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Citation: Joas, H. (2008). Punishment and Respect: The Sacralization of the Person and its Endangerment. Translated by Simon Susen. *Journal of Classical Sociology*, 8(2), pp. 159-177. doi: 10.1177/1468795x08088870

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Link to published version: <https://doi.org/10.1177/1468795x08088870>

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Punishment and Respect

The Sacralization of the Person and Its Endangerment

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Translated by Simon Susen

ABSTRACT Discussions of punishment in the modern era turn on the question of the definition and importance of human rights. To understand this linkage, it is important to examine critically two narratives of the origin and development of modern Western forms of punishment, namely that of the Enlightenment, and that of the process of 'disciplination' to be found in the work of Foucault. In this article, I suggest an alternative to both these narratives, namely a Durkheimian attention to the process of the 'sacralization of the person' which indicates the importance of reading the development of modern punishment as part of a larger process of 'inclusion' in which more and more people were included within the category of human personhood. A focus on the sacrality of the person as central to the notion of punishment also helps us to understand the ambiguity of punishment in the modern era, as well as threats posed to human rights by certain contemporary punishment regimes.

KEYWORDS discipline, Durkheim, Enlightenment, Foucault, human rights, person, punishment, sacralization, torture, utilitarianism

It is a well-known and uncontroversial fact that a profound shift in the European culture of punishment began to take place in the eighteenth century. The most significant aspect of this transformation may well be the turn away from torture, as an instrument for the search of truth or for the enforcement of confessions, and from ordeal, as a publicly celebrated spectacle of punishment. What is also important, however, is the ongoing questioning and partial abolition of the death penalty in the context of a general problematization of the right of the state to be the master of its citizens' lives, and 'the birth of the prison' as the main locus of the penal system. On the basis of available investigations, it would not be difficult

to demonstrate this transformation and to illustrate its continuing relevance in the present. We would then have to take into account many heroic efforts to consolidate these European developments of the eighteenth century in other parts of the world: for example, the developing opposition to 'lynching' practices, common until the twentieth century in the Southern United States, or to the role of torture and the death penalty in China today, or to the stoning of alleged adulteresses, where this is still (or once again) a common practice. Despite the unity of Europeans and North Americans with regard to the defence of human rights and the condemnation of cruel and humiliating forms of punishment, we would be confronted with differences around the question of whether the death penalty should be repudiated as such or whether we should only disapprove of specific forms of its enforcement. We would also have to explore the prospects and limitations of the humanization of the penal system here and now, as well as the threat of retreat from what we consider to be the achievements of the Enlightenment, one such threat being the current questioning of the categorical prohibition of torture in the theory and practice of the fight against crime and against real and putative terrorists.

Yet, here we do not wish to go down this road. While it may appear relatively simple to describe the historical processes involved in the evolution of punishment, it is difficult to understand exactly what these processes were caused by and what has led to their – at least partial – success. In order to understand the possibility of a defence, or a continued promotion, of the modern European culture of punishment in today's world, it is extremely important to examine what happened in the eighteenth century. Metaphorically speaking, we stand undoubtedly on the shoulders of the reformers of that time. Thus, it seems reasonable to begin by commenting on two important and enormously influential interpretations of this development. Both interpretations need to be somewhat simplified to illustrate their main features more clearly; by doing so, both explanations will be slightly exaggerated and robbed of some of their restrictive clauses. The main objective, however, is to go beyond the analysis of the benefits and weaknesses of these two predominant interpretations by presenting a tentative outline of an alternative approach which does justice both to the epochal events at the time and to contemporary tendencies. Hence, this essay offers an analysis of the exemplary case of a value shift and proposes a theory which could also serve as a practical guide for the analysis of other cases.

The Myth of the Enlightenment

The first story to be told according to this plan could be titled 'The Myth of the Enlightenment'. Its literary form can be found in the heroic epic. The hero is a young and rather shy Milanese intellectual, who – at the age of 25 and after intense discussions in his circle of friends – sits down to write a manuscript in less than a year, which he publishes anonymously not in (Austrian) Milan but – due

to the strict censorship – in the grand duchy of Tuscany in the year 1764. We are dealing with Cesare Beccaria and his treatise *On Crimes and Punishments* (*Dei delitti e delle pene*).¹ This book – which, shortly after its appearance, was put on the index of banned books – turned out to be a huge success, published in several editions and translated into other languages, including German and English. In terms of its overall influence, the French edition is the most important one, for it was read by such leading French Enlightenment figures as Voltaire, Diderot, and d'Alembert. One of Beccaria's friends, Pietro Verri, summarized the historical impact of the book as follows: 'abuse and torture, these dreadful practices, were either eliminated or at least moderated in the trials of all states; *and this is the achievement of only one book*' (Verri, in Beccaria, 1998 [1776]: 1, italics are mine).

Here we have the ingredients of a story adored by Enlightenment intellectuals. In a simplified manner, the story could be summarized like this: for a long time, but for reasons still incomprehensible even at present, habits, customs, and prejudices have determined people's lives. These still-contemporary practices have now lost their meaning, if they have ever had any meaning in the first place, and are to be conceived of as mere relics, to which the present continues to cling either out of lethargy or because they represent the specific interests of certain people. Beccaria calls the prevailing rules of the system of punishment 'the residue of the most barbarous centuries' (1995 [1766]: 3).

A few odd remnants of the laws of an ancient conquering race codified twelve hundred years ago by a prince ruling at Constantinople, and since jumbled together with the customs of the Lombards and bundled up in the rambling volumes of obscure academic interpreters – this is what makes up the tradition of opinions that passes for law across a large portion of Europe. It is as deplorable as it is common that an opinion of Carpzov's, an ancient custom noted by Claro, or a mode of punishment suggested with vengeful complacency by Farinacci have become the laws so confidently implemented by those who should tremble at the responsibility of ordering the lives and fortunes of men.

(1995 [1766]: 3)

To counter these barbaric practices, we need to rely on one brave and solitary initiative: 'that philosopher who had the courage to scatter out among the multitudes from his humble, despised study the first seeds of those beneficial truths that would be so long in bearing fruit, deserves the gratitude of all humanity' (1995 [1766]: 8). With his insights he seeks to address 'the hearts of the few wise men' (1995 [1766]: 71) spread around the world. At the same time, however, he hopes that 'the great monarchs, the human benefactors who rule us, love the truths which are expounded by humble philosophers with an unfanatical zeal'; he thereby values the idea of setting out the 'confusions' of the old laws 'in a style designed

to ward off the unenlightened and impatient run of men' (1995 [1766]: 3). Against these age-old prejudices and barbaric practices, Beccaria – an isolated but determined intellectual – proposes an alternative conception. This conception is presented not as the newly created work of this particular thinker, but as the revival of the simplest fundamental principles, whose validity, evident prior to all history, had been concealed by history.

It is, therefore, only after they have experienced thousands of miscarriages in matters essential to life and liberty, and have grown weary of suffering the most extreme ills, that men set themselves to right the evils that beset them and to grasp the most palpable truths which, by virtue of their simplicity, escape the minds of the common run of men who are not used to analysing things, but instead passively take on a whole set of second-hand impressions of them derived more from tradition than from enquiry.

(1995 [1766]: 7)

And these 'most tangible truths' and simplest fundamental principles are reflected in the insight that we need to conceive of laws as 'contracts amongst free men' and that we need to develop them systematically from another point of view, that is, with the aim of distributing 'the greatest happiness shared among the greater number' (1995 [1766]: 7).

From this point of departure, it is possible to identify, by virtue of strictly logical deduction, all the principles which are necessary for an effective establishment of laws and criminal justice. The origin of and reason for punishments can then only lie in the violation of the social contract to which individuals have committed themselves in order to do away with the bellicose state of nature, a violation which occurs when an individual seeks to regain a natural – that is, pre-social – liberty.

What were wanted here were sufficiently tangible motives to prevent the despotic spirit of every man from resubmerging society's laws into the ancient chaos. These tangible motives are the punishments enacted against law-breakers.

(1995 [1766]: 9)

This origin of punishments leads immediately to setting the boundary of legitimacy of all state punishment: 'Any punishment which goes beyond the need to preserve this bond [that is, of this social contract] is unjust by its very nature' (1995 [1766]: 11). Yet the power of this consideration goes far beyond the establishment of general principles; it leads to a sort of mathematical calculability of each punishment for each crime. This calculability follows from the fundamental principle according to which crimes should become less and less frequent

... in proportion to the harm they do to society. Hence the obstacles which repel men from committing crimes ought to be made stronger the more these crimes are against the public good and the more inducements there are for committing them. Hence, there must be a proportion between crimes and punishments.

(1995 [1766]: 19)

The attempt to measure the seriousness of a crime in terms of the seriousness of the intention behind the crime is explicitly rejected.

The exuberance with which this thought is presented is certainly partly due to the assumption that not only the harm that a crime inflicts on society but also the effect that a punishment has on the delinquent can be quantified precisely. This leads the enlightened intellectual Beccaria to sharply worded reflections. He observes that it is not so much the cruelty of threatened punishments which has a daunting effect but rather their unerring and predictable presence. What has a deterrent effect, in other words, is less the magnitude of a punishment than its relative *position* in the ordered register of punishments. By contrast, the intensification of punishment is subject to a sort of law of decreasing marginal utility. As he asserts, concerning the increasing cruelty of the old penal system,

... human souls which, like fluids, find their level from their surroundings, become hardened and the ever lively power of the emotions brings it about that, after a hundred years of cruel tortures, the wheel only causes as much fear as prison previously did.

(1995 [1766]: 63–4)

Most fascinating are his passages on torture and the death penalty. From his perspective, torture can only appear as an incomprehensibly illogical means to find out the truth. How can one possibly deny that torture is less an instrument of the search for truth than merely a testing of the suspect's capacity to resist? It is 'a sure route for the acquittal of robust ruffians and the conviction of weak innocents' (1995 [1766]: 39).

The result, therefore, of torture depends on a man's predisposition and on calculation, which vary from man to man according to their hardihood and sensibility, so that, with this method, a mathematician would settle problems better than a judge. Given the strength of an innocent man's muscles and the sensitivity of his sinews, one need only find the right level of pain to make him admit his guilt of a given crime.

(1995 [1766]: 42)

Under the aforementioned assumptions, the problem of the death penalty can be easily resolved. When punishments must be justified on the basis of the model of the social contract, it seems implausible from the outset to assume that

any individual – who will have sacrificed only the smallest part of his ‘private freedom’ through the arrangement of this contract (Beccaria, 1998 [1776]: 123) – could have given others permission to kill him. Beccaria also asks how it is possible that a society which makes use of the death penalty (as was common in his time) would prohibit suicide attempts. In order for individuals to be entitled to hand over the right to be killed to others, they must have the right to kill themselves prior to granting this right to other people. Following this logic, the death penalty can never be right. On the contrary, it is ‘an act of war on the part of society against the citizen that comes about when it is deemed necessary or useful to destroy his existence’ (Beccaria, 1995 [1766]: 66). Beccaria develops a comprehensive argument aimed at demonstrating that ‘death is neither necessary nor useful’. He only concedes two exceptions: first, the homicide of a citizen who ‘even if deprived of his freedom ... retains such connections and such power as to endanger the security of the nation’ (1995 [1766]: 66); and, second, the homicide of a citizen whose death ‘is the true and only brake to prevent others from committing crimes’ (1995 [1766]: 66–7). Taken all together, we are confronted with a philosophy of punishment which demands that punishment be ‘public, speedy, necessary, the minimum possible in the given circumstances, proportionate to the crime, and determined by the law’ (1995 [1766]: 113).

The story told so far is certainly a nice, and in many respects a heart-warming, one. Yet, is it not *too* nice to be true? Let us only mention three of the many possible objections that can be raised against it. First of all, one may ask if the assertion that the book had a revolutionary impact is in fact historically verifiable. Doubts about this can be based on the text of the book itself, for it refers to the abolition of torture in Sweden in the year 1734 and in Prussia by Friedrich II immediately after his accession to the throne in 1740: that is, in each case decades *before* Beccaria’s book was first published in 1764. In France the so-called *parlements* (courts of appeal) had progressively restricted torture since the middle of the eighteenth century.² This is not to deny the important historical role of Beccaria’s book, yet the sequence of events needs to be corrected. This correction illustrates that Beccaria’s writing was certainly not an illuminating bolt from the blue, but rather the expression of a much more profound transformational process. Beccaria himself speculates about the circumstances under which the changes he postulates could become possible. He believes that the realistic possibility of living a long life has an alleviating effect on the morals of society. Immediately after the initial completion of the social contract we could count on the presence of hard and savage characters. But, ‘as souls become softened by society, [sensitivity] grows. And as it does so, the severity of punishments ought to diminish, if the relation between the object and the sensation is to remain constant’ (1995 [1766]: 113, translation modified). Not humanization of punishment but increasing ‘sensitivity’ (*sensibilità*)

is his expression for the distinctiveness of this process. Beccaria mentions two reasons why this sensibility increases so strongly in, and even shortly before, the eighteenth century. He suggests that one reason is growing wealth: 'luxury and refinement', he claims, lead to the spread of 'the mildest virtue, humanity, generosity, and indulgence for human fallacy'. He polemicizes against the idea that his own time is an age of decline in comparison to the past, which he believes was characterized by superstition, greed, and oppression. The other reason he gives for the improvement of morals and the decrease of crime is the rise of the printing press. For Beccaria, the knowledge of law provides an important motive not to commit crimes.

A second objection against the Enlightenment perspective adopted by Beccaria highlights the striking contrast between the strictly logical elaboration of his own philosophy of punishment and his total inability to conceive of the practices and mentalities against which he fights as something other than confused, illogical, or superstitious relics of a barbaric past. At every turn, one encounters this lack of comprehension in his book. He believes, for instance, that it 'has its foundation in human nature' (1995 [1766]: 77) that homicide has to be considered to be the worst possible crime – regardless of the fact that the history of law runs counter to this view: sacrilege, heresy, and blasphemy have often been given more weight than the killing of a 'profane' human being. He does not associate penal law with concepts such as 'dignity' and 'honour', focusing instead on utility. To his mind, the prohibition of suicide is an absurdity; in the respective passage, he devotes more space to the question of whether emigration could be punished. Within his own argumentative framework this emphasis is only consistent, for he assumes the following: 'One who kills himself does less harm to society than one who leaves its borders forever, for the former leaves all his belongings, whilst the latter takes with him some part of what he owns' (1995 [1766]: 83). Hence, Beccaria fails to comprehend the specific logic of the penal system whose deficiencies he sought to overcome.

Finally, one can ask if Beccaria's arguments against the death penalty, reminding us of its lack of utility, are actually satisfying. What if we could, in a given case, prove the utility of a killing? In such a case, would the death penalty, or a killing of a 'useless' life or a 'life unworthy of living' – as it was called in the dreadful jargon of the Third Reich – be acceptable? Here we touch upon contemporary problems. We realize that a utilitarian philosophy of punishment, that is, one based on the principle of utility, cannot give voice to the moral intuition that something – for example, human life – needs to be *categorically* protected. However, if it does not succeed in giving voice to such an intuition, then it needs to assert itself *against* this intuition. If it cannot or will not, then the intuition succeeds in making a case for a more adequate view of things.

The Transformation of Power?

Before going further into these questions, we need to tell the second story. We can hardly imagine a more radical counter-position to the 'myth of the Enlightenment' than the one found in the book which has influenced the debates on the nature of punishment over the last thirty years more than any other analysis. In Michel Foucault's *Discipline and Punish: The Birth of the Prison*, first published in 1975,³ the changes in the criminal justice system are described in a manner which may be called the 'reconstruction of the techniques of power'. Given that this book is so well known, it is unnecessary to summarize its content in great detail here. It begins with a disturbing – not to say disgusting – description of the brutal public torture and execution of Damiens, who had attempted to murder the King, in the year 1757, in Paris. This description provides a background for an analysis which seeks to show how the body, as the target of punishment, became historically less important, and instead how 'the behaviour' and 'the spirit' of the convicted were converted into new targets. As a consequence, the death penalty became more rare and ceased to be carried out publicly. On the other side, this tendency manifests itself in the attempt to discipline prisoners, to trim and shape them, and to drill their body and spirit. According to Foucault's account, a sign of this new conception of punishment was the birth of the modern prison. Dungeons and cells had existed for a long time, but the new prisons were – architecturally and organizationally – constructed in such a way that the permanent surveillance of prisoners became possible, or that, at least, this impression could be created among the captives.

Foucault has shown this in a literarily powerful form by considering the so-called 'panopticon' – a plan, dating from the late eighteenth century, for a prison in which cells are arranged in a circular manner, such that all of them can be overseen from the central place of the guardian – as the epitome of the modern penal system. This must have seemed obvious to him, because the inventor of the panopticon, Jeremy Bentham, was indeed a much more 'utilitarian' philosopher and reformer of the penal system than even Beccaria. The new penal system, Foucault claims, is concerned less with the destruction of the body than with the augmentation of efficiency and the increase of control and power over body and spirit. Furthermore, for Foucault (and for many of his readers), the development of the modern prison is only one element within a comprehensive system of modern techniques of power and discipline. For example, the drilling of soldiers and industrial workers is part of the same programme, and the fundamental reforms of the criminal justice system thus are not interpreted as a sign of progress in terms of whatever sort of humanization. Rather, drawing upon Nietzsche, they are regarded as a sign of a mere transformation of power, which ceases to be a clearly identifiable force, becoming more and more silent and subtle, but which also now becomes ubiquitous.

The story told by Foucault was, and still is, taken seriously as a credible guide to positive knowledge about the development of criminal justice. This is

remarkable given that Foucault made no secret of his critical attitude towards conventional historiography, or indeed of his rejection of mainstream historiography and its methods. Taking Foucault's description at face value is somewhat dangerous if we consider the fact that the verdict of specialized historiography concerning the validity and verifiability of Foucault's account has turned out to be disastrously negative.⁴ These particulars shall be left aside here. Yet, it is important – as with the 'myth of the Enlightenment' – to examine the key objections that can be levelled against Foucault's account.

The first two objections to the 'myth of the Enlightenment' do not concern Foucault. One can certainly not accuse him of overestimating the impact of intellectuals, or of ignoring the inner logic of the penal system that existed before the Enlightenment. With regard to the first objection, Foucault is rather located at the other extreme: he embeds all singular analyses into an alleged process of social disciplining, in relation to which he barely mentions any actors who carry out, justify, or challenge this process. This leads to a total overestimation of the efficiency of power and control. Neither industrial organization nor the military nor the prison corresponded fully to the picture painted by Foucault. He succeeds, however, in reconstructing the inner logic of torture and ordeal in great detail. For him, torture is a duel with strict rules; ordeal, on the other hand, is symbolically related to a confessed crime. In the epoch of absolutism, the dominant power manifests itself in a spectacular 'celebration of the ordeals' in public punishment:

It is a ceremonial by which a momentarily injured sovereignty is reconstituted. It restores that sovereignty by manifesting it at its most spectacular. ... Its aim is not so much to re-establish a balance as to bring into play, as its extreme point, the dissymmetry between the subject who has dared to violate the law and the all-powerful sovereign who displays his strength.

(Foucault, 1977 [1975]: 48–9)

For Foucault, then, ordeal in the eighteenth century is by no means, as for Beccaria, a relic of barbaric times, but a logical component of a penal system 'in which the sovereign himself presses a charge, pronounces the sentence, and carries out the punishment' (1977 [1975]: 71): that is, of a penal system in which there is a *crimen majestatis* in every delinquency. The new penal system which replaces this regime is also reconstructed by Foucault as something that is logical in itself. Differing from standard views of the Enlightenment, his account distinguishes the phase of reform from the swiftly following normalization of the prison sentence. He derives this rapid normalization from another process – and an ongoing one in many other social domains – which has already created conditions for the perfection of the control system.

I would like to disregard all the methodological objections to Foucault's account⁵ and address only two main problems which are crucial in

the context of our discussion. One can ask if his idea of an advancing process of disciplination is not only completely exaggerated but altogether inappropriate for the identification of the key dimensions of the penal reforms carried out in the eighteenth and nineteenth centuries. Against Foucault's studies of the history of 'madness', some – among others, Marcel Gauchet (1994) – have proposed a radical change of perspective. According to Foucault, in medieval times the lunatic was tolerated as a normal part of creation and it was not until the 'age of reason' that he was excluded from life and imprisoned in 'total institutions'. This interpretation, however, is based on a serious fallacy, for the alleged tolerance of the lunatic rested upon a radical distancing. The lunatic was regarded as a fundamentally different entity: as a creature occupying its own particular place in a richly differentiated cosmos, not a human being in the full sense. According to this conception, the lunatic is precisely not a human being like you and me, but like a member of another species. In this account, which diverges from Foucault's perspective, a levelling of all citizens to the status of subjects of the one sovereign gradually emerges under absolutism, although this process is never fully realized. The creation of the asylum – no matter how paradoxical this may sound – can be regarded as a first, albeit inconsistent, step towards the *integration* of the lunatic into the species of humans. Thus, it is not the process of disciplination but the process of *inclusion* which is crucial; disciplination is only an insufficient attempt to make inclusion possible. This insight can be transferred to the field of criminal justice. The proposals by reformers of punitive justice, inspired by utilitarianism and the Enlightenment, are specific, if in many respects one-sided, expressions of processes of inclusion, rather than of the processes of disciplination. Beccaria considers the criminal to be a human being both before and after the crime; thus, far from conceiving of the criminal as a naturally different being, he reminds us that there is no way we can simply set aside our compassion for the criminal faced with his punishment.

The second objection results from a point upon which Foucault is right to insist against the myth of the Enlightenment. He writes that the hopes of the Enlighteners for a re-education (or, as it was later also called, a therapy) of the delinquents never were truly realized – at least not in the scope previously imagined. The reformed penal system did not have the unambiguous effect that it was expected to have. Therefore, the discourse on punishment exhibits shifting conjunctures: the failure of attempts of re-education can lead to its intensification or to resignation and, as a consequence thereof, to a renewed emphasis on repression. In fact, the treatability of determinate categories of sex offenders has been overestimated in the recent past, so that a reaction in favour of repression by a scandalized public is hardly surprising. In this case, we have to face up to the tragic trade-offs that are necessary, that is, to an irresolvable tension between repression and prevention, and to the implementation of different forms of compromise between the two. Both objectives can bring each other into discredit. One even

can interpret Foucault's book itself as an expression of this dilemma. The French sociologist Jacques Donzelot writes:

In the moment in which repression considered itself to be harmful and in which prevention did not seem to be anything but an advanced form of repression, Foucault said that the King was naked, that the reformism of the modern philosophy of criminal law was only the deceptive mask of a new art of social control and that it – with its alleged aspiration towards prevention rather than repression – actually had the impact of expanding the surveillance of everybody and everything.

(1991: 148)

Foucault himself by no means indicates a clear way out of this dilemma. In a sense he takes flight forward, embracing an unclear form of radicalization. The perspective of the humanization of the penal system, as something to be realized one day, is annulled. Instead, what is questioned here in an aporetic fashion is the right of the state or of society to impose a penalty.

The Sacralization of the Person

These questions and objections directed towards Foucault and towards the Enlightenment thinkers' conception of themselves allow for an interpretation that goes beyond both narratives. Let us suppose that it is inclusion, rather than discipline, which provides the key to understanding the social changes which occurred in the eighteenth century. Inclusion, in this context, refers to an integration into the category of human being, that is, integration also of those – like criminals or slaves – who had not previously been included within the applicable limits of this concept. In addition, let us suggest that – contrary to the ideas of the Enlightenment – it is not at all natural to conceive of assassination as the worst possible crime. Rather, what was considered the worst possible crime in the history of the penal system has always been an act directed against that which constituted the sacred core of a community. If we presuppose this, then it seems reasonable to deduce the changes in the penal system from changes in the understanding of the sacred. It is for this reason that the alternative interpretation proposed here is subsumed under the title 'The Sacralization of the Person'. From this perspective, the reforms of penal law and penal practice, just like the creation of human rights in the late eighteenth century, are an expression of a profound cultural shift, through which the human person itself is converted into a sacred object. The great French sociologist Émile Durkheim was the first person to have this idea.⁶ During the turmoil of the Dreyfus scandal, he wrote in 1898:

This human person (*personne humaine*), the definition of which is like the touchstone which distinguishes good from evil, is considered sacred in the

ritual sense of the word. It partakes of the transcendent majesty that churches of all time lend to their gods; it is conceived of as being invested with that mysterious property which creates a void about sacred things, which removes them from vulgar contacts and withdraws them from common circulation. And the respect which is given it comes precisely from this source. Whoever makes an attempt on a man's life, on a man's liberty, on a man's honour, inspires in us a feeling of horror analogous in every way to that which the believer experiences when he sees his idol profaned.

(1973 [1898]: 46)

Durkheim mentioned this idea in many of his writings and applied it to many different objects of study: for example, to the ethos of scientific discussion in which every argument, regardless of a person's status, has to count, as well as to an understanding of sensibilities developed towards those forms of sexual *rapprochement* not approved by the subject. As a consequence, Durkheim revised his early conceptions of the development of penal law, which suggested that it was going through an unstoppable process of desacralization.⁷ As Gephart notes,

... in his analysis of modern law there are different overlapping developmental processes ...: desacralization and resacralization, juridification in the sense of a demoralization of diffuse solidarity-based relations, and, finally, also the demand for a resacralization of civil law.

(Gephart, 1993: 413)

Other commentators have tried to consider a variety of phenomena in a similar light: from politeness in everyday life, such as the giving and receiving of greetings, or reciprocal safeguarding of participants in interactional conflicts, to considerations observed between doctors and patients, for example patients' entitlement to information and to participative management of therapies. All these attempts illustrate that it would be erroneous to characterize the moral situation of the present with concepts such as 'liberalization' or 'value loss', given that the relaxation of norms in some areas will often be confronted with increasing sensitivities in other areas. The growing public alertness to sexual harassment in general and paedophilia in particular is due to a more developed perception of the harmfulness of these penal offences, rather than to an increase in these offences.

In relation to our topic, criminal justice, Durkheim alluded to a double effect of this sensibilization in an attempt to comprehend the development of criminal law.⁸ The same process which teaches us to deprecate cruel forms of punishment – because we see the human being in the criminal, whom we therefore respect – makes us more sensible to the cruelty of crimes. In other words, the drive to punish is both stimulated and inhibited. This ties in with the fact that – historically, as described by Foucault – not only have physical punishments receded, but in addition, the right to physical integrity has become more and

more important in the last two centuries. This increasing appreciation of the body cannot be understood in terms of the paradigm of disciplinatio (see Kalupner, 2004). If, however, we proceed on the assumption of the sacralization of the person, then this appreciation appears to make sense. In addition, we then recognize an irresolvable contradiction between the need to sanction every violation of the person's sacrality, and the violation of the person's sacrality which is a consequence of the act of punishment as such. Given its irresolvable nature, this contradiction can only be mitigated. Durkheim thought that this insight would allow him to explain why custodial punishments have come to replace physical punishments – at least when and where the process of sacralization of the person persists. Custodial punishments would provide a way out of the dilemma. Hence, Durkheim can assign a milder penal system to developed societies, although he has one significant reservation: the more absolute a central authority of power, the more likely it is that punishments of the highest order will be enforced. This clause does justice to a fact which has been overlooked by Beccaria, but detected by Foucault: the fact that the draconian punishments of absolutism are not a relic but a radicalization of the penal practices of medieval times. However, Durkheim did not provide a proper theory of the *process* of sacralization. He related the particularities of modern society to an increasing strength of 'these sentiments that centre on man, the human being', which promote a 'means of fulfilling and developing human nature' as 'the supreme object of collective sensibility' (Durkheim, 1957 [1950]: 112), but this does not allow us to characterize his approach as providing a truly causal or processual account. If he had developed such an account, he would have had to take the role of power into consideration. To be sure, in this case one could have attributed a constitutive role not to power as such – as in Foucault's approach – but only to specific forms of power and its carriers, as well as to their legitimations and intentions.

However, the impression should not be conveyed here that the sacralization of the person is the only form of sacralization which exists in modernity and that the idea of the sacralization of the person describes some sort of linear progress in the sense of an increasingly profound and universal understanding of and protection of human dignity. Progress in this regard is challenged by counteracting forces, and the sacralization of the person permanently competes with other forms of sacralization, such as that of the nation or of a communist utopia. The clearest counteracting forces in the twentieth century can certainly be found in fascism and national socialism. In the context of the Dreyfus affair, which disrupted France at the end of the nineteenth century, we find not only Émile Durkheim's theses on human rights, which are symptomatic of the sacralization of the person, but also the French proto-fascist Charles Maurras and his declaration that the cause of the nation was so important that individuals and their rights would have to be sacrificed. Italian fascism and German national socialism took this idea even further: 'You are nothing, your *Volk* is everything' – this became a central slogan. More than radical anti-individualism and a mobilization of the

nation as the normative cornerstones of fascist ideology, the strategic meaning of racist ideology consisted precisely in declaring that specific categories of human beings were worthless and that, therefore, their extinction was acceptable or even morally imperative.

Yet, it is not only opposition to the increasing sacralization of the person which gives rise to abuse, but also the internal difficulties of punishment itself. We cannot radically de-emotionalize punishment and crime, as the utilitarians and also Foucault had thought possible. A sense of outrage remains the most reliable indicator of the violation of central values; if crime in terms of penal law constitutes such a violation, then passionate defence of such values is inevitable. The constitutional state translates this into procedures, and can thereby at least channel the emotions involved. Crime and punishment also lend themselves to the construction of friend-foe schematizations and, therefore, to the integration of social formations in a common aggression against the inner enemy, which the criminal is declared to be. In his classic essay on the 'Psychology of Punitive Justice', published in 1917, the American philosopher and social psychologist George Herbert Mead astutely observed:

While then the attitude of hostility, either against the transgressor of the laws or against the external enemy, gives to the group a sense of solidarity which most readily arouses like a burning flame and which consumes the differences of individual interests, the price paid for this solidarity of feelings is great and at times disastrous.

(1964 [1917–18]: 229)

This form of unity – which is based on the creation of a collective identity through the exclusion of enemies – is inconceivable without the constant creation of new enemies, or the persistence of an already existing enmity.

This is exactly the point at which questions of criminal justice merge with the creation of relations based on hostility. In the introduction, we touched upon the death penalty and torture as issues which are, in the modern era, deeply emotional and which can be highly disputed, as they are, for example, between Europe and the USA at present. Where can we situate them within the area of tension described above? We cannot derive them in all cases from the contradictory nature of the sacralization of the person. The attempts made by the lawyers of the American government to bypass the prohibition of torture against terrorists or against suspects of terrorism, or to justify this circumvention, are certainly not a case of tragic trade-offs between the sacrality of the person of the offender and that of the victim. Such trade-offs may have played a crucial role in the case of a policeman from Frankfurt am Main who threatened a kidnapper with torture, thinking that this would allow him to save the life of a child kidnap victim. In this context, Winfried Brugger's influential discussion of the issue can be understood as an impulse of professional honesty in an attempt to find an adequate legal

consideration for such a moral dilemma in the life of a policeman (Brugger, 1996: 67ff.). What appears in a very different light, however, are American reports concerning suspects of terrorism who are considered as enemies of the state and who are therefore deprived of both constitutional procedures and the protection of international agreements on the treatment of prisoners of war. In this case, an emotionalized situation, based on a collective feeling of threat created by terrorism, is abused for the arbitrary empowerment of executive authority, by relaxing or abrogating legal protections and by creating legal black holes. In contemporary Germany there is a similar discussion on the alleged need to create an 'enemy law' (*Feind-Strafrecht*) (Jakobs, 2004).

Indeed, these developments can be interpreted as countertendencies to the sacralization of the person, rather than as a sign of its contradictory nature. In order to see how the persistence of the death penalty in the USA can be interpreted in this framework, we need to point out first that – contrary to stereotypical images of the USA – the struggle against the death penalty as an expression of the sacralization of the person also has deep roots in American culture. Some states in the USA – for example, Michigan – were among the first states in the world to abolish the death penalty. The death penalty in the USA has a clear regional centre in the South, for it is in the Southern states where racist lines of distinction, a tradition of violence and a peculiar conception of Christianity – one which interprets itself not in universalistic terms but as a nationalistic civil religion – are interlinked as a syndrome which justifies the death penalty with biblical quotations. Now, in accordance with Mead's description, spectacular crimes – in the Southern US or in the entire nation – can be instrumentalized to stimulate collective emotions, depreciate the political opponent, and whitewash other political objectives – as happened famously in the senior Bush's electoral campaign against Michael Dukakis. Here, there are two different cultures which collide in the USA itself, the sacralization of the person and the civil religion of the South.

Thus, not even in the core areas of the West can we observe a secure consolidation of the sacralization of the person. Even less so can we rely upon a supposedly autonomous universalization of this culture of punishment. In the outlook of Islamic fundamentalism, the carrying-out of cruel punishments is regarded as an identity-giving characteristic not simply because of a literal interpretation of legal documents, but also because of indignation directed against the West or against modernist forces: that is, such punishments become a symbol of resistance against a secularist decadence which seems to spread from the West. Even in multi-cultural and highly modern Singapore, physical punishments, and also constructs such as the idea of 'Asian values' – which can only be understood in terms of the intention to distinguish a collective self from others – are openly referred to as authentic expressions of cultural otherness. Again, the situation is different in China, the country against which the critique of arbitrary executions and the habitual use of torture in the present is, and should be, mainly directed. Here, it is the continued existence of a 'communist' political structure and culture of

punishment – the ‘rule *by* law’ instead of the ‘rule *of* law’ – which leads to these excesses and which undermines the resistance of those who are directly affected by, and pay the price for, the situation. The hopes of the Enlightenment philosophers, as well as those of Émile Durkheim, were directed towards the civilizing consequences of economic modernization: increasing wealth and increasing education. But Durkheim already knew that the democratic control of power was an additional condition. After the end of the twentieth century, it is clear to us that the sacralization of the person remains – at any time and in any place – under threat. With unambiguous clarity and with an undecided outcome, the Chinese case illustrates the tension between economic modernization and normative requirements, such as legal security and the value system of universal human dignity. Drawing upon a reinterpretation of the cultural changes of the eighteenth century as a manifestation of ‘inclusion’, in the sense of a sacralization of the person, we can account not only for transformations of the culture of punishment, but also for many other phenomena of moral change. The concept which we are accustomed to use in reference to particularly despicable criminals – the concept of the ‘monster’ – was used as a description of so-called monstrosities – that is, of seriously disabled newborns – as late as the eighteenth century. Certain specific historical shifts which have been largely forgotten – such as the rejection of the idea that such ‘monstrosities’ are creatures somewhere between human and animal, or the abolition of castration as a medium for the creation of certain pitches of voice in the eighteenth century – fit into this overall picture. This picture, however, is based neither on the process of disciplination nor on the Enlightenment in the utilitarian sense. The creation of human rights is part of this process of inclusion. One generation later, the idea of human rights was converted into a demand for the abolition of slavery – a further movement of inclusion of a very radical nature. The schemes of the Enlightenment or of social disciplination have also been applied to the history of the antislavery movement, but with little success, as in the case of the history of punishment. What plays a central role in this movement is the originally Christian impulse towards moral decentring, that is, towards the idea that we need to interpret the world not from the perspective of those with whom we have already established affective bonds, but from the perspective of the ‘most humble among our brothers and sisters’. In addition to this, the expansion of commercial relations enabled morally decentred actors to causally relate the general moral detestation of grievances in other parts of the world to their own moral actions, thereby allowing for the conception that the responsibility for the elimination of these grievances was a real possibility and moral duty.

The sacralization of the person was a continuation of Judaeo-Christian motives, even if some Enlightenment philosophers emphasized the rupture with religious tradition, and even if the Churches were accordingly opposed to it. In respect to this point, Durkheim was ambiguous. On the one hand, he stressed that the laws of the Jews in ancient times were much milder than those of their

neighbours – a phenomenon which he derives from the quasi-democratic nature of the political constitution of ancient Judaism – and that the medieval Church used to have a mitigating impact on penal practices. On the other hand, he seemed to imply that, in the modern world, religious tradition needs to be both continued and overcome. The sacralization of the person is rooted in religious traditions, but at the same time, for Durkheim, the former now makes the latter superfluous.

The question which poses itself in light of this view of the sacralization of the person is whether it actually permits us to obtain a categorical protection of the person. The dignity of the person is asserted as the core of the modern penal system by virtue of the concept of 'sacrality'. The role of utilitarian considerations is discredited as a basis of law, because it reflects people's attitude towards the law only rarely. In the context of the universal sacralization of the person, which is both possible and jeopardized on a global scale, an enormous danger is constituted when, in the West, interpretive models (such as the idea of a curtailed Enlightenment, or Foucault's approach to the history of disciplinatio) prevail, for they distort and misjudge the meaning of progress made in the culture of punishment. The European culture of punishment can only be grounded in people's attitudes and adhered to, even against strong opposition, if its historical motives remain rightly remembered.

Notes

This is an extended version of the 'Lenzburg Lecture', which I gave on 22 September 2005 at the *Stäpferhaus* in Lenzburg (Switzerland). A shorter version appeared in the *Neue Zürcher Zeitung* (1/2 April 2006), and the original version was published in the journal *Leviathan* 34 (2006): 15–29.

1. In the following discussion of Beccaria, I make use of two different editions of Beccaria's work. My own main source is Beccaria (1998 [1776]), a standard German translation of *On Crimes and Punishments*. For the English-speaking reader's convenience, however, the major quotations have been presented as translated into English from the 1766 edition, in Beccaria (1995 [1766]).
2. A description of this process, which largely converges with my argument, may now be found in Hunt (2007: 70–112).
3. Foucault (1977 [1975]). See, for example, pp. 3–69 for his discussion of torture and ordeal within the regime of 'spectacular' punishment, and pp. 135–228 on discipline and panopticism.
4. Representative of many is Léonard (1977). I owe numerous bibliographical references to Foucault's reception in the humanities to Martin Saar, Frankfurt am Main. The most detailed overview of the historical objections is provided by Garland (1990: esp. 157–76).
5. For an insightful interpretation in social theory, see, for example Honneth (1991 [1985]: 176ff.). I do not intend to discuss the question of whether Foucault's later work represents a critical revision of his early work. To my knowledge, Foucault never provided a self-critical account of his description of the history of criminal justice.

6. See Joas (2008). In the secondary literature, see also, for example, Bellah (1973); Marske (1987); Thomas (2001: esp. 168ff.); Tole (1993).
7. Needless to say, in light of Durkheim's self-criticism, the objections levelled against his previous conceptions appear less relevant.
8. Durkheim (1992 [1899–1900]); see also Durkheim (1969: 244–73). A critical account of the state of research can be found in Reiner (1984: esp. 194ff.) and, most importantly, in Garland (1990: 23–82). On the comparison between Durkheim and Foucault, see Ramp (1999).

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