

because the judges gave up on it or because Enlightenment writers eventually opposed it. Torture ended because the traditional framework of pain and personhood fell apart, to be replaced, bit by bit, by a new framework, in which individuals owned their bodies, had rights to their separateness and to bodily inviolability, and recognized in other people the same passions, sentiments, and sympathies as in themselves. "The men, or perhaps the women," to return to the good doctor Rush one last time, "whose persons we detest [convicted criminals], possess souls and bodies composed of the same materials as those of our friends and relations." If we contemplate their miseries "without emotion or sympathy," then "the principle of sympathy" itself "will cease to act altogether; and . . . will soon lose its place in the human breast."<sup>50</sup>

## 3

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“THEY HAVE SET A  
GREAT EXAMPLE”

*Declaring Rights*

**DECLARATION:** The action of stating, telling, setting forth, or announcing openly, explicitly or formally; positive statement or assertion; an assertion, announcement or proclamation in emphatic, solemn, or legal terms. . . . A proclamation or public statement as embodied in a document, instrument, or public act.—*Oxford English Dictionary*, electronic 2nd. ed.

WHY MUST RIGHTS be set forth in a declaration? Why do countries and citizens feel the need for such a formal statement? The campaigns to abolish torture and cruel punishment point to one answer: a formal, public statement confirms the changes in underlying attitudes that have taken place. Yet the declarations of rights in 1776 and 1789 went further still. They did not just signal transformations in general attitudes and expectations.

They helped effect a transfer of sovereignty, from George III and the British Parliament to a new republic in the American case, and from a monarchy claiming supreme authority to a nation and its representatives in the French one. In 1776 and 1789, declaring opened up whole new political vistas. The campaigns against torture and cruel punishment would from then onward be fused with a whole host of other human rights causes, whose relevancy only emerged after the declarations had been made.

The history of the word "declaration" gives a first indication of the shift in sovereignty. The English word "declaration" comes from the French *déclaration*. In French, the word originally referred to a catalogue of lands to be given in exchange for swearing homage to a feudal lord. Over the course of the seventeenth century, it increasingly pertained to the public statements of the king. In other words, the act of declaring was linked to sovereignty. As authority shifted from feudal lords to the French king, so too did the power of making declarations. In England, the converse also held: when subjects wanted a reaffirmation of their rights from their kings, they drew up their own declarations. Thus, the Magna Carta ("Great Charter") of 1215 formalized the rights of English barons in relation to the English king; the Petition of Right of 1628 confirmed the "diverse Rights and Liberties of the Subjects"; and the English Bill of Rights of 1689 validated "the true, ancient and indubitable rights and liberties of the people of this kingdom."<sup>1</sup>

In 1776 and 1789, the words "charter," "petition," and "bill" seemed inadequate to the task of guaranteeing rights (the same would be true in 1948). "Petition" and "bill" both implied a request or appeal to a higher power (a bill was originally "a petition to the sovereign"), and "charter" often meant an old document or deed. "Declaration" had less of a musty, submissive air.

Moreover, unlike "petition," "bill," or even "charter," "declaration" could signify the intent to seize sovereignty. Jefferson therefore began the Declaration of Independence with this explanation of the need to proclaim it: "When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should *declare* [my emphasis] the causes which impel them to the separation." An expression of "decent respect" could not obscure the main point: the colonies were declaring themselves a separate and equal state and seizing their own sovereignty.\*

In contrast, in 1789 the French deputies were not yet ready to explicitly repudiate the sovereignty of their king. Yet they nonetheless accomplished nearly as much by deliberately omitting any mention of him in their Declaration of the Rights of Man and Citizen: "The representatives of the French people, constituted as a National Assembly, and considering that ignorance, neglect or contempt of the rights of man are the sole causes of public misfortunes and governmental corruption, have resolved to set forth in a solemn *declaration* [my emphasis] the natural, inalienable and sacred rights of man." The Assembly had to do more than give speeches or draft laws on specific questions. It had to put in writing for posterity that rights flowed not from a compact between ruler and citizens, less still from a petition to him or a charter granted by him, but rather from the nature of human beings themselves.

These acts of declaring were at once backward- and forward-looking. In each case, the declarers claimed to be confirming

\*See the Appendix for the full text.

rights that already existed and were unquestionable. But in so doing they effected a revolution in sovereignty and created an entirely new basis for government. The Declaration of Independence asserted that King George III had trampled on the preexisting rights of the colonists and that his actions justified the establishment of a separate government: "whenever any Form of Government becomes destructive of these ends [the securing of rights], it is the Right of the People to alter or to abolish it, and to institute new Government." Similarly, the French deputies declared that these rights had simply been ignored, neglected, or disdained; they did not claim to have invented them. "Henceforward," however, the declaration proposed that these rights constitute the foundation of government, though they had not been in the past. Even while claiming these rights already existed and they were merely defending them, the deputies created something radically new: governments justified by their guarantee of universal rights.

### *Declaring Rights in America*

The Americans did not begin with a clear plan to separate from Great Britain. No one imagined in the 1760s that rights would lead them into such new territory. Reshaping of sensibility helped make the idea of rights more tangible to the educated classes, in the debates over torture and cruel punishment, for example, but the notion of rights also changed in response to political circumstances. Two versions of rights language were available in the eighteenth century: a particularistic version (rights specific to a people or national tradition) and a universalistic one (rights of man in general). The Americans used one or

the other or both in combination, depending on the circumstances. During the Stamp Act crisis of the mid-1760s, for example, American pamphleteers emphasized their rights as colonists within the British Empire, whereas the Declaration of Independence of 1776 clearly invoked the universal rights of all men. The Americans then set up their own particularistic tradition in the Constitution of 1787 and the 1791 Bill of Rights. In contrast, the French almost immediately embraced the universalistic version, in part because it undercut the particularistic and historical claims of the monarchy. In the debates over the French Declaration, duc Mathieu de Montmorency exhorted his fellow deputies to "follow the example of the United States: they have set a great example in the new hemisphere; let us give one to the universe."<sup>2</sup>

Before the Americans and French declared the rights of man, the leading proponents of universalism lived on the margins of the great powers. Perhaps that very marginality enabled a handful of Dutch, German, and Swiss thinkers to take the initial lead in arguing that rights were universal. As early as 1625, a Dutch Calvinist jurist, Hugo Grotius, put forward a notion of rights that was applicable to all of mankind, not just one country or legal tradition. He defined "natural rights" as something self-possessed and conceivable separately from God's will. He also suggested that people could use their rights—unaided by religion—to establish the contractual foundations for social life. His German follower Samuel Pufendorf, the first professor of natural law at Heidelberg, featured Grotius's achievements in his general history of natural law teachings published in 1678. Although Pufendorf criticized Grotius on certain points, he helped solidify Grotius's reputation as a prime source of the universalist stream of rights thinking.<sup>3</sup>

The Swiss natural law theorists built upon these ideas in the early eighteenth century. The most influential of them, Jean-Jacques Burlamaqui, taught law in Geneva. He synthesized the various seventeenth-century natural law writings in *The Principles of Natural Law* (1747). Like his predecessors, Burlamaqui provided little specific legal or political content to the notion of universal natural rights; his main purpose was to prove their existence and their derivation from reason and human nature. He updated the concept by linking it to what the contemporary Scottish philosophers called an internal moral sense (thus anticipating the argument of my first chapters). Immediately translated into English and Dutch, Burlamaqui's work was widely used as a kind of textbook of natural law and natural rights in the last half of the eighteenth century. Rousseau, among others, took Burlamaqui as a point of departure.<sup>4</sup>

Burlamaqui's work fed a more general revival of natural law and natural rights theories across Western Europe and the North American colonies. Jean Barbeyrac, another Genevan Protestant, published a new French translation of Grotius's key work in 1746; he had previously issued a French translation of one of Pufendorf's works on natural law. An adulatory biography of Grotius by the Frenchman Jean Lévesque de Burigny appeared in 1752 and was translated into English in 1754. In 1754, Thomas Rutherford published his lectures given at Cambridge University on Grotius and natural law. Grotius, Pufendorf, and Burlamaqui were all well known to American revolutionaries, such as Jefferson and Madison, who read in the law.<sup>5</sup>

The English had produced two major universalist thinkers in the seventeenth century: Thomas Hobbes and John Locke. Their works were well known in the British North American colonies, and Locke in particular helped shape American political think-

ing, perhaps even more than he influenced English views. Hobbes had less impact than Locke because he believed that natural rights had to be surrendered to an absolute authority in order to prevent the "war of all against all" that would otherwise ensue. Whereas Grotius had equated natural rights with life, body, freedom, and honor (a list that seemed to call slavery, in particular, into question), Locke defined natural rights as "Life, Liberty and Estate." Since he emphasized property—Estate—Locke did not challenge slavery. He justified slavery for captives taken in a just war. Locke even proposed legislation to ensure that "every freeman of Carolina shall have absolute power and authority over his negro slaves."<sup>6</sup>

Yet, despite the influence of Hobbes and Locke, much if not most English, and therefore American, discussion of natural rights in the first half of the eighteenth century focused on the particular historically based rights of the freeborn English man, not universally applicable rights. Writing in the 1750s, William Blackstone explained why his countrymen would focus on their particular rights rather than on universal ones: "These [natural liberties] were formerly, either by inheritance or purchase, the rights of all mankind; but, in most other countries of the world being now more or less debased and destroyed, they at present may be said to remain, in a peculiar and emphatical manner, the rights of the people of England." Even if rights had once been universal, claimed the prominent jurist, only the superior English had managed to hold on to them.<sup>7</sup>

From the 1760s on, nonetheless, the universalistic strand of rights began to intertwine with the particularistic one in the British North American colonies. In *The Rights of the British Colonies Asserted and Proved* (1764), for example, the Boston lawyer James Otis affirmed both the natural rights of colonists

("Nature has placed all such in a state of equality and perfect freedom") and their political and civil rights as British citizens: "Every British subject born on the continent of America, or in any other of the British dominions, is by the law of God and nature, by the common law, and by act of parliament . . . entitled to all the natural, essential, inherent and inseparable rights of our fellow subjects in Great Britain." Still, from Otis's "rights of our fellow subjects" in 1764 it required another giant step to reach Jefferson's "unalienable rights" of "all men" of 1776.<sup>8</sup>

The universalistic strand of rights thickened in the 1760s and especially the 1770s as the breach widened between the North American colonies and Great Britain. If the colonists wanted to establish a new, separate country, they could hardly rely merely on the rights of freeborn Englishmen. Otherwise, they were looking at reform, not independence. Universal rights provided a better rationale, and accordingly, American election sermons in the 1760s and 1770s began to cite Burlamaqui by name in defense of "the rights of mankind." Grotius, Pufendorf, and especially Locke appeared among the most frequently cited authors in political writings, and Burlamaqui could be found in increasing numbers of private and public libraries. When British authority began to collapse in 1774, the colonists came to consider themselves in something like the state of nature they had read about. Burlamaqui had asserted, "The idea of *Right*, and even more that of *natural law*, are manifestly related to man's nature. It is therefore from this *nature* itself of man, from his *constitution*, and from his *condition* that we must deduce the principles of this science." Burlamaqui talked only of man's nature in general, not about the condition of American colonists or the constitution of Great Britain, but the constitution and condition of universal mankind. Such universalist thinking

enabled the colonists to imagine a break with tradition and British sovereignty.<sup>9</sup>

Even before Congress declared independence, the colonists called state conventions to replace British rule, sent instructions with their delegates to demand independence, and began drafting state constitutions that often included bills of rights. The Virginia Declaration of Rights of June 12, 1776, proclaimed that "all men are by nature equally free and independent and have certain inherent rights," which were defined as "the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety." More important still, the Virginia Declaration went on to offer a list of specific rights such as freedom of the press and freedom of religious opinion; it helped set the template not only for the Declaration of Independence but also for the eventual Bill of Rights of the U.S. Constitution. By the spring of 1776, declaring independence—and declaring universal rather than British rights—had gathered momentum in political circles.<sup>10</sup>

The events of 1774–76 thus temporarily fused particularistic and universalistic thinking about rights in the insurgent colonies. In response to Great Britain, the colonists could cite their already existing rights as British subjects and at the same time claim the universal right to a government that secured their unalienable rights as equal men. Yet, since the latter in effect abrogated the former, as the Americans moved more decisively toward independence they felt the need to declare their rights as part of the transition from a state of nature back into civil government—or from a state of subjection to George III forward into a new republican polity. Universalistic rights would never have been declared in the American colonies without the revolutionary moment created by the resistance to British

authority. Although everyone did not agree on the importance of declaring rights or on the content of the rights to be declared, independence opened the door to the declaration of rights.<sup>11</sup>

Even in Great Britain, a more universalistic notion of rights began to creep into discourse in the 1760s. Talk of rights had quieted down with the restoration of stability after the 1688 revolution that had resulted in the Bill of Rights. The number of book titles that included some mention of "rights" steadily declined in Britain from the early 1700s to the 1750s. As international discussion of natural law and natural rights intensified, the numbers then began to rise again in the 1760s and continued to grow thereafter. In a long pamphlet of 1768 denouncing aristocratic patronage of clerical positions in the Church of Scotland, the author called on both "the natural rights of mankind" and "the natural and civil rights of FREE BRITONS." Similarly, the Anglican preacher William Dodd argued that popery was "inconsistent with the Natural Rights of MEN in general and of ENGLISHMEN in particular." Still, the oppositional politician John Wilkes always employed the language of "your birth-right as ENGLISHMEN" when defending his case in the 1760s. *The Letters of Junius*, anonymous letters published against the British government in the late 1760s and early 1770s, also used the language of "the rights of the people" to refer to rights under English tradition and law.<sup>12</sup>

War between the colonists and the British crown brought the universalist strain more fully into the open in Britain itself. A tract of 1776 signed "M.D." cites Blackstone to the effect that the colonists "carry with them only so much of the English laws as is applicable to their own situation"; therefore, if ministerial "innovations" violate "their native rights as [English] freemen," the chain of government is broke," and the colonists can be expected to exert their "natural rights." Richard Price made the

appeal to universalism very explicit in his immensely influential pamphlet of 1776, *Observations on the Nature of Civil Liberty, the Principles of Government, and the Justice and Policy of the War with America*. It went through no less than fifteen editions in London in 1776 and was reprinted in the same year in Dublin, Edinburgh, Charleston, New York, and Philadelphia. Price based his support for the colonists on "the general principles of Civil Liberty," that is, "what reason and equity, and the rights of humanity give," not precedent, statute or charters (the practice of English liberty in the past). Price's pamphlet was translated into French, German, and Dutch. His Dutch translator, Joan Derk van der Capellen tot den Poll, wrote to Price in December 1777 and recounted his own support, in a speech subsequently printed and widely circulated, of the American cause: "I consider the Americans to be brave men who defend in a moderate, pious, courageous manner the rights which they hold, as being men, not from the legislative power of England, but from *God* himself."<sup>13</sup>

Price's pamphlet ignited a fierce controversy in Britain. Some thirty pamphlets appeared almost immediately in response, accusing Price of false patriotism, factiousness, parricide, anarchy, sedition, and even treason. Price's pamphlet put "the natural rights of mankind," "the rights of human nature," and especially "the unalienable rights of human nature" on the agenda in Europe. As one author clearly recognized, the crucial question was this: "Whether there are inherent rights in Human Nature, so connected with the will, that such rights cannot be alienated." It was only sophistry, claimed this opponent, to argue that "there are certain rights of Human Nature which are unalienable." These had to be given up—one had "to relinquish the guidance of one's self by one's own will"—in order to enter the civil state. The polemics show that the meaning of natural

rights, civil liberty, and democracy now occupied and were debated by many of Britain's best political minds.<sup>14</sup>

The distinction between natural and civil liberty put forward by Price's opponents serves as a reminder that the articulation of natural rights engendered its own countertradition, which continues to the present day. Like natural rights, which grew up in opposition to governments perceived as despotic, the countertradition too was reactive, arguing either that natural rights were a fabrication or that they could never be unalienable (and thus were irrelevant). Hobbes had already argued in the mid-seventeenth century that natural rights had to be given up (and therefore were not unalienable) in order to establish an orderly civil society. Robert Filmer, the English proponent of patriarchal authority, explicitly refuted Grotius in 1679 and pronounced the doctrine of "natural freedom" an "absurdity." In *Patriarcha* (1680), he again contradicted the notion of the natural equality and liberty of mankind, arguing that all people are born subjects of their parents; the only natural right, in Filmer's view, inhered in the regal power that derives from the original model of patriarchal power and is confirmed in the Ten Commandments.<sup>15</sup>

More influential in the long run was the view of Jeremy Bentham, who argued that only positive (actual rather than ideal or natural) law mattered. In 1775, long before he became famous as the father of Utilitarianism, Bentham wrote a critique of Blackstone's *Commentaries on the Laws of England*. In it he laid out his rejection of the concept of natural law: "There are no such things as any 'precepts,' nothing by which man is 'commanded' to do any of those acts pretended to be enjoined by the pretended law of Nature. If any man knows of any let him produce them. If they were producible, we should not need to be puzzling out

the business of 'discovering' them, as our author [Blackstone] soon after tells us we must, by the help of reason."

Bentham objected to the idea that natural law was innate in the person and discoverable by reason. He therefore basically rejected the entire natural law tradition and with it natural rights. The principle of utility (the greatest happiness of the greatest number, an idea he borrowed from Beccaria), he would later argue, served as the best measure of right and wrong. Only calculations based on fact rather than judgments based on reason could provide the basis for the law. Given this position, his later rejection of the French Declaration of the Rights of Man and Citizen is less surprising. In a pamphlet reviewing the French Declaration article by article he categorically denied the existence of natural rights. "Natural rights is simple nonsense: natural and imprescriptible rights, rhetorical nonsense, nonsense upon stilts."<sup>16</sup>

Despite its critics, rights talk was gathering momentum after the 1760s. "Natural rights," now supplemented by "the rights of mankind," "the rights of humanity," and "the rights of man," became common currency. Its political potential vastly enhanced by the American conflicts of the 1760s and 1770s, talk of universal rights shifted back across the Atlantic to Great Britain, the Dutch Republic, and France. In 1768, for example, the reform-minded French economist Pierre-Samuel du Pont de Nemours offered his own definition of the "rights of each man." His list included freedom to choose an occupation, free trade, public education, and proportional taxation. In 1776, du Pont volunteered to go to the American colonies and report on events to the French government (an offer left on the table). Du Pont later became a close friend of Jefferson's and in 1789 was elected a deputy to the Third Estate.<sup>17</sup>

Although the Declaration of Independence might not have been as "all-but-forgotten" as Pauline Maier recently proclaimed, the universalist idiom of rights essentially returned back home to Europe after 1776. The new state governments of the United States began adopting individual bills of rights as early as 1776, yet the Articles of Confederation of 1777 included no bill of rights, and the Constitution of 1787 was approved without one. The U.S. Bill of Rights only came into being with the ratification of the first ten amendments to the Constitution in 1791, and it was a deeply particularistic document: it protected American citizens against encroachment by their federal government. In comparison, the Declaration of Independence and the Virginia Declaration of Rights of 1776 had made much more universalistic claims. By the 1780s, rights in America had taken a back seat to concerns about building a new national institutional framework. As a consequence, the French Declaration of the Rights of Man and Citizen of 1789 actually preceded the American Bill of Rights, and it immediately attracted international attention.<sup>18</sup>

### *Declaring Rights in France*

Despite the American turn away from universalism in the 1780s, "the rights of man" got a great boost from the American example. Without it, in fact, human rights might have withered on the vine. After sparking widespread interest in the "rights of man" in the early 1760s, Rousseau himself became disenchanted. In a long letter written in January 1769 about his religious convictions, Rousseau railed against the excessive use of "this beautiful word 'humanity.'" Worldly sophisticates, "the

least human of people," invoked it so often that it was "becoming insipid, even ridiculous." Humanity had to be impressed on hearts, Rousseau insisted, not just printed on pages in books. The inventor of the phrase "rights of man" did not live to see the full impact of American independence; he died in 1778, the year that France joined the American side against Great Britain. While Rousseau knew of Benjamin Franklin, a veritable celebrity in France since his arrival as minister for the rebellious colonists in 1776, and on one occasion defended the Americans' right to protect their liberties even if they were "obscure or unknown," he expressed little interest in American affairs.<sup>19</sup>

The repeated references to humanity and rights of man continued despite Rousseau's scorn, but they might have been ineffectual if events in America had not given them a sharper edge. Between 1776 and 1783, nine different French translations of the Declaration of Independence and at least five French translations of various state constitutions and bills of rights provided specific applications of rights doctrines and helped crystallize the sense that French government too could be established on new grounds. Although some French reformers favored an English-style constitutional monarchy, and Condorcet for one expressed disappointment with the "aristocratic spirit" of the new U.S. Constitution, many enthused about the American ability to get out from under the dead weight of the past and establish self-government.<sup>20</sup>

The American precedents became all the more compelling as the French entered a state of constitutional emergency. In 1788, facing a bankruptcy caused in large measure by French participation in the American War of Independence, Louis XVI agreed to convoke the Estates-General, which had last met in 1614. As elections of delegates began, declaratory rumbles could



already be heard. In January 1789, Jefferson's friend Lafayette prepared a draft declaration and in the weeks that followed Condorcet quietly formulated his own. The king had asked the clergy (the First Estate), the nobles (the Second Estate), and ordinary people (the Third Estate) not only to elect delegates but also to write up lists of their grievances. A number of the lists drawn up in February, March, and April 1789 referred to "the inalienable rights of man," "the imprescriptible rights of free men," "the rights and the dignity of man and the citizen," or "the rights of enlightened and free men," but "rights of man" predominated. The language of rights was now diffusing rapidly in the atmosphere of growing crisis.<sup>21</sup>

A few grievance lists—more often those of the nobles than the clergy or Third Estate—explicitly demanded a declaration of rights (usually those that also asked for a new constitution). The nobility of the Béziers region in the south, for instance, requested that "the general assembly take as its true preliminary task the examination, drafting, and declaration of the rights of man and citizen." The grievance list of the Third Estate of the outer Paris region titled its second section "Declaration of rights" and provided a list of those rights. Virtually all of the lists asked for specific rights in some form or another: liberty of the press, freedom of religion in a few cases, equal taxation, equality of treatment under the law, protection from arbitrary arrest, and the like.<sup>22</sup>

The delegates came with their grievance lists to the official opening of the Estates-General on May 5, 1789. After weeks of futile debate over procedure, the deputies of the Third Estate unilaterally pronounced themselves members of a National Assembly on June 17; they claimed to represent the entire nation, not just their "estate." Many clerical deputies soon

joined them and before long the nobles had no choice but to either leave or join too. On June 19, in the very midst of these struggles, a deputy requested that the new Assembly embark immediately on the "great task of a declaration of rights," which he insisted had been mandated by the electors, though far from universally demanded, the idea was most certainly in the air. A Committee on the Constitution was set up on July 6, and on July 9 the committee announced to the National Assembly that it would begin with a "declaration of the natural and imprescriptible rights of man," labeled in the recapitulation of the session "the declaration of the rights of man."<sup>23</sup>

Thomas Jefferson, then in Paris, wrote to Thomas Paine in England on July 11 with a breathless account of unfolding events. Paine was the author of *Common Sense* (1776), the single most influential pamphlet of the American independence movement. According to Jefferson, the deputies of the National Assembly "have prostrated the old government, and are now beginning to build one from the foundation." He reported that they considered the very first task to be the drafting of "a Declaration of the natural and imprescriptible rights of man"—the very terms of the Committee on the Constitution. Jefferson consulted closely with Lafayette, who read his own draft proposal of a declaration to the Assembly that same day. Several other prominent deputies now rushed to get their proposals into print. Terminology varied: "the rights of man in society," "the rights of a French citizen," or simply "rights," but "the rights of man" predominated in the titles.<sup>24</sup>

On July 14, three days after Jefferson wrote to Paine, crowds in Paris armed themselves and attacked the Bastille prison and other symbols of royal authority. The king had ordered thousands of troops to move into Paris, causing many deputies to fear

a counterrevolutionary coup. The king withdrew his soldiers, but the question of a declaration remained unresolved. In late July and early August, the deputies were still debating whether they needed a declaration, whether it should go at the head of the constitution, and whether it should be accompanied by a declaration of a citizen's duties. Division about the necessity of a declaration reflected fundamental disagreements over the course of events. If monarchical authority simply needed a few repairs, then a declaration of the "rights of man" could hardly be necessary. For those, in contrast, who agreed with Jefferson's diagnosis that the government had to be rebuilt from scratch, a declaration of rights was essential.

The Assembly finally voted on August 4 to draw up a declaration of rights without duties. No one then or since has adequately explained how opinion finally shifted in favor of drafting such a declaration, in large part because the deputies were so busy confronting day-to-day issues that they did not grasp the larger import of each of their decisions. As a result, their letters and even later memoirs proved tantalizingly vague about the shifting tides of opinion. We do know that the majority had come to believe that an entirely new groundwork was required. The rights of man provided the principles for an alternative vision of government. As the Americans had before them, the French declared rights as part of a growing rupture with established authority. Deputy Rabaut Saint-Etienne remarked on the parallel on August 18: "like the Americans, we want to regenerate ourselves, and therefore the declaration of rights is essentially necessary."<sup>25</sup>

Debate quickened in mid-August, even as some deputies openly derided the "metaphysical discussion." Faced with a bewildering array of alternatives, the National Assembly chose

to consider a compromise document drawn up by a largely anonymous subcommittee of forty members. In the midst of continuing uncertainty and anxiety about the future, the deputies devoted six days to tumultuous debate (August 20-24, August 26). They agreed to seventeen amended articles out of the twenty-four proposed (in the United States the individual states ratified only ten of the first twelve amendments proposed for the Constitution). Exhausted by the discussion of articles and amendments, on August 27 the Assembly voted to postpone any further discussion until after drawing up a new constitution. They never reopened the question. In this somewhat back-handed fashion, the Declaration of the Rights of Man and Citizen took its definitive shape.

The French deputies declared that all men, and not just French men, were "born and remain free and equal in rights" (Article 1). Among the "natural, inalienable, and sacred rights of man" were liberty, property, security, and resistance to oppression (Article 2). Concretely, this meant that any limits on rights had to be established in law (Article 4). "All citizens" had the right to take part in the formation of the law, which should be the same for everyone (Article 6), and to consent to taxation (Article 14), which should be apportioned equally according to the capacity to pay (Article 13). In addition, the declaration forbade "arbitrary orders" (Article 7), unnecessary punishments (Article 8), any legal presumption of guilt (Article 9), or unnecessary government appropriation of property (Article 17). In somewhat vague terms, it insisted that "no one should be disturbed for his opinions, even in religion" (Article 10) while more vigorously asserting freedom of the press (Article 11).

\* See the Appendix for the full text.

In one document, therefore, the French deputies tried to encapsulate both legal protections of individual rights and a new grounds for governmental legitimacy. Sovereignty rested exclusively in the nation (Article 3), and "society" had the right to hold every public agent accountable (Article 15). No mention was made of the king, French tradition, history or custom, or the Catholic Church. Rights were declared "in the presence and under the auspices of the Supreme Being," but however "sacred," they were not traced back to that supernatural origin. Jefferson had felt the need to assert that all men were "endowed by their Creator" with rights; the French deduced rights from the entirely secular sources of nature, reason, and society. During the debates, Mathieu de Montmorency had affirmed that "the rights of man in society are eternal" and "no sanction is needed to recognize them." The challenge to the old order in Europe could not have been more forthright.<sup>26</sup>

None of the articles of the declaration specified the rights of particular groups. "Men," "man," "each man," "all citizens," "every citizen," "society," "any society" were contrasted to "no body," "no individual," "no man." It was literally all or nothing. Classes, religions, and sexes made no appearance in the declaration. Although the absence of specificity would soon create problems, the generality of the assertions should not be surprising. The Committee on the Constitution had originally undertaken to prepare as many as four different documents about rights: (1) a declaration of the rights of man; (2) of the rights of the nation; (3) of the rights of the king; and (4) of the rights of citizens under the French government. The document adopted combined the first, second, and fourth but without defining the qualifications for citizenship. Before going on to specifics (the rights of the king or the qualifications for citizenship), the deputies first endeav-

ored to set down general principles for all government. In this regard, Article 2 is typical: "The purpose of all political association is the preservation of the natural and imprescriptible rights of man." The deputies wanted to set forth the basis of all political association—not monarchy, not French government, but of all political association. They would have to turn to French government soon enough.<sup>27</sup>

The act of declaring did not resolve all the issues. In fact, it gave greater urgency to some questions—the rights of those without property or of religious minorities, for example—and opened up new ones about groups such as slaves or women who had had no previous political standing (to be examined in the next chapter). Perhaps those opposing a declaration had sensed that the declaring itself would have a galvanizing effect. Declaring did more than clarify articles of doctrine; by declaring, the deputies effectively seized sovereignty. As a result, declaring opened up a previously unimagined space for political debate: If the nation was sovereign, what was the role of the king, and who best represented the nation? If rights served as the foundation of legitimacy, what justified their limitation to people of certain ages, sexes, races, religions, or wealth? The language of human rights had germinated for some time in the new cultural practices of individual autonomy and bodily integrity, but then it burst forth suddenly in times of rebellion and revolution. Who should, would, or could control its effects?

Declaring rights had consequences outside France, too. The Declaration of the Rights of Man and Citizen transformed everyone's language virtually overnight. The change can be traced especially clearly in the writings and speeches of Richard Price, the dissenting British preacher who had sparked controversy with his talk of "the rights of humanity" in support of the Amer-

ican colonists in 1776. His 1784 pamphlet *Observations on the Importance of the American Revolution* continued in the same vein; it compared the American independence movement to the introduction of Christianity and predicted that it would "produce a general diffusion of the principles of humanity" (notwithstanding slavery, which he roundly condemned). In a sermon of November 1789, Price now endorsed the new French terminology: "I have lived to see the rights of men better understood than ever, and nations panting for liberty, which seemed to have lost the idea of it. . . . After sharing in the benefits of one Revolution [1688], I have been spared to be a witness to two other Revolutions [American and French], both glorious."<sup>28</sup>

Edmund Burke's 1790 pamphlet against Price, *Reflections on the Revolution in France*, unleashed in its turn a frenzy of discussion on the rights of man in various languages. Burke argued that the "new conquering empire of light and reason" could not provide an adequate foundation for successful government, which had to be rooted instead in a nation's longstanding traditions. In his indictment of the new French principles, Burke singled out the declaration for especially harsh condemnation. His language infuriated Thomas Paine, who seized on this notorious passage in his riposte of 1791, *Rights of Man: Being an Answer to Mr. Burke's Attack on the French Revolution*.

"Mr. Burke with his usual outrage," Paine wrote, "abused the Declaration of the Rights of Man. . . . This he calls 'paltry and blurred sheets of paper about the rights of man.' Does Mr. Burke mean to deny that man has any rights? If he does, then he must mean that there are no such things as rights anywhere, and that he has none himself; for who is there in the world but man?" Although Mary Wollstonecraft's response, *Vindication of the Rights of Men, in a Letter to the Right Honourable Edmund Burke, occasioned by his Reflections on the*

*Revolution in France*, had appeared earlier, in 1790, Paine's *Rights of Man* had an even more immediate and stupendous impact, in part because he took the occasion to argue against all forms of hereditary monarchy, including the English one. His work appeared in several English editions in just the first year of its publication.<sup>29</sup>

As a consequence, the use of rights language increased dramatically after 1789. Evidence for this surge can be found readily in the number of titles in English using the word "rights": it quadrupled in the 1790s (418) as compared to the 1780s (95) or any previous decade during the eighteenth century. Something similar happened in Dutch; *rechten van den mensch* appeared for the first time in 1791 with the translation of Paine and then was followed by many uses in the 1790s. *Rechten des menschen* followed soon after in the German-speaking lands. Somewhat ironically, then, the polemics between English-language writers brought the French "rights of man" to an international audience. The impact was greater than it had been after 1776, for the French had a monarchy like those of most other European nations and they never gave up the language of universalism. The writings inspired by the French Revolution also pushed the American discussion of rights into higher gear; Jeffersonians constantly invoked the "rights of man," but the Federalists spurned language associated with "democratic excess" or threats to established authority. Such disputes helped disseminate the language of human rights all over the Western world.<sup>30</sup>

### *Abolishing Torture and Cruel Punishment*

Six weeks after passing the Declaration of the Rights of Man and Citizen, and even before voting qualifications had been

determined, the French deputies abolished all uses of judicial torture as part of a stopgap reform of criminal procedure. On September 10, 1789, the Paris city council formally petitioned the National Assembly in the name of "reason and humanity" for immediate judicial reforms that would both "rescue innocence" and "better establish proofs of crime and make condemnation more certain." The city council members made the request because so many people had been arrested by the new National Guard, commanded in Paris by Lafayette, in the weeks of upheaval following July 14. Would the habitual secrecy of judicial proceedings foster manipulation and chicanery by the enemies of the Revolution? In response, the National Assembly named a Committee of Seven to draw up the most pressing reforms, not just for Paris but for the entire country. On October 5, under the pressure of a massive march to Versailles, Louis XVI finally gave his formal approval to the Declaration of the Rights of Man and Citizen. The marchers forced the king and his family to move to Paris from Versailles on October 6. In the midst of this renewed agitation, on October 8-9, the Assembly passed the decree proposed by its committee. At the same time, the deputies voted to join the king in Paris.<sup>31</sup>

The Declaration of the Rights of Man and Citizen had laid out only general principles of justice: the law should be the same for everyone, it should not permit arbitrary imprisonment or punishments other than those "strictly and obviously necessary," and the accused should be considered innocent until judged guilty. The decree of October 8-9, 1789, began with an invocation of the declaration: "The National Assembly, considering that one of the principal rights of man, which it has recognized, is that of enjoying, when accused of a criminal offense,

the full extent of liberty and security for the defense that can be reconciled with the interest of society which demands the punishment of crimes. . . ." It then went on to specify procedures, most of them designed to ensure transparency to the public. In a move inspired by distrust of the sitting judiciary, the decree required the election of special commissioners in every district to assist in all criminal cases, including oversight of the collection of evidence and testimony. It guaranteed the access of the defense to all information gathered and the public nature of all criminal proceedings, thus putting into practice one of Beccaria's most cherished principles.

The shortest of the twenty-eight articles in the decree, Article 24, is the most interesting for our purposes here. It abolished all forms of torture and also the use of a low, humiliating stool (the *sellette*) for the final interrogation of the accused before his or her judges. Louis XVI had previously suppressed the "preparatory question," the use of torture to get confessions of guilt, but he had only provisionally forbidden the use of the "preliminary question," torture to get names of accomplices. The king's government had eliminated the *sellette* in May 1788, but because this action was so recent, the deputies felt the need to make their own position clear. The *sellette* was an instrument of humiliation and represented the kind of assault on individual dignity that the deputies now regarded as unacceptable. The deputy presenting the decree for the committee reserved his discussion of these measures for the very end in order to underline their symbolic importance. He had insisted to his colleagues from the beginning that "you cannot leave in the current Code stains that revolt humanity; you want them to disappear straightaway." Then he turned almost lachrymose when he reached the subject of torture:

We believe that we owe it to humanity to offer you a final observation. The king has already . . . banished from France the absurdly cruel practice of tearing from the accused, by means of torture, the confession of crimes . . . but he has left to you the glory of completing this great act of reason and justice. There remains still in our code preliminary torture . . . [the most unspeakable refinements of cruelty] are still used to obtain the revelation of accomplices. Fix your eyes on this remnant of barbarism, will you not, Sirs, and obtain its proscription from your hearts? That would be a beautiful, a touching spectacle for the universe: to see a king and a nation, united by the indissoluble bonds of a reciprocal love, rivaling each other's zeal for the perfection of the laws, and trying to outdo each other in raising monuments to justice, liberty, and humanity.

In the wake of declaring rights, torture was now finally and completely abolished. The abolition of torture had not been on the agenda of the Paris city government on September 10, but the deputies could not resist taking the opportunity presented to make it the capstone of their first revision of the criminal code.<sup>32</sup>

When the time came to complete revision of the penal code more than eighteen months later, the deputy assigned to present the reform invoked all the notions that had become familiar during the campaigns against torture and cruel punishment. Louis-Michel Lepeletier de Saint-Fargeau, once a judge in the Parlement of Paris, climbed up to the rostrum on May 23, 1791, to provide the rationale of the Committee on Criminal Law (a continuation of the Committee of Seven appointed in September 1789). He denounced the "atrocious tortures imagined in barbaric centuries

and nonetheless retained in centuries of enlightenment," the lack of proportion between crimes and punishments (one of Beccaria's prime complaints), and the generally "absurd ferocity" of the previous laws. "The principles of humanity" would now shape the penal code, which would in the future rest on rehabilitation through work rather than sacrificial retribution through pain.<sup>33</sup>

So successful had been the campaigns against torture and cruel punishment that the committee put the section on punishments before the section defining crimes in the new penal code. All societies experience crime, but punishment reflects the very nature of a polity. The committee proposed a complete overhaul of the penal system to embody the new civic values: in the name of equality, everyone would be tried in the same courts under the same law and be susceptible to the same punishments. Deprivation of liberty would be the signal punishment, which meant that being sent to sea on the galleys and banishment would be replaced by imprisonment and forced labor. A criminal's fellow citizens would learn nothing about the significance of punishment if the criminal was simply sent elsewhere, out of public view. The committee even advocated eliminating the death penalty except for rebellion against the state, but knew it would face resistance on this point. The deputies voted to reinstate the death penalty for a few crimes, though they excluded all religious crimes such as heresy, sacrilege, or practice of magic. (Sodomy, previously punishable by death, was no longer listed as a crime.) The death penalty would now be rendered only by decapitation, previously reserved to nobles. The guillotine, invented to make decapitation as painless as possible, went into operation in April 1792. Breaking on the wheel, burning at the stake, "those tortures that accompanied the death penalty," were to disappear; "all these legal horrors are detested by

humanity and by public opinion," insisted Lepeletier. "These cruel spectacles degrade public morals and are unworthy of a humane and enlightened century."<sup>34</sup>

Since rehabilitation and the reentry of the criminal into society were the chief aims, bodily mutilation and branding became intolerable. Lepeletier nonetheless lingered some time over the question of branding; how would society protect itself against convicted offenders without some kind of permanent sign of their status? He concluded that under the new order it would be impossible for vagabonds or criminals to go unnoticed because municipalities would keep exact registers with the names of every inhabitant. To mark their bodies permanently would prevent them from reintegrating into society. In this as in the question of pain more generally, the deputies had to walk a fine line; punishment was supposed to be simultaneously a deterrent and yet readaptive in its effects. Punishment could not be so degrading as to prevent those convicted from joining society again. As a consequence, while the penal code prescribed public exposure of those convicted, sometimes in chains, it carefully limited the exposure (at most three days) depending on the severity of the offense.

The deputies also wanted to wipe away the religious coloring of punishment. They eliminated the formal act of penitence (*amende honorable*) in which the convict, dressed only in a shirt, with a rope around his neck and a torch in hand, went to a church door and begged forgiveness from God, king, and justice. In its place the committee proposed a rights-based punishment called "civic degradation," which might be the sole punishment or might be added on to a term of imprisonment. Its procedures were laid out in detail by Lepeletier. The convict would be conducted to a specified public place, where the clerk

of the criminal court would read these words aloud: "Your country has convicted you of a dishonorable action. The law and the court take away your standing as a French citizen." The convict would then be put in an iron collar where he would remain exposed to the public for two hours. His name, his crime, and his judgement would be written on a placard placed below his head. Women, foreigners, and recidivists posed a problem, however; how could they lose their voting rights or right to hold office when they had no such rights? Article 32 specifically addressed this point: in the case of a sentence of "civic degradation" against women, foreigners, or recidivists, they would be condemned to the iron collar for two hours and would wear a placard similar to the one prescribed for men, but the clerk would not read the phrase regarding the loss of civic standing.<sup>35</sup>

"Civic degradation" might sound formulaic, but it pointed to the reorientation not only of the penal code but of the political system more generally. The convict was now a citizen, not a subject; therefore, he or she (women were "passive" citizens) could not be made to endure torture, unnecessarily cruel punishments, or excessively dishonoring penalties. When Lepeletier presented the reform of the penal code, he distinguished between two kinds of punishments: corporal punishments (prison, death) and dishonoring punishments. Though all punishment had a shaming or dishonoring dimension, as Lepeletier himself asserted, the deputies wanted to circumscribe the use of dishonoring punishments. They kept public exposure and the iron collar but suppressed the act of penitence, use of stocks and pillory, dragging of the body on a hurdle after death, judicial reprimand, and declaring a case against the accused open indefinitely (implying therefore guilt). "We propose," said Lepeletier, "that you adopt the principle [of dishonoring pun-

ishment] but multiply less the variations, which by dividing it up weaken this salutary and terrible thought: society and the laws pronounce an anathema against someone who has defiled himself by crime." Shaming a criminal could be carried out in the name of society and the laws, but not in the name of religion or the king.<sup>36</sup>

In another move that signified a fundamental realignment, the deputies decided that the new dishonoring punishments applied only to the individual criminal, not to his or her family. With traditional types of dishonoring punishment, family members of convicts suffered the consequences directly. None of them could buy offices or hold public positions, their property was subject to confiscation in some cases, and they were considered equally dishonored by the community. In 1784, the young lawyer Pierre-Louis Lacretelle won a prize from the Metz Academy for an essay arguing that the shame of dishonoring punishments should not be extended to family members. The second prize went to a young lawyer from Arras with a remarkable future, Maximilien Robespierre, who took the same position.

This attention to dishonoring punishment reflects a subtle but momentous shift in the concept of honor: with the rise of a notion of human rights, the traditional understanding of honor was coming under attack. Honor had been the most important personal quality under the monarchy; indeed, Montesquieu argued in his *Spirit of Laws* (1748) that honor was the animating principle of monarchy as a form of government. Many considered honor the special province of the aristocracy. In his essay on dishonoring punishments, Robespierre had traced the practice of shaming entire families back to the defects of the notion of honor itself:

If one considers the nature of this honor, fertile in caprices, always inclined to an excessive delicacy, often appreciating things for their glamour rather than for their intrinsic value, and men for their accessories, titles that are foreign to them, rather than for their personal qualities, one could easily understand how it [honor] could deliver up to contempt those who hold dear a villain punished by society.

Yet Robespierre also denounced the reserving of decapitation (thought more honorable) to nobles alone. Did he want all people to be equally honorable or to give up on honor itself?<sup>37</sup>

Even before the 1780s, however, honor was undergoing changes. "Honor," according to the 1762 edition of the dictionary of the Académie Française, signifies "virtue, probity." "In speaking of women," however, "honor signifies chastity, modesty." Increasingly in the second half of the eighteenth century, the distinctions in honor divided men from women more than aristocrats from commoners. For men, honor was becoming linked to virtue, the quality Montesquieu associated with republics; all citizens were honorable if they were virtuous. Under the new dispensation, honor had to do with actions, not birth. The distinction between men and women carried over from honor into questions of citizenship as well as forms of punishment. Women's honor (and virtue) was private and domestic; men's was public. Men and women alike could be shamed in punishment, but only men had political rights to lose. In punishment as in rights, aristocrats and commoners were now equal; men and women were not.<sup>38</sup>

The dilution of honor did not escape notice. In 1794, the



writer Sébastien-Roch Nicolas Chamfort, one of the members of the elite Académie Française, satirized the change:

It is a recognized truth that our century has put words in their place; by banishing scholastic, dialectical, and metaphysical subtleties, it has returned to the simple and true in physics, morals, and politics. Speaking only of morals, one senses how much this word, honor, incorporates complex and metaphysical ideas. Our century felt the drawbacks of these and to bring everything back to the simple, to prevent every abuse of words, it has established that honor remains integral to any man who has never been an ex-convict. In the past this word was a source of equivocations and contestations; at present, nothing could be clearer. Has a man been put in the iron collar or not? This is the state of the question. It is a simple question of fact which can be easily answered by the court clerk's registers. A man who has not been put in the iron collar is a man of honor who may lay claim to anything, places in the ministry, etc. He gains entrance to professional bodies, to the academies, to sovereign courts. One senses how much clarity and precision save us from quarrels and discussions, and how much the commerce of life becomes convenient and easy.

Chamfort had his own reasons for taking honor seriously. An abandoned child of unknown parents, Chamfort made a literary reputation and became the personal secretary of Louis XVI's sister. He killed himself at the height of the Terror not long after writing these words. During the Revolution, he first attacked the prestigious Académie Française, which had elected

him in 1781, and then repented of his actions and defended it. Elevation to the Académie was the greatest honor that could be bestowed on a writer under the monarchy. The Académie was abolished in 1793 and revived under Napoleon. Chamfort grasped not only the magnitude of the change in honor—the difficulty of maintaining social distinctions in an impatiently equalizing world—but also the connection of the new penal code to it. The iron collar had become the lowest common denominator of loss of honor.<sup>39</sup>

The new penal code was only one of the many consequences that followed from the Declaration of the Rights of Man and Citizen. The deputies had responded to the urging of duc de Montmorency to "set a great example" by drawing up a declaration of rights, and within weeks of doing so, they began to discover how unpredictable the effects of such example setting could be. "The action of stating, telling, setting forth, or announcing openly, explicitly or formally" that was implied in declaring had a logic all its own. Rights once announced openly raised new questions—questions previously unasked and previously unaskable. Declaring turned out to be only the first step in a highly charged process, one that continues to our day.