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## Democratizing tthe Eighth Amendment

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## Articles

### DEMOCRATIZING THE EIGHTH AMENDMENT

ERIN E. BRAATZ\*

#### ABSTRACT

The concept of evolving standards of decency has long been an important component of the Supreme Court's interpretation of the Eighth Amendment's prohibition on cruel and unusual punishment. Yet the Court's recent decisions problematically conceive of standards of decency as something static and capable of precise measurement. This Article proposes a theoretically robust and empirically grounded account of evolving standards of decency, drawing on scholarship in the fields of history, sociology, and anthropology. This literature reveals that rather than constituting a static state, standards of decency develop through a process dependent upon interpersonal interactions. While the Supreme Court's earliest invocations of the concept of evolving standards of decency relied upon arguments similar to those found in this literature, the Court has lost sight of the concept's dynamic nature.

Applying this account of standards of decency to the history of penal reform in the United States, this Article contends that the extreme privatization and isolation of penal practices beginning in the mid-twentieth century prevents the public from evaluating whether prison practices in the United States violate the Eighth Amendment's prohibition on cruel and unusual punishment. It also stymies the process through which standards of decency might evolve. The development of penal practices outside of the public eye thereby contributes to the Supreme Court's struggle to apply the concept of evolving standards of decency to imprisonment cases. In contrast, recent reform movements, such as prison abolitionism, community control, and democratic criminal justice all rely

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implicitly on some version of a process-oriented notion of standards of decency. In varying ways, they reflect a belief that building and facilitating robust interpersonal relationships will lead to a radical reimagining of how individuals can and should be treated in response to harms they may have caused. Rather than rely on the Supreme Court to ensure that punishments in the twenty-first century are not cruel and unusual, this Article concludes that we must democratize the Eighth Amendment by adopting public policy choices that enable public engagement with penal spaces and the development of the interpersonal relationships through which standards of decency can be engaged.

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## INTRODUCTION

IN 1846, the Massachusetts State Prison had more than 6,000 visitors.<sup>1</sup> Visiting was so common that the prison simply charged one schilling for anyone wishing to enter<sup>2</sup> and North American prisons were included in guidebooks, with descriptions telling the potential visitors that they were “an object of great interest for visiting.”<sup>3</sup> Contrast this history with the account of a journalist describing her attempts, starting in 2000, to enter and report on MCI-Framingham, Massachusetts’s only all-female prison.<sup>4</sup> She writes that although “[t]he department’s book of regulations acknowledge[s] that ‘conditions in a state correctional institution are a matter of interest to the general public,’” it took her “two successful lawsuits, and countless trips to court[ ]” and still “the Massachusetts Department of Correction continues to deny [her] access.”<sup>5</sup> In the end, she wrote her book based on interviews conducted with inmates in the visiting room, having never been allowed to actually enter the prison herself.<sup>6</sup> These two examples—the regular practice in the nineteenth century of public prison visiting versus a journalist attempting to gain access to a prison in order to portray how women experience incarceration in the early twenty-first century—reveal a sea change in how prisons are experienced and understood in the United States. From relatively porous institutions, visited and engaged with by thousands of individuals, to completely secret and insulated institutions routinely denying access to researchers and members of the press, public experiences with and observations of prisons have changed dramatically.

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1. JANET MIRON, PRISONS, ASYLUMS, AND THE PUBLIC: INSTITUTIONAL VISITING IN THE NINETEENTH CENTURY 56 (2011).

2. MICHAEL STEPHEN HINDUS, PRISON AND PLANTATION: CRIME, JUSTICE, AND AUTHORITY IN MASSACHUSETTS AND SOUTH CAROLINA, 1767–1878, at 170 (1980).

3. MIRON, *supra* note 1, at 60 (quoting THE NEW WORLD IN 1859: BEING THE UNITED STATES AND CANADA 66 (1859)) (discussing practices at Sing Sing prison in New York); *see also* REBECCA M. MCLENNAN, THE CRISIS OF IMPRISONMENT: PROTEST, POLITICS, AND THE MAKING OF THE AMERICAN PENAL STATE, 1776–1941, at 47 (2008) (reporting similar practice at Newgate prison in New York).

4. CRISTINA RATHBONE, A WORLD APART: WOMEN, PRISON, AND LIFE BEHIND BARS (2005).

5. *Id.* at xi.

6. Rathbone argues that this is not unique to Massachusetts, and points to severe restrictions in California, Arizona, Pennsylvania, South Carolina, and Connecticut. *Id.* at xii. While a number of states “officially allow media access to their prisons as long as interviews pose no threat to security,” Rathbone argues that in practice this means very little. *Id.* She points to Idaho as an example: although having a policy of allowing interviews, not a single one had been granted in five years. *Id.* One consequence of this stonewalling, Rathbone contends, is that journalists only force access “when confronted with extreme examples of abuse.” *Id.* at xiv. An example of this can be found in a recent Boston Globe Spotlight article on the violence employed in taking a prisoner out of a cell at MCI-Souza-Baranowski. Mark Arsenault, *The Taking of Cell 15*, BOS. SUNDAY GLOBE (Aug. 14, 2021), <https://apps.bostonglobe.com/metro/investigations/spotlight/2021/08/departments-of-corrections-investigation/> [<https://perma.cc/VZT2-5J98>].

This Article examines the effects of the increasing “secretization”<sup>7</sup> of prisons in the United States on public attitudes towards punishment and the treatment of individuals convicted of crimes. Public perceptions of punishment play a key role in the Supreme Court’s interpretation of whether a particular penal practice violates the Eighth Amendment. These perceptions, referred to as “the evolving standards of decency of a civilized society,”<sup>8</sup> can—the Court has suggested—change over time and in turn can redefine what constitutes a “cruel and unusual punishment”<sup>9</sup> prohibited by the Eighth Amendment.<sup>10</sup> But can public views of acceptable forms of punishment change or “evolve,” as the test indicates, if actual practices within prisons are completely hidden from the public’s gaze? What effect does barring the public from observing what occurs in prisons have on the evolution of standards of decency and the application, by courts, of the Eighth Amendment?

The evolving standards of decency test first appeared in the twentieth century in *Trop v. Dulles*,<sup>11</sup> although there are strong reasons to believe the drafters of the Constitution and those voting to adopt the Eighth Amendment assumed that attitudes towards what constituted cruel or unusual

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7. I term this practice “secretization” for two reasons. First, the term “privatization” has been used to describe the shift in punishment practices from public to private in the nineteenth century as both shame-based and physical punishments, including executions, moved into the prisons. However, as discussed below, even when punishment moved into prisons, it was not entirely closed off to the public. See, e.g., Michael Meranze, *Penalty and the Colonial Project: Crime, Punishment, and the Regulation of Morals in Early America*, in *CAMBRIDGE HISTORY OF LAW IN AMERICA: EARLY AMERICA (1580–1815)* at 178, 206–07 (Michael Grossberg & Christopher Tomlins eds., 2008) (discussing shift from public punishments to imprisonment); Elizabeth Dale, *Criminal Justice in the United States, 1790–1920: A Government of Law or Men?*, in *CAMBRIDGE HISTORY OF LAW IN AMERICA: THE LONG NINETEENTH CENTURY (1789–1920)* at 133, 165 (Michael Grossberg & Christopher Tomlins eds., 2008) (examining privatization of executions). Moreover, in the late twentieth and early twenty-first centuries, privatization has come to take on a different meaning in the prison context. Now privatization evokes the move towards private companies rather than state entities operating prisons. See, e.g., SHANE BAUER, *AMERICAN PRISON: A REPORTER’S UNDERCOVER JOURNEY INTO THE BUSINESS OF PUNISHMENT* 61 (2018). The term “secretization” better captures the extent to which the move to render prisons spaces that are completely cut off from public view was a deliberate decision by state Departments of Correction to prevent the public from knowing about and weighing in on the practices that occur within prison walls. Thus, it is not simply that imprisonment has moved out of the open public gaze; rather, deliberate choices were made to prevent the public from being allowed to know what happens inside of contemporary prisons.

8. *Estelle v. Gamble*, 429 U.S. 97, 102 (1976).

9. U.S. CONST. amend. VIII.

10. See *infra* Section II.A.

11. 356 U.S. 86, 100–01 (1958) (holding that “[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society”). While *Trop* was the first Supreme Court decision to use the exact phrase of the test, it was not the first to express this sentiment. In *Weems v. United States*, the Court held that the cruel and unusual punishments clause “may acquire meaning as public opinion becomes enlightened by a humane justice.” *Weems v. United States*, 217 U.S. 349, 378 (1910).

punishments would change over time.<sup>12</sup> The concept of “evolving standards of decency” has had a checkered history in the years since *Trop*. Although it is widely accepted as playing some role in Eighth Amendment jurisprudence and the interpretation of the phrase “cruel and unusual,”<sup>13</sup> the Court has largely confined its invocation to cases involving capital punishment.<sup>14</sup> Although it is not explicitly part of the Court’s “death-is-different” jurisprudence, the concept has had its most significant effects in death penalty cases and those cases have, in turn, defined its contemporary contours.<sup>15</sup>

The Court has struggled to apply this concept when confronted with claims that imprisonment practices violate the Eighth Amendment. This Article contends that this struggle is a result of two intertwined factors:

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12. See Erin E. Braatz, *The Eighth Amendment’s Milieu: Penal Reform in the Late Eighteenth Century*, 106 J. CRIM. L. & CRIMINOLOGY 405, 405 (2016).

13. Even Justice Scalia admitted to some version of changing sensibilities when he confessed that he would struggle to uphold flogging as a punishment even though flogging was an acceptable punishment in 1789, the year he generally cuts off any change in meaning for the cruel and unusual punishments clause. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849, 864 (1989). This admission is all the more striking given his outspoken opposition to the phrase “evolving standards of decency.” *The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT’L J. CONST. L. 519, 525 (2005) (“I detest the phrase.”). In the scholarly literature, the concept of evolving standards of decency invariably appears as an example of a flexible standard that brings changing moral values into constitutional interpretation. See, e.g., Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 713 (1975) (using evolving standards of decency as an example of an interpretation of the Bill of Rights that would have to be discarded if a pure interpretive view of judicial review prevailed); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1205–06 (1987) (pointing to evolving standards of decency as an example of a value argument—an argument that “assert[s] [a] claim[ ] about what is good or bad, desirable or undesirable, as measured against some standard that is independent of what the constitutional text requires[ ]”—approach to constitutional interpretation).

14. See *infra* Part III.

15. For a discussion of this “death-is-different” jurisprudence, see Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145 (2009). See also *Harmelin v. Michigan*, 501 U.S. 957, 995 (1991) (noting a “qualitative difference between death and all other penalties”); *Rummel v. Estelle*, 445 U.S. 263, 272 (1980) (“Because a sentence of death differs in kind from any sentence of imprisonment, no matter how long, our decisions applying the prohibition of cruel and unusual punishments to capital cases are of limited assistance in deciding the constitutionality of the punishment meted out to Rummel.”); *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (“The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases. A variety of flexible techniques—probation, parole, work furloughs, to name a few—and various postconviction remedies may be available to modify an initial sentence of confinement in noncapital cases. The nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence.”).

First, the Court's flawed understanding of what standards of decency are and how they evolve, and second, the structural barriers—imposed by prison secretization—to the public's ability to develop standards of decency regarding practices of imprisonment. These structural barriers are, as this Article shows, the product of deliberate choices by state legislators and prison officials to reduce or prevent public access to or knowledge of state penal practices.

Regarding the first factor, the Court's understanding of standards of decency, this Article argues that the Court's concept of standards of decency fails to capture the empirical basis of this concept. Drawing on the social science literature, it proposes a process-oriented understanding of this concept. This understanding emphasizes how standards of decency change over time. While the Court's term "standards of decency" is not used in this literature, analogous concepts, including "sensibilities" and "empathy" have received significant treatment in the social sciences. As such, this literature offers important insights that help clarify what standards of decency are and how they might evolve.<sup>16</sup> First, what sociologist Norbert Elias terms the "civilizing process," reveals how emotions such as shame and disgust evolve over time, as bodily functions become increasingly regulated and individuals view themselves as distinct from others.<sup>17</sup> This process involves increasing respect for the autonomy of individual bodies, leading societies to limit what can be legitimately done to a person's body.<sup>18</sup> Second, a related process existed in the development of the culture of sympathy, which reached its apex in the mid- to late-eighteenth century amid a humanitarian revolution marked by efforts to eliminate slavery, torture, and certain forms of punishment.<sup>19</sup> An increased emphasis on sympathy led individuals to conform their own behavior to changing moral standards, to consider how their behavior was perceived by others, and to recognize that others may share the same emotions (such as shame or disgust) and physical experiences (such as pain) that they do.<sup>20</sup>

This interpersonal dynamic underpins sensibilities and standards of decency and suggests a process of evolution and refinement. Although concepts of sympathy and civilization have fallen out of usage, the related concept of empathy—developed within early twentieth century psychological literature—embraces a similar dynamic.<sup>21</sup> That is to say, its proponents assume that it can be the basis for a particular morality determining appropriate action or treatment of others based on our ability to experience their pain.<sup>22</sup>

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16. *See infra* Section I.A.

17. *See generally* NORBERT ELIAS, *THE CIVILIZING PROCESS* (Edmund Jephcott trans., 1994).

18. *Id.*

19. *See infra* Section I.B.

20. LYNN HUNT, *INVENTING HUMAN RIGHTS: A HISTORY* 26–29 (2007).

21. *Id.* at 64–66.

22. *See infra* Section I.B.



As for the second factor impacting the Court's ability to apply the concept of evolving standards of decency in imprisonment cases in a meaningful way, structural barriers can be attributed to changes in penal practices since *Trop*. Over the course of the twentieth century, prison practices became increasingly secretized, with the public losing access to information on what occurs inside prisons. This prison secretization hinders the development of public opinion regarding particular penal practices and, in turn, the Court's recognition and application of an objective measure of standards of decency. The use of solitary confinement, which scholars have shown is the product of administrative action and not public or legislative choice, provides an important example.<sup>23</sup> In this situation, the Court has no "objective" measures of standards of decency to point to and, arguably, the public is not engaged to provide such a standard.

Public attitudes towards punishment are increasingly significant as the lack of community or individual engagement with the carceral state has been cited as one explanation for the rise of mass incarceration.<sup>24</sup> Some scholars have pointed to an increased need for community participation as a "fix" for the current state of affairs.<sup>25</sup> In addition, the prison abolitionism movement relies on a notion that individual engagement

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23. KERAMET REITER, 23/7: PELICAN BAY PRISON AND THE RISE OF LONG-TERM SOLITARY CONFINEMENT 91–92 (2016); MONA LYNCH, SUNBELT JUSTICE: ARIZONA AND THE TRANSFORMATION OF AMERICAN PUNISHMENT 108 (2010).

24. William Stuntz has been described as "a founding father" of the body of scholarship arguing for greater democratization of the criminal legal system. Joshua Kleinfeld, *Manifesto of Democratic Criminal Justice*, 111 NW. U.L. REV. 1367, 1403 (2017) (introducing an entire volume dedicated to democratic criminal justice). Stuntz's work is vast, but his argument that loss of community control can, in part, be blamed for the rise of mass incarceration, is perhaps most fully developed in WILLIAM STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 7–8 (2011). See also, Andrew E. Taslitz, *The Criminal Republic: Democratic Breakdown as a Cause of Mass Incarceration*, 9 OHIO ST. J. CRIM. L. 133, 134 (2011) (arguing that mass incarceration can be attributed to a lack of truly deliberative democracy).

25. See, e.g., K. Sabeel Rahman & Jocelyn Simonson, *The Institutional Design of Community Control*, 108 CALIF. L. REV. 679 (2020) (analyzing movements arguing for "community control over policing and economic development to develop a transsubstantive framework for analyzing institutions of local governance"); Jocelyn Simonson, *The Place of "The People" in Criminal Procedure*, 119 COLUM. L. REV. 249, 296 (2019) (claiming that viewing the public as being implicated in both sides of a criminal case "should inform constitutional procedural doctrines"); Joshua Kleinfeld, *Three Principles of Democratic Criminal Justice*, 111 NW. U.L. REV. 1455, 1457 (2017) (asserting that one principle of democratic criminal justice is that "enforcement of criminal law should be so structured that lay citizens take part in it and see their sense of justice at work in it, rather than left wholly to officials and experts acting on the instrumental reasons characteristic of bureaucratic control"); Jocelyn Simonson, *Democratizing Criminal Justice Through Contestation and Resistance*, 111 NW. U.L. REV. 1609, 1609 (2017) [hereinafter Simonson, *Democratizing Criminal Justice*] (arguing that "it is from the voices of those who have been most harmed by the punitive nature of our criminal justice system that we can hear the most profound reimaginings of how the system might be truly responsive to local demands for justice and equality"). For a contrary view, arguing against the "democratization" thesis, see John Rappaport, *Some Doubts about "Democratizing" Criminal Justice*, U. CHI. L. REV. 711 (2020).

with offenders will lead to a better and more just criminal legal system.<sup>26</sup> Advocates of greater democratic participation in the criminal legal system and abolitionist arguments assume, consistent with the social science literature, that active engagement of the sort prevented by prison secretization will lead to a more just system.<sup>27</sup> These literatures are also grounded in a notion that democratic processes, and not courts, will drive desired change. Such processes have, however, been stymied by prison secretization. Increased transparency in penal practice will facilitate both the evolution of standards of decency and a democratization of the Eighth Amendment. It will render both state legislatures and local communities more capable of identifying, denouncing, and reforming violations of the Eighth Amendment's prohibition against cruel and unusual punishment.

This Article proceeds in four parts. Part I discusses how concepts related to standards of decency are understood across a variety of social science disciplines, including sociology, history, psychology, and anthropology. Standards of decency are most closely related to the social science concept of "sensibilities." This Part traces the development of concepts of "sensibilities," starting with the notion of the "civilizing process" and moving to the rise of sentimentalism in the eighteenth century which led to the nineteenth-century humanitarian revolution. This Part ends with a discussion of the twentieth century and two concepts particular to present time: empathy and de-civilization.

Part II provides examples of how this civilization process and cultivation of sensibilities has impacted the history of punishment. This history demonstrates not only how this process has altered punishment, but also how one effect of prison secretization is that the interpersonal dynamic traced in Part I can no longer influence the internal workings of the prison and those subjected to it.

Next, Part III traces the development of the concept of evolving standards of decency in the Court's Eighth Amendment jurisprudence. A concept initially linked to the ideas traced in Part I, it quickly became more narrowly focused as the Court sought to determine how standards of decency could be "objectively" measured. The resulting Eighth Amendment jurisprudence constrains the notion of evolving standards of decency to capital cases and fails to consider their impact on cases involving imprisonment. I suggest two ways the Court should reconsider its treatment of evolving standards of decency. First, the development of sensibilities demonstrates that the core of the concept of standards of decency is respect for the bodily integrity of the prisoner. As such, for this concept to gain traction in imprisonment cases, practitioners should link prison conditions to the prisoner's bodily suffering. Second, the social science literature suggests limits on when the Supreme Court should defer to legislative

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26. DANIELLE SERED, *UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR* 243–44 (2019).

27. *See infra* Section IV.A.

and administrative authorities in situations where prison secretization shields particular practices from public awareness and democratic deliberation.

Finally, Part IV applies the insights gleaned from the social science literature to reconsider public policy debates over penal practices. First, this Part argues that this process-oriented notion of standards of decency helps us understand a fundamental connection between various reform projects, including abolitionism and so-called “democratic” criminal justice. These proposals turn on arguments that emphasize the need for and the practical significance of interpersonal identification which is at the heart of notions of standards of decency. This leads to the second argument: that a preliminary step towards any of these reform projects should be a move towards greater penal transparency. This is a topic central to penal reform movements outside of the United States but has rarely been discussed in this context. Increasing the transparency of Departments of Correction is one step towards engaging with the standards of decency that have been a central component to Eighth Amendment jurisprudence for three-quarters of a century.

#### I. A PROCESS-ORIENTED UNDERSTANDING OF “EVOLVING STANDARDS OF DECENCY”

This Part turns to historical and social science literature to develop an account of what standards of decency are, how they might evolve, and how they might be determined. The most closely related concept to “standards of decency” in this literature is “sensibilities,” which refers to “ways of feeling”<sup>28</sup> that might be described as “a kind of visceral judgment—one which expresses emotional repugnance rather than rational objection.”<sup>29</sup> Sensibilities help individuals “differentiate between permissible and impermissible forms of violence,” and embody differing “cultural attitudes towards the sight of pain.”<sup>30</sup> These sensibilities change over time and differ from one culture to the next.<sup>31</sup> In a similar fashion, standards of decency, as used in the Eighth Amendment cases, indicate one’s emotional reaction to the effect of another’s punishment. An individual’s punishment elicits a gut reaction—either the punishment is entirely appropriate or, if it crosses the proverbial line, the punishment produces a distasteful or repulsive reaction. It is this distinction that the justices, when using the term “evolving standards of decency,” have sought to evoke. Moreover, the notion of evolution further signifies that, like sensibilities, these standards change over time and from one culture to another.

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28. DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY 213 (1990).

29. *Id.* at 214, 213–15. Garland is not alone in using this term. For another example, see STEVEN PINKER, THE BETTER ANGELS OF OUR NATURE: WHY VIOLENCE HAS DECLINED 2, 11 (2011).

30. GARLAND, *supra* note 28, at 214.

31. *Id.* at 213. See generally CATHERINE A. LUTZ, UNNATURAL EMOTIONS (1988).

This Part draws broadly on literature in the fields of sociology, history, psychology, and anthropology to examine how these distinctions are made and develop over time. The first section will trace the development of sensibilities, in particular the actual changes in cultural practice that undergird the development of the concept. This section starts with the work of Norbert Elias and his work tracing the origins of Western Civilization and the emotional developments that it entails. The second section examines the notion of sympathy as it developed in the seventeenth and eighteenth centuries in order to demonstrate how sympathy takes on a life course of its own as it becomes part of a moral and ethical imperative that helps explain the rise of humanitarianism particularly between roughly 1750 and 1850. The debates over the role of sympathetic understanding are particularly relevant for this Article's inquiry as they were actively being made at the time the Eighth Amendment was adopted and mirror current debates over evolving standards of decency. Much of the current literature evoking empathy draws on this earlier concept of sympathy. In the third section this Part ends with an examination of notions of de-civilization or the idea that civilization and sensibilities can be fragile and breakdown in certain conditions. This concept is particularly relevant as the Article examines the impact of sensibilities on punishment in the late twentieth and early twenty-first centuries and has important implications for public policy changes that might better ensure that sensibilities do not move in a direction of greater tolerance for the pain and suffering of the accused.

#### A. *The Civilizing Process*

Our examination of sensibilities starts with the work of Norbert Elias because Elias, more than any other thinker, has done the hard work of tracing the emotional development of people who self-consciously claim to be members of "Western Civilization."<sup>32</sup> He argues that the notion of

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32. ELIAS, *supra* note 17. Steven Pinker refers to Elias as "the most important thinker you have never heard of." PINKER, *supra* note 29, at 59. The term "Western Civilization" has become problematic because of the role it played in denigrating non-Western countries over the course of the nineteenth and twentieth centuries. When evoked in that sense, it was used as an evaluative judgment—placing that which was worthy of emulation on one side and that which was to be eliminated on the other. This Article shows that a number of the Court's Eighth Amendment cases reflect an analogous dynamic, contrasting acceptable practices from those of the past that are deemed unacceptable (indeed, frequently those cases evoke the term "civilized" or, its opposite, "barbaric"). There is nothing inherently wrong with this dynamic and there are many concepts that develop out of or are defined in relation to what they are not. For example, Lynn Hunt has remarked that the development of human rights "depended—as it still does—on the interpretation given to what was 'no longer acceptable.'" HUNT, *supra* note 20, at 26 (quoting LYNN HUNT, *THE FAMILY ROMANCE OF THE FRENCH REVOLUTION* 119, 157 (1992)). Thus, the comparative aspect of the notion of Western Civilization is not what should concern this Article. What is troubling is the tendency of those in the "West" to assume that they embody all that is positive within the concept of civilization and to use it to deny value to other peoples and their cultures. See, e.g., ED-

Western Civilization has grown out of particular changes in practice and manners that, in turn, caused emotional changes in its members. Elias decisively demonstrates that our reactions to actions (like cruelty) change over time. They are not static. It is their fact of changing that has undergirded the Court's evolving standards of decency jurisprudence and presents public policy challenges that are evaluated below.

Elias identified changes in sensibilities by examining manners books to determine "the texture of everyday life in medieval Europe."<sup>33</sup> In particular, he focused on the type of behavior that was expected around certain bodily functions, such as eating, the "natural functions" (eliminating waste), blowing one's nose, and spitting. He argued that over time all these functions became increasingly regulated, with social rules being superimposed on where, when, and how they could be performed. For example, the sixteenth century manners books directed at members of the ruling classes advised on how to maintain "outward bodily propriety."<sup>34</sup> Included in the recommendations were admonitions on when and how to blow one's nose; recommended table manners, such as do not "search the whole dish with one's hand" to find the best piece of meat and use only three fingers to take food from the common dish; and other warnings that focused on the body and its functions, such as "[d]o not expose without necessity 'the parts to which Nature has attached modesty.'"<sup>35</sup>

Over time, these books significantly changed in their proscriptions. For example, regarding table manners, by the seventeenth century, readers were admonished that while "[i]n *times past*, people ate from the common dish and dipped their bread and fingers in the sauce. *Today* everyone

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WARD SAID, *ORIENTALISM* (1978). In order to avoid this tendency, this Article uses the concept of Western Civilization "in a much more neutral, non-evaluative, *analytical* sense to describe a particular configuration of sensibilities and attitudes which is peculiar to Western societies in the modern period and which represents the outcome of a long developmental process of cultural and psychic change." GARLAND, *supra* note 28, at 215. Because this Article evokes this term in an analytical sense to refer to cultural and psychic structures specific to the West, in this discussion any reference to *a* civilization will be modified with "Western" and capitalize both terms.

33. PINKER, *supra* note 29, at 65. Elias does not argue that the process started in the Middle Ages. Rather, he argued that "the civilizing process is a process without beginning." STEPHEN MENNELL, *NORBERT ELIAS: AN INTRODUCTION* 42 (1992) (emphasis removed); *see also* PINKER, *supra* note 29, at 73 ("Elias leapfrogged academic fashion in not claiming that early modern Europeans 'invented' or 'constructed' self-control. He claimed only that they toned up a mental faculty that had always been a part of human nature but which the medieval had underused. He repeatedly drove the point home with the pronouncement 'There is no zero point.'" (quoting ELIAS, *supra* note 17, at 135, 181, 403, 421)).

34. ELIAS, *supra* note 17, at 44.

35. *Id.* at 46 (quoting ERASMUS OF ROTTERDAM, *DE CIVILITATE MORUM PUEILLIUM* (1530)); *see also id.* at 44–46, 49–51.

eats with spoon and fork from his own plate.”<sup>36</sup> And by the eighteenth century there were increasingly complex rules imposed on how those utensils may be used.<sup>37</sup>

Elias argues that there is a relationship between these developing regulations and restrictions that the manners books were identifying related to bodily functions and complementary emotional changes. He emphasizes two trends that accompanied changes in behavior.<sup>38</sup> The first is that as the manners books imposed increasing controls on specific bodily functions, they also emphasized concern with how other people would perceive one’s behavior.<sup>39</sup> Thus, the focus is less on the manners themselves and more on how each individual is perceived by others. Second, a number of specific acts were increasingly privatized (eliminating bodily waste was relegated to a specific room in the home, for example). Indeed, one Eliasian scholar argues that “[t]he hiding behind the scenes of what has become distasteful is one of the most characteristic features of the civilizing process in Europe.”<sup>40</sup>

Lynn Hunt, drawing on Elias, also points to these emotional changes and argues that “[g]reater respect for bodily integrity and clearer lines of demarcation between individual bodies had been produced by the ever-rising threshold of shame about bodily functions and the growing sense of bodily decorum.”<sup>41</sup> She argues that this “new concern for the human body” resulted in a belief that “the body [was] sacred on its own in a secular order that rested on the autonomy and inviolability of individuals.”<sup>42</sup> This was a two-part development: “Bodies gained a more positive value as they became more separate, more self-possessed, and more individualized . . . while violations of them increasingly aroused negative reactions.”<sup>43</sup> Hunt argues that this new valorization of the ordinary body was a necessary precondition for the sympathetic understanding that rose in importance in the eighteenth century and the subsequent humanitarian revolution that she argues it brought about, which this Article discusses more fully in the next section.

As these arguments from Hunt suggest, as regulations imposed on the body increased, there were similar changes elsewhere in society, most notably “changes in aggressiveness and cruelty over the centuries.”<sup>44</sup> Elias argues that life during the medieval period was unquestionably more violent than our own and that there was a joy and pleasure taken in acts of cruelty. For example, a popular sport in pre-revolutionary France involved

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36. *Id.* at 75 (quoting Song by Marquis de Conlanges (between 1640–1680)).

37. *Id.* at 84–85.

38. *Id.* at 65–67.

39. *Id.* at 67; see also MENNELL, *supra* note 33, at 43.

40. MENNELL, *supra* note 33, at 43.

41. HUNT, *supra* note 20, at 29–30.

42. *Id.* at 82.

43. *Id.*

44. MENNELL, *supra* note 33, at 57.

“[p]layers with hands tied behind them [who] competed to kill a cat nailed to a post by battering it to death with their heads.”<sup>45</sup> Over time, these entertainments came to be treated as unacceptable by most of the population. Similarly, over time, various forms of harm to other human beings were reduced, including human sacrifice, witch killing, torture, and, ultimately, slavery. These changes were part of what has been termed the humanitarian revolution, which, again, this Article examines in the next section.

First, however, this Article ends this initial discussion of Elias by examining why the above changes occurred. Elias argues that there were two exogenous triggers to explain how the emotional changes identified above came about: the rise of the nation-state and the transformation of the economy.<sup>46</sup> The medieval period was marked by a feudal social structure and fragmented rule, with the continent divided among numerous noble houses, none having significant priority over the others. This resulted in “[t]he webs of interdependence bonding together the people of different territories [being] weak.”<sup>47</sup> Over time, however, political power became concentrated in fewer hands, starting a long-term process of state formation. Elias views the monopolization of violence by the state as a central component of this process.<sup>48</sup> The key for Elias is that a byproduct of state formation was increasing interdependence across wider geographical spaces.

Equally important, and the second exogenous trigger identified by Elias, was the increasing differentiation of society between the nobility, the bourgeoisie, the Church, peasants and artisans, a differentiation occasioned by a transformation in the economy.<sup>49</sup> Advances in the economy “encouraged the division of labor, increased surpluses, and lubricated the machinery of exchange.”<sup>50</sup> The result was that “all social strata” were “steadily woven . . . into denser webs and long chains of functional interdependence.”<sup>51</sup> This interdependence increased interpersonal identification that led to a greater valorization of the physical bodies of other people.

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45. PINKER, *supra* note 29, at 67 (quoting BARBARA W. TUCHMAN, *A DISTANT MIRROR: THE CALAMITOUS 14TH CENTURY* (1978)).

46. *Id.* at 74–75.

47. MENNELL, *supra* note 33, at 63.

48. *Id.* at 62. Although not highlighted in the section above, it is worth noting that numerous justices have remarked upon the relevance of this monopolization for how the Court does or should think about its role in regulating punishment. In this, Elias aligns with Max Weber who also emphasizes the monopolization of violence by the state. See PINKER, *supra* note 29, at 74.

49. MENNELL, *supra* note 33, at 74; ELIAS, *supra* note 17, at xii, 167.

50. PINKER, *supra* note 29, at 77.

51. MENNELL, *supra* note 33, at 75; see also ELIAS, *supra* note 17, at xi–xii, 225–30; MENNELL, *supra* note 33, at 79 (“[T]he process as a whole tends to increase the two-way interdependence of people and social groups on each other. Interdependence does not mean equal interdependence: those who are less dependent on others than others are on them remain more powerful. But the web of interde-

In summarizing these emotional changes, British historian V.A.C. Gatrell argues that by the nineteenth century the bourgeoisie was “blocking aggression, capable of shame and embarrassment when passion was exposed, self-conscious about the body and its functions, but also newly respectful of others’ bodies, as instinct was subordinated to the socialized super-ego.”<sup>52</sup> The nineteenth century bourgeoisie was not only a product of the civilizing process, but rather was also involved in a movement historians have termed “sentimentalism.” This Article thus parts from Elias and turns to the self-conscious embrace of the concept of sympathy that started in the seventeenth century and resulted in the humanitarian revolution that occurred in the mid-eighteenth to mid-nineteenth centuries.<sup>53</sup>

### B. *From Sympathy to Empathy*

In the seventeenth century, the term “sympathy” became increasingly common and was used to refer not only to an affinity between people or things, but also had the “psychological meaning of sharing the feelings of another person or being affected by their suffering.”<sup>54</sup> In the eighteenth century, the term took on greater theoretical meaning as philosophers such as David Hume and Adam Smith grappled with the moral implications of sympathy. Smith argued that sympathy is the bond that unites society. Sensibility was a closely related term referring to “human sensitivity of perception, [comprising] the fundamental link of self and society,”<sup>55</sup> and “was part of new thinking about human psychology and solidarity, a philosophical attempt to discover a system of morals and society by enquiring into the human constitution . . . . Sensibility was a basis of morals and a mainspring of action.”<sup>56</sup> As Hunt describes the process: “Sentiment was the emotional reaction to a physical sensation, and morality was the education of this sentiment to bring out its social component (sensibility).”<sup>57</sup>

There are parallels between the unfolding of this movement and the process of civilization identified by Elias. Both entailed a refinement of manners. Both relied on a particular group (courtly elites in Elias, the

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pendence increasingly constrains all—the more powerful and the less powerful. And this has long-term effects on their feelings and behaviour.” (emphasis omitted)).

52. V.A.C. GATRELL, *THE HANGING TREE: EXECUTION AND THE ENGLISH PEOPLE 1770–1868*, at 17 (1994).

53. This is not to argue that the process Elias identifies ceases at this time or is otherwise unrelated to sentimentalism. In fact, Elias’s account continues into the early twentieth century and many scholars examining sentimentalism draw on Elias. See, e.g., HUNT, *supra* note 20; G.J. BARKER-BENFIELD, *THE CULTURE OF SENSIBILITY* (1992).

54. Gustav Jahoda, *Theodor Lipps and the Shift from “Sympathy” to “Empathy”*, 41 J. HIST. BEHAV. SCI. 151, 152 (2005).

55. SARAH KNOTT, *SENSIBILITY AND THE AMERICAN REVOLUTION* 1 (2009).

56. *Id.* at 8.

57. HUNT, *supra* note 20, at 111.



growing middle class and, particularly, women, with sympathy) defining what it meant to be refined or to behave in an appropriate fashion. Indeed, for those advocates of sympathetic understanding “[t]he progress of human history involved the cultivation of sensibility: uncivilized peoples, or ordinary laborers in the present day, were not fully sensible”<sup>58</sup> and they contrasted their sensibilities with “barbaric savagery,” defined as not having the human sensitivity cultivated by sympathy.<sup>59</sup> As this indicates, neither sympathy nor civilization was neutral in its approach to “man and his environment” and both were “normative and prescriptive.”<sup>60</sup> The difference is that sympathy entailed the “moral refinement of those in the know.”<sup>61</sup> Thus, sympathy involved a self-conscious attempt to inculcate a particular type of feeling within the sensitive subject that would then be the basis for moral action. As Samuel Moyn argues, sympathy “inaugurated a new moral universe.”<sup>62</sup> The universe was “new” because “no prior movements . . . had ever made compassionate response to others’ pain—especially their physical suffering—the emblematic experience and emotional engine of individual and collective moral life.”<sup>63</sup>

In this sense, sympathetic understanding is contrasted with detachment, which has a long history, going all the way back to Greek philosophy.<sup>64</sup> The enduring success of the sympathetic revolution can be seen in the “unintelligibility” of “moral detachment from and immunity to others (including their pain).”<sup>65</sup> While this perspective might ring true for someone studying human rights or humanitarianism, we will see below that it faces a particular challenge in the contemporary criminal law context, where the pain of the victim may be contrasted with that of the criminal and the moral imperative to ignore the pain of the latter can be lauded as a virtue.

Significantly for any discussion of the Constitution or the Bill of Rights, sentimentalism was widely embraced in the American colonies, particularly by the founders. Historian Sarah Knott argues that “[t]he ratification process that constitutionalism involved drew not only on classical precepts, the states’ experience of sovereignty, and the political ideologies we know so well but also on contested ideas about the universal workings of self, knitting sensibility into the very formation of the American federal

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58. KNOTT, *supra* note 55, at 8–9.

59. *Id.* at 11–12. Similarly, Mary Wollstonecraft connects sympathy to the progress of civilization and “aligned her view of progress with her wish for a reformation of manners.” BARKER-BENFIELD, *supra* note 53, at xxix (note that Barker-Benfield draws on Elias throughout his book).

60. KNOTT, *supra* note 55, at 5.

61. *Id.*

62. Samuel Moyn, *Empathy in History, Empathizing with Humanity*, 45 *HIST. & THEORY* 397, 399 (2006).

63. *Id.*

64. *See id.* at 407 n.18.

65. *Id.* at 407.

state.”<sup>66</sup> Thus, in thinking about who could or how to identify cruel and unusual punishments, it is likely that the founders were thinking of the sensible man: someone who could use their carefully cultivated sensibility of compassion and pity to determine whether the punishment was appropriate.<sup>67</sup> This does not mean that the sensible man would always mitigate a particular punishment. Indeed, the same individuals who were self-consciously evoking sympathetic feelings recommended that the poor women and children be “put to work manufacturing linen,” which would lessen the state’s tax burden in supporting them.<sup>68</sup> As this example demonstrates, sensibility was frequently balanced by “hardheadedness” that could demand harsh treatment.<sup>69</sup>

While the focus thus far has been on the development of the concept of sympathy and the practice of sentimentalism that was widely discussed and debated in the eighteenth century, a series of movements for social change starting in the mid-seventeenth century represent a concrete reshaping of acceptable practices in society and constitute what has come to be termed the humanitarian revolution. Hunt argues that “from the 1760s onward, campaigns of various sorts led to the abolition of state-sanctioned torture and a growing moderation of punishment (even for slaves).”<sup>70</sup>

There have been numerous attempts to explain why and how this revolution came about. Hunt and Pinker argue the intellectual movement of sentimentalism was accompanied by a technological revolution, the printing press, which led to widespread reading of novels causing increases in sensitivity to the emotions and feelings of others.<sup>71</sup> Thomas Haskell makes a similar argument to Elias, contending that changes in the economy help explain the rise of humanitarian sentiment between 1750 and 1850.<sup>72</sup> Haskell sees his work as largely compatible with Elias, though he claims to be identifying a more specific mechanism of change.<sup>73</sup> He argues that “market discipline . . . inculcat[ed] altered perceptions of causation in human affairs” and that this alteration led to “a shift in the con-

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66. KNOTT, *supra* note 55, at 19; *see also* ANDREW BURSTEIN, *SENTIMENTAL DEMOCRACY* 11 (1999). *See generally* G.J. BARKER-BENFIELD, ABIGAIL AND JOHN ADAMS: *THE AMERICANIZATION OF SENSIBILITY* (2010).

67. *See* Braatz, *supra* note 12, for a similar argument, which has particular implications for the subjective measures of evolving standards of decency traced in *infra* Section III.D. The founders likely would have expected judges to evoke them as the sentiments expressed therein were at the heart of being a sensible man, though as stated above this could be tempered by other considerations.

68. BARKER-BENFIELD, *supra* note 66, at 17.

69. *Id.*

70. HUNT, *supra* note 20, at 80.

71. PINKER, *supra* note 29, at 172–74; HUNT, *supra* note 20, at 40–41.

72. *See* Thomas L. Haskell, *Capitalism and the Origins of Humanitarian Sensibility, Part 1*, 90 AM. HIST. REV. 339, 341 (1985) [hereinafter Haskell, *Humanitarian Sensibility Part 1*].

73. *See* Thomas L. Haskell, *Capitalism and the Origins of Humanitarian Sensibility, Part 2*, 90 AM. HIST. REV. 547, 548 (1985) [hereinafter Haskell, *Humanitarian Sensibility Part 2*].

ventions of moral responsibility.”<sup>74</sup> In other words, people could see more clearly a causal relationship between their own acts and harm to other people. Thus, although he recognizes that “[t]he rise of antislavery sentiment was, among other things, an upwelling of powerful feelings of sympathy, guilt, and anger,” he argues that “these emotions would not have emerged when they did, taken the form they did, or produced the same results if they had not been called into being by a prior change in the perception of causal relations.”<sup>75</sup>

None of these arguments are so far afield of the civilizing process identified by Elias as one might think, however. All of them rely on an increase in interpersonal relations leading individuals to identify with the feelings, particularly the pains, of others. Thus, whether the change was brought about by changes in state structure, the economy, technology such as the printing press, or shifts in causal thinking, the effect is seen as the same: there was an increase in interpersonal identification leading to emotional changes that arose when individuals saw the physical suffering of other people.

Sympathy as a philosophical concept and moral imperative declined in importance as modern philosophy developed. Kant argued that sentimentalism could not provide the foundation for morality because it could not be counted on to guarantee a particular reaction. He gave the example of a philanthropist who “might ‘feel nothing’ or . . . might suffer from ‘deadly insensibility’ before the plight of others, extinct capacities precluding his moral intervention.”<sup>76</sup> As a result, “[t]he empathically numbed agent is . . . the point of departure of modern moral philosophy.”<sup>77</sup>

At the same time, the florescence of work studying and lauding the role of a related, twentieth-century concept of empathy demonstrates how deeply the sympathetic movement penetrated our modern selves.<sup>78</sup> Starting in the early twentieth century, the field of psychology began to develop the concept of empathy.<sup>79</sup> Hunt has connected the concept of sensibili-

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74. Haskell, *Humanitarian Sensibility Part 1*, *supra* note 72, at 342.

75. *Id.* at 343.

76. Moyn, *supra* note 62, at 401 (quoting IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* 53–54 (Mary Gregor & Jens Timmermann ed. & trans., 1996)).

77. *Id.*

78. *See, e.g.*, *EMPATHY: PHILOSOPHICAL AND PSYCHOLOGICAL PERSPECTIVES* (Amy Coplan & Peter Goldie eds., 2011) (providing a broad overview of contemporary uses of and debates concerning the concept); *EMPATHY & AGENCY: THE PROBLEM OF UNDERSTANDING IN THE HUMAN SCIENCES* (Hans Herbert Kögler & Karsten R. Stueber eds., 2000) (arguing for empathy as foundational to the social sciences); JEREMY RIFKIN, *THE EMPATHIC CIVILIZATION* (2009) (retelling human history through the lens of empathy).

79. Focus on this term in the social science literature has increased, perhaps directly in response to findings in the scientific literature that suggests not only a neurological basis for empathy but also that empathy may be foundational to how we learn and interact with others. *See, e.g.*, FRANS DE WAAL, *THE AGE OF EMPATHY: NATURE’S LESSONS FOR A KINDER SOCIETY* (2009); MARCO IACOBONI, *MIRRORING PEOP-*

ties to the more recent term “empathy.”<sup>80</sup> She argues that the term empathy “better captures the active will to identify with others.”<sup>81</sup> Many of the normative assumptions made about empathy actually mirror arguments made about sympathy. Both concepts contain distinct definitions, but become functionally related once empathy is used to examine ways of interacting with others.

### C. *De-Civilization*

Elias wrote *The Civilizing Process* in 1939. The reality of World War II and Nazi Germany, while not included in that work, informed Elias’s later thinking.<sup>82</sup> In particular, it prompted the question of how to explain instances where the civilizing process reverses itself. If the civilizing arc is for greater restrictions to be placed on the types of actions against the body of another that might be deemed acceptable, the holocaust seems entirely anomalous. There are two distinct explanations for de-civilizing processes that are important to bear in mind in the next two Parts. First is Elias’s own explanation which argues that in situations where there is a distinct set of outsiders within a social group they will not receive the benefits of the interpersonal identification traced above. This process can be seen in Elias’s explanation for the rise of Nazi Germany: the state lost its monopoly on violence, which, in turn, “result[ed] [in a] contraction of empathy for groups perceived to be outsiders, particularly the Jews.”<sup>83</sup> This ques-

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PLE: THE NEW SCIENCE OF HOW WE CONNECT WITH OTHERS (2008). *But see* GREGORY HICKOK, THE MYTH OF MIRROR NEURONS: THE REAL NEUROSCIENCE OF COMMUNICATION AND COGNITION (2014).

80. *See* HUNT, *supra* note 20, at 64–66.

81. *Id.* at 65.

82. *See generally* NORBERT ELIAS, THE GERMANS (1996).

83. PINKER, *supra* note 29, at 78. While in this quote Pinker is merely paraphrasing Elias, ultimately Pinker is critical of Elias’s account, in part because “in Germany during the Nazi years the declining trend for one-on-one homicides continued.” *Id.* at 79. Thus, the civilizing process continued in some aspects of German life even if it does not appear to have guided state action. Similarly critical of Elias is Zygmunt Bauman, who sees Elias as part of the “myth deeply entrenched in the self-consciousness of our Western society,” which Bauman saw as “the morally elevating story of humanity emerging from pre-social barbarity.” ZYGMUNT BAUMAN, MODERNITY AND THE HOLOCAUST 12 (1989). Instead, Bauman sees modern societies as containing “power-concentrations which are not under effective control and can be used for good or evil.” Eric Dunning & Stephen Mennell, *Elias on Germany, Nazism and the Holocaust: On the Balance Between ‘Civilizing’ and ‘Decivilizing’ Trends in the Social Development of Western Europe* 49 BRIT. J. SOCIO. 339, 340 (1998). Dunning and Mennell argue that Bauman’s argument assumes that “moral behaviour—identification with, and feeling for, other humans—is ‘natural’, deriving from the ontological conditions of life rather than processes of socialization,” which is directly contradictory to Elias who argues that “what we have come to call ‘morality’ is not ‘innate’ but socially produced and variable through time and space.” *Id.* It may be that the holocaust should inform our thinking about these topics in other ways. Carolyn Dean argues that the holocaust and later the “victim” culture of late-twentieth century humanitarian movements have led to “compassion fatigue” and demonstrate the “precariousness of empathy as a partic-

tion of “established” versus “outsider” became significant in some of Elias’s later work,<sup>84</sup> where he argued that an imbalance of power between the two could lead “the established” to “come to characterize the outsiders on the basis of myth and fantasy—‘real’ knowledge of the outsiders being increasingly minimized.”<sup>85</sup> Jonathan Fletcher argues that in these situations there is “a contraction in the scope of mutual identification between constituent groups and individuals,” which results in the established group gaining so much power that it is able to demonize the “other.”<sup>86</sup>

The second explanation for de-civilizing processes can be found in the works of Ian Burkett and John Pratt.<sup>87</sup> Each argue that civilization carries within it the seeds of its own downfall. Pratt argues that the bureaucratization central to the modern state “drew an effective administrative veil across these most disturbing of all disturbing events: for a good time at least, ‘nobody knew what was going on.’”<sup>88</sup> He elaborates that

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ular cultural narrative.” CAROLYN J. DEAN, *THE FRAGILITY OF EMPATHY AFTER THE HOLOCAUST* 1, 15 (2004).

84. See generally NORBERT ELIAS & JOHN L. SCOTSON, *THE ESTABLISHED AND THE OUTSIDERS* (1994).

85. JOHN PRATT, *PUNISHMENT AND CIVILIZATION: PENAL TOLERANCE AND INTOLERANCE IN MODERN SOCIETY* 6 (2002).

86. Jonathan Fletcher, *Towards a Theory of Decivilizing Process*, 22 *AMSTERDAMS SOCIOLOGISCH TIJDSCHRIFT* [Amsterdam Socio. Mag.] 283, 289 (1995) (Neth.).

87. Pinker, drawing on Cas Wouters, argues for a third approach to de-civilization to try to explain the increase in crime rates in the United States in the late-twentieth century. PINKER, *supra* note 29, at 109–10. See generally CAS WOUTERS, *INFORMALIZATION: MANNERS AND EMOTIONS SINCE 1890* (2007). In Wouters’s account, “[t]he Civilizing Process had been a flow of norms and manners from the upper classes downward . . . as Western countries became more democratic, the upper classes became increasingly discredited as moral paragons, and hierarchies of taste and manners were leveled.” PINKER, *supra* note 29, at 109–10 (discussing Wouters). This same process is described elsewhere as the “permissive society.” Stephen Menell, *Decivilising Processes: Theoretical Significance and Some Lines of Research*, 5 *INT’L SOCIO.* 205, 211 (1990). Pinker concludes, however, that the remarkable decline in crime that started in the 1980s can be attributed to a re-civilizing process. While the original civilizing process relied upon changes to the “ingrained habits of civilized society,” this re-civilizing process “consists of a conscious reflection on these habits, in which we evaluate which aspects of a culture’s norms are worth adhering to and which have outlived their usefulness.” PINKER, *supra* note 29, at 128. This Article is not entirely convinced by this account, however. The explanations for the reduction in violent crime started in the 1980s seem too varied to be fully captured by Pinker’s account. Compare PATRICK SHARKEY, *UNEASY PEACE: THE GREAT CRIME DECLINE, THE RENEWAL OF CITY LIFE, AND THE NEXT WAR ON VIOLENCE* (2019) (identifying numerous strategies for declining crime rates including one pointed to by Pinker: intensive efforts by leaders in affected communities to address the sources of crime), with FRANKLIN ZIMRING, *THE CITY THAT BECAME SAFE: NEW YORK’S LESSONS FOR URBAN CRIME AND ITS CONTROL* (2013) (pointing to a range of explanations for New York City’s precipitous decrease in crime between 1991 and 2000, including particular and intensive policing methods). Menell also considers increasing crime rates but says that the information is too partial and the time period too short to develop a full theory of whether the increasing crime rates in the late twentieth century actually indicated a move towards decivilization. MENELL, *supra* note 33, at 214.

88. PRATT, *supra* note 85, at 7 (quoting ELIAS, *supra* note 17).

“[i]n the contemporary civilized world, self-restraint seems to turn very easily into moral indifference, when it combines with the range of other anonymizing anomic factors present in such societies.”<sup>89</sup> Similarly, Burkitt argues that the “central features” of the civilizing process “can become mechanisms which actually suppress mutual identification and can lead to a form of ‘civilized’ violence and terror.”<sup>90</sup>

These scholars thus pose some caveats regarding the fragility of the civilizing process and sensibilities that need to be considered by public policy makers. First, the civilizing process depends upon ties of interdependence that develop between relatively equal groups. When this balance of equality is disturbed then a situation of “established” versus “outsider” occurs and the “outsider” can be demonized and treated in a way that would not be acceptable among the “established.” This can clearly be seen in the treatment of racial minorities in the United States. Thus, while this may seem obvious, it bears clearly stating: the problem of racism must be addressed in any public policy proposals. Second, several scholars have identified the problems that can arise when there is no longer public engagement with particular institutions. Sensibilities cannot be engaged if the public does not know what is happening behind the walls of the prison. The next Part turns to this problem.

## II. EVOLVING STANDARDS OF DECENCY AND THE HISTORY OF PENAL CHANGE

This Part turns to an examination of the relationship between the civilizing process and sensibilities traced in Part I and the history of penal change in order to examine how these concepts might be employed both to drive and to understand changes in penal form. Historical works that trace a change in sensibilities towards punishment tend to examine changes in the acceptable forms of physical punishment and execution over time and the shift from these punishments towards imprisonment.<sup>91</sup> In contrast, histories of imprisonment itself rarely evoke changes in sensibilities as a factor shaping this history.<sup>92</sup> The next Part will highlight how this bifurcation is mirrored in how the Court approaches questions of the Eighth Amendment’s application in capital cases versus those involving imprisonment.

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89. *Id.*

90. Ian Burkitt, *Civilization and Ambivalence*, 47 *BRIT. J. SOCIO.* 135, 149 (1996).

91. *See, e.g.*, LOUIS MASUR, *rites of Execution: Capital Punishment and the Transformation of American Culture* (1989); PIETER SPIERENBURG, *The Spectacle of Suffering* (1984).

92. *See, e.g.*, MICHAEL IGNATIEFF, *A Just Measure of Pain: The Penitentiary in the Industrial Revolution 1750–1850* (1989); MICHEL FOUCAULT, *Discipline and Punish: The Birth of the Prison* (Alan Sheridan trans., 1977); DAVID ROTHMAN, *The Discovery of the Asylum* (1971).

Historian Pieter Spierenburg has done the most work to connect the history of penal change with changes in sensibilities. In tracing changes in execution practices in Europe over the course of a number centuries, Spierenburg argues that Elias's notion of a civilizing process provides a causal explanation for the declining physical violence associated with executions as well as their ultimate privatization.<sup>93</sup> Like Elias, Spierenburg relates the shift in execution practice to a change in sensibilities<sup>94</sup> toward the execution procedure, which occurred simultaneously with a shift from the early modern state to the nation-state.<sup>95</sup> With regard to the first of these changes, Spierenburg argues that "[f]rom about 1600 . . . two [central] elements [of the ancient regime], publicity and suffering, slowly retreated."<sup>96</sup> This change contained multiple elements including: a shift away from forms of execution that involved extra measures of pain; the retreat from non-capital sentences of mutilation; and, finally, the change to more private forms of punishment such as the house of correction.<sup>97</sup>

While this shift is widely recognized, not only in the historical literature but also in Supreme Court cases, Spierenburg adds an important element to this history: he traces the changing attitudes of spectators to the site of the physical suffering of the convict.<sup>98</sup> He argues that this was a result of "[i]ncreasing inter-human identification," by which he means that "[t]he death and suffering of fellow human beings were increasingly experienced as painful, just because other people were increasingly perceived as fellow human beings."<sup>99</sup> This process of inter-human identification took two forms. First, those facing punishment were increasingly seen as people the spectator could identify with and second, "more ways of making people suffer [were] viewed as distasteful."<sup>100</sup> Spierenburg cites the statements of distaste and horror that spectators started to express in their writings about punishment and in response to seeing the body of a convict experiencing pain. These statements begin to appear prior to changes in penal form, providing an empirical basis for recognizing an initial shift in sensibilities.

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93. SPIERENBURG, *supra* note 91, at ix–x. Remember that in this context, privatization means taken out of the public's view. *See supra* note 7.

94. The translation of his work uses the term "mentalities," but it is clear he means it to be used in the same manner as "sensibilities." *See supra* Part I.

95. SPIERENBURG, *supra* note 91, at x.

96. *Id.* at 200.

97. *Id.*

98. *See, e.g.,* *Baze v. Rees*, 553 U.S. 35, 94–108 (2008) (Thomas, J., concurring). Spierenburg's account is much more nuanced than that of Justice Thomas. Spierenburg traces shifts not only in how the execution itself is carried out, but also other forms of public mutilation and the use of torture to extract proof in criminal cases. *See* SPIERENBURG, *supra* note 91, at 183–99.

99. SPIERENBURG, *supra* note 91, at 185.

100. *Id.*

Randall McGowen contests Spierenburg's claim that the change in sensibilities turned on shifts in inter-human identification. Rather, he argues that the spectators

were as concerned about the image of punishment as they were about the fate of the criminal, for this spoke to their own identity. Reformers argued that it was not seemly, it was not moral, for the state to mount spectacular rituals of death, and that religion should not lend its support to such displays.<sup>101</sup>

Thus, their statements were not concerned with the pain suffered by the alleged criminal, instead they were about their own self-perception as a particular type of moral subject. At the same time, however, McGowen concedes that even if certain sectors of society "may have imagined themselves possessed of a sympathy they did not, in fact, express . . . this self [-]perception may still have influenced their conduct, in subtle but important ways."<sup>102</sup> Thus, for McGowen, the question of whether there is an actual change in sensibilities is less important than the effect that expressions of discomfort have on the perception and functioning of the penal system.<sup>103</sup>

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101. Randall McGowen, *Revisiting the Hanging Tree: Gatrell on Emotion and History*, 40 BRIT. J. CRIMINOLOGY 1, 10 (2000). He gives as an example Robert Peel, who:

was so convinced of his own moral rectitude that he resisted what he saw as the weakness of character among those who appealed to sensibility. He, too, was concerned about the image of justice offered to the nation. He set a particular conception of his duty against the claims of feeling.

*Id.*

102. *Id.* at 9.

103. While Spierenburg and McGowen are both addressing the situation in Europe, there is no reason to think that a different process was at work in the United States. Louis Masur, writing about the United States, argues that the privatization of executions and the rise of imprisonment "embodied the triumph of new sensibilities and the reconstitution of cultural values throughout the Western world." MASUR, *supra* note 91, at 3. These works have not been without criticism. In particular, Gatrell, in his monumental work on executions in Britain in the early nineteenth century, argues that it was changes in the economy and level of social control that the state had achieved, rather than changes in sensibilities, that first initiated a significant shift in England from executions to imprisonment. *See generally*, GATRELL, *supra* note 52. He argues that "humane feelings prevail when their costs in terms of security or comfort are bearable; when they can be productively acted upon; and when they bring emotional and status returns to the 'humane.'" *Id.* at 12. For Gatrell, humane opinion derived from, rather than caused, changes in society. *Id.* at 24–25. Indeed, he rejects "the easy generalizations historians still make about this generation's [nineteenth century] humanitarian inclinations." *Id.* at 261. Gatrell rejects the claim of middle-class reformers that "[h]orrid inflictions . . . marked a cruder age, while their demand for milder punishments displayed the elevated sensibility that was the hallmark of their own time." McGowen, *supra* note 101, at 6. As summarized by McGowen, the privatization of executions "was a defence against something so distasteful, so disturbing, that it threatened to overwhelm the individual. But rather than admit the danger, the respectable turned away," and, later, "[t]his turning aside from something unpleasant is not founded



While the history of capital punishment can reinforce the account of sensibilities traced in Part I, the history of imprisonment does not fit so easily within that framework. For much of the nineteenth and twentieth centuries, historians of punishment and imprisonment did recount a narrative of progressive humanitarianism. However, starting with revisionist historians in the 1970s, the most well-known being Foucault in *Discipline and Punish*,<sup>104</sup> that narrative of progress and change has increasingly come into question. There has been a tendency in the late-twentieth and early-twenty-first century scholarship on the prison to continue this critical vein established not only by Foucault but also by David Rothman and Michael Ignatieff.<sup>105</sup> Each of these scholars provided a critique of the view of penal history that saw the prison as the pinnacle of penal development and certainly more humane than previous centuries. Foucault famously asserted against this view his argument that the real aim of the penal reformers who developed the penitentiaries in the nineteenth century was “not to punish less, but to punish better; to punish with an attenuated severity perhaps, but in order to punish with more universality and necessity; to insert the power to punish more deeply into the social body.”<sup>106</sup> A critical stance that assumes that humanitarian sentiment went horribly awry when it undertook penal reform is not predisposed to find sensibilities at work in contemporary prisons.

While there have been an increasing number of works examining the rise of mass imprisonment<sup>107</sup> and attempting to provide causal explanations for its development, efforts to determine those effects are hampered by the fact that “[d]espite the unprecedented growth of the incarcerated population since the early 1970s, there has been a steady decline in scholarly attention to life inside prison walls.”<sup>108</sup> This is, in part, because “prison fieldwork is fraught with administrative, bureaucratic, and legal

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upon principle or a higher motive; it is no more than cowardly avoidance of a painful reality.” *Id.* at 7.

104. MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (Alan Sheridan trans., 1977); see also ROTHMAN, *supra* note 92; IGNATIEFF, *supra* note 92.

105. ROTHMAN, *supra* note 92; FOUCAULT, *supra* note 92; IGNATIEFF, *supra* note 92.

106. FOUCAULT, *supra* note 92, at 82.

107. This term is typically taken to indicate the scale of the use of imprisonment in the United States. For example, in defining the phenomenon, David Garland pointed to the growth in the imprisonment rate in the United States in the 1990s: contrasting the rate of 110 per 100,000 people that held steady for most of the twentieth century with the rate of 450 per 100,000 current by the turn of the twenty-first century. David Garland, *The Meaning of Mass Imprisonment*, in *MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES* 1–3 (David Garland ed., 2001). It is also common to compare this rate not just historically but also internationally. Garland argues that “[c]ompared to European and Scandinavian countries, the American rate is [6] to 10 times higher.” *Id.* at 1.

108. KITTY CALAVITA & VALERIE JENNESS, *APPEALING TO JUSTICE: PRISONER GRIEVANCES, RIGHTS, AND CARCERAL LOGIC* 7 (2015).

obstacles.”<sup>109</sup> For this reason, this Article focus on two aspects of imprisonment in the late twentieth and early twenty-first centuries: first, the declining faith in notions of progress or reform in penal practice and, second, the increasing isolation of prison administration.

Starting in the 1970s, historians increasingly questioned the traditional narrative of imprisonment representing a progressive or humanizing development from prior public and physical punishments. Practitioners and social scientists made a similar move away from narratives of progress and reform. David Garland points to a “pervasive sense of failure, fueled by the sharply increasing crime rates of the 1970s and 1980s [that] would eventually lead to a questioning of the state’s ability to control crime and a rethinking of the role of criminal justice.”<sup>110</sup> This “sense of failure,” meant “the criminal justice system came to be viewed primarily in terms of its limitations and propensity for failure rather than its prospects for future success.”<sup>111</sup>

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109. *Id.* This is echoed in the quote from Christina Rathbone earlier in this Article. See RATHBONE, *supra* note 4, at xi. In contrast, the early seminal work by Gresham Sykes depended upon a deep ethnographic study of the inside of a prison. See generally GRESHAM M. SYKES, *THE SOCIETY OF CAPTIVES* (1958). Currently there are no similar works. The exceptions are written by individuals who work as correctional officers: SHANE BAUER, *AMERICAN PRISON: A REPORTER’S UNDERCOVER JOURNEY INTO THE BUSINESS OF PUNISHMENT* (2018); TED CONOVER, *NEWJACK: GUARDING SING SING* (2000); MARK S. FLEISHER, *WAREHOUSING VIOLENCE* (1989); or by inmates themselves: KERI BLAKINGER, *CORRECTIONS INK: A MEMOIR* (2022); ALBERT WOODFOX, *SOLITARY* (2019); SHAKA SENGHOR, *WRITING MY WRONGS: LIFE, DEATH, AND REDEMPTION IN AN AMERICAN PRISON* (2013); PIPER KERMAN, *ORANGE IS THE NEW BLACK: MY YEAR IN A WOMAN’S PRISON* (2010); VICTOR HASSINE, *LIFE WITHOUT PAROLE: LIVING AND DYING IN PRISON TODAY*, (Robert Johnson & Sonia Tabriz eds., 5th ed. 2011); ERIN GEORGE, *A WOMAN DOING LIFE: NOTES FROM A PRISON FOR WOMEN*, (Robert Johnson ed., 2d ed. 2010); LEONARD PELTIER, *PRISON WRITINGS: MY LIFE IS MY SUN DANCE* (Harvey Arden ed., 1999). The one notable exception of an academic being allowed to conduct an ethnographic study in prison is LORNA A. RHODES, *TOTAL CONFINEMENT: MADNESS AND REASON IN THE MAXIMUM SECURITY PRISON* (2004), although arguably she was able to perform this work because of the extreme conditions of confinement in a maximum security prison that allows no interaction with or between inmates. There has also been a shift towards ethnographic studies of imprisonment’s effects on those outside of the institution, thus also allowing the researcher to avoid the access issues departments of correction impose. See, e.g., Megan Comfort, *In the Tube at San Quentin: The “Secondary Prisonization” of Women Visiting Inmates*, 32 J. CONTEMP. ETHNOGRAPHY 77 (2003); ANNE M. NURSE, *FATHERHOOD ARRESTED: PARENTING FROM WITHIN THE JUVENILE JUSTICE SYSTEM* (2002); DONALD BRAMAN, *DOING TIME ON THE OUTSIDE: INCARCERATION AND FAMILY LIFE IN URBAN AMERICA* (2007).

110. GARLAND, *supra* note 28, at 62.

111. *Id.* at 107; see also Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and its Implications*, 30 CRIMINOLOGY 449, 456 (1992) (arguing that the “new penology” entails a “technocratic rationalization” that “tends to insulate institutions from the messy, hard-to-control demands of the social world” and “reflects the lowered expectations for the penal system that result from failures to accomplish more ambitious promises of the past”).

The shift away from a history of progressive change occurred at the same time as social scientists and practitioners increasingly questioned the efficacy of the criminal justice system's focus on rehabilitation and the very possibility of progress. The effect of this shift was revealed in part by the responses of the justices to arguments regarding evolving standards of decency, particularly the increasing tendency to question whether evolution always moves in one direction.<sup>112</sup> Such questions reflect a broader shift, which Garland highlights, away from a narrative of progress and reform.

In addition and at the same time, prison administrators are increasingly deferred to by both the Supreme Court in its decisions evaluating Eighth Amendment claims and the legislatures that the Court assumes oversee penal practice. This is most clearly revealed in the work of Karamet Reiter and Mona Lynch, who explore the rise of long-term solitary confinement in California and Arizona, respectively.<sup>113</sup> In Reiter's account, the development of California's Pelican Bay Prison (a portion of which is comprised entirely of solitary confinement cells) was entirely initiated and led by prison officials, with extremely limited legislative oversight. The legislature "provided the Department of Corrections with extraordinary delegations of authority and exemptions from existing law."<sup>114</sup> The individual within the California Department of Corrections who was largely responsible for the design and building of Pelican Bay said of the legislative debates over the institution: "You're not going to find much in the record. It was all negotiated [off the record], and [the Department of Corrections] pretty much had our way with the legislature."<sup>115</sup> Reiter concludes that "[p]rison officials had successfully negotiated a prison-building process that minimized their accountability

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112. Chief Justice Roberts has framed the debate as being over whether the direction of change is always in the direction of decreasing the punishment imposed. In his dissent in *Miller v. Alabama*, Chief Justice Roberts argued that "[a]s judges we have no basis for deciding that progress towards greater decency can move only in the direction of easing sanctions on the guilty." 567 U.S. 460, 494 (2012) (Roberts, C.J., dissenting). Similarly, Justice Alito, also dissenting in *Miller* (with Justice Scalia joining), asked: "[i]s it true that our society is inexorably evolving in the direction of greater and greater decency? Who says so, and how did this particular philosophy of history find its way into our fundamental law?" *Id.* at 510 (Alito, J., dissenting). On the other hand, in *Baze v. Rees*, Chief Justice Roberts, writing the plurality opinion, made repeated references to the "more humane means of carrying out the [death] sentence" and argued "[t]hat progress has led to the use of lethal injection by every jurisdiction that imposes the death penalty." 553 U.S. 35, 41 (2008) (Roberts, C.J., concurring; Kennedy & Alito, JJ., joining) (plurality opinion). According to Roberts, the legislatures had engaged "with an earnest desire to provide for a progressively more humane manner of death." *Id.* at 51.

113. REITER, *supra* note 23, at 88–89, 98–99; LYNCH, *supra* note 23.

114. REITER, *supra* note 23, at 98 (quoting CAL. STATE LEGIS. ANALYST OFF., THE NEW PRISON CONSTRUCTION PROGRAM AT MIDSTREAM 12 (1986)).

115. *Id.* at 99 (alterations in original) (quoting Interview with Craig Brown, Deputy Secretary of Finance (1983–1985) and Undersecretary of Corrections (1987–1996), California Joint Legislative Committee on Prison Construction and Operations).

to legislators—or, for that matter, to anyone else.”<sup>116</sup> Lest we think that this narrative is unique to California, Reiter points out that “state and federal systems across the United States have failed to track how many prisoners are in isolation and how long they have been there. Today, calculations of either the scale or duration of solitary confinement use are hardly better than educated guesses.”<sup>117</sup> Thus, even while increasing numbers of individuals are subject to incarceration, the prison administration that makes decisions regarding their conditions of confinement is decreasingly subject to oversight even for so significant of a change in policy as the move to the long-term use of solitary confinement.

John Pratt argues that this move towards less public engagement and increasing control by prison administrators reflects the move towards bureaucratization that is a central aspect of the civilizing process.<sup>118</sup> He argues that punishment in the West “[b]ecame largely anonymous, remote, encircled by the growing power of the bureaucratic forces presiding over it which then shaped, defined and made it understandable.”<sup>119</sup> Greater bureaucratization meant that the “formal language of punishment came to be sanitized: stripped of the emotive, pejorative force that its infliction might invoke in favour of one that spoke of punishment in more neutral, objective, scientific terms.”<sup>120</sup> In his account, “[a] modern penal bureaucracy would thus be able to proclaim its ameliorative, sanitized approach to prison development and at the same time draw a veil of silence across anything that might contradict this.”<sup>121</sup> This had the result that prisons, and what occurred inside of them were cut off from public view:

[T]he cold, remorseless deprivation that punishment could inflict in the civilized world—especially if it involved going to prison—did not much trouble the public. If this sanction was certainly enough to decay the human spirit, it was not enough to destroy the human body—and there were thus few grounds for

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116. *Id.*

117. *Id.* at 32.

118. An alternative account of the distinctiveness of American penalty, in particular, is provided by Joshua Kleinfeld and James Q. Whitman, who each argue that in the United States we have a popular view of those accused of crime as degraded and thus deny them basic dignity while in prison (whereas in Europe a different trend is observable). This Article does not dispute this account, it simply sees it as part of the problem. Moreover, these accounts fit within this Article’s account of evolving standards of decency, they simply do not provide the same public policy prescriptions suggested in Part IV. Joshua Kleinfeld, *Two Cultures of Punishment*, 68 STAN. L. REV. 933 (2016); JAMES Q. WHITMAN, *HARSH JUSTICE* (2003).

119. PRATT, *supra* note 85, at 3. In this quotation, Pratt is agreeing with Nils Christie who “argued that the growth of mass imprisonment in the civilized world today . . . is a ‘natural outgrowth of our type of society, not an exception to it.’” *Id.* at 2–3 (quoting NILS CHRISTIE, *CRIME CONTROL AS INDUSTRY* 177 (1993)).

120. PRATT, *supra* note 85, at 81; *see also* GARLAND, *supra* note 29, at 180–89.

121. PRATT, *supra* note 85, at 122.

concern: it seemed to produce no ostensible suffering or brutality. If there was any, this took place behind the scenes—no one need know or worry about it.<sup>122</sup>

Thus, while changes in sensibilities might be linked to a shift from public punishments to those that occur behind closed doors, that same move has rendered the resulting punishment, imprisonment, largely impervious to the public gaze, thus cutting off the process of interpersonal identification, which Spierenburg and McGowen viewed as central to the initial shift toward imprisonment as the primary penalty in Europe and the United States.

### III. EVOLVING STANDARDS OF DECENCY IN EIGHTH AMENDMENT CASE LAW

If the process-oriented approach to evolving standards of decency traced in Part I is taken seriously, then not only do many aspects of penal history become clearer, but it also helps analysts better grapple with the confusing nature of the Supreme Court's Eighth Amendment jurisprudence. While Part II was a practical application of evolving standards of decency to penal history, this Part asks how practitioners can better understand this concept in the Eighth Amendment context and apply it in future cases.

As the above indicates, historians and social scientists treat cognate notions of standards of decency as a process rather than a destination. These notions change over time and depend on various types of interpersonal identification in order to develop. The Supreme Court's jurisprudence on evolving standards of decency, on the other hand, while starting with a dynamic notion of change, quickly morphed into a static question of measuring what those standards were at any given moment. The Court has such an ossified notion of the standards of decency precisely because the Court has struggled to develop a consistent method of applying them.<sup>123</sup> This Part traces the concept through the Supreme Court's juris-

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122. *Id.* at 10.

123. Most scholarship in this area focuses on the limitations of the concept as understood and applied by the Court. *See, e.g.*, Michael S. Moore, *Morality in Eighth Amendment Jurisprudence*, 31 HARV. J.L. & PUB. POL'Y 47, 63 (2008) (critiquing the Court's reliance on a majoritarian standard for evolving standards of decency); William W. Berry III, *Following the Yellow Brick Road of Evolving Standards of Decency: The Ironic Consequences of 'Death-is-Different' Jurisprudence*, 28 PACE L. REV. 15, 22–24 (2007) (arguing that the evolving standards of decency test is problematic because there is no governing normative principle and it imports the justice's subjective views); Tonja Jacobi, *The Subtle Unraveling of Federalism: The Illogic of Using State Legislation as Evidence of an Evolving National Consensus*, 84 N.C. L. REV. 1089, 1092–93 (2006) (criticizing the Court's heavy reliance on state legislatures to measure evolving standards of decency); Tom Stacy, *Cleaning Up the Eighth Amendment Mess*, 14 WM. & MARY BILL RTS. J. 475, 520 (2005) (same). Very few commentators focus on the process by which standards of decency might evolve, though some discuss how they might be identified. *See, e.g.*, William Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 550 (1986) (arguing that the dialogue between federal and state courts

prudence, focusing on what the Court has understood the phrase to mean and how it has attempted to measure it. The analysis is deliberately broad in scope, considering any discussion about how penal practices have or do change as relevant to an understanding of how we should comprehend evolving standards of decency.

A. *Early Versions of Evolving Standards of Decency*

The earliest versions of the concept “evolving standards of decency” clearly mirror the language and understanding of the civilizing process traced in Part I. This indicates that, at its origin, the phrase was part of a shared language about how modern society had evolved and the place of punishment within that process.

The phrase “evolving standards of decency” has its origin in the 1958 decision *Trop v. Dulles*.<sup>124</sup> *Trop* was not, however, the first case to assert that the meaning of the phrase “cruel and unusual” might change over time. *Weems v. United States*,<sup>125</sup> decided in 1910, was the first to make such an argument. There, the Court argued that although constitutional provisions are enacted “from an experience of evils” the language itself “should not, therefore, be necessarily confined to the form that evil had theretofore taken” and “a principle, to be vital, must be capable of wider application than the mischief which gave it birth.”<sup>126</sup> The Court went on to argue that although the abuse of power could have been anticipated by the founders (hence the need for the Eighth Amendment), they would not have assumed “that it would be manifested in provisions or practices which would shock the sensibilities of men.”<sup>127</sup> The Court concluded that the Eighth Amendment may be “progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.”<sup>128</sup> *Weems*, therefore, introduces the twin notions that the Eighth Amendment is intended to prohibit practices that might “shock the sensibilities of man,” which were seen as violating the very principle of democratic governance, *and* that its meaning changes as “public opinion becomes enlightened by a humane justice.”<sup>129</sup>

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regarding the meaning and interpretation of fundamental rights “enables all courts to discern more rapidly the ‘evolving standards of decency that mark the progress of a maturing society.’” (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1970))).

124. *Trop*, 356 U.S. at 101.

125. 217 U.S. 349 (1910).

126. *Id.* at 373.

127. *Id.* at 375.

128. *Id.* at 378.

129. *See id.* at 375–78. The punishment in question was not one used or developed in the United States. Rather, it was imposed in the Philippines and represented a continuation of Spanish law in the relatively new American colony. *Id.* at 357. Significantly for our purposes, this demonstrates an even closer identification with the notion of civilization. While Elias was focused on how the civilization process unfolded in a particular location, and this is where our focus lies, the con-

Following *Weems*, the *Trop* Court extended the argument that the cruel and unusual punishments clause could apply to contemporary punishments not imagined at the time of the founding.<sup>130</sup> The Court's hold-

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cept of civilization became a significant one in international relations as nations asserted their position within Western Civilization and further asserted certain rights and duties that led to the vast system of European (and American) colonialism that was still going strong at the time of *Weems* (and, again, because *Weems* involved the Philippines, was centrally at issue in that case). For a more extensive discussion of this aspect of the case, see Braatz, *supra* note 12, at 456–57. This concept of civilization would continue to be relevant in later cases as the Supreme Court looked to international practice to measure evolving standards of decency. See, e.g., *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1977); *Enmund v. Florida*, 458 U.S. 781, 796 n.22 (1982); *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988) (holding that the execution of someone who was less than sixteen years old when the offense was committed “would offend civilized standards of decency . . . [and] is consistent with the views that have been expressed by respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community”); *Stanford v. Kentucky*, 492 U.S. 361, 384 (1989) (Brennan, J., dissenting) (arguing that these international opinions are relevant as “indicators [of] whether a punishment is acceptable in a civilized society”); *Roper v. Simmons*, 543 U.S. 551, 576 (2005); *Graham v. Florida*, 560 U.S. 48, 81–82 (2010). This will not be the focus here, however, as this Article is more concerned with the intricacies of the civilizing process at the domestic level.

130. *Trop v. Dulles*, 356 U.S. 86, 99–102 (1970). The structure of the argument in *Trop* followed what has become a longstanding practice in Eighth Amendment cases of comparing the punishment in question (here, denationalization for desertion from the military during war time) to known “cruel and unusual punishments” (here, torture) and describing the relationship between the two. *Id.* at 99. Here, the Court found the contemporary punishment to be “a form of punishment more primitive than torture.” *Id.* at 101. The Court concluded by evoking the notion of civilization, pointing to the lack of such a punishment in “[t]he civilized nations of the world.” *Id.* at 102. *Trop* therefore determined that denationalization was cruel and unusual because, the Court concluded, it was even more cruel than torture, representing “the total destruction of the individual’s status in organized society.” *Id.* at 101. This approach of comparing the punishment being challenged to long-abandoned punishments dominated the Court’s earliest Eighth Amendment cases and continues to play a minor role in Eighth Amendment interpretation. As the Court in *Weems* summarized this mode of argument as “[looking] backwards for examples by which to fix the meaning of the clause.” 217 U.S. at 377. The reasoning in these cases turns on an absolute distinction between the outmoded punishments of the past and those under discussion in the case at hand. In other words, the analysis is largely dichotomous—historic “cruel” punishments are compared to or contrasted with contemporary practices. These cases are relevant to an examination of evolving standards of decency because in each instance the Court assumes that such an evolution has already occurred. For the earliest cases, see *Wilkerson v. Utah*, 99 U.S. 130, 135 (1878) (comparing death by shooting to punishments listed in Blackstone as having been long abandoned, such instances “where the prisoner was drawn or dragged to the place of execution, in treason; or where he was emboweled alive, beheaded, and quartered, in high treason”); *O’Neil v. Vermont*, 144 U.S. 323, 339 (1892) (Fields, J., dissenting) (arguing that the designation “unusual and cruel . . . is usually applied to punishments which inflict torture, such as the rack, the thumb-screw, the iron boot, the stretching of the limbs, and the like, which are attended with acute pain and suffering”); *In re Kemmler*, 136 U.S. 436, 447 (1890) (contrasting the presumed instantaneous death by electrocution to the “torture or a lingering death” of previous methods of

ing expresses language that would soon become central to Eighth Amendment cases: that the meaning of the phrase “cruel and unusual” is not “static” but “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”<sup>131</sup> In making this determination, the Court evoked civilization, using it as both a measure of what punishments might be cruel and unusual<sup>132</sup> and as an explanation for why, in the United States, there would be little occasion to decide that a punishment violated that prohibition.<sup>133</sup> Therefore, while the Court did not specify the exact content of the phrase “standards of decency,” it did provide some suggestions as to contours of that concept.

The next major Eighth Amendment case to reach the Court was *Robinson v. California*,<sup>134</sup> which made no mention of evolving standards of decency.<sup>135</sup> So, it was not until the Court decided *McGautha v. California*<sup>136</sup> that evolving standards of decency received further elaboration. In that case, the dissent rejected the majority’s historically grounded argument that it could not find a violation of the Constitution<sup>137</sup> and instead argued that the majority was ignoring “the evolving gloss of civilized standards which this Court, long before the time of those who now sit here, has been reading into the protective procedural due process safeguards of the Bill of Rights.”<sup>138</sup> Thus, the dissent applied a more broadly derived

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execution); *Louisiana ex. rel. Francis v. Resweber*, 329 U.S. 459, 476 (1947) (Burton, J., dissenting) (describing the repeated application of electrical current as “such a form of torture [that] would rival that of burning at the stake”). For more contemporary examples following the same form of argumentation, see *Baze v. Rees*, 553 U.S. 35, 95–96 (2008) (Thomas, J., concurring) (contrasting lethal injection with graphic descriptions of earlier forms of execution, describing “burning at the stake,” “gibbeting” or hanging the condemned in an iron cage so that his body would decompose in public view, “dissection,” and, most graphically, “emboweling alive, beheading, and quartering”).

131. *Trop*, 356 U.S. at 101.

132. *Id.* at 99 (“The question is whether this penalty subjects the individual to a fate forbidden by the principle of civilized treatment guaranteed by the Eighth Amendment.”); *id.* at 100 (“The Amendment stands to assure that this power be exercised within the limits of civilized standards.”).

133. *Id.* at 100 (“This Court has had little occasion to give precise content to the Eighth Amendment, and, in an enlightened democracy such as ours, this is not surprising.”).

134. 370 U.S. 660 (1962).

135. The absence to any reference to evolving standards of decency is striking considering that the opinion itself turns on the Court’s finding that “[i]t is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease,” and concludes that “in the light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.” *Id.* at 666. References to both this moment in history and “contemporary human knowledge” could relate to evolving standards of decency, but that argument was not explicitly made by the Court. *Id.*

136. 402 U.S. 183 (1971).

137. *Id.* at 207.

138. *Id.* at 241 (Douglas, J., dissenting).



notion of evolving standards of decency as providing a “civilized gloss” to the administration of the death penalty. It did not, however, articulate what the content of that “civilized gloss” was, nor how it could guide the Court in its decision. All three of these cases suggest that the Court itself understood the prohibition on cruel and unusual punishment and the way that would be measured, through evolving standards of decency, as connected to the civilizing process, even if they did not have a fully articulated or studied understanding of what that meant.

### B. *Death Is Different—Or Is It?*

While the early cases indicate that the notion of standards of decency was initially explicitly rooted in a concept of the civilizing process, the unfolding of the concept in later cases demonstrates that the notion of standards of decency continues to be tied to that the process, even if the justices do not always openly recognize the relationship. This is most clear in comparing when the Court has deployed the concept, overwhelmingly in death penalty cases, versus when it has not, in imprisonment cases. This is true because the death penalty cases cannot avoid grappling with the issue of bodily integrity and violations to it. The death penalty is, by definition, a penalty that touches the body of the condemned. While the Supreme Court has never acknowledged this as a reason why it has tended to use evolving standards of decency in that context, the history traced out in Part I demonstrates that this is an expected outcome, as those standards are most firmly rooted in a response to bodily functions and bodily integrity.<sup>139</sup> The fact that evolving standards of decency are used to a much lesser effect in imprisonment cases reinforces this argument. There, the most successful cases have all tied the perceived constitutional violation to its impact on the prisoner’s body.

A focus on bodily pain is already implicitly present in the Court’s precedents. For example, central to the *In re Kemmler*<sup>140</sup> analysis was the fact that death was, in the legislature’s and the Court’s estimation, being rendered painless through the method of electrocution. Similarly, a dominant component of the Court’s evaluation of the penalty in *Weems*, involving a sentence of fifteen years of imprisonment at hard labor, was that “[i]t may be that even the cruelty of pain is not omitted [from Weems’s sentence]. He must bear a chain night and day. He is condemned to painful as well as hard labor.”<sup>141</sup> Likewise, in its mid-twentieth century decision in *Louisiana ex rel. Francis v. Resweber*,<sup>142</sup> the Court summarized

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139. See *supra* Part I.

140. 136 U.S. 436 (1890).

141. *Weems v. United States*, 217 U.S. 349, 366 (1910). In *Resweber*, Justice Burton argued that “[t]he all-important consideration is that the execution shall be so instantaneous and substantially painless that the punishment shall be reduced, as nearly as possible, to no more than that of death itself.” *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 474 (1947) (Burton, J., dissenting).

142. 329 U.S. 459 (1947).

the Anglo-American legal tradition as forbidding “the infliction of unnecessary pain in the execution of the death sentence” and argued that it included a “[p]rohibition against the wanton infliction of pain.”<sup>143</sup>

In more recent cases, however, the Court has returned to the concept of bodily pain, although in these instances the justices are embracing it as not being prohibited by an originalist understanding of the Eighth Amendment. For example, in *Baze v. Rees*,<sup>144</sup> Justice Thomas’s opinion represents a rejection *not* of evolving standards of decency *per se*, but of an evolution of these standards since 1789. In his opinion, Justice Thomas followed a graphic recitation of history with the assertion that “[q]uite plainly, what defined [those] punishments was that they were designed to inflict torture as a way of enhancing a death sentence; they were intended to produce a penalty worse than death.”<sup>145</sup> Justice Thomas derives his own standard that punishment is not cruel and unusual if the execution method does not involve the deliberate application of pain. This view of the Eighth Amendment became the majority view in *Bucklew v. Precythe*.<sup>146</sup> What is remarkable about both opinions is that while they reject a notion of evolving standards of decency (neither account references it) the history of penal development that they each reference assumes the civilizing process as traced by Elias. They simply cut that process off in 1789 rather than accepting or acknowledging that it is a dynamic and continuous process. In so doing, the Court acknowledges and seemingly accepts the infliction of pain on the body of the condemned.<sup>147</sup>

Although later cases have expanded the category of what constitutes pain to include “serious deprivations of basic human needs” or of the “minimal civilized measure of life’s necessities,” there has been little analysis of the relationship between the concept of pain and these additional concepts.<sup>148</sup> Justice Blackmun, concurring in *Hudson v. McMillian*,<sup>149</sup> emphasized that pain should not be limited to physical pain or injury and that the term “pain” encompassed certain kinds of “psychological harm.”<sup>150</sup> However, the Court has not squarely addressed this issue.

Indeed, the fact that this proposition is seemingly taken for granted can help explain the additional restrictions the Court places on Eighth Amendment claims as it explicitly limits the reach of the Eighth Amendment to events occurring inside of prisons by means other than evolving

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143. *Id.* at 463.

144. 553 U.S. 35 (2008).

145. *Id.* at 101 (Thomas, J., concurring) (emphasis omitted).

146. 139 S. Ct. 1112 (2019).

147. This is especially true in *Bucklew* where the Court seemingly accepts the proposition that Mr. Bucklew would suffer considerable pain when the State killed him using lethal injection.

148. *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981).

149. 503 U.S. 1 (1992).

150. *Id.* at 16–17 (Blackmun, J., concurring). Justice Brennan also invoked mental as well as physical pain in his *Furman* concurrence. *Furman v. Georgia*, 408 U.S. 238, 272 (1972) (Brennan, J., concurring).

standards of decency. For example, in *Estelle v. Gamble*,<sup>151</sup> the Court held that for a prisoner to allege an Eighth Amendment violation in the context of failure to attend to serious medical needs, prison officials must have acted with deliberate indifference to the medical needs of the prisoner.<sup>152</sup> Similarly, in *Wilson v. Seiter*,<sup>153</sup> a case involving severe overcrowding in a prison, the Court held that a prisoner challenging the conditions of his confinement must “show a culpable state of mind on the part of prison officials” before he could find relief under the Eighth Amendment.<sup>154</sup> Likewise, in *Whitley v. Albers*,<sup>155</sup> the Court held that a prisoner shot during the quelling of a prison riot had not suffered an Eighth Amendment violation because the pain was not “unnecessary[ily] and wanton[ly] inflict[ed].”<sup>156</sup> *Whitley* held that in the context of a prison riot, the central question was “whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.”<sup>157</sup> Finally, in *Farmer v. Brennan*,<sup>158</sup> a case involving prison rape, the Court imposed the requirement that prison officials may be liable under the Eighth Amendment only when they knew of a substantial risk of serious harm and disregarded that harm.<sup>159</sup> All of these opinions involve a restriction on the reach of the Eighth Amendment based on structural aspects of the prison, *not* evolving standards of decency. If one were to ask whether current standards of decency permit a prisoner to suffer physical injury due to a lack of medical care, the effects of serious overcrowding, shootings, or sexual assault, the answer would be quite different.

At the other end of the spectrum, the Court had no difficulty in *Hudson* finding that prison guards beating a prisoner could constitute an Eighth Amendment violation, even in the absence of a showing of serious injury to the prisoner.<sup>160</sup> The Court held that “[w]hen prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated.”<sup>161</sup> The Court reasoned that reaching this conclusion did not require a showing of significant injury because “[o]therwise, the Eighth Amendment would permit any physical punishment, no matter how diabolic or inhuman, inflicting less than some arbi-

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151. 429 U.S. 97 (1976).

152. *Id.* at 104.

153. 501 U.S. 294 (1991).

154. *Id.* at 296.

155. 475 U.S. 312 (1986).

156. *Id.* at 314, 319 (quoting *Ingraham v. Wright*, 430 U.S. 651, 670 (1977)).

157. *Id.* at 320–21 (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973)).

158. 511 U.S. 825 (1994).

159. *Id.* at 848.

160. *Hudson v. McMillan*, 503 U.S. 1, 4 (1992).

161. *Id.* at 9.

trary quantity of injury.”<sup>162</sup> The key to understanding this holding is to recognize the centrality of bodily integrity to the Court’s understanding of what standards of decency allow or prohibit.

The role of bodily harm in applying evolving standards of decency can be seen most clearly in the case of *Brown v. Plata*<sup>163</sup> where the Court held that the California prison system was overcrowded.<sup>164</sup> The Court’s argument begins with a graphic analysis of the effects of overcrowding in California prisons, including information that “[a]s many as 54 prisoners may share a single toilet” and a report from “a psychiatric expert” who observed “an inmate who had been held in a [telephone booth sized] cage for nearly 24 hours, standing in a pool of his own urine, unresponsive and nearly catatonic.”<sup>165</sup> Describing the inadequate health care that resulted from this overcrowding, the opinion pointed to the following examples:

[a] prisoner with severe abdominal pain died after a 5-week delay in referral to a specialist; a prisoner with “constant and extreme” chest pain died after an 8-hour delay in evaluation by a doctor; and a prisoner died of testicular cancer after a “failure of MDs to work up for cancer in a young man with 17 months of testicular pain.”<sup>166</sup>

This language emphasizes that the overcrowding itself was not why the Court found an Eighth Amendment violation; rather, the extreme effects on the prisoners’ bodies was what the Court found to be cruel. This is entirely in keeping with what this Article identified as the core of evolving standards of decency, which derives from the civilizing process’s focus on the physical effects of the body (indeed, the reference to the number of prisoners sharing a toilet specifically links to this literature). However, the Court found an Eighth Amendment violation because these conditions violated “the dignity of man” rather than evolving standards of decency.<sup>167</sup> Indeed, evolving standards of decency were never mentioned because there would be no way to evaluate standards of decency in a situation where the suffering highlighted occurred entirely out of sight of the public.

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162. *Id.*; *see also id.* at 14 (Blackmun, J., concurring) (arguing that if there was a requirement of significant physical injury, then the Eighth Amendment “might not constrain prison officials from lashing prisoners with leather straps, whipping them with rubber hoses, beating them with naked fists, shocking them with electric current, asphyxiating them short of death, intentionally exposing them to undue heat or cold, or forcibly injecting them with psychosis-inducing drugs”).

163. 563 U.S. 493 (2011).

164. *See id.* at 502.

165. *Id.* at 502–04.

166. *Id.* at 505 (quoting CAL. PRISON HEALTH CARE RECEIVERSHIP CORP., K. IMAL, ANALYSIS OF CDCR DEATH REVIEWS 6–7 (2007)).

167. *Id.* at 510 (citing *Atkins v. Virginia*, 536 U.S. 304, 311 (2002)).

C. *Objective Measures of Evolving Standards of Decency*

While a core aspect of the evolving standards of decency test explains the Court's differential treatment of capital versus imprisonment cases, the Court has become trapped in a struggle of its own making. The Court's understanding of the concept being rooted in public perceptions of what is "decent" has become clearer in the second half of the twentieth century as it focused on defining how to measure standards of decency. Here, the Court hones in on legislative decisions as an "objective" marker—thus assuming a role for the public and democratic process in determining those standards. This began with the range of opinions that made up the plurality in *Furman v. Georgia*.<sup>168</sup> There, a majority of five declared that the death penalty as applied in the United States was unconstitutional.<sup>169</sup> Two of the five, Justices Brennan and Marshall, concluded that the death penalty violated evolving standards of decency. Although their opinions set the stage for subsequent debates over the meaning and measure of evolving standards of decency, it was the Court's follow-up case *Gregg v. Georgia*<sup>170</sup> that determined the contours of how evolving standards of decency would be applied in subsequent cases.

Although the Court in *Gregg* did not specify why it thought legislative decisions should be central to its determination of what standards of decency are, some of the Court's earliest decisions demonstrate the assumptions that underlie this argument. The Court's 1890 decision in *In re Medley*<sup>171</sup> reflects an early treatment of legislation as the manifestation of evolving standards of decency.<sup>172</sup> There, the Court pointed to the history of the use of solitary confinement in the early nineteenth century and found that "experience demonstrated that there were serious objections to it."<sup>173</sup> The Court concluded that solitary confinement was abandoned be-

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168. 408 U.S. 238 (1972).

169. *See generally id.* The five justices who agreed that the death penalty as applied violated the Eighth Amendment were Justices Douglas, Brennan, Stewart, White, and Marshall. *Id.* at 240–372 (filing separate concurrences).

170. 428 U.S. 153 (1976).

171. 134 U.S. 160 (1890).

172. This is not, strictly speaking, an Eighth Amendment case; rather, it examined whether particular changes made by the Colorado legislature in the conditions imposed prior to the final punishment of death violated the *ex post facto* clause. New York appears to have passed a very similar law around this same time. *McElvaine v. Brush*, 142 U.S. 155, 157–58 (1891) (describing a similar pre-execution procedure).

173. *In re Medley*, 134 U.S. at 168. As in *Trop*, the majority decision included a graphic description of the effects of the punishment in question:

A considerable number of prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community.

*Id.*

cause “the whole subject attracted the general public attention, and . . . solitary confinement was found to be too severe.”<sup>174</sup> The Court therefore assumed that the legislature’s decision to abandon solitary confinement reflected public sentiment that the punishment was too severe. Although it was not an Eighth Amendment case, the model of evolution idealized by the Court in *In re Medley* recurs throughout the Eighth Amendment case law: the public becomes aware of and develops an opinion about the appropriateness of a particular punishment and the legislature takes responsive action.<sup>175</sup>

Another approach to evaluating legislative action can be seen in *In re Kemmler*, which was handed down the same year as *In re Medley*. In that case, the legislature and the executive had worked together to find what they thought would be a more humane method of execution. In 1885, the governor of New York asked the legislature to investigate modes of execution, stating:

“The present mode of executing criminals by hanging has come down to us from the dark ages, and it may well be questioned whether the science of the present day cannot provide a means for taking the life of such as are condemned to die in a less barbarous manner.”<sup>176</sup>

The legislature appointed a commission to investigate, and it recommended a bill that adopted electrocution as the new method of execution for New York State.<sup>177</sup> The Supreme Court subsequently approved the New York courts’ opinion that held:

[I]t was for the legislature to say in what manner sentence of death should be executed; that this act was passed in the effort to devise a more humane method of reaching the result; that the courts were bound to presume that the legislature was possessed of the facts upon which it took action; and that by evidence taken *aliunde* the statute that presumption could not be overthrown.<sup>178</sup>

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174. *Id.* A similar argument can be seen in Chief Justice Burger’s dissent in *Furman* where he argued that “punishments such as branding and the cutting off of ears, which were commonplace at the time of the adoption of the Constitution, passed from the penal scene without judicial intervention because they became basically offensive to the people and the legislatures responded to this sentiment.” *Furman v. Georgia*, 408 U.S. 238, 384 (1972) (Burger, C.J., dissenting).

175. For an empirical analysis of whether this is, in fact, what drives legislative action, see David Niven & Aliza Plener Cover, *The Arbiters of Decency: A Study of Legislators’ Eighth Amendment Role*, 93 WASH. L. REV. 1397 (2018).

176. In *Kemmler*, 136 U.S. 436, 444 (1890) (quoting Governor David B. Hill, New York, Speech to State Legislature (Jan. 6, 1885)).

177. *Id.*

178. *Id.* at 447.

Therefore, the Court assumed that in making the change, the legislature had sufficient facts before it to evaluate the alleged humaneness of the new method of execution and deferred to its decision. Two paradigmatic processes of legislative reform in the realm of punishment therefore emerged: the first in which a legislature responds to changing public sentiments by modifying a particular punishment, and the second in which the legislature independently investigates the available evidence and determines that a more humane method of punishment is available.

*In re Medley* and *In re Kemmler* are both nineteenth century cases, and it was not until *Gregg* that the actions of legislatures became the dominant method for evaluating evolved standards of decency. Following the response to *Furman*, the Court reaffirmed the role of legislative action as an objective measure of standards of decency and embraced a view of legislative action seen in *In re Medley*: first standards of decency would evolve, and then the legislature would act in response to those standards. In *Gregg*, Justice Stewart's plurality opinion emphasized that determining the evolution of standards of decency "does not call for a subjective judgment."<sup>179</sup> "It requires," he continued, "that we look to objective indicia that reflect the public attitude toward a given sanction."<sup>180</sup> This language established a dichotomy between objective versus subjective measures of standards of decency. Justice Stewart's plurality opinion held that great deference should be given to legislative decisions "because the constitutional test is intertwined with an assessment of contemporary standards and the legislative judgment weighs heavily in ascertaining such standards."<sup>181</sup> The reason the Court held legislative judgment to weigh so heavily in determining the contemporary standards of decency was because "in a democratic society[,] legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people."<sup>182</sup> The assumption was that the legislature would be aware of and responsive to the contemporary standards of decency, rendering them a better barometer of those standards.

Although subsequent cases do not always explicitly discuss the assumptions underlying this focus on legislative action, the argument relies upon the supposition that the legislature is aware of and responsive to changing standards of decency. Justice Scalia, in *Thompson v. Oklahoma*,<sup>183</sup> made this point explicit when he argued "[i]t will rarely if ever be the case that the Members of this Court will have a better sense of the evolution in views of the American people than do their elected representatives."<sup>184</sup>

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179. *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (Stewart, J., plurality opinion).

180. *Id.*

181. *Id.* at 175.

182. *Id.* (quoting *Furman v. Georgia*, 408 U.S. 238, 383 (1972) (Burger, C.J., dissenting)).

183. 487 U.S. 815 (1988).

184. *Id.* at 865 (Scalia, J., dissenting).

Here, Justice Scalia was echoing an argument Justice Blackmun made in his *Furman* dissent: that the legislative branch was better positioned to evaluate changing standards of decency because “these elected representatives of the people—[are] far more conscious of the temper of the times, of the maturing of society, and of the contemporary demands for man’s dignity, than are we who sit cloistered on this Court.”<sup>185</sup> Throughout the Court’s exploration of legislative decisions, therefore, there is an assumption that legislatures are responsive to and representative of the moral sentiments of the public.

All of the above cases involve the death penalty and limitations on its application.<sup>186</sup> The examination of imprisonment conditions, on the other hand, frequently fails to discuss comparative legislative actions. One exception is *Estelle* where the Court stated that it relied on legislative pronouncements to measure evolving standards of decency:

The infliction of such unnecessary suffering [by failing to treat medical conditions] is inconsistent with contemporary standards of decency as manifested in modern legislation codifying the common-law view that “[i]t is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself.”<sup>187</sup>

The Court was not specific as to which legislative decisions it was relying upon, however. Rather, it appears that the Court was simply alluding to its perception that all states provide some measure of medical care to their prisoners.

The Court’s refusal to extend the Eighth Amendment to prisoners challenging the length of their sentence can be attributed in part to a perceived lack of an objective measure of evolving standards of decency in that context. For example, although *Rummel v. Estelle*<sup>188</sup> is not, strictly speaking, an evolving standards of decency case, the Court’s discussion of legislation and the uses to which it could be put is revealing. The Court argued that “the length of the sentence actually imposed is purely a matter of legislative prerogative” and that

a more extensive intrusion into the basic line-drawing process that is pre-eminently the providence of the legislature when it makes an act criminal would be difficult to square with the view

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185. 408 U.S. at 413 (Blackmun, J., dissenting).

186. The exceptions are *Graham* and *Miller*, which rest, in part, on an argument that life without the possibility of parole for juveniles is analogous to the death penalty. *Graham v. Florida*, 560 U.S. 48, 88–90 (2010) (Roberts, J., concurring); *Miller v. Alabama*, 567 U.S. 460, 464 (2012).

187. 429 U.S. 97, 103–04 (1976) (second alteration in original) (footnote omitted) (quoting *Spicer v. Williamson*, 132 S.E. 291, 293 (N.C. 1926)).

188. 445 U.S. 263 (1980) (focusing on proportionality and how to measure it).



expressed in *Coker* that the Court's Eighth Amendment judgments should neither be nor appear to be merely the subjective views of individual Justices.<sup>189</sup>

*Rummel* specifically rejects the type of legislative comparison found in the death penalty cases: "It is one thing for a court to compare those States that impose capital punishment for a specific offense with those States that do not. It is quite another thing for a court to attempt to evaluate the position of any particular recidivist scheme within *Rummel's* complex matrix."<sup>190</sup> In other words, the distinct challenges posed by legislative comparisons in the context of sentencing are taken to limit the reach of the Eighth Amendment in challenges to a length of imprisonment.

#### D. *Subjective Measures of Standards of Decency*

The heavy reliance on legislative decisions arose out of the Court's concern that evolved standards of decency be determined objectively, as opposed to subjectively. Wherever the Court makes this contrast, it defines subjectively by reference to the individual conscience or judgment of the judge. Despite this, at times the Justices suggest a role for intuitions regarding the acceptability of forms of punishment. These intuitions are not, however, always framed as individual subjective judgments, but rather sometimes as reflections of social norms in a civilized society. Dissenting in *Resweber*, Justice Burton argued that "[t]aking human life by unnecessarily cruel means shocks the most fundamental instincts of civilized man."<sup>191</sup> Concurring in *Robinson*, Justice Douglas referred to "the revulsion of civilized man against barbarous acts—the 'cry of horror' against man's inhumanity to his fellow man."<sup>192</sup> And in *Furman*, Justice Marshall remarked, in response to Justice Powell's dissent,

Mr. Justice Powell himself concedes that judges somehow know that certain punishments are no longer acceptable in our society; for example, he refers to branding and pillorying. Whence

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189. *Id.* at 274–75.

190. *Id.* at 280. (citation omitted). The Court explicitly evokes the "death-is-different" jurisprudence to assert that there is no objective standard that can be applied in the imprisonment context:

In short, the "seriousness" of an offense or a pattern of offenses in modern society is not a line, but a plane. Once the death penalty and other punishments different in kind from fine or imprisonment have been put to one side, there remains little in the way of objective standards for judging whether or not a life sentence imposed under a recidivist statute for several separate felony convictions not involving "violence" violates the cruel-and-unusual punishment prohibition of the Eighth Amendment.

*Id.* at 282 n. 27.

191. *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 473 (1947) (Burton, J., dissenting).

192. *Robinson v. California*, 370 U.S. 660, 676 (1962) (Douglas, J., concurring).

comes this knowledge? The answer is that it comes from our intuition as human beings that our fellow human beings no longer will tolerate such punishments.<sup>193</sup>

Most often, however, the concern with subjective measures of standards of decency is that they are entirely personal to the individual justice. One concern with this approach, expressed by Justice White in his dissent in *Weems*, suggests that by excessively focusing on the nature of the punishment imposed, a judge might be incapable of rendering an impartial decision: “Of course, in every case where punishment is inflicted for the commission of crime, if the suffering of the punishment by the wrongdoer be alone regarded, the sense of compassion aroused would mislead and render the performance of judicial duty impossible.”<sup>194</sup> Thus, Justice White argues that too close of an identification with the defendant’s pain would lead the judge to improperly discern and apply the standards of decency.

This theme has recurred throughout the Court’s Eighth Amendment jurisprudence. For example, in *Resweber*, Justice Frankfurter stated that:

[T]his Court must abstain from interference with State action no matter how strong one’s personal feeling of revulsion against a State’s insistence on its pound of flesh. One must be on guard against finding in personal disapproval a reflection of more or less prevailing condemnation. Strongly drawn as I am to some of the sentiments expressed by my brother Burton, I cannot rid myself of the conviction that were I to hold that Louisiana would transgress the Due Process Clause if the State were allowed, in the precise circumstances before us, to carry out the death sentence, I would be enforcing my private view rather than that consensus of society’s opinion which, for purposes of due process, is the standard enjoined by the Constitution.<sup>195</sup>

Justice Frankfurter further argued that if he were to allow his own feelings to guide his decision, he would come to a result that was not “[r]ooted in the traditions and conscience of our people.”<sup>196</sup>

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193. *Furman v. Georgia*, 408 U.S. 238, 369 n.163 (1972). In the same footnote, Marshall refers to “ethical leaders” as guiding judges in determining whether they are being objective.

194. *Weems v. United States*, 217 U.S. 349, 384 (1910); *see also* *Thompson v. Oklahoma*, 487 U.S. 815, 865 (1988) (Scalia, J., dissenting) (“Of course, the risk of assessing evolving standards is that it is all too easy to believe that evolution has culminated in one’s own views. To avoid this danger we have, when making such an assessment in prior cases, looked for objective signs of how today’s society views a particular punishment.”).

195. 329 U.S. at 471 (Frankfurter, J., concurring).

196. *Id.* at 470 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

In other opinions, however, the Court identifies an important role for the independent judgment of the justices. For instance, in *Coker v. Georgia*<sup>197</sup> the Court declared that “the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment,” a view echoed in later decisions.<sup>198</sup> In practice, however, this independent judgment has more frequently been invoked in the evaluation of whether the punishment relates to the “personal culpability of the criminal defendant,” and if the punishment in question serves a social purpose, rather than whether it conforms to evolving standards of decency.<sup>199</sup>

As with the Court’s examinations of the question of evolving standards of decency according to objective measures, here, the Court also fails to clearly articulate what a standard of decency is, how it relates to the individual views of the judge, and how it might change over time. As the discussion in Part I demonstrates, the personal feeling of revulsion that Justice Frankfurter cites is actually an integral part of evolving standards of decency. But because the Court has never satisfactorily defined what those are, the Justices must downplay their own subjective responses to a body in pain and rely on the legislature to reflect those subjective experiences. This has significant consequences for the applicability of the evolving standards of decency test and suggests that its utility will be limited in cases involving imprisonment, where the public’s ability to respond is sharply curtailed by its inability to see what occurs within prisons.

#### E. *The Future: Occasions for Less Legislative Deference?*

This section proposes three specific places in which insights gleaned from the analysis in Part I might affect how deferential the Court should be to legislative or administrative pronouncements. First, a dynamic approach to standards of decency highlights the limits of the deference the Court should give to prison officials and their claims of expertise. There are structural reasons why the interpersonal relationship—central to evolving standards of decency—might be short-circuited in the prisoner/guard relationship. These limitations should be borne in mind in evaluating their claims to expertise. Second, because evolving standards of decency depends on the proper functioning of interpersonal identification, any punishment that disproportionately impacts a minority group should receive heightened scrutiny from the Court. The lack of an interpersonal identification with individuals perceived as different can lead to a breakdown in evolving standards of decency, which could lead majority groups within the public to accept and majoritarian legislatures to adopt penal

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197. 443 U.S. 584 (1977).

198. *Id.* at 597; see also *Thompson*, 487 U.S. at 822 (referring to this process as a “careful[ ] consider[ation] [of] the reasons why a civilized society may accept or reject the death penalty in certain types of cases”).

199. *Thompson*, 487 U.S. at 834 (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O’Connor, J., concurring)).

practices that would otherwise be considered unacceptable if applied to a significant segment of the majority population. Third, the failure to recognize a length of sentence as impacting the bodily integrity of the prisoner suggests that standards of decency are less likely to be engaged in evaluating the appropriateness of any given sentence length.

To begin, a dynamic approach to standards of decency also clarifies the limitations of another central aspect of the Court's Eighth Amendment jurisprudence as it applies to imprisonment: the Court's extreme deference to prison administrators. There is a clear tendency in the Court's decisions to defer to the determinations of the prison administration, with no clear guiding principle as to what the limits or contours of this deference should be.<sup>200</sup> Taking a dynamic approach to evolving standards of decency allows articulation of some of the limits that should be placed on this deference. There are strong indications that the interpersonal identification central to the evolving standards of decency can break down the prisoner/guard relationship.<sup>201</sup> For this reason, the necessities of prison administration should never be taken as an indication of what evolving standards of decency would or should allow. The latter is a separate and necessarily distinct inquiry.

Second, the process through which standards of decency evolve relies on interpersonal identification, meaning one must empathize with others, understanding what it feels like for them to suffer pain or hardship. There is evidence that this interpersonal identification can break down in situations of racial or ethnic difference.<sup>202</sup> This is a particularly troubling result in the Eighth Amendment context given the significant racial disparities in sentencing.<sup>203</sup>

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200. For a discussion of this deference in the supermax context, see Keramet Reiter, *Supermax Administration and the Eighth Amendment: Discretion, Deference, and Double Bunking, 1986–2010*, 5 U.C. IRVINE L. REV. 89 (2015).

201. See, e.g., CONOVER, *supra* note 109.

202. See generally COLIN DAYAN, *THE STORY OF CRUEL AND UNUSUAL* (2007). Elias recognized this and described the effect on the outsider:

[w]here the balance of power between established and outsiders is extremely unequal, it is very common for people to believe that the differentials of power are inherent in the very 'nature' of mankind . . . . Where the balance of power is very uneven, the oppressed and exploited cannot escape from their position . . . . The outsiders are always [stigmatized as] dirty, morally unreliable and lazy, among other things.

MENNELL, *supra* note 33, at 216. For a discussion of this process and its effects on African Americans, see ISABEL WILKERSON, *CASTE: THE ORIGINS OF OUR DISCONTENTS* (2020).

203. See, e.g., WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* (2011); MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); BRUCE WESTERN, *PUNISHMENT AND INEQUALITY IN AMERICA* (2006). For a detailed analysis of the ways the Court misinterprets race-based claims in a way that reinforces the carceral state, see Dorothy E. Roberts, *Abolition Constitutionalism*, 133 HARV. L. REV. 1 (2019).

Although the Court confronted the problem of racial disparities in punishment in *McCleskey v. Kemp*,<sup>204</sup> it completely failed to consider the impact of race on evolving standards of decency. Rather, the Court identified death as a punishment that was approved by societal standards and then reviewed the procedural safeguards that the Court had imposed in attempts to ensure its proper application in any individual case. At no point did the Court consider whether societal acceptance of death was premised on its racially disparate imposition.<sup>205</sup>

Third and finally, the recognition that a central concept to evolving standards of decency is the bodily integrity of prisoners poses a challenge for both the public at large and the Court to evaluate another significant aspect of imprisonment: the length of a sentence. Bodily harm is concrete and immediately identifiable. It can be harder to comprehend the impact of time or the significance to the prisoner of a particular term of a sentence to imprisonment. Taking a dynamic approach to evolving standards of decency suggests, however, that the interpersonal identification that allows one to understand the pain that another individual feels would also allow one to understand the import of a length of imprisonment if it were expressed in more concrete terms. All of the Court's cases that discuss the Eighth Amendment's application to a length of imprisonment focus their attention on the crimes committed by the defendant and whether the length of sentence is proportional to those offenses.<sup>206</sup> Instead, if practitioners and scholars focus on what a term of imprisonment means, including factors such as what life would be like for the prisoner over that length of time and the impact of that length of time on the prisoner's relationship with family and the community, discussions of evolving standards of decency may better grapple with how we determine whether and when a particular sentence length is appropriate.

Ultimately, however, because of their insistence on objective measures of change and rejection of subjective markers, the Supreme Court is not currently the best repository for Eighth Amendment protections. Rather, the next section will argue that it is civil society, particularly one encouraged to directly engage with the criminal legal system that is a better source to protect the continuing vitality of the Eighth Amendment's prohibition on cruel and unusual punishment.

#### IV. EVOLVING STANDARDS OF DECENCY IN THE TWENTY-FIRST CENTURY

The previous Parts explored how various disciplines understand cognate concepts to evolving standards of decency, including what these standards are and how they might change over time, the history of their impact on penal practice, and the ways the social science concept and his-

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204. 481 U.S. 279 (1987).

205. *Id.* at 301–06.

206. *Solem v. Helm*, 463 U.S. 277 (1983); *Hutto v. Davis*, 454 U.S. 370 (1982); *Rummel v. Estelle*, 445 U.S. 263 (1980).

tory have shaped the Supreme Court's understanding (even if imperfectly) of evolving standards of decency. This final Part suggests implications of the discussion above for public policy choices that can work towards emphasizing the development of standards of decency. As explained in Part I, the increasing prison secretization that has marked the last fifty years has led to a dramatic decrease in public engagement with the infliction of punishment, thus preventing the development of standards of decency for those institutions. This Part proposes some public policy choices that could help break down those barriers. The first involves proposals grounded in abolitionism and public/community punishment, both of which rely on the intuition that the public needs to be more directly engaged with the punishment process. The second involves an international movement towards penal transparency.

While the concept of evolving standards of decency is one that the Court developed to assist in its application of the Eighth Amendment, this Article demonstrates that the question of what appropriate punishments within a liberal democracy are, is a question that transcends the Court's role in applying the Eighth Amendment to individual cases. Rather, the United States' constitutional structure itself demands that the legislature take a role in defining appropriate punishments and the democratic basis of that structure assumes that the public will have input into that decision making process. There are significant reasons to be concerned that this process has broken down.

Ultimately the focus here is on how the Eighth Amendment and evolving standards of decency can be taken out of the courts into civil society. Everyone has a role to play in ensuring that the punishments our government inflicts are not cruel and unusual and the only way that can occur is by cultivating more direct public engagement with penal practice.

#### A. *Abolitionism, Community Control, Democratic Criminal Justice*

This process-oriented approach to the evolving standards of decency allows clearer interpretation of the interventions that scholars advocating for either an abolitionist or more community-oriented approach to the criminal legal system are assuming or implicitly arguing. These approaches turn on an argument that more direct engagement between participants in the system will result in a more just result for all involved. The reason, however, that the result will be more just is because of the interpersonal identification that they all assume will occur at this more local or immediate level. In other words, all are recognizing, at least in part, the problem of prison secretization and are proposing solutions to get around the perceived breakdown in interpersonal relations that they all see as central to the development and implementation of notions of justice.<sup>207</sup>

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207. Of course, these literatures all consider the criminal legal system from a variety of perspectives, including, significantly, policing. *See, e.g.*, Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405 (2018); Allegra M. Mc-

One way that abolitionists seek to bring an end to the carceral state is to develop what Carly Guest and Rachel Seoighe term an “‘abolitionist affect’—that is, an emotional engagement with and response to dominant carceral logic that is framed by and productive of abolitionist principles.”<sup>208</sup> This mirrors the affective response that Hunt argues was central to the humanitarian revolution in the late-eighteenth and early-nineteenth centuries.<sup>209</sup> Guest and Seoighe argue that this “has enormous potential to unsettle the naturalization of the prison” and that “starting with an emotional engagement with the prison can generate readings that disrupt its legitimacy.”<sup>210</sup> They argue that their methodology contributes to abolitionism by “altering ways of seeing and understanding the carceral system and its impacts. In deliberately evoking emotion and asking questions of what our responses can reveal, we aim to contest carceral logic.”<sup>211</sup> While Guest and Seoighe urge an emotive response to penal practices, they also argue that response is similar to an “ethics of care” developed by feminist scholars, which turns on the development of interpersonal relationships. For example, Sara Ahmed recommends drawing attention “to gut instinct as a kind of knowledge, and, further, as a kind of research method.”<sup>212</sup>

Moreover, abolitionism, as a practice, turns on a rethinking of the relationships that surround the criminal legal system: “If, however, we shift our attention from prison, perceived as an isolated institution, to the set of relationships that comprise the prison industrial complex, it may be easier to think about alternatives.”<sup>213</sup> In other words, abolitionists recognize

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Leod, *Confronting the Carceral State*, 104 GEO. L.J. 1405 (2016). This Article is not considering this particular aspect of the abolitionist or community centered criminal legal system argument because it is particularly focused on our affective response to punishment.

208. Carly Guest & Rachel Seoighe, *Generating Abolitionist Affect: Decarceral Feminist Methodologies and the Closure of Holloway Prison*, in CONTESTING CARCERAL LOGIC: TOWARDS ABOLITIONIST FUTURES 77, 77 (Michael J. Coyle & Methchild Nagel eds., 2022).

209. See *supra* Section I.B.

210. Guest & Seoighe, *supra* note 208. They argue that this provides a counter-response to a phenomenon identified by Henrique Carvalho and Anastasia Chamberlen, who “argue that we invest in punishment not because we believe in its utility but because of its affective dimension. We derive pleasure from punishment—‘hostile solidarity’ is generated through processes of scapegoating, othering, excluding and controlling others.” *Id.* at 78 (citing Henrique Carvalho and Anastasia Chamberlen, *Why Punishment Pleases: Punitive Feelings in a World of Hostile Solidarity*, PUNISHMENT & SOC’Y 217, 219 (2018)).

211. *Id.* at 80.

212. *Id.* (citing S. AHMED, *LIVING A FEMINIST LIFE* 28 (2017)).

213. ANGELA Y. DAVIS, *ARE PRISONS OBSOLETE?* 106 (2003). Miriam Kaba gives the example of R. Kelly and asks us to “consider the larger social, economic, and political context in which the harm occurs.” MARIAME KABA, *WE DO THIS ‘TIL WE FREE US: ABOLITIONIST ORGANIZING AND TRANSFORMING JUSTICE* 85 (2021). For example, she asks “what accountability do we attribute to the record executives propping up and facilitating his ability to harm people? Should they also be prevented from exercising power within the recording industry?” *Id.*

part of their project is breaking apart the relationships that surround imprisonment and “all the social relations that support the permanence of the prison.”<sup>214</sup> Instead, it seeks to “reshap[e] systems of justice around strategies of reparation, rather than retribution.”<sup>215</sup> This focus is on the building of new interpersonal relations, which is precisely what is at the heart of the civilizing process.<sup>216</sup> An example of how this interpersonal dynamic can be built can be found in Danielle Sered’s account of how Common Justice built a relational response to violent crime in Brooklyn.<sup>217</sup> Her moving account relates the challenging, but ultimately valuable rebuilding that can occur by allowing victims to state what they need and requiring perpetrators to understand and meet those needs.

While abolitionism is one version of proposed reforms, it is part of a broader movement arguing for increased democratic participation in the criminal justice system.<sup>218</sup> This movement is a response to a critique levelled by William Stuntz that part of what has “gone wrong” with the American criminal legal system is the increasing centralization of criminal legal

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214. DAVIS, *supra* note 213, at 112.

215. *Id.* at 114.

216. *See, e.g.*, THOMAS MATHIESEN, *THE POLITICS OF ABOLITION REVISITED* (2015); PRISON RESEARCH EDUCATION ACTION PROJECT, *INSTEAD OF PRISONS: A HANDBOOK FOR ABOLITIONISTS* (Mark Morris ed., 1976).

217. SERED, *supra* note 26. For more examples, see ZENA SHARMAN, *THE CARE WE DREAM OF: LIBERATORY AND TRANSFORMATIVE APPROACHES TO LGBTQ+ HEALTH* (2021); *BEYOND SURVIVAL: STRATEGIES AND STORIES FROM THE TRANSFORMATIVE JUSTICE MOVEMENT* (Ejeris Dixon & Leah Lakshmi Piepzna-Samarasinha eds., 2020); DEAN SPADE, *MUTUAL AID: BUILDING SOLIDARITY DURING THIS CRISIS (AND THE NEXT)* (2020); ANDREAS CHATZIDAKIS, JAMIE HAKIM, JO LITTLER, CHATERINE ROTTENBERG & LYNNE SEGAL, *THE CARE MANIFESTO: THE POLITICS OF INTERDEPENDENCE* (2020); Patrisse Cullors, *Abolition and Reparations: Histories of Resistance, Transformative Justice, and Accountability*, 132 HARV. L. REV. 1684 (2019); *see also*, Dylan Rodriguez, *Abolition as Praxis of Human Being: A Foreword*, 132 HARV. L. REV. 1575 (2019) (noting that “[a]bolition is a dream toward futurity vested in insurgent, counter-civilizational histories” though it is clear from context he means civilization in the colonial-state building sense, not as a process of inter-personal identification). For an alternative perspective on the theoretical justification for punishment in an abolitionist framework, see Rafi Reznik, Comment, *Retributive Abolitionism*, 24 BERKELEY J. CRIM. L. 123 (2019). For an example of this relational framework, specifically in the reentry context, see Marina Bell, *Abolition: A New Paradigm for Reform*, 46 L. & SOC. INQUIRY 32 (2020).

218. *See generally* STUNTZ, *supra* note 203. Note that this paper is implicitly rejecting the countervailing view to democratic criminal justice, which is bureaucratic professionalism. My argument regarding evolving standards of decency and prison secretization rejects the premise that we can simply “trust the experts.” For an explanation of these two camps, see Kleinfeld, *supra* note 24. The foremost proponent of bureaucratic professionalism can be found in RACHEL ELISE BARKOW, *PRISONERS OF POLITICS* (2019). Undergirding arguments in favor of this camp is a fear of penal populism and the belief that given a change the public will tend toward punitivism. *See, e.g.*, JOHN PRATT, *PENAL POPULISM* (2007). This has been a tendency in the United States over the last fifty years, though this Article would argue that it is a result of insufficient engagement with the subject of penal policies, thus this Article’s policy prescription tends in a different direction than that of Barkow.



policy making, with the “fix” therefore returning control to local residents.<sup>219</sup> Like abolitionism, this movement recognizes the need for public engagement with the role of interpersonal identification in defining and articulating appropriate responses to harms within the community.

### B. *Penal Transparency*

Turning next to the problem of prison secretization, this Article explained above that the civilizing process involved an increasing privatization of many aspects of social life, particularly those aspects deemed distasteful. The same trend can be seen in the history of punishment, with public punishments giving way to ones that occurred in private. While this trend is seen as an important component of the civilizing process, it poses a threat to evolving standards of decency because those standards depend upon the witnessing of acts of punishment. It was only through witnessing the public infliction of pain on individual prisoners that the physical punishments frequently identified in the Eighth Amendment case law as clearly cruel and unusual came to be seen as such. Indeed, the history of flogging demonstrates what happens when punishments are privatized.<sup>220</sup> While the public infliction of physical punishments declined over the course of the eighteenth and nineteenth centuries, flogging itself persisted into the twentieth century. In part, its persistence can be attributed to the fact that it no longer occurred in public and thus was not seen.

A movement for greater penal transparency, occurring elsewhere in the world, could help create an intermediary step between prison secretization and the approaches highlighted in Section A. Foucault participated in a group seeking to combat the power of the penal state by engaging in “counterveillance,” “whereby state officials themselves become the targets of unwanted scrutiny. By turning persistent attention to intolerable prison practices, the system and its operators are placed under the watchful eye of the outside world.”<sup>221</sup>

Similarly, in numerous parts of the world the question of penal transparency has taken on increasing importance.<sup>222</sup> There is currently an international discussion over how to improve prison transparency and the best practices to engage in in order to achieve it among practitioners and

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219. See, e.g., Rahman & Simonson, *supra* note 25; Simonson, *supra* note 25; Kleinfeld, *supra* note 25.

220. See generally G. GELTNER, *FLOGGING OTHERS: CORPORAL PUNISHMENT AND CULTURAL IDENTITY FROM ANTIQUITY TO THE PRESENT* (2014).

221. Michael Welch, *Counterveillance: How Foucault and the Groupe d'Information sur les Prisons Reversed the Optics*, 15 *THEORETICAL CRIMINOLOGY* 301, 302 (2011).

222. See, e.g., Tomer Einat, Anat Litvin, Niv Michaeli, Gila Zelikovitsh, Katy Marsh & Ofer Parchev, *Letting the Fox Guard the Chicken Coop: Oversight Transparency, and Violation of Human Rights in the Israeli Penal System*, 24 *CRIM. JUST. STUD.* 255 (2011).

scholars outside of the United States.<sup>223</sup> This conversation has largely been overlooked by scholars in the United States,<sup>224</sup> but some of its lessons could guide next practices.

The movement reaffirms the need to hold prison officials accountable to some discernable standards. In the United States, the only such standards are the Eighth Amendment, which (as demonstrated above) provides precious little in terms of meaningful standards. International human rights norms could also provide a working basis for standards, though United States courts have been reluctant to impose them.<sup>225</sup>

However, the literature also has caveats in that it indicates that some efforts towards penal transparency devolve into or never evolve out of indicators type governance. This means that rather than leading to meaningful evaluations of penal practice, they simply provide a series of checklists for officials to conform to without leading to meaningful change.<sup>226</sup>

#### CONCLUSION

This Article has traced a more empirically grounded account of how standards of decency, a concept developed by the Supreme Court to guide its interpretation of the cruel and unusual punishments clause of the Eighth Amendment, might evolve over time. The work of sociologists, historians, anthropologists, and psychologists help give to this concept a firmer theoretical basis. This concept is based on the development of interpersonal relationships that accompanied the development of modern society and then became a self-conscious aspect of how individuals sought to respond to other people's pain in the late-eighteenth and early-nineteenth centuries. This means that the concept of evolving standards of decency should be viewed as a process rather than as a static state. This

223. See generally Ciara O'Connell & Mary Rogan, *Monitoring Prisons in Europe: Understanding Perspectives of People in Prison and Prison Staff*, L. & SOC. INQUIRY, Mar. 2022, at 1; Eva Aizpurua & Mary Rogan, *Correctional Oversight Bodies' Resources and Protections Across the European Union: Are Their Hands Tied?*, 22 CRIMINOLOGY & CRIM. JUST. 383 (2021); Nicola Padfield, *Monitoring Prisons in England and Wales: Who Ensures the Fair Treatment of Prisoners?*, 70 CRIME, L. & SOC. CHANGE 57 (2018).

224. But see Jeremy Conrad, *Behind the Walls: Transparency in Prison Practices*, 36 WASH. LAW. 32 (2021); Andrea C. Armstrong, *No Prisoner Left Behind? Enhancing Public Transparency of Penal Institutions*, 25 STAN. L. & POL'Y REV. 435 (2014).

225. Christine Bicknell & Malcolm Evans, *Monitoring Prisons: The Increasingly Complex Relationship between International and Domestic Frameworks*, in EUROPE IN PRISON 11, 11–35 (Tom Daems & Luc Robert eds., 2017); Bronwyn Naylor, *Human Rights and Respect in Prisons: The Prisoners' Perspective*, 31 L. CONTEXT: A SOCIO-LEGAL J. 84 (2014). For a critical account of human rights norms in this context, see Abdullahi Ahmed An-Na'im, *The Spirit of Laws Is Not Universal: Alternatives to the Enforcement Paradigm for Human Rights*, 21 TILBURG L. REV. 255 (2016).

226. Cormac Behan & Richard Kirkham, *Monitoring, Inspections and Complaints Adjudication in Prison: The Limits of Prison Accountability Frameworks*, 55 HOW. J. CRIME & JUST. 432 (2016); Jamie Bennett, *Resisting the Audit Explosion: The Art of Prison Inspection*, 53 HOW. J. CRIM. JUST. 449 (2014).

process can be seen in the history of penal change in the United States over the course of the nineteenth and twentieth centuries. The Supreme Court, in its jurisprudence, implicitly recognizes the connection between evolving standards of decency and this broader body of literature, though because it has insisted on objective measures of this concept rather than subjective ones, the Court's jurisprudence has ultimately ossified this concept. Moreover, the Court has been unable to successfully apply this concept in imprisonment cases because imprisonment is deliberately shielded from public view or rendered secret, thus preventing the public's sensibilities from being engaged to evaluate penal practices within those institutions. This Article concludes that if society wants to take the protections against cruel and unusual punishment embodied in the Eighth Amendment seriously rather than rely on the Supreme Court to safeguard them, society must take public policy measures to ensure that the public's standards of decency are engaged in penal policy. This concept is implicit in the work of both scholars arguing for abolition of the carceral state as well as those pushing for greater community patrol or democratic participation in criminal legal systems. Scholars arguing in these various veins all recognize the necessity of the interpersonal relationships that are impaired by the current carceral state and recommend reforms to help better facilitate them. Thus, this Article concludes that the Eighth Amendment, rather than being the primary or exclusive preserve of the Supreme Court, can help guide and be better embodied in policy decisions made at the state and local level.