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## The Eighth Amendment's Milieu: Penal Reform in the Late Eighteenth Century

Erin E. Braatz

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# CRIMINAL LAW

## THE EIGHTH AMENDMENT'S MILIEU: PENAL REFORM IN THE LATE EIGHTEENTH CENTURY

ERIN E. BRAATZ\*

*Conflicting interpretations of the history of the “cruel and unusual punishments” clause of the Eighth Amendment play a significant role in seemingly never-ending debates within the Supreme Court over the scope of that Amendment’s application. These competing histories have at their cores some conception of the specific punishments deemed acceptable at the time of the Amendment’s adoption. These narrow accounts fail, however, to seriously engage with the broader history of penal practice and reform in the eighteenth century. This is a critical deficiency as the century leading up to the adoption of the Eighth Amendment was a period in which penal practices underwent numerous changes and reforms.*

*This Article closely examines the experiments in penal reform that occurred in the American colonies immediately following the Revolution to elucidate what the Founding Generation thought about penal form, how and why it might change, and its relationship to the creation of the American republic. It argues that these penal reform movements, which have been ignored in discussions of the Eighth Amendment, were well known during the founding era. Furthermore, the salience of these reform movements at the time demonstrates a persistent concern among the Founders with adopting a more enlightened or civilized penal code in order to distinguish the American republic from monarchical practices in England and Europe. Foregrounding the content of both the experiments themselves and the debates over penal practice, they reflect yields*

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\* Law Clerk to the Honorable Juan R. Torruella, United States Circuit Court for the First Circuit, 2016-2017; Ph.D., New York University; J.D., New York University School of Law; B.A., Northwestern University. Thanks to David Garland, John Infranca, and Bill Nelson for their helpful conversation and comments.

*important and previously unrecognized insights for our understanding of the Eighth Amendment’s meaning and its import at the time it was drafted.*

*This Article helps illuminate current debates over the interpretation and application of the Eighth Amendment, including the use of international comparisons, the idea of evolution or progress, and the concept of proportionality. It also exposes significant gaps and limitations in the historical accounts relied upon by the Court to date.*

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#### INTRODUCTION

The history of the “cruel and unusual” punishment clause of the Eighth Amendment plays a significant role in the ongoing debate over the Amendment’s meaning and application.<sup>1</sup> Those advocating a narrow

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<sup>1</sup> See, e.g., *Glossip v. Gross*, 135 S. Ct. 2726, 2749 (2015) (Scalia, J., concurring) (arguing that the Court should revisit all Eighth Amendment cases beginning with *Trop v. Dulles* because those cases have departed from “the historical understanding of the Eighth Amendment”); *Harmelin v. Michigan*, 501 U.S. 957, 966–82 (1991); *Solem v. Helm*, 463 U.S. 277, 285–86 (1983) (arguing that the English Bill of Rights embraced the concept of proportionality present in earlier documents such as the Magna Carta); *Rummel v. Estelle*, 445 U.S. 263, 288–89 (1980) (Powell, J., dissenting) (same); *Furman v. Georgia*, 408 U.S. 238 *passim* (1972) (per curiam) (three of the five concurring opinions, as well as the dissent examine the history of the Eighth Amendment); *Weems v. United States*, 217 U.S. 349, 389–97 (1910) (White, J., dissenting) (engaging in extensive discussion of the Eighth Amendment’s history in order to refute the majority opinion’s holding that it requires proportionality in sentencing); see also JOHN D. BESSLER, *CRUEL & UNUSUAL: THE AMERICAN DEATH PENALTY AND THE FOUNDERS’ EIGHTH AMENDMENT* 31–65 (2012) (arguing that Enlightenment authors, especially Cesare Beccaria, greatly influenced the

interpretation of the Amendment and those promoting a more expansive one each invoke different elements of that history.<sup>2</sup> Scholars and Supreme Court justices who support a narrow reading claim to engage in a textual history akin to statutory interpretation.<sup>3</sup> Justices taking this approach argue that it limits the Amendment's protections to forms of bodily punishment and torture considered cruel and unusual in 1791.<sup>4</sup> This approach problematically ignores the context out of which the text emerged, even while ultimately relying on a narrow understanding of the form punishments took in the colonies.<sup>5</sup>

Those who argue for a broader interpretation engage in a more contextual analysis, pointing to the ideas and beliefs held at the time the Amendment was adopted, either concerning the rights of Englishmen generally or the writings of the Enlightenment.<sup>6</sup> However, this approach completely ignores the penal context, seemingly conceding the point that punishments in 1791 were more cruel than those found today. Ultimately,

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Founders); Charles W. Schwartz, *Eighth Amendment Proportionality Analysis and the Compelling Case of William Rummel*, 71 J. CRIM. L. & CRIMINOLOGY 378, 378–82 (1980); Deborah Schwartz & Jay Wishingrad, *The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the Weems v. United States Excessive Punishment Doctrine*, 24 BUFF. L. REV. 783, 784–85 (1974) (same).

<sup>2</sup> For example, compare *Furman*, 408 U.S. at 242–45, 254–55 (1972) (Douglas, J., concurring) (interpreting history to indicate that the founders were particularly concerned with discrimination), and *id.* at 259–65 (Brennan, J., concurring) (arguing that the history does not provide much illumination as to the Amendment's meaning), and *id.* at 319–23 (White, J., concurring) (finding that the history of the clause “clearly establishes that it was intended to prohibit cruel punishments,” but turning to case law to determine the meaning of cruelty), with *id.* at 376–78 (Burger, C.J., dissenting) (concluding that the historical record demonstrates that the Founders were only concerned with tortuous punishments).

<sup>3</sup> See, e.g., *Harmelin*, 501 U.S. at 981–85; *Weems*, 217 U.S. at 389–97 (White, J., dissenting); Schwartz, *supra* note 1, at 378–82.

<sup>4</sup> See, e.g., *Harmelin*, 501 U.S. at 977–81; *Weems*, 217 U.S. at 389–90, 404 (White, J., dissenting).

<sup>5</sup> *Baze v. Rees*, 553 U.S. 35, 97 (2008) (Thomas, J., concurring) (using a history of changes in how death sentences were carried out in order to advocate for a narrow interpretation of the Eighth Amendment's protections); *Harmelin*, 501 U.S. at 268 (referring to the “vicious punishments” occurring at the time of the English Bill of Rights as including “drawing and quartering, burning of women felons, beheading, disemboweling, etc.” and as being “common”); *Weems*, 217 U.S. at 390 (defining the punishments addressed by the “cruel and unusual” punishments clause of the English Bill of Rights as being “the atrocious, sanguinary and inhuman punishments which had been inflicted in the past upon the persons of criminals”).

<sup>6</sup> See, e.g., *Solem*, 463 U.S. at 285–86 (arguing that the English Bill of Rights embraced the concept of proportionality present in earlier documents such as the Magna Carta); *Rummel*, 445 U.S. at 289 (Powell, J., dissenting) (same); BESSLER, *supra* note 1, at 31–65 (arguing that Enlightenment authors, especially Cesare Beccaria, greatly influenced the Founders); Schwartz & Wishingrad, *supra* note 1, at 784–85 (same).

neither approach has convincingly established why such an Amendment would be considered important enough to include in the Bill of Rights, much less what it was intended to capture.

The picture that emerges from the Supreme Court's treatment of the history of the Eighth Amendment is that either the penal methods used in the past are of little importance, or the only thing worth knowing about penal form historically is that it was tortuous and cruel.<sup>7</sup> This Article, in contrast, demonstrates that penal form and the changes it was undergoing at the end of the eighteenth century is highly relevant in interpreting the Eighth Amendment. The attempts at experimentation that occurred during this period make clear that the underlying concern leading to the Eighth Amendment's adoption was not horrible past punishments per se, but rather the need to adopt punishments in keeping with republican (and as will be seen "civilized") government.<sup>8</sup> The precise content of what this meant was subject to debate, and yet some key assumptions regarding the desirability of reform were largely shared across the lines of contention.<sup>9</sup> This history has not hitherto been examined in the context of the meaning of the Eighth Amendment and it sheds important light on how attempts at penal reform in the new republic may have informed understandings of that Amendment.

The changes that had occurred between seventeenth-century England (also known as the Stuart Period of English history) and the American Revolution were understood at the time in terms of cultural progress and increasing civilization.<sup>10</sup> The American republic was seen as a new pinnacle along a continuum of progress, but not as the end point of that progression.<sup>11</sup> Indeed, the various local-level experiments in criminal law reform that occurred between the time of the Revolution and the adoption of the Bill of Rights suggest that the one thing the Founding Generation could be sure of is that they did not know the final form the reform of the criminal laws would take.<sup>12</sup> Thus, in order to understand the meaning of the Eighth

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<sup>7</sup> Compare *Solem*, 463 U.S. at 285–86 (containing no examination of punishments used in historical context), with *Baze*, 553 U.S. at 97 (Thomas, J., concurring) (arguing that the Eighth Amendment is only intended to prohibit "tortuous punishments").

<sup>8</sup> See discussion *infra* Part II.C.

<sup>9</sup> BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 28–29 (1967) (identifying Cesare Beccaria and his notions of a more enlightened penal practice as one of a handful of thinkers embraced by loyalists and patriots alike).

<sup>10</sup> See *infra* Part II.A and C.

<sup>11</sup> See *infra* Part II.B.

<sup>12</sup> See *infra* Part II.D. Bernard Bailyn argues that the important experiments with republican ideology at the local level prior to the Constitution and Bill of Rights mark the second phase of the ideological development of the American Revolution. The various attempts at criminal law reform that occurred within the states traced in Part II, *infra*, can

Amendment, it is not enough to acknowledge changes that had already occurred at the time of the Revolution or the adoption of the Bill of Rights, rather it is necessary to understand the place of these changes within a larger narrative of what the American republic was understood by the Founding Generation to be achieving at its creation.

By focusing narrowly on the specific words of the Eighth Amendment, the Court's historical inquiry has tended to treat particular penal methods in a rather static way—as though the only distinction that can be drawn is between the so-called “Stuart horrors” of the seventeenth century and eighteenth-century penal practice.<sup>13</sup> In contrast, various scholars have argued that the shift in penal policy during this period was both gradual and wide-ranging, and, in the words of Louis Masur “embodied the triumph of new sensibilities and the reconstitution of cultural values throughout the Western world.”<sup>14</sup> The Eighth Amendment was not an end point within this far-ranging development, rather it took form at a particular historical moment within the arc of a deeper cultural change.<sup>15</sup>

This Article departs from previous histories of the Eighth Amendment by drawing on the now considerable histories of criminal law and penal reform in the late eighteenth century. These histories are sufficiently detailed to permit a “thick description”<sup>16</sup> of the debates and concerns regarding the criminal law and punishment that occurred at the time the Eighth Amendment was drafted and adopted. At the time of the Eighth Amendment's drafting, vibrant debates were occurring regarding the form punishment should take within a civilized society and as an aspect of republican governance.<sup>17</sup> The history of penal reform outlined in Part II

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thus be seen as part of this larger attempt to remake local institutions into a form more fitting with the image of the new republic. At the same time, these local level reforms in turn shaped how governance would be structured and thought about in the new republic. BAILYN, *supra* note 9, at vii.

<sup>13</sup> See, e.g., *Baze v. Rees*, 553 U.S. 35, 94, 97 (2008) (Thomas, J., concurring) (arguing that “[t]he Eighth Amendment's prohibition on the ‘inflict[ion]’ of ‘cruel and unusual punishments’ must be understood in light of the historical practices that led the Framers to include it in the Bill of Rights” and concluding that “the Eighth Amendment was intended to disable Congress from imposing tortuous punishments”).

<sup>14</sup> LUIS P. MASUR, *RISES OF EXECUTION: CAPITAL PUNISHMENT AND THE TRANSFORMATION OF AMERICAN CULTURE, 1776–1865*, at 3 (1991).

<sup>15</sup> See *infra* Part II.D.

<sup>16</sup> To perform a “thick description” is to “engage with the frameworks of meaning within which social action takes place.” DAVID GARLAND, *PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY* 193 (1990). The term is best elucidated by CLIFFORD GEERTZ, *Thick Description: Toward an Interpretive Theory of Culture*, in *THE INTERPRETATION OF CULTURES* 3 (1973).

<sup>17</sup> See discussion *infra* Part II.

demonstrates that the Eighth Amendment must be understood to prohibit more than a narrowly defined group of outdated penalties. Rather, it captures an understanding about the fact and process of historical change.<sup>18</sup>

This paper goes beyond a history of the ideas that help us understand the fact and process of penal reform, however. At the time the Eighth Amendment was adopted, there was a shift occurring in individual sensibilities with regard to interpersonal violence and the site of physical infliction of pain.<sup>19</sup> The impact of this “way of feeling,” which is both socially and historically determined, can be seen in Justice Scalia’s admission that there is a limit to originalism when it comes to the Eighth Amendment.<sup>20</sup> While arguing for an originalist approach to constitutional interpretation, Scalia conceded that although whipping would not have been constitutionally suspect in 1791, he would have difficulty “upholding a

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<sup>18</sup> Although I am not myself an originalist, this does not mean that the argument here is irrelevant to its adherents. My argument is most akin to that advanced by Paul Freund when he asserted with regard to habeas corpus that “there is involved in such institutions or practices a dynamic element which itself was adopted by the framers. . . . The organic element in an institution ought to be taken into account . . . .” Paul A. Freund, *Discussion of William Hurst, The Role of History*, in *SUPREME COURT AND SUPREME LAW* 59, 61 (Edmond Cahn ed., 1954). Attempting to understand the meaning of cruel and unusual by focusing on those practices that would meet that definition in 1791 misses the larger import of the phrase which, I argue, was meant to capture the dynamism of penal reform in the late-eighteenth century.

<sup>19</sup> J.M. BEATTIE, *CRIME AND THE COURTS IN ENGLAND 1660–1800*, at 111–12 (1986) (finding a reduction in prosecutions for murder and manslaughter in Surrey, England between 1660–1800, and arguing that this indicates “a developing civility, expressed perhaps in a more highly developed politeness of manner and a concern not to offend or to take offense, and an enlarged sensitivity toward some forms of cruelty and pain”); PIETER SPIERENBURG, *THE SPECTACLE OF SUFFERING: EXECUTIONS AND THE EVOLUTION OF REPRESSION: FROM A PREINDUSTRIAL METROPOLIS TO THE EUROPEAN EXPERIENCE 200–01* (2008) (arguing that changes in the form of executions throughout Europe indicate a “fundamental change in sensibilities which set in after the middle of the eighteenth century” and ultimately led to the privatization of executions and narrowing of the capital codes).

<sup>20</sup> David Garland uses “ways of feeling” synonymously with the less popularly well-known term “sensibilities.” GARLAND, *supra* note 16, at 213. He also uses the terms “emotions” and “structures of affect,” all in an attempt to describe “[t]he range and refinement of the feelings experienced by individuals, their sensitivities and insensitivities, the extent of their emotional capacities, and their characteristic forms of gratification and inhibition.” *Id.* He argues that “[t]he question of how sensibilities are structured and how they change over time is important . . . because it has a direct bearing upon punishment,” in part because “crime and punishment are issues which provoke an emotional response on the part of the public and those involved.” *Id.* “[T]o the extent that punishment implies the use of violence or the infliction of pain and suffering, its deployment will be affected by the ways in which prevailing sensibilities differentiate between permissible and impermissible forms of violence, and by cultural attitudes towards the sight of pain.” *Id.* at 214.

statute that imposes the punishment of flogging.”<sup>21</sup> This is a statement that relies on a way of feeling that is clearly separate from the Justice’s views of how history determines the Eighth Amendment’s application. This sensibility has itself been shaped over time. The history examined in Part II thus seeks to explore how the Founding Generation thought about penal change and its place within the creation of the American republic on an intellectual level, as well as shifts and changes that were occurring at the level of emotional responses to physical suffering and argues that both are relevant to understanding the original meaning of the phrase “cruel and unusual.” This Article will argue that it was this process of changing sensibilities that was embodied in the Eighth Amendment, and that rather than ossifying the sensibilities of the late seventeenth century, the Amendment captured the belief that sensibilities would and should develop and change over time.

Ultimately, this Article highlights two very different ways of determining the meaning of a phrase. One approach, which is most prevalent in the Supreme Court’s decisions, is formalistic, focused narrowly on instances in the historical record where the precise words in question appear, even while ultimately relying on an interpretation of their application at one moment in time. The other seeks to recreate a world of thought, a system of meaning and a way of feeling out of which a particular phrase arose. My intention in this Article is to show that a historical approach that seeks to fully engage with the context in which a text is created yields insights that other historical approaches neglect. An entire history of thought and meaning surrounded the adoption of the Eighth Amendment, but has largely been overlooked in discussions regarding the application of that Amendment.<sup>22</sup> This history sheds important light on the terms of current debates on the Court and in the scholarship over application of the Eighth Amendment.

Moreover, Part III will demonstrate that the history presented in Part II is not only a history of the ideas and influences upon the Founding Generation, it is also the first step in a history of how penal reform and change has been understood throughout the previous two centuries and more. In other words, the history of the intellectual and emotional antecedents of the Founders’ thought is a story about our own antecedents and continues to inform how the Eighth Amendment is interpreted not because of the relatively recent focus on originalism, but because narratives of progress, enlightenment, and civilized understanding, along with actual

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<sup>21</sup> Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849, 861 (1989).

<sup>22</sup> See discussion *infra* Part III.



changes in sensibilities, have shaped how justices in the nineteenth, twentieth, and twenty-first centuries have interpreted the Eighth Amendment.<sup>23</sup> Understanding this history, separate and apart from the history of the Eighth Amendment, is relevant for clarifying some of the current debates over the Amendment's application. Though this history is too complex to provide easy answers to current questions, if American jurisprudence is to engage honestly and rigorously with the history of penal changes and reform, then the experiments with and discussions regarding penal reform that occurred in the American colonies following the Revolution, and the continuing impact of the underlying arguments and beliefs, cannot continue to be ignored.

\* \* \*

This Article proceeds in three parts. Part I summarizes how the history of the Eighth Amendment has been told in numerous Supreme Court opinions. Part II then provides a thick description<sup>24</sup> of the changes to the criminal law and punishment that were occurring in the colonies following the American Revolution. It explores the transformations those practices underwent in three key states following the Revolution: Virginia, Massachusetts, and Pennsylvania. The reform movements in each are presented as examples of broader cultural, intellectual, and emotional changes that spanned not only the colonies but Europe as well. This Part recreates the milieu out of which the Eighth Amendment emerged. It argues that a confluence of various strains of thought, previously unexplored in the literature on the Eighth Amendment, created a particular attitude towards penal change that can be linked to broader ideas regarding civilization and progress, as well as the very specific place of the new American republic within that narrative. Part III then explores some implications of this revised history for current debates regarding the meaning and application of the Eighth Amendment. It examines how the Supreme Court has relied on the concepts of civilization, progress, and proportionality examined in Part II to interpret penal change and how the history of those concepts themselves sheds light on their current application and meaning.

#### I. HISTORY OF THE EIGHTH AMENDMENT AT THE SUPREME COURT

This Part traces how the history of the Eighth Amendment has been debated within Supreme Court cases. The first section discusses opinions

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<sup>23</sup> See discussion *infra* Part III.

<sup>24</sup> See GEERTZ, *supra* note 16, at 3.

that profess to rely on the textual history of the Eighth Amendment.<sup>25</sup> This approach purports to focus narrowly on discussion in the historical record of the clauses' specific words and tends to yield an interpretation of the Eighth Amendment that limits the scope of its protections. The second section examines various approaches to the history of the Eighth Amendment that claim to support a more expansive view of the Eighth Amendment's application. The Supreme Court opinions that embrace this approach view the relevant history more broadly than those embracing a textualist approach by examining, albeit in a limited way, the context of the Eighth Amendment's adoption.<sup>26</sup> However, this approach largely ignores questions of penal change, which was a subject of vigorous debate at the time of adoption, a debate in which many Founders participated.<sup>27</sup> Indeed, we will see that in practice both approaches share key assumptions about penal form at the time of the adoption of the Bill of Rights. By failing to engage with the broader history of penal change, I conclude, neither approach can provide an adequate explanation for how it was that any specific punishment came to be seen as cruel and unusual, nor why a prohibition against cruel and unusual punishments was important enough to include in the Bill of Rights.

#### A. THE TEXTUAL APPROACH

Those justices that take a textualist approach to the Eighth Amendment purport to focus on instances in the historical record when the term "cruel and unusual" is specifically used. This takes them back to the origin of the wording of the Eighth Amendment in the English Bill of Rights, adopted in

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<sup>25</sup> Part I.B refers to this approach as the "textualist" approach, borrowing from the following definition provided by Justice Scalia: "The theory of originalism treats a constitution like a statute, giving the [C]onstitution the meaning that its words were understood to bear at the time they were promulgated. You will sometimes hear it described as the theory of original intent. You will never hear me refer to original intent, because I am first of all a textualist, and secondly an originalist. If you are a textualist, you don't care about the intent, and I don't care if the Framers of the U.S. Constitution had some secret meaning in mind when they adopted its words. I take the words as they were promulgated to the people of the United States, and what is the fairly understood meaning of those words." Justice Antonin Scalia, Speech at Catholic University of America: Judicial Adherence to the Text of our Basic Law: A Theory of Constitutional Interpretation (Oct. 18, 1996) (transcript available at <http://www.proconservative.net/PCV015Is225ScaliaTheoryConstlInterpretation.shtml>).

<sup>26</sup> For a description of contextualism as an approach to intellectual and legal history, see William W. Fisher III, *Texts and Contexts: The Application to American Legal History of the Methodologies of Intellectual History*, 49 STAN. L. REV. 1065, 1068–69, 1076–79 (1997).

<sup>27</sup> See *infra* Part II *passim*.

1689 following the Glorious Revolution of 1688.<sup>28</sup> From there, they examine the adoption of the clause in various state bills of rights, discussions over the need for a bill of rights in the Constitutional Conventions and debate over the Eighth Amendment in the First Congress.<sup>29</sup> Although this approach claims to limit itself to textual references, its basic premise that the meaning of cruel and unusual became fixed in 1791 forces the justices using this method to ultimately depend on a conception of what punishments were in use in the seventeenth and eighteenth centuries. For this reason, the relevant history examined by the textualists ultimately goes beyond the specific terms used in the Amendment, and examines some portion of the intellectual and social history of the period. The opinions of three justices exemplify this approach, Justice White, writing in dissent in *Weems v. United States*<sup>30</sup>; Justice Scalia, whose interpretation of the history of the Eighth Amendment is most fully articulated in *Harmelin v. Michigan*<sup>31</sup>; and Justice Thomas, whose concurring opinion in *Baze v. Rees*<sup>32</sup> most clearly demonstrates how far from the text the justices taking this approach have ultimately strayed.<sup>33</sup>

Before we examine these opinions, however, it is necessary to set out some of their background. A focus on what punishments would have been considered cruel in the eighteenth century originated long before the more recent debates over history and constitutional interpretation. Graphic descriptions of past punishments created a baseline against which contemporary penal measures were compared in the few nineteenth-century

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<sup>28</sup> Anthony F. Granucci, “*Nor Cruel and Unusual Punishments Inflicted:*” *The Original Meaning*, 57 CAL. L. REV. 839, 852–53 (1969). The relevant wording is: “That excessive baile ought not to be required nor excessive fines imposed nor cruell and unusuall punishments inflicted.” The Bill of Rights, 1 Will. & Mar. sess. 2, c. 2. (1688); see also *Harmelin v. Michigan*, 501 U.S. 957, 969 (1991) (quoting more extensively from the English Bill of Rights, including the preamble listing the harms the Bill of Rights was drafted to address).

<sup>29</sup> See *Baze v. Rees*, 553 U.S. 35, 97–99 (2008) (Thomas, J., concurring); *Harmelin v. Michigan*, 501 U.S. 957, 975–85 (1991) (Scalia, J., concurring); *Weems v. United States*, 217 U.S. 349, 394–98 (1910) (White, J., dissenting).

<sup>30</sup> 217 U.S. at 382–413.

<sup>31</sup> 501 U.S. at 966–75.

<sup>32</sup> 553 U.S. at 94–107.

<sup>33</sup> While I focus here on how these opinions have a narrow view of penal form at the time of the adoption of the Bill of Rights, John Stinneford argues that they also have an overly simplified approach to the terms “cruel” and “unusual,” respectively. See generally John Stinneford, *The Original Meaning of “Cruel,”* 105 GEO. L.J. 441; John Stinneford, *The Original Meaning of “Unusual”: The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739 (2008). The approach taken here differs in arguing that the meaning of the phrase “cruel and unusual” can be more fully understood if it is read against the background of debates and discussions over penal reform in the new republic.

opinions that considered the meaning of the Eighth Amendment.<sup>34</sup> For example, *Wilkerson v. Utah*<sup>35</sup> involved a question over the constitutionality of a method of punishment (firing squad).<sup>36</sup> In its opinion, the Court referenced the methods of execution discussed by Blackstone<sup>37</sup> and concluded:

[Blackstone] admits that in very atrocious crimes other circumstances of terror, pain, or disgrace were sometimes superadded. Cases mentioned by the author are, where the prisoner was drawn or dragged to the pace of execution, in treason; or where he was emboweled alive, beheaded, and quartered, in high treason. Mention is also made of public dissection in murder, and burning alive in treason committed by a female.<sup>38</sup>

From this description of previously available punishments, the Court derived the principle that “it is safe to affirm that punishments of torture, such as those mentioned by the commentator referred to, and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution.”<sup>39</sup>

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<sup>34</sup> *O’Neil v. State of Vermont*, 144 U.S. 323, 339 (1892) (Fields, J., dissenting); *In re Kemmler*, 136 U.S. 436, 446 (1890); *Wilkerson v. Utah*, 99 U.S. 130, 135 (1878). Numerous state court decisions similarly found “cruel and unusual” provisions in state law to only apply to “a punishment that disgraced the civilization of former ages and made one shudder with horror to read of it.” LARRY CHARLES BERKSON, *THE CONCEPT OF CRUEL AND UNUSUAL PUNISHMENT* 9 (1975) (citing *People v. Morris*, 80 Mich. 634, 637 (1890); *Whitten v. State*, 47 Ga. 297, 301 (1872); *State v. Manuel*, 20 N.C. 20, 36 (1838)). The graphicness of their descriptions evokes the work of Karen Halttunen, who argued that over the course of the nineteenth century, murder narratives in popular fiction increasingly contained “deliberate use of pain and horror to generate readers’ *pleasure*, the peculiar ‘dreadful pleasure’ of imaginatively viewing terrible scenes of violent death.” KAREN HALTTUNEN, *MURDER MOST FOUL: THE KILLER AND THE AMERICAN GOTHIC IMAGINATION* 61 (1998). She argues that this was a result of a “revolution in sensibility we may call humanitarian, which in shaping dramatically new responses to pain and death gave rise to a pornography of violence that both fed a new taste for body-horror, and confirmed the guilt attached to that taste.” *Id.* at 62. This “revolution in sensibility” is discussed *infra* Part II.A and C. For our purposes, the significance of Halttunen’s point is simply that because public infliction of pain was no longer acceptable (for example, public executions were almost entirely abolished by the mid-nineteenth century), the graphic descriptions of past punishments were used in these opinions as a means of reveling in past horror, while emphasizing the restraint of modern sensibilities that reject such practices.

<sup>35</sup> 99 U.S. 130 (1878).

<sup>36</sup> *Id.* at 130.

<sup>37</sup> 4 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 370–71 (1979). (“Disgusting as this catalogue may seem, it will afford pleasure to an English reader, and do honour to the English law, to compare it with that shocking apparatus of death and torment, to be met with in criminal codes of almost every other nation in Europe.”).

<sup>38</sup> *Wilkerson*, 99 U.S. at 135. The opinion also cites Archbold’s treatise for examples “of such legislation in the early history of the parent country,” though specific examples are not cited. *Id.*

<sup>39</sup> *Id.* at 135–36.

The Court in *In re Kemmler*,<sup>40</sup> which concerned the constitutionality of electrocution as a method of execution, continued in this vein, pointing to punishments that “were manifestly cruel and unusual, [such] as burning at the stake, crucifixion, breaking on the wheel, or the like.”<sup>41</sup> The consequences of focusing on these outmoded forms of punishment are made clear by the Court’s conclusion that “[p]unishments are cruel when they involve torture or a lingering death. . . . It implies there something inhuman and barbarous, something more than the mere extinguishment of life.”<sup>42</sup> While debate over the history of the Eighth Amendment expanded during the twentieth and twenty-first centuries, this tendency to reduce understanding of past punishments to graphic lists of extreme penalties continues to influence understanding of the meaning “cruel and unusual.”

The first justice to support a narrow interpretation using the Eighth Amendment’s own history, rather than a limited history of penal form, was Justice White who dissented in *Weems*.<sup>43</sup> The majority held that the punishment in question<sup>44</sup> was disproportionate to the offense and therefore in violation of the “cruel and unusual punishments” clause.<sup>45</sup> Justice White, in contrast, focused on the history of the Eighth Amendment to argue that it

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<sup>40</sup> 136 U.S. 436 (1890).

<sup>41</sup> *Id.* at 446.

<sup>42</sup> *Id.* at 447.

<sup>43</sup> 217 U.S. 349, 382–413 (1910) (White, J., dissenting) (rejecting a reading of the Eighth Amendment that would embrace the concept of proportionality and instead limiting his interpretation of that Amendment’s application to punishments that were considered cruel and unusual in 1689 when the English Bill of Rights was adopted).

<sup>44</sup> *Weems* was an employee of the United States government in the Philippines and was accused of falsifying official documents, namely by “entering as paid out, ‘as wages of employees of the Light House Service of the United States Government of the Philippine Islands,’ at the Capul Light House, of 208 pesos, and for like service at the Matabriga Light House of 408 pesos, Philippine currency.” *Id.* at 357–58. For this offense, *Weems* was sentenced “[t]o the penalty of fifteen years of Cadena, together with the accessories of section 56 of the Penal Code, and to pay a fine of four thousand pesetas, but not to serve imprisonment as a subsidiary punishment in case of his insolvency, on account of the nature of the main penalty, and to pay the costs of this cause.” *Id.* at 358. “[T]hose sentenced to *cadena temporal* and *cadena perpetua* shall labor for the benefit of the state. They shall always carry a chain at the ankle, hanging from the wrists; they shall be employed at hard and painful labor, and shall receive no assistance whatsoever from without the institution.” *Id.* at 364. Also included were certain civil penalties, including permanent disqualification from public office and “subjection to surveillance” of the public authorities for life. *Id.* *Weems* challenged his conviction on numerous grounds, including an allegation that his sentence violated a provision of the American government’s treaty with the Philippines Islands, which was identical to the Eighth Amendment of the U.S. Constitution. *Id.* at 367–68.

<sup>45</sup> *Id.* at 380–81.

did not include a proportionality principle.<sup>46</sup> He made this argument by tracing the wording of the Eighth Amendment back to a nearly identical provision in the English Bill of Rights of 1689.<sup>47</sup> The full contours of Justice White's analysis of the history of the "cruel and unusual clause" in the English Bill of Rights are not directly relevant; what is of interest is his definition of cruel and unusual punishments within the meaning of that document.<sup>48</sup> Justice White argued that the meaning of the Eighth Amendment was limited to the meaning of the same phrase in the English Bill of Rights.<sup>49</sup> According to Justice White, the term "cruel" in the English Bill of Rights referred to punishments that "were the atrocious, sanguinary, and inhuman punishments which had been inflicted in the past upon the persons of criminals."<sup>50</sup> These punishments were "such as disgraced the civilization of former ages, and made one shudder with horror to read of them, as drawing, quartering, burning, etc."<sup>51</sup> While seventeenth-century English punishments would make "one shudder with horror," Justice White went on to remark that, during the period between the adoption of the English Bill of Rights and the American Revolution, "[t]he severity of the criminal law [in England] was greatly increased . . . [and] there can be no doubt that the legislation of the eighteenth century in criminal matters was severe to the highest degree, and destitute of any sort of principle or system."<sup>52</sup> This account thus portrays English penal practice as going from bad to worse. However, Justice White goes on to argue that in America, this type of punishment had largely become irrelevant by the time the American Bill of Rights was adopted because by then, "as a rule, the cruel

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<sup>46</sup> *Id.* at 389–99.

<sup>47</sup> *Id.* at 389–96.

<sup>48</sup> *Id.* at 406. Debate over the meaning and relevance of the related provision in the English Bill of Rights has been extensive; *see, e.g.*, AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 279 (1998); IRVING BRANT, *THE BILL OF RIGHTS: ITS ORIGIN AND MEANING* 134–58 (1965); LEONARD W. LEVY, *ORIGINS OF THE BILL OF RIGHTS* 231–37 (1999); ROBERT ALLEN RUTLAND, *THE BIRTH OF THE BILL OF RIGHTS, 1776–1791* at 1–6, 9 (1955); BERNARD SCHWARTZ, *THE GREAT RIGHTS OF MANKIND: A HISTORY OF THE AMERICAN BILL OF RIGHTS* 21–23 (1977); Granucci, *supra* note 28, at 852–60; Schwartz, *supra* note 1, at 378–82.

<sup>49</sup> *Weems*, 217 U.S. at 394–95.

<sup>50</sup> *Id.* at 390.

<sup>51</sup> *Id.* at 404; *see also id.* at 409 (discussing how "the word cruel, as used in the Amendment, forbids . . . [the infliction of] unnecessary bodily suffering through a resort to inhuman methods for causing bodily torture, like or which are of the nature of the cruel methods of bodily torture which had been made use of prior to the bill of Rights of 1689").

<sup>52</sup> *Id.* at 393 (quoting 1 JAMES FITZJAMES STEPHEN, *HISTORY OF THE CRIMINAL LAW OF ENGLAND* 470–71 (1883)).

bodily punishments of former times were no longer imposed.”<sup>53</sup> We will see in Part II that this portrayal of past punishments relies upon a caricature of the past, as containing punishments that were simultaneously cruel and torturous while also largely disappearing from the American colonies in the eighteenth century. Justice White’s argument in *Weems*, lacks a deep analysis of the relevant historical context and the changes they did or did not undergo in the intervening century. Instead, while purporting to trace the text and its meaning, this account ultimately relies on expressions of “horror” and short lists of extreme punishments.

While Justice White used the Eighth Amendment’s origin in the English Bill of Rights to justify a narrow interpretation that limited the Amendment’s protections to the types of cruel bodily punishments imposed in England at the time, Justice Scalia ultimately argued that this history is largely irrelevant because what mattered was what the drafters of the Bill of Rights thought the words meant.<sup>54</sup> He focused on statements and events in late eighteenth-century America to distill the meaning of “cruel and unusual punishments.”<sup>55</sup> He started by examining the wording of the clause itself, which does not mention proportionality, even though certain state constitutions did explicitly require proportionality in punishments.<sup>56</sup> Here, Justice Scalia engaged in a classic form of statutory construction: pointing to similar earlier documents that do use the term in order to demonstrate that the drafters of the text in question did not intend to include said term.<sup>57</sup> Next, Justice Scalia pointed to what he termed “contemporary understanding,” which he found in the statements made during the constitutional conventions, the debate over the Bill of Rights in the First Congress, the actions of the First Congress and early commentary on the clause, and nineteenth-century court decisions interpreting this or similar state provisions.<sup>58</sup>

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<sup>53</sup> *Id.* at 395. He also stated that “judges, where moderate, bodily punishment was usual, had not, under the guise of discretion, directed the infliction of such punishments to so unusual a degree as to transcend the limits of discretion and cause the punishment to be illegal.” *Id.*

<sup>54</sup> *Harmelin v. Michigan*, 501 U.S. 957, 966–75 (1991).

<sup>55</sup> *Id.* at 977–81.

<sup>56</sup> *Id.* at 977–79 (Justice Scalia cites the following state constitutional provisions adopted before the Bill of Rights: N.H. BILL OF RIGHTS of 1784, art. XVIII (“[A]ll penalties ought to be proportioned to the nature of the offence.”); S.C. CONST. of 1778, art. XL (“punishments should be in general more proportionate to the crimes”); PA. CONST. of 1776, § 38 (same).). Justice Scalia’s historical approach in this opinion is focused on rejecting any notion of proportionality. This concept will be explored in more detail in the next part.

<sup>57</sup> *See id.* at 977–81.

<sup>58</sup> *Id.* at 978–85.

Turning first to the constitutional conventions, the question of a protection against cruel and unusual punishments only arose twice.<sup>59</sup> During the Massachusetts Convention, Mr. Holmes argued that without a Bill of Rights, Congress was nowhere restrained from imposing “the most cruel and unheard-of punishments . . . and there is no constitutional check on them, but that *racks* and *gibbets* may be amongst the most mild instruments of their discipline.”<sup>60</sup> During the Virginia Convention, Patrick Henry made an impassioned plea that a Bill of Rights was required to prevent Congress from permitting torture.<sup>61</sup> From these statements, Justice Scalia concluded that the drafters of the Eighth Amendment were narrowly focused on methods of punishment and the only methods they found to be cruel and unusual were those akin to torture.<sup>62</sup>

Next, Justice Scalia turned to the actions of the First Congress, which “punished forgery of United States securities, ‘run[ning] away with [a] ship or vessel, or any goods or merchandise to the value of fifty dollars,’ treason, and murder on the high seas with the same penalty: death by hanging.”<sup>63</sup>

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<sup>59</sup> See *id.* at 977–80.

<sup>60</sup> 2 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 111 (2d ed. 1901).

<sup>61</sup> 3 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 445–48 (2d ed. 1901).

<sup>62</sup> *Harmelin*, 501 U.S. at 979–83. This argument that the drafters were concerned only with methods of punishment was first made by Anthony Granucci in an influential article on the Eighth Amendment. Granucci, *supra* note 28, at 842–47. Although the heart of his article focused on the meaning of the same provision in the English Bill of Rights, he first argued that the Founders were concerned about preventing certain methods of punishment and that in so doing they actually misunderstood the true meaning of the English Bill of Rights. *Id.* Granucci has been cited in eight Supreme Court cases: *Harmelin*, 501 U.S. at 968, 973 n.4, 974–75 n.5, 979; *Id.* at 1011 n.1 (White, J., dissenting); *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 289, 294 (1989) (O’Connor, J., concurring in part and dissenting in part); *Solem v. Helm*, 463 U.S. 277, 312 n.5 (1983) (Burger, C.J., dissenting); *Rummel v. Estelle*, 445 U.S. 263, 287, 289 (1980) (Powell, J., dissenting); *Ingraham v. Wright*, 430 U.S. 651, 664 n.29, n.31 (1977); *Estelle v. Gamble*, 429 U.S. 97, 102 (1976); *Gregg v. Georgia*, 428 U.S. 153, 169 (1976); *Furman v. Georgia*, 408 U.S. 238, 274 (1972) (Brennan, J., concurring); *Id.* at 242 n.2 (Douglas, J., concurring); *Id.* at 316 n.5, 318–19 n.11, n.13–15 (Marshall, J., concurring); *Id.* at 376 n.2 (Burger, C.J., dissenting); *Id.* at 419 n.3 (Powell, J., dissenting). This line of argumentation has not gone unanswered. The fullest response came in Justice Brennan’s opinion in *Furman*, which concluded that:

It does not follow, however, that the Framers were exclusively concerned with prohibiting torturous punishments. Holmes and Henry were objecting to the absence of a Bill of Rights, and they cited to support their objections the unrestrained legislative power to prescribe punishments for crimes. Certainly we may suppose that they invoked the specter of the most drastic punishments a legislature might devise.

*Furman*, 408 U.S. at 260 (Brennan, J., concurring).

<sup>63</sup> *Harmelin*, 501 U.S. at 980–81 (quoting 1 Stat. 114 (1790)).



Justice Scalia contrasted the federal punishments with two contemporary documents that pointed to an alternative approach.<sup>64</sup> The first was the New Hampshire Constitution, which required proportionality in punishments and defined proportionality in a limited way: “[n]o wise legislature”—that is, no legislature attuned to the principle of proportionality—“will affix the same punishment to the crimes of theft, forgery and the like, which they do to those of murder and treason.”<sup>65</sup> He also pointed to Thomas Jefferson’s Bill For Proportioning Crimes and Punishments, which “punished murder and treason by death; counterfeiting of public securities by forfeiture of property plus six years at hard labor, and ‘run[ning] away with any sea-vessel or goods laden on board thereof’ by treble damages to the victim and five years at hard labor.”<sup>66</sup> Because the legislation passed by the First Congress did not similarly explicitly embrace proportionality, and instead relied upon the death penalty as a punishment for a range of offenses, Justice Scalia concluded that the Founders did not interpret the Eighth Amendment to include a requirement of proportionality.<sup>67</sup> Missing from this analysis is any of the contemporary discussions regarding the need for penal reform (which was widely accepted) and the various attempts that were being made at this time to devise revised criminal codes that would allow for more republican or civilized modes of punishing.<sup>68</sup> Jefferson’s bill was rejected by the Virginia legislature and, as will be seen in Part II, although there were various state level experiments with hard labor occurring at this time, none were advanced enough to serve as a model for the newly formed federal government.<sup>69</sup>

Justice Scalia also cited two nineteenth-century commentators whose arguments as to what constitutes cruel punishments resemble those found in the nineteenth-century cases: “the rack or the stake, or any of those horrid modes of torture, devised by human ingenuity for the gratification of fiendish passion” and “[t]he various barbarous and cruel punishments inflicted under the laws of some other countries. . . . Breaking on the wheel, flaying alive, rending assunder with horses, various species of horrible tortures inflicted in the inquisition, maiming, mutilating and scourging to death.”<sup>70</sup> Thus, even while Justice Scalia’s opinion attempted to rest upon

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<sup>64</sup> *Id.* at 980.

<sup>65</sup> *Id.* (quoting N.H. CONST., pt. I, art. XVIII (1784)).

<sup>66</sup> *Id.* (quoting 1 THOMAS JEFFERSON, THE WRITINGS OF THOMAS JEFFERSON 220–22, 229–31 (Albert Ellery Bergh eds., 1905)). This bill is discussed *infra* Part II.A.

<sup>67</sup> *Id.* at 980–81.

<sup>68</sup> *See infra* Part II.

<sup>69</sup> *See infra* Part II.

<sup>70</sup> *Harmelin*, 501 U.S. at 981 (quoting JAMES BAYARD, A BRIEF EXPOSITION OF THE

purely textual analysis, there is interspersed within it discussion of penal form in the early American republic (though focused entirely on the First Congress with no examination of state-level experiments) and of punishments centered around racks, gibbets, maiming, mutilation, and torture.<sup>71</sup> His textual analysis thus demonstrates the limits of that approach, requiring as it does some attention to the surrounding society and the beliefs and understandings that were common at the time. Once one turns to society to understand penal form, however, it is not clear what principle limits the examination to penal form, rather than expanding the inquiry to embrace penal reform, including why and how it is occurring.

The opinion that most openly embraces this approach's reliance upon conceptions of past penal practices is Justice Thomas's concurrence in *Baze*, which like Justice White in *Weems*, and Justice Scalia in *Harmelin*, provides a very narrow reading of the Eighth Amendment's protections.<sup>72</sup> *Baze* involved a challenge to Kentucky's use of lethal injection.<sup>73</sup> Justice Thomas began his historical analysis by arguing that the "cruel and unusual" punishments clause of the Eighth Amendment "must be understood in light of the historical practices that led the Framers to include it in the Bill of Rights."<sup>74</sup> The "historical practices" that he examined, however, all focus on changes in the implementation of the death penalty.<sup>75</sup> He argued that while death by hanging was the most common form of execution, there were additional "tools" used to "'intensify[] a death sentence.'"<sup>76</sup> He then cited examples, including burning at the stake, "'gibbeting,' or hanging the condemned in an iron cage so that his body would decompose in public view," public dissection and "the worst fate a criminal could meet . . . 'embowelling alive, beheading, and quartering.'"<sup>77</sup> He then emphasized the content of this last punishment by quoting a death sentence imposed on seven men convicted of high treason (no date is given):

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CONSTITUTION OF THE UNITED STATES 154 (2d ed. 1840) (referring to "improved spirit of the age," which led to adoption of Eighth Amendment) and BENJAMIN L. OLIVER, *THE RIGHTS OF AN AMERICAN CITIZEN* 186 (1832) (stating that "some other countries" in question "profess not to be behind the most enlightened nations on earth in civilization and refinement").

<sup>71</sup> *Id.*

<sup>72</sup> 553 U.S. 35, 94–97 (2008) (Thomas, J., concurring).

<sup>73</sup> *Id.* at 41.

<sup>74</sup> *Id.* at 94.

<sup>75</sup> *Id.* at 95–96.

<sup>76</sup> *Id.* at 95 (quoting STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 54 (2002)).

<sup>77</sup> *Id.* at 95–96 (quoting BANNER, *supra* note 76, at 72–74; BLACKSTONE, *supra* note 37, at 376).

That you and each of you, be taken to the place from whence you came, and from thence be drawn on a hurdle to the place of execution, where you shall be hanged by the necks, not till you are dead; that you be severally taken down, while yet alive, and your bowels be taken out and burnt before your faces—that your heads be then cut off, and your bodies cut in four quarters, to be at the King's disposal. And God Almighty have mercy on your souls.<sup>78</sup>

Justice Thomas proceeded to argue that these forms of aggravated capital punishment had “dwindled away” by the late eighteenth century and therefore would have qualified as “unusual” at the time the Eighth Amendment was adopted.<sup>79</sup> He therefore used this graphic description of a punishment that would have been “unusual” in 1789 to support the conclusion that the Eighth Amendment was intended to capture only “tortuous punishment.”<sup>80</sup> Absent is any discussion of the use of these penalties in the American colonies or any examination of broader changes penal practices in the colonies may have undergone.

Thus, while Justice Thomas's decision in *Baze* differs from the examples we saw in Justice White's opinion in *Weems*, or Justice Scalia's opinion in *Harmelin* in that he provided some contextual examination of penal practices in England and, to a lesser extent, in the colonies, his opinion ultimately rests upon a conception of past penal practices that focuses entirely on graphic descriptions of their violence. By limiting his examination to the changes in execution form that occurred between seventeenth-century England and late eighteenth-century America, Justice Thomas's opinion in *Baze*, arrives at a very narrow conception of penal

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<sup>78</sup> *Baze v. Rees*, 553 U.S. 35, 96 (2008) (quoting GEORGE R. SCOTT, *THE HISTORY OF CAPITAL PUNISHMENT* 179 (1950)).

<sup>79</sup> *Id.* at 97 (citing STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 70 (2012)).

<sup>80</sup> *Id.* Although not directly relevant to the history of the Eighth Amendment, some justices have sought to argue the irrelevance of this history that relies on histories of previous types of punishment to define the meaning of cruel and unusual. Justice Brennan in *Furman* points to earlier cases that “proceeded primarily by ‘looking backwards for examples by which to fix the meaning of the clause.’” *Furman v. Georgia*, 408 U.S. 238, 264 (1972) (Brennan, J., concurring) (quoting *Weems v. United States*, 217 U.S. 349, 377 (1910)). He argued that, “[h]ad this ‘historical’ interpretation of the Cruel and Unusual Punishments Clause prevailed, the Clause would have been effectively read out of the Bill of Rights,” and cites to examples of this happening. *Id.* He begins first with Justice Story, who concludes “that the provision ‘would seem to be wholly unnecessary in a free government, since it is scarcely possible that any department of such a government should authorize or justify such atrocious conduct,’” and then Justice Cooley, who said “the Court, ‘apparently in a struggle between the effect to be given to ancient examples and the inconsequence of a dread of them in these enlightened times, . . . hesitate[d] to advance definite views.’” *Id.* at 265 (internal citations omitted).

change, both what it entailed and how it occurred.<sup>81</sup>

## B. THE CONTEXTUAL APPROACH

While the textualists rely on a limited examination of past punishments in order to support their narrow interpretation of the Eighth Amendment's protections, the contextualists seemingly grant this portrayal of past punishments even while arguing that other aspects of colonial society suggest a broader reading of the Eighth Amendment. The first case to suggest looking beyond a narrow focus on the types of punishments used in 1789 to determine the meaning of the phrase "cruel and unusual" was Justice Field, dissenting in *O'Neil v. State of Vermont*.<sup>82</sup> He gestured towards this narrower line of interpretation before arguing that the Eighth Amendment's application was not limited to such penalties.<sup>83</sup> He argued "[t]hat designation [cruel and unusual], it is true, is usually applied to punishments which inflict torture, such as the rack, the thumbscrew, the iron boot, the stretching of limbs and the like, which are attended with acute pain and suffering."<sup>84</sup> However, while "[s]uch punishments were at one time inflicted in England," their use ceased with the adoption of the English Bill of Rights.<sup>85</sup> Justice Field went on to conclude that "[t]he inhibition is directed, not only against punishments of the character mentioned, but against all punishments which by their excessive length or severity are greatly disproportioned to the offences charged."<sup>86</sup> In other words, "[t]he whole inhibition is against that which is excessive either in the bail

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<sup>81</sup> Justice Thomas's argument also resembles the argument of Michel Foucault in the way it focuses on a dichotomy between modern and pre-modern penalties. See generally MICHAEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (Alan Sheridan trans., 1977). *DISCIPLINE AND PUNISH* begins and is in many respects shaped by a similar dichotomous portrayal of penal form. The work opens with a graphic description of the drawing and quartering by French authorities of a would-be regicide. *Id.* at 3–6. Foucault then contrasts this penalty with the highly regimented (disciplinary) approach taken by penitentiaries in the early nineteenth century. *Id.* at 6–7. Foucault has been critiqued for this periodization, with numerous scholars arguing that penal change occurred earlier than Foucault suggests and that the process of change was more gradual and less distinct than he is willing to admit. GARLAND, *supra* note 16, at 157–62. Justice Thomas is thus constitutionalizing a dichotomous approach to penal form (modern/pre-modern; physical/disciplinary) that was suggested by Foucault but that has been closely questioned by later historians.

<sup>82</sup> 144 U.S. 323, 337–66 (1892).

<sup>83</sup> *Id.* at 339–40.

<sup>84</sup> *Id.* at 339.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 339–40.

required, or fine imposed, or punishment inflicted.”<sup>87</sup> Justice Field thus expanded the scope of the Eighth Amendment by turning both to the idea of penal change, as well as to the concept of proportionality.

Similarly, although Justice White’s dissent in *Weems* invoked its origin in the English Bill of Rights to narrowly interpret the Eighth Amendment, Justice McKenna’s majority opinion in the same case examined that history, but then broadened the inquiry to consider from what types of abuse those who advocated the Eighth Amendment sought to provide protections. He concluded:

[S]urely they intended more than to register a fear of the forms of abuse that went out of practice with the Stuarts. Surely, their jealousy of power had a saner justification than that. They were men of action, practical and sagacious, not beset with vain imagining, and it must have come to them that there could be exercises of cruelty by laws other than those which inflict bodily pain or mutilation. . . . [I]t was believed that power might be tempted to cruelty. This was the motive of the clause, and if we are to attribute an intelligent providence to its advocates we cannot think that it was intended to prohibit only practices like the Stuarts, or to prevent only an exact repetition of history. We cannot think that the possibility of a coercive cruelty being exercised through other forms of punishment was overlooked.<sup>88</sup>

Thus, while Justice McKenna acknowledged a history of penal practice that contained “exercises of cruelty” and “bodily pain or mutilation,” he invoked a conception of the Founders as “men of action, practical and sagacious” to argue that they must have intended the Amendment to encompass punishments beyond those attributed to the Stuarts.<sup>89</sup> At the same time, he provides little historical evidence or analysis to support his understanding.

Justice Douglas’s concurrence in *Furman* also considered the concerns that likely dominated the Framers’ thoughts in determining the scope of the Eighth Amendment.<sup>90</sup> He also traced the Amendment’s origin to the English Bill of Rights and argued that the document “was concerned primarily with selective or irregular application of harsh penalties and that its aim was to forbid arbitrary and discriminatory penalties of a severe nature.”<sup>91</sup> Similarly, he pointed to abuses of power that were perpetrated during the years immediately prior to the adoption of the English Bill of Rights.<sup>92</sup> From this history, Justice Douglas argued for an interpretation of

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<sup>87</sup> *Id.* at 340.

<sup>88</sup> *Weems v. United States*, 217 U.S. 349, 372–73 (1910). Justice McKenna later stated: “[A] principle to be vital must be capable of wider application than the mischief which gave it birth.” *Id.* at 373.

<sup>89</sup> *Id.* at 372–73.

<sup>90</sup> *Furman v. Georgia*, 408 U.S. 238, 255 (1972) (Douglas, J., concurring).

<sup>91</sup> *Id.* at 242.

<sup>92</sup> *Id.* at 246–57. He uses Irving Brant’s *The Bill of Rights*, its account of the Bloody

the Eighth Amendment that would prohibit discriminatory applications of punishments:

Those who wrote the Eighth Amendment knew what price their forebears had paid for a system based, not on equal justice, but on discrimination. In those days the target was not the blacks or the poor, but the dissenters, those who opposed absolutism in government, who struggled for a parliamentary regime, and who opposed governments' recurring efforts to foist a particular religion on the people. . . . One cannot read this history without realizing that the desire for equality was reflected in the ban against "cruel and unusual punishments" contained in the Eighth Amendment.<sup>93</sup>

Justice Douglas's opinion, thus focuses on aspects of the historical record that illuminate who was targeted by particular punishments, though he gives no attention or analysis to what those punishments were.

Justice Powell's majority opinion in *Solem v. Helm*<sup>94</sup> is another example of this attempt to use a broader history of the Amendment's origin to justify a more expansive interpretation of its application.<sup>95</sup> In *Solem*, Justice Powell argued that the English Bill of Rights embraced "[t]he principle that a punishment should be proportionate," a principle that was deeply embedded in English constitutional history going back to Magna Carta.<sup>96</sup> By incorporating the language of the English Bill of Rights, the drafters of the Eighth Amendment "also adopted the English principle of proportionality" and it was consistently argued that Americans retained "all the rights of English subjects."<sup>97</sup> Justice Powell, thus opened the historical record to include previous understandings of appropriate punishment in England (such as the Magna Carta), along with a broader interpretation of what the drafters of the Eighth Amendment thought that they were doing when they adopted language directly from the English Bill of Rights.<sup>98</sup> Absent from his opinion, however, was any discussion of past penal

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Assizes and the execution of Sidney to support this argument. See BRANT, *supra*, note 48, at 154–55. For a similar argument, see Laurence Claus, *The Antidiscrimination Eighth Amendment*, 28 HARV. J.L. & PUB. POL'Y 119 (2004).

<sup>93</sup> *Furman*, 408 U.S. at 255.

<sup>94</sup> 463 U.S. 277 (1983).

<sup>95</sup> *Id.* at 284–86.

<sup>96</sup> *Id.* at 284–85.

<sup>97</sup> *Id.* at 285–86.

<sup>98</sup> *Id.* Justice Scalia's discussion of history in *Harmelin* was a direct response to Justice Powell's opinion in *Solem*. He summarizes *Solem*'s approach to history this way: "Thus not only is the original meaning of the 1689 Declaration of Rights relevant, but also the circumstances of its enactment, insofar as they display the particular 'rights of English subjects' it was designed to vindicate." *Harmelin v. Michigan*, 501 U.S. 957, 966–67 (1991). Justice Scalia views the extra-textual aspects of the history presented in *Solem* as irrelevant. *Id.* at 967.

practice and how it may or may not have exhibited a principle of proportionality.

Thus, while there are examples of justices willing to engage in a more contextual history of the Eighth Amendment, none of these examples engage with the history of punishments in England or America, or the changes these punishments underwent in the early years of the republic. Rather, they seem to concede the point to the textualists and assume that the only thing worth knowing about eighteenth-century penal practice is that it was marked by harshness and cruelty. The next part will demonstrate the limitations of this approach. In order to have a more complete picture of how the Founding Generation thought about penal form and its place in the American republic, it is necessary to look beyond a narrow list of outmoded punishments and examine the entire system of punishments and how they were shifting in America during the decade following the Revolution.

## II. HISTORY OF EIGHTEENTH-CENTURY PENAL CHANGE

This Part traces the three most significant state-level experiments in penal reform that occurred in the decade following the end of the American Revolution. Although debates over reform of the colonial penal system began in the years leading up to the Revolution, that event gave new impetus and significance to the discussion.<sup>99</sup> In the years following the Revolution, the colonial penal codes would undergo significant transformation. The examples examined in this Part of these changes are significant for a number of reasons. First, the states involved were leaders among the American colonies, as measured by population, economic strength and sources of Founding Fathers. Second, their experiments with penal change were most developed, but they were also representative of reforms that were occurring elsewhere. Third, the experiments of each of these three states served as examples to other states that later attempted similar reforms. Thus, while focus is on these three states, broader trends, practices or experiments elsewhere will be mentioned where relevant.

The first example is actually a failed attempt at reform: Thomas Jefferson's proposal for a reformed penal code in Virginia. Although this legislation never actually came into effect, debates over some of its more

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<sup>99</sup> REBECCA MCLENNAN, *THE CRISIS OF IMPRISONMENT: PROTEST, POLITICS, AND THE MAKING OF THE AMERICAN PENAL STATE, 1776–1941*, at 19 (2008). *But see* ADAM HIRSCH, *THE RISE OF THE PENITENTIARY: PRISONS AND PUNISHMENT IN EARLY AMERICA* 47–56 (1992) (arguing that the impact of revolutionary ideology on penal change is more ambiguous than this statement suggests and finding the intellectual antecedents for incarceration in the workhouse and changes occurring in society to be more directly relevant to shifts in penal form that followed the Revolution).

controversial provisions capture many of the larger debates over penal reform that were occurring in the colonies and in Europe.<sup>100</sup> The second focuses on Massachusetts and its attempt at implementing incarceration as an alternative penalty to either death or public, physical chastisement. The third examines Pennsylvania and its experiment with public hard labor, which was quickly abandoned in favor of incarceration. In each, there was vigorous debate over how to reform British penal practice in the new republic (even while the need to reform was largely taken for granted) as Americans began to “redraw[] the political and moral grounds of possibility in the arena of punishment.”<sup>101</sup> Moreover, each is representative of discussions and changes occurring elsewhere in the world.<sup>102</sup> This broader context will be examined in each section as relevant in order to situate the experiments in penal reform that were occurring in the American colonies with intellectual and cultural debates occurring in Europe at that time. It is only by examining this process of actual penal change that we can begin to understand how the Founding Generation thought about penal reform and how particular punishments might be evaluated as cruel and unusual. Examining penal reform in the early republic indicates that the determination of what punishments were acceptable was a process involving experimentation with new approaches to punishment, rather than a fixed state of affairs.

#### A. VIRGINIA: THE ENLIGHTENMENT AND DECREASES IN VIOLENCE

Although the example of Virginia represents a failed attempt at reform, the attempt itself and potential reasons for its failure demonstrate the extent of the perceived need for reform, the relevance of Enlightenment thinkers (especially the work of Cesare Beccaria) in attempts to fashion a new penal system, as well as some of the long-term changes in sensibilities regarding

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<sup>100</sup> Jefferson himself raised concerns regarding these portions of the bill. Letter from Thomas Jefferson to George Wythe (Nov. 1 1778), FOUNDERS ONLINE, <http://founders.archives.gov/documents/Jefferson/01-02-02-0086> (last visited Sept. 4, 2016). Later, Jefferson wrote of the bill’s reception in Europe and the concerns raised by the *lex talionis* portions of the bill. Kathryn Preyer, *Cesare Beccaria and the Founding Fathers*, in BLACKSTONE IN AMERICA: SELECTED ESSAYS OF KATHRYN PREYER 69 (Mary Sarah Bilder et al., eds. 2009).

<sup>101</sup> *Id.* at 18.

<sup>102</sup> See, e.g., MICHAEL IGNATIEFF, A JUST MEASURE OF PAIN: THE PENITENTIARY IN THE INDUSTRIAL REVOLUTION 1750–1850 44–79 (1978) (discussing debates over and changes in penal form in England starting in the mid-eighteenth century). See generally PIETER SPIERENBERG, THE PRISON EXPERIENCE: DISCIPLINARY INSTITUTIONS AND THEIR INMATES IN EARLY MODERN EUROPE (1991) (arguing that there was a long-term gradual shift from public physical punishments to imprisonment throughout Europe beginning in the sixteenth century).



interpersonal and physical violence that impacted how leaders sought to shape both society and the government's response to criminal acts among its population. The proposed reform of the criminal law in Virginia thus demonstrates the salience of many of the underlying trends and ways of thinking that would impact penal reform elsewhere in the colonies, including the push towards reducing capital codes, advocating proportionality in sentencing, and increasing discomfort with public, physical violence.

Following the Declaration of Independence in 1776, Virginians Thomas Jefferson, George Wythe, and Edmund Pendleton proposed a range of revised laws for their state.<sup>103</sup> Jefferson was responsible for drafting the criminal law portion of these revisions and his resulting, "Bill for Proportioning Crimes and Punishments in Cases Heretofore Capital," was completed in 1779.<sup>104</sup> However, the legislature delayed considering the bill until 1785.<sup>105</sup>

The bill embraced a notion of proportionality in punishment and declared that each member of society deserved "a punishment in proportion to his offence" and protection from any "greater pain, so that it becomes a duty in the legislature to arrange in a proper scale the crimes which it may be necessary for them to repress, and to adjust thereto a corresponding gradation of punishments."<sup>106</sup> It limited the infliction of capital punishment by hanging to cases of treason and murder.<sup>107</sup>

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<sup>103</sup> Kathryn Preyer, *Crime, the Criminal Law and Reform in Post-Revolutionary Virginia*, 1 *LAW & HIST. REV.* 53, 56 (1983).

<sup>104</sup> *Id.* at 56–57.

<sup>105</sup> *Id.* at 68.

<sup>106</sup> 64. *A Bill for Proportioning Crimes and Punishments in Cases Heretofore Capital*, 18 June 1779, FOUNDERS ONLINE, <http://founders.archives.gov/documents/Jefferson/01-02-02-0132-0004-0064> (last visited Sept. 4, 2016). The preamble also states various objections to capital punishment including: that "reformation of offenders" should be a goal of punishment; that "exterminate[ion] . . . of their fellow citizens . . . weakens the state by cutting off so many who, if reformed, might be restored sound members to society," or, whose labors while in prison might be useful to or whose example might prove a deterrence to other criminals. *Id.* The bill also argues that "cruel and sanguinary laws defeat their own purpose" because people feel reluctant to prosecute or convict knowing the outcome could be death. *Id.*

<sup>107</sup> *Id.* There was some limited variation in how executions would be carried out depending on the type of crime. While the typical execution form would be hanging, three additional penalties of death were proscribed: for petty treason (a servant killing his or her master) or murder within a family (husband and wife or parent and child) hanging was to be the penalty with dissection following; for cases of murder by poison, death by poison was to be the penalty and in cases of dueling, the penalty was to be death by hanging, with the body of the challenger gibbeted following death. Execution was to be swift (the next day, unless the next day be Sunday, in which case "on the Monday following") and both pardons and

Hard labor “in the public works” became the penalty for a number of formerly capital cases including: manslaughter, counterfeiting, arson, willful destruction of ships or their contents, robbery, burglary, housebreaking, horse stealing, grand larceny, petty larceny, robbery or larceny of bonds, or other obligatory notes, and buying and receiving stolen goods.<sup>108</sup> Physical punishments remained for a number of offenses, however, including: rape, polygamy or sodomy, which were to be punished by castration if committed by a man or “if a woman, by cutting thro’ the cartilage of her nose a hole of one half inch diameter at the least;” and maiming or disfigurement, which would result in the offender being “maimed or disfigured in like sort: or if that cannot be for want of the same part, then as nearly as may be in some other part of at least equal value and estimation in the opinion of a jury.”<sup>109</sup> In addition to the above penalties, the bill provided for various types of forfeiture of property and or restitution to either the victim, the victim’s family, or the Commonwealth.<sup>110</sup>

Scholars examining Jefferson and his works have tended to accord little importance to this bill, focusing on its reduction in capital crimes and deeming its more directly retributive features as “shocking lapses from humane and liberal standards” in an overall humanitarian piece of legislation.<sup>111</sup> There is a tendency to attempt to disaggregate the modern or humane aspects of the bill from the backwards-looking “alarming chinks in its humanity.”<sup>112</sup> This treatment begs the question, however, of which aspects are “humane” and which the “shocking lapses.” In tracing these two aspects of the law we can begin to see the transformations that penal law in the new republic was soon to undergo.

Although the bill had numerous influences,<sup>113</sup> one of the most prominent was Cesare Beccaria. Beccaria’s *Essay on Crimes and Punishment* was first published in 1764.<sup>114</sup> Among the better-known

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privilege of clergy were abolished. *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> MERRILL D. PETERSON, THOMAS JEFFERSON AND THE NEW NATION: A BIOGRAPHY 125 (1970); Preyer, *supra* note 103, at 57 n.16.

<sup>112</sup> PETERSON, *supra* note 111, at 126.

<sup>113</sup> All excellently traced by Kathryn Preyer. See Preyer, *supra* note 103, at 61–68.

<sup>114</sup> Richard Bellamy, *Chronology*, in BECCARIA: ON CRIMES AND PUNISHMENTS AND OTHER WRITINGS xxxi (Richard Bellamy, ed., Cambridge Texts in the History of Political Thought 2000). Montesquieu also argued for a need to revise criminal laws and asserted that “terror and severe punishments are only necessary in ‘despotic government.’ In ‘moderate states,’ severe punishment is unnecessary. ‘Civil laws will make corrections more easily and will not need as much force.’” RONALD J. PESTRITTO, FOUNDING THE CRIMINAL LAW:

aspects of Beccaria's work are his calls for strict proportionality in punishments,<sup>115</sup> their swift application,<sup>116</sup> and an end to the death penalty.<sup>117</sup> By the 1770s, this work was widely available in the American colonies.<sup>118</sup> Beccaria was one of a handful of Enlightenment thinkers that everyone, loyalist and patriots, could agree on.<sup>119</sup> His significance can be seen in part, in his ubiquitous presence in the libraries and writings of the Founders.<sup>120</sup>

In Jefferson's bill, one can find numerous instances of Beccaria's influence. The basic principle it attempts to embrace, that punishments should be proportional, is clearly an influence from Beccaria as is its goal to reduce the number of crimes that are capital. Beccaria's approach can also be seen in the call for swift application of punishments and the abolition of privilege of clergy and pardons. At the same time, nothing in Beccaria's work called for such a close approximation between crime and punishment as Jefferson's bill demonstrated in its more retributive, *lex talionis*, provisions, and it was these aspects of the bill that raised concerns at the time. In submitting the bill to George Wythe, Jefferson himself expressed the concern that:

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PUNISHMENT AND POLITICAL THOUGHT IN THE ORIGINS OF AMERICA 78 (2000). *See generally* David W. Carrithers, *Montesquieu's Philosophy of Punishment*, 19(2) HIST. POL. THOUGHT 213 (1998).

<sup>115</sup> CESARE BECCARIA, ON CRIMES AND PUNISHMENTS AND OTHER WRITINGS 19 (Richard Bellamy ed., Richard Davies, trans. 1995) (1764).

It is in the common interest not only that crimes not be committed, but that they be rarer in proportion to the harm they do to society. Hence the obstacles which repel men from committing crimes ought to be made stronger the more those crimes are against the public good and the more inducements there are for committing them. Hence, there must be proportion between crimes and punishments.

*Id.*

<sup>116</sup> *Id.* at 48. "The swifter and closer to the crime a punishment is, the juster and more useful it will be."

<sup>117</sup> *Id.* at 66–72.

<sup>118</sup> Preyer, *supra* note 100, at 242.

<sup>119</sup> BAILY, *supra*, note 9, at 28–29.

<sup>120</sup> To cite but a few examples: George Washington ordered a copy of his work in 1769, as did Jefferson, who copied extensive passages into his *Commonplace Book*. Preyer, *supra* note 100, at 241–42; *see also* BESSLER, *supra* note 1, at 50. John Adams quoted from Beccaria in his diary in June 1770, and later used that quote in his opening statement in defense of the British soldiers in the Boston Massacre Trials. Preyer, *supra* note 100, at 242. James Wilson and Benjamin Rush, both of Pennsylvania (and both signers of the Declaration of Independence and the Constitution) frequently embraced Beccarian arguments. BESSLER, *supra* note 1, at 51–53. Three state constitutions, Pennsylvania, South Carolina, and New Hampshire, embraced Beccarian notions of proportionality. PA. CONST. of 1776, § 38; S.C. CONST. of 1778, art. XL; N.H. BILL OF RIGHTS of 1784, art. XVIII.

The *lex talionis*, altho' a restitution of the Common law, to the simplicity of which we have generally found it so advantageous to return will be revolting to the humanised feelings of modern times. An eye for an eye, and a hand for a hand will exhibit spectacles in execution whose moral effect would be questionable. . . . This needs reconsideration.<sup>121</sup>

Writing from France following the Revolution, Jefferson contrasted the praise given to Virginia's Act for Establishing Religious Freedom with the criticism the "principle of retaliation" in the proposed revised criminal code had received.<sup>122</sup>

The "eye for an eye" approach towards crimes involving interpersonal violence thus seems out of tune with broader trends towards feelings of discomfort with public, physical chastisement.<sup>123</sup> One explanation for the perceived need for these provisions can perhaps be found in the fact that during the eighteenth century in Virginia, there seems to have been a high number of assaults, as indicated in the civil records in suits for damages.<sup>124</sup> The Virginia Assembly attempted in 1752, and again in 1772, to impose criminal prosecutions in these cases.<sup>125</sup> Preyer argues that "[a] high degree of individual aggression constituted one of the chief aspects of Virginia culture and was shared among all classes of society in much the same fashion as gambling, racing, cockfighting or other turbulent amusements."<sup>126</sup> Assuming this to be true,<sup>127</sup> then the reasons for including the *lex talionis* provisions that appear to be the most anachronistic may in fact have a modern bent.

This interpretation is further supported by the extensive evidence of a

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<sup>121</sup> Letter from Thomas Jefferson to George Wythe (Nov. 1 1778), FOUNDERS ONLINE, <http://founders.archives.gov/documents/Jefferson/01-02-02-0086> (last visited Sept. 4, 2016).

<sup>122</sup> Preyer, *supra* note 100, at 69.

<sup>123</sup> I am setting aside for the moment a debate over whether these were actual feelings that were shifting or rather class-based expressions of feeling used to distinguish one group (typically described as aristocratic) from another (the common crowd). Compare V.A.C. GATRELL, *THE HANGING TREE: EXECUTION AND THE ENGLISH PEOPLE 1770–1868*, at 12, 24–25 (1994), with Randall McGowen, *Revisiting the Hanging Tree: Gatrell on Emotion and History*, 40 BRIT. J. OF CRIMINOLOGY 1, *passim* (2000). What matters for the argument here is that the people evaluating the bill, both in Virginia and in France, found those aspects of the bill to be its most troubling, reflecting long-term trends towards discomfort with public, physical violence.

<sup>124</sup> Kathryn Preyer, *Penal Measures in the American Colonies: An Overview*, 26 AM. J. LEGAL HIST. 326, 342 (1982).

<sup>125</sup> *Id.* The act in 1752 passed and made "malicious wounding and maiming a felony without benefit of clergy," however, the measure in 1772 dealt with the same offense but failed to pass. *Id.*

<sup>126</sup> Preyer, *supra* note 103, at 81.

<sup>127</sup> Preyer notes that it is difficult to make definitive statements because the trial court records for much of this period were burned during the Civil War in 1865. *Id.* at 70.

long-term decrease in interpersonal violence in Western Europe that began by at least the seventeenth century.<sup>128</sup> For example, J.M. Beattie points to a long-term decrease in the homicide rate in England between 1660 and 1800.<sup>129</sup> Beattie links this change in the murder and manslaughter rates with broader changes in society that revealed a “growing antipathy toward cruelty and extreme physical violence.”<sup>130</sup> There is no study comparable in breadth or depth of colonial America.<sup>131</sup> However, if Beattie is correct that

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<sup>128</sup> BEATTIE, *supra*, note 14, at 111–12. See generally NORBERT ELIAS, *THE CIVILIZING PROCESS: SOCIOGENETIC AND PSYCHOGENETIC INVESTIGATIONS* (Eric Dunning, et al. ed., Edmund Jephcott trans., 2000); STEVEN PINKER, *THE BETTER ANGELS OF OUR NATURE: WHY VIOLENCE HAS DECLINED* (2012).

<sup>129</sup> BEATTIE, *supra* note 14, at 111–12. He argues that there was a reduction in the . . . number of deaths in quarrels, of murder in the furtherance of robbery, and of deliberate and planned killing. Men and women would seem to have become more controlled, less likely to strike out when annoyed or challenged, less likely to settle an argument or assert their will by recourse to a knife or their fists, a pistol, or a sword. . . . This supposes a developing civility, expressed perhaps in a more highly developed politeness of manner and a concern not to offend or to take offense, and an enlarged sensitivity toward some forms of cruelty and pain.

*Id.* He argues that this suggests that changes in sensibilities were not simply occurring at the level of elites but that it had trickled down to “at least the broad ranks of the artisans, tradesmen, and shopkeepers.” *Id.* at 112.

<sup>130</sup> *Id.* at 135.

One can see that on one level in the growing hostility toward violent sports, particularly blood sports like bull-baiting and throwing at cocks, and cruelty to animals in general. There are signs of that before 1750, but it was particularly strong in the last two decades of the eighteenth century and into the nineteenth. This was surely linked in turn with the more broadly developing sentiment antipathetic to cruelty of other kinds that helped to encourage opposition to the slave trade or support for prison reform or the abolition of capital punishment, all of which emerged toward the end of the century.

*Id.* at 135–136. He further connects this to changes in domestic and family relations, where acceptable methods of discipline and control within the family shifted.

These broadly changing ideas about violence, within the family and without, are reflected in stiffening penalties imposed by the courts after the middle of the eighteenth century for wife-beating and the abuse of children, and in the increasing willingness of the courts to establish clearer criminal responsibility in deaths caused by accidents and other manslaughter. Such charges proceeded not in response to legislation, but from a shift in attitude on the part of jurors and judges and from what was at bottom a growing hostility towards forms of physical violence that had been readily accepted a hundred years earlier.

*Id.* at 136. For another example of this type of argument, see generally PINKER, *supra* note 128.

<sup>131</sup> Linda Kealey notes that levels of personal violence were “fairly consistent,” in the second half of the eighteenth century in Massachusetts. Linda Kealey, *Patterns of Punishment: Massachusetts in the Eighteenth Century*, 30 *AM. J. LEGAL HIST.* 163, 169 (1986). Other sources indicate that in Massachusetts, the level of personal violence was always low. See, e.g., EDWIN POWERS, *CRIME AND PUNISHMENT IN EARLY MASSACHUSETTS 1620–1692, A DOCUMENTARY HISTORY* 400–23 (1966); David H. Flaherty, *Crime and Social Control in Provincial Massachusetts*, 24 *HIST. J.* 339, 342–43 (1981); Preyer, *supra* note

there was a long-term process of decreasing acceptance of interpersonal violence, then aspects of Jefferson's bill take on a slightly different cast. As Preyer notes, "[i]t is significant that in Jefferson's bill all penalties for offenses against the person were extremely severe—castration for rape, for example. Apparently the revisors believed that these crimes constituted a greater threat to the social fabric of the new Commonwealth than crimes against property."<sup>132</sup> These offenses in which individuals committed acts of violence against other people were seen as particularly troubling at a time when the long-term trend appears to have been towards a diminishing of precisely these types of violence. Thus, the apparently inhumane aspects of the bill that imposed harsh penalties in instances of interpersonal violence were a response to a perception that Virginia may have been falling behind modern society in its decreasing acceptance of acts of interpersonal violence.

A final modern aspect of the bill was its call for hard labor to replace capital punishment for most offenses.<sup>133</sup> The bill was accompanied by another one that provided for the creation of a penitentiary.<sup>134</sup> Although, as we will see, Massachusetts was about to start an experiment with incarceration, this bill would have led to the creation of the first specially constructed penitentiary in the colonies.<sup>135</sup> Indeed, Jefferson sent a model for this penitentiary from France to officials in Virginia.<sup>136</sup>

Although the bill did not come up for a vote during the Revolution, Jefferson was able to enact some of its provisions while he was governor of Virginia from June 1779 to June 1781.<sup>137</sup> During this time, he "pardoned felons convicted of capital crimes on condition that they work for a term of years on a variety of public works—generally the lead mines."<sup>138</sup> This practice was followed by subsequent governors "until 1785 when the Court of Appeals determined that conditions attached to pardons were

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124, at 342–43. See generally EDGAR J. MCMANUS, *LAW AND LIBERTY IN EARLY NEW ENGLAND: CRIMINAL JUSTICE AND DUE PROCESS, 1620–1692* (1993).

<sup>132</sup> Preyer, *supra*, note 103, at 68.

<sup>133</sup> 64. *A Bill for Proportioning Crimes and Punishments in Cases Heretofore Capital, 18 June 1779*, FOUNDERS ONLINE, <http://founders.archives.gov/documents/Jefferson/01-02-02-0132-0004-0064> (last visited Sept. 4, 2016).

<sup>134</sup> 68. *A Bill for the Employment, Government and Support of Malefactors Condemned to Labour for the Commonwealth, 18 June 1779*, FOUNDERS ONLINE, <http://founders.archives.gov/documents/Jefferson/01-02-02-0132-0004-0068> (last visited Sept. 4, 2016).

<sup>135</sup> See *id.*

<sup>136</sup> Preyer, *supra* note 103, at 78–79.

<sup>137</sup> *Id.* at 68.

<sup>138</sup> *Id.*

unconstitutional.”<sup>139</sup>

When the bill finally came up for a vote, Jefferson was in Paris as Minister to the French court.<sup>140</sup> In conveying news of the bill’s demise by one vote in 1787, Madison stated that “[o]ur old bloody code<sup>141</sup> is by this event fully restored.”<sup>142</sup> Virginia did achieve a revised criminal code with a marked reduction in capital crimes in 1796.<sup>143</sup>

In Jefferson’s proposed revised criminal code, we thus see the modern impulse towards reduction in capital codes, proportionality in sentencing, and a concern with reducing Virginia’s troubled history of interpersonal violence. At the same time, the response of Jefferson and his European interlocutors to the physical punishments called for in some of the provisions reveal changing attitudes towards punishments directly imposed on the body of the condemned.

## B. MASSACHUSETTS: REPUBLICANISM AND THE BLOODY CODE

While the example of Virginia reveals changing attitudes towards violence and physical punishments, the experiment in Massachusetts with an alternative to capital punishment demonstrates how those changes impacted the goals the Founders had for the new governments. They believed that a republican form of government would be distinguished from monarchical ones, in part, in the different forms of punishment that it embraced.<sup>144</sup> Extensive use of capital codes was seen as not only unenlightened, but also monarchical and un-republican.

While Virginia was debating an extensive revision to its criminal codes, which would have entailed embracing a new form of punishment in the form of a penitentiary, Massachusetts was embarking on a more modest yet similar reform of penal practice. In 1785, Massachusetts became the first state after independence to adopt incarceration in a prison as a potential

<sup>139</sup> *Id.* at 68–69.

<sup>140</sup> *Id.* at 69.

<sup>141</sup> See *infra* Part II.B for a discussion of the significance of the term “Bloody Code.”

<sup>142</sup> Preyer, *supra* note 103, at 69 (quoting Madison to Jefferson (Feb. 15, 1787)). Madison attributed the failure of the bill to a rage against horse stealers. *Id.*

<sup>143</sup> *Id.* at 76.

<sup>144</sup> HIRSCH, *supra* note 99, at 51; see also STEVEN WILF, LAW’S IMAGINED REPUBLIC: POPULAR POLITICS AND CRIMINAL JUSTICE IN REVOLUTIONARY AMERICA 138–64 (2010); MCLENNAN, *supra* note 99, at 18–23. Hirsch notes, however, that republicanism cut two ways because it simultaneously raised concerns regarding the fragility of that type of government and over the threat individualism and corruption posed to the new government. HIRSCH, *supra* note 99, at 51. But see MASUR, *supra* note 14, at 60 for an argument that the high crime rate merely heightened the desire for a reformed criminal code.

criminal penalty.<sup>145</sup> Castle Island, “a fortress guarding Boston harbor,” was appointed for this purpose and was to receive individuals sentenced throughout the state.<sup>146</sup> The Castle Island Act emerged out of a commission that was to consider revisions to the colonial law code more generally.<sup>147</sup> These types of commissions were common in the colonies during and following the Revolution (Jefferson’s bill was itself part of this movement).<sup>148</sup> Among other changes the commission introduced were more narrow definitions of certain capital crimes such as burglary, robbery, and arson, as well as a reduction in the number of capital offenses with time spent at hard labor being used as a substitute.<sup>149</sup> Within Castle Island, the prisoners “lived under military-like discipline,” were to be kept at “fatigue work” and wore matching uniforms.<sup>150</sup>

Attempts to explain why imprisonment arose as an alternative punishment in Massachusetts at this time demonstrate the complexity of finding causal explanations for penal reform. At the same time, an examination of the debates surrounding penal reform in general, and the need to find an alternative to the death penalty in particular, occurring both in Massachusetts and elsewhere in the colonies, demonstrates the relevance of those debates to the overall project of constructing republican governance in the new nation. References to Beccaria were most noteworthy for indicating a desire for penal reform, rather than the specific content of that reform.<sup>151</sup> Although other distinguished jurists such as William Blackstone and William Eden embraced his philosophies, none of them provided a theory of penal practice that could be adopted by the American states.<sup>152</sup> Instead, they focused on the problems of sanguinary or cruel criminal codes without indicating what a more enlightened code would look like.<sup>153</sup> Thus, while the ubiquitous references to Beccaria should then be taken as a measure of the perceived need for criminal law reform, rather than as a set of precepts for what form reformed punishment would take, references to that thinker did frequently entail a critique of the extensive use of capital punishment.

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<sup>145</sup> *Id.* at 11.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 47.

<sup>148</sup> *See id.*

<sup>149</sup> Linda Kealey, *Punishment at Hard Labor: Stephen Burroughs and the Castle Island Prison, 1785–1798*, 57 *NEW ENG. Q.* 249, 250–51 (1984).

<sup>150</sup> *Id.* at 251.

<sup>151</sup> HIRSCH, *supra* note 99, at 26.

<sup>152</sup> MCLENNAN, *supra* note 99, at 25.

<sup>153</sup> *Id.*



While Jefferson's bill proposed an overall reduction in capital crimes, there was nothing particularly in Beccaria's thought that suggested the alternative punishment that Jefferson's bill proposed: hard labor. Hard labor was a penalty that had been proposed at various times during the previous two centuries, both in England and in the colonies but never really implemented as a punishment for the more serious categories of crime.<sup>154</sup> "Workhouses" or "houses of correction" were constructed in England starting in the sixteenth century to address a perceived problem with vagrancy.<sup>155</sup> Their inhabitants were not those charged with more serious crime such as burglary, rather they have been described as: "[u]nruly apprentices, sturdy beggars, strumpets, vagrants and rogues."<sup>156</sup> The goal of the workhouse was to replace idleness with industry by forcing the vagrant to work.<sup>157</sup> Because there was this goal of reformation, "conscientious management of the institution became "essential" and in order to "protect the integrity of the workhouse's rehabilitative routine, authorities provided codes of regulations for its orderly government, which was monitored by the local justice of the peace."<sup>158</sup> Massachusetts, Pennsylvania, and New York all had workhouses by the early eighteenth century.<sup>159</sup> Throughout the seventeenth and eighteenth centuries, there were serious proposals in England and the colonies to introduce hard labor as a penalty for criminals.<sup>160</sup> For example, Massachusetts passed legislation in 1749 and 1750, prescribing hard labor in the state's workhouses for those convicted of extortion and counterfeiting.<sup>161</sup> A bill proposed in 1765

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<sup>154</sup> HIRSCH, *supra* note 99, at 28.

<sup>155</sup> *Id.* at 13–14.

<sup>156</sup> NEGLEY K. TEETERS, *THE CRADLE OF THE PENITENTIARY: THE WALNUT STREET JAIL AT PHILADELPHIA 1773–1835*, at 4 (1955).

<sup>157</sup> HIRSCH, *supra* note 99, at 14.

<sup>158</sup> *Id.* at 15. Among which were: "[u]nlike jail keepers, all workhouse officers were to be 'fitly qualified' for their posts. And to ensure that the rehabilitative routine was not threatened by disease, authorities mandated the first rudimentary hygienic precautions against the afflictions endemic to other carceral facilities." *Id.*

<sup>159</sup> *Id.* at 27. Rothman argues that the workhouses were not a significant aspect of colonial poor relief, though Hirsch argues persuasively against this interpretation. Compare DAVID J. ROTHMAN, *THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC 25–29* (1971), with HIRSCH, *supra* note 99, at 26–31.

<sup>160</sup> HIRSCH, *supra* note 99, at 16–17; see also BEATTIE, *supra*, note 14, at 492–500 for a discussion of proposals to use incarceration in houses of correction in early eighteenth-century England. Beattie argues that transportation ultimately displaced this experiment for much of the eighteenth century though the idea "re-emerged powerfully in the third quarter of the century at the heart of a new dominant penal ideology." *Id.* at 500. See *id.* at 520–24 for a proposal to change the punishment for felonies to confinement in hard labor at the dock yards.

<sup>161</sup> HIRSCH, *supra* note 99, at 28.

“would have introduced the punishment comprehensively.”<sup>162</sup>

Although Pennsylvania implemented hard labor in a house of correction under Penn’s Law, implemented in 1682, this was done away with in 1718, and little is known about the actual functioning of that law or its penal measures.<sup>163</sup> The first state to actually introduce hard labor as a penalty for serious crimes in the eighteenth century was Connecticut.<sup>164</sup> In 1773, the Connecticut General Assembly passed a resolution indicating their desire to find a facility “for the purpose of confining, securing and profitably employing such criminals as may be committed to them by any future law or laws of this Colony, in lieu of the infamous punishments in divers cases now appointed.”<sup>165</sup> A group of mines, known as the Simsbury copper mines, were purchased and secured for this purpose.<sup>166</sup> By the end of that year, individuals found guilty of five kinds of offenses: robbery, burglary, forgery, counterfeiting, and horse theft could be sentenced to the prison.<sup>167</sup> Prior to the creation of this prison, those guilty of these offenses would have been subjected to various forms of corporal punishment, including branding and removal of an ear (first-time burglary offenses) or execution (third-time burglary offenders).<sup>168</sup> The mines were closed in 1782 “for the duration of the hostilities with Britain.”<sup>169</sup> Although legislation was passed in 1783 to construct a more secure facility on the site, it was not until 1790 that Connecticut opened Newgate as a statewide prison.<sup>170</sup> As was seen above, Jefferson started a similar practice in Virginia while he was governor during the revolution, but it ended in

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<sup>162</sup> *Id.*

<sup>163</sup> ORLANDO LEWIS, *THE DEVELOPMENT OF AMERICAN PRISONS AND PRISON CUSTOMS, 1776–1845* 10 (1922); see also Herbert William Keith Fitzroy, *The Punishment of Crime in Provincial Pennsylvania*, 60 PA. MAG. HIST. & BIOGRAPHY 242 (1936); Lawrence Gipson, *Crime and Its Punishment in Provincial Pennsylvania: A Phase of the Social History of the Commonwealth*, 2 PA. HIST. 3 (1935); William Lloyd, Jr., *The Courts of Pennsylvania in the Eighteenth Century Prior to the Revolution*, 56 U. PA. L. REV. 28 (1908); Paul Lernack, *Peace Bonds and Criminal Justice in Colonial Philadelphia*, 100 PA. MAG. HIST. & BIOGRAPHY 173 (1976); Preyer, *supra* note 124, at 336; G.S. Rowe, *Black Offenders, Criminal Courts, and Philadelphia Society in the Late Eighteenth-Century*, 22 J. SOC. HIST. 685 (1989).

<sup>164</sup> HIRSCH, *supra* note 99, at 56; Alexis M. Durham III, *Newgate of Connecticut Origins and Early Days of an Early American Prison*, 6 JUST. Q. 89, 90 (1989).

<sup>165</sup> Durham, *supra* note 164, at 90–91 (quoting Public Records of the Colony of Connecticut May 1773, at 92–93).

<sup>166</sup> RICHARD H. PHELPS, *A HISTORY OF NEWGATE OF CONNECTICUT* 6, 92 (1860).

<sup>167</sup> Durham, *supra* note 164 at 90.

<sup>168</sup> *Id.* at 93.

<sup>169</sup> *Id.* at 101–03.

<sup>170</sup> HIRSCH, *supra* note 99, at 11 n.87; Durham, *supra* note 164, at 103.

1785.<sup>171</sup>

Hirsch argues that the workhouse model, and the ideology of reform through hard work that it embodied, provided the justifying language and form for the new Castle Island Act.<sup>172</sup> But while the workhouse provided a model for the structure of the new penalties, there is still the question of why it was adopted at this time rather than when proposals had been put forward earlier in the century. There are two related answers to this question. The first is that colonial society underwent substantial changes in the second half of the eighteenth century, and the traditional punishments that had worked in the close-knit colonial towns were breaking down as the population both grew and became more mobile.<sup>173</sup> The second is that the old punishments were no longer seen as effective, in part because of changing attitudes towards the relationship between punishment and the state.<sup>174</sup> Hirsch argues that “by the 1780s . . . tracts proposing hard labor had taken on an alarmist tone, and the emphasis had shifted to a delineation of the *demerits* of the prevailing body of sanctions.”<sup>175</sup>

The traditional punishments of the admonition,<sup>176</sup> fines (with sale into service being their alternative) and public punishments such as whipping, all depended on a “communal pattern of life.”<sup>177</sup> The punishments reflected the fact of embeddedness within the community: “[t]he usual penalties . . . did not sever a criminal’s ties with society,” and the penalty with the longest duration (sale into servitude<sup>178</sup>) had a “probable effect . . . to

<sup>171</sup> See *infra* Part II.A.

<sup>172</sup> HIRSCH, *supra* note 99, at 31.

<sup>173</sup> *Id.* at 35–36.

<sup>174</sup> This is true whether that changing relationship was defined by republicanism, HIRSCH, *supra* note 99, at 50–53, or by liberalism, MICHAEL MERANZE, LABORATORIES OF VIRTUE: PUNISHMENT, REVOLUTION, AND AUTHORITY IN PHILADELPHIA, 1760–1835 at 12–16 (1996).

<sup>175</sup> *Id.* at 37. Masur argues that “Americans in post-Revolutionary America believed that criminal activity raged out of control. . . . This social perception of crime on the loose intensified the desire to restructure the criminal justice system.” MASUR, *supra* note 14, at 59.

<sup>176</sup> This involved an appearance by the offender in “open court for a formal admonition by the magistrate, a public confession of wrongdoing, and a pronouncement of sentence, wholly or partially suspended to symbolize forgiveness.” HIRSCH, *supra* note 99, at 4.

<sup>177</sup> *Id.* at 4. For a description of colonial penalties, see MCMANUS, *supra* note 131, at 164–79, 200–10; POWERS, *supra* note 131, at 163–320; Flaherty, *supra* note 131, at 349–52; Kealey, *supra* note 131, at 171.

<sup>178</sup> Preyer, *supra* note 124, at 343. Individuals were sold into servitude when they were unable to pay the fine that was the primary penalty. *Id.* Because property offenses typically involved triple restitution, a fine in those cases frequently resulted in the offender being sold into servitude in order to pay off the fine. *Id.* The incidence of sale into servitude increased in the 1730s and 1740s, with those in the 1740s receiving comparatively longer terms of

integrate [the convicted] more fully into society by reorienting him toward normal social contacts.”<sup>179</sup> In the second half of the eighteenth century, however, the population of the state became increasingly transient and individuals charged with crimes were no longer necessarily integrated members of the community.<sup>180</sup> As a result, the various penalties that made up the colonial penal code came to be seen as ineffective.<sup>181</sup> Sale into servitude all but stopped, presumably because people were unwilling to take on a stranger, particularly a criminal stranger, to labor for them.<sup>182</sup> Admonition fell away as crimes were increasingly committed by strangers to the community and a culture of privacy developed that made established members of the community reluctant to discuss their offenses in public.<sup>183</sup> Finally, with regard to public punishments such as whipping or time spent in the stocks, while the goal had previously been to reintegrate the offender into the community “when the offender lacked community ties, this formula no longer applied. In such cases, the purpose of these sanctions shifted to expulsion, by alerting townspeople to the culprits’ infamy.”<sup>184</sup> This resulted in public punishments administered to strangers that created mutual antipathy rather than reintegrating the offender into the community.<sup>185</sup> One response was to increase the recourse to capital punishment.<sup>186</sup> But this posed a dilemma, as described by one newspaper: “[a]lthough ‘[a]t present, our laws are no more a check to simple robbery [than] they are to getting money honestly,’ the alternative of ‘tak[ing] a man’s life for every trifling theft, as is done in England, is a disgrace to a civilized nation; humanity recoils from the idea.’”<sup>187</sup>

Herein lay the heart of the problem: in America following the Revolution, traditional sanctions not only came into question because of the changing nature of society, but because they were seen as a corrupt inheritance from England.<sup>188</sup> During this time, Americans began to refer to England’s code as “bloody,” “unit[ing] England’s capital statutes into a

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service. *Id.*

<sup>179</sup> WILLIAM NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760–1830*, at 40 (1975).

<sup>180</sup> HIRSCH, *supra* note 99, at 35–36.

<sup>181</sup> *Id.* at 36–39.

<sup>182</sup> *Id.* at 37–38.

<sup>183</sup> *Id.* at 38.

<sup>184</sup> *Id.* at 40.

<sup>185</sup> HIRSCH, *supra* note 99, at 39.

<sup>186</sup> *Id.* at 40.

<sup>187</sup> *Id.* at 41 (quoting MASS. CENTINEL, Oct. 16, 1784, at 1).

<sup>188</sup> *Id.* at 47–48; MCLENNAN, *supra* note 99, at 19–23.

common ‘code’ with bloodshed as its centerpiece.”<sup>189</sup> In part, this was a result of the very large number of offenses that could result in the death penalty (by 1776 there were nearly 200).<sup>190</sup> There were frequent references in the newspapers to the number of executions in England: “No other country in the civilized world, it was often stated, had as many executions as England.”<sup>191</sup> Benjamin Rush estimated that from 1688 (the year of the Glorious Revolution) to 1787, there had been 70,000 executions in England.<sup>192</sup> Recent evidence suggests that his estimate was far from correct.<sup>193</sup> 2,000 is a more accurate number, but the fact that he believed the exaggerated number was accurate underscores perceptions in America of England’s excessive reliance on the death penalty.<sup>194</sup>

Criticism of this “Bloody Code” became ubiquitous in the 1780s and 90s, and the extensive capital codes were connected with physical, public punishments in a category of penalties referred to as “sanguinary.”<sup>195</sup> “Critics argued that capital and related sanguinary punishments were inherently despotic and immoral in nature,” while “[b]loody and ‘excessive’ spectacles of punishment . . . were the native weapons of kings and despots.”<sup>196</sup> While not all of the Founders opposed capital punishment in all circumstances, they did all associate excessive use of that penalty with monarchical forms of government.<sup>197</sup>

This relationship between the perception of England as “Bloody” and the perceived need for penal reform in the colonies can be seen in a number

<sup>189</sup> WILF, *supra* note 144, at 138.

<sup>190</sup> *Id.* at 139.

<sup>191</sup> *Id.* at 142.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> WILF, *supra* note 144, at 142.

<sup>195</sup> *Id.* at 138–54; MCLENNAN, *supra* note 99, at 18–19.

<sup>196</sup> MCLENNAN, *supra* note 99, at 19.

<sup>197</sup> *Id.* Benjamin Rush (Philadelphia physician and signer of the Declaration of Independence and the Constitution) and William Bradford (Attorney General under President Washington) were perhaps the most famous proponents of a complete abolition of the death penalty at the time, though others indicated support for the cause. BESSLER, *supra* note 1, at 66–96. Rothman makes a similar point:

Armed with patriotic fervor, sharing a repugnance for things British and a new familiarity with and faith in Enlightenment doctrines, they posited that the origins and persistence of deviant behavior would be found in the nature of the colonial criminal codes. Established in the days of oppression and ignorance, the laws reflected British insistence on severe and cruel punishment.

ROTHMAN, *supra* note 159, at 59. As does Michael Meranze: “Revolutionary-era reformers forcefully redefined exemplary punishments as cruel and excessive. They linked the practice of capital and corporal punishments to the archaisms of tyranny and monarchy.” MERANZE, *supra* note 174, at 68.

of state constitutions calling for a reduction in so-called “sanguinary” laws. For example, Maryland’s constitution, adopted on November 11, 1776, was the first to do so with this provision: “[t]hat sanguinary laws ought to be avoided, as far as is consistent with the safety of the State: and no law, to inflict cruel and unusual pains and penalties, ought to be made in any case, or at any time hereafter.”<sup>198</sup> Similarly, South Carolina’s constitution of 1778 included a provision: “[t]hat the penal Laws, as heretofore used, shall be reformed, and Punishments made, in some Cases less sanguinary, and, in general, more proportionate to the crime.”<sup>199</sup> Pennsylvania (1776) and Vermont (1777) had identical provisions that provided for “punishing by hard labour” in order to “make sanguinary punishments less necessary.”<sup>200</sup>

It was thus in marked contrast to the portrayal of England as “Bloody” that the colonists sought to reform their own criminal laws and these reforms “served as outward legitimating representations of the American Revolution” and “[b]y signaling differences with English criminal law, states were announcing the special character of justice in fledgling American republics.”<sup>201</sup> “A repulsion from the gallows rather than any faith in the penitentiary spurred the late-eighteenth century construction. . . . Incarceration seemed more humane than hanging and less brutal than whipping.”<sup>202</sup> There were thus two arguments with regard to the criminal laws and punishment that were being made. First, there was “a coherent American critique of what the revolutionaries argued were ‘monarchical’ penal laws and practices,” which led to “a positive republican theory of crime, penal law, and penal practice.”<sup>203</sup> The critique was of a capital code that was seen to be excessive because it included everything from murder to

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<sup>198</sup> MD. DECL. OF RIGHTS of 1776, art. XIV.

<sup>199</sup> S.C. CONST. of 1778, art. XL.

<sup>200</sup> PA. CONST. of 1776, art. II, § XXIX; VT. CONST. of 1777, art. II, § XXXV; *see also* PA. CONST. of 1776, art. II, § XXXVIII (providing in part that “[t]he penal laws as heretofore used shall be reformed by the legislature of this state, as soon as may be, and punishments made in some cases less sanguinary”).

<sup>201</sup> WILF, *supra* note 144, at 146, 148. The focus here is on attempts to use a reformed criminal law as one marker of the difference between a republican form of government and a monarchical one. This is not to suggest that similar calls for reform were not also occurring in England. Michael Ignatieff traces the ideological beginnings of the penitentiary to this period. *See* IGNATIEFF, *supra* note 102, at 44–79. Although V.A.C. Gatrell argues that English elites were committed to the Bloody Code up until that code became completely dismantled in the 1830s, Simon Devereaux has recently argued that there were leading statesmen who were seeking alternatives to capital punishment. *Compare* GATRELL, *supra* note 123, at 20, *with* Simon Devereaux, *Inexperienced Humanitarians? William Wilberforce, William Pitt, and the Execution Crisis of the 1780s*, 33 *LAW & HIST. REV.* 839, 842 (2015).

<sup>202</sup> ROTHMAN, *supra* note 159, at 62.

<sup>203</sup> MCLENNAN, *supra* note 99, at 19.

petty theft and physical punishments that were directed at the body of the condemned.<sup>204</sup> Criminal law took on political meaning as punishment was evaluated as being appropriate (or not) to a *republican* form of government.<sup>205</sup> “A new understanding of criminal law emerged around the time of the American Revolution. Criminal justice was seen as a mirror that reflected truths about the surrounding political and social structure,” and “[p]enal reform created an outward representation of the new republic, playing much the same role as health care or literacy programs for twentieth-century revolutions. The political authority of the nascent republic turned in part upon its remaking of criminal law.”<sup>206</sup> Thus, by rejecting England’s excessive capital code and reliance on punishments directed at the body of the offender, the American colonies were signaling to themselves and the rest of the world what it meant to be republican.<sup>207</sup>

While the rhetoric of the period saw the question of a revised criminal code as central to the creation of a new type of government, the actual changes wrought by the Castle Island Act should not be overstated. Under the new law, hard labor was an option, but not a requirement, and it did not immediately replace corporal punishment.<sup>208</sup> Although a statute was proposed and passed by the Massachusetts House of Representatives in 1785 making hard labor an alternative in all cases where corporal punishment was an option, it failed to pass the Senate and corporal punishment was not officially ended until 1826 (although it had fallen out of use in the first decade of the nineteenth century).<sup>209</sup> Moreover, the experiment with incarceration as an alternative penalty was short lived. Castle Island was sold to the federal government in 1789 to be used for

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<sup>204</sup> *Id.*

<sup>205</sup> “Many publicists distinguished a republic from a monarchy not only by its liberal political objectives but also by its lack of a strong state coercive apparatus.” HIRSCH, *supra* note 99, at 51. The term “publicist” refers to anyone publishing a political tract. *See* BAILYN, *supra* note 9, at 1–21, for discussion of the political pamphlets that were the source of “much of the most important and characteristic writing of the American Revolution.” *Id.* at 2.

<sup>206</sup> WILF, *supra* note 144, at 9–10.

<sup>207</sup> In this the American colonists were engaged in a form of self-definition that has a long and varied history. Guy Geltner has recently argued that the depiction of past or simply other regimes as relying on brutal physical punishments has been extensively used as a form of self-definition and a means of claiming cultural superiority. He suggests that this is true even though corporal punishment continues in use within the new regime, thus rejecting arguments that there has been a long-term trend towards decreasing reliance on corporal punishment. *See generally* GUY GELTNER, *FLOGGING OTHERS: CORPORAL PUNISHMENT AND CULTURAL IDENTITY FROM ANTIQUITY TO THE PRESENT* (2015).

<sup>208</sup> HIRSCH, *supra* note 99, at 57.

<sup>209</sup> *Id.* at 58.

military purposes.<sup>210</sup> Massachusetts's next prison, in Charlestown, did not open until 1799.<sup>211</sup> Still, Castle Island was the "first American carceral institution to achieve international celebrity."<sup>212</sup> Within a year, there was "a pilot project in the city of New York and . . . a statewide program in Pennsylvania."<sup>213</sup>

### C. PENNSYLVANIA: CIVILIZATION AND CHANGING SENSIBILITIES

Rather than follow the lead of Massachusetts and embrace hard labor within an institutional setting, Pennsylvania first experimented with hard labor conducted in public.<sup>214</sup> The rapid breakdown of this experiment led to the adoption in 1790 of hard labor within the Walnut Street Prison, which became famous throughout the new nation and internationally as other jurisdictions sought examples of more humane punishments.<sup>215</sup> The reasons why hard labor in public ultimately broke down provide the final link in explaining the content and depth of post-revolutionary penal reform. The example of Pennsylvania thus demonstrates that the focus of penal reform was not simply on reducing the infliction of capital punishment, it was also ultimately focused on reducing the public infliction of physical chastisements.

The discussion of Massachusetts above reveals that in the post-Revolutionary period, Americans defined their republican form of government, and the reformed penal practice it would entail, in opposition to England's Bloody Code. It was not just as a contrast to England's "sanguinary" practices that this definition of republican criminal practice was being defined, however. Frequently in the accounts, references to bloody codes and sanguinary practices gave way to descriptions of such penal practices as being savage or barbaric.<sup>216</sup> These terms connect penal reform not just with the creation of a republican government, but also a more civilized one. This point becomes more apparent in debates over public punishments in Pennsylvania in the late 1780s.<sup>217</sup>

References to British penal practices as being "savage" or "barbaric"

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<sup>210</sup> *Id.* at 11.

<sup>211</sup> *Id.* at 11.

<sup>212</sup> *Id.* at xii.

<sup>213</sup> *Id.* at 11.

<sup>214</sup> MERANZE, *supra* note 174, at 55–86.

<sup>215</sup> Rex A. Skidmore, *Penological Pioneering in the Walnut Street Jail, 1789-1799*, 39 J. CRIM. L. & CRIMINOLOGY 167, 167–68 (1948).

<sup>216</sup> MERANZE, *supra* note 174, at 70–71.

<sup>217</sup> *See, e.g., id.* at 70–71 (discussing characterizations of capital and corporal punishments as "unnecessary legacies from unenlightened, barbaric times").



were almost as common as references to their Bloody Code.<sup>218</sup> For example, a charge given in 1793 to a Philadelphia grand jury stated: “In England . . . their books are crowded with penal statutes which appear to have resulted from the barbarous dictates of revenge.”<sup>219</sup> Harsh punishments with little purpose aside from their harshness were seen by commentators as exemplary of less developed states: “Amongst unpolished nations, and during the prevalence of savage manners punishment is the only means known for preserving public order. . . . When one proves ineffectual, he thinks of another more rigorous.”<sup>220</sup> England’s system of punishment was described as having been “‘copied from the Goth and the Vandal.’”<sup>221</sup> Rebecca McLennan argues, “[c]onnections were drawn between British ‘savagery’ on the battlefield and the frequency with which the courts in England reputedly condemned Englishmen, found guilty of crimes grand and petty, to swing from the ‘hanging tree.’”<sup>222</sup> As an example, Thomas Paine described British war acts as “contrary to the practice of all nations but savages,” and later asked “[w]hat sort of men must Englishmen be . . . ? The history of the most savage Indians does not produce instances exactly of this kind.”<sup>223</sup> To the Americans, extensive

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<sup>218</sup> MCLENNAN, *supra* note 99, at 19; MERANZE, *supra* note 174, at 70–71. This equation between unreformed criminal law and barbarism continued well past this initial focus on England. When arguing for the need to reform the criminal law in Virginia in 1796 a state legislator referred to the old code as “barbaric.” WILF, *supra* note 144, at 140–41; Preyer, *supra* note 103, at 77.

<sup>219</sup> See, e.g., WILF, *supra* note 144, at 140.

<sup>220</sup> MERANZE, *supra* note 174, at 70–71 (quoting *An Essay on Capital Punishment*, in FREEMEN’S JOURNAL, Sept. 7, 1785).

<sup>221</sup> HIRSCH, *supra* note 99, at 48. Masur also found critiques of British “barbaric behavior.” He argues that “many Americans believed in ‘the barbarity of our oppressors’ and were horrified at repeated examples of ‘inhuman and worse than savage cruelty’ by the British.” MASUR, *supra* note 14, at 55. He also quotes Abigail Adams referring to the British as “our Barbarous foes” who “let loose the infernal savages.” *Id.* In April 1777, “a committee appointed by Congress reported its findings on the conduct of British soldiers and found,” *inter alia*, “savage butchery.” *Id.* at 56. Referring to the execution of a militia member captured by loyalists, Thomas Paine wrote “‘as far as our knowledge goes there is not a more detestable character, nor a meaner or more barbarous enemy than the present British one. . . . [The execution] is an original in the history of civilized barbarians, and is truly British.’” *Id.* Washington referred to the same execution as “‘the most wanton, unprecedented and unhuman Murder that ever disgraced the arms of a civilized people.’” *Id.* at 57. In response to a proposal that the American troops execute one of their own prisoners of war in response, Alexander Hamilton wrote that “so solemn and deliberate a sacrifice of the innocent for the guilty must be condemned on the present received notions of humanity, and encourage an opinion that we are in a certain degree in a state of [f] barbarism.” *Id.* at 58.

<sup>222</sup> MCLENNAN, *supra* note 99, at 19 (quoting MASUR, *supra* note 14, at 19).

<sup>223</sup> *Id.* at n.12 (quoting *A Supernumerary Crisis, To Sir Guy Carleton*, in CRISIS PAPERS, Philadelphia, May 31, 1782).

use of capital punishment was “central to the organization of English society” and “England was portrayed in much the same way as Blackstone depicted primitive societies.”<sup>224</sup> For example, one American essayist referred to the executed as “human sacrifices” that were “yearly offered up.”<sup>225</sup>

This discussion provides important context for understanding the content of the reformed republican criminal law that was being embraced throughout the colonies. By the late eighteenth century, the word “civilization” was beginning to take root.<sup>226</sup> The first use of this term has been traced to Victor Riqueti Mirabeau in his work *L'Ami des hommes*.<sup>227</sup> The term, as used by Mirabeau, “referred . . . to a group of people who were polished, refined, and mannered, as well as virtuous in their social existence.”<sup>228</sup> Within a short period of time, “the designation had swept over Europe and become commonplace in Enlightenment thought” and it “formed part of the idea of progress and became the third phase in conjectural history, signaling the last stage in the movement of humanity from savagery to barbarism and then to civilization.”<sup>229</sup> While civilization represented a particular conception of evolutionary, progressive change, its content—that is to say, what it meant to be a civilized state—focused on defining what the bonds or connections were between members of society.<sup>230</sup> For some, this meant a focus on manners or mores “as lying at the center of sociability,” while elsewhere emerging at the same time is a focus on the “public sphere,” the “social,” “social contract,” etc., all of which are “part of an effort to describe, understand, and project new forms

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<sup>224</sup> WILF, *supra* note 144, at 141.

<sup>225</sup> *Id.* It should be noted that this does not mean that objectively the American colonists were less brutal than the British. Masur argues that “Americans . . . viewed themselves as the virtuous and humane citizens of a new nation,” while portraying the British as “debased and barbarous.” MASUR, *supra* note 14, at 57. At the same time, “[i]n actuality, patriots executed offenders as frequently and as barbarously as their enemies.” *Id.* at 58. Thus, it is not about a factual difference between the British and the Americans, rather it was about making a claim to cultural superiority on the part of the Americans. See generally GELTNER, *supra* note 207.

<sup>226</sup> BRUCE MAZLISH, CIVILIZATION AND ITS CONTENTS 5 (2004).

<sup>227</sup> *Id.* We know that at least Jefferson and Madison were familiar with this work. See *From Thomas Jefferson to James Madison, with a List of Books 1 September 1785*, FOUNDERS ONLINE, <http://founders.archives.gov/documents/Jefferson/01-08-02-0360> (last visited Sept. 4, 2016) (including Mirabeau’s *L'Ami des hommes* among a list of books Jefferson had purchased for and was sending to Madison).

<sup>228</sup> MAZLISH, *supra* note 226, at 7.

<sup>229</sup> *Id.* at 7–8.

<sup>230</sup> *Id.* at 8–11. See generally ELIAS, *supra* note 128.

of social bonding.”<sup>231</sup>

Gordon Wood has pointed to this particular problem following the American Revolution: if the previous methods of holding society together (largely hierarchical in which everyone knew their place) were falling apart in a new republican government that assumed equality between all men, then what were to be the bonds that held society together?<sup>232</sup> The Founders believed in their ability to shape a new society.<sup>233</sup> Part of how they set about achieving that new society depended on their belief that “people were not born to be what they might become.”<sup>234</sup> Lockean theory argued that people were shaped by their sensations and the mind, according to John Adams, “could be cultivated like a garden, with barbarous weeds eliminated and enlightened fruits raised, ‘the savages destroyed, . . . the civil People increased.’”<sup>235</sup> This meant the “pushing back of darkness and what was called Gothic barbarism,” which took place on many fronts.<sup>236</sup> Ultimately, all of these changes were connected to the concept of civilization.<sup>237</sup> While civilization as a concept has been linked to changes in the material prosperity of a people:

It was above all a matter of personal and social morality, of the ways in which men and women treated each other, their children, their dependents, even their animals. Such enlightened morality lay at the heart of republicanism. Americans thought themselves more civilized and humane than the British precisely because they had adopted republican governments, which as Benjamin Rush said, were “peaceful and benevolent forms of government” requiring “mild and benevolent principles.” With the Revolution they sought to express these mild and benevolent principles in a variety of reforms—most notably perhaps in their new systems of criminal punishment.<sup>238</sup>

Herein lies the heart of the matter: the changes sought to create a more virtuous citizenry—one that was required for civilization to flourish—would be pursued in no small part by implementing a reformed criminal code.

But what change in the criminal code would lead to this transformation

<sup>231</sup> MAZLISH, *supra* note 226, at 10–12.

<sup>232</sup> GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 189 (1991). Elsewhere he describes that a struggle “to find new attachments befitting a republican people . . . they sought enlightened connections to hold their new popular societies together.” *Id.* at ix.

<sup>233</sup> *Id.* at 190.

<sup>234</sup> *Id.*

<sup>235</sup> *Id.* (quoting John Adams to Jonathan Sewell (Feb. 1760)).

<sup>236</sup> *Id.* at 191.

<sup>237</sup> *Id.* at 192.

<sup>238</sup> WOOD, *supra* note 232, at 192.

in the citizenry? To understand this problem, we need to more closely examine Pennsylvania's experiment with public labor.<sup>239</sup> The changes wrought in Pennsylvania's penal practice were the most far reaching of the penal reforms attempted in the 1780s, and they foreshadowed much of the changes that other states would pursue in the 1790s. The first indication of the sweeping changes to come can be found in Pennsylvania's first state constitution, adopted in 1776. It provided that:

To deter more effectually from the commission of crimes, by continued visible punishments of long duration, and to make sanguinary punishments less necessary; houses ought to be provided for punishing by hard labour, those who shall be convicted of crimes not capital; wherein the criminals shall be employed for the benefit of the public, or for reparation of injuries done to private persons. And all persons at proper times shall be admitted to see the prisoners at their labour.<sup>240</sup>

It was not until 1786 that legislation was passed to give effect to this provision. In that year an act was passed that called for "continued hard labor, publicly and disgracefully imposed . . . in streets of cities and towns, and upon the highways of the open country and other public works."<sup>241</sup> The act also reduced the number of capital crimes (robbery, burglary and sodomy were removed) and replaced whipping and other public punishments with hard labor.<sup>242</sup> By replacing whipping and some capital punishments, the system of public labor "greatly reduced reliance on sanguinary penalties" at the same time that it "would turn convicts into constant reminders of the penalties of vice."<sup>243</sup> Thus, Pennsylvania sought to retain the benefits of public punishment and the visibility of the condemned minus the problematic aspects of physical punishments aimed at the body of the convict.<sup>244</sup>

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<sup>239</sup> Other states experimented with public labor, for example a public labor act passed in Rhode Island. MCLENNAN, *supra*, note 99, at 33 n.63. New York also started a pilot project in New York City in 1785. HIRSCH, *supra*, note 99, at 25. Under the project, hard labor was to occur in an existing workhouse, though apparently, it was in reality performed on public works in the city. *Id.* Incarceration at hard labor was not expanded statewide in New York until 1796. *Id.* at 11 n.87.

<sup>240</sup> PA. CONST. of 1776, §39. Vermont's Constitution, adopted in 1777, contained an almost identical provision. VT. CONST. of 1777, art. II, § XXXV.

<sup>241</sup> Thorsten Sellin, *Philadelphia Prisons of the Eighteenth Century*, 43 TRANS. AM. PHIL. SOC'Y 326, 327 (1953); MERANZE, *supra* note 174, at 21–22.

<sup>242</sup> MERANZE, *supra* note 174, at 79.

<sup>243</sup> *Id.* at 55.

<sup>244</sup> Merenze, like Hirsch, attributes the driving force for penal reform to rising fears of criminality, even while the ideology behind that reform was expressed in terms of "enlightened" moderation. *Id.* at 67. To acknowledge that there were forces other than the purely ideological that helped push forward penal reform is not to diminish the significance of the ideological. As David Garland argues, penal form is always over determined and

From the beginning, the program of public labor was beset by problems. The prisoners wore a ball and chain while they went about their work, and sometimes used this to injure passersby.<sup>245</sup> Their cloths were specially designed to bring attention, described as: “‘A parti-colored scheme. . . . The roundabout would have sleeves of different colors, as for example, red and green, black and white, or blue and yellow. The legs of the pantaloons were also of different colors.’”<sup>246</sup> There were complaints that the prisoners engaged in theft while at their public labor, and escapes were frequent.<sup>247</sup>

Aside from the complaints regarding the problems of public safety and maintaining the prisoners at hard labor, a deeper complaint was made by Dr. Benjamin Rush. Rush was a signer of both the Declaration of Independence and the Constitution.<sup>248</sup> A prominent member of Philadelphia Society, he took a particular interest in penal reform.<sup>249</sup> Rush presented a paper at the home of Benjamin Franklin in 1787 criticizing public punishments in general.<sup>250</sup> In it he argued that they “end to make bad men worse, and to increase crimes, by their influence upon society . . . it is always connected with infamy, it destroys in the criminal the sense of shame which is one of the strongest outposts of virtue.”<sup>251</sup> He concluded by arguing that “‘I cannot help entertaining the hope that the time is not very far distant when the gallows, the pillory, the stocks, the whipping post and the wheelbarrow (the usual engines of public punishments) will be connected with the history of the rack, and the stake, as marks of barbarity of ages and countries.’”<sup>252</sup>

At the same time that this experiment was occurring in Philadelphia, the Constitutional Convention was convening there to draft a new Constitution.<sup>253</sup> The Walnut Street Jail was located just across the street from the state house where the Convention was held: “Outside the walls of

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there will generally be multiple explanations for a given outcome. GARLAND, *supra* note 16, at 280–81 (1990).

<sup>245</sup> TEETERS, *supra* note 156, at 27.

<sup>246</sup> *Id.* at 28 (citation omitted).

<sup>247</sup> *Id.*

<sup>248</sup> BESSLER, *supra* note 1, at 53.

<sup>249</sup> *Id.* at 66.

<sup>250</sup> *Id.* at 69.

<sup>251</sup> BENJAMIN RUSH, AN ENQUIRY INTO THE EFFECTS OF PUBLIC PUNISHMENTS UPON CRIMINALS AND UPON SOCIETY 4 (1787) (reprinted in *Reform of Criminal Law in Pennsylvania* (Morton Horowitz & Stanley Katz eds., 1972)).

<sup>252</sup> *Id.* at 18.

<sup>253</sup> See generally CATHERINE DRINKER BOWEN, *MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION, MAY TO SEPTEMBER 1787* (1986).

the state house, the prisoners at the Walnut Street Jail—in close proximity to the Convention proceedings, and cursing anyone who ignored them—thrust long poles with cloth caps on the ends through the prison's barred windows, seeking alms.”<sup>254</sup>

Pennsylvania's negative experience with public labor had an impact throughout the colonies. For example, “[a]lthough he had earlier proposed public hard labor for prisoners, Jefferson wrote that by 1786 the Pennsylvania experience with the wheelbarrow laws had changed his mind.”<sup>255</sup> Later in his autobiography, he recounted: “Exhibited as a public spectacle, with shaved heads and mean clothing, working on the high roads, produced in the criminals such a prostration of character, such an abandonment of self-respect, as, instead of reforming, plunged them into the most desperate and hardened depravity of morals and character.”<sup>256</sup>

This same breakdown in public punishments could be seen in other states. For example, in Massachusetts, “[a] culture of privacy” led to the breakdown of admonition as a penalty as offenders were no longer willing to provide public confessions of wrongdoing.<sup>257</sup> Similarly, public punishments began to involve scenes of disorder: “Such sessions also became increasingly tumultuous affairs, in which offenders were liable to be pelted with refuse or worse. Onlookers appear to have seized the occasions of public punishment to vent their frustration over crime, in the process creating scenes of chaos that would have been unheard of when they shared with offenders a sense of belonging to the same community.”<sup>258</sup>

In Rush's writings, we see a changing reaction to the site of physical suffering while in these scenes of public disorder surrounding public inflictions of punishment, we see officials' increasing concern that the public was not reacting in the “correct” way to the punishments.<sup>259</sup> Meranze refers to the problem posed by public punishments as “mimetic corruption,” meaning that the message that officials intended to convey failed.<sup>260</sup> The response of Dr. Rush and other Founders to sites of suffering suggest an even deeper problem, however. The problem posed by public

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<sup>254</sup> *Id.* at 114. See also Simon P. Newman & Billy G. Smith, *Incarcerated Innocents: Inmates, Conditions, and Survival Strategies in Philadelphia's Almshouse and Jail*, in *BURIED LIVES: INCARCERATION IN EARLY AMERICA* 60, 60 (Michele Lise Tarter et al. eds., 2012).

<sup>255</sup> PESTRITTO, *supra* note 114115, at 123.

<sup>256</sup> THOMAS JEFFERSON, *AUTOBIOGRAPHY OF THOMAS JEFFERSON, 1743–1790*, at 72 (1821).

<sup>257</sup> HIRSCH, *supra* note 99, at 38.

<sup>258</sup> *Id.* at 40.

<sup>259</sup> See generally RUSH, *supra* note 251.

<sup>260</sup> MERANZE, *supra* note 174, at 87–88.

punishments and what officials sought to control was the emotional connection to the convicted criminal.<sup>261</sup> Too much identification and the system of justice was subverted, but too little identification and the social bonds of moral sense that hold the community together would be threatened as well.

This change in the individual emotional reaction to violence, the body and physical pain has been termed “sensibilities.”<sup>262</sup> We already saw some influence of these changing sensibilities in the reaction to Jefferson’s Crime Bill (and suggested another influence in the evident concern the bill demonstrated with the problem of interpersonal violence).<sup>263</sup> Here, it is evident again in the reactions of elites themselves to scenes of suffering, in their reaction to the problems of crowds, and their behavior during public punishments. The public punishment is seen as brutalizing the sensibilities of those that observe it. There is some debate among historians about the influence of changing sensibilities on penal form, but whether they drive the change or follow it, it is undeniable that over time attitudes have shifted and that which was once acceptable (whipping in public, for example) comes to be seen as abhorrent.<sup>264</sup> Thus, it was not only to minimize the bloody or sanguinary effects of England’s criminal code that Americans sought reform, they also sought to reduce the public infliction of pain and suffering on convicts.<sup>265</sup>

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<sup>261</sup> MASUR, *supra* note 14, at 79; RUSH, *supra* note 251, at 7–8.

<sup>262</sup> GARLAND, *supra* note 16, at 223. Summarized by David Garland, the argument is that:

[T]he sight of violence, pain, or physical suffering has become highly disturbing and distasteful to modern sensibilities. Consequently it is minimized wherever possible, though ironically this “suppression” of violence is actually premised upon the build-up of a state capacity for violence so great that it discourages unauthorized violence on the part of others. And where violence does continue to be used it is usually removed from the public arena, and sanitized or disguised in various ways, often becoming the monopoly of specialist groups such as the army, the police, or the prison staff which conduct themselves in an impersonal, professional manner, avoiding the emotional intensity which such behavior threatens to arouse.

*Id.*

<sup>263</sup> See *supra*, Part II.A.

<sup>264</sup> McGowen, *supra* note 123, at 6–7; see also discussion, *supra* note 123.

<sup>265</sup> MASUR, *supra* note 14, at 76–81; MERANZE, *supra* note 174, at 126–27. Two authors studying this process in Europe connect these changes in sensibility to larger changes in the structure of government, argue that “these developments are closely related to the rise of a network of states and the changes they underwent. Notably, the disappearance of public executions is related to the transition from the early modern state, whether absolutist or patrician, to the nation-state.” SPIERENBERG, *supra* note 19, at x. See generally ELIAS, *supra* note 128. Changes in sensibility have been used to explain the elimination of public executions during the nineteenth century in America. MASUR, *supra* note 14, at 3. Numerous authors have connected changes in sensibility to the American Revolution and

Because of these “scandals” involving the wheelbarrow men, the Philadelphia Society for Alleviating the Miseries of Public Prisons (“Philadelphia Prison Society”), founded in 1787, called for the abolition of public labor and asked that “‘more *private* or even *solitary* labor’ be substituted.”<sup>266</sup> The Philadelphia Prison Society included some of the most prominent members of Philadelphia, including Benjamin Rush.<sup>267</sup> It fostered an international exchange of ideas over penal form, corresponding with John Howard, a noted English penal reformer, and embracing many of his ideas.<sup>268</sup> In 1788, the Supreme Executive Council “sent a message to the legislature, signed by Benjamin Franklin, recommending that changes be made in the penal law ‘calculated to render punishment a means of reformation, and the labour of criminals of profit to the state. Late experiments in Europe have demonstrated that those advantages are only to be obtained by temperance, and solitude with labour.’”<sup>269</sup>

The result of the petition from the Philadelphia Prison Society was a reformed criminal law in 1789 that transformed the Walnut Street Jail into a prison.<sup>270</sup> During its first ten years, the program implemented at the Walnut Street Prison became famous throughout the colonies and internationally.

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development of the American state. See generally ANDREW BURSTEIN, *SENTIMENTAL DEMOCRACY* (1999); SARAH KNOTT, *SENSIBILITY AND THE AMERICAN REVOLUTION* (2009); STEPHEN MENNELL, *THE AMERICAN CIVILIZING PROCESS* (2007).

<sup>266</sup> Sellin, *supra* note 241, at 328. The Philadelphia Society arose out of an early Society, the Philadelphia Society for Assisting Distressed Prisoners, started in 1776 to provide assistance to prisoners in the Walnut Street Jail. TEETERS, *supra* note 156, at 19–20. For more on this society, see generally Negley K. Teeters, *The Philadelphia Society for the Relief of Distressed Prisoners 1776–1777*, 24 PRISON J. 452 (1944). For more on the Philadelphia Prison Society, see generally NEGLEY K. TEETERS, *THEY WERE IN PRISON: A HISTORY OF THE PENNSYLVANIA PRISON SOCIETY 1787–1937* (1937).

<sup>267</sup> TEETERS, *supra* note 266, at 4.

<sup>268</sup> HIRSCH, *supra* note 99, at 49 (explaining that this correspondence started prior to the Revolution); IGNATIEFF, *supra* note 102, at 64. Howard’s work, *State of Prisons*, was published in 1777. TEETERS, *supra* note 156, at 31. In it, Howard “advocated the establishment of penitentiary-houses in which each convict would be assigned his own cell, or room, where he would work, sleep and eat.” *Id.* As this example reveals, although in the period following the American Revolution there was a tendency to criticize all things British, “their Anglophobic diatribes were aimed at capital statutes and at public punishments that they also regarded as inexpedient. Those diatribes notwithstanding, American criminologists remained eager to learn about English *carceral* initiatives, and they maintained an active correspondence with their English counterparts, including John Howard.” HIRSCH, *supra* note 99, at 49. Indeed, the same Whig radicals whose thought helped shape the ideology of the American Revolution were engaged in an attack on penal methods at home as well. IGNATIEFF, *supra* note 102201, at 63–64; BAILYN, *supra* note 9, at 40–41.

<sup>269</sup> Sellin, *supra* note 241, at 328 (quoting *Minutes of the Twelfth General Assembly of the Commonwealth of Pennsylvania, 1787–1788*, at 102).

<sup>270</sup> Skidmore, *supra* note 215, at 168.



“During the years 1790 to 1835, many international dignitaries visited this prison, made careful observations and established modified replicas of it in their various countries.”<sup>271</sup> For example, Robert Turnbull of South Carolina visited and published an extensive description of the prison in 1796.<sup>272</sup> One historian of the Walnut Street Jail described it as a “mecca for students of penal reform from various parts of the country as well as from Europe.”<sup>273</sup> This included an enthusiastic account of the prison written and published by Robert Turnball of South Carolina.<sup>274</sup> The Philadelphia prison was held out as “one of the most striking emblems, of progress in refinement.”<sup>275</sup>

Although the Walnut Street Jail began operating as a prison in 1790, it was not until 1794 that Pennsylvania engaged in a more extensive revision of its criminal law.<sup>276</sup> An act passed that year which “set up the popular definition of murder in the first degree and abolished the death penalty for all other crimes.”<sup>277</sup> In 1796, Virginia followed Pennsylvania in an extensive revision of its capital code.<sup>278</sup> At this time, the Virginian governor wrote to Dr. Caspar Wistar of Philadelphia “requesting information about Pennsylvania’s experience as well as a copy of the plan for the Pennsylvania penitentiary.”<sup>279</sup> In his request, he referred to “this humane law.”<sup>280</sup> One of the sponsors of the bill described the existing criminal code as “unjust, impolitic, and barbarous.”<sup>281</sup> In 1796, there was also a pilot project prison in Rhode Island and New York that abolished corporal punishment.<sup>282</sup> In 1798, a prison opened in Kentucky and in 1799,

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<sup>271</sup> *Id.* at 167.

<sup>272</sup> Sellin, *supra* note 241, at 330.

<sup>273</sup> TEETERS, *supra* note 156, at 1. Later he argues that “[n]ews of the sweeping reforms spread abroad. British and French writers commented favorably on the new era of prison discipline and visitors to Philadelphia from other states wrote of the amazing results that flowed from the new administration.” *Id.* at 36.

<sup>274</sup> *Id.* at 43.

<sup>275</sup> *Id.* at 44 (quoting from Philadelphia Monthly Magazine, Vol. I, p. 101 (Feb. 1798)).

<sup>276</sup> Sellin, *supra* note 241, at 328.

<sup>277</sup> *Id.* at 328–29.

<sup>278</sup> Preyer, *supra* note 103, at 76.

<sup>279</sup> *Id.* at 77.

<sup>280</sup> *Id.* at 77 n.89.

<sup>281</sup> *Id.* at 77 (quoting GEORGE KEITH TAYLOR, SUBSTANCE OF A SPEECH DELIVERED IN THE HOUSE OF DELEGATES OF VIRGINIA, ON THE BILL TO AMEND THE PENAL LAWS OF THIS COMMONWEALTH 7, 10–11 (1796). “He charged his colleagues with passively submitting to a system ‘calculated to awe and crush the humble vassals of monarchy,’ and urged them to revise the criminal law ‘to comport with the principles of our government.’” *Id.* at 78 (citation omitted).

<sup>282</sup> HIRSCH, *supra* note 99, at 11 n.87; MCLENNAN, *supra* note 99, at 37.

one opened in New Jersey.<sup>283</sup> Thus, the experiment in Philadelphia started a process of significant changes in American penal form, as public inflictions of physical suffering gave way to punishments that occurred entirely behind walls and outside of public view.

#### D. THE SIGNIFICANCE OF LATE-EIGHTEENTH CENTURY PENAL REFORM

We can draw the following conclusions from these early attempts at penal reform. First, penal reform was seen as an important component of the creation of a republican form of government. In this, the colonists were without a doubt working within a comparative framework. They wanted a government, and with it a criminal code, that was unlike that found in England and other countries in Europe. Beyond that, however, they distinguished themselves from regimes that they saw as even less enlightened. Terms like 'barbaric' or 'savage' were used often and had real content. In discussions of penal codes, references were made to Goth and Vandals who were among the first 'barbarians,' so the term could clearly be understood historically, but there were also contemporary examples for writers to draw on, in the form of Indians, Turks, Africans, or the Native Americans on their own borders. The perception Americans had of all of these groups, was that they used physical punishments as a means of terrorizing the population.<sup>284</sup> It was in contrast to these examples that the early Americans sought to reform their penal codes.

Second, the primary concern with regard to the desire to distinguish themselves from the English was England's so-called "Bloody Code." The sheer number of people executed in England was seen as indicative of a government that relied on terror to govern its population.<sup>285</sup> Numbers alone were not the only concern, however. Also disturbing to the colonists was the extreme disproportionality that the code embraced. In referring to the Bloody Code, it was common to point out that in England, those executed were not just murderers, but petty thieves as well. Moreover, the Bloody Code was seen to be ineffectual because it seemed to be arbitrarily applied. Although the criminal statutes called for death for a wide range of offenses, not all of those who committed those offenses were executed because of the use of benefit of the clergy, pardons, and jury nullification.<sup>286</sup>

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<sup>283</sup> HIRSCH, *supra* note 99, at 11 n.87. However, Preyer dates the New Jersey prison to 1797. Preyer, *supra* note 103, at 78 n.92.

<sup>284</sup> See discussion *supra* pp. 35–38.

<sup>285</sup> See discussion *supra* p. 32.

<sup>286</sup> See discussion *supra* pp. 31–34.

Third, beyond the death penalty, public, physical punishments short of death were becoming increasingly problematic. Shifts in penal form were responding in part, to long-term decreases in interpersonal violence. This was a trend that spanned Europe and the colonies and extended into the twentieth century. Duels, whippings, assaults—these forms of physical violence were becoming decreasingly socially acceptable, which in turn impacted the emotional response that people had to the site of public infliction of pain as part of a criminal punishment. Hard labor was introduced as an alternative not only to the death penalty, but also to other public corporal punishments, such as whipping.<sup>287</sup> In part, this arose from a breakdown in the communicative event that was public punishment. Authorities were increasingly concerned with the disorder that attended public punishments. The spectators at such events no longer seemed to be edified by such practices. Indeed, there was a concern that far from learning respect for the law they were being brutalized or made worse by it.<sup>288</sup> It is here that we see a deeper concern being made manifest—to those in positions of authority the appropriate emotion that one should feel upon seeing the physical suffering of another human was sympathy. But if this were the case, then public physical punishments would either elicit sympathy for the criminal, or, even worse, deaden the ability of the spectators to feel sympathy because they would be themselves brutalized by the public scenes of violence that punishment entailed. Both outcomes were seen as problematic.

Finally, although reform of the criminal law was seen as an important component of the process of fashioning a republican style of government, there were no clear precedents for this reform and all attempts at the local level were still in an experimental stage. Although leading figures at the time the Bill of Rights was adopted knew that penal practice was changing, and they embraced and pushed for that change, they did not know what it would ultimately look like. They knew what they did not want it to look like (England's Bloody Code, the barbaric or savage practices of the less civilized), but they did not know exactly what a more enlightened practice would be. Private work at hard labor was starting to be embraced, and would soon become the dominant mechanism of punishment, but the development of this form of punishment was only beginning at the time the Bill of Rights was adopted.

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<sup>287</sup> See discussion *supra* pp. 24–26.

<sup>288</sup> See discussion *supra* pp. 39–42.

### III. REFRAMING CONTEMPORARY EIGHTH AMENDMENT STRUGGLES

This Part examines how the revised history provided in Part II sheds light on current debates over the meaning and application of the Eighth Amendment. The argument here is that even those aspects of Eighth Amendment jurisprudence that are treated as ahistorical or are not grounded in the type of historical argumentation seen in Part I have a history. The use of concepts such as civilization, progress and evolution, and proportionality have a history rooted in the late eighteenth century. Examining them in light of their historical context helps us to understand their content better and, for those scholars and justices who rely on originalist arguments, provides a justification for their continued relevance in Eighth Amendment interpretation. The examination in this Part demonstrates that the Eighth Amendment was one node in a broader history of penal reform and change. The Eighth Amendment was not an end point in this process. Rather, it was part and parcel of those broader changes. The question of penal change, how and why it occurs, did not end in the eighteenth century. Rather, it is an ongoing process that the Eighth Amendment attempted to embrace instead of a set list of punishments it sought to eliminate. Terms that were central to that debate in the eighteenth century continue to have salience and recur in discussions of the Eighth Amendment. In order to fully understand and engage the Supreme Court's Eighth Amendment jurisprudence, it is important to understand these key concepts that arose in the eighteenth century and continued to develop and change along their own trajectory over the following century. This section starts by examining the concept of civilization and informs the interpretation of the Eighth Amendment context. It then looks at the idea of progress or evolution and how this concept is deployed in Eighth Amendment jurisprudence. The final section examines the tension between the concepts of proportionality and cruelty and explores the extent to which this occurs because of the limited view of past "cruel" punishments employed so often by the Supreme Court. It is beyond the scope of this Article to provide an exhaustive examination of these concepts. The intention is merely to underscore how the revised history of late eighteenth-century penal change I provide can illuminate some of the persistent struggles and debates over the Eighth Amendment, its meaning, and its application.

#### A. CIVILIZATION

As discussed in Part II, the word "civilization" and the many meanings associated with it began to gain currency at the end of the eighteenth

century.<sup>289</sup> Within this conception, penal practice at the time of the Founding was very much understood in international comparative terms. Officials understood what a reformed penal code would entail, in part by examining England's "Bloody Code." Similarly, the various proposals for reform took place in the context of an international dialogue concerning what enlightened or civilized punishment practices were.<sup>290</sup> Thus, rather than being a recent development, the understanding of cruelty or humanity in international comparative terms goes back to the founding period.

For the next one hundred fifty years, civilization proved to be an enduring signifier of who Americans thought they were.<sup>291</sup> It served this role in part by describing and distancing who they thought they were not.<sup>292</sup> The sense that only people less civilized than the United States would engage in particular forms of punishment permeates Eighth Amendment analysis.<sup>293</sup> For example, a fact often overlooked in discussions of *Weems* is that it involved the United States' administration of the Philippine Islands.<sup>294</sup> The majority opinion, written by Justice McKenna, made numerous statements distancing the majority from a system of punishment designed by a foreign country and implemented in a foreign land.<sup>295</sup> For example: "[i]t must be confessed that [the criminal code], and the sentence in this case, excite wonder in minds accustomed to a more considerate adaptation of punishment to the degree of crime."<sup>296</sup> Later, a similar sentiment is conveyed that someone coming from the perspective of the American criminal justice system would be astonished by the Philippine penal code: "[s]uch penalties for such offenses amaze those who have formed their conception of the relation of a state to even its offending citizens from the practice of the American commonwealths."<sup>297</sup> While the opinion is most frequently examined for its argument that penalties must be proportionate to the offense,<sup>298</sup> it is important not to overlook the deliberate

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<sup>289</sup> See *supra* Part II.C.

<sup>290</sup> See *supra* Part II.B & C.

<sup>291</sup> For an exhaustive examination of the use of the term "civilization" in American history, see generally CHARLES A. BEARD, MARY R. BEARD, 4 THE AMERICAN SPIRIT: A STUDY OF THE IDEA OF CIVILIZATION IN THE UNITED STATES (1942).

<sup>292</sup> MAZLISH, *supra* note 226, at 24–27.

<sup>293</sup> See, e.g., *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988); *Furman v. Georgia*, 408 U.S. 238, 255 (1972) (per curiam) (Douglas, J., concurring); *Trop v. Dulles*, 356 U.S. 88, 99 (1958); *Weems v. United States*, 217 U.S. 349, 351 (1910).

<sup>294</sup> *Weems*, 217 U.S. at 351.

<sup>295</sup> *Id.* at 365, 367.

<sup>296</sup> *Id.* at 365.

<sup>297</sup> *Id.* at 366–67.

<sup>298</sup> See, e.g., William W. Berry, III, *Promulgating Proportionality*, 46 GA. L. REV. 69,

distancing these arguments establish between the penal code of the Philippine Islands and that of the United States. The seemingly disproportionate sentence is shocking to Justice McKenna precisely because it is out of tune with American practice. It “excite[s] wonder” in and “amaze[s] those who have formed their conception of the relation of a state to even its offending citizens from the practice of the American commonwealths.”<sup>299</sup> Later in the opinion, Justice McKenna declined to closely examine state court decisions interpreting the meaning of cruel and unusual punishment because:

It may be said of all of them that there was not such challenge to the import and consequence of the inhibition of cruel and unusual punishments as the law under consideration presents. It has no fellow in American legislation. Let us remember that it has come to us from a government of a different form and genius from ours.<sup>300</sup>

Later in that same paragraph, he referred to it as having an “alien source.”<sup>301</sup> In Justice McKenna’s opinion, the American system served as the yardstick against which the Philippine system was found very much wanting.<sup>302</sup>

*Trop v. Dulles*<sup>303</sup> presented a different set of issues, yet also focused on the relationship between the penalty in question (the denationalization of individuals dishonorably discharged from the military for desertion) and the practice in civilized countries.<sup>304</sup> Chief Justice Warren, writing for the majority, stated that “[t]he question is whether this penalty subjects the individual to a fate forbidden by the principle of civilized treatment guaranteed by the Eighth Amendment.”<sup>305</sup> Later, he makes the same argument, assuming that in general, American practice would be considered “enlightened”: “[w]hile the State has the power to punish, the Amendment

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108–10 (2011); Schwartz & Wishingrad, *supra* note 1, at 796. *But see* Margaret Raymond, “No Fellow in American Legislation”: *Weems v. United States and the Doctrine of Proportionality*, 30 VT. L. REV. 251, 253–54 (2006) (arguing that the fact that *Weems* was analyzing a punishment imposed in the Philippines explains why the proportionality analysis applied subsequently by the Supreme Court has been so muddled).

<sup>299</sup> *Weems*, 217 U.S. at 365, 366–67.

<sup>300</sup> *Id.* at 377.

<sup>301</sup> *Id.*

<sup>302</sup> Justice White’s dissent also refers to practice in “any civilized country” and uses the foreignness of the Philippines as a justification for not judging the penal law of that country. *Id.* at 384 (White, J., dissenting) (“[A]s these considerations involve the necessity for a familiarity with local conditions in the Philippine Islands which I do not possess, such want of knowledge at once additionally admonishes me of the wrong to arise from forming a judgment upon insufficient data, or without a knowledge of the subject-matter upon which the judgment is to be exerted.”). *Id.*

<sup>303</sup> 356 U.S. 86 (1958).

<sup>304</sup> *Id.* at 99.

<sup>305</sup> *Id.* at 99.

stands to assure that this power be exercised within the limits of civilized standards. . . . 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.”<sup>306</sup> The problem for Chief Justice Warren is that the penalty in question is not civilized: “[h]e may be subject to banishment, a fate universally decried by civilized people” and the Chief Justice knows this because: “[t]he civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime.”<sup>307</sup> Justice Frankfurter, in dissent, used the same framework of analysis, making factual distinctions rather than analytical ones, between the two opinions: “[m]any civilized nations impose loss of citizenship for indulgence in designated prohibited activities.”<sup>308</sup>

A similar distinction between the practice in civilized countries and that believed to occur elsewhere can be seen in Justice Douglas’s concurrence in *Furman*, when he made a reference to ancient Hindu law, to draw an analogy to the discriminatory nature of the American death penalty: “a Brahman was exempt from capital punishment, and under that law, ‘[g]enerally, in the law books, punishment increased in severity as social status diminished.’ We have, I fear, taken in practice the same position . . . .”<sup>309</sup> Here, Justice Douglas is establishing the contours of civilized practice by pointing to a jurisdiction that he assumes the reader will understand to be less civilized, and not desirable to emulate.

As these examples demonstrate, the import of the word “civilization” is that it can only be understood in an international comparative framework. It embraces more than the nation-state of the United States. This is confirmed in a number of cases: Justice Marshall concurring in *Furman* argued that “[o]nly in a free society could right triumph in difficult times, and could civilization record its magnificent advancement. . . . We achieve ‘a major milestone in the long road up from barbarism’ and join the approximately 70 other jurisdictions in the world which celebrate their regard for civilization and humanity by shunning capital punishment.”<sup>310</sup>

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<sup>306</sup> *Id.* at 100.

<sup>307</sup> *Id.* at 102.

<sup>308</sup> *Id.* at 126 (Frankfurter, J., dissenting).

<sup>309</sup> *Furman v. Georgia*, 408 U.S. 238, 255 (1972) (per curiam) (Douglas, J., concurring) (citations omitted); see also *Hutto v. Finney*, 437 U.S. 678, 681 (1978) (describing the district court’s finding that the conditions in Arkansas prisons were “a dark and evil world completely alien to the free world” to be “amply supported”).

<sup>310</sup> *Furman*, 408 U.S. at 371 (citations omitted). He also argues for civilization being a process of evolution by arguing: “While England may, in retrospect, look particularly brutal, Blackstone points out that England was fairly civilized when compared to the rest of Europe.” *Id.* at 334.

Similarly, the Court in *Thompson v. Oklahoma*<sup>311</sup> explicitly connected the concept of civilization to practices in other countries:

The conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense 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.<sup>312</sup>

The invocation of the terms civilized or civilization in the Eighth Amendment context appears, however, to have fallen out of favor. Although Justice Kennedy recently evoked the concept in his majority opinion in *Brown v. Plata*<sup>313</sup>; prior to that opinion, the last justice to reference civilized standards in an Eighth Amendment context was Justice O'Connor in *Roper v. Simmons*.<sup>314</sup> She referred to "those sanctions . . . that civilized society had already repudiated in 1791" and later argued that the Eighth Amendment draws its meaning "directly from the maturing values of civilized society."<sup>315</sup> What is noteworthy about these references is that unlike in *Furman* or *Thompson*, there is no explicit link made between civilized society and other jurisdictions, even though elsewhere, Justice O'Connor used statistics drawn from international practice to justify the outcome in the case.<sup>316</sup> Thus, while previously the term civilization was evoked to refer to a group of nations all having achieved the same level of development, here the concept is reduced to a particular way of characterizing or understanding our own society.

There is not the space in this Article to resolve precisely why this concept may have fallen out of favor. I simply note that while the term "civilization" may have fallen into disfavor in the twenty-first century, the idea that the practices in comparably situated countries have relevance for appraising American punishment has not. There are numerous examples of the Court's (albeit controversial) reliance on international precedent in determining the content of evolving standards of decency: *Graham v.*

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<sup>311</sup> 487 U.S. 815 (1988).

<sup>312</sup> *Id.* at 830. A similar argument is made by Justice Brennan, dissenting in *Stanford v. Kentucky*, 492 U.S. 361, 384 (1989) (Brennan, J., dissenting) ("The views of organizations with expertise in relevant fields and the choices of governments elsewhere in the world also merit our attention as indicators whether a punishment is acceptable in a civilized society.").

<sup>313</sup> 131 S. Ct. 1910, 1928 (2011) ("A prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society.").

<sup>314</sup> 543 U.S. 551, 589, 605 (2005) (O'Connor, J., dissenting).

<sup>315</sup> *Id.* at 589, 605.

<sup>316</sup> *Id.* at 604.



Florida,<sup>317</sup> *Roper v. Simmons*,<sup>318</sup> a footnote in *Atkins v. Virginia*,<sup>319</sup> *Enmund v. Florida*,<sup>320</sup> and *Coker v. Georgia*.<sup>321</sup> While sometimes the argument is made in purely numerical terms (such as the argument in *Coker* that of sixty nations surveyed only three retained the death penalty for rape<sup>322</sup>), or is merely a generalized reference to the “other nations who share our Anglo-American heritage”<sup>323</sup> or simply “Western Europe,”<sup>324</sup> the Court sometimes points specifically to those countries that have not abolished the death penalty as a means of indicating who Americans should not want to emulate. For example, in dissent in *Stanford*, Justice Brennan listed the other countries in the world that have executed juveniles under eighteen: “Pakistan, Bangladesh, Rwanda, and Barbados.”<sup>325</sup> Similarly, in *Roper* and *Graham*, the majority pointed to the fact that Article 37(a) of the United Nations Convention on the Rights of the Child has been ratified by every nation except the United States and Somalia.<sup>326</sup> The implication is that

<sup>317</sup> 130 S. Ct. 2011, 2033 (2010) (noting “support for our conclusion in the fact that, in continuing to impose life without parole sentences on juveniles who did not commit homicide, the United States adheres to a sentencing practice rejected the world over”).

<sup>318</sup> 543 U.S. 551, 575–76 (2005) (arguing that “[o]ur determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty”).

<sup>319</sup> 536 U.S. 304, 317 n.21 (2002) (pointing to the fact that “[w]ithin the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved”).

<sup>320</sup> 458 U.S. 782, 796 n.22 (1982) (finding it is “worth noting that the doctrine of felony murder has been abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe”).

<sup>321</sup> 433 U.S. 584, 596 n.10 (1977) (stating that it is “not irrelevant here that out of 60 major nations in the world surveyed in 1965, only 3 retained the death penalty for rape where death did not ensue”); see, e.g., Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109 (2005); Joan L. Larsen, *Importing Constitutional Norms from a “Wider Civilization”*: Lawrence and the Rehnquist Court’s Use of Foreign and International Law in Domestic Constitutional Interpretation, 65 OHIO ST. L. J. 1283 (2004). For a fuller discussion of the use of international precedent, see also *Agora: The United States Constitution and International Law*, 98 AM. J. INT’L L. (Lori Fisler Damrosch & Bernard Oxman eds., 2004).

<sup>322</sup> 433 U.S. at 596 n.10; see also *Furman v. Georgia*, 408 U.S. 238, 371 (1972) (Marshall, J., concurring) (noting seventy countries that have abolished the death penalty).

<sup>323</sup> *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988).

<sup>324</sup> *Id.*; see also *Enmund*, 458 U.S. at 796 n.22 (referring to Commonwealth countries and continental Europe).

<sup>325</sup> *Stanford v. Kentucky*, 492 U.S. 361, 389 (1989) (Brennan, J., dissenting).

<sup>326</sup> *Graham v. Florida*, 130 S. Ct. 2011, 2034 (2010); *Roper v. Simmons*, 543 U.S. 551, 576 (2005). This article prohibits the imposition of either the death penalty or “life imprisonment without possibility of release . . . for offences committed by persons below eighteen years of age.” *Graham*, 130 S. Ct. at 2034.

these are not countries that the United States would want to be compared to. They are, in other words, not civilized. Thus, the Court has moved from explicit references to barbaric versus civilized practices to comparing those countries that have embraced particular practices versus those who have rejected them. This leaves implicit the judgment that those practices and the societies that embrace them are not civilized.

These international comparisons largely occur in the context of death penalty cases. With the exception of juvenile life-imprisonment without the possibility of parole, they have not made their way into the imprisonment cases, even though such a comparison could be made, with regard to length of sentences, types of crimes so punished, and conditions of confinement.<sup>327</sup> In part this could be a result of the complexity of the analysis that would be required to conduct a comparative study with regard to sentence length.<sup>328</sup> It could also be a result of the terms by which sentences of imprisonment are evaluated by the Court (as involving questions of proportionality rather than cruelty). The history of Founding thought outlined in Part II, however, as well as the Court's continued embrace of the relevance of international comparison suggests that this would be a fruitful line of argument for advocates. The Founders had a narrative of what it meant to be a republic that embraced a distinction between the "despotic" monarchical practices of England and the more rational approach advocated for the republic. Their definition of a republic entailed a government that valued its citizens and avoided subjecting them to a "Bloody Code." A similar narrative could be drawn today in discussions of the United States' extreme departure from international practice in terms of our use of imprisonment. Terms such as civilization may no longer be common but there continues to be a sense that the United States aspires to treat its citizens better than may be the case under harsher forms of government (as seen in the negative comparisons to practices in Pakistan, Bangladesh, Rwanda, Barbados, and Somalia). The

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<sup>327</sup> See, e.g., James P. Lynch & William Alex Pridemore, *Crime in International Perspective*, in CRIME AND PUBLIC POLICY 5 (James Q. Wilson & Joan Petersilia eds. 2011); Marc Mauer, *The International Use of Incarceration*, 75 PRISON J. 113 (1995). But see James Lynch, *A Cross-National Comparison of the Length of Custodial Sentences for Serious Crimes*, 10 JUST. Q. 639 (1993) (finding that when crime rates are controlled for, the "time served in the United States for violent crimes is similar to that in other industrialized democracies").

<sup>328</sup> See, e.g., Gordon C. Barclay, *The Comparability of Data on Convictions and Sanctions: Are International Comparisons Possible?*, 8 EUROPEAN J. CRIM. POL. & RESEARCH 13 (2000) (examining the various complications involved in comparing sentencing data among European nations); Warren Young & Mark Brown, *Cross-national Comparisons of Imprisonment*, 17 CRIME & JUST. 1 (1993) (discussing techniques for creating meaningful cross-national comparisons of imprisonment).

significance of these comparisons, first to the practice among civilized countries and then simply among the international community, is in part that they can be traced back to the Founding belief that civilization and America's development along the continuum from barbaric to savage to civilized required a reformed penal practice, one that was less cruel and more rational than that found in the "old world."

## B. PROGRESS AND EVOLUTION

The concept of civilization is closely linked to the concept of progress or evolution and was seen as a state achieved after savagery or barbarism.<sup>329</sup> The idea of progress or evolution is deeply imbedded in the Court's Eighth Amendment jurisprudence. *Trop* contained the now oft repeated maxim: "The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."<sup>330</sup> There are numerous references in the early cases to this evolution, such as Justice Stewart's in *Robinson v. California*,<sup>331</sup> who argued 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 venereal disease."<sup>332</sup> Justice Blackmun made reference to this idea of evolution in his dissent in *Furman*, stating that the majority decision could be seen to be "the compassionate decision for a maturing society" or that "we are moving down the road toward human decency," or "that we are less

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<sup>329</sup> See, e.g., MENNELL, *supra* note 265, at 26–28 (citing Jefferson's use of "civilization" frequently in conjunction with "other symptoms of progress"). For example:

Let a philosophic observer commence a journey from the savages of the Rocky Mountains, eastwardly towards our seacoast. These he would observe in the earliest stage of association living under no law but that of nature, subsisting and covering themselves with the flesh and skins of wild beasts. He would next find those on our frontiers in the pastoral state, raising domestic animals to supply the defects of hunting. Then succeed our own semi-barbarous citizens, the pioneers of the advance of civilization, and so in his progress he would meet the gradual shades of improving man until he would reach his, as yet, most improved state in our seaport towns. This, in fact, is equivalent to a survey, in time, of the progress of many from the infancy of creation to the present day. I am eighty-one years of age; born where I now live, in the first range of mountains in the interior of our country. And I have observed this march of civilization advancing from the seacoast, passing over us like a cloud of light, increasing our knowledge and improving our condition, insomuch as that we are at this time more advanced in civilization here than the seaports were when I was a boy. And where this progress will stop no one can say. Barbarism has, in the meantime, been receding before the steady step of amelioration; and will in time, I trust, disappear from the earth.

*Id.* at 27 (quoting JEFFERSON, *supra* note 66, at 75).

<sup>330</sup> 356 U.S. 86, 101 (1958).

<sup>331</sup> 370 U.S. 660 (1962).

<sup>332</sup> *Id.* at 666 (emphasis added).

barbaric than we were.”<sup>333</sup> So pervasive is the concept of progress that Justice Powell, also dissenting in *Furman*, declared: “It is, however, within the historic process of constitutional adjudication to challenge the imposition of the death penalty in some barbaric manner.”<sup>334</sup> He then went on to delineate changing sensibilities with regard to penal practice: “Neither the Congress nor any state legislature would today tolerate pillorying, branding, or cropping or nailing of the ears—punishments that were in existence during our colonial era. . . . Similarly, there may well be a process of evolving attitude with respect to the application of the death sentence for particular crimes.”<sup>335</sup> Thus, although Powell did not think that evolving standards had progressed to the point of opposing any sentence of death, he did not disagree with the notion that sensibilities could and do change.

Even while concepts of progress and evolution pervade the Eighth Amendment cases, there has been a significant shift in how both scholars and the justices think of penal reform and progress. For over a century and a half following the Founding, the story of penal reform was told as one of progressive humanitarianism.<sup>336</sup> Starting with revisionist historians in the 1970s,<sup>337</sup> however, that narrative of progress and change has increasingly come into question. It should be noted that the argument made in Part II is in marked contrast to how the history of the prison has been told since the 1970s.<sup>338</sup> Starting with the work of David Rothman in the United States,

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<sup>333</sup> *Furman v. Georgia*, 408 U.S. 238, 410 (1972) (Blackmun, J., dissenting). The fact that he is dissenting does not mean that he does not believe in progress. For example, his argument can also be seen in his argument that the Court’s decision might require mandatory death sentences: “[t]his approach, it seems to me, encourages legislation that is regressive and of an antique mold, for it eliminates the element of mercy in the imposition of punishment. I thought we had passed beyond that point in our criminology long ago.” *Id.* at 413.

<sup>334</sup> *Id.* at 420 (Powell, J., dissenting).

<sup>335</sup> *Id.* at 430.

<sup>336</sup> See generally Michael Ignatieff, *State, Civil Society, and Total Institutions: A Critique of Recent Social Histories of Punishment*, in *SOCIAL CONTROL AND THE STATE* (Stanley Cohen & Andrew Scull eds., 1983).

<sup>337</sup> See generally FOUCAULT, *supra* note 81; IGNATIEFF, *supra*, note 102201; ROTHMAN, *supra* note 159.

<sup>338</sup> For a critique of these historical debates, see Preyer, *supra* note 100, at 251.

Recent revisionist scholarship has tended to minimize the reformist impulse of the eighteenth century, attributing change instead to economic factors alone, or to the necessity for social control of the populace by ruling groups, or to the relationship between the origins of the modern prison and the formation of the modern state. Such interpretations have offered healthy correctives to earlier models that explained change *solely* in terms of the ideas of humanitarian reformers divorced from the social context in which historical change inevitably takes place. Yet, does the social context have no room for the examination of changed modes of thinking, of perceiving reality? No room for examining the role of those who convey that alteration of

and Michel Foucault in France, contemporary historians have focused on the prison as a development unique to the nineteenth century.<sup>339</sup> Foucault's account of a sharp contrast between pre-modern penalties, with his graphic description of a man being drawn and quartered, and modern, disciplinary penalties, is the most well-known of these revisionist accounts.<sup>340</sup> Both Foucault and Rothman emphasize the internal arrangements of the penitentiary as its distinguishing characteristic.<sup>341</sup> The discussion in Part II reveals that these accounts oversimplify how and when penal change occurs and rely upon a misleading dichotomy between "modern" and "pre-modern" penalties. Only by recognizing the significant changes in penal form that were already occurring at the end of the eighteenth century, as well as how those changes played into the larger narrative of the place of penal change within the creation of the American republic, can we begin to grasp the tenuous basis of any purported distinction between the modern and pre-modern.

It is not just that historians began to call into question the narrative of progressive humanitarianism embraced by penal reformers, however. David Garland points to a "pervasive sense of failure, fuelled 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>342</sup> This "sense of failure," meant that "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>343</sup> Thus, the progressive narrative of penal reform was attacked by historians at the same time that the efficacy of the criminal justice system came under attack. Within this new crime control culture, there was a marked decline in belief in progress.

As with the concept of civilization, the Supreme Court has failed to embrace a notion of evolution or progress in Eighth Amendment prison cases. In part, this could be a result of how the narrative of penal progress has typically unfolded, with the prison standing in contrast to past, clearly cruel, punishments. On its face, that narrative leaves little room for an

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sensibility that in itself becomes an historical artifact, even though less subject to empirical quantitative analysis than other data?

*Id.*

<sup>339</sup> See generally FOUCAULT, *supra* note 81; ROTHMAN, *supra* note 159.

<sup>340</sup> FOUCAULT, *supra* note 81, at 3–7.

<sup>341</sup> *Id.* at 6–31; ROTHMAN, *supra* note 159, at 79–108.

<sup>342</sup> DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 62 (2002).

<sup>343</sup> *Id.* at 107.

understanding of progressive prison reform. This might also be attributed to the changing culture of control, in which there is no longer a faith that the state can or should implement a prison regime that accomplishes anything beyond incapacitation. Of course this is not to say that the Eighth Amendment has no application in the prison context, far from it. It is only to point out that there is little mention of progress or evolution in the context of discussion of prison policies.

Within the context of the death penalty, however, the narrative of progress or evolution continues, and it provides the primary justifications for a number of cases, including *Coker*, *Enmund*, *Atkins*, *Roper*, *Graham*, and *Miller*. Yet, the methods that the Court uses to divine the evolving standards of decency have opened the door to a notion of evolution that is willing to contemplate regression. This can be seen most clearly in *Kennedy v. Louisiana*,<sup>344</sup> in which there was some debate regarding the significance of the fact that six jurisdictions had recently made rape of a child a capital offense.<sup>345</sup> The majority failed to hold that evolving standards could not go in the direction of expanding the death penalty.<sup>346</sup> The dissent, on the other hand, indicated that they believed such a reading could certainly be plausible.<sup>347</sup> Justice Scalia, in dissent, noted that six states had enacted new child-rape laws since 1977:

I do not suggest that six new state laws necessarily establish a “national consensus” or even that they are sure evidence of an ineluctable trend. In terms of the Court’s metaphor of moral evolution, these enactments might have turned out to be an evolutionary dead end. But they might also have been the beginning of a strong new evolutionary line. We will never know, because the Court today snuffs out the line in its incipient stages.<sup>348</sup>

Although Justice Scalia evokes the concept of evolution, he decouples it from the idea of progress. Under his account, evolution could occur in any direction, even towards a harsher system of punishment.

A related argument was made by Chief Justice Roberts, dissenting in

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<sup>344</sup> 554 U.S. 407 (2008).

<sup>345</sup> *Id.* at 431–33 (analyzing the question of whether six states adopting the death penalty for child rape constituted a “direction of change” in support of that penalty).

<sup>346</sup> *Id.* at 431 (“Whatever the significance of consistent change where it is cited to show emerging support for expanding the scope of the death penalty, no showing of consistent change has been made in this case.”). Similar hesitancy can be seen in Justice Sotomayor’s dissent in *Glossip v. Gross*, in which she argued that “[c]ertainly, use of the firing squad could be seen as a devolution to a more primitive era” but then went on to assert “[t]hat is not to say, of course, that it would therefore be unconstitutional.” 135 S. Ct. 2726, 2796–97 (2015) (Sotomayor, J., dissenting).

<sup>347</sup> *Kennedy*, 554 U.S. at 461 (Scalia, J., dissenting).

<sup>348</sup> *Id.*

*Miller v. Alabama*,<sup>349</sup> when he 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.”<sup>350</sup> Indeed, he argued that “[i]n this case, there is little doubt about the direction of society’s evolution” and went on the point to the fact that for most of the century, life without parole was not an option and it was only starting in the 1980s when “outcry against repeat offenders, broad disaffection with the rehabilitative model, and other factors led many legislatures to reduce or eliminate the possibility of parole.”<sup>351</sup> It is thus an open question whether evolution must always go in one direction.

This dispute is in part the result of a sustained critique by certain justices of the very notion of evolving standards of decency. One precursor to the *Kennedy* debate can be found in Justice Scalia’s relentless questioning of any narrative of change. For example, in *Thompson*, Justice Scalia characterized the majority’s argument as stating “that a 4-decade trend is adequate to justify calling a constitutional halt to what may well be a pendulum swing in social attitudes.”<sup>352</sup> Instead, he argued that there were many explanations for change that have nothing to do with changing sensibilities of the American people: “[t]here are many reasons that adequately account for the drop in executions other than the premise of general agreement that no 15-year-old murderer should ever be executed.”<sup>353</sup> Similarly, dissenting in *Atkins*, Justice Scalia argued:

The Eighth Amendment is addressed to always-and-everywhere “cruel” punishments, such as the rack and the thumbscrew. But where the punishment is in itself permissible “[t]he Eighth Amendment is not a ratchet, whereby a temporary consensus on leniency for a particular crime fixes a permanent constitutional maximum, disabling the States from giving effect to altered beliefs and responding to changed social conditions.”<sup>354</sup>

In this, we see the heart of Justice Scalia’s critique and a question that is embraced by other Justices, including Chief Justice Roberts: Does change always go in the direction of less harshness? Once society has evolved to a

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<sup>349</sup> 132 S. Ct. 2455 (2012).

<sup>350</sup> *Id.* at 2478.

<sup>351</sup> *Id.* Chief Justice Roberts argues that “most States have changed their laws relatively recently to expose teenage murderers to mandatory life without parole.” *Id.* Similarly, Justice Alito, also dissenting in *Miller* (with Justice Scalia joining) asked: “Is 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 2487.

<sup>352</sup> 487 U.S. 815, 869 (1988).

<sup>353</sup> *Id.*

<sup>354</sup> 536 U.S. 338, 349 (2002) (Scalia, J., dissenting) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 990 (1991)).

particular level of sensibilities with regard to punishment, could it go back?

In contrast to his opinion in *Miller*, Chief Justice Roberts heartily embraced a conception of progress when writing for the majority in *Baze*, where he made repeated references to the “more humane means of carrying out the sentence” and argued “that progress has led to the use of lethal injection by every jurisdiction that imposes the death penalty.”<sup>355</sup> He argued that the states had fulfilled their legislative function “with an earnest desire to provide for a progressively more humane manner of death.”<sup>356</sup> Indeed, Chief Justice Roberts’s opinion seems to rely upon a belief in the concept of progress as integral to the determination of the Eighth Amendment’s scope. If there is an alternative procedure that is “feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain” then a state’s refusal to adopt “such an alternative in the face of these documented advantages, without a legitimate penological justification for adhering to its current method of execution, then a State’s refusal to change its method can be viewed as ‘cruel and unusual’ under the Eighth Amendment.”<sup>357</sup>

Much more work can and should be done to evaluate the Court’s jurisprudence regarding evolving standards of decency. My intention in this Article is merely to underline the fact that from the founding moment, a particular conception of progress was central to understandings of the Eighth Amendment. It held that as America created a republic and thereby became more civilized, its penal code would become less harsh. Indeed, this was understood to be a defining difference between a monarchy and a republic.<sup>358</sup> This conception of the relevance of progress for evaluating penal form has been called into question, starting in the second half of the twentieth century. The Court’s jurisprudence in this regard appears muddled, I suggest, because its members, in marked contrast to the Founders, do not share a unitary conception of what progress entails.

### C. PROPORTIONALITY VERSUS CRUELTY

Civilization is also connected to another aspect of the enduring legacy of eighteenth-century penal reform on Eighth Amendment interpretation—the place of the body in understanding cruelty. Part II emphasized the extent to which the penal reform pursued in the late eighteenth century

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<sup>355</sup> 553 U.S. 35, 41 (2008) (Roberts, C.J., concurring; Kennedy, J., and Alito, J., joining).

<sup>356</sup> *Id.* at 51.

<sup>357</sup> *Id.* at 52.

<sup>358</sup> *See supra* Part II.B.



focused almost exclusively on eliminating public, physical punishments.<sup>359</sup> As was outlined in the above discussion of Pennsylvania's experiment with public hard labor, this reflects changing sensibilities towards the sight of physical violence imposed on the body.

This understanding that cruelty is somehow closely linked to physical violence can be seen in Supreme Court cases. For example, in his dissent in *O'Neil*, Justice Field argued that if the punishment in question involved whipping instead of a term of imprisonment then "a cry of horror would rise from every civilized and Christian community of the country against it."<sup>360</sup> This "cry of horror" is an expression of a particular sensibility towards violence inflicted on the body. References to sensibilities continued well into the twentieth century, although the term itself is not used the concept can be seen in expressions of a way of feeling about a particular punishment. Civilization itself was frequently used as a shorthand for particular sensibilities. Central to this idea of sensibilities is the fact that they are expressed as a way of feeling. Thus, Supreme Court justices frequently referenced civilization in their opinions to characterize ineffable qualities that distinguish those who tolerate particular punishments from those who do not.<sup>361</sup> Justice Douglas, concurring in *Robinson*, argued that "[t]he Eighth Amendment expresses the revulsion of civilized man against barbarous acts—the 'cry of horror' against man's inhumanity to his fellow man."<sup>362</sup> Similarly, Justice Burton, dissenting in *Resweber*, argued that "[t]aking human life by unnecessarily cruel means shocks the most fundamental instincts of civilized man."<sup>363</sup> Justice Marshall in *Ford v. Wainwright*<sup>364</sup> referred to the "natural abhorrence civilized societies feel at

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<sup>359</sup> See *supra* Part II.C.

<sup>360</sup> *O'Neil v. Vermont*, 144 U.S. 323, 340 (1892) (Field, J., dissenting).

<sup>361</sup> See *supra* pp. 48–50.

<sup>362</sup> *Robinson v. California*, 370 U.S. 660, 676 (1962) (Douglas, J., concurring). Brennan in *Furman*, also linked the Eighth Amendment with concepts of civilization: "the command of the Clause that the State may not inflict inhuman and uncivilized punishments upon those convicted of crimes." *Furman v. Georgia*, 408 U.S. 238, 282 (1972) (Brennan, J., concurring). In his dissent in *Gregg*, Justice Brennan referenced civilization three separate times. *Gregg v. Georgia*, 428 U.S. 153, 228–29 (1976) (Brennan, J., dissenting) (The Eighth Amendment "embodies in unique degree moral principles restraining the punishments that our civilized society may impose on those persons who transgress its laws;" the Court has the duty to declare "that the law has progressed to the point where we should declare that the punishment of death, like punishments on the rack, the screw, and the wheel, is no longer morally tolerable in our civilized society;" and "[m]y opinion in *Furman v. Georgia* concluded that our civilization and the law had progressed to this point.").

<sup>363</sup> *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 473 (1947) (Burton, J., dissenting).

<sup>364</sup> 477 U.S. 399 (1986).

killing” the insane and stated that “such an execution simply offends humanity.”<sup>365</sup> In all of these examples, the concept of “civilization” expresses an ineffable quality that relates to our ability to feel horror and shock at the sight of the pain and suffering of the human body.

At the same time, because late eighteenth-century reforms were not only about reducing bodily violence but also about privatizing punishment,<sup>366</sup> the public no longer “sees” the punishment. For this reason, the process of civilization that calls forth feelings of abhorrence may be short-circuited by the very civilizing process that helped create those feelings in the first place. The instances where the Court has found an Eighth Amendment violation in the prison context generally involve examples of the Court uncovering instances of physical mistreatment.<sup>367</sup> The most recent decision in *Brown* underscores this point. Kennedy’s opinion is full of examples of the physical suffering of the prisoners as a

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<sup>365</sup> *Id.* at 409.

<sup>366</sup> See *supra* Part II.C.

<sup>367</sup> Compare, e.g., *Brown v. Plata*, 131 S. Ct. 1910 (2011) (finding the inadequate medical care provided by California prisons to be an Eighth Amendment violation), and *Hope v. Pelzer*, 536 U.S. 730 (2002) (finding Eighth Amendment violation when inmate was handcuffed to a hitching post), and *Farmer v. Brennan*, 511 U.S. 825 (1994) (holding that the requirement of humane prison conditions under the Eighth Amendment is violated if the inmate faced substantial risk of serious harm), and *Helling v. McKinney*, 509 U.S. 25, 35 (1993) (finding a cause of action under the Eighth Amendment in allegations that the prisoner was exposed “to levels of [environmental tobacco smoke] that pose an unreasonable risk of serious damage to his future health”), and *Hudson v. McMillian*, 503 U.S. 1 (1992) (finding potential Eighth Amendment claim in a beating a prisoner received from guards), and *Hutto v. Finney*, 437 U.S. 678 (1978) (finding Arkansas prison conditions unconstitutional), and *Jackson v. Bishop*, 404 U.S. 571 (1968) (holding use of strap as a disciplinary measure within the prison to be cruel), with *Ewing v. California*, 538 U.S. 11 (2003) (failing to find an Eighth Amendment violation in a sentence of two consecutive twenty-five year to life sentences for three minor thefts), and *Lockyer v. Andrade*, 538 U.S. 63 (2003) (same), and *Hutto v. Davis*, 454 U.S. 370 (1982) (*per curiam*) (holding that a forty-year sentence imposed for possession of nine ounces of marijuana did not constitute cruel and unusual punishment), and *Rummel v. Estelle*, 445 U.S. 263 (1980) (failing to find an Eighth Amendment violation in a mandatory life sentence imposed following three relatively minor felonies). See also *Wilson v. Seiter*, 501 U.S. 294 (1991) (identifying conditions of confinement that might amount to an Eighth Amendment violation as including deprivations of an “identifiable human need such as food, warmth, or exercise”); *Rhodes v. Chapman*, 452 U.S. 337, 347–49 (1981) (failing to find an Eighth Amendment violation in double celling, and finding that only deprivations that deny “the minimal civilized measures of life’s necessities” sufficiently serious to form the basis of an Eighth Amendment violation); *Estelle v. Gamble*, 429 U.S. 97 (1976) (contemplating, though ultimately failing to find, an Eighth Amendment violation in inadequate medical care). *But see* *Solem v. Helm*, 463 U.S. 277 (1983) (finding sentence of life without parole for minor crime to be disproportional and therefore a violation of the Eighth Amendment).

result of overcrowding.<sup>368</sup> Indeed, the opinion includes three photographs of conditions inside California prisons so that we can “see” the mistreatment.<sup>369</sup> Not unrelatedly, Kennedy’s opinion is an exception to recent trends as it explicitly evokes standards of civilized society.

While the previous examples linked civilization with a feeling of abhorrence when confronted with particular penal practices, later opinions explicitly reference when pain may be imposed. Justice Brennan, concurring in *Furman*, argued that “[t]he primary principle is that punishment must not be so severe as to be degrading to the dignity of human beings. Pain, certainly, may be a factor in the judgment.”<sup>370</sup> Later, he argued that “death remains as the only punishment that may involve the conscious infliction of physical pain.”<sup>371</sup> Roberts, discussing what he perceives to be the growing humanity of the manners in which the death penalty is imposed in the United States, distinguishes the practice from what occurred historically: “[w]hat each of the forbidden punishments had in common was the deliberate infliction of pain for the sake of pain—‘superadd[ing]’ pain to the death sentence through torture and the like.”<sup>372</sup>

One result of this approach has been that in order to find a violation of the Eighth Amendment, the Court requires some analogy between the punishment in question and torture. For example, in *Trop*: “It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development.”<sup>373</sup> This point was explicitly rejected by the dissenters: “The very substantial rights and privileges that the alien in this country enjoys under the federal and state constitutions puts him in a very different condition from that of an outlaw in fifteenth-century England.”<sup>374</sup> Kennedy’s concurrence in *Davis v. Ayala*<sup>375</sup> suggests a similar approach with regard to solitary confinement, creating an

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<sup>368</sup> *Brown v. Plata*, 131 S. Ct. 1910, 1923–27 (2011).

<sup>369</sup> *Id.* at 1949–50.

<sup>370</sup> *Furman v. Georgia*, 408 U.S. 238, 271 (1972) (Brennan, J., concurring). Though he went on to argue that:

When we consider why they have been condemned, however, we realize that the pain involved is not the only reason. The true significance of these punishments is that they treat members of the human race as nonhumans, as objects to be toyed with and discarded. They are thus inconsistent with the fundamental premise of the Clause that even the vilest criminal remains a human being possessed of common human dignity.

*Id.* at 272–73.

<sup>371</sup> *Id.* at 288.

<sup>372</sup> *Baze v. Rees*, 553 U.S. 35, 48 (2008).

<sup>373</sup> 356 U.S. 86, 101 (1958).

<sup>374</sup> *Id.* at 127.

<sup>375</sup> 135 S. Ct. 2187 (2015).

analogy with torture.<sup>376</sup>

The result is an ambiguous application of the Eighth Amendment in imprisonment cases. There is a distinction between the cases that examine prison conditions and contemplated the possibility of or actually found Eighth Amendment violations, and length of sentence cases that have almost uniformly failed to find Eighth Amendment violations.<sup>377</sup> This is because the former focus on the concept of cruelty and its relationship to the physical infliction of pain on the body of the offender, whereas the latter focus on proportionality and leave cruelty almost entirely out of the equation. If, however, cruelty is not to be limited to a particular set of punishments present at the Founding, and instead represents the process by which types of punishment come to be seen as cruel, then its application ought not to be limited to situations that involve the physical application of pain to the prisoner's body. Rather, advocates need to develop ways of discussing extreme deprivations of time with society, family, and community in terms of cruelty. In this way, application of the Eighth Amendment to length of sentence should be expanded beyond examinations of proportionality, which the Court has found to be less than illuminating.

#### CONCLUSION

Perhaps the most important thing that we can say about the Eighth Amendment is that it exists. Penal form played a key role in late eighteenth-century understandings of what it meant to be a republic, what it meant to be civilized, and what it meant to be a person capable of proper feeling vis à vis other members of the society. It is for these reasons that the protections included in the Eighth Amendment were considered important enough to include in the Bill of Rights. This Article departs from histories of the Eighth Amendment that tend to treat particular penal methods in a static way—as though the only distinction that can be drawn is between the so-called Stuart horrors and eighteenth-century penal practice.<sup>378</sup> Part II

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<sup>376</sup> *Id.* at 2209–10 (Kennedy, J., concurring).

<sup>377</sup> Thus, compare *Hudson v. McMillian*, 503 U.S. 1, 9 (1992), which, although it did not find an Eighth Amendment violation on the particular facts of that case, was willing to consider that there could be one if the physical injury to the prisoner had risen to the level of being “significant,” with *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991), in which the Court would only find a prison sentence unconstitutional if it was grossly disproportionate (in *Harmelin*, a life sentence without possibility of parole for possessing 672 grams of cocaine was not grossly disproportionate).

<sup>378</sup> See, e.g., *Baze*, 553 U.S. at 94, 97 (Thomas, J., concurring) (arguing that “[t]he Eighth Amendment’s prohibition on the ‘inflict[ion]’ of ‘cruel and unusual punishments’ must be understood in light of the historical practices that led the Framers to include it in the Bill of Rights,” and concluding that “the Eighth Amendment was intended to disable

demonstrated that the final two decades of the eighteenth century were marked by significant changes in penal form as state legislatures sought to shape the criminal law and penal practice into a form they deemed more appropriate to a civilized and republican government.<sup>379</sup> Beyond this, however, Part II demonstrated that these discussions were part of a larger change in sensibilities that related to how people thought about the public infliction of pain. Understanding these aspects of the history illuminate aspects of contemporary debates over the Eighth Amendment, including the use of international comparison, debates over the question of progress and how it occurs, and the use of proportionality rather than cruelty in evaluating terms of imprisonment.

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Congress from imposing tortuous punishments”).

<sup>379</sup> See *supra* Part II.