The Legal Civilizing Process: Dignity and the Protection of Human Rights in Advanced Bureaucratic Democracies

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Introduction: Two Civilizing Processes or One?

Twenty-five years ago Zygmunt Bauman in *Modernity and the Holocaust* (1989) urged social scientists to consider the implications of the Holocaust for the conventional assumptions about the social foundations of morality. Rationality, self-interest, and social organization, according to Bauman, do not prevent genocide; instead they are necessary elements of genocide. Bauman did not reject the insights of sociology about the civilizing process, nor call into question the basic claim that suppressing irrational local violence in favor of centrally organized state power bound by the rule of law can create conditions of security and freedom, but he recognized their dual edge. The same forces, aligned with a determined social goal (e.g., a classless, Aryan, or perhaps drug-free society), could lead to the unprecedented violence and cruelty. At the book’s end Bauman suggested that independent sources of morality not tied to contemporary social values, something more abundant before the completion of modernization, might be necessary to guard against the worst tendencies of modern social organization (although he admittedly did not say much about where these might come from except the pre-social existential conditions of humans).

*Modernity and the Holocaust* (1989) contains two invitations that this chapter takes up: first, to consider how human rights disasters short of the magnitude of the Holocaust develop out of the same “civilized” conditions; and second, having recognized the limits of modern institutions to protect fundamental human rights, to consider what alternatives might exist, either recovered from “pre-modern” practices or in the margins of modern ones. Taking up the first invitation, this chapter considers mass incarceration in the US at the end of the 20th century (Simon 2014). Prisons may not be inherently places of inhumanity, but at times and places, perhaps most times and places, they have unquestionably become so and sometimes on the scale of atrocity (or human rights disaster). One such was the “convict lease system” that prevailed in a number of Southern states from the end of the Civil War until at least World War I in which Black citizens convicted of minor property crimes were often sentenced to years of labor for private contractors who had little incentive not to work them to death (Lichtenstein 1996; Oshinsky 1996). More recently, the quadrupling of the national imprisonment rate between the late 1970s and late 1990s, what punishment and society experts call “mass” or “hyper” incarceration, resulted in another widespread human rights disaster, the scope

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of which is only now emerging. The warehousing of prisoners, a large portion of them burdened by chronic illnesses, under conditions of medical and mental health deprivation exacerbated by extreme overcrowding, has led to uncounted premature deaths in the thousands and the experience of degradation by tens of thousands nationwide (Fleury-Steiner 2008; Simon 2014)

Mass incarceration is no holocaust. But it bares many of the traits Bauman associated with the capacity of modern bureaucratic societies to make one, including highly insulated state agencies capable of cutting off routine contact between members of the public and members of the excluded population. Mass incarceration is even more alarming because it happened, not where one might expect at the periphery of the US penal state in places like our now notorious war on terror prisons like Guantanamo Bay Naval Station in Cuba, or Abu Ghraib prison in Iraq, but in the center of the domestic legal system, under the eyes (sometimes blinded) of courts and in places like California with mass media, liberal values, and highly educated citizens (Gilmore 2008; Alexander 2010).

Second, I want to consider the potential for contemporary human rights law as a tool for resisting the intrinsic danger posed by modern democratic bureaucracies to the human rights of those who can be made to seem less worthy of them and removed from sight. Admittedly the last forty years of mass incarceration were not proud ones for the rule of law (and nor were the previous forty). But human rights law is a more promising candidate that has emerged in contemporary states and in international human rights conventions in response to the Holocaust; these include the International Declaration of Human Rights, the International Covenant on Civil and Political Rights, the German Constitution, the European Convention on Human Rights and the European Union Charter of Fundamental Rights. In the United States, this has also taken the form of enhanced protection for human dignity in existing constitutional provisions, such as the Eighth Amendment’s prohibition on “cruel and unusual punishment” and the Fourth Amendment’s again “unreasonable searches and seizure.”

In modern post-World War II US constitutional jurisprudence, a key term for this human rights value is “civilization” or more precisely a “civilized society.” For example, in the critical recent decision requiring California to reduce its prison population by the sum of more than 40,000 prisoners in order that long standing court orders requiring dramatic improvements in prison medical and mental health care could be implemented, the Court writes:

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.” (Brown v Plata 2011, 1928)

2 But dignity, in the contemporary human rights sense, might be taken to be applicable in almost any aspect of the Constitution and in the laws made subordinate to it (in short, all domestic law).
I will return to other aspects of Brown in the final section of this chapter, but consider the phrase “civilized society”, a “place” defined for our purposes by institutions and practices that respect “human dignity.” The United States Supreme Court, albeit only a handful of quite different times, has evoked the nation’s “evolving standards of decency” as a “civilized society” to hold certain punishments to be “cruel and unusual” even though not the equivalent of torture.

What might this idea, of a “civilized society” with “evolving standards of decency” (what I will call for present purposes the “legal civilizing process”) add, if anything, to the existing sociological “civilizing process” (Elias 1979)? Does a legal civilizing process offer us any protections against turns to mass human rights disasters that sociological civilization did and does not? The precedents are not at first blush promising. Talk about “civilization” and “decency” might seem to be an invitation to judicial subjectivity (the worry of conservatives like Justice Scalia), or perhaps worse, the regulatory strategies that have so often followed from the sympathetic response of elites to the suffering of certain groups among the poor, such as children of immigrants, people with psychiatric disabilities, and female sex workers, among others. A more optimistic scenario suggests that modern human rights law, once embodied in capable legal centers of power, can counter-balance the inherently degrading tendencies of bureaucracies that take totalizing control over populations excluded from general public knowledge.

Today the best-case scenario for that is Europe (van zyl Smit and Snacken 2009), where despite populist strains in penal policy, the worst excesses of American style mass incarceration have not gained a significant footing; including widespread prolonged solitary confinement as a prison management tool, life sentences with no meaningful release mechanism (common in the US, rare in Europe and recently condemned by the European Court of Human Rights). An optimistic reading of the US situation (Simon 2014) is that spurred on by the excesses of mass incarceration, US courts are moving to upgrade the very thin form of dignity jurisprudence adopted in the period 1950 through 1980. Dignity-based constitutional rules are not a gainsay or a talisman that can freeze degrading tendencies in the penal or immigration systems of advanced bureaucratic democracies, but they are a form of counter-power, a legal civilizing process that can check those tendencies.

Mass Incarceration as a Human Rights Disaster

Bauman’s reading of the Holocaust gives any student of penal power pause at the potential of incarceration to promote mass human rights violations. Following conviction for felony (in the US or a similar offense in other countries), legal prisoners face the likelihood of physical distancing, exclusive bureaucratic management, and the self-enclosing power of expert technical knowledge. These techniques are not themselves the methods of genocide, but they played a crucial role in enabling the Nazi genocide by removing its potential victims from the everyday sphere of encounter and imagination, which seem to be the crucial existential source for moral responsibility.
From this perspective the modern prison poses a dilemma. Invented in the 18th century to replace practices that enlightened opinion deemed inhumane, torture on the scaffold, prison has had a long career seeking to reinvent itself from regular scandals that have belied its humanity. Since the Holocaust, the prison faces the additional challenge not only of avoiding reversion to torture, but of being an inherent threat to the human rights of prisoners by removing them physically from the everyday experience of citizens, and subjecting them to direct rule by a correctional bureaucracy. On the other hand, if the modern prison does not always lead to the mass dehumanization and degradation of its prisoners, it is precisely because some of these same elements, including bureaucracy and expert technical knowledge, operate to hold prison regimes accountable to human rights norms and observers.

Mass incarceration in the US marked a significant departure from the nation’s post-World War II record of seeking to improve protection for human rights in prisons. Beginning in the 1940s, the Federal government and several of the leading industrialized states, set out to reframe corrections along the lines of the modern mental health establishment, with a focus on diagnosis, individualized treatment, and normalizing deviant behavior. From the 1960s through the 1980s, civil rights lawyers, acting on behalf of state prison inmates (many in the South), relied in part on this new correctional penology to convince federal judges that racist and abusive informal prison regimes and antiquated prisons that lacked access to decent medical care violated the 8th Amendment’s ban on “cruel and unusual” punishment (Feeley and Rubin 1998).

At virtually the same time, state governments began to commit themselves to a policy of expanding imprisonment as a response to ordinary non-violent property and drug crimes in an effort to repress violent crime through general incapacitation. Beginning in the 1980s, this state effort received growing federal support and both state and federal prison systems began to grow rapidly reaching a national average more than four times the rate of imprisonment in the 1970s. Concentrated on urban communities of color, where violent crime rates were far higher than metropolitan averages, this campaign greatly increased the racial disproportionality of the prison population (which had been marked from the beginning of statistics in the 1920s) to shocking highs. At its peak in the 1990s, this combined state and federal effort produced a flow of prisoners in which African American men were nine times more likely to be present than Whites, given each group’s relative proportion of the overall population (that is down to 6 to 1 in the 2012 data). Nearly one third of African American men born in the 1970s will experience imprisonment by the end of their lives (Bureau of Justice Statistics 2013).

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3 Historians would rightly point out that American correctionalism has delivered failure far more commonly than the promise of rehabilitative oriented treatment (McClennon 2008; Spillane 2014). What distinguished mass incarceration after the 1970s, however, was the decision to pursue wide spread incapacitation with little pretense to protecting human dignity.
Much has been written about this carceral wave (Garland 2001, Wacquant 2009, Alexander 2010), but for our purposes only one feature is salient: it has produced human rights violations on a scale far in excess of the correctional past. While mass incarceration is no Holocaust, it is fairly described as a human rights disaster, or in the more measured words of Supreme Court Justice Stephen Breyer, “a big Human Rights problem.” I describe the formation of this disaster at greater length in a recent book (Simon 2014), but its key features can be summarized here. By widening the net of people convicted of crimes sent to prison, and increasing the length of time required for many traditional imprisonment crimes, mass incarceration took hold of a population different in kind than the traditional prison population, one with a heavy burden of chronic illness problems associated with poverty, substance abuse, and repeatedly disrupted lives. This manifests itself in psychiatric illnesses like schizophrenia, and in physical illness like diabetes, Hepatitis C and HIV. Intending to incapacitate prisoners, not rehabilitate them, mass incarceration prisons were built without adequate facilities or routines to cope with these problems. These problems deepened as fiscal crises following the internet bust of 2000/the 9/11 Recession of 2001, and the Great Recession of 2008-9 largely ended new prison construction by states, while mass imprisonment policies continued to operate. As a result, at the start of this decade, half the states had chronic overcrowding, in some more than twice the design capacity for entire systems.

Thus within the history of the prison, mass incarceration reflected a significant shift toward inhumanity on a broad scale. Many features detailed in Bauman’s study can be observed tellingly in this shift. Particularly important was the role of the penal bureaucracy. This included both frontline correctional workers and administrators in correctional agencies, which during this period became increasingly cut off from the influences of a global correctional profession with important ties to science and social relief efforts, and became increasingly tied to state politics and self referential in its normative demands (Page 2011). Other professions, including medicine and psychology, which had long been involved in supervising prisoners, were largely excluded during the era of mass incarceration. Always distanced from the general population, prisoners were increasingly at the mercy of mostly public and sometimes private bureaucracies with no oversight by authorities with a general community role, with the limited exception of courts.4

California became a national example of mass incarceration as inhuman punishment when the Supreme Court issued its 2011 Brown v. Plata decision upholding a sweeping judicial order capping California’s prison population as a percentage of design capacity (137%), and ordering the State to achieve that goal in two years (since extended) presumably through diversion of felons to local jails and non-incarcerative sentences. Central to the decision, the first in decades that had strongly affirmed prisoners’ rights, was a record of tremendous suffering due to the State’s “deliberate indifference” toward the medical and mental health needs of the prison population. As noted above, the

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4 In contrast the European Community, subject to the European Convention on Human Rights, specifically requires member states to integrate prison services with the institutions that deliver those services generally.
Court’s majority invoked “civilized society” in rejecting the state’s clear democratic preference for addressing crime with incarceration. The dissenters in contrast, would have given the state more time to reduce overcrowding and address unmet medical and mental health needs in the name of keeping California citizens safe from the risk of crime posed in any prisoner release or diversion.

As a result of *Brown v. Plata*, California law makers reversed several decades of prison sentence expansion to exclude a large swath of felony convictions for non-violent, non-serious, non-sexual felonies, reducing its prison admissions by a startling 65 percent in 2012 and leading a nationwide decline in both prison population and imprisonment rate for the first time in nearly four decades (Bureau of Justice Statistics 2012). Coming at a time when politicians and the media have already begun to sour on mass incarceration, *Plata* added a human rights dimension missing in most other debates on incarceration. It is far too early to declare mass incarceration over. Indeed, recent data suggests that the prison population is growing again after several years of decline (Eckholm 2014). But given that most of the downward trend in US prison populations has come from one case condemning California’s form of mass incarceration, it is surely worth exploring how strengthening the legal civilizing process might check the human rights abusing potentialities in its sociological cousin. The rest of this chapter draws lessons from three key moments in the US Supreme Court’s treatment of the legal civilizing process since first observing it in the aftermath of the Holocaust.

**Evolving Standards of Decency?**

The first appearance of modern human rights dignity talk in the a US Supreme Court decision came a decade after the Universal Declaration of Human Rights and in a most curious case. In *Trop v. Dulles* (1958) the Court overturned the decision of a court-martial stripping Trop of his US citizenship as a punishment for his wartime desertion of his post from the armed forces. Writing for only 4 of the 5 justices who voted to strike down the sentence as “cruel and unusual”, Chief Justice Earl Warren observed that although the penalty “involved no physical mistreatment, no primitive torture” it actually was a more significant harm, threatening “the total destruction of the individual's status in organized society,” the very “right to have rights.” *Trop* was an unusual case in every respect, but in the 1970s the Supreme Court applied the same doctrine to strike down a life sentence without parole for a small time (but persistent) property offender, suggesting that conventional state penal policies might also be subject to this kind of “decency.”

Two decades later, in *Harmelin v. Michigan* (1991), at the height of the war on crime and mass incarceration, the Supreme Court upheld a life sentence without the possibility of parole for the crime of possessing 650 or more grams of crack cocaine. Writing for another plurality, Justice Anthony Kennedy suggested that the broad range of utilitarian purposes served by prisons, and the deference courts owe to democratic policymaking choices, means that prison sentences should almost never violate the Eighth Amendment. Along with a 1994 case instructing lower courts to defer to the
expertise of state prison officials (Farmer v. Brennan), the Supreme Court had largely withdrawn the 8th Amendment from any role in checking mass imprisonment. It would be capital punishment alone, and that only to a very limited degree, where the Constitution would set limits on substantive penal choices.

In several decisions since 2010, the Supreme Court has signaled that it may be revitalizing the “evolving standards of decency doctrine.” In Graham v. Florida (2010), the Supreme Court rejected life without parole sentences imposed on juveniles for non-homicide crimes (a position later extended to all life without parole sentences for crimes committed as juveniles). In Brown v. Plata (2011), the Supreme Court let stand a lower court order requiring California to reduce its prison population by nearly 40,000 inmates, despite the Prison Litigation Reform Act (1996), which requires courts to balance the need to remedy constitutional violations with public safety.

The “evolving standards of decency” doctrine under the Eighth Amendment, and the concept of human dignity said to underlie it, offers no talisman that can prevent advanced bureaucratic democracies from engaging in systematic cruelty, but it can provide a legal basis for individual justices to learn lessons from wartime failures of the rule of law (Chief Justice Earl Warren and Justice Kennedy). An even more promising approach is that taken in the European Council, where a strong dignity-based charter (the European Convention on Human Rights) is strengthened further by the creation of bureaucratic governmental agencies, (the European Committee for the Prevention of Torture and the Committee of Ministers of the Council) with a mission of enforcing the Convention by inspecting places of detention and by producing guiding norms for problematic areas of state coercion (prisons, psychiatric hospitals, etc.)

Trop v. Dulles

As everyone will recall, the rule of law, including our domestic Constitution, has a long history of fading during national emergencies. During the Civil War and World War I, executive authority (some with, some without Congressional affirmation) was used to repress individuals engaged in ordinary democratic dissent. In both instances, courts generally declined to intervene. Most infamously during World War II, the US engaged in one of the largest scale human rights violations in our history, the forced removal of all persons of Japanese ancestry from the West Coast of the US. When this action was formally reviewed by the Supreme Court, in Korematsu v. United States (1944), the Court upheld the classification and imposition of a terrible burden on the basis of nationality, the first time ever an explicit racial classification had been approved, on the grounds that dire necessity made it permissible:

When under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.

After World War II, the adoption of the Universal Declaration of Human Rights in 1948 signaled the beginning of a new effort to deepen the human rights protections in
both domestic and international law. In the US, the Supreme Court under Chief Justice Earl Warren, whose term began in 1954, began a process of reforming criminal justice institutions through enforcement of the Fourth, Fifth, Sixth, and Eighth Amendments of the US Constitution to the States.

_Trop v. Dulles_, decided four years into Warren’s transformative Chief Justiceship, represented the most significant early effort to discern the implications of the new focus on human dignity for the state’s power to punish.\(^5\) Trop was a soldier who deserted in French West Africa during World War II when he briefly escaped from the Casablanca jail before turning himself over to a US military vehicle. He was convicted by a court-martial and dishonorably discharged from the army. Under a statute dating to the civil war but renewed in 1940, Congress made loss of citizenship a consequence of wartime desertion, but only if the soldier was discharged from the military and not given a chance to complete his service, which is what happened to Trop and apparently thousands of other servicemen during the war. Trop claimed that the loss of citizenship for wartime desertion violated the Eighth Amendment’s prohibition on “cruel and unusual punishment” but the Court had previously upheld capital punishment, presumably a more severe penalty, for the very same crime.

Since wartime desertion is punishable by death, there can be no argument that the penalty of denationalization is excessive in relation to the gravity of the crime. The question is whether this penalty subjects the individual to a fate forbidden by the principle of civilized treatment guaranteed by the Eighth Amendment…..While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards. _Trop v. Dulles_ 1958, 498

In conventional terms of comparing crimes and penalties, denaturalization might not seem “cruel and unusual”, but Chief Justice Warren on behalf of a plurality of four\(^6\) (thus not a majority) argued that the Eighth Amendment’s meaning should not remain static but instead changed over time as society “matured:” “The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.” This was the beginning of the “evolving standards of decency doctrine,” what we are calling, the legal civilizing process.

\(^5\) His first landmark, _Brown v. Board of Education_ (1954) did not directly reference dignity but seems deeply informed by it.

\(^6\) Ironically the fifth vote in the judgment was none other than William Brennan, who would later write a powerful concurrence of his own on dignity and capital punishment, once again for a plurality in _Furman v. Georgia_ (1972). Here he saw little room for judicial limitations on public policy choices: “And where Congress has determined that considerations of the highest national importance indicate a course of action for which an adequate substitute might rationally appear lacking, I cannot say that this means lies beyond Congress' power to choose” [citing to _Korematsu_].
Thus far his opinion makes the legal civilizing process sound a lot like its sociological cousin (Elias 1979). In the crucial sections of his concurring opinion, the Chief Justice gave more substantive shape to his reasons for viewing forfeiture of citizenship as beyond the limits of decency.

There may be involved no physical mistreatment, no primitive torture. There is instead the total destruction of the individual's status in organized society. 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. The punishment strips the citizen of his status in the national and international political community. His very existence is at the sufferance of the country in which he happens to find himself. … In short, the expatriate has lost the right to have rights.

This evocative phrase, seemingly lifted without attribution from Hannah Arendt (1951), may not have been intended to set a threshold for conditions that would be indecent but instead to place human dignity at the center of power, symbolized here by the sovereign power of the nation to punish a soldier/citizen. Trop would have lost not just US nationality, but lacking an alternative passport, the possibility of being unwanted in any state and thus a refugee subject to the whim or mercy of states and individuals.

_Trop v. Dulles_ was clearly a limited precedent for purposes of the penal state. It did not involve a prison sentence, the routine punishment for US felonies, and thus had seemingly little implication for routine punishment. Trop escaped the stigma of felony crime, being associated with the shame but not danger posed by desertion. In any event, Chief Justice Warren served more than a decade more without revisiting this promising doctrine. Warren, a former prosecutor and governor, probably believed that fixing police and prosecutorial abuses would be more efficacious in limiting the repressive power of the state than attacking prison sentences at a time when the dominant ideology supported rehabilitative penology and most states were moving toward shorter prison sentences.

_Harmelin v. Michigan_

_Trop v. Dulles_ was decided in 1958 at a time when prison populations in the US remained near their traditional rate of about 100 prisoners per 100,000 in the population as a whole. In the early 1980s, a more conservative Court struck down a life in prison without parole sentence imposed on a person with a long record of petty property crime, again citing the evolving standards of decency (Solem v. Helm 1983). But as the prison population began to rise sharply in the 1980s and 1990s, the Supreme Court signaled that its analysis of imprisonment under the “evolving standards of decency” would be dramatically narrowed. The key shift came in a case involving a sentence of “life without parole” for possession of more than 650 grams of cocaine. Harmelin argued that such a severe sentence, for what amounted to a non-violent drug possession crime, was so disproportionate as to offend the Eighth Amendment on the civilized law ground we have been discussing. The majority rejected the claim but disagreed on why. The Court’s
most conservative justices rejected the 8th Amendment claim on the grounds that the Constitution does not include any proportionality doctrine, at least not when it comes to prison sentences (as opposed to capital punishment). On this theory, states may sentence residents to prison sentences of any length assuming they have been properly tried and convicted and the sentence is for a rational purpose. Justice Kennedy’s concurrence, joined by several other centrists on the Court, argued that the 8th Amendment did indeed include a proportionality principle, as part of the evolving standards of decency of a maturing society, but that the pursuit of objectivity necessary to discerning these standards makes them very narrow indeed.

The Court therefore has recognized that a punishment may violate the Eighth Amendment if it is contrary to the “evolving standards of decency that mark the progress of a maturing society.”… In evaluating a punishment under this test, “we have looked not to our own conceptions of decency, but to those of modern American society as a whole” in determining what standards have “evolved,” …and thus have focused not on “the subjective views of individual Justices,” but on “objective factors to the maximum possible extent”…. (Harmelin 501 US 957, 1014, citations omitted)

Justice Kennedy emphasized this quest for objectivity in setting out four limiting principles that tremendously limit the scope of proportionality review by courts:

The first of these principles is that the fixing of prison terms for specific crimes involves a substantive penological judgment that, as a general matter, is “properly within the province of legislatures, not courts”….Determinations about the nature and purposes of punishment for criminal acts implicate difficult and enduring questions respecting the sanctity of the individual, the nature of law, and the relation between law and the social order. …The efficacy of any sentencing system cannot be assessed absent agreement on the purposes and objectives of the penal system. And the responsibility for making these fundamental choices and implementing them lies with the legislature…..The second principle is that the Eighth Amendment does not mandate adoption of any one penological theory….Third, marked divergences both in underlying theories of sentencing and in the length of prescribed prison terms are the inevitable, often beneficial, result of the federal structure. ....The fourth principle at work in our cases is that proportionality review by federal courts should be informed by “objective factors to the maximum possible extent.” …The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are “grossly disproportionate” to the crime. (Harmelin 1991, 1000-1001, citations omitted)
Based on these four factors, all of which place deference to state power to imprison in a higher and higher priority, Justice Kennedy reasoned that the scope of analysis previously entertained by the Court (in which Harmelin’s sentence would have been considered in comparison with those of similar offenders on other states and offenders with the same kind of sentence in his state) should only be considered if the Court’s own assessment of the gravity of the offense and the severity of the crime are “grossly disproportionate.” Although Harmelin’s sentence was the harshest prison sentence possible, and second only to capital punishment among possible punishments, Justice Kennedy had no problem finding that possession of cocaine in such a large quantity was in fact, a crime of violence equivalent or close enough to actual murder (the crime for which life without parole is most typically given).

Petitioner's suggestion that his crime was nonviolent and victimless, echoed by the dissent, ..., is false to the point of absurdity. To the contrary, petitioner's crime threatened to cause grave harm to society....Quite apart from the pernicious effects on the individual who consumes illegal drugs, such drugs relate to crime in at least three ways: (1) A drug user may commit crime because of drug-induced changes in physiological functions, cognitive ability, and mood; (2) A drug user may commit crime in order to obtain money to buy drugs; and (3) A violent crime may occur as part of the drug business or culture. ....Studies bear out these possibilities and demonstrate a direct nexus between illegal drugs and crimes of violence. See generally id., at 16–48. To mention but a few examples, 57 percent of a national sample of males arrested in 1989 for homicide tested positive for illegal drugs. ...The comparable statistics for assault, robbery, and weapons arrests were 55, 73, and 63 percent, respectively...... In Detroit, Michigan, in 1988, 68 percent of a sample of male arrestees and 81 percent of a sample of female arrestees tested positive for illegal drugs. Fifty-one percent of males and seventy-one percent of females tested positive for cocaine. Id., at 7. And last year an estimated 60 percent of the homicides in Detroit were drug related, primarily cocaine related.... (Harmelin 1991, citations omitted)

Kennedy and the other centrist justices also dismissed the potential for unfairness in such an extremely harsh sentence for what was, formally speaking, a possession offense on the grounds that Harmelin (and others like him) had a clear choice not to engage in conduct that was becoming a major focus of social concern and governmental response. Indeed, mandatory sentences, then very much in fashion, were deemed by many to be fairer because they were more transparent than mid-20th century indeterminate sentencing systems that allowed parole release.

Notice that this puts the subjective views of the justices ahead of the more objective comparison of the sentence with the empirical record while claiming to be serving “objectivity.”
This system is not an ancient one revived in a sudden or surprising way; it is, rather, a recent enactment calibrated with care, clarity, and much deliberation to address a most serious contemporary social problem. The scheme provides clear notice of the severe consequences that attach to possession of drugs in wholesale amounts, thereby giving force to one of the first purposes of criminal law—deterrence. In this sense, the Michigan scheme may be as fair, if not more so, than other sentencing systems in which the sentencer's discretion or the complexity of the scheme obscures the possible sanction for a crime, resulting in a shock to the offender who learns the severity of his sentence only after he commits the crime. (Harmelin 1991, 1007-08, citations omitted)

Justice Kennedy’s concurring opinion in Harmelin came to define the scope of what we have called legal civilization for purposes of the Eighth Amendment. Many of the features that Baumann identified as critical to enabling human rights abuses under conditions of sociological civilization apply here as well. First, ignoring the point of having a legal civilization test, Justice Kennedy’s Harmelin analysis tied the standard so closely to the organized governing bureaucracy itself (just the part that can become critical to human rights disasters). Faced with multiple reasons to defer to state penal choices, the promise that “evolving standards of decency” might restrain populist penal measures, aimed at pleasing voters at the expense of demonized criminal threats, became an illusion. This deference infected the Eighth Amendment overall. Three years after Harmelin, in Farmer v. Brennan (1994) the Court rejected an Eighth Amendment claim from a transsexual (male to female) prisoner who had been raped and brutalized by other prisoners after being housed in the general population despite asking for protective treatment. The Court noted that courts should be reluctant to second guess management decisions of prison officials because they “face the unenviable task of keeping dangerous men secure in humane conditions;” despite the fact that Farmer, guilty of property crimes, posed little danger to anyone, the prison he was held in was neither secure nor humane.

Second, the association of crime with violence is featured, and violence with an emergency that requires risky decisions that may require over-riding a particular individual’s right to hope for a future as an individual. If the state can define carrying crack cocaine as a threat akin to homicide, there is little to stop it from doing that with those who possess far smaller weights, or those who use drugs, or those loitering in drug-infested areas. Here it is worth noting that 1991, the year Harmelin was decided, was at or near the peak of a wave of homicides that most criminologists at the time associated with crack cocaine sales and which pushed the homicide rate to its highest level in the 20th century.

8 In the 2003 case of Ewing v. California, Justice O’Connor’s majority opinion for the Court relied on Kennedy’s Harmelin concurrence to uphold California’s notorious three-strikes law that imposed a life sentence with no realistic chance of parole on a person convicted of a property crime (but who had the predicate past serious or violent felonies on his record).
Third, respect for human dignity, unnamed here except in its prior core association with the “evolving standards of decency” doctrine, receives acknowledgment only in terms of choice, and whether Harmelin had a clear chance to avoid exposing himself to this very severe penalty. This is fully consistent with the prevailing legal and philosophical views of dignity that closely associated that word, so central to post-World War II human rights treaties, with the Kantian conception of rationality (Waldron 2013). Under this prevailing conception, individuals who chose to commit crimes subject to extreme penalties, aimed at deterring conduct deemed highly dangerous to the social order, had placed their rationality and dignity on the side of their law-breaking. Imposing harsh punishment in such cases was precisely the way to honor their human dignity. A system of mercy, predicated on executive or judicial discretion, would arguably demean that very dignity.

_Brown v. Plata_

In the second decade of the 20th century there is evidence that the idea of legal civilization as a restrain on the state’s penal power is being revived. Its strongest articulation came in a 2011 decision, _Brown v. Plata_, where the Court upheld a population cap on California’s mammoth prison decision after years of chronic overcrowding that had prevented previous court orders from fixing a broken system of health care delivery in prison. The case was a consolidation of two distinct Eighth Amendment cases involving challenges to treatment in the entire California prison system (then the largest in terms of prison population in the United States). _Coleman v. Wilson_ (1995) found that the state had been “deliberately indifferent” to the fate of thousands of prisoners with serious mental illness in failing to provide adequate professional staff or treatment space at its massive new prison complexes and failing to develop procedures to screen for prisoners suffering mental illness or suicidal conditions, or to respond to those conditions. Judge Lawrence Karlton of the United States District Court for the Central District of California ordered the state to create a constitutionally adequate mental health care system and appointed a “special master” to oversee the implementation of his order across a system with thirty or more facilities. _Plata v. Davis_ (2002) found a similar systemic failure to provide adequate staff or infrastructure to deliver medical care to prisoners who increasingly suffered from complex chronic illnesses requiring careful monitoring of individual prisoners. The state initially entered a negotiated “stipulation” in which it agreed that the problem was a constitutional violation and agreed to remedy it within three years. Instead, finding a lack of progress in 2005, Judge Thelton Henderson of the United States District Court for the Northern District of California placed the entire prison medical system under a court appointed “Receiver” (a role best known in bankruptcy law) to oversee the operation of the system as well as implement the remedy.

The two cases became linked in 2009 when both judges joined in convening a special three-judge court to consider whether a population cap was necessary to completing the long frustrated remedial orders in the two cases (14 years and 7 years
respectively). Since the late 1990s, California prisons had been operating at two to three times their design capacity. With every available space crammed with extra bedding (often in the form of triple bunks), delivery of health services to prisoners with chronic conditions faltered and efforts to implement remedies in both of these gigantic prison condition reform litigations proved futile. The special vehicle of the three-judge court and the demanding standard required before a population cap could be imposed on a state prison system were both products of the Prison Litigation Reform Act of 1996, an historically unprecedented federal law limiting jurisdiction of the federal courts to protect the civil rights of state prisoners and signed by President Bill Clinton at the height of the war on crime. Before it can order a population cap, the court must find that overcrowding is the main cause of the unconstitutional conditions and that no remedy short of limiting the state’s power to increase the prison population will provide relief. Even then the court must determine that a population cap would not significantly endanger public safety.

In August of 2009 the Three-Judge court ordered the State of California to reduce its level of overcrowding to 137% of design capacity (from near 200 percent system wide) within a two-year period. The order did not formally speaking require that the state turn away prisoners. California might have met the population cap through a massive program of prison construction or by sending those with felony convictions to private prisons, but as a practical matter, given the state’s weak financial position during the Great Recession, and because of the strong resistance to privatization from California’s powerful union of prison officers, both the court and the state recognized that only the diversion of potential prisoners to other sentences could possibly achieve the target set by the court in time permitted. With political leaders dead set against any “early release” of existing prisoners (many of whom suffered from the greatest medical and mental health problems) the state had to consider ways to keep people from becoming prisoners in the first place by diverting some portion of the people newly sentenced to prison terms by courts or formerly incarcerated people who violated the conditions of their community release and would normally be sent back to a state prison. Ultimately the state would do both.

In the meantime, the State appealed on the grounds that the population cap was not necessary to remedy the existing unconstitutional conditions and that it would endanger public safety. The US Supreme Court upheld that cap 5-4. Directly invoking Chief Justice Warren’s appeal in *Trop v. Dulles* to “civilized” treatment and the parallel claim that the protection of human dignity forms a central purpose of the Eighth Amendment, but this time for a majority of the Supreme Court, Justice Kennedy wrote:

> Just as a prisoner may starve if not fed, he or she may suffer or die if not provided adequate medical care. 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. Respect for that dignity animates the Eighth Amendment prohibition against cruel and unusual punishment.” (*Brown v. Plata* 2011, 1928)
Whether *Brown v. Plata* will mark a turning point or not remains to be seen. It is already responsible for the largest prison population reduction in modern history (although the latest figures show the California prison population growing despite the caps, which apply only to prisoners housed in California prisons and not private prisons or jails contracted to hold them). It clearly marks the return of the idea of civilized treatment or society, and the related ideas of evolving standards of decency and protection of human dignity. Nor is it a singular decision. In other recent Eighth Amendment decisions the same majority coalition (traditional progressives plus Justice Kennedy), the Supreme Court has signaled a growing concern with the excesses of populist penalty. These include decisions abolishing capital punishment as a penalty for raping a child (where there is no homicide), or for homicides committed by juveniles, and abolishing Life Without Parole sentences for juveniles.

There is a long history of constitutional rights fading during wartime emergencies, only to be revitalized in the aftermath, sometimes with enhanced protections against the next wave of emergencies. All in all, this pattern is more compatible with Bauman’s thesis about sociological civilization than it is an exception to it. Nonetheless there are a number of features of the recent revival of the legal idea of “civilized society,” what we have called the legal civilizing process, that recommend it as a framework to resist the ready deployment of conventional criminal justice bureaucracies to exclude and degrade minority populations.

The concept of dignity underlying the concepts of civilization and evolving standards of decency has shifted in recent decades from a focus on rationality and choice to one on the life course and the existential features of the human condition (and the suffering inherent in that condition). For the first several decades after World War II, the emphasis on human dignity in human rights law was read to emphasize values of equality and liberty, centered in the idea of autonomy and human agency. In such a framework, extreme deprivations of rights can be readily justified if seen as a response to the threat of violence to others. Like Harmelin, who presumably chose to earn economic premiums rewarded for those willing to run the risks of criminal trafficking, those who violate laws sincerely enacted to protect public safety have made a rational choice and harsh punishment may be considered completely consistent with human dignity. Since the 1990s dignity is increasingly associated with the human condition in a more embodied and social sense. From this perspective the requirements of sustaining a human life, and human forms of suffering anchored in the life course (adolescents, child birth, aging, dying), require limits on punishment quite apart from the rational choices of the person who has violated the law.

This case is also noteworthy because the federal statute that formed the major ground for the state’s appeal, the *Prison Litigation Reform Act*, is an example of a law intended to insulate state institutions from the potential checking power of courts. The explicit purpose of the law was to make it harder for state prisoners to bring constitutional issues into federal court, which it does through multiple features (requiring a three judge rather than one judge decision, allowing permissive joinder for law enforcement agencies, and setting high standards for remedies). The law drew a
particularly strong line against judicial remedies that interfere with the ability of states to imprison as many people as it chooses to, requiring the court to reject a population cap if it proves a significant risk to public safety even when it is necessary to remedy a constitutional violation. The fact that the three-judge court in *Plata* ordered a massive reduction in prison population even under that standard is a demonstration of the resilience of federal courts as shields against state penal power. The *Plata* court created a powerful factual record demonstrating that the characterization of the broad prison population as a danger to the community requiring penal incapacitation, central to mass incarceration, was inaccurate in many cases. The tens of thousands of prisoners who were part of the *Coleman* class action, all of who suffer from a major mental illness, and the even larger number of prisoners with serious chronic illnesses or injuries requiring sustained medical treatment and monitoring which the *Plata* case found the state incapable of, are far more at risk of premature death at the hands of the state, than they are a risk to kill anyone. Indeed Justice Kennedy references the concept of “evolving standards of decency” in a footnote where he indicates just how broad was the harm of California’s human rights abuses.

Plaintiffs rely on systemwide deficiencies in the provision of medical and mental health care that, taken as a whole, subject sick and mentally ill prisoners in California to “substantial risk of serious harm” and cause the delivery of care in the prisons to fall below the evolving standards of decency that mark the progress of a maturing society. (*Brown v. Plata* 2011, 1926, note 4)

The fact that a very conservative US Supreme Court upheld it is likely to be a major signal to other lower courts that overriding state penal preferences is necessary. Indeed, after decades of instructing federal courts to defer to state penal policies and administrative expertise, the *Brown* majority laid a clear rationale for intervention.

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.…

If government fails to fulfill this obligation, the courts have a responsibility to remedy the resulting Eighth Amendment violation…. Courts must be sensitive to the State's interest in punishment, deterrence, and rehabilitation, as well as the need for deference to experienced and expert prison administrators faced with the difficult and dangerous task of housing large numbers of convicted criminals…. Courts nevertheless must not shrink from their obligation to “enforce the constitutional rights of all ‘persons,’ including prisoners.”… Courts may not allow constitutional violations to continue simply because a remedy would involve intrusion.

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9 US law permits similarly situated parties to join in a “class” that becomes a single legal party for purposes of the case.
into the realm of prison administration. (Brown v. Plata 2011, 1928-9, citations omitted)

During the growth era of mass incarceration, deference to state penal choices and expertise, intensified by popular expressions of frustration over violent crime, left courts largely absent in setting limits to bureaucratic power in the penal setting. Given the degree to which this setting is one already distanced from the public and normal political processes, courts play a singular role against this particularly risk pathway toward mass human rights abuses in advanced democratic societies. As a precedent Brown v. Plata is likely to launch challenges to prison and jail conditions all over the country. While the component cases in Brown v. Plata, and the crisis in medical and mental health care exposed there, took decades to hold the state’s mass incarceration policies accountable, the challenges in other states are likely to move faster but not fast enough to unwind degrading conditions that exist all over the country where overcrowding and chronic illness burdened prison populations are more the rule than the exception. Courts can play a checking role but not ultimately carry the full burden of policing the human rights of people caught in our distended penal and policing systems.

Conclusions

Is there a legal civilizing process? Here Europe offers an intriguing counterexample. At the end of World War II and through the early 1970s, the US and Western Europe had similar approaches to the relationship between human rights and the authority of national (or in the US federal system, state) penal and police authorities. In both cases limited protections of individual rights were anchored mostly in national constitutions or criminal procedure codes. Incarceration rates were higher in the US but not dramatically so, and capital punishment was in use in both Europe and the US. Today as everyone knows the two are quite different. Despite not insignificant increases in the scale of incarceration in many European Union member states, and a high concentration on racial and nationality or immigration status minorities among the incarcerated (De Giorgi 2006; Wacquant 2009), there is no clear analog to American style mass incarceration in any European state.10 Likewise, a trans-national set of values and institutions is now recognized as necessary to the security of human rights in Europe, and the end of capital punishment across the world is now a continental purpose. While there are many differences in political institutions, culture, and history that may explain this, the fact that European penal systems are subject to a body of human rights law that has no current analog in the US, and informed by the concept of human dignity, is extremely promising (von zyl Smit and Snacken 2009). There it is importantly not just the courts as instruments of human rights, but agencies with expertise, budgets, and transnational political clout, like the European Committee for the Prevention of Torture and the Committee of Ministers of the Council of Europe, which promulgates the European Prison Rules.

10 To colleagues at Prato, I invite correction if I’ve painted too rose-colored a picture.
From the 1960s through the 1980s United States federal judges played a celebrated role in civilizing brutal state prison practices, many of which dated back to the 19th century (Feeley and Rubin 1998). Then, during the last decade of the 20th century through the first decade of this century, mass incarceration introduced a new kind of degradation into American corrections, one based on late 20th century technologies and a commitment to an extreme version of penal incapacitation as a primary societal justification for imprisonment (Simon 2014). Courts by and large failed to check these tendencies, approving supermax prisons and irreducible life sentences for adults as compatible with the evolving standards of decency. We can see at play many of the forces that Bauman’s analysis would indicate, especially the perception of a national emergency around violent crime, which enabled the judiciary to avoid a confrontation with mass incarceration. But arguably we also see the consequences of an underdeveloped legal civilizing process, one too weak to bolster restraints on inhumane treatment or seed counter centers of power. In this respect a gulf opened up between the US and legal systems, like Europe, with fully formed “post-modern” constitutions anchored in human rights and human dignity.11

Today we are at the end of that cycle, and we appear to be at the start of another period when the meaning of human rights within our national Constitution is being enhanced, a process that began in the US after World War II, but was left incomplete after the 1960s. That does not mean mass incarceration is going to disappear anytime soon. The better wager is that it will shrink a bit and morph into something superficially more legitimate, such as a focus on violent and repeat offenders, but which is likely to be just as racialized and even more degrading (Simon forthcoming).12 What is needed is not legal guarantees of respect for human rights—those are a liberal fantasy—but legal sources of counter-power and resistance to degradation that take the form of litigation, public investigation and shaming, and norm shaping within the penal and police bureaucracies. In the case of the US, the sociological civilizing process is quite advanced (even if not complete by European standards), but the legal civilizing process has just begun.

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11 I first heard this use of “postmodern” in a recent discussion here at Berkeley Law on comparative constitutional law with Justice Anthony Kennedy of the US Supreme Court and Justice Rosie Abella of the Supreme Court of Canada. Justice Abella used this to describe charters like those in Canada and South Africa that took a human rights perspective and internalized it into the national legal system.

12 Half of California prisoners are now under a life, death, or extended prison sentence under the Three-Strikes law (BJS 2014, 13).
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U.S.= United States Reports (the official but much delayed publication of the Supreme Court of the US)
S.Ct. = private but reliably published edition of Supreme Court decisions, unofficial but usually available in libraries and online