

UC Irvine

UC Irvine Previously Published Works

Title

The Most Restrictive Alternative: A Litigation History of Solitary Confinement in U.S. Prisons, 1960-2006

Permalink

<https://escholarship.org/uc/item/3db064tt>

ISBN

978-1-78052-623-2

Author

Reiter, Keramet Ann

Publication Date

2012-01-01

License

[CC BY 4.0](#)

Peer reviewed

THE MOST RESTRICTIVE ALTERNATIVE: A LITIGATION HISTORY OF SOLITARY CONFINEMENT IN U.S. PRISONS, 1960–2006

Keramet Ann Reiter

ABSTRACT

Supermaxes across the United States detain thousands in long-term solitary confinement, under conditions of extreme sensory deprivation. Almost every state built a supermax between the late 1980s and the late 1990s. This chapter examines the role of federal prisoners' rights litigation in the 1960s and 1970s in shaping the prisons, especially supermaxes, built in the 1980s and 1990s in the United States. This chapter uses a systematic analysis of federal court case law, as well as archival research and oral history interviews with key informants, including lawyers, experts, and correctional administrators, to explore the relationship between federal court litigation and prison building and designing. This chapter argues that federal conditions of confinement litigation in the 1960s and 1970s (1) had a direct role in shaping the supermax institutions built in the subsequent decades and (2) contributed to the resistance of these institutions to constitutional challenges. The

Studies in Law, Politics, and Society, Volume 57, 71–124

Copyright © 2012 by Emerald Group Publishing Limited

All rights of reproduction in any form reserved

ISSN: 1059-4337/doi:10.1108/S1059-4337(2012)0000057006

history of litigation around supermaxes is an important and as-yet-unexplored aspect of the development of Eighth Amendment jurisprudence in the United States over the last half century.

INTRODUCTION

Solitary confinement is an age-old form of punishment in which a prisoner is traditionally kept isolated, in a single, small cell, with limited access to daylight, reading materials, or any form of activity. The practice usually involves absolutely minimal human contact, with simple food delivered through slats or holes in an iron or steel door. Early prisons in the United States attempted to implement complete solitary confinement, as a means of rehabilitating prisoners. Late eighteenth century reformers hoped solitary confinement would give prisoners time to contemplate their sins, while working at handicrafts, or reading the Bible, in silence. Relatively quickly, however, wardens at one prison after another abandoned this practice; so many prisoners in solitary confinement went insane, lost all ability to function, or committed suicide that the practice became unsustainable. Indeed, visitors to America, such as Charles Dickens (1842), Alexis de Tocqueville, and Gustave de Beaumont (1979) commented in the mid-nineteenth century on the disturbing severity of these solitary confinement conditions; in 1890, the Supreme Court even recorded the indisputable shortcomings and risks of the then – largely abandoned practice of keeping prisoners in long-term solitary confinement (*In Re Medley*, p. 168).

But, in 1986, the correctional practice of keeping prisoners in long-term solitary confinement was re-instituted, in Arizona. In 1986, the Security Management Unit (SMU) opened in Florence, Arizona (Lynch, 2010). The SMU represented the first modern “supermax” prison, explicitly designed, through a combination of modern technological innovations, to maintain prisoners in indefinitely long-term solitary confinement. In 1989, California opened the second supermax, the Security Housing Unit (SHU) at Pelican Bay State Prison in Crescent City, California. In 1994, the Federal Bureau of Prisons opened its own supermax, the Administrative Maximum (ADX) in Florence, Colorado. Within a decade, almost every state had its own supermax (National Institute of Corrections, 1997).

The SMU, the SHU, ADX, and their progeny differ in a number of critical ways from the original solitary confinement cells first built in the 1780s in the United States. First, they are technologically advanced facilities, which

actually completely remove the prisoner from any form of human contact. Prisoners remain in supermax cells 23–24 h a day, with little to no human contact for weeks, months, or even years at a time. Correctional officers can press a button in a central control booth, in order to open a cell door and allow a prisoner out for a shower, or into a “dog run” for exercise. Fluorescent lights remain on 24 h a day, and usually there are no windows and no direct access to natural light. Televisions and reading materials are often forbidden or strictly limited (Rhodes, 2004, p. 28; Shalev, 2009).

Second, these new facilities are not general population prisons to which a judge or a jury sentences a prisoner; rather they house prisoners correctional administrators determine to be the “worst of the worst” (Griffith, 1989). In other words, correctional administrators assign prisoners to supermax confinement through an internal administrative process. Usually, prisoners are assigned to supermaxes because (1) they broke a prison rule or (2) they were determined, through an administrative process, to be gang leaders too dangerous to be housed with the rest of the general prison population. However, prisoners might also be assigned to supermaxes because they require “protective custody,” if their lives would be in danger in the general prison population, or because they are severely mentally ill and disruptive in the general prison population (Lovell, Cloyes, Allen, & Rhodes, 2000). Supermaxes are usually free-standing facilities, where prisoners are sent for more than a few months, as opposed to smaller segregation units within individual prisons, where prisoners might be sent for a period of a month, or two.

Finally, there is nothing redemptive or rehabilitative about supermaxes. There is no pretense, as there was with the eighteenth century penitentiaries, that solitary confinement will give prisoners time to think, repent, and reform. Rather, prisoners are consigned to these facilities indefinitely, often with the explicit understanding that nothing the prisoner does, or refrains from doing, could possibly earn him his release (*Austin v. Wilkinson*, 2005, p. 220). Moreover, great intellectuals like Dickens and Tocqueville are not flocking to America to visit these supermaxes; in fact, the only people who have visited them are lawyers and experts whom courts have ordered to be admitted inside, after the extreme brutality of the conditions in the facilities has been challenged through litigation.

This chapter will explore the role of the courts in this long American history of punitive isolation, examining how courts have addressed questions about the constitutionality of solitary confinement and isolation in two main periods: (1) during the two decades *before* states started to build supermaxes and (2) during the two decades just *after* Arizona and California

built the first supermaxes. First, however, the chapter provides an overview of the uses of both solitary confinement and sensory deprivation techniques, in U.S. prisons and the U.S. military, dating back to the early days of the American Republic. This first section also reviews the few comments the federal courts made on practices of solitary confinement and sensory deprivation in the late nineteenth century.

Second, the chapter examines the explosion of litigation challenging conditions in U.S. prisons, which took place in the 1960s and 1970s. This second section documents the socio-legal changes that facilitated this prisoners' rights litigation and specifically analyzes how courts evaluated challenges to the constitutionality of solitary confinement and punitive isolation, before the first supermax was built. This analysis documents the direct impact 1960s and 1970s courts had in shaping supermax prisons in the 1980s and 1990s.

The third section of the chapter examines the post-1980s prisoner litigation challenging the supermax institution. These challenges attack the institutions from a variety of angles, including: the extremity of the sensory deprivation conditions in supermaxes, such as the absence of windows and out-of-cell time; the limitations on prisoners' privileges, like access to family visits or to educational programs; the duration of confinement in these conditions; and the procedures by which correctional administrators assign prisoners to supermaxes. In spite of this proliferation of challenges to the fundamental constitutionality of long-term solitary confinement under sensory-deprivation conditions, the analysis of this post-supermax litigation period reveals that supermaxes have been especially resistant to litigation.

When courts have considered individual challenges to supermaxes, or, in a very few instances, certified class action challenges to the institutions, their criticisms and reforms of the institutions have been extremely limited. Indeed, the jurisprudence of supermaxes reflects the (much more frequently explored) jurisprudence of the death penalty, developed in federal courts since the 1970s. Federal courts evaluating challenges to both long-term solitary confinement and death sentences have focused mainly on two kinds of claims: (1) the application of scientific evaluations (of mental health, competency, DNA evidence, etc.) to highly individualized cases and (2) the procedural rights that should accompany either a sentence to death or an assignment to solitary confinement. This chapter argues that the resistance of supermaxes to systemic constitutional challenges is partially attributable to the role the courts played in the preceding decades in shaping the ultimate design of the modern supermax. Understanding the history of litigation around supermaxes, therefore, is an important piece of understanding the

development of Eighth Amendment jurisprudence in the United States over the last half-century.

Moreover, exploring the role of the courts in shaping the constitutional forms of isolation and solitary confinement in U.S. prisons contributes to legal historiography debates about how important courts are to the development of legal rights and the codification of moral values. Specifically, questioning the exact role of the courts in the supermax phenomenon implicates Willard Hurst's critique of legal history, which he alleges tends to over-emphasize the role of courts and to under-emphasizes the role of inertia and social drift (Hurst, 1988); this analysis will seek to explore which factors were at play in the case of the supermax: inertia or concerted action? Lawrence Friedman, on the other hand, has suggested that law can be not only instrumental and powerful, but also symbolic and moral (Friedman, 1988); exploring the question of how the courts affected the supermax phenomenon speaks to exactly this dichotomy. This exploration of litigation precedent to and subsequent to the building of supermax institutions will explore the exact relationship between "official law and actual behavior" (Friedman, 1988). In sum, this legal historical project implicates questions at the core of legal realism, about whether and how court-made-law shapes social institutions.

Terminology: Segregation, Solitary Confinement, and Supermaxes

Throughout this chapter, *segregation* or *isolation* conditions refer to prison conditions in which prisoners have minimal out-of-cell time; minimal intellectual stimulation, such as access to books, radios, televisions, or human conversation; no programming, like access to education or in-prison jobs; and severe limitations of the most basic privileges, such as access to fresh air, daylight, exercise, and a normal diet. Fundamentally, the terms *isolation* and *segregation* simply refer to the fact of some prisoners being isolated, or segregated, from the rest of the prison population, usually in total solitary confinement. However, *isolation* or *segregation* might involve detention in a cell with another prisoner. *Isolation* and *segregation* may be imposed for a period of a few days or for weeks at a time. Both state departments of corrections and federal courts often use these terms interchangeably. Between the 1890s, when prison administrators abandoned long-term solitary confinement, and the 1980s, when prison administrators re-instituted the practice, with the advent of supermaxes, most state prison systems (and the federal prison system) maintained some form of short-term

isolation or segregation cell, in order to control and punish recalcitrant prisoners. These kinds of segregation cells are the subject of the second section of this chapter, which examines prisoners' early conditions of confinement challenges in the federal courts in the 1960s and 1970s. The challenges to these segregation cells, I argue, shaped the physical structure of the more extreme supermax cells which were ultimately built.

Solitary confinement is a kind of segregation, in which a prisoner is placed in a cell without any other prisoners present. Some of the 1960s and 1970s conditions-of-confinement cases challenged segregation conditions generally, and some challenged the specific practice of solitary confinement. *Supermaxes*, in turn, are a kind of solitary confinement. Definitions of exactly what constitutes a supermax vary with the 50 state prison systems; surveys have found that anywhere from 5,000 to 100,000 U.S. prisoners are in supermax confinement at any given time, and that there are anywhere from 20 to 57 supermax facilities in the United States (Naday, Freilich, & Mellow, 2008; Riveland, 1999). Based on extensive research on supermax prisons throughout the United States, and on the survey of case law included in this chapter, I identify four key factors I associate with supermaximum security confinement, whatever label different states assign to the practice: (1) sensory deprivation,¹ usually in combination with solitary confinement; (2) an internal administrative, post-conviction process for placement in the institution; (3) institutional placement for long durations of more than a few months; and (4) the use of novel technology built or added during the 1980s and 1990s prison-building boom to produce unprecedentedly secure confinement.

Case Selection and Methods

The bulk of this chapter is the section analyzing 1960s and 1970s conditions-of-confinement challenges in federal court. This section focuses in particular on eight state case studies (listed in order of discussion): Arkansas, Ohio, Mississippi, Alabama, Illinois, Colorado, California, and Pennsylvania. I chose these eight state case studies from the universe of roughly 900 cases pulled from a LexisNexis search of all federal cases including the terms "solitary confinement," or "isolation," in combination with "prison," for the years 1963–1993. (1963 is the year that the Eighth Amendment was incorporated, or applied to citizens of the states, and 1993 is the year that a federal court in California heard one of the first major cases about supermax

prisons, so it marks the end of the pre-supermax era of litigation.) Although this search retrieved more than 900 federal cases, there was significant overlap among cases; each iteration of a case, at each level of appeal, for instance, appears as a separate search result. Note that I searched only federal cases. Although some of the 1960s and 1970s prisoners' rights litigation took place in state courts, the majority of these cases were litigated in federal courts, because the majority of the plaintiffs were claiming federal rights – to be free from cruel and unusual punishment under the Eighth Amendment to the U.S. Constitution, or to hold prison officials responsible for unconstitutional actions, under the federal Civil Rights Act.

From these hundreds of cases, I focused on those cases that involved some form of class action litigation, as these are the cases that are most likely to have significant impact on individual prisons and on broader state prison systems. Specifically, I chose the eight state case studies profiled here to reflect a combination of (1) geographic diversity, (2) diversity in scale of class action litigation (some cases involve a single prison and some involve an entire state prison system), (3) diversity in duration of litigation, and (4) diversity in kind of remedy ordered by the federal court. I present a cross-section of states from throughout the United States, in order to capture any potential regional variations in either severity of unconstitutional conditions in prisons, or style of federal court interventions in individual state prisons and prison systems.²

Given the hundreds of cases retrieved in the LexisNexis search described earlier, an examination of the procedural history and legal analysis in every case would be a lifetime project in itself. Here, through a smaller number of case analyses, I simply seek to explore the consistency with which courts across the United States, over two decades, addressed conditions of confinement claims, especially claims concerning the conditions in isolation and solitary confinement cells.

This chapter interweaves analysis of this federal case law with details from litigation documents and with data collected from more than 20 in-depth key informant interviews with lawyers, experts, architects, and correctional administrators who participated in both prisoners' rights litigation and prison building over the last 40 years. Through this analysis, I seek to explore the mechanisms by which prison conditions litigation in the 1960s and 1970s shaped both the physical design and the administrative structure of at least some of the prisons that were built across the United States in the 1980s and 1990s. In addition, I hope this analysis of a new form of extreme punishment, which is not the death penalty, will illuminate a variety of themes in the development of Eighth Amendment jurisprudence.

HISTORICAL OVERVIEW: SOLITARY CONFINEMENT AND SENSORY DEPRIVATION IN THE UNITED STATES, 1776–1973

I hold this slow and daily tampering with the mysteries of the brain, to be immeasurably worse than any torture of the body; and because its ghastly signs and tokens are not so palpable to the eye and sense of touch as scars upon the flesh; because its wounds are not upon the surface, and it extorts few cries that human ears can hear; therefore I the more denounce it, as a secret punishment which slumbering humanity is not roused up to stay. (Dickens, 1842)

Solitary confinement is a longstanding, or at least long-experimented with, form of punishment. In the United States, it was first used in the Walnut Street prison, beginning in the 1780s in Pennsylvania. (In an 1890 opinion, the Supreme Court suggested that solitary confinement was first used in Italy in 1703, in a “solitary prison connected with the Hospital San Michele at Rome” (*In Re Medley*, 1890, p. 168).). In Walnut Street prison, some prisoners worked at hard labor, but others lived in complete solitary confinement, in an eight-by-six foot cell, without any work assignments at all. The solitary confinement conditions first implemented at Walnut Street in 1787 were replicated at Auburn prison in New York, which opened in 1821 and at Cherry Hill prison in Pennsylvania, which opened in 1829 (Friedman, 2005, pp. 219–220; Hirsch, 1992; Lewis, 1922; Rothman, 1971, p. 69). Auburn State Prison in New York was known for requiring complete silence at all times, but prisoners were allowed out of their cells during the day for congregate work. In addition to prisoners who were subject to this “Auburn System,” some prisoners at Auburn were also subject to true solitary confinement cells, like those at Walnut Street Prison, where they had no congregate time with other prisoners. Other states, including Massachusetts, New Jersey, and Maryland, also built prisons in the first half of the nineteenth century, intending to replicate the so-called Auburn system.

Within a few decades, however, both European visitors, including Alexis de Tocqueville and Charles Dickens, as well as the United States Supreme Court, had roundly condemned these prisons. Dickens unequivocally described what he saw in the solitary confinement cells he visited at Cherry Hill Penitentiary as “torture” in 1842. And although Tocqueville and Beaumont were largely impressed by the American criminal justice system, they described the use of solitary confinement at Auburn as an experiment “which ... proved fatal for the majority of prisoners ... It devours the victim incessantly and unmercifully; it does not reform, it kills” (Beaumont & Tocqueville, 1979, p. 41).

Indeed, by the mid-nineteenth century, hundreds of deaths and cases of insanity had been documented and attributed to the uses of long-term solitary confinement in places like Auburn and Cherry Hill. In light of this evidence, many jurisdictions took steps to limit the duration of solitary confinement, or to eliminate the practice entirely (Haney & Lynch, 1997). The Supreme Court even condemned the practice, albeit in dicta. In 1890, in *In Re Medley*, the Supreme Court devoted more than a page (of a short, 14-page opinion) to describing the severity and futility of solitary confinement as a punishment. A brief excerpt reveals the certainty with which the Court condemned the practice of solitary confinement:

A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition ... And others became violently insane; others, still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community. (*In Re Medley*, 1890, p. 168)

The procedural context in which the Court made this statement is particularly interesting, and foreshadowed the tone of much of the litigation around solitary confinement, which would take place almost 100 years later, in the 1990s and beyond.

Specifically, in *Medley*, the Court held that a change in Colorado law requiring that death-sentenced prisoners be held in solitary confinement (rather than sharing cells with other prisoners in a local jail) constituted a significant increase in punishment for death-sentenced prisoners. For those prisoners who committed their crime before the statute was passed, subjecting them to the extreme solitary confinement conditions would violate the *ex post facto* prohibition on changing the punishment for a crime after the crime was committed (*In Re Medley*, 1890, p. 166). In other words, James Medley, who was found guilty of first-degree murder and sentenced to death in 1889 in the state of Colorado, could not be held in solitary confinement, under the terms of a statute, which was enacted after Medley committed the murder for which he was sentenced. If a new law "alters the situation of the accused to his disadvantage," then an *ex post facto* violation may occur (*In Re Medley*, 1890, p. 171). Imprisoning Medley in solitary confinement would be tantamount to punishing him for an act that was not criminal at the time he committed it. The Court, in fact, was so upset by this new solitary confinement practice that it ordered that Medley go entirely free, even though the Court conceded the problem was not an error in the trial process, which resulted in Medley's conviction and sentence, but an error in the conditions of his detention.

The Court's distaste for solitary confinement, however, was limited to this intricate procedural framework, revolving around questions of the reach of the *ex post facto* prohibition in the Constitution, and not engaging questions of the actual constitutionality of the punishment itself. In fact, after *Medley*, the Court found few problems with solitary confinement. In 1891, the Court held that extended, pre-execution stays in solitary confinement in New York State were perfectly constitutional (*McElvaine v. Brush*, 1891). Over the next 50 years, the Court only mentioned solitary confinement off-hand a few times, noting that it was a comparatively severe (though not unconstitutional) form of punishment (see *Chambers v. Florida*, 1940, p. 237–238; Haney & Lynch, 1997, p. 540; *United States v. Moreland*, 1922, pp. 449). Although prisons continued to use isolation and solitary confinement as short-term punishments for misbehaving prisoners, the early Quaker penitentiary model, which kept prisoners in total isolation for the duration of their confinement, was largely abandoned by 1890.

Limited Uses of Solitary Confinement

In Re Medley, then, marked the end of a century of on-again-off-again uses of extended solitary confinement in the early United States penitentiaries. Although solitary confinement continued to be used in limited circumstances, even after 1890, it was neither the ideal nor even the norm in American prisons. Even the infamous Alcatraz, which operated from 1934 to 1963, did not maintain its prisoners in absolute solitary confinement. Rather, the approximately 250 prisoners in this highest-security federal institution shared meals in a congregate dining hall and had out-of-cell work shifts, to name just a few of the privileges accorded to prisoners at Alcatraz (Odier, 1982, pp. 113, 117). The warden of Alcatraz did briefly attempt to maintain a regime of silence, harking back to the early Quaker penitentiaries, but the silence policy met with the same kind of criticism solitary confinement had faced in the late nineteenth century, including vocal European critics and an exposé in the *Saturday Evening Post* (Haney & Lynch, 1997, p. 488).

In 1963, the Federal Bureau of Prisons closed Alcatraz, citing a number of escaped prisoners and the expense of running the island prison (Ward & Kassebaum, 2009, p. 463). Many of the high-security prisoners from Alcatraz were transferred to a new federal prison in Marion, Illinois, which opened in 1963. Marion later became known as the first “control unit,” a precursor to the modern supermax. However, Marion was not originally designed to maintain prisoners in long-term solitary confinement; the prison only began to keep a

small segment of its population (roughly 50 prisoners) in long-term solitary confinement in the early 1970s (Dowker & Good, 1993, p. 1; Griffin, 1993, p. 7). In sum, where solitary confinement did exist in American prisons, between the 1890s and the 1970s, it was the exception rather than the rule. Moreover, the duration of confinement was usually short. For instance, the warden of Alcatraz would occasionally throw recalcitrant prisoners into the "Spanish dungeons" for a few days at a time (Odier, 1982, p. 117). And from the mid-1950s, San Quentin had an infamous "adjustment center" for temporary, punitive isolation in solitary confinement (Haney & Lynch, 1997, p. 489).

As discussed further in the subsequent section, courts in the 1970s acknowledged these temporary uses of solitary confinement, but explicitly noted that confinement under such conditions was always limited, usually to a day, or a few weeks at most (see, e.g., *Gates v. Collier*, 1974, p. 1305; *Sostre v. McGinnis*, 1971, p. 192). However, in the late 1970s, both the duration of solitary confinement terms and the number of people confined began a steady expansion, which paralleled, in fact, the expansion of prison conditions lawsuits in federal courts.

Between the late 1970s and early 1980s, prisons across the United States returned to the practice of punishing through imposition of long-term solitary confinement. Starting in 1972 and 1973, portions of prisons in California, Illinois, and Massachusetts, to name just a few examples, were "locked down" following riots; prisoners were no longer allowed to leave their cells for meals, work, or other programming. The lockdowns lasted first for months, and then years at a time (Bissonnette, Hamm, Dellelo, & Rodman, 2008; Cummins, 1994, p. 232; *Toussaint*, 1984, pp. 1397, 1410; Ward & Breed, 1984). Within a decade, in the early 1980s, the federal Bureau of Prisons, and a number of state departments of corrections, began building new facilities to maintain these prisoners in even more restrictive conditions of indefinitely long-term solitary confinement. This was the beginning of the supermax phenomenon.

Sensory Deprivation Practices

Although solitary confinement in U.S. prisons was used only for short durations throughout the first half of the twentieth century, and courts and reformers had readily acknowledged the problems with these conditions for more than a century, scientists at this time were still interested in evaluating the impacts of these kinds of conditions, especially conditions involving sensory deprivation. Donald Hebb was the first to conduct one such experiment. In the early 1950s, Hebb, a professor of psychiatry at McGill

University, recruited students to participate in studies where they were isolated under sensory deprivation conditions, in silence and darkness, with gloves to prevent physical sensations. Hebb found that the conditions affected brain functioning, and many students, in spite of the \$20 per day payment for participation, defected from the studies (Brown & Milner, 2003; Heron, 1957). The results later formed the basis of Canadian and U.S. military investigations into the practices and effects of brainwashing, justified in light of fears of Communist military tactics used against American soldiers during the Korean War. Specifically, in the early 1960s, the Central Intelligence Agency (CIA) developed a military training program dubbed SEREs, or Survival, Evasion, Resistance, Escape. This program trained soldiers to withstand sensory deprivation techniques during interrogations. In the 2000s, facing criticisms of the conditions at Guantanamo and tactics used by the military in interrogating terrorists, federal executive advisors referenced evidence of soldiers' resilience, gathered through the SEREs program, to justify and defend the use of SEREs-like tactics against alleged terrorists (Koenig, Stover, & Fletcher 2009, p. 164; Shane, 2009).

Although this dialogue, initiated by Donald Hebb, between the scientific community and the military, took place largely outside of American courts, the scientific findings would shape the design of both military and civilian prisons over the next century. In 1962, for instance, Edgar Schein, a professor of organizational psychology at the Massachusetts Institute of Technology, gave a speech, sponsored by the National Institutes of Mental Health, to a group of Federal Bureau of Prisons officials, in which he argued that techniques pioneered by Hebb and institutionalized through SEREs could and should be applied in the domestic prison context. Schein noted that the SEREs techniques, often colloquially referred to as "brainwashing" could well be applied to create "deliberate changing of behavior and attitudes by a group of men who have relatively complete control over the environment in which the captive population lives" (as quoted in Chorover, 1979, p. 200).

Within a few years, the Federal Bureau of Prisons had implemented one of the first behavior management programs, dubbed Control and Rehabilitation Effort, or CARE. The program institutionalized many of the brainwashing tactics for which Schein had advocated, including social isolation through solitary confinement and "character invalidation" through intensive and confrontational group therapy sessions with a "prisoner thought-reform team" (Mitford, 1974, pp. 134–135). In 1972, Missouri state prison officials implemented a similar kind of behavior

modification program, dubbed the Special Treatment and Rehabilitation Training (START), in which prisoners were placed in solitary confinement and allowed no reading materials or other access to human contact until they achieved certain behavioral benchmarks (*Clonce*, 1974, p. 345; *Reiter*, 2009, pp. 511–512). Although behavior management programs, like CARE and START, were challenged in federal court (*Adams*, 1973, pp. 621–622; *Clonce*, 1974, p. 345), these challenges did not stop other prisons from implementing similar programs. As recently as 2005, California implemented its own Behavioral Management Unit, premised on the same principles of placing prisoners in extreme isolation with the explicit goal of reforming prisoners' behavior (Administrative Bulletin No. 05/02, 2005; *Piller*, 2010).

These examples simply illustrate the ongoing dialogue between scientists and military officials experimenting with sensory deprivation practices and U.S. prison officials experimenting with safety and security practices. Like the history of solitary confinement in the United States, the history of sensory deprivation practices provides important context for understanding the litigation that took place in the 1970s and after regarding prisoners' rights and standard-setting for constitutional practices and procedures in U.S. prisons. Some scholars have argued, in fact, that eighteenth-century American jurisprudence laid the groundwork for twenty-first century American jurisprudence condoning abusive military practices, including those practices rooted in the sensory deprivation and brainwashing experiments of the 1950s and 1960s (*Dayan*, 2007). I, in turn, argue that twentieth-century American jurisprudence rationalized and entrenched these sensory deprivation practices, along with the use of long-term solitary confinement in U.S. prisons.

SUPERMAX PROTOTYPES: PRISON REFORM, ISOLATION, AND SOLITARY CONFINEMENT, 1972–1993

The indescribable conditions in the isolation cells required immediate action to protect inmates from any further torture by confinement in those cells. As many as six inmates were packed in four foot by eight foot cells with no beds, no lights, no running water, and a hole in the floor for a toilet which could only be flushed from the outside. (*Pugh v. Locke*, 1976, pp. 327–328)

Although American courts received prisoner complaints about both sentences and conditions of confinement from the eighteenth century on, few of these complaints were met with careful consideration, until the second half of the twentieth century. This section first details the three

changes in federal law in the mid-twentieth century, which both expanded the civil rights available to prisoners and facilitated litigation challenging prison conditions. The section then provides a procedural history and analysis of the prototypical mid-twentieth century prisoners' rights case: *Hutto v. Finney*, a case that originated in Arkansas in 1965. The case is prototypical in two senses: (1) its procedural history and the claims it encompasses are fairly representative of the procedural history and type of prisoners' claims raised in cases throughout the United States in this period and (2) it was the first of the 1960s state prison conditions challenges to reach the Supreme Court. Following the *Hutto* analysis, this section discusses the other Supreme Court case to evaluate state prison conditions and isolation conditions in the 1970s: *Rhodes v. Chapman*, which originated in Ohio. The section then provides overviews of the specific kinds of prison isolation conditions lower federal courts found unconstitutional in six separate states. As mentioned in the introduction, I chose these six state sites of litigation to represent a variety of regions and to include those cases with the broadest impacts, in terms of the scope of the litigation and the kind of remediation, especially as to isolation conditions, which the courts ordered. Finally, this section identifies how the concerns the courts raised in each of these state sites of litigation were ultimately reflected in the designs of the supermax institutions built in those states.

More Rights and More Litigation

When the American criminal law system was first codified, in the eighteenth century, prisons hardly existed. So when the framers drafted the Eighth Amendment prohibition against cruel and unusual punishment, they were codifying a ban against uncivilized, public corporal punishments, like beheadings and drawing-and-quartering. Federal courts would take more than a century to make the link between the Eighth Amendment and the apparently more civilized and definitively more private and less corporal punishment of long-term imprisonment. Similarly, the right to habeas corpus is codified in Article One of the U.S. Constitution, but traditionally, habeas corpus claims were only available as a means to challenge the legitimacy of a criminal conviction, and the only associated remedy was for a court to order the prisoner's release from custody, or to overturn a criminal sentence in its entirety. (Recall that the 1890 case *In Re Medley* was a habeas corpus challenge to the legitimacy of a death sentence preceded by a term of solitary confinement, and the remedy for the unconstitutionality of the

solitary confinement was *not* to change the conditions of the confinement but simply to release the prisoner from custody, and from his sentence of death.)

In 1953, however, two federal court cases changed the scope of habeas corpus rights available to prisoners. First, a federal appellate court in Washington, DC permitted a convicted "sexual psychopath" to file a habeas corpus claim in which he challenged not the legitimacy of his conviction and sentence, but the conditions of his confinement (*Miller v. Overholer*). In *Miller*, the D.C. Circuit Court evaluated the habeas corpus petition of a convicted sexual psychopath and found that he had a right to challenge the conditions of his confinement – specifically his placement in a ward with criminally insane prisoners, who assaulted him during his stay. The existence of a prisoner's right to challenge the conditions of his confinement, in turn, implies the right of a court to remedy any unconstitutional conditions with a specific order about where or how the prisoner may be held, rather than with a blanket order that the prisoner be released from custody.

In the same year that the D.C. Circuit Court decided *Miller*, the U.S. Supreme Court heard another case about the scope of a convicted criminal defendant's right to bring a habeas corpus challenge. In *Brown v. Allen*, the Court held that a federal court may review a state court's death sentencing decision, and may even hold a hearing and review new evidence, if the state court left any federal constitutional questions unresolved. In other words, the case expanded the rights of state criminal defendants to have challenges to their state criminal sentences heard in federal court.³ These two cases represented two of the first twentieth century cases that expanded the rights available to prisoners throughout the United States.

Over the next 20 years, federal courts, and especially the Supreme Court, would continue to expand and specify the rights available to both criminal defendants and prisoners. Indeed, 1953 was the year that Earl Warren became Chief Justice of the U.S. Supreme Court (just after *Brown v. Allen* was decided), and Warren in particular was known for leading the Court in this "rights revolution" (Epp, 1998).

Nine years after *Brown v. Allen*, the Supreme Court took a second step to expand the civil litigation rights available to prisoners. Specifically, in 1962, the Court incorporated the Eighth Amendment prohibition on cruel and unusual punishment against the states (*Robinson v. California*, 1962). Prior to *Robinson*, a state prisoner would have had to rely on rights accorded to him under the constitution of the state in which he was imprisoned, rather than on the federal bill of rights. After *Robinson*, a state prisoner could bring a claim in federal court challenging the conditions of his confinement in

state prison, thereby further expanding the scope of constitutional rights state prisoners could claim.

One year after *Robinson*, in 1964, the Supreme Court took a third step to expand the civil litigation rights available to prisoners; the Court subjugated prison officials' actions to the constraints of the Civil Rights Acts (*Monroe v. Pape*, 1961; *Cooper v. Pate*, 1964). According to the Court's decision in *Cooper*, a prisoner had the right to sue an individual state prison official for a violation of his civil rights, in federal court. Together, these three changes – expansion in habeas corpus rights, application of the Eighth Amendment to state prisoners, and authorization of suits against prison officials under the Civil Rights Act – led to an explosion in prisoner lawsuits during the 1960s and 1970s (Feeley & Rubin, 1998, p. 37).

Although many of these lawsuits began as individual claims, brought by prisoners representing themselves (as *pro se* petitioners), these single legal challenges quickly combined and expanded into sprawling class action cases, litigated over decades. These lawsuits resulted in court orders that subjugated prisons, and sometimes entire state departments of corrections, to expert monitoring, federal court oversight, and enforceable promises to alter and improve conditions of confinement. In a 1981 Eighth Amendment challenge to prison conditions in Arkansas, Justice Brennan noted that there were 8,000 pending prisoner lawsuits challenging conditions of confinement in the United States, and 24 states with individual institutions or entire prison systems under consent decrees or orders remedying findings of unconstitutional conditions of confinement (*Rhodes v. Chapman*, 1981). In a book about judicial policy making in the 1970s, Feeley and Rubin identified even more jurisdictions with unconstitutional prisons; they counted more than 30 jurisdictions with at least one prison institution that had been declared unconstitutional as of 1975 (1998, p. 40). This explosion in prisoners' rights lawsuits reflected a steep increase in overall civil rights lawsuits throughout the United States. Between 1970 and 1982, the total number of civil rights claims filed annually increased seven-fold. In 1970, 2,793 cases were filed; in 1982, 15,575 cases were filed (Alexander, 2005, p. 207).

The explosion in prison conditions and prisoners' rights litigation paralleled the Warren Court's so-called due process revolution in the rights of criminal defendants (Friedman, 1993, pp. 300–301). While socio-legal scholars have thoroughly assessed and debated the effect of the Warren Court's due process decisions on criminal procedure (see, e.g., Symposium, 2002; Weisselberg, 2008), the parallel effects of the prisoner litigation decisions on prisons (and on the prison-building boom of the 1980s and

1990s (Zimring & Hawkins, 1991)) have hardly been explored. Feeley and Rubin (1998) wrote one of the few assessments of the role of prisoner rights litigation, in the context of analyzing judicial policymaking; however, their analysis stops with the conclusion of the litigation explosion, without exploring specific after-effects. This section suggests a concrete relationship between prisoners' rights litigation in the 1960s and 1970s and the shape of the prison-building boom in the 1980s and 1990s.

Specifically, eight state-based case histories of litigation addressing isolation, segregation, or solitary confinement conditions in the 1970s suggest that federal court interventions in state prisons in the 1960s and 1970s influenced the design of the prisons that were built in the 1980s and 1990s, especially the design of supermax institutions, which would institutionalize the practice of maintaining prisoners in long-term solitary confinement.

The first two states discussed are Arkansas and Ohio, the two states in which federal court litigation about state prison conditions was appealed, heard, and evaluated by the Supreme Court. The remaining six states discussed are: Mississippi, Alabama, Illinois, Colorado, California, and Pennsylvania. In each of these states, federal district courts oversaw substantial class action challenges to the constitutionality of a prison or an entire state prison system, and also considered the constitutionality of either long-term isolation and segregation, or long-term solitary confinement.

Arkansas: The Prototypical Prison Conditions Case

This section provides a procedural history and analysis of the prototypical mid-twentieth century prisoners' rights case: *Hutto v. Finney*, a case that originated in Arkansas in 1965 as *Talley v. Stephens*. As aforementioned, *Hutto* is prototypical in terms of both its procedural history and the invasiveness of federal court interventions in the Arkansas state prison system. Moreover, *Hutto* represented a number of firsts. It represented the first time a judge found that an entire state penitentiary, in the sum of its practices, was violating the U.S. constitution. It represented the first of the 1960s state prison conditions challenges to reach the Supreme Court. And it represented the first time in the twentieth century that the Supreme Court considered the constitutionality of long-term isolation in a prison cell.

First, the procedural history of *Hutto* is representative of how individual prison conditions claims of the 1960s became statewide class action reform cases in the 1970s. Three prisoners in Arkansas initially filed three individual

lawsuits against Dan Stephens, who was then the Superintendent, or warden, of the Arkansas State Penitentiary. Prisoners Talley, Hash, and Stone each challenged specific conditions of their confinement at the Arkansas State Penitentiary, including the amount of hard field labor expected of them, the availability of medical care, the imposition of corporal punishments in the form of whippings, and specific instances of obstruction of access to the courts. The federal district court in Arkansas appointed lawyers to represent the prisoners, who had initially filed their claims pro se, representing themselves, and consolidated the three original petitions into a single case (*Talley v. Stephens*, 1965, pp. 685–690). So, Talley was, first, a single pro se prisoner petitioner arguing his claims before the federal district court in Arkansas; the district court, observing similarities between Talley's claims and those of Hash and Stone, joined the three petitions together. Within five years, *Talley* had expanded to include the entire Arkansas State Prison system; Chief Judge Henley of the Eastern District of Arkansas had found that conditions in prisons throughout the state violated the Eighth Amendment prohibition against cruel and unusual punishment (*Holt v. Sarver*, 1970).

Judge Henley, too, was characteristic of the judges who oversaw – and shaped – the 1960s and 1970s prison conditions litigation. Like U.S. Supreme Court Justice Earl Warren, Henley was a Republican and an Eisenhower appointee. Henley served on the Arkansas Eastern District court from 1959 through 1975 and then on the Eighth Circuit Court of Appeals until his death in 1997. Throughout his 38 years as a federal court judge, he enforced and interpreted civil rights protections. In the early 1960s, Henley oversaw the legally enforced desegregation of the Arkansas public schools (Henry, 1997). Next, he turned to the state's prison system, where, for almost two decades, he oversaw a gradual improvement of prison conditions, repeatedly ordering state prison officials to develop and maintain minimum constitutional standards of treatment in their institutions.

From the first three lawsuits brought by three state prisoners representing themselves, the *Talley* case (and its successors *Holt* and *Hutto*) wound its way through the federal courts. The case bounced back and forth between the Eastern District court and the Eighth Circuit Court of Appeals, with the appellate court largely upholding the lower court's findings and orders. And, in 1978, 13 years after the federal district court in Eastern Arkansas first considered Talley's single challenge to the conditions in one Arkansas prison, the case reached the Supreme Court, now as a class action encompassing the entire Arizona state prison system under the name *Hutto*

v. Finney (1978). In this way, a single case challenging specific conditions in a single prison became a class action case challenging an entire prison system.

A successive hierarchy of federal courts in *Hutto* not only found conditions in Arkansas prisons unconstitutional, but these courts ordered specific changes to prison conditions. For instance, Judge Henley ordered: legislative allocations of funds to the Arkansas prison system, the elimination of a system in which some prisoners acted as guards over other prisoners, improvements in basic living conditions, and limitations on the durations of confinement in isolation cells (*Holt v. Sarver*, 1970). A few years later, Henley enjoined prison officials from taking specific actions in retaliation against prisoners filing lawsuits, and threatened to close down certain prisons entirely if prison officials did not comply with his orders (*Holt v. Hutto*, 1973). Henley made multiple, in-person visits himself to the state's prisons (Feeley & Rubin, 1998, pp. 70–71). Over time, Henley's orders became increasingly detailed, setting acceptable overcrowding levels; specifying healthcare provisions, grievance procedures, and visiting regulations; and requiring both affirmative action hiring and prisoner desegregation plans (*Finney v. Hutto*, 1976).

Finally, in 1978, the U.S. Supreme Court agreed to hear an appeal, brought by Arkansas corrections officials, of these sweeping district court orders. (The Eighth Circuit Court of Appeals had generally upheld these orders throughout the 1970s, and in some cases even encouraged further intervention by Judge Henley's district court.) The Arkansas state prison administrators did not dispute, on appeal, the district court's finding that the conditions in Arizona state prisons violated the Eighth Amendment prohibition on cruel and unusual punishment. Rather, they disputed the right of the district court (i.e. of Judge Henley) to impose two specific remedial orders on prison officials: a 30-day limit on confinement in punitive isolation and a requirement that the Department of Corrections pay the attorneys' fees of the prisoners' court-appointed attorneys (*Hutto v. Finney*, 1978, p. 681).

In a detailed, 40-page opinion, to which only Justice Rehnquist dissented in its entirety, the Supreme Court upheld the Arkansas district court's remedial order. Although the Court did not explicitly consider the lower courts' findings that conditions in the Arkansas prisons violated the Eighth Amendment prohibition against cruel and unusual punishment, the affirmations of the lower courts' remedial orders implicitly affirmed the underlying finding of unconstitutionality. And so, in 1978, the highest court in the United States placed its stamp of approval on the general practice, increasingly common across the United States, of prisoners bringing sweeping, class action lawsuits in federal court to challenge a variety of conditions in state prisons.

More importantly for the purposes of this chapter, the Court explicitly discussed various aspects of punitive isolation in the Arkansas prison system. This was the first time in almost a century that the Supreme Court had considered the constitutionality of long-term isolation in prison. Unlike the solitary confinement cells at issue in *Medley*, however, the "isolation" cells at issue in *Hutto* were not solitary confinement cells. In fact, one of the problems the district court identified with these isolation cells was the degree to which they were overcrowded.

The isolation cells in Arkansas prisons were 8-foot-by-10-foot cells in which anywhere from 4 to 11 prisoners would be locked in 24 h per day, served only "four-inch squares of grue" – "a substance created by mashing meat, potatoes, oleo, syrup, vegetables, eggs, and seasoning into a paste and baking the mixture in a pan," and left in these conditions indefinitely (*Hutto v. Finney*, 1978, p. 683). Although the Arkansas isolation cells did not maintain prisoners in complete solitary confinement, they shared many characteristics with both the solitary confinement cells that had been used in early penitentiaries in the United States in the eighteenth century, and with those cells that would be used in modern supermax prisons in the 1990s. Specifically, prisoners were detained indefinitely in isolation cells, without access to the outdoors, fresh air, or work programs, and with severely limited lighting, no books or radios, and food purposefully cooked to be unappetizing. The Arkansas district court ordered that punitive isolation in these conditions be limited to a maximum term of 30 days; the Supreme Court upheld this order (*ibid.*, 1978, p. 685). The worse the conditions, the more reasonable a limitation on the length of confinement seemed to the Court: "[T]he length of confinement cannot be ignored in deciding whether the confinement meets constitutional standards. A filthy, overcrowded cell and a diet of 'grue' might be tolerable for a few days and intolerably cruel for weeks or months" (*Hutto v. Finney*, 1978, pp. 686–687).

The Court also expressed concern with the "atmosphere of violence" in the isolation cells, which contributed to the "interdependence of the conditions" that justified the district court's specific remedial orders directed towards Arkansas prison officials (*Hutto v. Finney*, 437 U.S. at 688). *Hutto*, then, stands for the proposition that a combination of severe deprivations of basic living conditions, with an extended period of confinement, easily rises to the level of a constitutional violation, under the Eighth Amendment. The particular conditions with which the Court was concerned – the size of the cell, the duration of the confinement, the incidence of violence under the conditions – echoed concerns in lower court cases, and foreshadowed the necessity of a different kind of punitive isolation, although not necessarily a more humane kind.

While *Hutto* is notable for the conditions the Court found to be unconstitutional and to justify intrusive remedial measures from the district court, the case is also notable for what the Court did not find. Specifically, the *Hutto* Court did not find any single aspect of the isolation conditions in Arkansas to be unconstitutional alone. The Court noted the conflation of factors, including terrible food in the form of "grue" and indefinite confinement, but did not find that any one factor alone created an unconstitutional condition. In other words, indefinite isolation was acceptable, within strict limits, as defined by federal courts.

In sum, *Hutto* represented the first time the Supreme Court directly considered the application of the Eighth Amendment to a state prison system, or to prison conditions at all, for that matter. *Hutto* also represented the first time since *In Re Medley* (1890) that the Supreme Court had addressed the question of the constitutionality of long-term isolation in a prison cell. So *Hutto* set the tone of prison litigation, in general, and of federal court evaluations of isolation and solitary confinement in particular. This tone permitted detail-oriented and fairly intrusive federal court interventions in the day-to-day management of state prison systems. Especially permissible were federal court interventions governing the way prison officials managed the most serious prisoners allegedly in need of the highest degree of secure confinement.

Ohio: The U.S. Supreme Court Reconsiders State Prison Conditions Lawsuits

Three years after *Hutto*, in 1981, the Supreme Court heard its second major case regarding the application of the Eighth Amendment to prison conditions: *Rhodes v. Chapman*. *Rhodes* was the first case in which the Court considered the application of the Eighth Amendment to the conditions of confinement at a particular prison, as opposed to an entire prison system, as in *Hutto* (*Rhodes v. Chapman*, 1981, p. 345). Unlike the litigation underlying *Hutto*, the *Rhodes* litigation did not concern a battery of alleged constitutional violations, but rather focused on one question: Did double-celling prisoners in cells designed for only one person constitute a violation of the Eighth Amendment prohibition against cruel and unusual punishment? The district court in Ohio found that double-celling was unconstitutional and ordered that the practice be stopped. If the practice was not stopped, the district court threatened to order the release of prisoners from the offending prison: Southern Ohio Correctional Facility in Lucasville (*Chapman v. Rhodes*, 1977, p. 1022). *Rhodes*, in this sense,

resembled *Hutto*; Judge Hogan, an engaged federal district court judge, intervened in a state prison system, ordering specific changes to practices and procedures (Alexander, 2005, p. 139). Judge Hogan even bolstered his remedial orders with threats of prisoner releases, just as Judge Henley had raised the threat of prison closures in Arkansas.

In *Rhodes*, however, the Supreme Court did not find the same interdependence of multiple deprivation conditions that had existed in Arkansas, as raised in the *Hutto* case, and so refused to uphold the district court's order that the Southern Ohio Correctional Facility stop double-celling its prisoners. So the prisoners seeking better conditions of confinement ultimately lost in *Rhodes*. In fact, *Rhodes* represented a turn not only of the Supreme Court, but of the federal courts in general, away from both (1) willingly hearing conditions of confinement challenges and (2) frequently finding Eighth Amendment violations in the context of these challenges (Feeley & Rubin, 1998, p. 48). Nonetheless, a number of the Court's observations in *Rhodes* are relevant, both for establishing what kinds of minimum standards of confinement are necessary, and for understanding how the Court saw its role in the prison reform cases.

First, even though the Supreme Court found that the conditions at Southern Ohio Correctional Facility did not rise to the level of a constitutional violation, the Court noted many specific details about the Ohio prison, including: the exact size of the cells (63 ft²), the presence of an adequate ventilation system and windows, the number of double-celled prisoners who were allowed out of their cells 6 h or less per week (350), and the fact that double-celling had, in practice, "been substantially eliminated" at the prison (*Rhodes v. Chapman*, 1981, pp. 342, 340, n.1). In sum, the Court found that the conditions in the Ohio prison met the "minimal civilized measure of life's necessities" (*ibid.*, p. 346). In other words, some double-celling, even including extensive time in small cells, is not unconstitutional. The Court also noted what conditions were absent in the Ohio prison: there were no "deprivations of essential food, medical care, or sanitation," nor was there an "increase [in] violence among inmates or ... other conditions intolerable for prison confinement" (*ibid.*). By describing the conditions that were absent in Ohio, the Court outlined exactly what conditions might, at least in some combination, produce an Eighth Amendment violation.

While the Court found no constitutional violation in the Ohio double-celling practice, the majority was quite concerned to delineate the specific facts, down to the square footage of cells, and the exact number of hours per day prisoners spent in these cells, that did not rise to the level of a constitutional violation. Similarly, the Court was concerned to delineate a

different, specific set of facts – regarding food and health – that *would* rise to the level of a constitutional violation. This level of specificity is indicative of the degree to which courts defined the precise conditions under which extreme punishments, like long-term isolation, could take place. The close and focused eye the Court turned to examining Ohio's practices indicated that correctional administrators were not free to use just any punitive practice.

Furthermore, although the Court did not find double-celling to be unconstitutional, their conclusion was neither unanimous nor summary. A number of justices, writing separately in a concurrence and a dissent in *Rhodes*, reiterated the importance of judicial oversight of prisons; Justice Brennan, in fact, asserted that the courts had played a critical role in improving prison systems and encouraging appropriate legislative appropriations to prisons (*ibid.*, pp. 354, 359). Justice Marshall's dissent, however, concludes the *Rhodes* opinion on a warning note, suggesting: "the majority's admonitions might eviscerate the federal courts' traditional role of preventing a State from imposing cruel and unusual punishment through its conditions of confinement" (*ibid.*, p. 375). Indeed, the specificity of detail the Court provided, regarding the conditions at the Ohio prison in question, suggested clear bounds for prison administrators to work within in order to both avoid future lawsuits and maintain facially constitutional prisons.

Whether the majority's intention was to leave the door open to Eighth Amendment conditions-of-confinement challenges, or whether their intention was to shut that door, *Rhodes* at least suggested some boundary lines between constitutional and unconstitutional conditions of confinement. Although the Court did not find the same egregious violations in *Rhodes* that it had found in *Hutto*, nor allow the same sweeping remedial orders, the case still contributed to the cannon of Eighth Amendment law describing minimum standards for prisons, and especially standards of confinement for the longest-term prisoners, in the most restrictive conditions. For instance, those 350 double-celled prisoners in Ohio, who were permitted 6 h or less per week of out-of-cell time, at least had adequate ventilation, adequate nutrition, and limited exposure to violence. And this was critical to the *Rhodes* Court's finding of constitutionality.

Exploring how federal courts assessed conditions of confinement in the 1960s and 1970s is important to understanding how the courts drew (and draw) boundary lines around the constitutionally acceptable limits of extreme punishments. The framework which the courts applied to assessing "isolation cells," like those in both *Hutto* and *Rhodes*, cells which represented the extreme of in-prison punishment in the 1970s, will become relevant to understanding the frameworks courts might apply to assessing

solitary confinement and supermaxes, which represent the extreme of in-prison confinement in the 1990s and today.

*Between Hutto and Rhodes: Lower Court Cases Evaluating
Isolation Conditions*

Hutto and *Rhodes* are useful places to begin an analysis of federal court interventions reforming prison conditions and altering prison management in the 1960s and 1970s. Both cases are representative of the kind of litigation that challenged state prisons across the United States. Moreover, both cases ultimately reached the Supreme Court, and so established the governing law across the United States for prisoners seeking to challenge the conditions of their confinement, especially the conditions of their confinement in isolation or segregation.

The vast majority of Eighth Amendment standards, however, were set not by the Supreme Court, but in lower federal courts, in cases in which district courts found violations so egregious that the officials in charge of the offending prisons either did not appeal the lower court's remedial orders, or did appeal and were summarily dismissed by the circuit courts. The next sub-sections of this chapter look more closely at these Eighth Amendment standards developed in lower federal courts, in six specific states. The analysis focuses especially on those standards governing the longest term and most restrictive forms of confinement – in isolation.

The hundreds of conditions of confinement lawsuits litigated in federal courts in the 1960s and the 1970s (and after) spanned states from Alabama to California, Washington to Maine. The opinions and orders in these cases document gruesome, abhorrent conditions in prisons across the United States. According to the records in these cases, prisons were overcrowded, dilapidated, filthy, and plagued by rampant violence. The quote at the beginning of this section from *Pugh v. Locke*, a conditions-of-confinement challenge in Alabama, is representative. Many of these cases dealt specifically with the kinds of isolation conditions, with long in-cell periods and often-severe deprivations of minimum life necessities, which the Supreme Court addressed in *Hutto* and *Rhodes*. And as in both *Hutto* and *Rhodes*, no court ever held that these conditions were absolutely unconstitutional in all circumstances.

Instead, the courts placed a number of restraints on the uses of punitive isolation. This combination of permitting isolation, but specifying the exact conditions under which it would be permissible, contributed to the

development of the modern supermax. Of course, the exact relationship between courts, social policy, and institutions like prisons is often hard to trace definitively. However, as these specific state-based case studies of federal court interventions in specific prisons suggest, the parallels between the precise conditions federal courts condoned for long-term isolation and the structure of the supermaxes developed in the late 1980s are striking. Moreover, in each of the state case studies discussed later, in which federal courts addressed isolation conditions and ordered remediation, department of corrections officials eventually built a supermax of some form.

The following subsections review six representative Eighth Amendment challenges to isolation conditions in prison from Mississippi, Alabama, Illinois, Colorado, California, and Pennsylvania, spanning 1971–1989. These cases demonstrate the kinds of isolation conditions lower federal courts identified in the prison reform cases and the kinds of restraints these courts imposed on the uses of punitive isolation. Three themes will be apparent in every state example. First, in each state, district (and often appellate) courts found egregious constitutional violations in the conditions of isolation or solitary confinement in the state's prisons. Second, in each state, courts ordered very specific changes to these conditions, either in terms of provisions of specific amenities, or in terms of procedural reforms, like limitations to the durations of confinement. Third, in each state, courts stopped short of declaring the entire practice of either isolation or solitary confinement, as imposed in any given state institution, unconstitutional. Following these state-based case presentations, this chapter will explore the specific connections between the conditions courts identified as unconstitutional and the changes courts ordered in the 1970s and 1980s to specific design characteristics of supermaxes built in the 1980s and 1990s.

Mississippi: Dark Hole Solitary Confinement

In Mississippi in 1971, a federal district court found that conditions at the Mississippi State penitentiary in Parchman were unconstitutional. Among the remedies the court ordered was “immediate and intermediate relief” to limit the use of disciplinary isolation at Parchman. Disciplinary isolation at Parchman involved a “dark hole”:

The inmates are placed in the dark hole, naked, without any hygienic material, without any bedding, and often without adequate food. It is customary to cut the hair of an inmate confined in the dark hole by means of heavy-duty clippers. Inmates have frequently remained in the dark hole for forty-eight hours and may be confined there for

up to seventy-two hours. While an inmate occupies the dark hole, the cell is not cleaned, nor is the inmate permitted to wash himself. (*Gates v. Collier*, 1974, p. 1305)

The Fifth Circuit Court of Appeals agreed with the district court that such confinement was “unassailab[ly] ... constitutionally forbidden” (*ibid.*). However, both the district and the appellate court stopped short of completely forbidding the use of the dark hole for punitive solitary confinement. Instead, the district court ordered that confinement to the dark hole be limited to one, 24h period, and include adequate food, clothing, hygiene items, and temperature control. In 1974, the Fifth Circuit affirmed both the district court’s finding that unconstitutional conditions existed in the Parchman dark holes and the court’s order limiting use of the dark hole (*ibid.*).

In sum, the conditions in the Parchman dark holes were egregiously unconstitutional. However, the court-ordered remedy did not involve shutting down the dark-hole-practice entirely (as both the district court judges in *Hutto* and *Rhodes* had threatened to do to remedy their respective findings of unconstitutional prison conditions in Arizona and Ohio). Rather, the dark holes became subject to specific court orders about the specific rights prisoners in those conditions had – to food, clothing, hygiene, and minimal comforts – and the specific length of time a prisoner might be kept there.

Alabama: Torture in Isolation

In Alabama in 1976, the district court found that conditions throughout the Alabama prison system were unconstitutional. The court noted in particular the conditions in isolation cells in Alabama, which amounted to “torture”:

As many as six inmates were packed in four foot by eight foot cells with no beds, no lights, no running water, and a hole in the floor for a toilet which could only be flushed from the outside ... Inmates in punitive isolation received only one meal per day, frequently without utensils. They were permitted no exercise or reading material and could shower only every 11 days. Punitive isolation has been used to punish inmates for offenses ranging from swearing at guards and failing to report to work on time, to murder. (*Pugh v. Locke*, 1976, pp. 327–328)

In order to improve these conditions, the district court in Alabama neither forbid the use of such cells, nor the use of long-term isolation. Rather, the court simply required that the conditions in the isolation cells meet minimum basic standards, including a minimum size (40–60 ft² per prisoner), provision of three meals per day, daily outdoor exercise, hygiene items, and regular examination by a health professional (every third day).

The court also ordered that only one prisoner be confined per one isolation cell. In addition, the court suggested that prison administrators make particular efforts to segregate prisoners known to “engage in violence or aggression” (*Pugh v. Locke*, 1976, pp. 327–328). The Fifth Circuit affirmed the district court’s findings and order (*Pugh v. Locke*, 1977).

Again, both the district and appellate courts found unequivocally unconstitutional conditions in isolation cells. Again, the courts ordered very specific remedies – for provision of minimal space and minimal comforts, but stopped short of closing down the isolation cells, or forbidding their use.

Illinois: Procedural Negotiations

In Illinois, in October 1971, following a fight in June of that year on the Stateville Penitentiary baseball fields, more than 100 prisoners, who correctional administrators had identified as “agitators” and “trouble makers” in the earlier altercation, were transferred to a new, “Special Program Unit” at the Joliet Correctional Center (*United States ex rel. Miller v. Twomey*, 1973, p. 710). According to the district court, which reviewed the constitutionality of this Special Program Unit, the place was designed as a “three-stage progressive system, whereby an inmate can earn greater privileges and promotion to successive stages and ultimately can progress to the point where he will be considered for release” (*ibid.*) However, according to the lawyers who originally challenged the conditions in the Special Program Unit, in practice “prisoners were transferred to strip cells covered with chicken wire” and left there indefinitely (People’s Law Office, 2011). In 1972, the Illinois district court certified a class of those prisoners in the Special Program Unit, and evaluated their challenges to both the conditions of confinement in the Special Program Unit and to the procedures by which they were placed there; the district court found that the Special Program Unit was punitive and ordered that correctional administrators design some form of due process, so that prisoners could learn why they were being placed in the unit (*United States ex rel. Miller v. Twomey*, 1973, p. 711).

In 1973, Warden Twomey of the Joliet Correctional Center appealed the lower court’s order to the Seventh Circuit. The Seventh Circuit agreed to review both the Special Program Unit case (originally named *Armstrong v. Bensinger*) along with a consolidated group of individual prisoners’ claims from both Illinois and Wisconsin. In addition to the class action claims arising out of the Special Program Unit, the *Twomey* court also reviewed a claim brought by an Illinois prisoner named Jack R. Thomas, challenging

his placement in solitary confinement following a disciplinary infraction at Joliet Correctional Center.

In reviewing both the challenges to the Special Program Unit and Thomas's individual challenge to his placement in solitary confinement, the Seventh Circuit held that placement in solitary confinement might "involve 'grievous loss,'" and therefore might require "an adequate and timely written notice of the charge, a fair opportunity to explain and to request that witnesses be called or interviewed, and an impartial decision maker" (*United States ex rel. Miller v. Twomey*, 1973, p. 717). In fact, the Seventh Circuit not only specified what kind of due process might be appropriate, but also ordered the lower district courts to oversee the development of the precise due process procedures that prison administrators would implement prior to placing prisoners in either the Special Program Unit or solitary confinement. As the circuit court stated; "The judiciary cannot avoid its ultimate responsibility for interpreting the constitutional requirements of due process. Certainly that responsibility cannot be delegated to prison authorities" (*ibid.*, p. 719).

Eight years later, another district court in Illinois again considered the question of whether a prisoner deserved any kind of due process, in the form of some kind of hearing, prior to being placed in solitary confinement (*Black v. Brown*, 1981). Herbert Black argued that his constitutional right to due process was violated when he was placed in punitive segregation for 18 months without any hearing or access to the courts (*ibid.*, p. 857). Black further argued that his constitutional right to be free from cruel and unusual punishment was violated when he was kept in isolation without basic toilet articles, in conditions that lacked basic cleanliness (*ibid.*, p. 858). In a brief opinion, the district court agreed that both Black's due process right and his right to be free from cruel and unusual punishment had been violated and found that Black was entitled to \$5,000 in damages, and his attorneys were entitled to attorney's fees. The Seventh Circuit affirmed the damages order (*Black v. Brown*, 1982).

These two Illinois cases are important for a few reasons.⁴ First, they demonstrate how even a single prisoner's pro se petition can weave through the federal court system over a few years, bouncing back and forth between district and appellate courts, like Thomas' claim did, within the *Twomey* case. And, in the case of *Black*, a single procedural error can be costly to correctional administrators, whom the court found liable to Black for \$5,000 worth of damages, not to mention attorney's fees.

The cases are relevant, though, not just for their procedural complexity, but for the nature of the court's concern in each case. As with the district court's findings of egregiously unconstitutional conditions in Alabama and

Mississippi, the Illinois district courts found on at least three occasions that procedures for placement in solitary confinement, or Special Program Units, were inadequate. However, the court's remedy was to tweak the procedures, requiring specific kinds of procedural protections prior to placement in isolation. Indeed, the *Twomey* court ordered the district court to develop the procedures itself, albeit in collaboration with correctional administrators from the Joliet Correctional Center.

Colorado: Decrepit, Violent Isolation

In Colorado, in 1979, a district court found conditions at the "Old Max," the state's highest security prison, unconstitutional (*Ramos v. Lamm*, 1979). Old Max made up one unit, or group of seven cellblocks, within the Colorado State Penitentiary complex, located in Cañon City, Colorado. Two of the chief problems the Colorado district court identified with the Old Max were "idleness" and "isolation." According to the *Ramos* court, the majority of the Old Max prisoners were unemployed and, therefore, spent 20 h or more per day confined to their cells (*ibid.*, pp. 137–138). In addition, "a large number of prisoners" at Old Max were explicitly subject to "long-term isolation under oppressive conditions of confinement" – namely being locked in their cells for 22 or more hours every day, with neither regular showers nor regular exercise.

The *Ramos* court was concerned not just with the facts of idleness and long-term isolation but with the conditions of this idle isolation. Specifically, the district court specified a battery of public health problems with the Old Max facility itself, including: inadequate plumbing, unbearable humidity, intolerable noise levels, and a food service program that "fail[ed] to meet any known public health standards" (*ibid.*, pp. 135–136). In fact, the court detailed the specific structural problems, and the ensuing public health problems on each cell block in the Old Max institution:

Environmentally Old Max is inadequate to meet the health and safety needs of prisoners in the correctional system ... The roof in cellhouse 3 is deteriorated and has also been leaking over a major portion of the cellhouse. Plumbing throughout Old Max is unsanitary, inadequate and poses an imminent danger to public health. Cellhouse 3 does not have hot water ... In cellhouse 7, continuing problems with leaking plumbing have caused leaks into adjacent and lower cells. Moreover, malfunctioning toilets and deficient venting of the plumbing system have caused sewage to drain into sinks in adjacent and lower cells. Shower areas have not been maintained in clean, sanitary and safe condition. Bath water has been impounded in shower drains and troughs due to obstructed drains. Excessive moisture, humidity and overgrowths of mold, fungus and slime have resulted from inadequate ventilation ... The unsanitary conditions present a

source of infection from fungal buildup and a hazard to users due to metal stubs sticking up through the floor and uncovered electrical boxes that are sources for electrical shock. In cellhouse 3, one inmate was burned on the arms, hands, neck, back and face by being exposed to excessively hot water in the shower; his injuries required plastic surgery. (*ibid.*, pp. 134–135)

All these conditions, the court found, coalesced to create an atmosphere of violence, which had produced “severe injury and death” (*ibid.*, p. 136).

The remedy: the district court ordered that Old Max be closed. The Tenth Circuit agreed that many of the conditions were unconstitutional, but reversed on the question of remedy, finding that the state had already taken significant steps toward building a new institution. Specifically, between 1976 and 1979, the Colorado General Assembly allocated \$22.5 million toward the building of a new, high security prison (*Ramos v. Lamm*, 1980, p. 585). Indeed, following an earlier conditions-of-confinement lawsuit in Oklahoma, the Tenth Circuit had found that a prisoner required at least 60 ft² of living space, and Colorado was building its new prison to exactly these specifications.

In the *Ramos* case, because the district court attempted to take a step that none of the other district court judges in other states, like Arizona and Ohio, Alabama and Mississippi, were willing to take. Specifically, Judge Kanekane of the federal district court of Colorado actually ordered the closure of an unconstitutional prison facility. However, his order was overturned on appeal.

Even though the Tenth Circuit overturned the prison closure order, the appellate court agreed with Judge Kanekane’s findings that the conditions at the Old Max prison had been unconstitutional. Both courts agreed that the Old Max facility, primarily because of its decrepit physical structure, had been unconstitutionally dirty, unhealthy, and noisy. These conditions, in turn, had not only caused serious health problems but had incited violence. As in the previously reviewed prison conditions cases, the court-ordered remedies in Colorado were incredibly detailed, down to specifying the exact size of new prison cells being built.

California: Institutionalizing Routine and Procedure

In 1976, the northern district court in California certified a class of all male prisoners confined in one of four of the state’s maximum security prison units, designated for prisoners who had broken prison rules or who had requested protective custody in an isolation unit (*Wright v. Enomoto*, 1976, p. 398). The prisoners in *Wright* challenged both the conditions of confinement in these

isolation units and the procedures prison administrators applied for finding prisoners guilty of rule infractions, prior to placing prisoners in these units.

The *Wright* court described the conditions in these isolation units succinctly:

Prisoners in the maximum security units are confined in cells approximately five feet wide by eight feet long. The cells are without fresh air or daylight, both ventilation and lighting being poor. The lights in some cells are controlled by guards. It is difficult for prisoners to get needed medical attention. They must eat in their cells or not at all. They are allowed very limited exercise and virtually no contact with other prisoners. They cannot participate in vocational programs. They are denied those entertainment privileges provided for the general prison population. (*ibid.*, p. 399)

Furthermore, the *Wright* court characterized the administrative process by which correctional administrators assigned prisoners to these units as full of "vagaries and irregularities," with no guarantee that a prisoner would receive "prior notice, a hearing, [or] a written decision" about the assignment to isolation (*ibid.*, 400-401). The *Wright* court ordered remedies to these procedural flaws, including requirements that prisoners have notice of their placement, a hearing, and some kind of representation at that hearing (*ibid.*, 404).

For the next 10 years, this case bounced back and forth between the northern district court in California and the Ninth Circuit court of appeals; each time the district court re-considered the conditions in California's four maximum security "lock-up units" or "Secure Housing Units," the court ordered further, increasingly detailed remedies to the unconstitutional conditions. For instance, in 1983, the northern district court of California ordered the California Department of Corrections to provide clean cells, bedding, clothing, and cleaning supplies to all prisoners in the state's four maximum security units. The court further ordered that prisoners be allowed three showers and 8-to-10 h of outdoor exercise per week, be double-celled for no more than 30 days in any given year, and be permitted to visit with family members and friends (*Toussaint v. Rushen*, 1983, p. 1385). The Ninth Circuit court of appeals affirmed these remedies ordered by the lower court (*Toussaint v. McCarthy*, 1986).

In California, as in the other states examined in this section, district courts heard legal challenges to both the allegedly unconstitutional conditions in state prison isolation units and to the allegedly unconstitutional procedures by which prisoners were assigned to these units. The northern district court in California agreed with the prisoners' claims, finding a battery of unconstitutional conditions and procedures, and crafting remedies, which involved court interventions in the day-to-day management of the state prisons, including very specific orders about how prisoners should be

treated. In California, these interventions took place over a period of more than 10 years and were largely upheld on multiple reviews by the Ninth Circuit Court of Appeals. Again, however, no court ever declared California's four lock-up units to be wholly unconstitutional. Eventually, prison administrators, frustrated with the ever-growing list of requirements for the prisoners in the state's four lock-up units, focused on designing and building new prisons, rather than trying to fix the existing ones.

Pennsylvania: Decrepit, Crowded Isolation

In Pennsylvania in 1989, a district court found that conditions in the state's maximum-security prison were unconstitutional. The court noted that some prisoners in the State Correctional Institution at Pittsburgh spent 21–22 h per day in cells for up to 4 weeks at a time. The court was particularly concerned that some of these prisoners, and others throughout the institution, were double-celled in dilapidated, unsanitary conditions. In addition to the problem of long-term isolation, the court noted that the institution had "endemic bed bugs," especially in the area of the institution where prisoners were in long-term isolation, as well as broken windows that allowed birds into the institution, and inadequate cell lighting (*Tillery v. Owens*, 1989, p. 1265). An expert also testified during the trial that the conditions in the prison were dangerous and potentially violent, because prisoners were so "on-edge," living "elbow to elbow" (*ibid.*, p. 1266). The district court ordered, among other remedies, that double-celling in the prison, especially in the most dilapidated cell blocks, where the prisoners were confined for the most hours per day, be eliminated. State officials appealed this order requiring the elimination of double-celling, but the Third Circuit upheld the district court's order (*Tillery v. Owens*, 1990). Prison officials, meanwhile, moved forward with a plan to build a new, maximum-security institution.

As in Colorado and California, a district court in Pennsylvania found that the state's highest security prison, and especially its isolation units, were, literally, falling apart. The combination of problems with the Pennsylvania building, from inadequate lighting to insect and rodent infestations, together created unconstitutional conditions. The Pennsylvania district court ordered specific remedies, including specifying that prisoners not be double-celled, and the Third Circuit Court of appeals upheld the order. Again, the court stopped short of ordering that the entire facility be shut down, but the correctional administrators, as in Colorado and California, started work on building new prisons anyway.

From Maximum Security to Supermaximum Security

Each of these eight state cases exemplifies the manner in which courts handled questions of long-term, punitive isolation involving near-complete deprivation of basic living privileges, like exercise, fresh air, and intellectual stimulation. No court ordered the cessation of such practices entirely, nor found any such practice to be unequivocally unconstitutional. Instead, courts sometimes placed limitations on the duration of confinement, as in the case of the isolation cells at Parchman prison in Mississippi. More often, courts suggested, instead, changes to the conditions of the confinement. Sometimes these changes were structural, as in the district court's order to shut down Old Max in Colorado. More often, these changes sought to reduce overcrowding, by forbidding double-celling as in the cases challenging the Alabama prisons and the maximum security prison in Pennsylvania. Courts also sought to improve basic living conditions by requiring prison officials to provide minimum life necessities, such as food, clothing, light, and exercise, as in California.

Many of the improvements to isolation conditions, which the courts mandated in the above eight examples, were ordered again and again by courts across the country. The main improvements can be divided into a few key categories, notable because they foreshadow the basic principles of supermax confinement throughout the United States today: (1) requirements that prisoners have access to some basic routines of daily life, like showers and regular outdoor exercise; (2) requirements that prisoners have minimum physical comforts, largely geared toward avoiding health problems, such as provisions for adequate lighting as well as adequate hygiene, and limitations on noise; (3) requirements that prisoners be physically safe from attacks by other prisoners, and relatedly, not be isolated in overcrowded cells; (4) requirements that prisoners have some minimal due process protections.

In terms of basic routines of daily life, by 1980, federal courts generally agreed that prisoners should have access to some regular form of outdoor exercise for a minimum of about five hours every week, as well as access to at least a few opportunities to shower weekly. For instance, in 1979, the Ninth Circuit noted that "there is substantial agreement among the cases in this area that some form of regular outdoor exercise is extremely important to the psychological and physical well being of the inmates" (*Spain v. Procunier*, 1979, p. 199).

In terms of minimum physical comforts, courts frequently expressed concerns with the potential health impacts of excessively decrepit, or uncomfortable isolation conditions. For instance, a federal district court in California, in 1984, echoed the concerns of the district court in Colorado with the

detrimental health impacts of the “unrelenting, nerve-racking din” in the Old Max facility. The California district court held that prisoners must be held in an environment “reasonably free of excess noise” (*Toussaint v. McCarthy*, 1984, p. 1397). Similarly, a number of courts were concerned, as in the case of Pennsylvania’s high security prison, with inadequate lighting in isolation cells. In reviewing conditions in a Washington state prison isolation unit, the Ninth Circuit held in 1982 that adequate lighting is a fundamental attribute of adequate shelter, which is itself a requirement implicit in the Eighth Amendment prohibition on cruel and unusual punishment (*Hoptowit v. Spellman*, 1984, p. 783). In the same year, the Ninth Circuit also held, again reviewing Washington state prison conditions, that the Eighth Amendment requires access to personal hygiene supplies, like a toothbrush and soap (*Hoptowit v. Ray*, 1982, p. 1246).

Of course, the cases out of both Ohio and Pennsylvania, among other states, engaged the question of how many prisoners could be kept in what size cell, under what conditions. The movement in these cases was toward setting minimally accepted square-footage for cells and toward isolating violent prisoners from each other in increasingly solitary confinement.

Strikingly, of the states highlighted in this section for their unconstitutional prison conditions in the 1970s and 1980s, every one subsequently either transformed an existing section of a prison into a supermax unit, or built a brand new supermax. Mississippi transformed a portion of the Parchman prison that was challenged in the 1970s litigation into a supermax unit, holding the state’s death row and more than 900 administrative segregation cells, in which prisoners were detained, indefinitely, in solitary confinement, locked in their cells 23–24 per day, every day (Kupers, Dronet, Winter, & Austin, 2009). Alabama opened Donaldson prison in 1982, complete with 300 segregation cells equipped to control the allegedly most difficult behavioral problem prisoners in the state (Alabama Department of Corrections, 2011). Illinois opened the Tamms Correctional Center, with 500 supermax beds, in 1998 (Sundt, Castellano, & Briggs, 2008). Colorado opened the Centennial Correctional Facility in 1980, per the plans laid out by state officials, who sought a stay to prevent the district court from forcing them to close the Old Max in 1979, before the new, replacement prison opened. Today, Centennial (now Colorado State Prison) has more than 700 cells designated for administrative segregation, which maintain prisoners in solitary confinement, locked in their cells 23 or more hours per day (Colorado Department of Corrections, 2011). In 1989, California opened Pelican Bay State Prison with 1,056 supermax beds (California Department of Corrections and Rehabilitation, 2011). Pennsylvania opened a special management and long-term segregation unit in 2000 (*Beard v. Banks*, 2006,

p. 536). The Ninth Circuit cases cited in the preceding paragraph also referenced prisons in Washington State in the 1970s. Washington opened its first Intensive Management Unit, within the older Washington Correctional Center, in 1984, to house 124 of the allegedly most difficult prisoners in the Washington state prison system, locked in their cells, for 23 h per day or more (Department of Corrections Washington State, 2011; Rhodes, 2004).

In these institutions, numerous design features resolve problems the courts raised with health, safety, and routines in earlier high-security prisons. For instance, these units all contain prisoners for extended periods of time in isolation; solitary confinement minimizes crowding and the often-associated problems with violence. Cells are grouped into pods of 8-to-10 with one or two showers and a single, attached outdoor exercise yard, sometimes called a dog run, because it is the size of a cell, or a few cells combined; the pod groups are carefully structured to allow each prisoner in the pod adequate weekly access to the solitary outdoor exercise yard and the showers. As the architect who designed the first supermax in Arizona said, the pod-design “allowed us to put an inmate in his cell, to take him to his cell, and [allowed] a time to go [to] exercise, and ... get those guys through a daily routine never requiring two inmates in the room at the same time. We cut the staff ration to 1:4, instead of 1:1” (Author’s Interview with anonymous Arizona Architect, 2011).

Similarly, the use of 24-h fluorescent lighting, smooth, concrete walls, and modern, automated temperature control systems minimize problems with inadequate lighting, hygiene, and ventilation. In Arizona and California, even though the lights in the supermax cells remain on 24 h per day, prisoners can vary the brightness by tapping a switch in their cell. As the Arizona Architect described it:

They give the inmates control of the lights. I think that unit up there [in California], and our units [in Arizona] have what they call a touch-bolt. It’s another reaction to [the idea that] ‘inmates tear everything up.’ It’s a carriage-head-bolt ... with a flat, round head, and that bolt comes through the light fixtures, and when you touch it, the static electricity in your body sends a charge into that bolt, and on the other end of it is a sensor ... so there’s no moving parts ... You’ve seen the lamps, where you walk up to it and touch it? That’s the same technology. (*ibid.*)

The Arizona Architect’s precise description of the technology that allows prisoners to control the lights in their cells, through a complicated touch-sensor mechanism, harks eerily back to the *Wright* court’s observation in 1976 that, in addition to ventilation and lighting being poor, and medical attention being lacking, “the lights in some cells are controlled by guards” (p. 399). The modern supermax ensures that lighting is always on, addressing concern of

the *Wright* court and others with inadequate lighting in dark isolation cells. In addition, some state's supermaxes, including those in California and Arizona, allow prisoners limited control over the brightness of the lighting in their cells, addressing the *Wright* court's additional concerns with who controls cell lighting.

In a sense, supermax prisons represent the opposite of the many abuses courts documented in the 1970s and 1980s prison reform cases. The supermax prison keeps people in absolute isolation; no overcrowding. The supermax prison is brand new – made of clean steel and smooth concrete, with technologically advanced central control rooms, from which officers can open and close cell doors at the push of a button without even the necessity of human sound, let alone contact; no dilapidation, no filth. Heavy doors with perfect seals muffle the sounds; no intolerable din. Supermax prisons keep individual prisoners contained, each in his own concrete box, for 23–24 h every day; no violence.

The simple fact that every state prison system reviewed in this section as the subject of litigation challenging punitive isolation practices later opened a long-term solitary confinement, or supermax, unit, does not necessarily mean that the litigation, and the court interventions, inevitably produced the modern supermax institution. However, the combined evidence from court cases, supermax designers, and details about what kinds of institutions states actually built in the 1980s and 1990s, demonstrate that federal courts played a role in encouraging and inspiring the physical shape of the modern supermax, down to the smallest detail of design, like whether or not prisoners control their own light switches.

Supermax Designers Disaggregate Rights from Privileges

Correctional administrators and architects involved in supermax design decisions, and lawyers who later challenged these decisions, rarely articulate the exact relationship between 1970s litigation and 1980s prison design. However, administrators, experts, and lawyers do at least implicitly reference the courts and acknowledge the potential role of earlier court interventions in later design decisions.

For instance, a practicing criminal justice architect, who worked on Pelican Bay, California's supermax, noted that he was very aware that he might have to justify his design decisions to a federal court, and so he followed court cases about prison conditions closely. For instance, he remembered actually observing the hearings for the federal court case

involving a challenge to the conditions at Pelican Bay State Prison (discussed further in the next section):

I sat in on one or two sessions. I was actually quite surprised that the state never contacted us to engage us in the defense of the architecture ... and they never did ... The case was convened in San Francisco, so I sat in one or two days on it. I just did it out of curiosity to see what they were doing over there ... but they never did ask us to come forward ... We were not named as a defendant, of course, but it is not unusual in those situations to ask anyone involved in the project to ask us to assist in defense ... that was fine with us [that they didn't ask]. (Author's Interview with Practicing Criminal Justice Architect, 2010)

In some cases, the supermax designers were even more explicit about the relationship between court decisions and the physical design of the supermax prison. For instance, the Arizona architect who designed the first supermax in the early 1980s clearly delineated rights from privileges. When he talked about rights, he referenced the specific kinds of conditions federal courts had ordered in prisons across the United States, like light, showers, and a space to exercise: "Arizona [correctional officials wanted to] ... take all their privileges away, [but] give them all their rights ... they can have their natural light, shower, exercise, all with one guy in the room at a time ... there's no right to have twelve people in your room together" (Author's Interview with anonymous Arizona Architect, 2011). In other words, this Arizona Architect, although he did not explicitly reference the role of the courts, had internalized the basic minimum rights courts had accorded to prisoners throughout the 1970s, and he worked to physically institutionalize these rights – at the barest minimum level delineated by courts – in the supermax design. As this architect explained, the challenge of the supermax design was that: "We need[ed] to find a way to separate them [prisoners], bring them all the privileges and rights they have, but come up with a configuration that would keep them separated, not have to inject our staff every time they have to go to a shower, to go to [get] food" (*ibid.*). So prison designers instituted a form of compliant resistance – building institutions to comply with the precise minimum standards courts had articulated for punitive isolation conditions, but resisting the provision of any unnecessary, or nonrequired privileges.

A 1986 California Auditor General's (AG) Report investigating the lock-up facilities at Folsom Prison, provides a particularly good example of this kind of compliant resistance. In this report, the AG, Thomas Hayes, noted that the *Toussaint* court did not require contact visits for prisoners in the SHUs, or isolation units. The report, therefore, recommended eliminating contact visits for these prisoners (Hayes, 1986, p. 155). In a response to the

audit, Daniel J. McCarthy, the Director of Corrections, agreed that this was a reasonable goal, and committed to work toward providing adequate space for *non*-contact visits (McCarthy, 1986, pp. 44–45). So privileges were actually *reduced* to only those minimums specifically delineated by the *Toussaint* Court. This process of minimizing privileges and conditions to include only what the courts had required would continue through the design and development of the supermax at Pelican Bay. Litigation at least indirectly affected prison building by setting minimum standards, which correctional administrators were careful not to embellish in the least.

Other supermax designers described more explicitly building institutions that would successfully avoid the kind of court intervention correctional administrators had been subject to in the 1970s. For instance, in California, correctional administrators argued that they needed a new, extremely high security prison in order to satisfy the court's demands in the 1970s class action case challenging the conditions in the state's four highest security units (*Toussaint*). In the Senate Bill files of Robert Presley, the Senator who chaired the California legislative committee on prison building, a May 1986 letter from Rodney J. Blonien, the Undersecretary of Corrections, argued that the legislature should fund, and the Department of Corrections should commit to "a replacement facility ... at a cost of an estimated \$250 million," to replace the long-term lockdown unit at San Quentin, which two courts had already found to be unconstitutional. Undersecretary Blonien explicitly argued that this commitment was necessary to appease the judges in the *Toussaint* and *Wilson* courts, and to reach a financially sustainable agreement to minimize repairs at San Quentin itself (Presley's Bill File on SB-2098, 1986).

Attorney Steve Fama, who represented the plaintiffs in the *Toussaint* case, reiterated this idea that the California Department of Corrections had figured out that they could avoid litigation over unconstitutional conditions by simply building new and better prisons. Specifically, Fama said that he thought a ninth circuit opinion issued in the *Toussaint* case might have helped to pave the way for the idea of the supermax at Pelican Bay. Fama said: "At a particular point there, the Department opened New Folsom [later re-named California State Prison – Sacramento], and the Ninth Circuit held that the [*Toussaint*] order did not apply, and this gave the Department the idea of a way out of the consent decree" (Author's Interview with Steve Fama, 2010).⁵

One federal prison architect was even more explicit about how prison designers in the 1980s and 1990s sought both to remedy and avoid the mistakes of correctional administrators in the 1970s. This architect

described how the federal supermax in Florence, Colorado was purposely, physically concealed from public view, so as to avoid both publicity and the litigation often associated with publicity:

They acquired this site in Florence, Colorado, that had a ridge down the middle. The ridge allowed them to design the administration building on the public side of the approach and then there was in effect a tunnel that went through the ridge into the secure part of the facility. That sort of helped conceal the facility from casual public view ... The Bureau feels the less public exposure a facility like that can get the better. If it were in the news constantly it would be a negative thing from the standpoint of trying to operate the facility in a normal way ... the idea is not to be secretive ... It's to sort of to take it out of the minds of people. (Author's Interview with Federal Prison Architect, 2010)

Together, the comments of architects, like this Federal Prison Architect, the Arizona Architect, and the Practicing Criminal Justice Architect, who worked on Pelican Bay, along with evidence from archival records about prison building policies in states like California, demonstrate how the frequency and scale of litigation around specific prison conditions, especially the conditions in isolation and solitary confinement cells, across the United States, ultimately shaped the supermax prison design. Although supermax prison designs were initiated at the state level, in states like Arizona and California, the design ultimately became popular throughout the United States. And its popularity is partially attributable to the ways in which the supermax design adequately satisfied the specific requirements of federal courts for minimum prison conditions standards and basic prisoners' rights, as laid out in the 1960s and 1970s litigation.

Although supermax prisons at least appear to respond neatly – and conclusively – to the many concerns prisoner advocates and courts raised in the prison reform period, they also perpetuate many of the problems with isolation and solitary confinement that have been documented since the first uses of solitary confinement in the United States at Walnut Street Prison in 1787. Solitary confinement, even in the clean, quiet, largely violence-free conditions of a supermax, makes people crazy. Psychiatrists, psychologists, and anthropologists across the United States have documented the mental de-compensation that occurs in long-term solitary confinement, and testified to it in countless court cases (Haney & Lynch, 1997; Kupers et al., 2009; Rhodes, 2004). Human rights activists have also alleged that long-term solitary confinement, even in supermax conditions, constitutes torture, in violation of multiple international law treaties and norms (Cohen, 2006; Lobel, 2008). Indeed, within a year or two of each supermax prison's opening, prisoner litigants from these facilities have knocked on the doors of

the courthouse, or at least, bombarded the courthouse mailboxes with complaints.

Some scholars have suggested that by the mid-1980s, the prison reform movement was "in retreat" (Feeley & Rubin, 1998). In spite of the "retreat" of prison reform, and the passage of two significant pieces of federal legislation in the mid-1990s (the Prison Litigation Reform Act and the Anti-Terrorism and Effective Death Penalty Act), which severely limited the ability of prisoners to bring conditions-of-confinement challenges in federal court (Boston, 2004), prisoners and prisoners' advocates have challenged the constitutionality of supermax prisons in every state where such an institution has been built.

THE SUPERMAX: AN OVERVIEW OF THE LITIGATION, 1990–2006

Trying to explain it is like trying to explain what an endless toothache feels like ... I wish I could paint what it's like ... slow constant peeling of the skin, stripping of the flesh, the nerve-wracking sound of water dripping from a leaky faucet in the still of the night while you're trying to sleep. Drip, drip, drip, the minutes, hours, days, weeks, months, years, constantly drip away with no end or relief in sight.

Tommy Silverstein, who has spent more than 32 years in solitary confinement. (quoted in Prendergast, 2007)

In broad terms, prisoners and their advocates have brought two kinds of challenges to prison conditions: Eighth Amendment challenges, which were predominant in the prison reform era discussed in the Supermax Prototypes Section, and Fourteenth Amendment challenges, which have predominated in more recent litigation around prison conditions. While hundreds of prisoners have alleged in the 1990s and the 2000s that long-term solitary confinement in supermax prisons, locked in their cells for 23 h per day, with minimum sensory or perceptual stimulation, constitutes cruel and unusual punishment in violation of the Eighth Amendment, few have succeeded. After all, even in the height of the prison reform era, courts were not willing to completely forbid punitive segregation in dark holes. This section will first address the nature of the few Eighth Amendment challenges to supermaxes that have been litigated in courts in recent years, and summarize the scholarly commentary on the limitations of these challenges. Next, this section will address the Fourteenth Amendment procedural challenges, which have been brought against supermaxes with slightly more success; the implications of these challenges will be considered.

Limitations of the Eighth Amendment

The few Eighth Amendment challenges to supermaxes that have succeeded have usually revolved around the detrimental mental health impacts of long-term solitary confinement, especially on those prisoners who had pre-existing mental health conditions prior to their detention in solitary confinement. While courts have not found indeterminate punitive solitary confinement terms to be unconstitutional, in general, some courts have held such terms to be unconstitutional for the mentally ill (see, e.g., Lobel, 2008, n.44; *Madrid v. Gomez*, 1995). However, even these decisions mandating gentler minimum standards for people with pre-existing mental illnesses fall far short of either limiting the use of long-term solitary confinement in prisons more generally, or even protecting all people with mental health conditions.

One psychologist, who has extensively studied supermax conditions and their effects, argues that courts, in assessing challenges to supermax conditions, have systematically and repeatedly displayed a "superficial understanding of the nature of the psychological harm inflicted" in supermax conditions, deferred unreasonably to the discretion of correctional administrators, and permitted the practice to spread and then used this spread as a "de facto justification" for the continued use of solitary confinement (Haney & Lynch, 1997, pp. 542–543). Indeed, another expert, testifying before a national commission on prison conditions, argued that conditions in supermaxes are so severe that imposition of such conditions should be treated analogously to the imposition of mechanical restraints (such as restraint chairs, which lock a person into a fixed position and allow for virtually no movement) (Gibbons & Katzenbach, 2006, p. 462). Courts have held that mechanical restraints can only be applied for extremely limited periods of time, under conditions of extreme necessity, and not for purely punitive purposes; Cohen suggests identical provisions should apply to the "application" of supermax conditions (2006). However, no court has adopted such a standard to govern the imposition of supermax confinement.

Instead, courts have focused on reforming the policies that govern supermax confinement. In the context of Eighth Amendment challenges, this involves limiting the placement of the mentally ill in supermaxes and ensuring that correctional officers do not physically abuse prisoners in supermaxes. The *Madrid* case, which considered challenges to Pelican Bay State Prison in California, and was one of the first cases to assess the constitutionality of the modern supermax, is representative of how Eighth Amendment challenges have proceeded in the supermax context. In his initial order in *Madrid*, Judge Thelton Henderson found numerous

violations of individual prisoners' rights – including a memorable passage detailing how correctional officers bathed a prisoner at Pelican Bay in scalding water, and the prisoner subsequently sustained third-degree burns all over his body – and ordered specific policy reforms at the institution, from diversion of mentally ill prisoners from the supermax to improved training and oversight programs for correctional officers (*Madrid*, 1995). However, Henderson stopped short of finding that the physical structure of long-term solitary confinement at Pelican Bay State Prison was itself an unconstitutional violation of the Eighth Amendment. In an interview in which he reflected on the case, Henderson recalled the shock he first experienced when he learned about conditions at Pelican Bay State Prison, from prisoners' petitions received in the courthouse:

I was chief justice at the time Pelican Bay was built ... one of your jobs as chief justice is to notice things that are happening on and to your court ... one of the things that started happening is we got a ton of handwritten letters and petitions from this place we had never heard of before – Pelican Bay ... [So] I contacted the warden and asked to talk to him and see what was going on ... He kindly agreed to come down ... and meet with a group of our judges ... just to talk and understand what's behind the unusual [number of] petitions ... What was surprising to me was the inhumanity of the thing. They were treating prisoners like animals. They were either ignorant or didn't care about constitutional rights. (Author's Interview with Henderson, 2011)

As he had in his original opinion in the case, Henderson focused on the state of mind and actions of Pelican Bay correctional officers – who were ignorant or dismissive of constitutional rights – rather than on the physical structure of the prison. Henderson found that there was a lack of knowledge of constitutional rights, and many of the reforms he ordered involved imposing training and enforcing existing rights. But, fundamentally, he found the conditions at Pelican Bay State Prison were constitutional, even if some of the policies and practices desperately needed reform. As Henderson said:

I thought the concept of a supermax was not unconstitutional. I thought the implementation [was the problem] – it seemed the mentality at Pelican Bay was that these are really bad people, and so they don't really have any rights to mention, so whatever we do to them is OK ... The concepts were fine. They had a lot of tough guys. (*ibid.*)

In other words, Henderson found no constitutional violation inherent in the physical structure of Pelican Bay State Prison, or in the institution's stated purpose of imposing long-term solitary confinement, under conditions of sensory deprivation. Henderson, incidentally, is one of the more liberal judges in the federal court system. He was the first African-American lawyer to work for the U.S. Department of Justice, where he investigated the

16th Street Baptist Church Bombing in Montgomery, Alabama, and he has presided over a number of controversial cases in his career, including a case upholding environmental protections for dolphins, a case overturning a murder conviction of an alleged Black Panther, and, most recently, a class action prison conditions case in California in which he ordered the release of more than 30,000 state prisoners. If any judge was predisposed to find the conditions of confinement in a supermax like Pelican Bay unconstitutional, it was Henderson.

However, lower state and federal courts have been quite hesitant to find Eighth Amendment violations inherent in supermax prison conditions, and the Supreme Court has never directly addressed the question. An Eighth Amendment violation based on prison conditions requires both objective and subjective harms. First, the deprivation wrought by the prison conditions must be "objectively sufficiently serious." Second, the correctional official must have, subjectively, been deliberately indifferent to prisoner health or safety, during the time of the deprivation (*Farmer v. Brennan*, 1994, p. 834). Added to this analysis, of course, is the traditional Eighth Amendment concept of evolving standards of decency – specifically, "whether society considers the risk that the prisoner complains of to be so great that it violates contemporary standards of decency to expose anyone unwillingly to such a risk" (*Helling v. McKinney*, 1993, p. 36). Jules Lobel, an attorney who has represented a number of prisoners in Eighth Amendment challenges to the conditions in supermax prisons suggests that these two conditions for an Eighth Amendment violation – serious harm and deliberate indifference – should be easy to prove, based on the conditions present in many supermaxes (2008). And yet, no lawyer has successfully convinced a federal judge that supermaxes inherently involve Eighth Amendment violations. Given the specificity with which courts in the 1970s, 1980s, and 1990s, as discussed in the previous section, determined what conditions of isolation and solitary confinement would and would not comport with the requirements of the Eighth Amendment, their recent hesitation to find any violation of the prohibition against cruel and unusual punishment inherent in the conditions of modern supermaxes, built at least in part to compensate for the constitutional violations found in earlier decades, is not surprising.

Fourteenth Amendment: Room for Reform?

While Eighth Amendment claims against supermaxes have failed to establish any principle of fundamental unconstitutionality inherent in the

structure and conditions of modern supermax facilities, Fourteenth Amendment claims against supermaxes have been more successful. Specifically, prisoners and their advocates have brought challenges to the procedures by which prisoners are placed into supermax units, and courts have been quite willing to look closely at these procedures, and to require very specific minimum procedural requirements for imposition of the severe, in-prison penalty of confinement to long-term conditions of extreme sensory deprivation and solitary confinement. In fact, in 2005, the Supreme Court addressed for the first (and to date, the last) time the constitutionality of confining prisoners in isolation for long, or even indefinite periods of time in the new hyper-secure supermaximum institutions. The case, *Wilkinson v. Austin*, dealt almost exclusively with the question of what procedures necessarily must precede a prisoner's placement in solitary confinement, specifically in a supermax prison in the state of Ohio. A close examination of this case will demonstrate the limited role federal courts have played (or not played, as the case may be) in recent years in overseeing, or in any way intervening to alter, the conditions of confinement in modern supermax facilities.

As with the *In Re Medley* case more than a century earlier, the *Wilkinson* Court's assessment of the constitutionality of the conditions in the Ohio supermax was merely implicit in the rigorousness of the procedural standards it laid out, under the Fourteenth Amendment, rather than explicit under (an entirely absent) Eighth Amendment analysis. There were two central principles to the *Wilkinson* holding. First, prisoners detained in Ohio's supermaximum security prison, the Ohio State Penitentiary (OSP), have an unequivocal liberty interest in avoiding assignment to a facility with the kinds of restrictive conditions of confinement in place at OSP: "assignment to OSP imposes an atypical and significant hardship under any plausible baseline" (*Wilkinson*, 2005, p. 224). In holding that a prisoner has a liberty interest in not being assigned to OSP, the Supreme Court noted two particular limitations on liberty that are relatively unusual at OSP: confinement there is indefinite, with only an annual review, and an otherwise parole-eligible prisoner who is in OSP is barred from parole consideration.

While *Wilkinson* is a landmark decision for establishing that a prisoner *might* have a liberty interest in being placed in long-term solitary confinement under conditions of extreme sensory deprivation, the decision is severely limited in scope. First, the Court noted in particular the two "added components" of solitary confinement in OSP, which constitute greater limitations than are characteristic of "most" such facilities:

indefiniteness and parole ineligibility. Second, the Court did not hold that officials at OSP had actually infringed any prisoner's liberty interest through implementing the facility's policy of indefinite solitary confinement.

In fact, the second central principle in the *Wilkinson* holding was that the limited procedural protections in place for prisoners assigned to OSP – “notice of the factual basis” for the assignment, and a limited “opportunity for rebuttal” – were sufficient to prevent any unconstitutional liberty deprivation (2005, pp. 226–227). The Court overturned the earlier Sixth Circuit holding that OSP placement policies were insufficient to protect prisoners' due process rights. Balancing the individual prisoner's interests in avoiding erroneous placement in OSP against the government's “dominant” interest in maintaining a safe and secure institution, the Court found that the existing OSP placement policy was perfectly constitutional (2005, p. 230).

The *Wilkinson* case represents two notable trends in late twentieth century review of prisoner cases. First, the federal appellate courts have been much more reluctant to tell correctional administrators how to run their prison facilities than district courts have been (see, e.g., *Sandin*, 1995, p. 482). Of course, appellate decisions are binding on multiple courts and institutions, whereas the kinds of settlement agreements and consent decrees district courts have the flexibility to negotiate are, at least in terms of binding precedent, off the record, and therefore binding only on one institution or state at a time.⁶ The fact that circuit courts are reluctant to codify these agreements as legal precedents, especially in a conservative legal period and tough-on-crime era, makes sense.

In *Wilkinson*, for instance, the district court in Ohio ordered a number of revisions to the OSP placement policy – both substantive revisions limiting the permissible justifications for OSP placement and procedural revisions allowing prisoners to present documentary and testimonial evidence at placement hearings and increasing administrative requirements for written determinations regarding placement, but the Sixth Circuit overturned the district court's substantive revisions and held that only the procedural revisions were required. This limitation on the district court's far-reaching order is not surprising; in terms of tough-on-crime policies, the Sixth Circuit is not a “soft” circuit. Sixty-seven percent of its judges were appointed by Republican presidents; Republican appointees are often more likely to side against defendants in criminal cases and with defendants in civil rights challenges (Goldman, 1997; Landis, Lessig, & Solimine, 1998; Sunstein, Schkade, Ellman, & Sawicki, 2006). Moreover, the states constituting the Sixth Circuit tend to be tough-on-crime themselves: Ohio and Tennessee are

two of the ten states with the largest death rows in the United States. Nonetheless, despite the Sixth Circuit's relatively conservative decision in the *Wilkinson* case, the Supreme Court struck down even those limited due process revisions the Sixth Circuit had left in place.

In addition to the trend of further limiting the constitutional rights of prisoners with each level of appeal, another trend is evident in the solitary confinement challenges: Eighth Amendment challenges to prison conditions rarely proceed beyond the district court level, and appellate decisions often turn on Fourteenth Amendment procedural questions. The Eighth Amendment claims tend to get buried at the trial court in settlement agreements and consent decrees, which, while valuable at the institutional reform level, do not move the overall constitutional law analysis forward. Indeed, the federal district court in Ohio presided over a settlement of the OSP prisoner's Eighth Amendment challenges, complete with a rigorous consent decree; only the due process procedures in place at the prison were ultimately held in a published decision to be in violation of the Constitution.

In other words, although the plaintiff's lawyers in *Wilkinson* negotiated critical improvements in conditions at OSP, those improvements are not codified in a publicly searchable legal opinion, and have not joined the ranks of valuable legal precedent that might help to shape institutional standards in other districts and states. Indeed, even conditions at OSP remain severely punitive and, at least potentially, unconstitutional. One lawyer, who litigated the case in the Supreme Court, noted that, even after the Supreme Court decision in *Austin*, the District Court again heard complaints from OSP and found that "Ohio was not following, nor was it prepared to follow, the procedures it had represented to the Supreme Court that it would implement" (Lobel, 2008). In other words, perhaps the limited Fourteenth Amendment, procedural challenge route to restraining the imposition of supermax conditions, is itself not even working. But, perhaps this is of little concern to courts who see supermaxes as implementing vast and systemic improvements, as specified by federal courts, over the conditions at prisons like Parchman in Mississippi and throughout states like Alabama that existed in the 1960s and 1970s.

In sum, across the United States, federal courts have largely confined their assessments of the constitutionality of supermaxes to two narrow questions: (1) whether individual prisoners have experienced unconstitutional treatment, based on very specific, personal circumstances such as a prisoner's pre-existing serious mental health condition or a prisoner's unusually extreme and unprovoked beating at the hands of a correctional officer and (2) whether an

institution's administrative process for placing a prisoner in long-term solitary confinement or isolation adequately protects each prisoner's liberty interest in living in a less restrictive prison environment. This development of a jurisprudence of punishment around supermaxes parallels the development of death penalty jurisprudence in the United States. In death penalty cases, too, federal courts tend to address legally complex procedural questions directly, and to only indirectly assess the basic constitutionality of a state executing a criminal. For instance, the procedure by which a prisoner can challenge the method of his execution has been litigated almost as frequently as the method of the execution itself (see, e.g., *Beardslee v. Woodford*, 2005; *Cooley v. Strickland*, 2007; *Grayson v. Allen*, 2007 (circuit court cases litigating the timing and procedural rules under which a prisoner may challenge the constitutionality of a given state's lethal injection execution protocol)).

CONCLUSION

In one sense, the uses of punitive isolation and solitary confinement in the United States, and the litigation challenging these conditions, has come full circle in the last two centuries. Many prisons have returned to using the kind of solitary confinement first implemented at Walnut Street Prison in the 1780s, though for longer periods, and under arguably more systemic conditions of sensory deprivation. More disturbingly, solitary confinement is imposed in 2010 in the face of a much broader body of knowledge documenting the detrimental mental health impacts of solitary confinement than existed in 1780.

As solitary confinement has come back into fashion, so have courts reverted to old-fashioned modes of evaluating conditions of confinement. Federal courts have returned to looking not at the constitutionality of the conditions of confinement themselves, but at the procedural protections that must be in place before extreme conditions can be imposed. The similarities between the intricate procedural reasoning, largely overlooking the actual conditions which justify the close procedural scrutiny in the first place, in the 1890 case *In Re Medley* and the 2005 case *Wilkinson v. Austin* are striking. This trend, as seen in the particular examples of cases addressing conditions of isolation and solitary confinement, is just one piece of a broader trend, in which courts and legislatures have resisted the further expansion of substantive rights for criminal defendants and prisoners, while maintaining extreme punishments, like the death penalty, as long as adequate procedural protections are in place to check imposition of the penalties.

Although the courts have come full circle regarding the constitutionality of isolation and solitary confinement in the last 200 hundred years, the courts played a critical and often overlooked role in the interim, especially between the 1960s and 1980s. Specifically, courts did hear a significant number of cases regarding isolation conditions and solitary confinement in these years; courts scrutinized isolation conditions quite carefully, down to questions of precise amounts of square footage, light, and out-of-cell hours required to render conditions constitutional; and courts ordered very specific remedies to the violations they found. In response, states across the United States built a specific kind of structure, neatly streamlined, at least in part, to respond to the conditions courts mandated: the supermax. The role of the courts in this correctional phenomenon, shaping a very specific outcome, demonstrates the ways in which courts not only set policies, but sometimes even create specific structures. Once created, these structures are all the harder to challenge, even if they replicate the torturous conditions courts were seeking to avoid, because they are literally physical embodiments of judicial precedent. So, one question remains: Have federal courts inadvertently established uniform and regulated, but inhuman, standards of confinement?

This chapter suggests that further research is needed to explore the relationship between prisoners' rights litigation, federal court precedent, and the shape of prison policies and institutions in the United States. If minimum standards for solitary confinement have shaped the supermaxes built in the 1980s, perhaps these minimum standards have also contributed to other prison policies and institutions. For instance, perhaps the frequent concern with in-prison violence, as raised in federal court litigation in the 1960s and 1970s, has contributed to widespread prison policies of keeping prison facilities "locked-down," i.e. minimizing the amount of in-prison programming, like job training and education, and out-of-cell time available to prisoners (see, e.g., Small, 2011). At some level, the resistance of facilities like supermaxes to litigation challenging the fundamental constitutionality of their physical designs, might have made supermax-like institutions increasingly appealing to state departments of corrections.

NOTES

1. Sensory deprivation is a contested term. Correctional administrators sometimes claim that, because prisoners might have access to a radio, or might be able to conduct shouted conversations with prisoners in neighboring cells, they are not

actually experiencing sensory deprivation, or total solitary confinement (see, e.g., Rhodes, 2005; Shane, 2011). In using the terms sensory deprivation and solitary confinement, I refer to the many ways in which the supermax (a) isolates prisoners from normal human contact, by keeping prisoners in solitary confinement and prohibiting contact visits with family members, for instance, and (b) also isolates prisoner from normal contact with the natural world, by removing windows, keeping cell lights on 24 h per day, and allowing prisoners to go outside only into a cement “dog run” with a bit of access to natural light.

2. Some historians of prisons and punishment in the United States have argued that the politics of punishment, and the resulting design of prisons, was distinctive in southern states (Ayers, 1984; Lichtenstein, 1996); others have argued that certain economic and class themes pervaded prisons and punishment across the United States (McLennan, 2008). Recently, some scholars have argued that the Sunbelt, which stretches across the southern United States from east to west, including states like Arizona and California, in addition to Florida and Texas, is itself characterized by distinctive politics and policies which influenced the design of criminal justice institutions in Sunbelt states (Lynch, 2010; Perkinson, 2010).

3. The specific scope of the habeas corpus writ has been the subject of much litigation and legislation since 1953, so these cases do not represent the final law on the subject. *Miller* and *Brown* are discussed here for the changes they represent in the law of prisoners’ rights in the 1950s in the United States, i.e. in the period of interest here, when prisoners first began to litigate their conditions of confinement with greater frequency.

4. Although the focus of this section is on federal court interventions in *state* prison cases, one other major prisoners’ rights case, which arose in Illinois federal district courts, deserves a reference. In the case, *Adams v. Carlson*, 488 F.2d 619 (7th Cir. 1973), a class of federal prisoners challenged the constitutionality of long-term isolation and solitary confinement in United States Penitentiary in Marion, Illinois. In *Adams*, the Seventh Circuit found that these prisoners were entitled at least to due process protections, including the ability to access the courts, and the right to a hearing prior to being placed in isolation.

5. The decision *Fama* referred to is: *Rowland v. United States Dist. Court for Northern Dist.*, 849 F.2d 380 (9th Cir. 1988).

6. David Fathi, a nationally renowned prisoners’ rights lawyer, has argued that the fact that so many prisoners’ rights cases are settled deprives “the bench and bar of a readily accessible account of the litigation’s result.” “Anatomy of the Modern Prisoners’ Rights Suit: The Common Law of Supermax Litigation,” *Pace Law Review*, Vol. 24, 675, at 677 (Spring, 2004).

ACKNOWLEDGMENTS

This chapter benefited especially from multiple rounds of careful comments from Professor Harry N. Scheiber, as well as from panel and audience comments at a 2010 Law & Society Association presentation. I am also grateful for both funding and comments received through the University of

California – Berkeley Center for Research on Social Change Graduate Fellowship Program. Among the fellows, Corey Abramson, Yolanda Anyon, Trevor Gardner, Anne Martin, and Sarah Anne Minkin, as well as our faculty adviser Chrisine Trost, provided helpful comments on earlier drafts. A University of California Mentored Research Grant also supported me while I prepared this manuscript. Comments from anonymous reviewers ultimately helped me to hone and sharpen the argument. All mistakes and misinterpretations, however, remain my own. Finally, I am grateful to the key informants who generously provided me with time and insights in participating in oral history interviews for this research.

REFERENCES

- Adams v. Carlson*, 488 F.2d 619 (7th Cir 1973).
- Administrative Bulletin No. 05/02 (2005). California Department of Corrections and Rehabilitation (Nov. 21). Copy on file with author.
- Alabama Department of Corrections. (2011). Donaldson correctional facility. Retrieved from <http://www.doc.state.al.us/facility.asp?id=4>
- Alexander, R. S. (2005). *A place of recourse: A history of the U.S. district court for the southern district of Ohio*. Athens: Ohio University Press.
- Anti-Terrorism and Effective Death Penalty Act (AEDPA) of 1996. Pub. L. No. 104–132, 110 Stat. 1214. Introduced as S. 735 ENR, 104th Congress (1995–96).
- Arizona Architect. (2011). Phone: Feb. 4. Interview notes on file with author.
- Austin v. Wilkinson*, 545 U.S. 209 (2005).
- Ayers, E. L. (1984). *Vengeance and justice: Crime and punishment in the 19th century American South*. New York: Oxford University Press.
- Beard v. Banks*, 548 U.S. 521 (2006).
- Beardslee v. Woodford*, 395 F.3d 1064 (9th Cir. 2005).
- Beaumont, G., & Tocqueville, A. (1979). *On the penitentiary system in the United States and its application to France*. Carbondale, IL: Southern Illinois University Press.
- Bissonnette, J., Hamm, R., Dellelo, R., & Rodman, E. (2008). *When the Prisoners Ran Walpole: A true story in the movement for prison abolition*. Cambridge, MA: South End Press.
- Black v. Brown*, 524 F. Supp. 856 (N.D. Ill. 1981), *rev'd in part and aff'd in part* at 688 F.2d 841 (7th Cir. 1982).
- Boston, J. (2004). *The prison litigation reform act*. New York: Legal Aid Society, Prisoners' Rights Project. Retrieved from www.wnyc.net/pb/docs/plra2cir04.pdf
- Brown, R. E., & Milner, P. M. (2003). The legacy of Donald O. Hebb: More than the Hebb synapse. *Nature Reviews: Neuroscience*, 4, 1013–1019 (December).
- Brown v. Allen*, 344 U.S. 443 (1953).
- California Department of Corrections and Rehabilitation. (2011). Pelican Bay State Prison (PBSP). Retrieved from http://www.cdcr.ca.gov/Facilities_Locator/PBSP.html.
- Chambers v. Florida*, 309 U.S. 227 (1940).
- Chapman v. Rhodes*, 434 F. Supp. 1007 (S.D. Ohio 1977).

- Chorover, S. L. (1979). *From genesis to genocide: The meaning of human nature and the power of behavior control*. Cambridge, MA: MIT Press.
- Clonce v. Richardson*, 379 F. Supp. 338, 345 (W.D. Mo. 1974).
- Cohen, F. (2006). Prison reform: Commission on safety and abuse in America's prisons: Isolation in penal settings: The isolation-restraint paradigm. *Journal of Law and Politics*, 22, 295-324.
- Colorado Department of Corrections. (2011). Colorado state penitentiary. Retrieved from <http://www.doc.state.co.us/facility/csp-colorado-state-penitentiary>
- Cooley v. Strickland*, 479 F.3d 412 (6th Cir. 2007).
- Cooper v. Pate*, 378 U.S. 546 (1964).
- Cummins, E. (1994). *The rise and fall of California's radical prisoner movement*. Stanford, CA: Stanford University Press.
- Dayan, C. (2007). *The story of cruel and unusual*. Cambridge, MA: The MIT Press, A Boston Review Book.
- Department of Corrections Washington State. (2011). Washington corrections center - history. Retrieved from <http://www.doc.wa.gov/facilities/prison/wcc/default.asp>
- Dickens, C. (1842). American notes. Retrieved from <http://www.online-literature.com/book-search.php>
- Dowker, F., & Good, G. (1993). The proliferation of control unit prisons in the United States. *Journal of Prisoners on Prison*, 4.2. Formatted Online Version (2006). Retrieved from <http://www.jpp.org/backIssuePages/volume4Number2.html>
- Epp, C. R. (1998). *The rights revolution: Lawyers, activists, and Supreme Courts in comparative perspective*. Chicago: University of Chicago Press.
- Fama, S. (2010). Berkeley, CA: October 13. Interview notes on file with author.
- Farmer v. Brennan*, 511 U.S. 825 (1994).
- Fathi, D. (2004). Anatomy of the modern prisoners' rights suit: The common law of supermax litigation. *Pace Law Review*, 24(Spring), 675-690.
- Feeley, M. M., & Rubin, E. L. (1998). *Judicial policy making and the modern state: How the courts reformed america's prisons*. New York: Cambridge University Press.
- Finney v. Hutto*, 410 F. Supp. 251 (E.D. Ark. 1978).
- Friedman, L. (2005). *A history of American law* (3rd ed.). New York: Simon & Schuster.
- Friedman, L. M. (1988). American legal history, past and present. In L. M. Friedman & H. N. Scheiber (Eds.), *American law and the constitutional order: Historical perspectives*. Boston: Harvard University Press.
- Friedman, L. M. (1993). *Crime and punishment in American history*. New York: BasicBooks.
- Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974).
- Gibbons, J. J., & Katzenbach, N. B. (2006). Prison reform: Commission on safety and abuse in America's prisons: Confronting confinement. *Journal of Law and Politics*, 22, 385-547.
- Goldman, S. (1997). *Picking federal judges: Lower court selection from Roosevelt through Reagan*. New Haven: Yale University Press.
- Grayson v. Allen*, No. 07-12364-P, 2007 WL 2027903 (11th Cir. July 16, 2007).
- Griffin, E. (1993). Breaking men's minds: Behavior control and human experimentation at the federal prison in marion. *Journal of Prisoners on Prison*, 4.2. Formatted Online Version (2006). Retrieved from <http://www.jpp.org/backIssuePages/volume4Number2.html>
- Griffith, J. (1989). New border prison spurs concerns. *The Oregonian*, p. D-1 (December 1).

- Haney, C., & Lynch, M. (1997). Regulating prisons of the future: A psychological analysis of supermax and solitary confinement. *New York University Review of Law and Social Change*, 23.4, 477-570.
- Hayes, T. W. (1986). *A report of an audit of security measures at two California prisons*. (State of California, Office of the Auditor General, March 14.) Sacramento: California State Archives AN: 2003-029, Joint Committee on Prison Construction and Operation Subject Files, Hearing Files 1981-1999, Loc: B4181 - 2907. Copy on file with author.
- Helling v. McKinney*, 509 U.S. 25 (1993).
- Henderson, T. (2011). San Francisco, CA: May 24. Interview notes on file with author.
- Henry, P. (1997). Judge who reformed prison system dies; ruled 'Dark and Evil World' unconstitutional. *Arkansas Democrat-Gazette*, B-1(October 20).
- Heron, W. (1957). The pathology of boredom. *Scientific American*, 196, 52-56.
- Hirsch, A. J. (1992). *The rise of the penitentiary: Prisons and punishment in early America*. New Haven, CT: Yale University Press.
- Holt v. Hutto*, 363 F. Supp. 194 (E.D. Ark. 1973)
- Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970).
- Hoptowit v. Ray*, 628 F.2d 1237, 1257-58 (9th Cir. 1982).
- Hoptowit v. Spellman*, 753 F.2d 779 (9th Cir. 1984).
- Hurst, W. (1988). The law in United States history. In L. M. Friedman & H. N. Scheiber (Eds.), *American law and the constitutional order: historical perspectives*. Boston: Harvard University Press.
- Hutto v. Finney*, 437 U.S. 678, 685 (1978).
- In Re Medley*, 134 U.S. 160, 168 (1890).
- Koenig, K. A., Stover, E., & Fletcher, L. E. (2009). The cumulative effect: A medico-legal approach to United States torture law and policy. *Essex Human Rights Review*, 6.1(December), 146-168.
- Kupers, T. A., Dronet, T., Winter, M., Austin, J., Kelly, L., Cartier, W., ... McBride, J. (2009). Beyond supermax administrative segregation: Mississippi's experience rethinking prison classification and creating alternative mental health programs. *Criminal Justice and Behavior*, 20(2), 1-14.
- Landis, W., Lessig, L., & Solimine, M. (1998). Judicial influence: A citation analysis of federal courts of appeals judges. *Journal of Legal Studies*, 27, 271.
- Lewis, O. F. (1922; 2005). *The development of American prisons and prison customs, 1776-1845*. Whitefish, MT: Kessinger Publishing.
- Lichtenstein, A. (1996). *Twice the work of free labor: The political economy of convict labor in the New South*. London: Verso.
- Lobel, J. (2008). Symposium-cruel and unusual punishment: Litigating under the eighth amendment, prolonged solitary confinement and the constitution. *University of Pennsylvania Journal of Constitutional Law*, 11, 115-138.
- Lovell, D., Cloyes, K., Allen, D. G., & Rhodes, L. A. (2000). Who lives in supermaximum custody? A Washington state study. *Federal Probation*, 64.2, 33-38.
- Lynch, M. (2010). *Sunbelt justice: Arizona and the transformation of American punishment*. Stanford: Stanford University Press.
- Madrid v. Gomez*, 889 F.Supp. 1146 (N.D. Cal. 1995).
- McCarthy, D. J. (1986). *Response to: A report of an audit of security measures at two California prisons*. (California Department of Corrections, March). Sacramento: California State

- Archives AN: 2003-029, Joint Committee on Prison Construction and Operation Subject Files, Hearing Files 1981-1999, Loc: B4181-2907. Copy on file with author.
- McElvaine v. Brush*, 142 U.S. 155 (1891).
- McLennan, R. M. (2008). *The crisis of imprisonment: Protest, politics, and the making of the American penal state, 1776-1941*. New York: Cambridge University Press.
- Miller v. Overholder*, 206 F.2d 415 (D.C. Cir. 1953).
- Mitford, J. (1974). *Kind and usual punishment*. New York: Vintage Books Edition, Random House.
- Monroe v. Pape*, 365 U.S. 167 (1961).
- Naday, A., Freilich, J. D., & Mellow, J. (2008). The elusive data on supermax confinement. *Prison Journal*, 88.1(March), 69-94.
- Odier, P. (1982). *The rock: A history of the fort/the prison*. Eagle Rock, CA: L'Image Odier Publishing Company.
- People's Law Office. (2011). Our prison work. Retrieved from <http://www.peopleslawoffice.com/archives/our-prison-work/>
- Perkinson, R. (2010). *Texas tough: The rise of America's prison empire*. New York: Metropolitan Books.
- Piller, C. (2010). Guards accused of cruelty, racism. *Sacramento Bee*, A-1(May 9).
- Practicing Criminal Justice Architect. (2010). Phone: August 4. Interview notes on file with author.
- Prendergast, A. (2007). The caged life: Is Thomas Silverstein a prisoner of his own deadly past - or the first in a new wave of locked-down lifers? *Denver Westword News* (August 16).
- Presley, R. (1986). Bill File on SB-2098. Letter from Undersecretary of Corrections, Rodney J. Blonien, dated May 30, 1986. Sacramento: California State Archives. Copy on file with author.
- Pugh v. Locke*, 406 F.Supp. 318 (MD Ala. 1976), *aff'd as modified*, 559 F.2d 283 (5th Cir. 1977), *rev'd in part*, 438 U.S. 781 (1978) (per curiam).
- Ramos v. Lamm*, 485 F. Supp. 122, 137-38 (D. Colo. 1979), *rev'd in part*, 639 F.2d 559 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981).
- Reiter, K. (2009). Experimentation on prisoners: Persistent dilemmas in rights and regulation. *California Law Review*, 97, 501-566.
- Rhodes, L. (2004). *Total confinement: Madness and reason in the maximum security prison*. Berkeley, CA: University of California Press.
- Rhodes, L. (2005). Changing the subject: Conversation in supermax. *Cultural Anthropology*, 20.3, 388-411.
- Rhodes v. Chapman*, 452 U.S. 337, 346 (1981).
- Riveland, C. (1999). *Supermax prisons: Overview and general considerations*. Washington, D.C.: U.S. Department of Justice, National Institute of Corrections (January), Retrieved from <http://www.nicic.org/pubs/1999/014937.pdf>
- Robinson v. California*, 370 U.S. 660 (1962).
- Rothman, D. (1971). *The discovery of the asylum: Social order and disorder in the New Republic*. Boston: Little, Brown and Company.
- Rowland v. United States Dist. Court for Northern Dist.*, 849 F.2d 380 (9th Cir. 1988).
- Sandin v. Conner*, 515 U.S. 472 (1995).
- Shalev, S. (2009). *Supermax: Controlling risk through isolation*. Portland, OR: Willan Publishing.

- Shane, S. (2009). U.S. architects of Harsh Tactics in 9/11's wake. *New York Times*, p. A-1 (August 12).
- Shane, S. (2011). Accused soldier in Brig. as WikiLeaks link is sought. *The New York Times*, January 13, p. A-1.
- Small, J. (2011). Complaint says California prisons resort to excessive, race-based lockdowns. *Southern California Public Radio*, April 27.
- Sostre v. McGinnis*, 442 F.2d 178 (2d Cir. 1971), *en banc*, *rev'd in part sub nom Davidson v. Scully*, 694 F.2d 50 (2d Cir. 1982).
- Spain v. Procunier*, 600 F.2d 189, 199 (9th Cir. 1979).
- Sundt, J. L., Castellano, T. C., & Briggs, C. S. (2008). The sociopolitical context of prison violence and its control: A case study of supermax and its effect in Illinois. *Prison Journal*, 88.1, 94-122.
- Sunstein, C. R., Schkade, D., Ellman, L., & Sawicki, A. (2006). *Are judges political? An empirical investigation of the federal judiciary*. Washington, DC: Brookings Institution Press.
- Symposium: The Jurisprudential Legacy of the Warren Court. (2002). *Washington and Lee Law Review*, 59 (Fall).
- Talley v. Stephens*, 247 F. Supp. 683 (E.D. Ark. 1965).
- The Prison Litigation Reform Act. (PLRA) of 1995, Pub. L. No. 104-134. Introduced as H.R. 3019, 104th Cong. (1995-96).
- Tillery v. Owens*, 719 F. Supp. 1256 (W.D. Pa. 1989), *aff'd by*, 907 F.2d 418 (3d Cir. 1990).
- Toussaint v. McCarthy*, 597 F. Supp. 1388, 1397, 1410 (N.D. Cal. 1984), *aff'd in part, rev'd in part*, 801 F.2d 1080, 1110 (9th Cir. 1986), *cert. denied*, 481 U.S. 1069 (1987).
- Toussaint v. Yockey*, 722 F.2d 1490, 1492-93 (9th Cir. 1984).
- Toussaint v. Rushen*, 553 F. Supp. 1365 (N.D. Cal. 1983).
- United States ex rel. Miller v. Twomey*, 479 F.2d 701 (7th Cir. 1973).
- United States v. Moreland*, 258 U.S. 433, 449 (1922) (Brandeis, J., dissenting).
- U.S. Department of Justice, National Institute of Corrections. (1997). *Supermax housing: A survey of current practice special issues in corrections* (March). Retrieved from <http://www.nicic.org/pubs/1997/013722.pdf>
- Ward, D., & Kassebaum, G. (2009). *Alcatraz: The gangster years*. Berkeley, CA: University of California Press.
- Ward, D. A., & Breed, A. F. (1984). *The United States penitentiary, marion, illinois: A report to the judiciary committee, United States House of Representatives* (October).
- Weisselberg, C. D. (2008). Mourning Miranda. *California Law Review*, 96, 1519-1601.
- Wright v. Enomoto*, 462 F. Supp. 397 (N.D. Cal. 1976).
- Zimring, F., & Hawkins, G. (1991). *The scale of imprisonment*. Chicago, IL: University of Chicago Press.