Notre Dame Law Review

Volume 95 | Issue 1 Article 2

12-2019

Experimental Punishments

John F. Stinneford
University of Florida Levin College of Law

Follow this and additional works at: https://scholarship.law.nd.edu/ndlr

 Part of the Constitutional Law Commons, Criminal Law Commons, and the Law Enforcement and Corrections Commons

Recommended Citation
95 Notre Dame L. Rev. 39 (2019).

This Article is brought to you for free and open access by the Notre Dame Law Review at NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized editor of NDLScholarship. For more information, please contact lawdr@nd.edu.

EXPERIMENTAL PUNISHMENTS

*John F. Stinneford**

The Cruel and Unusual Punishments Clause prohibits, under its original meaning, punishments that are unjustly harsh in light of longstanding prior practice. The Clause does not prohibit all new punishments; rather, it directs that when a new punishment is introduced it should be compared to traditional punishments that enjoy long usage. This standard presents a challenge when the government introduces a new method of punishment, particularly one that is advertised as more "progressive" or "humane" than those it replaces. It may not always be obvious, for example, how to compare a prison sentence to a public flogging, or death by lethal injection to death by hanging. When the new method of punishment is introduced, it is often an experimental punishment whose constitutional status is not immediately clear.

This Article shows how usage over time clarifies the constitutional status of experimental punishments by revealing two types of data that may not be available at the time the punishment is adopted. First, the degree of stable reception the punishment achieves over time indicates whether society has accepted the punishment as consistent with the overall tradition. The Eighth Amendment is premised on the idea that long usage is the most reliable method of determining what is cruel and what is not. The longer a practice is used, and the more universally it is received, the more likely it is to comport with the demands of justice. On the other hand, failure to achieve long usage may be powerful evidence that a punishment is cruel. Second, usage over time can reveal more clearly how harsh the effects of the punishment are in comparison to traditional punishments. Innovations in punishment such as long-term solitary confinement, involuntary sterilization, and three-drug lethal injection all appeared "progressive" and "humane" when first adopted, but usage over time has shown their effects to be unjustly harsh in comparison with the practices they have replaced.

© 2019 John F. Stinneford. Individuals and nonprofit institutions may reproduce and distribute copies of this Article in any format at or below cost, for educational purposes, so long as each copy identifies the author, provides a citation to the *Notre Dame Law Review*, and includes this provision in the copyright notice.

* Professor of Law, University of Florida Levin College of Law, Gainesville, Florida. I thank Albert Alschuler, William Baude, Samuel Bray, Marc DeGirolami, Sharon Dolovich, Daniel Greenfield, Aziz Huq, Saul Levmore, Nick McLean, Alexander Reinert, John Robinson, Stephen Sachs, Margo Schlanger, David Shapiro, participants in the Law, Practice, and Policy of Incarceration Roundtable discussion at the University of Michigan Law School, the National Conference of Constitutional Law Scholars at the University of Arizona James E. Rogers College of Law, and faculty workshops at Notre Dame Law School and George Mason University Antonin Scalia Law School for helpful comments on an earlier version of this draft. I also thank the University of Florida Levin College of Law for a generous research grant that made this Article possible.

INTRODUCTION

Our entire criminal justice system is, in fundamental ways, experimental. Over the past two centuries, we have repeatedly changed what we do and how we do it in light of shifting political and social goals. These changes often occur quickly and without much understanding of what their effects will be. They cut across several axes:

> *What we punish.* We have vastly expanded the scope of the criminal law, largely through the creation of regulatory crimes. Many of these new crimes permit punishment without any showing of blameworthy conduct or intent.[1] More recently, some legislatures have

1 American law's transformation from a system that forbade punishment without culpability to one that permitted it happened rapidly at the turn of the twentieth century. *Compare* Felton v. United States, 96 U.S. 699, 703 (1878) ("All punitive legislation contemplates some relation between guilt and punishment. To inflict the latter where the former does not exist would shock the sense of justice of every one."), *with* United States v. Balint, 258 U.S. 250, 251–52 (1922) (interpreting a federal felony narcotics statute as not requir-

moved to permit punishment without culpability by eliminating traditional affirmative defenses like the insanity defense.[2]

Why we punish. The traditional justification for punishment was retributive justice.[3] Today legislatures can draw from a hodgepodge of penal justifications, including retribution, deterrence, rehabilitation, incapacitation, or almost any regulatory purpose.[4]

How much we punish. Numerous innovations in substantive criminal law, sentencing law, and judicial interpretation of criminal statutes[5] have resulted in longer sentences for many common crimes and an unprecedented level of incarceration.[6]

---

ing proof of culpability) ("While the general rule at common law was that the *scienter* was a necessary element in the indictment and proof of every crime, and this was followed in regard to statutory crimes even where the statutory definition did not in terms include it, there has been a modification of this view in respect to prosecutions under statutes the purpose of which would be obstructed by such a requirement." (citation omitted)). Although the Supreme Court has expressed various levels of reluctance and regret arising from the decision to permit strict liability crimes, *see, e.g.*, Morissette v. United States, 342 U.S. 246, 263 (1952), it has not reversed itself on this point and has done relatively little to stem the tide of strict liability crimes. The expansion of the scope of conduct we punish has led to an explosion in the number of criminal statutes. For example, estimates of the number of federal criminal laws range from 4500 to over 300,000. *See* Richard J. Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law*, 83 GEO. L.J. 2407, 2441–42 (1995) (300,000); Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 537, 538 (2012) [hereinafter Smith, *Overcoming Overcriminalization*] (4500). The disparity in these estimates appears to arise from the decision to count only the criminal statutes themselves, or also the many federal regulations that are enforceable as federal crimes.

2 *See, e.g.*, KAN. STAT. ANN. § 21-5209 (West 2019) ("It shall be a defense to a prosecution under any statute that the defendant, as a result of mental disease or defect, lacked the culpable mental state required as an element of the crime charged. Mental disease or defect is not otherwise a defense.").

3 *See, e.g.*, John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899, 962–68 (2011) [hereinafter Stinneford, *Rethinking Proportionality*] (discussing historical evidence).

4 *See, e.g.*, Ewing v. California, 538 U.S. 11, 25–31 (2003) (plurality opinion) (upholding sentence of twenty-five years to life for recidivist convicted of shoplifting, despite its apparent gross disproportionality to the offender's desert, because the punishment furthered the state's interest in deterrence and incapacitation); Harmelin v. Michigan, 501 U.S. 957, 999 (1991) (Kennedy, J., concurring in part and concurring in the judgment) ("[T]he Eighth Amendment does not mandate adoption of any one penological theory.").

5 *See, e.g.*, Smith, *Overcoming Overcriminalization*, *supra* note 1, at 539, 567–68 (arguing that broadly worded criminal statutes, combined with judicial abandonment of the rule of lenity, have substantially contributed to the vast expansion of criminal law).

6 The total number of people incarcerated in American prisons and jails increased by approximately 620% between 1970 and 2016, from 300,000 to 2,162,400. *See* DANIELLE KAEBLE & MARY COWHIG, U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2016, at 2 (2018) (2016 figure); Douglas A. Berman, *Re-Balancing Fitness, Fairness, and Finality for Sentences*, 4 WAKE FOREST J.L. & POL'Y 151, 164 (2014) (1970 figure).

> *How we punish.* The modern prison system is largely a nineteenth-century invention, and it has been the subject of constant experimentation—to a far greater extent than most people understand—ever since.[7] We have also experimented with involuntary sterilization and chemical castration, and have invented at least three new methods of execution since the end of the nineteenth century.[8]

Our experimental criminal justice system exists in tension with the United States Constitution, and particularly the Eighth Amendment. Under its original meaning, the Cruel and Unusual Punishments Clause prohibits cruel innovations—that is, punishments that are unjustly harsh in light of longstanding prior practice.[9] The Clause is premised on the idea that the longer a punishment is used, and the more universally it is received, the more likely it is to be just, reasonable, and to enjoy the consent of the people—for if it lacked these qualities it would fall out of usage.[10] On the other hand, new punishment practices that are significantly harsher than the baseline established by longstanding prior practice are cruel and unusual because they are unjust in light of the traditional practices they are replacing or supplementing.[11]

A punishment might be cruel and unusual because it is grossly disproportionate to the offense in light of prior practice.[12] For example, even skeptics of proportionality have accepted that a life sentence for a parking violation would be cruel and unusual because it is far out of proportion to the punishments traditionally given for this offense.[13] A punishment might also be cruel and unusual because it involves an inherently cruel method. For example, the rack is cruel and unusual because the Anglo-American punishment tradition has prohibited the use of torture for centuries.[14]

---

7 *See infra* Part II.

8 *See, e.g.*, STUART BANNER, THE DEATH PENALTY 198–202 (2002); DAVID GARLAND, PECULIAR INSTITUTION 117–18 (2010); John F. Stinneford, *Death, Desuetude, and Original Meaning*, 56 WM. & MARY L. REV. 531, 556 (2014) [hereinafter Stinneford, *Death, Desuetude*].

9 *See infra* Part I. The idea of longstanding prior practice, or tradition, as a source of both preconstitutional and constitutional norms that can provide stability, flexibility, and consonance with basic principles of justice has been explored in recent years by a number of scholars. *See, e.g.*, Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665; Michael W. McConnell, *Tradition and Constitutionalism Before the Constitution*, 1998 U. ILL. L. REV. 173; Marc O. DeGirolami, *The Traditions of American Constitutional Law*, 95 NOTRE DAME L. REV. (forthcoming 2020), https://ssrn.com/abstract=3349187.

10 *See infra* Section I.A.

11 *See infra* Part I.

12 *See* Stinneford, *Rethinking Proportionality*, *supra* note 3, at 942.

13 *See* Rummel v. Estelle, 445 U.S. 263, 274 n.11 (1980).

14 In the Massachusetts convention for ratifying the United States Constitution, Abraham Holmes argued that because the Constitution did not (before adoption of the Bill of Rights) constrain Congress's ability to create new punishments, it might choose to model itself after the Spanish Inquisition and start using torture for state ends:

Each type of experimentation listed at the beginning of this Article creates a risk of cruel and unusual punishment. If we change *what* we punish by expanding the list of crimes—and particularly by permitting punishment in the absence of culpability—we are likely to inflict punishments that are grossly disproportionate to an offender's desert.[15] Similarly, if legislatures change *why* they punish by designing punishments solely in light of utilitarian goals such as deterrence or incapacitation, some of those punishments will be grossly disproportionate to an offender's desert.[16] Innovations that change *how much* we punish by lengthening the sentences of traditional crimes are also likely to result in gross disproportionality.[17] Finally, when we change *how* we punish by adopting new methods of punishment, the new methods may turn out to be inherently cruel.[18]

The Cruel and Unusual Punishments Clause does not prohibit all new punishments, nor does it permit all old ones. A new punishment practice that is not significantly harsher than the traditional practices it replaces is not cruel and unusual.[19] Similarly, an old punishment practice that falls out of usage for multiple generations is no longer "usual," because it has not with-

---

> What gives an additional glare of horror to these gloomy circumstances is the consideration, that Congress have to ascertain, point out, and determine, what kind of punishments shall be inflicted on persons convicted of crimes. They are nowhere restrained from inventing the most cruel and unheard-of punishments, and annexing them to crimes; and there is no constitutional check on them, but that *racks* and *gibbets* may be amongst the most mild instruments of their discipline.

Abraham Holmes, Speech to the Massachusetts Ratifying Convention for the United States Constitution (Jan. 30, 1788), *in* 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 124, 125 (Jonathan Elliot ed., 2d ed., Washington, D.C., 1836).

15 *See, e.g.*, Ely v. Thompson, 10 Ky. (3 A.K. Marsh.) 70, 71, 73 (1820) (holding that slave-era statute making it a crime for "any negro . . . [to,] at any time[,] lift his or her hand in opposition to any person not being a negro, mulatto or Indian" violated Kentucky's prohibition of cruel and unusual punishments because it permitted punishment without culpability—for example, in cases where an African American raised a hand against a white person to ward off an assault or a rape (quoting Act of Feb. 8, 1798, ch. 63, § 13, *in* 2 THE STATUTE LAW OF KENTUCKY 113, 116 (William Littell ed., Frankfort, Ky., Johnson & Pleasants 1810))).

16 For example, theories of deterrence and incapacitation have justified sentences of twenty-five years to life for a recidivist convicted of shoplifting golf clubs, *see* Ewing v. California, 538 U.S. 11, 25–27, 29 (2003) (plurality opinion), and fifty years to life for a recidivist convicted of two counts of shoplifting videotapes, *see* Lockyer v. Andrade, 538 U.S. 63, 66, 76–77 (2003).

17 *See Ewing*, 538 U.S. at 43–44 (Breyer, J., dissenting) (noting that the sentence Ewing received under California's "three strikes" law was 150% to 625% greater than the maximum sentence anyone in the country could previously have received for this crime).

18 *See infra* Parts II–III (discussing long-term solitary confinement); *see also* John F. Stinneford, *The Original Meaning of "Cruel,"* 105 GEO. L.J. 441, 502 (2017) [hereinafter Stinneford, *Original Meaning of Cruel*] (discussing lethal injection).

19 *See infra* Section I.A.

stood the test of time.[20] If such a punishment is later revived, it is a new punishment and is to be judged against the tradition as it has survived up to today.[21]

In other words, the Cruel and Unusual Punishments Clause contains a principle of legal development.[22] Over time, some punishments fall out of the tradition and others become part of it. But in principle, the harshness of the system is supposed to remain steady, so as to ensure compliance with unchanging standards of justice and individual desert.[23] Like the common law on which it is based, the Cruel and Unusual Punishments Clause is supposed to guarantee that the criminal justice system will be like the ship of the Argonauts, replacing every board as it goes on its journeys but remaining the same ship.[24] For this process to succeed, however, we must ensure that the

20 *See infra* Section I.A.

21 *See infra* Section I.A.

22 This idea of legal development bears a certain family resemblance to interpretive concepts of constitutional "liquidation" or "gloss." Liquidation is the idea, largely associated with James Madison, that if a constitutional provision is vague or ambiguous, early interpreters (whether they be courts or the political branches of government) could settle its meaning over time, so long as they stayed within the range of possible meaning. *See* William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 1 (2019) ("Constitutional liquidation had three key elements. First, there had to be a textual indeterminacy. Clear provisions could not be liquidated, because practice could 'expound' the Constitution but could not 'alter' it. Second, there had to be a course of deliberate practice. This required repeated decisions that reflected constitutional reasoning. Third, that course of practice had to result in a constitutional settlement. This settlement was marked by two related ideas: acquiescence by the dissenting side, and 'the public sanction'—a real or imputed popular ratification."); Caleb Nelson, Stare Decisis *and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 15 (2001). Gloss is the idea, associated with Justice Frankfurter, that "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, . . . may be treated as a gloss" on the meaning of constitutional terms. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring); *see* Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers*, 105 GEO. L.J. 255, 261 (2017). The main distinction seems to be that liquidation and gloss focus on the role of practice over time in settling the meaning of constitutional terms, whereas the concept of "long usage" focuses on the role of practice over time in determining the proper application of a term whose meaning is already settled. Further research and analysis would be required to determine whether, and to what extent, this is a distinction with a difference.

23 *See infra* Section I.A.

24 *See* JAMES WILSON, *Of the Common Law*, *in* 1 THE WORKS OF JAMES WILSON 423, 453–54 (James DeWitt Andrews ed., Chicago, Callaghan & Co. 1896) ("It is the characteristic of a system of common law that it be accommodated to the circumstances, the exigencies, and the conveniencies of the people, by whom it is appointed. Now, as these circumstances, and exigencies, and conveniencies insensibly change; a proportioned change, in time and in degree, must take place in the accommodated system. But though the system suffer these partial and successive alterations, yet it continues materially and substantially the same. The ship of the Argonauts became not another vessel, though almost every part of her materials had been altered during the course of her voyage." (paraphrasing MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 39–40 (Charles M. Gray ed., Univ. of Chi. Press 1971) (1713))).

new boards are sufficiently like the old boards that they may appropriately become part of the ship.

This Article is all about those boards. It asks how we can determine whether a new punishment is sufficiently similar to traditional punishments that it may become part of our constitutional tradition, particularly when it is difficult to compare the new punishment to traditional punishments at the time it is adopted.[25] The most difficult problem of commensurability arises when the government introduces a new *method* of punishment. If a legislature simply lengthens a sentence for a given crime, it is relatively easy to determine whether the new punishment is grossly disproportionate to the crime in light of prior practice. But if the legislature replaces an old method with a new one—for example, replacing public flogging or pillorying with a term in prison—it is not always obvious how to compare the two methods. This is particularly true when the new method is advertised as more "progressive," "humane," or "scientific."[26]

We can solve the commensurability problem by examining the usage of a new punishment over time. Usage over time reveals two types of information that may not be apparent at the time the punishment is adopted. First, it shows how society responds to the punishment over time. Some punishments achieve universal reception and maintain this status over a period of numerous generations; others do not. Second, usage over time reveals characteristics of the punishment that may not be obvious at the time of adoption—particularly, the harshness of the suffering the punishment inflicts relative to the harshness of the traditional punishments it replaced. For example, we have a lot more information today about the harsh effects of long-term solitary confinement in "supermax" prisons than we did when they were invented thirty-five years ago. Although these two types of information are analytically distinct, the premise of the Cruel and Unusual Punishments Clause is that they should work together in practice.[27] That is, if we learn over time that a new punishment method is significantly harsher or more harmful than traditional punishments, this method is not likely to achieve universal reception that remains stable over a long period of time.[28] Although public opinion at any given moment may become enflamed and thus inclined to accept cruel methods of punishment, over time the traditions of a free people will revert back toward a more just and moderate punishment practice.[29]

This Article will focus on two related experiments in punishment to demonstrate how usage over time can solve the commensurability problem: imprisonment and long-term solitary confinement.[30] The modern prison

25 *See infra* Part I.

26 *See infra* Sections II.A–B.

27 *See infra* Section I.A.

28 *See infra* Section I.A.

29 *See infra* Section I.A.

30 I have previously argued that other innovations in punishment methods, including three-drug lethal injection and chemical castration, are cruel and unusual. For further

system did not exist at the time the Constitution was ratified.[31] Instead, the most common forms of punishment were fines, corporal punishment, public shaming of various kinds, and (relatively rarely) the death penalty.[32] But in the decades following ratification, legal reformers successfully advocated the creation of prisons to punish offenders in place of the public spectacles that had previously dominated the scene.[33] Long-term solitary confinement was an integral part of this reform in the early decades of the nineteenth century.[34]

The grand experiment of prison creation demonstrates how usage over time clarifies whether a new punishment practice is consistent with the American constitutional tradition. Prison itself, although experimental at the outset, has been universally received and used for nearly two centuries. On the other hand, the feature of imprisonment that many considered most important at the time it was created—long-term solitary confinement—has failed to become part of the tradition.[35] It enjoyed a vogue for several decades in the nineteenth century but was then rejected because of its cruel effects.[36] It was adopted once more in the 1980s and its cruel effects have become apparent once again.[37] Long-term solitary confinement's near-universal rejection because of its harsh effects after several decades of use in the nineteenth century is powerful evidence that it is an impermissibly cruel method of punishment. This conclusion is bolstered by empirical evidence of the extraordinarily harmful effects of modern solitary confinement as compared to imprisonment with some opportunity for meaningful human contact.[38]

Before starting, it is important to clarify the definition of long-term solitary confinement used in this Article: extreme isolation (confinement in a cell for twenty-two hours or more per day, without meaningful human contact) for an extended duration (a period of three months or more).[39] This

---

discussion of these issues, see John F. Stinneford, *Incapacitation Through Maiming: Chemical Castration, the Eighth Amendment, and the Denial of Human Dignity*, 3 U. ST. THOMAS L.J. 559 (2006); Stinneford, *Original Meaning of Cruel*, *supra* note 18, at 502.

31 *See infra* Section II.A.

32 *See infra* Section II.A.

33 *See infra* Section II.A.

34 *See infra* Section II.A.

35 *See infra* Section II.G.

36 *See infra* Section II.B.

37 *See infra* Section II.D.

38 *See infra* Part III; *see also* Merin Cherian, Note, *Cruel, Unusual, and Unconstitutional: An Originalist Argument for Ending Long-Term Solitary Confinement*, 56 AM. CRIM. L. REV. 1759 (2019).

39 The choice of a three-month period is somewhat arbitrary. The Supreme Court found in *In re Medley*, 134 U.S. 160 (1890), that two to four weeks of solitary confinement prior to execution added such "terror" and "severity" to the sentence that it constituted a punishment subject to constitutional limits. *See infra* notes 192–207 and accompanying text. Similarly, the ABA draws the line between shorter-term and long-term solitary confinement at thirty days. AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE: TREATMENT OF PRISONERS 12 (3d ed. 2010). The United Nations' Special Rapporteur on torture, on the other hand, has called for a ban on solitary confinement in excess of fifteen days. *See*

definition distinguishes long-term solitary confinement from two distinct practices that are sometimes given the same name: (1) assignment to solitary cells with significant out-of-cell time involving interaction with other people; and (2) shorter-term isolation as discipline for breaking prison rules. Each practice has been a part of the American prison system (albeit sometimes an underground part) from the beginning, and each presents its own questions of cruelty[40]—but both are distinct from the long-term solitary confinement discussed in this Article, whose harshness comes from the sheer duration and totality of the prisoner's isolation.[41]

Part I of this Article sets forth the original meaning of the Cruel and Unusual Punishments Clause, with a particular focus on the ways in which usage over time can clarify both the degree of stable societal acceptance the punishment has achieved and the objective harshness of the punishment in comparison to traditional practices. Parts II and III use the examples of imprisonment and long-term solitary confinement to demonstrate the dual function of usage over time. Part II focuses on the development of stable, multigenerational societal consensus. It describes the history of long-term solitary confinement in the United States in the context of the overall history of the prison, demonstrating that although the prison has achieved universal reception over a period of nearly two centuries, long-term solitary confinement has not. Rather, it is a repeated, failed experiment in punishment. Part III focuses on what usage over time has shown us about the harshness of long-term solitary confinement as compared to imprisonment with some meaningful opportunity for human interaction. This section examines the empirical literature surrounding imprisonment and long-term solitary confinement, which shows long-term solitary confinement to be a "cruel" practice within the meaning of the Eighth Amendment. Part IV provides a conclusion and suggests the implications of the foregoing analysis. The most important implication may be not only that long-term solitary confinement should be eliminated, but that reduction of the prison overcrowding that gave rise to the perceived need for such confinement should be a legislative priority of the highest order.

Solitary Confinement Should Be Banned in Most Cases, UN Expert Says, UN NEWS (Oct. 18, 2011), http://news.un.org/en/story/2011/10/392012-solitary-confinement-should-be-banned-most-cases-un-expert-says. I have chosen a three-month period simply because it enables me to draw a clear distinction between what might arguably be constitutional and practices that significantly—cruelly—exceed what has traditionally been considered acceptable. Further research into the historical practice and psychological effects of shorter-term solitary confinement might show that the line between shorter-term and long-term solitary confinement should be drawn earlier in the period of solitary confinement. Indeed, because so much of the practice of shorter-term solitary confinement has been hidden from public view and from the view of the courts, it may be the case that there is no clear constitutionally acceptable tradition of even shorter-term solitary confinement. But this difficult topic is for another day.

40 *See infra* Section II.C.

41 *See infra* Part III.

I. ORIGINAL MEANING AND THE SIGNIFICANCE OF USAGE OVER TIME

Although the phrase "cruel and unusual punishments" is a familiar one, its meaning is surprisingly obscure to modern readers. The word "unusual" seems particularly out of place, as there does not seem to be any clear connection between a punishment's rarity and its cruelty.[42] A law mandating the public torture of all sex offenders, for example, seems crueler than a law mandating torture only on rare occasions involving the worst offenders. For this reason, courts and scholars have largely ignored the word or assigned it a weak meaning.[43] Similarly, the Supreme Court has tended to treat the word "cruel" as covering only those punishments motivated by cruel intent[44] (sometimes rephrased as "deliberate indifference").[45] As I have shown in prior articles, and as is summarized below, the Court's reading of both terms is incorrect. In fact, the word "unusual" means "contrary to long usage,"[46] and the word "cruel" means "unjustly harsh."[47] A punishment is cruel and unusual if it is unjustly harsh in light of longstanding prior practice.

A. The Original Meaning of Unusual

The word "unusual" in the Cruel and Unusual Punishments Clause is a term of art that comes from the common law.[48] Although today the common law is often thought of as judge-made law, it was traditionally described as the law of "custom" and "long usage." The basic idea was that a practice or custom could attain the status of law if it enjoyed universal reception throughout the jurisdiction for a very long time.[49] These two characteris-

42 *See* Harmelin v. Michigan, 501 U.S. 957, 975–76 (1991) (opinion of Scalia, J.).

43 *See, e.g.*, Trop v. Dulles, 356 U.S. 86, 100 n.32 (1958) (plurality opinion) (treating the word as having no meaning or as meaning "different from that which is generally done"); *Harmelin*, 501 U.S. at 976 (opinion of Scalia, J.) (same); *see also, e.g.*, RAOUL BERGER, DEATH PENALTIES 41 (1982) (same); Laurence Claus, *The Antidiscrimination Eighth Amendment*, 28 HARV. J.L. & PUB. POL'Y 119, 122 (2004) ("immorally discriminatory"); Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CALIF. L. REV. 839, 840 (1969) ("constitutional 'boilerplate'"); Michael J. Perry, *Is Capital Punishment Unconstitutional? And Even If We Think It Is, Should We Want the Supreme Court to So Rule?*, 41 GA. L. REV. 867, 880 (2007) ("[n]ot common" or "rare" (quoting 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 503 (London, 6th ed. 1785))).

44 *See, e.g.*, Baze v. Rees, 553 U.S. 35, 50 (2008) (plurality opinion) (risk of botched execution not sufficiently substantial to "suggest cruelty"); *id.* at 94 (Thomas, J., concurring in the judgment) ("[I]n my view, a method of execution violates the Eighth Amendment only if it is deliberately designed to inflict pain . . . .").

45 Estelle v. Gamble, 429 U.S. 97, 104 (1976).

46 *See* John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1825 (2008) [hereinafter Stinneford, *Original Meaning of Unusual*].

47 *See* Stinneford, *Original Meaning of Cruel*, *supra* note 18, at 506.

48 *See generally* Stinneford, *Original Meaning of Unusual*, *supra* note 46, at 1745.

49 *See, e.g.*, 1 WILLIAM BLACKSTONE, COMMENTARIES *67 ("[I]n our law the goodness of a custom depends upon it's [sic] having been used time out of mind; or, in the solemnity of our legal phrase, time whereof the memory of man runneth not to the contrary."); EDWARD

tics—universality and long usage—justified legal enforcement of the practice despite the fact that it was never ordered by the sovereign, because these characteristics were thought to guarantee its goodness, practicality, and consensual nature.[50] If the practice was not good, it was thought, it would fall out of usage.[51] Thus the theoretical basis for common-law judging was not that judges had the power to make law, but that they had the power to identify and enforce universal, longstanding customs.[52]

Long usage as a basis for law gave rise to the idea of rights enforceable against the sovereign.[53] Common-law thinkers asserted that unwritten laws that enjoy long usage are morally and practically superior to laws ordered by

---

COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWES OF ENGLAND (1608), *reprinted in* 2 THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE 577, 701 (Steve Sheppard ed., 2003) ("And note that no custome is to bee allowed, but such custome as hath bin used by title of prescription, that is to say, from time out of minde."); WILSON, *supra* note 24, at 435–36 ("[L]ong customs, approved by the consent of those who use them, acquire the qualities of a law." (quoting Justinian)).

50 *See, e.g.*, 1 BLACKSTONE, *supra* note 49, at *64, *70, *74 (asserting that the only customs that had "binding power, and the force of laws" were those that enjoyed "long and immemorial usage" and "universal reception throughout the kingdom"; that such qualities made the common law "the perfection of reason . . . it always intends to conform thereto, and . . . what is not reason is not law"; and that the common law was consistent with "English liberty" because it arose through "the voluntary consent of the people"); JOHN DAVIES, *A Preface Dedicatory*, *in* LE PRIMER REPORT DES CASES & MATTERS EN LEY RESOLUES & ADIUDGES EN LES COURTS DEL ROY EN IRELAND *2 (Dublin, 1615) ("And this *Customary lawe* is the most perfect, & most excellent, and without comparison the best, to make & preserue a commonwealth, for the *written lawes* which are made either by the edicts of Princes, or by Counselles of estate, are imposed vppon the subiect before any Triall or Probation made, whether the same bee fitt & agreeable to the nature & disposition of the people, or whether they will breed any inconvenience or no. But a *Custome* doth neuer become a lawe to binde the people, vntill it hath bin tried & approued time out of minde, during all which time there did thereby arise no *inconuenience* . . . .").

51 *See, e.g.*, EDWARD COKE, THE COMPLEAT COPYHOLDER (1630), *reprinted in* 2 THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE, *supra* note 49, at 563, 564 ("Custome . . . lose[s its] being, if usage faile."); DAVIES, *supra* note 50, at *2 ("[F]or if it had beene found *inconuenient* at any time, it had beene vsed no longer, but had beene interrupted, & conseqnently it had lost the vertue & force of a lawe.").

52 Because the Cruel and Unusual Punishments Clause draws its meaning from the common law, it is useful to look at the ways in which courts and tribunals treat the meaning of the phrase "cruel and unusual" in common-law contexts outside of criminal law. *See generally, e.g.*, Alexander A. Reinert, *Reconceptualizing the Eighth Amendment: Slaves, Prisoners, and "Cruel and Unusual" Punishment*, 94 N.C. L. REV. 817 (2016) (examining the meaning of "cruel and unusual" in the context of slavery).

53 *See* Stinneford, *Original Meaning of Unusual*, *supra* note 46, at 1778 (summarizing rights identified by Edward Coke as derivative from the common law); *id.* at 1781–86 (describing seventeenth- and eighteenth-century conflicts in England between those who contended that the sovereign possessed absolute power and those who contended that the sovereign's power was limited by common-law rights); *id.* at 1792–800 (describing how the idea that the power of the sovereign was limited by common-law rights was the ideological basis for the American Revolution); *id.* at 1800–10 (describing how the same idea led to adoption of the Bill of Rights).

king or parliament.[54] Customs do not become law until multiple generations have used them and found them to be workable and just.[55] Laws ordered by the sovereign, by contrast, become law before they have been used and may turn out to be unjust or unworkable in practice.[56] A growing chorus in England and America argued that the sovereign lacked legitimate authority to enact or enforce laws that violate rights established through long usage—particularly rights relating to life, liberty, or property.[57] This complaint was the basis of the American Revolution and was the core argument used by Antifederalists agitating for a Bill of Rights.[58]

The word "unusual" was part of the lexicon of rights used in the debates surrounding the American Revolution and the subsequent ratification of the United States Constitution.[59] To say that something was unusual was to say that it was new and that it violated rights established through long usage.[60] In the context of constitutional debates, the word "unusual" is a "thick ethical concept[ ]."[61] It both describes a specific factual condition—"newness," or more specifically, "newness that runs contrary to longstanding common-law rights"—and gives reasons to avoid that factual condition. Because rights established through long usage were considered presumptively just and reasonable, new governmental practices that ran contrary to such rights were presumptively unjust and unreasonable.[62] Repeatedly throughout the period of the American Revolution, and again during the ratification of the United States Constitution, critics of governmental action that violated long-standing common-law practice would condemn such action by describing it as "unusual," or "unconstitutional," or as an "innovation."[63] These terms were used interchangeably.

The common-law notion of long usage contains a principle of legal development over time. If a once-traditional practice falls out of usage for multiple generations, it loses its status as presumptively reasonable.[64] If revived, it is to be treated as a new practice and compared to the tradition

54 *See, e.g.*, 1 BLACKSTONE, *supra* note 49, at *70 (arguing that when a common-law rule is abandoned for a new rule, "the wisdom of the rule hath in the end appeared from the inconveniences that have followed the innovation"); DAVIES, *supra* note 50, at 4; *cf.* COKE, *supra* note 49, at 740 ("[W]hen any innovation or new invention starts up, . . . trie it with the Rules of the common Law, . . . for these be true Touchstones to sever the pure gold from the drosse and sophistications of novelties and new inventions. And by this example you may perceive, That the rule of the old common Law being soundly . . . applied to such novelties, it doth utterly crush them and bring them to nothing . . . .").

55 *See* 1 BLACKSTONE, *supra* note 49, at *67

56 *See id.*

57 *See* Stinneford, *Original Meaning of Unusual*, *supra* note 46, at 1768–810.

58 *See id.*

59 *See id.*

60 *See id.* at 1770 & nn.175–84, 1771 & nn.185–89.

61 *See* BERNARD WILLIAMS, ETHICS AND THE LIMITS OF PHILOSOPHY 140 (1985).

62 *See* Stinneford, *Original Meaning of Unusual*, *supra* note 46, at 1799–800.

63 *See id.*

64 *See generally* Stinneford, *Death, Desuetude*, *supra* note 8 (discussing the common-law doctrine of desuetude incorporated in the Cruel and Unusual Punishments Clause).

that has developed up to that time.[65] Similarly, before a new practice can be considered "usual," it must gain universal reception within the relevant legal community, and it must sustain such universal reception over a period of multiple generations.[66] Only at that point can the practice be considered firmly part of the tradition, for only then can it be said to enjoy the multigenerational consent of the whole people.[67]

The precise amount of time a practice must enjoy universal reception before becoming part of the tradition is not clearly and consistently defined by common-law writers. For example, Blackstone wrote that a practice must have been used universally from time "immemorial" to be considered part of the common law.[68] If anyone could determine a time when the practice was not used, it could not be part of the common law.[69] At the same time, however, Blackstone acknowledged the fact that the English common law had developed over time and had changed as an "intermixture of adventitious nations, the Romans, the Picts, the Saxons, the Danes, and the Normans . . . must have insensibly introduced and incorporated many of their own customs with those that were before established."[70] American common-law thinkers such as James Wilson rejected the idea that a practice had to enjoy "immemorial usage" before becoming part of the common law:

> Some writers, when they describe that usage, which is the foundation of common law, characterize it by the epithet *immemorial*. The parliamentary description is not so strong. "Long use and custom" is assigned as the criterion of law, "taken by the people at their free liberty, and by their own consent." And this criterion is surely sufficient to satisfy the principle: for consent is certainly proved by long, though it be not immemorial usage.[71]

Despite this lack of precision, there are some things we can say with certainty about the scope and duration of usage a practice must enjoy before we can say that it is clearly part of the tradition. First, reception of the practice must be universal; that is, it must be employed throughout the relevant legal community.[72] Second, the practice must be public. A secret or "underground" governmental practice cannot be said to enjoy the consent of the people "taken . . . at their free liberty."[73] Third, the practice must continue

---

65 *See id.* at 538–39.

66 *See id.* at 538–39, 561–62.

67 *See id.*

68 1 Blackstone, *supra* note 49, at *64.

69 *See id.*

70 *Id.*

71 *See* James Wilson, *Municipal Law*, *in* 1 The Works of James Wilson, *supra* note 24, at 159, 186.

72 *See, e.g.*, 1 Blackstone, *supra* note 49, at *64 ("I therefore stile these parts of our law *leges non scriptæ*, because their original institution and authority are not set down in writing, as acts of parliament are, but they receive their binding power, and the force of laws, by long and immemorial usage, and by their universal reception throughout the kingdom.");

73 *See* Wilson, supra note 71, at 186; *see also* 1 Blackstone at *73 (describing the common law as "general immemorial custom . . . from time to time declared in the decisions of the courts of justice; which decisions are preserved among our public records,

to be universally received over the course of multiple generations. The premise of the common law is that multigenerational consensus is more reliably just and reasonable than the consensus of a given moment.[74] As noted above, the number of generations that must receive a given practice before it can be said to enjoy long usage is uncertain. Cases concerning the reverse question—how much time it takes a once-traditional practice to fall out of usage for constitutional purposes—have generally required a century or more of disuse.[75] Similarly, it would seem that a century or more of universal reception would be required to show that a new practice enjoys a stable multigenerational consensus. But in any event, there is no reason to treat long usage as an "on-off" switch. However much time it may take definitively to establish "long usage," we can at least say that the longer and more universally a public governmental practice is received, the more likely it is to comport with the tradition.

B. The Original Meaning of Cruel

The historical evidence shows that in the context of the Eighth Amendment, the word "cruel" means "unjustly harsh," not "motivated by cruel intent."[76] At least some of the unintended effects of a punishment may be considered in determining whether it is cruel and unusual.[77]

The historical evidence also indicates that a new punishment practice that creates a greater risk of unjustified suffering than the baseline risk permitted by longstanding prior practice may be considered cruel and unusual. For example, in 1799, the Supreme Court of Appeals of Virginia held that it was cruel and unusual to impose a joint fine in a criminal case because it violated a longstanding common-law rule designed to protect against the risk of disproportionate punishment.[78] The problem with joint fines was that if one codefendant defaulted, the remaining codefendants would be required to pay the defaulter's share of the fine, or go to jail if they were unable to do so.[79] Thus, even prior to any default, the joint fine was cruel and unusual because it imposed a risk of unjust suffering that was greater than the common law would allow.[80] On the other hand, in *Commonwealth v. Wyatt*, the General Court of Virginia upheld a statute that gave judges the discretion to

---

explained in our reports, and digested for general use in the authoritative writings of the venerable sages of the law").

74 *See, e.g.*, COKE, *supra* note 49, at 701 ("[I]f all the reason that is dispersed into so many severall heads were united into one, yet could he not make such a Law as the Law of England is, because by many successions of ages it hath been fined and refined by an infinite number of grave and learned men, and by long experience growne to such a perfection, for the government of this Realme . . . .")

75 *See* Stinneford, *Death, Desuetude*, *supra* note 8, at 593–94.

76 *See* Stinneford, *Original Meaning of Cruel*, *supra* note 18, at 441.

77 *See id.* at 501.

78 *See* Jones v. Commonwealth, 5 Va. (1 Call) 555, 557, 559–60 (1799).

79 *See id.* at 558.

80 *See id.* at 558–59.

order that a defendant convicted of illegal gaming be flogged on one or several occasions over a six-month period, so long as he was not given more than thirty-nine stripes at a time.[81] Wyatt argued that this created the risk that a judge would order the defendant to be flogged every day for six months, which would result in "death produced by the most *cruel torture*."[82] The court acknowledged this risk, but noted that judges are required to exercise discretion within the bounds set by longstanding common-law practice.[83] If the judge ordered flogging that exceeded these bounds, "he might and would be impeached."[84] Because the risk created by this statute was consistent with the risk permitted by longstanding prior practice, it did not violate the cruel and unusual punishments clause of the Virginia Bill of Rights.[85] These cases imply that new punishment methods such as lethal injection may be cruel and unusual, because they create a far greater risk of excruciatingly painful botched executions than traditional methods like hanging.[86] Similarly, long-term solitary confinement may be cruel and unusual if it significantly heightens the risk of extreme suffering as compared to traditional modes of confinement that offer the opportunity for meaningful interaction with others.[87]

C. The Significance of Usage over Time

As discussed above, a punishment violates the Cruel and Unusual Punishments Clause if it is unjustly harsh in light of longstanding prior practice. Sometimes the cruelty of the punishment in comparison to traditional practices is immediately apparent. If a legislature brought back the rack or thumbscrews as a method of punishment, or imposed the death penalty for shoplifting, a court could appropriately strike it down the moment it is adopted. But often the relationship of the new punishment to the traditional practice is not immediately apparent, particularly when it is publicly presented as more "progressive," "scientific," or "humane" than the traditional punishment it replaces. In the late eighteenth and early nineteenth centuries, long-term solitary confinement was instituted on the ground that it was a more humane and effective means of reforming criminals than the public corporal punishments it replaced.[88] At the beginning of the twentieth century, social progressives introduced involuntary sterilization as a humane and scientific way to prevent the propagation of "socially unfit" persons and

81 Commonwealth v. Wyatt, 27 Va. (6 Rand.) 694, 698, 701 (1828).

82 *Id.* at 700.

83 *Id.* at 701.

84 *Id.*

85 *See id.*

86 *See* Stinneford, *Original Meaning of Cruel*, *supra* note 18, at 502 (arguing that lethal injection is likely unconstitutional because studies show that it doubles the risk of excruciatingly painful botched executions as compared to traditional methods of execution like hanging); *see also* AUSTIN SARAT, GRUESOME SPECTACLES 177 (2014) (compiling data on botched executions).

87 *See infra* Parts II–III.

88 *See infra* Section II.A.

thus reduce crime and poverty.[89] Throughout the twentieth century, the government repeatedly replaced prevailing methods of execution with others (electrocution, then the gas chamber, then lethal injection) advertised as more "scientific" and "humane." Such experimental punishments initially achieved high degrees of acceptance in courts of law and/or in courts of public opinion, but later came to be questioned and often rejected as their effects became known.[90]

This process is consistent with the core idea underlying the Cruel and Unusual Punishments Clause, which is that long usage is the most reliable means of determining whether a governmental practice is just, reasonable, and enjoys the stable, multigenerational consent of the people. In order to understand the significance of this idea, we must consider the alternative methods available for determining whether a punishment is unconstitutionally cruel.

One alternative would be to take a snapshot of current public opinion.[91] This is the most democratic means of measuring the constitutionality of a punishment. If the sovereign people approve the punishment, it must be constitutional. But this approach is inconsistent with the premise underlying a written Bill of Rights, which is that the Constitution should constrain what is sometimes called the "tyranny of the majority." When caught in a moral panic—concerning drug dealers, juvenile superpredators, or sex offenders, for example—public opinion is likely to support extreme punishments in order to restore a sense of social control. The Constitution is meant to constrain the tendency to excess, not facilitate it.

Another alternative would be to allow judges to engage in abstract moral reasoning to determine whether a punishment is impermissibly cruel.[92] Under this approach, if five members of the Supreme Court determine that a punishment violates some abstract notion of cruelty, it is unconstitutional. But a moment's reflection shows the inadequacy of this method. Abstract principles are notoriously difficult to translate into concrete practice in a manner that most people would consider reliable. Some people consider it cruel to execute those who rape children, for example, while others consider

89 *See e.g.*, Stinneford, *Death, Desuetude, supra* note 8, at 556.

90 *See* BANNER, *supra* note 8, at 198–202; GARLAND, *supra* note 8, at 117–18.

91 This approach roughly corresponds to the "evolving standards of decency" test that has dominated much of the Supreme Court's recent Eighth Amendment jurisprudence. *See, e.g.*, Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion).

92 *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 564 (2005) ("The beginning point is a review of objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question. . . . We then must determine, in the exercise of our own independent judgment, whether the death penalty is a disproportionate punishment for juveniles."); Atkins v. Virginia, 536 U.S. 304, 313 (2002) ("[I]n cases involving a consensus, our own judgment is 'brought to bear,' by asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators." (citation omitted) (quoting Coker v. Georgia, 433 U.S. 584, 597 (1997) (plurality opinion)).

it morally justified.[93] What method can the Court use to reliably choose between these viewpoints? Justices are members of the society in which they live and are just as likely to share the passions and prejudices of the moment as anyone else. Unless we are willing to accept the idea that judges have unconstrained authority to impose their own private moral views on the rest of society, this method is also unacceptable.

The idea of long usage includes both a commitment to democratic consensus and to abstract principles of justice but adds to the reliability of both by focusing on usage over time. The longer a practice is used, and the more universally it is received, the more likely it is both to enjoy the stable, multigenerational consent of the people and to comport with fundamental principles of justice. This is so because usage over time reveals two things. First, it reveals the presence or absence of a multigenerational consensus in favor of the punishment.[94] Second, usage over time reveals the effects of the new punishment more clearly, enabling us to compare it more reliably to the traditional punishment it has replaced.[95] Although these two types of information are conceptually distinct from each other, the Eighth Amendment contemplates that they will work together in practice. If usage over time reveals that the punishments' effects are significantly harsher than the tradition would permit, we can expect that it will fail to achieve a stable, multigenerational consensus in its favor.

Parts II and III below apply these principles to the twin experiments of imprisonment and long-term solitary confinement. Part II shows that while imprisonment has come to be universally received within the United States for nearly two centuries, long-term solitary confinement was largely rejected on grounds of cruelty after several decades of popularity in the nineteenth century. It never became a "usual" punishment, but rather has the characteristics of a failed experiment. Part III examines what usage over time has shown us about the effects of modern long-term solitary imprisonment in comparison to imprisonment with some opportunity for meaningful human contact. This review of the empirical literature is consistent with the nineteenth-century conclusion that long-term solitary confinement is an impermissibly cruel method of punishment.

II. Usage over Time: The History of Long-Term Solitary Confinement

Imprisonment was first introduced as a primary form of punishment in this country at the end of the eighteenth century.[96] One of the most important features of imprisonment, for many offenders, was long-term solitary confinement.[97] Reformers hoped that imprisonment and solitary confine-

93 *See* Kennedy v. Louisiana, 554 U.S. 407 (2008) (striking down law permitting execution for the crime of aggravated rape of a child despite evidence of divided public opinion concerning the punishment).

94 See *infra* Part II.

95 See *infra* Part III.

96 *See infra* Section II.A.

97 *See infra* Section II.A.

ment would be less degrading and more effective at rehabilitating offenders and deterring crime than the previously dominant system of fines, corporal punishment, shaming punishments, and execution.[98] Over the course of the nineteenth century, prison achieved universal reception as corporal and shaming punishments fell away.[99] But long-term solitary confinement, after an initial phase of popularity, came to be rejected by the 1860s because of its cruel effects.[100] It survived at the very margins of penal practice during the twentieth century before being revived in the form of the "supermax" movement in the 1980s and 1990s.[101] Today it appears to be gradually receding once again as its cruel effects become more widely known.[102] Whereas prison has been transformed from an experimental punishment to what appears to be a "usual" punishment, long-term solitary confinement looks more like a repeated, failed experiment. It has never become "usual."

A. Reform and Conservation in the Founding Period

The late eighteenth and early nineteenth centuries were a period of great intellectual ferment in America.[103] Much of this ferment related to the protection of individuals exposed to the threat of criminal punishment.[104] Punishment is the most coercive thing the government does short of war, and Americans perceived that the British had abused this power in two primary ways: by ignoring the longstanding common-law rights of Americans subject to investigation, prosecution, and punishment;[105] and by radically expanding the list of capital offenses in England from nine to over one hundred sixty.[106]

---

98 *See infra* Section II.A.

99 *See infra* Sections II.A–B.

100 *See infra* Section II.B.

101 *See infra* Sections II.C–D.

102 *See infra* Section II.F.

103 *See generally, e.g.*, GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787 (1969); Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law* (pts. 1–2), 42 HARV. L. REV. 149, 365 (1928–1929), *reprinted in* EDWARD S. CORWIN, THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW (Cornell Univ. Press, 12th prtg. 1984); Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843 (1978).

104 *See, e.g.*, John D. Bessler, *Revisiting Beccaria's Vision: The Enlightenment, America's Death Penalty, and the Abolition Movement*, 4 NW. J.L. & SOC. POL'Y 195 (2009); Deborah A. Schwartz & Jay Wishingrad, *The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the* Weems v. United States *Excessive Punishment Doctrine*, 24 BUFF. L. REV. 783, 813–23 (1975).

105 *See* Stinneford, *Original Meaning of Unusual*, *supra* note 46, at 1796–97 (describing American complaints about British efforts to undermine the right to trial by jury in the vicinage of the offense).

106 *See* Alice Ristroph, *Farewell to the Felony*, 53 HARV. C.R.-C.L. L. REV. 563, 572 (2018) ("[N]ine specific crimes were traditionally classified as felonies at common law—murder, manslaughter, rape, sodomy, burglary, robbery, arson, mayhem, and larceny."); 4 BLACKSTONE, *supra* note 49, at *18 ("It is a melancholy truth, that among the variety of actions which men are daily liable to commit, no less than an hundred and sixty have been

To prevent these abuses in the new American republic, legislators engaged in a project of conservation and reform.

Conservation primarily showed itself in the rhetoric of the American Revolution and in the drafting of state and federal constitutions that followed. Americans were steeped in the English constitutional writings of Coke and Blackstone, and justified their break from England on the ground that the British refused to respect their longstanding common-law rights.[107] After breaking from England, state and federal constitution drafters wrote many of these common-law rights into the constitutional texts so that the new American governments could not ignore them.[108] One of these common-law rights was the prohibition of cruel and unusual punishments.[109]

At the same time, many Americans were familiar with the writings of criminal justice reformers such as Montesquieu and Beccaria, who advocated greater proportionality in punishment and reduction or elimination of the death penalty.[110] The influence of Beccaria can be seen in several early state constitutions that not only prohibited cruel and unusual punishments but also called for greater proportionality in punishment and the reduction or elimination of "sanguinary laws."[111]

---

declared by act of parliament to be felonies without benefit of clergy; or, in other words, to be worthy of instant death." (footnote omitted)).

107 *See, e.g.*, WOOD, *supra* note 103, at 10 (noting that Americans' focus on the English legal tradition was "what made their Revolution seem so unusual, for they revolted not against the English constitution but on behalf of it"); Grey, *supra* note 103.

108 *See, e.g.*, George C. Thomas III, *When Constitutional Worlds Collide: Resurrecting the Framers' Bill of Rights and Criminal Procedure*, 100 MICH. L. REV. 145, 157–60 (2001).

109 *See, e.g.*, Letter from Richard Henry Lee to Elbridge Gerry (Sept. 29, 1787), *in* 24 LETTERS OF DELEGATES TO CONGRESS, 1774–1789, at 451, 451–52 (Paul H. Smith ed., 1996) (arguing that the proposed federal constitution should be amended to include a number of common-law rights, including the prohibition of cruel and unusual punishments).

110 *See* Bessler, *supra* note 104, at 196; *see also* Schwartz & Wishingrad, *supra* note 104, at 813–23.

111 *See, e.g.*, N.H. CONST. of 1784, pt. I, art. I, § XVIII ("All penalties ought to be proportioned to the nature of the offence. No wise legislature will affix the same punishment to the crimes of theft, forgery, and the like, which they do to those of murder and treason; where the same undistinguishing severity is exerted against all offences, the people are led to forget the real distinction in the crimes themselves, and to commit the most flagrant with as little compunction as they do those of the lightest dye. For the same reason a multitude of sanguinary laws is both impolitic and unjust. The true design of all punishments being to reform, not to exterminate mankind."); OHIO CONST. of 1802, art. VIII, § 14 ("All penalties shall be proportioned to the nature of the offense. No wise legislature will affix the same punishment to the crimes of theft, forgery and the like, which they do to those of murder and treason. When the same undistinguished severity is exerted against all offenses, the people are led to forget the real distinction in the crimes themselves, and to commit the most flagrant, with as little compunction as they do the slightest offenses. For the same reasons, a multitude of sanguinary laws are both impolitic and unjust: the true design of all punishment being to reform, not to exterminate, mankind."); PA. CONST. of 1776, ch. II, § 38 (directing that "[t]he penal laws as heretofore used, shall be reformed . . . , and punishments made in some cases less sanguinary, and in general more proportionate to the crimes"); S.C. CONST. of 1778, art. XL (same).

The impulse for reform showed itself in three primary areas: first, a movement to reduce or eliminate the death penalty; second, a growing rejection of corporal punishments like flogging, especially in the northern states; and third, a revulsion against public shaming as a method of punishment.

The movement to reduce or eliminate the death penalty had many advocates in the founding era. Blackstone had complained in his highly influential *Commentaries on the Laws of England* that the numerous capital offenses authorized under the English Bloody Code were manifestly unjust.[112] Although there were fewer capital offenses in America than England, many American writers also advocated reducing the scope of the death penalty or even eliminating it. For example, Thomas Jefferson drafted an idiosyncratic proposal for proportioning punishments in Virginia that would have permitted the death penalty only for murder and treason and imposed a strangely literal form of *lex talionis* for many other crimes (maiming for those who maim; castration for those who rape; etc.).[113] Benjamin Rush argued that the death penalty was associated with tyranny and was inconsistent with republican principles.[114] Edward Livingston argued that public executions were an unhealthy spectacle that fostered an appetite for death.[115] During this period, many states amended their statutes to limit the scope of the death penalty.[116] For example, Pennsylvania—which was at the forefront of virtually every aspect of the criminal reform movement—eliminated the death penalty in 1790 for robbery, burglary, and sodomy, and further reduced the scope of the death penalty in 1794 by subdividing murder into "degrees" and only permitting the death penalty for first-degree murder.[117]

The criminal justice reform movement also increasingly rejected the use of flogging and other forms of corporal punishment, particularly in northern states.[118] For a variety of reasons, Americans started to feel a "revulsion against bodily punishments."[119] Massachusetts eliminated flogging as a form of punishment in its legislature's 1804–1805 session.[120] Indiana eliminated flogging in 1821, at the same time it opened its state prison.[121] Although corporal punishment did not disappear immediately, its use declined over

112 *See* 4 BLACKSTONE, *supra* note 49, at 17.

113 *See* Thomas Jefferson, *A Bill for Proportioning Crimes and Punishments in Cases Heretofore Capital*, *in* 2 THE PAPERS OF THOMAS JEFFERSON 492, 492–504 (Julian P. Boyd ed., 1950).

114 *See* LOUIS P. MASUR, RITES OF EXECUTION 65 (1989).

115 *See* 1 EDWARD LIVINGSTON, THE COMPLETE WORKS OF EDWARD LIVINGSTON ON CRIMINAL JURISPRUDENCE 43 (New York, Nat'l Prison Ass'n 1873).

116 *See* LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 73 (1993).

117 *See id.*

118 *See* MYRA C. GLENN, CAMPAIGNS AGAINST CORPORAL PUNISHMENT 10–11 (1984); *see also* BANNER, *supra* note 8, at 88–111.

119 FRIEDMAN, *supra* note 116, at 74.

120 *See id.*

121 *See id.*

the course of the nineteenth century.[122] Its decline was closely associated with the rise of the prison.[123]

Finally, public shaming fell out of favor during this period,[124] as it came to be seen as degrading, uncivilized, and ineffective. Professor Lawrence Friedman has noted that pre-Revolutionary colonial governments made heavy use of shaming punishments in the hope that the sharp, sudden pain of public humiliation would convince those who committed crimes to change their ways.[125] Such punishments included the stocks, the pillory, and the ducking stool.[126] But the growth and increasingly mobile nature of the American population arguably made shaming punishments less effective; for after being shamed, the offender could simply move to a new locale where his identity was unknown.[127]

The extent to which corporal and shaming methods of punishment were repudiated in the early nineteenth century is demonstrated by a case decided in 1825 by the Supreme Court of Pennsylvania, *James v. Commonwealth*.[128] In that case, the defendant was convicted of the crime of being a "common scold" and was sentenced to be publicly "duck[ed]" in cold water three times.[129] The Supreme Court of Pennsylvania held that this punishment was not authorized, either because it had never been part of the common law of Pennsylvania,[130] or because it had fallen into desuetude,[131] or because it had been implicitly repealed by the penal code of 1790.[132] The purpose of the new penal code was the "abolition of all infamous, disgraceful, public punishments—all cruel and unnatural punishments—for all the classes of minor offences and misdemeanors, to which they had been before applied."[133] In reaching this decision, the court condemned the idea of punishing "scolds" because it was discriminatory against the poor, the aged, and women.[134] But it also appeared to go further and condemn any and all uses of public shaming:

> If the reformation of the culprit, and prevention of the crime, be the just foundation and object of all punishments, nothing could be further

122 *See id.*
123 *See id.*
124 *See id.* at 75.
125 *See id.* at 37.
126 *See id.* at 37–38.
127 *See id.* at 12–13. The growth and mobility of the American population cannot completely explain the rejection of shaming and corporal punishments, for American governments employed methods like branding and bodily mutilation as ways of "marking" certain offenders as criminals, precisely to prevent them from slipping off to a new location and adopting a new identity. *See id.* at 40.
128 12 Serg. & Rawle 220 (Pa. 1825).
129 *Id.* at 220–21, 225.
130 *Id.* at 231.
131 *Id.* at 228.
132 *Id.* at 224, 231.
133 *Id.* at 231.
134 *Id.* at 226, 230, 236.

> removed from these salutary ends, than the infliction in question. It destroys all personal respect; the women thus punished would scold on for life, and the exhibition would be far from being beneficial to the spectators.[135]

This last passage reflects the essence of the critique of public shaming: it was considered degrading—it "destroy[ed] all personal respect" for the offender; it was considered ineffective—the offender would "scold on for life"; and it coarsened public sensibilities, and was thus "far from being beneficial to the spectators."[136]

B. Nineteenth-Century Imprisonment and Long-Term Solitary Confinement

The decline of shaming and corporal punishments was closely associated with the rise of a new method of punishment: the prison.[137] Prior to the nineteenth century, jails were primarily used to house debtors, pretrial defendants, and convicts awaiting corporal punishment or execution.[138] On the relatively rare occasion when a jail sentence was imposed as punishment, the term "rarely exceeded three months and often proved as fleeting as twenty-four hours."[139] Prisoners in eighteenth-century jails were kept together in large rooms, creating risk of disease and violence, and giving rise to the criticism that they were schools for vice.[140]

Several intellectual movements converged in the late eighteenth and early nineteenth centuries to support incarceration, and particularly solitary confinement, as a new form of punishment preferable to corporal or shaming punishments. English evangelical philanthropists argued that the commission of a crime showed that the criminal was estranged from God.[141] Instead of being fined or publicly shamed, therefore, criminal offenders should be separated from society and given time alone to reflect, pray, and bring their souls back into alignment with God and their fellow citizens.[142] Secular reformers argued that crime arose from an offender's bad associations with other criminals, and that punishment should be designed to keep offenders from "contaminating" each other and making reformation more

---

135 *Id.* at 235.

136 *Id.*

137 *See* FRIEDMAN, *supra* note 116, at 74; ADAM JAY HIRSCH, THE RISE OF THE PENITENTIARY, at xi (1992).

138 *See* Ashley T. Rubin & Keramet Reiter, *Continuity in the Face of Penal Innovation: Revisiting the History of American Solitary Confinement*, 43 LAW & SOC. INQUIRY 1604, 1612–13 (2018).

139 HIRSCH, *supra* note 137, at 8.

140 *See* Rubin & Reiter, *supra* note 138, at 1613–14.

141 *See* HIRSCH, *supra* note 137, at 19.

142 *See id.*

difficult.[143] Still others argued that solitary confinement would deter crime because it would fill potential offenders with "terror."[144]

The first prisons were built in the 1790s.[145] Initially, solitary confinement was not a dominant feature of incarceration. Pennsylvania's Walnut Street Prison, which was built to house one hundred prisoners, contained only sixteen solitary cells and these were used in a relatively limited fashion.[146] But over time, prison reformers started turning more completely toward the idea of solitary confinement of large numbers of prisoners in order to foster rehabilitation and ensure order in prison.[147]

In 1821, New York engaged in a major experiment in systematic long-term solitary confinement at its Auburn State Prison.[148] The state legislature passed an act authorizing prison inspectors to "select a class of convicts to be composed of the oldest and most heinous offenders, and to confine them constantly in solitary cells" in the hope that these offenders would be reformed.[149] The result of this experiment was devastating. In their famous study of the American penitentiary system, Beaumont and Tocqueville described the Auburn experiment as follows:

> This trial, from which so happy a result had been anticipated, was fatal to the greater part of the convicts: in order to reform them, they had been submitted to complete isolation; but this absolute solitude, if nothing interrupt[s] it, is beyond the strength of man; it destroys the criminal without intermission and without pity; it does not reform, it kills.
>
> The unfortunates, on whom this experiment was made, fell into a state of depression, so manifest, that their keepers were struck with it; their lives seemed in danger, if they remained longer in this situation; five of them, had already succumbed during a single year; their moral state was not less alarming; one of them had become insane; another, in a fit of despair, had embraced the opportunity when the keeper brought him something, to pre-

143 *See* Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. Rev. L. & Soc. Change 477, 482 (1997) ("The individualism of the age underscored the hope that criminals could be compelled to change internally, especially when kept isolated from each other and from the influence of the outside social world."); *see also* Hirsch, *supra* note 137, at 22 ("Incarceration became the key to rational rehabilitation because it removed criminals from their corrupting environment long enough to administer corrective therapy.").

144 2 William Paley, The Principles of Moral and Political Philosophy 291 (7th ed., London, J. Davis 1790); *see also* Hirsch, *supra* note 137, at 21 (describing more broadly the theories of deterrence).

145 *See* Rubin & Reiter, *supra* note 138, at 1612.

146 *See id.* at 1613.

147 *See id.* at 1613–17.

148 *See id.* at 1614.

149 Gershom Powers, A Brief Account of the Construction, Management, and Discipline &c. &c. of the New-York State Prison at Auburn 32 (Auburn, N.Y., U.F. Doubleday 1826).

> cipitate himself from his cell, running the almost certain chance of a mortal fall.[150]

The results of this initial experiment were so dire that New York dropped it after less than two years and gave most of the prisoners pardons.[151] Auburn State Prison then adopted a new plan under which prisoners still slept alone in their cells and were still required to maintain silence, but were required to work in "common workshops" with other prisoners during the day.[152] This change apparently alleviated the drastic consequences of total isolation.[153]

Problems similar to those that occurred at Auburn also arose several years later in Pennsylvania's Western State Penitentiary,[154] which had also attempted total isolation of prisoners. Prisoners quickly fell into poor health and had to be released from their cells.[155]

Pennsylvania was undeterred. In 1829 it opened the Eastern State Penitentiary at Cherry Hill to hold large numbers of prisoners in solitary confinement.[156] The new prison was designed to avoid past mistakes: The cells were larger and better ventilated than those at Western State Penitentiary.[157] Each cell had a small adjoining yard into which the offender would periodically be released in order to enjoy some sunshine.[158] Prisoners were given in-cell work to keep their minds occupied and weekly visits from prison staff and other approved visitors.[159]

Despite these improvements, the fact remained that prisoners at Cherry Hill lived in almost total isolation.[160] They spent most of their time in their cells, where they worked, ate, and slept alone.[161] Communication between prisoners was forbidden and all prisoners were required to maintain a rule of silence.[162] They were only allowed to see visitors approved by prison officials, and were given little reading material other than the Bible.[163] As Peter Scharff Smith describes, "[t]he inmate was expected to turn his thoughts

---

150 G. DE BEAUMONT & A. DE TOQUEVILLE, ON THE PENITENTIARY SYSTEM IN THE UNITED STATES, AND ITS APPLICATION IN FRANCE 5 (Francis Lieber trans., Philadelphia, Carey, Lea & Blanchard 1833) (citations omitted); *see also* POWERS, *supra* note 149, at 36 (noting that one prisoner was "so desperate, that he sprang from his cell, when his door was opened, and threw himself from the fourth gallery, upon the pavement," and that another "beat and mangled his head against the walls of his cell, until he destroyed one of his eyes").

151 *See* POWERS, *supra* note 149, at 36.

152 *See* Rubin & Reiter, *supra* note 138, at 1615–17.

153 *See id.*

154 *See id.* at 1614.

155 *See id.*

156 *See id.* at 1615.

157 *See id.*

158 *See id.*

159 *See id.* at 1615–16.

160 *See* HIRSCH, *supra* note 137, at 25 (noting that Pennsylvania's system of isolating prisoners from each other was designed "to prevent their mutual corruption").

161 *See* FRIEDMAN, *supra* note 116, at 79.

162 *See id.*

163 *See* Rubin & Reiter, *supra* note 138, at 1618 n.5.

inward, to meet God, to repent his crimes, and eventually to return to society as a morally cleansed Christian citizen . . . ."[164]

Pennsylvania officials claimed that their system was more humane than the reformed Auburn system of congregate labor,[165] but by the late 1830s, reports started surfacing that the system was causing "hallucinating prisoners, 'dementia,' and 'monomania.'"[166] An 1846 report noted a "disproportionately high number of cases of mental illness in Philadelphia's Cherry Hill Prison,"[167] but attempted to attribute these symptoms to the race and sexual psychology of the inmates.[168] In 1847, Francis C. Gray compared an Auburn model prison in Charlestown to the Eastern State Penitentiary at Cherry Hill, and noted that both death and insanity rates at Cherry Hill far outstripped those seen at Charlestown.[169] He concluded that "it appears that the system of constant separation [according to the Pennsylvania plan] . . . , even when administered with the utmost humanity, produces so many cases of insanity and of death as to indicate most clearly, that its general tendency is to enfeeble the body and the mind."[170]

When Charles Dickens visited Cherry Hill in the early 1840s, he recorded the following observations:

> In the outskirts, stands a great prison, called the Eastern Penitentiary: conducted on a plan peculiar to the state of Pennsylvania. The system here, is rigid, strict, and hopeless solitary confinement. I believe it, in its effects, to be cruel and wrong.
>
> In its intention, I am well convinced that it is kind, humane, and meant for reformation; but I am persuaded that those who devised this system of Prison Discipline, and those benevolent gentlemen who carry it into execution, do not know what it is that they are doing. . . . 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.[171]

---

164 Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 CRIME & JUST. 441, 456–57 (2006) [hereinafter Smith, *The Effects of Solitary Confinement*].

165 *See* Rubin & Reiter, *supra* note 138, at 1617.

166 *See* Smith, *The Effects of Solitary Confinement*, *supra* note 164, at 457.

167 *See id.* at 458 (citing SAMUEL GRIDLEY HOWE, AN ESSAY ON SEPARATE AND CONGREGATE SYSTEMS ON PRISON DISCIPLINE 76 (Boston, William D. Ticknor & Co. 1846)).

168 *See id.*

169 *See* FRANCIS C. GRAY, PRISON DISCIPLINE IN AMERICA 106, 109 (London, John Murray 1848); *see also* Smith, *The Effects of Solitary Confinement*, *supra* note 164, at 460 (discussing Gray report).

170 GRAY, *supra* note 169, at 181.

171 CHARLES DICKENS, AMERICAN NOTES FOR GENERAL CIRCULATION 123–24 (Paris, A. & W. Galignani & Co. 1842). Similarly, when Hans Christian Andersen visited a Swedish prison run according to the Pennsylvania plan, he wrote, "the stillness of the grave rests over it. It is as if no one dwelt here, or like a deserted mansion in time of plague. . . . The

Other states that instituted long-term solitary confinement experienced problems similar to those described above. Total isolation led prisoners to despair, insanity, and suicide.[172] For example, the physician for the New Jersey Penitentiary, which initially followed the Pennsylvania model, reported that total isolation led to "many cases of insanity."[173] But once these conditions were relaxed, the symptoms disappeared: "A little more intercourse with each other, and a little more air in the yard, have the effect[ ] upon mind and body, that warmth has upon the thermometer, almost every degree of indulgence showing a corresponding rise in health of the individual."[174] For this reason, other states that used solitary confinement ultimately hewed closer to the revised Auburn plan of partial solitary confinement combined with congregate labor than the Pennsylvania plan of total isolation.[175]

By the 1860s, the tide had turned against long-term solitary confinement. Penologists rejected the idea that either isolation or silence could assist in the reform of prisoners.[176] Rather, such practices were seen as pointless exercises that significantly harmed the well-being of prisoners for no good reason. By 1866, even Pennsylvania's Eastern State Penitentiary at Cherry Hill had started housing more than one prisoner to a cell.[177] By the 1870s and 1880s, both the Pennsylvania and Auburn systems had largely disappeared.[178] As Peter Scharff Smith put it, "The founding nation of the modern prison systems—the United States—was among the first to abandon large scale solitary confinement."[179]

---

whole is a well-built machine—a nightmare for the spirit." HANS CHRISTIAN ANDERSEN, PICTURES OF SWEDEN 55–56 (London, Richard Bentley 1851); *see also* Smith, *The Effects of Solitary Confinement*, *supra* note 164, at 460 (discussing Andersen's visit, as well as other nineteenth-century observations relating to solitary confinement).

172 *See* Haney & Lynch, *supra* note 143, at 484.

173 *See* Smith, *The Effects of Solitary Confinement*, *supra* note 164, at 459 (quoting PRISON DISCIPLINE SOC'Y, EIGHTEENTH ANNUAL REPORT 82 (1843), *reprinted in* 2 REPORTS OF THE PRISON DISCIPLINE SOCIETY 219, 300 (Boston, T.R. Marvin 1855)).

174 *Id.* (quoting PRISON DISCIPLINE SOC'Y, SEVENTEENTH ANNUAL REPORT 60 (1842), *reprinted in* 2 REPORTS OF THE PRISON DISCIPLINE SOCIETY, *supra* note 173, at 109, 168).

175 *See* Haney & Lynch, *supra* note 143, at 483–84; Smith, *The Effects of Solitary Confinement*, *supra* note 164, at 459.

176 *See* David J. Rothman, *Perfecting the Prison: United States, 1789–1865*, *in* THE OXFORD HISTORY OF THE PRISON 111, 124–25 (Norval Morris & David J. Rothman eds., 1995); Smith, *The Effects of Solitary Confinement*, *supra* note 164, at 465.

177 DAVID J. ROTHMAN, THE DISCOVERY OF THE ASYLUM 242 (1971).

178 *See* Rubin & Reiter, *supra* note 138, at 1617.

179 Smith, *The Effects of Solitary Confinement*, *supra* note 164, at 465; *see also* Haney & Lynch, *supra* note 143, at 487 (noting that by the early twentieth century, the use of long-term solitary confinement "in actual practice . . . had largely ended"); Alexander A. Reinert, *Solitary Troubles*, 93 NOTRE DAME L. REV. 927, 939 (2018) ("[B]y the turn of the nineteenth century, the experiment with widespread use of solitary appeared to be over.").

C. Solitary Confinement on the Margins: The 1880s to the 1980s

Although long-term solitary confinement largely disappeared in the decades after the Civil War, shorter-term solitary confinement survived for specific (often underground) purposes—specifically, to discipline unruly prisoners and to house capital offenders awaiting execution.[180]

The use of shorter-term solitary confinement to punish prisoners for violations of prison rules dates back to the beginning of the American prison experiment.[181] The Walnut Street Prison used its solitary cells partly for this purpose.[182] Similarly, the Eastern State Penitentiary at Cherry Hill used "dark cells" to punish prison misbehavior.[183] In the dark cells, all sources of external light were blocked so that the prisoner was kept in total darkness.[184] The prisoner was given only bread and water, and was given no work or books to keep his mind occupied.[185] This punishment lasted anywhere from a day to two weeks, and typically ended when the prisoner apologized and promised to behave better in the future.[186] Such practices continued in American prisons after the rejection of long-term solitary confinement—for example, the federal prison at Alcatraz used the "Spanish dungeons" to discipline prison troublemakers until it closed in 1963.[187] The details of these practices were often not well known outside of the prisons, as they were imposed as a matter of internal prison discipline, and prisoners did not have much access to the courts throughout the first half of the twentieth century.[188] When such practices did receive publicity, they were heavily criticized.[189]

Solitary confinement also came to be used to house prisoners awaiting execution. In the late nineteenth and early twentieth centuries, a number of states passed laws that not only relocated executions from the public square to the inside of the penitentiary, but also moved condemned prisoners from local jails to solitary confinement in state penitentiaries.[190] This relocation

180 *See, e.g.*, Reinert, *supra* note 179, at 939–40 (noting these uses of solitary confinement and observing that by the beginning of the twentieth century, "long-term solitary confinement was unusual in the United States, either explicitly abolished by statute or, even if permissible, having fallen into disrepute and disfavor by prison administrators," and "terms of confinement in solitary were measured in days and weeks, not months or years").

181 *See* Rubin & Reiter, *supra* note 138, at 1613.

182 *See id.*

183 *See id.* at 1616.

184 *See id.*

185 *See id.*

186 *See id.*

187 *See id.* at 1620 (quoting PIERRE ODIER, THE ROCK 117 (1982)).

188 *Cf. id.* at 1621 (noting that courts became increasingly receptive to prisoner litigation in the latter half of the twentieth century).

189 *See id.* at 1620 (describing a 1938 exposé by the *Saturday Evening Post* of the warden at Alcatraz's effort to revive an Auburn-type system of partial solitary confinement with silent congregate labor, which apparently resulted in more than a dozen instances of insanity).

190 *See* GARLAND, *supra* note 8, at 52, 116–17.

was advertised as an effort to prevent the coarsening of public sensibilities that comes with making execution a public "spectacle," but it appears also to have been motivated by a desire to reduce public opposition to the death penalty by hiding it from public view.[191]

The decision to house condemned prisoners in solitary confinement prior to execution attracted the attention of the United States Supreme Court in the case *In re Medley*.[192] The petitioner, James Medley, committed a murder in May of 1889.[193] In July of 1889, prior to Medley's trial and conviction, a new law took effect that changed the procedures for imposing the death penalty.[194] Under the old law, prisoners awaiting execution were kept in a county jail for a period of fifteen to twenty-five days before being executed by hanging.[195] Both the jail term and the execution were supervised by the county sheriff.[196] The new law took things out of the hands of county officials and placed an emphasis on solitude and secrecy. Under the new law, a prisoner sentenced to death would be kept in solitary confinement in the state penitentiary for two to four weeks prior to execution.[197] The execution would take place "enclosed from public view within the walls of the penitentiary."[198] The planned date and time of the execution were to be kept strictly secret, and witnesses to the event were not permitted to describe it afterward to anyone else.[199]

The *Medley* Court held that this statute could not be applied to the petitioner because it was an ex post facto law.[200] Requiring the prisoner to remain in solitary confinement prior to execution added such significant suffering to his sentence that it could not be imposed on a prisoner whose crime occurred before the statute took effect.[201] The Court noted that in England

191 *See, e.g.*, BANNER, *supra* note 8, at 148; JOHN D. BESSLER, DEATH IN THE DARK 25 (1997); GARLAND, *supra* note 8, at 135; MASUR, *supra* note 114, at 53; Michael Madow, *Forbidden Spectacle: Executions, the Public and the Press in Nineteenth Century New York*, 43 BUFF. L. REV. 461, 467 (1995).

192 134 U.S. 160 (1890).

193 *Id.* at 161.

194 *Id.* at 161–62.

195 *Id.* at 167.

196 *Id.*

197 *Id.* at 163–64.

198 *Id.* at 163 (quoting Act of Apr. 19, 1889, § 1, 1889 Colo. Sess. Laws 118, 118).

199 *Id.* at 164 ("The time fixed by said warden for said execution shall be by him kept secret and in no manner divulged, except privately to the persons by him invited to be present as aforesaid, and such persons so invited shall not divulge such invitation to any person or persons whomsoever nor in any manner disclose the time of such execution. All persons present at such execution shall keep whatever may transpire thereat secret and inviolate, save and except the facts certified to by them as hereinafter provided. No account of the details of any such execution, beyond the statement of the fact that such convict was on the day in question duly executed according to law at the state penitentiary, shall in any manner be published in this State." (quoting § 3, 1889 Colo. Sess. Laws at 119)).

200 *Id.* at 172, 174.

201 *Id.* at 172.

during the reign of George II, solitary confinement was authorized prior to execution in order to add "further terror and [a] peculiar mark of infamy" to the sentence.[202] The law was repealed under William IV because "[i]n Great Britain, as in other countries, public sentiment revolted against this severity."[203] The Court also discussed America's own experiment with long-term solitary confinement:

> [E]xperience demonstrated that there were serious objections to it. A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane, others, still, committed suicide, while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community. . . .
>
> . . . [S]ome thirty or forty years ago the whole subject attracted the general public attention, and its main feature of solitary confinement was found to be too severe.[204]

Because the effects of solitary confinement were so harsh, the decision to move a prisoner into solitary confinement could not be considered a mere administrative action—even though the confinement would last only four weeks at the most, and even though the offender was already sentenced to death.[205] Solitary confinement added such additional "terror" and "severity" to the death penalty that it had to be considered a new punishment.[206] The constitutional prohibition of ex post facto punishments meant that it could not be imposed on an offender who committed the crime before the law went into effect.[207]

After *Medley*, the Supreme Court clarified that offenders awaiting execution could be kept in solitary confinement so long as the statute did not violate the prohibition of ex post facto laws[208]—although it is important to remember that at that time, the period between sentence and execution was a matter of weeks, not months, years, or (as now) decades.[209] Cases involving solitary confinement as a mode of prison discipline arose on occasion, but

---

202 *Id.* at 170 (quoting Murder Act 1751, 25 Geo. 2 c. 37, § 1 (Eng.)).

203 *Id.*

204 *Id.* at 168.

205 *Id.* at 163.

206 *Id.* at 170.

207 *Id.* at 174.

208 *See* Holden v. Minnesota, 137 U.S. 483, 494 (1890) (upholding statute similar to the one at issue in *Medley* on the ground that it did not apply to punishments for crimes committed prior to statute's effective date); *see also* McElvaine v. Brush, 142 U.S. 155, 158–59 (1891) (refusing to decide claim that imposition of solitary confinement under New York sentencing statute was a cruel and unusual punishment because the Eighth Amendment did not apply to the states).

209 *See* Marah Stith McLeod, *Does the Death Penalty Require Death Row? The Harm of Legislative Silence*, 77 Ohio St. L.J. 525, 528 (2016).

these generally involved shorter-term solitary confinement, and often did not raise questions about the cruelty of solitude in and of itself.[210]

Once in a blue moon, a case arose revealing that some prison officials were keeping some offenders in solitary confinement for much longer periods of time. But even in these cases, questions about the cruelty of the practice were generally not directly presented to the court. For example, in *People v. Oppenheimer*,[211] the defendant challenged a death sentence he received for assault with a deadly weapon while serving a life sentence in prison. The defendant committed the assault after escaping from a solitary cell the prison used for "incorrigible[s]," in which he had been held for eight years.[212] The defendant raised an insanity defense, arguing that long-term solitary confinement had caused him to go insane.[213] But he did not argue that his extended solitary confinement was cruel and unusual under the California Constitution's cruel and unusual punishments clause.[214]

Similarly, in *Stroud v. Johnston*,[215] Robert Stroud (the "Birdman of Alcatraz") filed a petition for habeas corpus on various grounds, one of which related to his conditions of confinement. Stroud had been sentenced to death for killing a prison guard, but the President commuted the death sentence to life imprisonment and the Attorney General ordered that he be held in solitary confinement.[216] Stroud then spent over twenty years at Leavenworth before being transferred to Alcatraz, after which he filed this petition.[217] Stroud argued that extended solitary confinement was a cruel and unusual punishment. The court rejected this argument, however, noting that he had experienced only "'limited solitary confinement' at Leavenworth, Kansas, and . . . he enjoyed most of the privileges of other prisoners; [and] that on the face of his petition it appears he is not in solitary confinement at Alcatraz and is accorded the same treatment as is accorded other prison inmates."[218] Because there was no showing that he was currently kept in solitary confinement, the court refused to consider his Eighth Amendment claim as a ground for habeas relief.[219]

---

210 *See, e.g.*, Fuller v. State, 10 N.E.2d 594, 596–97 (Ind. 1937) (rejecting mentally ill prisoner's claim that keeping him in solitary confinement prior to trial was a denial of due process because it made it difficult to subpoena witnesses, prepare for his defense, etc.); Sims v. Hudspeth, 203 P.2d 129, 130 (Kan. 1949) (rejecting prisoner's claim that he was denied right to counsel because authorities used threat of solitary confinement to get him to sign waiver of counsel form).

211 106 P. 74, 76 (Cal. 1909).

212 *Id.* at 77, 78.

213 *Id.* at 78.

214 *Id.* at 77. He did argue, however, that the statute authorizing the death penalty for his assault was cruel and unusual. *Id.*

215 139 F.2d 171, 172 (9th Cir. 1943).

216 *Id.*

217 *Id.*

218 *Id.* (quoting the district court opinion).

219 *Id.* at 172–73.

D. Forgetfulness and Resurgence: The Rise of Supermax

The period between 1890 and the 1970s might be considered a time of forgetting. Solitary confinement existed at the margins of penal practice, and long-term solitary confinement was largely invisible.[220] By the 1960s and 1970s, judicial opinions concerning solitary confinement often showed a lack of awareness of the psychological suffering it caused, or treated psychological suffering as less "real" than physical suffering.[221]

With this forgetfulness came an increased willingness to categorize solitary confinement—even long-term solitary confinement—as an unremarkable exercise of administrative discretion. For example, in *Graham v. Willingham*,[222] a prisoner named Kenneth Graham challenged his relegation to solitary confinement for a period of two years as a cruel and unusual punishment. Several years previously, Graham had murdered a fellow inmate.[223] In subsequent years, he was present when two further murders were committed, although there was no showing that he was involved in them.[224] As a result, he was placed in solitary confinement "not . . . as a disciplinary control for specific misconduct but as an administrative control relating to inmates considered to be a 'threat to themselves, to others, or to the safety and security of the institution.'"[225] The Tenth Circuit dismissed Graham's Eighth Amendment claim in a one-page opinion that did not cite *In re Medley* and showed no awareness that long-term solitary confinement might have harmful effects on prisoner well-being.[226] Instead, the court simply asserted that such confinement is not a cruel and unusual punishment, and that "administrative" matters such as prison order should be left to the discretion and expertise of prison officials.[227]

---

220 *See* Rubin & Reiter, *supra* note 138, at 1618; *see also* Smith, *The Effects of Solitary Confinement*, *supra* note 164, at 465.

221 *See, e.g.*, Newman v. Alabama, 559 F.2d 283, 291 (5th Cir. 1977) ("We decline to enter this uncharted bog. If the State furnishes its prisoners with reasonably adequate food, clothing, shelter, sanitation, medical care, and personal safety, so as to avoid the imposition of cruel and unusual punishment, that ends its obligations under Amendment Eight. The Constitution does not require that prisoners . . . be provided with any and every amenity which some person may think is needed to avoid mental, physical, and emotional deterioration."), *rev'd in part on other grounds sub nom.* Alabama v. Pugh, 438 U.S. 781 (1978) (per curiam). *See generally* Haney & Lynch, *supra* note 143, at 543–44.

222 384 F.2d 367, 367–68 (10th Cir. 1967) (per curiam).

223 *Id.* at 368.

224 *Id.*

225 *Id.* (quoting Bureau of Prisons, U.S. Dep't of Justice, Policy Statement 7400.4 (Sept. 9, 1966)).

226 *See id.*

227 *See id.* ("Such a policy is perfectly proper and lawful and its administration requires the highest degree of expertise in the discretionary function of balancing the security of the prison with fairness to the individuals confined. In the case at bar the record reveals that appellant's confinement in segregation is the result of the considered judgment of the prison authorities and is not arbitrary.").

The United States Supreme Court issued an opinion in the late 1970s that appeared to display this same forgetfulness. On the surface, *Hutto v. Finney*[228] was a victory for prisoners. The Supreme Court upheld a district court's determination that the Arkansas prison system's use of punitive isolation was a cruel and unusual punishment.[229] The Court described the conditions of isolation as follows:

> An average of 4, and sometimes as many as 10 or 11, prisoners were crowded into windowless 8'x10' cells containing no furniture other than a source of water and a toilet that could only be flushed from outside the cell. At night the prisoners were given mattresses to spread on the floor. Although some prisoners suffered from infectious diseases such as hepatitis and venereal disease, mattresses were removed and jumbled together each morning, then returned to the cells at random in the evening. Prisoners in isolation received fewer than 1,000 calories a day; their meals consisted primarily of 4-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.[230]

The Court agreed that, "taken as a whole,"[231] the prisoners' "diet, the continued overcrowding, the rampant violence, the vandalized cells, and the 'lack of professionalism and good judgment on the part of maximum security personnel'"[232] created conditions that violated the Eighth Amendment.

At the same time, the Court showed a lack of awareness that long-term solitary confinement was harmful in and of itself. The Court stated that "[t]he length of time each inmate spen[ds] in isolation [is] simply one consideration among many,"[233] and "[i]f new conditions of confinement are not materially different from those affecting other prisoners, a transfer for the duration of a prisoner's sentence might be completely unobjectionable and well within the authority of the prison administrator."[234] The Court did not cite *In re Medley*, and did not make any reference to the harmful effects of long-term isolation.[235] It seemed to say that so long as the physical condi-

228 437 U.S. 678 (1978).

229 *Id.* at 680–81.

230 *Id.* at 682–83 (footnote omitted) (citations omitted).

231 *Id.* at 687.

232 *Id.* (quoting Finney v. Hutto, 410 F. Supp. 251, 277 (E.D. Ark. 1976)).

233 *Id.*

234 *Id.* at 686.

235 It is possible to read the Court's bland approval of long-term punitive isolation as having nothing to do with solitary confinement, since the "punitive isolation" most directly at issue in this case did not involve solitary confinement but its opposite: the dumping of four to eleven troublesome prisoners in a single "isolation" cell. However, this reading is undercut by a footnote in which the Court expressly disclaims any reading of the district court's opinion, or of its own approval thereof, that implies that long-term solitary confinement is unconstitutional:

> The Department reads the following sentence in the District Court's 76-page opinion as an unqualified holding that any indeterminate sentence to solitary confinement is unconstitutional . . . . But in the context of its full opinion, we think it quite clear that the court was describing the specific conditions found in

tions of solitary confinement—heat, light, food, access to medical care, etc.—were comparable to those in the general prison population, prison administrators had virtually limitless discretion to subject prisoners to it for virtually any length of time.

A series of factors arose in the 1970s and 1980s that led to the imposition of long-term solitary confinement on a grander scale than ever previously tried. During the 1970s, prison riots created the sense that prison administrators were losing the ability to control their own prisons and keep guards, prisoners, and the general public safe.[236] This led to a push for increased disciplinary tools to subdue disorder, including long-term solitary confinement.[237]

The sense of disorder in America's prisons reflected a larger sense of societal disorder after the end of the civil rights movement and in the wake of the Vietnam War.[238] Rising crime rates—particularly rising rates of violent crime and an increased focus on drug crime—gave rise to a "tough on crime" movement and an explosion in incarceration.[239] The total number of people incarcerated in American prisons and jails increased by approximately 620% between 1970 and 2016, from 300,000 to 2,162,400.[240] Much of this growth occurred in the 1980s and 1990s.[241] This increase in prison population led to significant overcrowding and further concern over prison administrators' ability to control their populations.[242]

The supermax movement was born in October 1983 at the federal prison in Marion, Illinois.[243] Marion was designed to replace Alcatraz as the one of the federal government's main prisons for housing violent and disruptive offenders.[244] A series of violent incidents occurred at Marion, culminat-

---

> the Arkansas penal system. Indeed, in the same paragraph it noted that "segregated confinement under maximum security conditions is one thing; segregated confinement under the *punitive* conditions that have been described is quite another thing."

Id. at 686 n.8 (quoting 410 F. Supp. at 278).

236 *See* Sarah Spiegel, Comment, *Prison "Race Riots": An Easy Case for Segregation?*, 95 CALIF. L. REV. 2261, 2270 (2007). Whereas there were twenty-four reported prison riots from 1900–1950, there were two hundred forty-two in the 1970s alone. *See* REID H. MONTGOMERY, JR. & GORDON A. CREWS, A HISTORY OF CORRECTIONAL VIOLENCE 74 (1998).

237 *See* Spiegel, *supra* note 236, at 2274–75.

238 For a discussion of various social forces at work that gave rise to a harsher criminal justice system, see generally MARIE GOTTSCHALK, THE PRISON AND THE GALLOWS (2006).

239 *See, e.g.*, John F. Pfaff, *The Complicated Economics of Prison Reform*, 114 MICH. L. REV. 951, 960–61 (2016).

240 *See supra* note 6.

241 *See* Berman, *supra* note 6, at 162–65.

242 *See, e.g.*, Craig Haney, *The Wages of Prison Overcrowding: Harmful Psychological Consequences and Dysfunctional Correctional Reactions*, 22 WASH. U. J.L. & POL'Y 265, 270 (2006).

243 *See* Smith, *The Effects of Solitary Confinement*, *supra* note 164, at 442–43.

244 *See* Haney & Lynch, *supra* note 143, at 489.

ing in the murder of two guards and an inmate.[245] In response, the warden declared an emergency and put the entire prison on permanent lockdown, relegating all prisoners to solitary confinement in their cells twenty-three hours per day.[246] This lockdown remained in effect until 2006, when the prison was redesignated as a medium-security facility.[247]

The lockdown at Marion inspired the creation of a new class of prison, known colloquially as "supermax," designed to eliminate virtually all contact between prisoners and other people.[248] Although conditions vary somewhat from facility to facility, the court's description in *Madrid v. Gomez*[249] of the special housing unit (SHU) at California's Pelican Bay State Prison[250] gives a sense of what life in a supermax facility is like.[251]

The *Madrid* court found that at Pelican Bay's SHU, prisoners in solitary confinement were kept alone in their cells twenty-two and a half hours per day.[252] They received their meals on trays passed through a narrow slot in the cell door.[253] Inmates ate their meals alone in their cells, and were pre-

245 Smith, *The Effects of Solitary Confinement*, *supra* note 164, at 442–43; Hanke Gratteu, *Marion Inmate 27, Is Stabbed to Death*, CHI. TRIB. (June 6, 1985), https://www.chicagotribune.com/news/ct-xpm-1985-06-06-8502050496-story.html.

246 Smith, *The Effects of Solitary Confinement*, *supra* note 164, at 442–43.

247 *See* United States v. Caro, 733 Fed. App'x 651, 671 n.8 (4th Cir. 2018).

248 *See* Smith, *The Effects of Solitary Confinement*, *supra* note 164, at 442–43.

249 889 F. Supp. 1146 (N.D. Cal. 1995).

250 In 2015, the parties to a class-action lawsuit concerning conditions at Pelican Bay settled the matter with an agreement to end imposition of indefinite solitary confinement. *See* CTR. FOR CONSTITUTIONAL RIGHTS, SUMMARY OF *ASHKER V. GOVERNOR OF CALIFORNIA* SETTLEMENT TERMS (2015), https://ccrjustice.org/sites/default/files/attach/2015/08/2015-09-01-Ashker-settlement-summary.pdf. There has continued to be litigation, however, concerning California's compliance with the settlement. *See, e.g.*, Victoria Law, *'As Long as Solitary Exists, They Will Find a Way to Use It,'* NATION (July 13, 2018), https://www.thenation.com/article/long-solitary-exists-will-find-way-use/.

251 *See* United States v. Fell, 224 F. Supp. 3d 327, 346–47 (D. Vt. 2016) (describing conditions at the federal supermax facility in Terre Haute, Indiana). In a survey of American prisons, the Liman Center described typical living conditions for prisoners in long-term solitary confinement as follows:

> As for living conditions, the cells were small, ranging from 45 to 128 square feet, sometimes for two people. In many places, prisoners spent 23 hours in their cells on weekdays and 48 hours straight on weekends.
>
> Opportunities for social contact, such as out-of-cell time for exercise, visits, and programs, were limited; the time out-of-cell ranged from 3 to 7 hours a week in many jurisdictions. Phone calls and social visits were as few as one per month in several jurisdictions; in others, more opportunities existed. In virtually all jurisdictions, what the prisoners could keep in their cells, as well as their access to programs and to social contact, could be limited as sanctions for misbehavior.

LIMAN PROGRAM, YALE L. SCH. & ASS'N OF STATE CORR. ADM'RS, TIME-IN-CELL: THE LIMAN-ASCA 2014 NATIONAL SURVEY OF ADMINISTRATIVE SEGREGATION IN PRISON, at ii (2015) [hereinafter LIMAN & ASCA, TIME-IN-CELL].

252 *Madrid*, 889 F. Supp. at 1229.

253 *Id.*

vented from having social interaction with each other.[254] They were denied access to prison job opportunities and recreational activities, spending almost all of their time in total idleness.[255] Group exercise was also forbidden.[256] Instead, for about one hour per day, each inmate was placed alone in a caged area resembling a dog run.[257] Very often, this exercise amounted to "simply pacing around the edges of the pen; the image created is hauntingly similar to that of caged felines pacing in a zoo."[258]

Interaction with other human beings, including prison staff, was kept to an "absolute minimum."[259] For example, prisoners were let into their exercise areas through a series of automatic doors, so that there was no human contact.[260] On the rare occasions when a guard had to have personal contact with a prisoner, the prisoner would be kept in shackles.[261] Because Pelican Bay was in an isolated location, prisoners received few outside visitors.[262] When they did receive a visitor, the visit was conducted by telephone through a thick glass window.[263] Prisoners had some ability to interact with other human beings when they needed medical treatment or requested spiritual counseling, but not much beyond that.[264] The district court concluded that "those incarcerated in the SHU for any length of time are severely deprived of normal human contact . . . . As former Warden Fenton testified, conditions in the SHU amount to a 'virtual total deprivation, including, insofar as possible, deprivation of human contact.' "[265]

The idea of supermax prisons was very popular with state and federal legislators in the 1980s and 1990s. According to one estimate, by 2004 some forty-four states and the District of Columbia had opened supermax prisons, and somewhere between 25,000 and 80,000 prisoners were kept in long-term solitary confinement.[266]

---

254 *Id.*
255 *Id.*
256 *Id.*
257 *Id.* at 1228.
258 *Id.* at 1229.
259 *Id.*
260 *Id.*
261 *Id.*
262 *Id.*
263 *Id.*
264 *Id.*
265 *Id.* at 1230.
266 *See* DANIEL P. MEARS, EVALUATING THE EFFECTIVENESS OF SUPERMAX PRISONS 40 (2006). The most recent Liman Center survey indicates that about 61,000 prisoners were being held in solitary confinement as of 2017. *See* ASS'N OF STATE CORR. ADM'RS & LIMAN CTR. FOR PUB. INTEREST LAW, YALE LAW SCH., REFORMING RESTRICTIVE HOUSING: THE 2018 ASCA-LIMAN NATIONWIDE SURVEY OF TIME-IN-CELL 4 (2018) [hereinafter ASCA & LIMAN, REFORMING]. Although not all states track length of confinement, states that did track and report this information indicated that 18.8% of the offenders held in solitary confinement had been kept there a year or more. *See id.* at 14. If this ratio holds true across all states, this would mean that nearly 11,500 prisoners are currently being held in solitary confinement for a year or more.

In theory, supermax prisons are supposed to house only the "worst of the worst" offenders: the incurably violent who will take any chance they can get to harm other people; the gang leaders who use murder and violence to control prisons from the inside; the would-be revolutionaries who will stop at nothing to burn the place down.[267] But in reality, a person can be assigned to supermax not just when that person is a security threat, but also when that person "is under a sentence of death, is a youthful offender, is at risk of attack by others, is seriously mentally ill, or has a major medical problem."[268] Even when a person is designated a security threat, this designation may conceal a very broad range of administrative discretion. For example, in a number of states, a person can be sent to supermax simply for being affiliated with a gang, and often cannot obtain release without agreeing to a "debriefing" in which he names all other gang members in the prison of whom he has knowledge.[269]

Solitary confinement in supermax facilities is indefinite. It appears that nearly 11,500 prisoners are currently spending a year or more in solitary confinement, and nearly 3000 are currently spending six years or more.[270] Some offenders have been held in solitary confinement for decades.[271]

E. Accidental Resurgence: The Extension of Time on Death Row

The law of unintended consequences has also led to an increase in the number of condemned prisoners spending multiyear periods in solitary confinement. As discussed above, the late nineteenth-century decision to move executions out of the public square and behind the walls of the penitentiary was accompanied by the movement of condemned prisoners into solitary confinement on death row.[272] At the time this occurred, the period between sentence and execution was typically a few weeks.[273] Prisoner civil rights litigation over the course of the twentieth century, however, had the perverse effect of lengthening the time prisoners spent on death row as the courts

267 *See* MEARS, *supra* note 266, at 5.

268 Elizabeth Alexander, *"This Experiment, So Fatal": Some Initial Thoughts on Strategic Choices in the Campaign Against Solitary Confinement*, 5 U.C. IRVINE L. REV. 1, 11 (2015).

269 *See, e.g.*, Katie Lynn Joyce, Note, *Stars, Dragons, and the Letter "M": Consequential Symbols in California Prison Gang Policy*, 104 CALIF. L. REV. 733, 750–51 (2016).

270 *See supra* note 266; *see also* ASCA & LIMAN, REFORMING, *supra* note 266, at 4, 14 (estimating that 61,000 prisoners were being held in solitary confinement as of 2017, and noting that 18.8% of the offenders held in solitary confinement had been kept there a year or more, and that 1950 of 41,061, about 4.7%, had been kept there for more than six years).

271 *See, e.g.*, Davis v. Ayala, 135 S. Ct. 2187, 2208 (2015) (prisoner held in isolation on death row for over twenty years); Johnson v. Wetzel, 209 F. Supp. 3d 766, 770 (M.D. Pa. 2016) (prisoner kept in solitary confinement for thirty-six years); Shoatz v. Wetzel, No. 2:13-CV-0657, 2016 WL 595337, at *2 (W.D. Pa. Feb. 12, 2016) (prisoner kept in solitary confinement for twenty-two years).

272 *See supra* Section II.C.

273 *See, e.g.*, *In re* Medley, 134 U.S. 160, 163, 167 (1890) (two to four weeks).

enabled appeals of death sentences to go on for years or even decades.[274] By 1960, the average time spent on death row had increased to two years.[275] Today, the average time between sentence and execution is sixteen years.[276] Most death penalty states keep condemned prisoners in some form of isolation, and many keep them in total isolation throughout this period.[277]

F. The Tide Withdraws? Gradual Diminishment of Long-Term Solitary Confinement

In recent years, the number of prisoners subjected to long-term solitary confinement has diminished, although thousands of prisoners remain subjected to it. Prisoner litigation has had some success,[278] and in California led to a settlement that eliminated (in theory) indefinite solitary confinement.[279] Several Supreme Court Justices have expressed concerns about the constitutionality of long-term solitary confinement and a possible willingness to strike it down.[280]

The gradual reduction in the number of inmates subjected to long-term solitary confinement is reflected in a series of surveys taken by the Arthur Liman Center for Public Interest Law at Yale Law School.[281] The Liman

274 *See* Glossip v. Gross, 135 S. Ct. 2726, 2764 (2015) (Breyer, J., dissenting) ("In 2014, 35 individuals were executed. Those executions occurred, on average, nearly 18 years after a court initially pronounced its sentence of death."); *id.* at 2749 (Scalia, J., concurring) (noting that the delays have been caused by "[n]othing other than the proliferation of labyrinthine restrictions on capital punishment, promulgated by this Court under an interpretation of the Eighth Amendment that empowered it to divine 'the evolving standards of decency that mark the progress of a maturing society'" (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion))).

275 *See* McLeod, *supra* note 209, at 536.

276 *See id.*; *see also, e.g.*, Peter Baumann, Note, "*Waiting on Death": Nathan Dunlap and the Cruel Effect of Uncertainty*, 106 GEO. L.J. 871 (2018) (discussing the cruel effects of long-term isolation on death row).

277 *See* McLeod, *supra* note 209, at 537.

278 *See, e.g.*, Williams v. Sec'y Pa. Dep't of Corrs., 848 F.3d 549, 574–75 (3d Cir. 2017) (holding that prisoners no longer subject to the death penalty have a due process right against indefinite solitary confinement).

279 *See* CTR. FOR CONSTITUTIONAL RIGHTS, *supra* note 250, at 1 (noting settlement of *Ashker* litigation in California).

280 *See* Apodaca v. Raemisch, 139 S. Ct. 5, 10 (2018) (Sotomayor, J., respecting denial of certiorari) (noting "the clear constitutional problems raised by keeping prisoners . . . in 'near-total isolation' from the living world . . . in what comes perilously close to a penal tomb" (quoting Davis v. Ayala, 135 S. Ct. 2187, 2210 (2015) (Kennedy, J., concurring))); Glossip v. Gross, 135 S. Ct. 2726, 2765 (2015) (Breyer, J., dissenting) (noting that "prolonged solitary confinement produces numerous deleterious harms" and has a "dehumanizing effect"); *Ayala*, 135 S. Ct. at 2210 (Kennedy, J., concurring) ("Years on end of near-total isolation exact a terrible price. . . . In a case that presented the issue, the judiciary may be required, within its proper jurisdiction and authority, to determine whether workable alternative systems for long-term confinement exist, and, if so, whether a correctional system should be required to adopt them.").

281 *See* ARTHUR LIMAN PUB. INTEREST PROGRAM, RETHINKING DEATH ROW 17 (2016); ASS'N OF STATE CORR. ADM'RS & ARTHUR LIMAN PUB. INTEREST PROGRAM, YALE LAW SCH.,

Center estimates that in 2015, there were approximately 67,000 inmates in "restrictive housing," approximately 13,000 of whom were kept in this condition for more than a year.[282] By contrast, the Liman Center estimates that in the period between December 2016 and fall 2017, there were approximately 61,000 inmates in restrictive housing.[283] The data on length of time in restrictive housing was less complete, but indicated that 18.8% of these inmates (or approximately 11,500 people)[284] spent a year or more in solitary confinement.[285]

This data shows an approximate 10% reduction in the use of solitary confinement in the period between 2015 and 2017. The most recent Liman Center report also indicates that prison administrators are looking for alternatives to this method of incarceration.[286] We may be repeating the pattern we saw at the end of the nineteenth century, when long-term solitary confinement mostly disappeared.[287] We are not there yet, however. Currently 4.7% of the inmates in solitary confinement, or nearly 3000 people,[288] have spent six consecutive years or more in total isolation.

G. Is Long-Term Solitary Confinement a "Usual" Punishment?

The history of long-term solitary confinement indicates that it is not a "usual" method of punishment within the original meaning of the Cruel and Unusual Punishments Clause, and it is likely a cruel and unusual one. As discussed above, a punishment can only be considered "usual"—that is, firmly part of the constitutional tradition—if it enjoys universal, public reception over a very long period of time.[289] Although the precise period of time necessary to establish a punishment as "usual" cannot be defined with precision, history indicates that it would likely need to be a century or more of universal reception.[290]

Long-term solitary confinement has not enjoyed anything close to "long usage." It was tried for several decades in the nineteenth century but was then largely abandoned because its effects were too harsh.[291] It was never

---

AIMING TO REDUCE TIME-IN-CELL 2 (2016); ASCA & LIMAN, REFORMING, *supra* note 266, at 99; ASS'N OF STATE CORR. ADM'RS & LIMAN CTR. FOR PUB. INTEREST LAW, YALE LAW SCH., WORKING TO LIMIT RESTRICTIVE HOUSING 19 (2018); LIMAN & ASCA, TIME-IN-CELL, *supra* note 251, at 55.

282 *See* ASCA & LIMAN, REFORMING, *supra* note 266, at 8. The Liman Center defines restrictive housing as "separating prisoners from the general population and holding them in their cells for an average of 22 hours or more per day for 15 continuous days or more." *Id.* at 4.

283 *Id.* at 10.

284 *See supra* notes 266, 270 and accompanying text.

285 ASCA & LIMAN, REFORMING, *supra* note 266, at 14.

286 *See id.* at 4–6.

287 *See supra* Section II.C.

288 *See supra* note 270 and accompanying text.

289 *See supra* Section I.A.

290 *See supra* Section I.A.

291 *See supra* Section II.B.

used in all American jurisdictions, and for much of its life in the nineteenth century it was confined to Pennsylvania and a small number of "copycat" states.[292] Thus it never achieved universal reception, and the reception it did receive lasted well under one hundred years.[293] To the extent that long-term solitary confinement survived in the period between 1870 and 1970, it was largely imposed behind the scenes by prison administrators, and thus lacked the "public" character necessary to make it part of the constitutional tradition.[294]

It is also important to consider the reasons long-term solitary confinement failed to achieve long usage. The historical record provides overwhelming evidence that it was rejected because of its cruel effects.[295] This fact provides strong evidence that the practice is cruel and unusual. To confirm whether this intuition is correct, the next step is to examine empirical evidence concerning the comparative effects of long-term solitary confinement.

III. Measuring Cruelty

Aristotle observed that man a social animal, and that "he who is unable to live in society, or who has no need because he is sufficient for himself, must be either a beast or a god."[296] Our current experiment with long-term solitary confinement tests this claim. Can we isolate a person from all human society for a period of months, years, or decades without destroying (or at least seriously damaging) his psyche? A beast or a god might withstand such conditions, but can a human being?

The question of cruelty is a comparative one. The Eighth Amendment does not direct us to ask whether a punishment is unjustly harsh in the abstract, but whether it is unjustly harsh in comparison to the traditional punishment it replaces.[297] In this case, relevant comparison is between solitary confinement and imprisonment with some opportunity for social interaction.

A. Establishing a Baseline: Happiness in Prison

Since the late 1970s, behavioral psychologists have studied the effects of positive or negative events on the overall happiness or well-being of people.[298] Through these studies, they have developed a theory of hedonic adaptation—that is, the idea that relatively quickly after a positive or negative event occurs, people tend to revert back to the level of happiness they occu-

292 *See supra* Section II.B.
293 *See supra* Section II.B.
294 *See supra* Section I.A.
295 *See supra* Section II.B.
296 Aristotle's Politics 29 (Benjamin Jowett trans., Clarendon Press 1908).
297 *See supra* Part I.
298 *See* John Bronsteen et al., *Happiness and Punishment*, 76 U. Chi. L. Rev. 1037, 1041 (2009) (describing studies).

pied before the event.[299] Lottery winners were found to be not much happier, over the long run, than members of a control group.[300] People paralyzed in an accident were found to be not much less happy, over the long run, than they were before the accident.[301] Although the positive or negative experience may create heightened positive or negative feelings in the short term, such feelings tend to revert back toward their pre-event level as the everydayness of life takes over once again.[302]

Studies also show that there are exceptions to this rule:

> People seem less likely to adapt to some health-related stimuli like noise, chronic headaches, and certain degenerative diseases such as rheumatoid arthritis, multiple sclerosis, HIV/AIDS, and hepatitis C infections. Additionally, socially relevant stimuli such as divorce, the death of a spouse, and unemployment prove difficult to adapt to, with hedonic penalties lasting for a considerable time into the future.[303]

Events that cause ongoing pain or deep social loss can keep us from returning to our previous level of happiness or well-being.

Hedonic adaptation appears to apply to life in prison. Both cross-sectional and longitudinal studies have shown that prisoners at the beginning of their sentences tend to show very high levels of depression and anxiety.[304] But as prisoners spend more time in prison, these symptoms tend to recede quickly, and several years into a sentence levels of happiness generally settle relatively close to the "normal" range.[305]

B. Suffering in Supermax

The experience of long-term solitary confinement is quite different. Studies of inmate well-being show alarming levels of injury to prisoner well-being that get worse over time.[306] For example, Dr. Stuart Grassian has

---

299 *See id.*

300 *See id.*

301 *See id.* at 1041–42.

302 *See id.* ("Most people are reasonably happy most of the time, and most events do little to change that for long." (quoting Daniel T. Gilbert et al., *Immune Neglect: A Source of Durability Bias in Affective Forecasting*, 75 J. PERSONALITY & SOC. PSYCHOL. 617, 618 (1998))).

303 *Id.* at 1043–44 (footnotes omitted).

304 *See id.* at 1047–48. Some groups of prisoners, of course, may not be able to adapt to prison as well as others. Mentally ill prisoners appear to be particularly vulnerable to harm in prison. *See, e.g.*, E. Lea Johnston, *Vulnerability and Just Desert: A Theory of Sentencing and Mental Illness*, 103 J. CRIM. L. & CRIMINOLOGY 147, 159–60 (2013) ("Prison is a toxic environment for individuals with serious mental health problems." (footnote omitted)).

305 *See* Bronsteen et al., *supra* note 298, at 1047–48. Although these studies tend to show that prisoner happiness tends to increase over the course of a prison term, other studies show that incarceration can have a profoundly negative effect on one's well-being after release. Former inmates suffer from higher unemployment, much lower wages, chronic disease, and alienation form loved ones, all of which have been shown to reduce one's sense of happiness or well-being over the longer run. *See id.* at 1050–52.

306 The literature concerning the harmful effects of solitary confinement on prisoner well-being is vast. As discussed above, these effects were well-known in the nineteenth cen-

made a number of studies of the effects of solitary confinement on inmate well-being.[307] In the early 1980s, he made his first such study, examining the well-being of inmates subjected to solitary confinement in Walpole State Prison in Massachusetts.[308] Despite his initial skepticism about the potential harmfulness of solitary confinement, he discovered widespread symptoms of an "acute organic brain syndrome."[309] Specifically, he found that over 50% of the prisoners exhibited one or more of the following symptoms: (1) hyper-responsivity to external stimuli; (2) perceptual distortions, illusions, and hallucinations; (3) panic attacks; (4) difficulties with thinking, concentration, and memory; (5) intrusive obsessional thoughts; (6) overt paranoia; and (7) problems with impulse control.[310] Dr. Grassian found this constellation of symptoms to be a "rare phenomenon in psychiatry," and asserted that the "striking and dramatically extensive perceptual disturbances" exhibited by these inmates was very rare outside the context of neurological illnesses such as seizure disorders and brain tumors.[311]

Similarly, in 1991 and 1992, Dr. Grassian evaluated forty-nine inmates at Pelican Bay State Prison in California as part of a class-action case concerning the constitutionality of long-term solitary confinement in that facility's SHU.[312] Of these forty-nine inmates, "at least seventeen were actively psychotic and/or acutely suicidal," and "twenty-three others suffered serious psychopathological reactions to solitary confinement, including (in several

---

tury. Numerous modern studies in America and Europe have replicated these findings. Many of these studies are summarized in the following literature reviews: Bruce A. Arrigo and Jennifer Leslie Bullock, *The Psychological Effects of Solitary Confinement on Prisoners in Supermax Units: Reviewing What We Know and Recommending What Should Change*, 52 INT'L. J. OFFENDER THERAPY & COMP. CRIMINOLOGY 622 (2008); Elizabeth Bennion, *Banning the Bing: Why Extreme Solitary Confinement Is Cruel and Far Too Usual Punishment*, 90 IND. L.J. 741, 753–63 (2015); Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J.L. & POL'Y 325 (2006); Craig Haney, *Mental Health Issues in Long-Term Solitary and "Supermax" Confinement*, 49 CRIME & DELINQ. 124, 132 (2003) [hereinafter Haney, *Mental Health Issues*]; Haney & Lynch, *supra* note 143; Smith, *The Effects of Solitary Confinement*, *supra* note 164. In 2010, a group of researchers published a study (known as the "Colorado study") purporting to show that prolonged solitary confinement has minimal negative effects and may actually be beneficial for mentally ill prisoners. *See* MAUREEN L. O'KEEFE ET AL., ONE YEAR LONGITUDINAL STUDY OF THE PSYCHOLOGICAL EFFECTS OF ADMINISTRATIVE SEGREGATION (2010). In 2016, a meta-analysis based largely on the Colorado study made similar finding. *See* Robert D. Morgan et al., *Quantitative Synthesis of the Effects of Administrative Segregation on Inmates' Well-Being*, 22 PSYCHOL. PUB. POL'Y & L. 439 (2016). Both of these studies have been shown to be so deeply methodologically flawed as to be meaningless. *See, e.g.*, Craig Haney, *The Psychological Effects of Solitary Confinement: A Systematic Critique*, 47 CRIME & JUSTICE 365 (2018); Stuart Grassian & Terry A. Kupers, *The Colorado Study vs. The Reality of Supermax Confinement*, 13 CORRECTIONAL MENTAL HEALTH REP. 1 (2011).

307 *See* Grassian, *supra* note 306, at 327.

308 *See id.* at 333–34.

309 *Id.* at 337–38.

310 *Id.* at 335–36.

311 *Id.* at 337.

312 *See id.* at 349.

cases) periods of psychotic disorganization."[313] Examining Dr. Grassian's report, the court noted that of these "40 seriously ill inmates, 28 suffered from perceptual disturbances, 35 had [trouble concentrating], 22 experienced intrusive obsessional thoughts, 29 [experienced] paranoia, 28 had impulse dyscontrol, 25 [experienced] anxiety/panic disorder, and 24 suffered from overt psychotic disorganization."[314]

As part of the same litigation, Dr. Craig Haney performed a study of one hundred randomly selected inmates in the Pelican Bay SHU.[315] The study showed that nearly 90% of inmates suffered a psychopathological effect, and nearly half suffered from "extreme forms of psychopathology."[316] Moving from the least common symptoms to the most common: 27% experienced suicidal thoughts; 41% experienced hallucinations; 44% experienced perceptual distortions; 61% experienced violent fantasies; 63% talked to themselves; 67% reported overall deterioration; 71% experienced mood swings; 73% experienced emotional flatness; 77% experienced chronic depression; 83% experienced social withdrawal; 84% experienced confused thought processes; 86% experienced oversensitivity to stimuli; 88% experienced irrational anger; and 88% experienced ruminations.[317] In light of this data, Dr. Haney wrote: "Because supermax units typically meld sophisticated modern technology with the age-old practice of solitary confinement, prisoners experience levels of isolation and behavioral control that are more total and complete and literally dehumanized than has been possible in the past."[318]

Dr. Grassian's studies also tend to show that the same personality characteristics that cause many people to violate prison rules (and thus get sent to long-term solitary confinement) also make these people highly vulnerable to psychological harm from long-term solitary confinement.[319] For example, in one case involving a maximum-security prison in New York in the late 1980s, a group of female prisoners with a history of serious emotional or mental difficulties were put into the prison's SHU for violations of prison rules.[320] As a result, "[m]any became grossly disorganized and psychotic, smearing themselves with feces, mumbling and screaming incoherently all day and night, some even descending to the horror of eating parts of their own bodies."[321] Similarly, according to Dr. Grassian, research indicates that people who suffer from attention deficit hyperactivity disorder or antisocial personality disorder have a "particular inability to tolerate restricted environmental

313 *Id.*

314 Madrid v. Gomez, 889 F. Supp. 1146, 1232 (N.D. Cal. 1995).

315 *See* Haney, *Mental Health Issues*, *supra* note 306, at 132.

316 *Id.* at 134.

317 *Id.*

318 *Id.* at 127.

319 *See* Grassian, *supra* note 306, at 350–51; *see also, e.g.*, Thomas L. Hafemeister & Jeff George, *The Ninth Circle of Hell: An Eighth Amendment Analysis of Imposing Prolonged Supermax Solitary Confinement on Inmates with a Mental Illness*, 90 DENV. U.L. REV. 1 (2012).

320 Grassian, *supra* note 306, at 351.

321 *Id.*

stimulation" and are likely to suffer serious breakdowns in solitary confinement.[322] More generally:

> [I]ndividuals whose internal emotional life is chaotic and impulse-ridden and individuals with central nervous system dysfunction may be especially prone to psychopathologic reactions to restricted environmental stimulation in a variety of settings. Yet . . . it is quite likely that these are the very individuals who are especially prone to committing infractions that result in stricter incarceration, including severe isolation and solitary confinement.[323]

Psychologically more resilient inmates also experience serious psychological disturbances over the course of their time in solitary confinement. For example, in a case involving a group of women kept in solitary confinement after committing a politically motivated crime, Dr. Grassian found that although the women were highly educated and showed no sign of prior mental illness, each suffered "significant psychopathological reactions," including "perceptual disturbances, free-floating anxiety, . . . panic attacks[,] . . . [and] severe difficulties in thinking, concentration, and memory."[324]

In sum, studies of the well-being of prisoners in long-term solitary confinement show markedly different results than studies of well-being of prisoners generally. Whereas the well-being of prisoners in the general prison population tends to revert back toward the pre-incarceration level over time, solitary confinement appears to have the opposite effect: serious psychological harm that deepens over time.

C. Dealing with Selection Bias: Studies Comparing Inmates in Solitary Confinement to Those in the General Prison Population

Although the discussion above appears to show that long-term solitary confinement causes significantly more harm to prisoners than does imprisonment generally, it is possible that this is partly the result of selection bias. That is, it might be the case that mentally ill inmates are more likely to get placed in long-term solitary confinement because their mental illnesses lead them to cause disruptions in the general prison population.[325] If this is so, the various psychological symptoms discussed above might not be caused by solitary confinement, but by a preexisting psychological condition. To be certain that the difference in well-being is real, we must do an apples-to-apples comparison of prisoners inside and outside of solitary confinement.

---

322 *Id.* at 350.

323 *Id.* at 350–51.

324 *Id.* at 352–53.

325 In fact, this does seem to be the case, at least in prisons that do not take affirmative steps to screen inmates for mental illness before assigning them to solitary confinement. *See, e.g.*, Johnston, *supra* note 304, at 160 (observing that mentally ill inmates "are more likely to be charged with rule violations—often because they are too disorganized to follow the many rules imposed by correctional facilities—and, as a result, are more likely to be housed in solitary confinement" (footnotes omitted)).

Several such direct comparisons have been performed.[326] For example, Dr. Craig Haney recently performed a study comparing the psychological well-being of prisoners who had been held in the Pelican Bay SHU for ten years or more to prisoners held in the general population of the same prison for a comparable period of time.[327] The study excluded prisoners listed on the prison's "mental health caseload," as a previous court order had excluded such prisoners from the SHU.[328] Prisoners from both groups were randomly selected.[329] The study found that extremely long-term SHU prisoners reported nearly twice the number of stress-related trauma and isolation-related pathology symptoms as prisoners in the general population.[330] Similarly, the extreme long-term SHU prisoners showed much greater intensity of stress, trauma, and isolation-related pathology symptoms.[331] Finally, the study found that "the prisoners in long-term solitary confinement were not only significantly more lonely than the long-term [general population] prisoners . . . , but also reported extremely high levels of loneliness rarely found anywhere in the literature."[332]

Similarly, Peter Scharff Smith describes two studies of Danish and Norwegian "remand" prisoners performed in the 1990s that compare prisoners subjected to solitary confinement prior to trial to those kept in the general prison population.[333] Smith explains that remand prisoners are defendants who are incarcerated prior to trial.[334] Some of these prisoners are kept in solitary confinement to prevent them from tampering with witnesses, or to pressure them to confess.[335] Overall, the remand prisoners sent to solitary confinement have "slightly better base expectancy rates for psychological or psychiatric illnesses (as well as IQ) than average nonisolated remand prisoners."[336] Smith attributes this to the fact that isolated remand prisoners are typically involved in "organized crime" and "relatively complicated cases," which results in a "slightly better psychological profile" than nonisolated remand prisoners.[337] Therefore, all other things being equal, one would

326 *See, e.g.*, Craig Haney, *Restricting the Use of Solitary Confinement*, 1 ANN. REV. CRIMINOLOGY 285, 291 (2018) [hereinafter Haney, *Restricting*] (listing several European studies comparing the psychological well-being of prisoners subjected to solitary confinement to that of prisoners not subjected to such conditions).

327 *See id.* at 292–93 (citing Craig Haney, The Dimensions of "Social Death": Psychological Reactions to Extremely Long-Term Solitary Confinement (2017) (unpublished manuscript)).

328 *See id.* at 292 n.2.

329 *See id.* at 292.

330 *See id.* at 292–93.

331 *See id.* at 293.

332 See *id.*

333 *See* Smith, *The Effects of Solitary Confinement*, *supra* note 164, at 453.

334 *Id.* at 444.

335 *Id.* at 442.

336 *Id.* at 454.

337 *Id.* Although Smith is not explicit on this point, it may be the case that involvement in organized criminal activity requires a more stable psychological profile than do crimes of opportunity. In any event, the key point is that the remand prisoners committed to

expect to find "a similar or perhaps lower prevalence of psychiatric morbidity"[338] among isolated remand prisoners than among remand prisoners not subjected to isolation. If these expectations were proven false, and there were a higher prevalence of psychiatric morbidity among isolated than nonisolated prisoners, this would strongly suggest that isolation is not merely correlated with heightened suffering, but actually causes it.

Studies of Danish and Norwegian remand prisoners showed precisely this effect. For example, in 1995, researchers conducted a longitudinal study of the effects of solitary confinement on Norwegian remand prisoners.[339] The study used a sample of fifty-four prisoners, half of whom were kept in isolation, and half of whom were not in isolation.[340] At the outset of the study, "the isolation group was healthier (both physically and mentally) than the control group."[341] The study "excluded inmates with a known intolerance for solitary confinement."[342] Thus, the study was designed to show the effects of solitary confinement on prisoners who are at least as healthy and capable of tolerating social deprivation as other inmates. The results showed that "[t]hose in solitary confinement suffered significantly more both physically and psychologically than the prisoners in the control group (sleeplessness, concentration problems, anxiety, depressions, etc.). The isolated prisoners were given and used much more medication than the control group."[343]

In 1994, researchers performed a larger-scale longitudinal study of 367 Danish remand prisoners.[344] This study also showed significantly higher rates of psychiatric morbidity among isolated than nonisolated prisoners.[345] In the first stage of the study, nonisolated prisoners showed a psychiatric morbidity rate of 15%, those who had been in solitary confinement less than two months showed a morbidity rate of 28%, and those who had been in solitary confinement more than two months showed a morbidity rate of 43%.[346] The psychiatric health of the nonisolated prisoners gradually increased over the course of the initial phase of the study, while the condi-

---

solitary confinement are at least as psychologically healthy as the control group kept in the general population. This makes it possible to directly compare the effect of the two types of imprisonment on their mental health.

338 *Id.*

339 *See id.* at 477.

340 *Id.*

341 *Id.*

342 *Id.* Six of the excluded inmates were placed in solitary confinement despite their vulnerability. All six developed psychoses while in isolation. *Id.*

343 *Id.*

344 *Id.*

345 *Id.*

346 *Id.* Although these differences are dramatic, Smith concludes that the overall psychiatric morbidity rate might have been suppressed by the fact that inmates were given hours of intensive social interaction throughout the period of the study, thus reducing the isolation the inmates experienced. *Id.* at 478.

tion of the isolated prisoners remained the same.[347] Once removed from isolation, the psychiatric health of the previously isolated group improved.[348]

The second part of the 1994 Danish study showed even more dramatic results.[349] This part of the study surveyed hospitalization among remand prisoners. The survey sampled 124 remand prisoners who had been hospitalized.[350] It showed that if "a person remained in SC [solitary confinement] for four weeks the likelihood of being admitted to the prison hospital for a psychiatric reason was about twenty times as high as for a person remanded in nSC [nonsolitary confinement] for the same period of time."[351]

Finally, in 1997, researchers performed a follow-up to the 1994 study, surveying participants as to the effects of their remand confinement.[352] Between 36 and 38% of those exposed to solitary confinement described the experience as "extraordinarily straining," as compared to 12% of those who were kept in the general population.[353] Between 23 and 27% of those exposed to solitary confinement reported "severe psychological reactions" after their remand imprisonment, as compared to 9% of those kept in the general population.[354]

These Danish and Norwegian studies showed that solitary confinement is not merely correlated with suffering, but causes it. These studies showed that prisoners not subjected to isolation displayed hedonic adaptation—that is, their psychological well-being improved over the course of their confinement. Prisoners kept in isolation, on the other hand, suffered psychological harm that worsened over the course of their time in isolation.

To be sure, the rates of morbidity for Norwegian and Danish remand prisoners were not as high as the rates we saw in the Haney and Grassian supermax studies, but then there are significant differences between the two types of incarceration. As Peter Scharff Smith points out, the remand prisoners did not suffer the same degree of isolation as supermax prisoners, their periods of isolation were significantly shorter than the isolation suffered by many supermax inmates, and perhaps most importantly, they knew that their isolation would end relatively quickly, when their cases went to trial.[355] Supermax prisoners, by contrast, often have no idea when or whether they will ever be released from solitary confinement. As Haney's study shows, both the prevalence and intensity of psychopathological symptoms displayed by American prisoners subjected to long-term extreme solitary confinement

347 *Id.* at 478.

348 *Id.*

349 *Id.* at 479.

350 *Id.*

351 *Id.* (alterations in original) (quoting Dorte Sestoft et al., *Impact of Solitary Confinement on Hospitalization Among Danish Prisoners in Custody*, 21 INT'L J.L. & PSYCHIATRY 99, 103 (1998)).

352 *Id.* at 480.

353 *Id.*

354 *Id.*

355 *See id.* at 443, 446.

are extraordinarily high as compared to long-term prisoners not subjected to such conditions.[356]

D. Is Solitary Confinement a Cruel and Unusual Punishment?

The empirical literature confirms what the historical record also tends to show: long-term solitary confinement causes mental suffering so extreme that a large proportion of the people subjected to it suffer severe psychological damage that worsens over time. Human beings are not beasts or gods. We need at least some social interaction. Because long-term solitary confinement is significantly more harmful than imprisonment involving some social interaction, it is cruel and unusual.

Conclusion—Constitutional and Practical Implications

This Article has demonstrated two things: first, although it might not always be obvious at the outset whether an experimental punishment is cruel and unusual, usage over time can allow us to make this determination. Usage over time reveals the effects of the punishment and shows whether the punishment has achieved a stable societal consensus in its favor over multiple generations.[357] Second, long-term solitary confinement is a failed experiment and is cruel and unusual. It has never achieved universal reception, but has been tried and rejected as its cruel effects became clear.[358] The historical record and the empirical literature both show that it is significantly—indeed extraordinarily—harsher and more harmful than imprisonment involving some degree of social interaction.[359]

The methodology used in this Article will be useful whenever the relationship of a new punishment practice to the tradition is not immediately clear. Its applicability is most obvious when the government adopts a new method of punishment, but it can also be useful when the government engages in one of the other kinds of experiment mentioned at the beginning of this Article.[360] When a legislature creates a new crime, for example, it may not be immediately obvious whether the punishment authorized for this crime is cruel and unusual. Paying attention to how adoption and enforcement of the new or revised crime plays out in practice over time can help clarify the constitutional question.

For example, strict-liability felonies—which allow significant punishment without any showing of blameworthy conduct or intent—appear to be inconsistent with traditional standards of culpability and proportionality. Although many legislatures have created such crimes, over time there has been a political and judicial reaction against them, and courts have made

356 *See* Haney, *Restricting*, *supra* note 326, at 292–93.
357 *See supra* Parts II–III.
358 *See supra* Part II.
359 *See supra* Parts II–III.
360 *See supra* Introduction.

efforts to limit their scope.[361] Such crimes might be subject to constitutional challenge.[362] Other kinds of expansion—for example, elimination of the marital exemption for rape—appear much more consistent with traditional standards of culpability and proportionality.[363] Although the marital rape exemption still survives in some states to some degree, we appear to be approaching a stable societal consensus in favor of eliminating it.[364] Elimination of the marital rape exemption appears much less likely to be subject to constitutional challenge.

This Article also shows that the various methods of punishment the government employs, and the possible forms of cruelty associated with them, are interconnected. Cruelty can lead to cruelty. Overcrowding in prisons can cause such suffering that it might be considered cruel and unusual.[365] So can failure to provide treatment for the physically or mentally ill.[366] So can physical abuse at the hands of prison guards.[367] Such examples of cruelty can also have knock-on effects, leading to prison disruptions that create a perceived need for further cruelty such as long-term solitary confinement.[368] This implies that the elimination of one form of cruelty can ameliorate the need for another. To the extent that prisons avoid overcrowding, provide care for the medical needs of their inmates, and treat them with a modicum of human dignity, there will be a reduced need for drastic "prison control" measures like supermax. There are two ways to achieve these goals: improve funding, training, and oversight; or reduce the number of people subject to imprisonment. Given the dramatic human cost of cruel and unusual punishments, and given the constitutional command to avoid them, such actions should be given the highest legislative priority.

361 *See generally, e.g.*, John F. Stinneford, *Punishment Without Culpability*, 102 J. CRIM. L. & CRIMINOLOGY 653 (2012).

362 *See id.* at 687.

363 *See, e.g.*, Jill E. Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373, 1379 (2000).

364 *See id.* at 1375.

365 *See* Brown v. Plata, 563 U.S. 493, 510–11 (2011).

366 *See* Estelle v. Gamble, 429 U.S. 97, 104 (1976).

367 *See* Whitley v. Albers, 475 U.S. 312, 320–21 (1986).

368 *See supra* Section II.D. A similar phenomenon occurred at the beginning of the nineteenth century. As Myra Glenn has described, when New York created its penitentiary system, the legislature initially prohibited flogging. As prisons became overcrowded, however, the prison population became increasingly unruly and as a result, the legislature authorized flogging once again. *See* GLENN, *supra* note 118, at 10–11.