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Reiter, Keramet A.

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The Most Restrictive Alternative:
The Origins, Functions, Control, and Ethical Implications of the Supermax Prison, 1976 - 2010

By

Keramet A. Reiter

A dissertation submitted in partial satisfaction of the

requirements for the degree of

Doctor of Philosophy

in

Jurisprudence and Social Policy

in the

Graduate Division

of the

University of California, Berkeley

Committee in Charge:

Professor Franklin E. Zimring, Chair

Professor Jonathon Simon

Professor Marianne Constable

Professor David Sklansky

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Abstract

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Concrete, steel, artificial light, complete technological automation, near-complete sensory deprivation, and total isolation – these are the basic conditions of supermaximum security prisons in the United States. “Supermax” prisoners remain alone twenty-three to twenty-four hours a day, under fluorescent lights that are never turned off. Meals arrive through a small slot in an automated cell door. Prisoners have little to no human contact for months, years, or even decades at a time, save brief interactions with correctional officers, who place hand, ankle, and waist cuffs on each prisoner before removing him from his cell. Prisoners only leave their cells four or five times per week, for showers or for brief, solitary exercise periods in “dog runs” – concrete pens with roofs at least partially open to natural light. In sum, supermax prisons across the United States detain thousands in long-term solitary confinement, under conditions of extreme sensory deprivation. They are prisons within prisons, confining the prisoners correctional administrators deem a threat to the general prison population.

Arizona opened the first supermax, in 1986, and California opened the second, in 1989. Over the subsequent ten years, almost every state, along with the federal prison system, either built a supermax or retrofitted an existing facility to create a supermax unit. This dissertation examines the birth of the supermax in Arizona and California, and the spread of the institutional innovation across the United States. The research presented here draws on three major categories of data: archival materials, including legal decisions and case files, local news reporting, and legislative records; oral history interviews with more than thirty key informants, including correctional administrators, legal professionals, architects, and former prisoners; and quantitative data maintained by the California Department of Corrections and Rehabilitation. This is the first study specifically focused on unearthing the administrative and political processes that underwrote the supermax.

The dissertation begins with an overview of the idea of solitary confinement and the term “supermax,” leading to a working definition of supermaxes as institutions that are: bounded in time, administratively overseen, characterized by extremely restrictive conditions, and large in both scale of beds and durations of confinement. Chapter Two uses this definition to create a working list of supermax institutions in the United States. Chapter Three frames supermaxes as a product of mass incarceration, and introduces the core region (the Sunbelt) and core case study (California) on which

the dissertation will focus. Chapters Four through Six document how and why correctional administrators decided to build California's first supermax, Pelican Bay State Prison. These chapters trace how socio-political changes in the 1970s – including structural changes to sentencing laws; race-based social organizing, both in and out of prison; and increasing judicial attention to prisons – paved the way for the supermax innovation in the 1980s. Chapter Four argues that critical power shifts between the executive, legislative, and judicial branches of government left a power vacuum, which correctional administrators quickly filled, in part through building supermaxes. Chapter Five describes the legislative process that nominally underwrote the supermax, and argues that California legislators ceded both planning and moral authority to state correctional administrators. Chapter Six describes the processes of architectural design and technological innovation that created the physical supermaxes themselves.

Chapters Seven through Nine explore the implications of the administrative origins of the supermax. These chapters document how the institution has never had a clearly articulated purpose (Chapter Seven), and how it has been operated in contradiction to its articulated goals (Chapters Eight and Nine). Chapter Eight shows that supermaxes have detained prisoners for decades longer than intended, and have disproportionately impacted minority prisoners. Chapter Nine argues that courts have largely deferred to correctional administrators' claims about the necessity of the supermax, even though little empirical evidence exists to support these claims. Together, these chapters demonstrate that correctional bureaucrats not only made the initial supermax design decisions in California, but also progressively concentrated their power over supermax prisoners through hyper-automated buildings and internal prison classification procedures.

Chapter Ten further explores the relationship between supermaxes and the federal judiciary, arguing that federal court decisions setting minimum conditions and standards for prisons in the 1970s and 1980s shaped the supermax innovation that followed. The conformity of supermaxes to these minimum constitutional standards has rendered the institutions resistant to legal challenges. The Conclusion discusses the implications of recent supermax-related trends, including prisoner protests about conditions of confinement, and state-based movements to reduce supermax populations. In sum, because supermaxes manifest, both physically and legally, the outer limits of non-death penalty punishment policy, they are critical for understanding both U.S. prison expansion, and the impacts of U.S. tough-on-crime policies.

To anyone who has lived or worked inside an American prison

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I. Introduction & Methods

In June of 1988, a small handful of California state senators had an animated discussion about what must have seemed like an unremarkable piece of legislation. Senate Bill 1685 authorized the construction of a new prison in Del Norte County, on California's northernmost border with Oregon. This authorization would have been unremarkable, because the Del Norte prison was only one of more than twenty new prisons built between 1980 and 2005 in California. Most of the prisons were named simply and functionally after the Central Valley towns in which they were located – Avenal, Salinas Valley, Corcoran. But the conference committee notes appended to the bill authorizing the Del Norte prison suggest that the senators had a light-hearted debate about what to call California's northernmost prison.

“Dungeness Dungeon,” one Senator proposed.

“No, Caso No Pasa,” another countered.

Even if those names “lack official dignity,” at least we can reserve the right to refer to the place as “Slammer by the Sea,” yet a third Senator argued.

The ultimate name for the Del Norte prison, codified in Senate Bill 1685, is refreshingly dignified in light of this conversation: Pelican Bay State Prison.¹ Pelican Bay echoes the name of another of California's more infamous prisons – Alcatraz, a Spanish word for pelican, in fact. Pelican Bay sounds like a peaceful place, where birds flock, resonant with the crash of waves along a rocky coastline. If only a name could actually imbue a place with grace. California's Senate Public Safety Committee, though, was hardly concerned with the dignity of the prison's name. In fact, the California legislature authorized the building of a prison in Del Norte County and dubbed it Pelican Bay in a piece of legislation that included just under a dozen short lines of text. The legislature never recorded any further activity about the place. Notably absent from the legislative committee notes: any discussion of what kind of prison Pelican Bay would be. The actual physical structure of the place, along with its day-to-day management, was left to the experts – correctional bureaucrats, prison wardens, and the “justice architects”² with whom they contracted to design and build prisons. In other words, the California legislature exercised minimal oversight over prison-building in California in the 1980s; Pelican Bay's novel high-security design was not a tough-on-crime political invention, but an administrative innovation, designed and implemented by bureaucrats within California's department of corrections.

These experts worked together to make Pelican Bay into a new kind of prison, for a “new breed of inmate.” State correctional officials planned, as early as 1986, to identify the “worst of the worst” prisoners in the state and send them to Pelican Bay. When the institution opened, in 1989, national news reporters dubbed it a “prison of the future,” one of the nation's first supermaxes.³ Over the next decade, dozens of states copied California's supermax model, building first hundreds, and then thousands, of total isolation cells. The animating question behind this story is a simple one: What conflation of forces paved the way for this expanded use

¹ Conference Committee Notes to California Senate Bill 1685 (1988).

² Architects who specialize in building prisons and jails in the United States refer to themselves as justice architects. See, for instance, www.kmdjustice.com, the website of a San Francisco-based architecture firm that specializes in corrections and justice architecture. The label “justice” indicates that these architects characterize themselves not just as experts in particular physical structures, but as experts in ideologies, like “just,” or “green” and environmentally conscious buildings. Justice architect (formerly with the Federal Bureau of Prisons), phone interview with author, June 14, 2010, notes on file with author.

³ Miles Corwin, “High-Tech Facility Ushers in New Era of State Prisons,” *Los Angeles Times*, May 1, 1990: A-1.

of long-term solitary confinement across the United States in the last decade of the twentieth century? What are the conditions of this modern isolation, who oversaw the expanded use of solitary confinement, and how was the practice justified?

Pelican Bay State Prison has 1,056 state-of-the-art, windowless isolation cells, divided into 132 self-contained pods of eight cells each. Each cell measures eight-by-ten feet – about the size of a wheelchair-accessible bathroom stall. Each cell is made of smooth, poured concrete, so there are no seams, no crevices, no sharp edges. The thick walls muffle sounds; prisoners must shout to communicate with each other, but most times the units remain “so quiet, you can’t even imagine there’s anybody there.”⁴ Fluorescent lights in the pods and in the cells remain on twenty-four hours per day. If a prisoner can afford to buy a television or a radio, or if he keeps in touch with people outside of prison who can order books for him, he might have access to some form of entertainment. Otherwise, little interrupts the monotonous solitude.

Each pod contains one shower and one exercise yard – a poured cement, windowless cell with a roof partially open to the sky. The pods are structured so that, in any given week, each of the eight prisoners in the pod can have five hours of exercise and three showers each, all without ever seeing or touching any other prisoner, or even any correctional officers. A correctional officer in a central control booth, who carries a gun at all times, simply presses a button, allowing one prisoner at a time to leave his cell and go onto the pod and out to the exercise yard, or into the shower.

Prisoners spend an average of two years in these conditions at Pelican Bay State Prison, before they are released.⁵ A small handful of prisoners, however, have been held in these isolation conditions at Pelican Bay State Prison for more than twenty years.⁶ Correctional officers place prisoners in isolation at Pelican Bay for one of two reasons: either a prisoner breaks a prison rule and is assigned to a fixed term of confinement in the supermax, or he is “validated,” through an internal administrative process, as a gang leader, and assigned to an indefinite term of confinement in the supermax.⁷ Either way, supermax assignment results from in-prison behavior. Correctional administrators, not judges or juries, make supermax assignment decisions.

The supermax designers explain that the institution’s Spartan conditions are necessary for safety and security, appropriately punitive, economically efficient. Correctional administrators who designed the first supermaxes remember a time when prisoners killed correctional officers with impunity, and reference gang members who ordered murders on the streets from inside prison.⁸ The architect, who designed the first supermax in Arizona, described the collaborative

⁴ A.R. (former Pelican Bay prisoner), interview with author, Stockton, CA, June 20, 2010, notes on file with author.

⁵ See *infra* Chapter VII, the section on Duration of Confinement.

⁶ Julie Small, “Under Scrutiny, Pelican Bay Prison Officials Say They Target Only Gang Leaders,” *89.3 KPCC Southern California Public Radio*, Aug. 23, 2011.

⁷ California Department of Corrections and Rehabilitation, *Department Operations Manual* (Updated through January 1, 2009), available online at: http://www.cdcr.ca.gov/Regulations/Adult_Operations/DOM_TOC.html (last accessed 19 Feb. 2010); California Code of Regulations 2009: Title 15, Secs. 3000, 3341.5.

⁸ Carl Larson, former Director of Finance for the California Department of Corrections, who oversaw much of the state’s 1980s prison building, including the design and implementation of the Pelican Bay supermax, explained that the supermax was a necessary response to the fact that “eleven staff members [were] murdered [and] 54 staff members stabbed” in the California Department of Corrections in the 1970s. He also explicitly recommended *The Black Hand* as necessary background reading for understanding the need for the Pelican Bay supermax. Carl Larson (former Director of Finance, California Department of Corrections), interview with author, Sacramento, CA, Feb. 22, 2010, notes on file with author; Chris Blatchford, *The Black Hand: The Story of Rene “Boxer” Enriquez and His Life in the Mexican Mafia* (New York: HarperCollins, 2008).

process underlying the innovative design. “We just asked what are the issues, what are the problems.” The architects then worked with correctional administrators to design solutions to the issues and problems identified; in Arizona, as in California, there was virtually no legislative oversight. The decision to remove windows from the facility is representative of how this creative collaboration between prison bureaucrats and architects produced a uniquely punitive infrastructure.

*We were looking for ways to try to save land space ... We figured out the windows were always a problem anyway. Inmates always covered them up. They were always a potential way for inmates to communicate [with each other]. So we decided we would do the windowless cells ... Because we didn't have windows, I was able to interlock the buildings like jigsaw puzzles, so we were able to do this facility on 30 percent less land ... So what would have been an outside wall was a common-use wall for other housing units, so it was a huge savings on construction costs, probably 30 percent.*⁹

Supermaxes, then, provide a measure of economic efficiency. However, the extreme conditions are not without their costs – both financial and psychological. Because supermaxes require staff to provide for every individual prisoner’s basic needs, including delivering three meals a day, providing medicine and basic healthcare, delivering mail, and escorting (usually requiring two to three correctional officers) any prisoner who needs to leave his cell for a meeting with a lawyer or a doctor or a prison administrator, the institutions can cost more than twice as much to run, per prisoner per year, than a general population prison.¹⁰

Moreover, long-term solitary confinement and sensory deprivation can exact emotional tolls on prisoners; psychiatrists who study the impact of these conditions suggest that long-term isolation produces symptoms that resemble post-traumatic stress disorder or worse, including prisoner reports of hearing voices, experiencing hallucinations, and having difficulty controlling anger. Psychiatrists have dubbed these problems “SHU Syndrome”; SHU stands for security housing unit and is a correctional term for supermaximum security confinement.¹¹ In California, an early 1990s federal court case evaluating the constitutionality of the conditions at Pelican Bay State Prison documented the range of emotional traumas experienced by prisoners in supermax units. In April of 1992, Vaughn Dortch was housed in solitary confinement at Pelican Bay State Prison. Dortch was twenty-eight years old. He had served six years of a ten-year prison sentence for grand theft, and he had been diagnosed with mental health problems prior to being placed in solitary confinement.¹² His mental health deteriorated in solitary confinement, to the point where he regularly smeared his entire body with his own feces. Smearing, throwing, or eating excrement, whether as a signal of despair or as a tool of manipulation, is a particular phenomenon associated with long-term solitary confinement.¹³

⁹ Justice architect (Arizona), phone interview with author, Feb. 4, 2011, notes on file with author.

¹⁰ In California, the average annual per prisoner cost of incarceration is \$49,000, but the average annual per prisoner cost of incarceration in the supermax at Pelican Bay State Prison is \$70,000, almost fifty-percent higher. California Department of Corrections and Rehabilitation, “Pelican Bay.” Available online at: http://www.cdcr.ca.gov/COMIO/Uploadfile/pdfs/Pelican_Bay.pdf (last accessed 16 Feb. 2012).

¹¹ Stuart Grassian, “Psychiatric Effects of Solitary Confinement,” Redacted Declaration Submitted pursuant to *Madrid v. Gomez* litigation (September 1993); Haney, Craig, “Mental Health Issues in Long-Term Solitary and ‘Supermax’ Confinement,” *Crime and Delinquency*, Vol. 49.1 (Jan. 2003): 124-156.

¹² “Former Inmate at Pelican Bay Wins Judgment Against State,” *San Francisco Chronicle*, March 1, 1994: A-18.

¹³ For instance, all 28 “gassing” incidents – when “inmates throw a mixture of urine and feces in officers’ faces” – documented in the California Department of Corrections in 1998 and 1999 took place in supermax units. Sharon

The correctional officers charged with overseeing Dortch likely felt incredibly helpless to handle his particular descent into what must have seemed a sub-human state of existence. Dortch was already assigned to the most secure and restrictive environment in the California Department of Corrections. There were no privileges left to remove from him. Moreover, he had made a place that was explicitly designed to be maximally hygienic – a brand new prison with smooth walls that could be hosed down and lights that stayed on twenty-four hours a day – filthy. Correctional officers were faced with two options, each equally unpleasant and untenable. Either they could leave Dortch in his cell, smeared in feces, reeking.¹⁴ Or they could remove Dortch from his cell, and try to clean him. Nothing in officer training would have prepared the guards to execute either plan.

Eventually, a group of at least five correctional officers opted for the latter option. In an alleged attempt to clean Dortch, these officers took him from his cell and escorted him to the hospital infirmary. There, they placed Dortch, with his hands cuffed behind his back, waist-deep in 125-degree Fahrenheit water. Dortch was held down in the water until his skin began to peel away, in chunks. Dortch is an African-American man, about whom one of the correctional officers bathing him said: “Looks like we’re going to have a white boy before this is through.” Dortch ultimately suffered third-degree burns over much of his lower torso.¹⁵

Most of Pelican Bay’s prisoners are, perhaps, more fortunate. Their scars are less black-and-white, are in fact less tangible. Today, prisoners at Pelican Bay can expect careful oversight of the conditions of confinement at the institution. In 1995, Thelton Henderson, the federal district court judge who originally reported the Dortch incident, issued a 137-page opinion, in which he ordered a number of reforms in the policies and practices at Pelican Bay. For the next 16 years, Henderson oversaw the regular monitoring of Pelican Bay State Prison, by prisoners’ rights lawyers and court-appointed experts. He even made a number of visits to the institution himself.¹⁶ Today, prisoners with pre-existing mental health problems are diverted from the Pelican Bay supermax, into cells that at least have windows. Correctional officers undergo regular trainings about appropriate uses of force. Nothing like the Dortch incident has been reported in two decades.

Judge Henderson originally found, in his 1995 opinion, that Pelican Bay was being run in an unconstitutional manner, which violated the Eighth Amendment right of prisoners to be free from cruel and unusual punishment. Although he ordered many reforms to make Pelican Bay constitutional, Judge Henderson never found that the physical structure of long-term solitary

Shaley, *Supermax: Controlling risk through solitary confinement* (Portland, OR: Willan Publishing, 2009): 73. Another scholar of supermax confinement, anthropologist Lorna Rhodes, notes that in supermaxes: “[Throwing] is also chronic, involving prisoners and their keepers in a persistent round of dirtying and cleaning and keeping everyone engaged in this aversive corporeal ‘conversation.’” *Total Confinement: Madness and Reason in the Maximum Security Prison* (Berkeley, CA: University of California Press, 2004): 48. See also Carol Rosenberg, “Waste Wars: Captives ‘weaponize’ bodily fluids,” *Miami Herald*, June 18, 2011.

¹⁴ In a more recent instance of a prisoner using excrement to control his environment – this time in the supermax wing of the U.S. military prison at Guantanamo Bay, Cuba – the *Miami Herald* described: “The gut-wrenching odor of excrement has for weeks wafted through the air vents of Camp 5, the Pentagon’s state-of-the-art, 100-cell maximum-security prison, according to smell-witnesses. It amounts to a kind of collective punishment that assaults the senses of compliant captives and captors alike.” Rosenberg, *supra* note 13.

¹⁵ *Madrid v. Gomez*, 889 F. Supp. 1146, 1168, 1213 (N.D. Cal. 1995).

¹⁶ Thelton Henderson (former Chief Judge of the federal court of the Northern District of California), interview with author, San Francisco, CA, May 24, 2011, notes on file with author.

confinement at Pelican Bay was itself unconstitutional. So while the practice of placing prisoners in long-term solitary confinement has been reformed, overseen, and streamlined, it continues.

Constitutional violation or not, even a few months in solitary confinement can leave a life-long impression on prisoners and former prisoners. Anthony Jenkins, who spent two years in solitary confinement in the federal prison system in the early 2000s, described how the experience of solitary confinement continues to haunt him. He said:

*I re-live it all the time. There'll be things – I will be – I will smell something that reminded me of the SHU [Secure Housing Unit, or supermax] and it'll take me right back there. Noises. I'll hear something. Keys jingling, primarily. Will bring back memories of that instantaneously, and it's not even a memory like a memory. I would almost say it was like a day-dream, where everything else gets tuned out and you actually live that, right there in that moment, until you realize that you're re-living it, and then you come out of it and you realize you're right here, in the present, and you're not actually there anymore.*¹⁷

While prisons like Pelican Bay State Prison are allegedly designed to hold “the worst of the worst,” this does not mean that they hold prisoners forever. Because assignment to supermaxes like Pelican Bay happens on the basis of in-prison behavior, being sent there has no effect on a prisoner’s overall criminal sentence, as meted out by a judge or jury. When the criminal sentence expires, the Department of Corrections must release the prisoner. And, in fact, an average of 16 prisoners per month are released directly from the supermax unit at Pelican Bay State Prison onto parole in California.¹⁸

The impact of long-term solitary confinement, then, is not limited to the individual prisoners who experience it. These prisoners return to communities in California, and elsewhere. Moreover, as the Vaughn Dortch story and the *Madrid* case suggest, supermaxes can be de-humanizing, for both their occupants and the people working in them. Judge Henderson said one of the things he remembered most vividly from his many visits to Pelican Bay State Prison, in the sixteen years during which he oversaw the monitoring of the prison, was seeing a prisoner, pacing like an animal, in an outdoor cage.

*I said I wanted to see one of their breaks [from their 22-plus hours in their cell]. They took one prisoner out and took him into a wired cage, maybe about the size of this [he gestured down the length of his office]. They put him in there. That was his exercise. I can picture that as clear as when I first saw it. He walked around in a figure eight. I remember so clearly going to the zoo with my kids, seeing a cat walking around like that [in a figure eight pattern].*¹⁹

* * *

This is the story of the Dungeness Dungeon, the Slammer by the Sea, Casa No Pasa, Pelican Bay State Prison. It is also the story of Anthony Jenkins, Vaughn Dortch, an anonymous Arizona architect, and Judge Thelton Henderson. It is a story of the banality of evil,²⁰ equally

¹⁷ A.J. (former federal supermax prisoner), interview with author, San Francisco, CA, July 3, 2010, transcript on file with author.

¹⁸ See *infra* Chapter VIII, the section on “Supermax Departures.”

¹⁹ Henderson interview, *supra* note 16.

²⁰ Hannah Arendt is credited with the phrase “the banality of evil,” from her book *Eichmann in Jerusalem: A Report on the Banality of Evil* in which she argues that evils like the Holocaust take place when acts like mass murder become normalized, often through the institutional structure of a powerful state. The story of Vaughn Dortch seems

distributed between the guards and the guarded. Vaughn Dortch committed burglary, was sentenced to prison, and while there smeared himself in his own excrement. He would have been a very challenging prisoner. But Dortch's own acts hardly justify the unconstitutional treatment he received. The architect who designed Arizona's first supermax and consulted on the California supermax design project used his expertise to physically institutionalize prison conditions that pushed the boundaries of the constitutionally acceptable. But it was not that architect's job to determine those constitutional boundaries. And when a judge stepped in to identify those very boundaries, he found a law bereft of the normative yardsticks by which to measure the constitutionality of long-term solitary confinement.

Everyone in this story – from the architect trying to build an economically efficient and safe prison, to the judge trying to oversee that prison, to the guards trying to control Ruiz and clean Dortch – had good reasons for their actions. These individuals meant to build and run safer and securer prisons. But their good intentions produced unintended consequences. In the end no single individual can be blamed for the lack of legislative and judicial oversight in Arizona and California – overseers who might have evaluated the constitutionality, the desirability, or the morality of the conditions of confinement institutionalized at the Security Management Unit in Arizona and at Pelican Bay State Prison in California.

This is not, however, just a story about Arizona and California. This is also a story about the United States, and the myriad tensions between bureaucracy and democracy and human rights in U.S. prisons. It is a story about who is actually punishing wrongdoers and how, a story of creative collaborations between prison bureaucrats, taking place under the radar, outside of the public dialogue of legislative debate or federal court litigation. Almost every state has a Pelican Bay State Prison, a supermax, where hundreds, if not thousands, of prisoners live in long-term solitary confinement, in often-invisible isolation. These prisons were built between 1986 and 2000, decades when incarceration rates were rising and prison facilities were burgeoning. California alone added 21 new prisons, or more than a prison a year, to the state correctional system during these years.²¹

Across the United States, there are at least 20,000 prisoners in supermaxes, living in conditions similar to those at Pelican Bay State Prison.²² These thousands of prisoners, living out their lives in solitary confinement across the United States, join a long history of prisoners who have existed in spaces of isolation throughout American history, reaching back to the earliest Quaker penitentiaries in Pennsylvania. Of course, the Quaker practice of using long-term solitary confinement was largely abandoned in the nineteenth century when the likes of Alexis de Tocqueville and Charles Dickens condemned the practice as a slow and un-ending torture.²³ Although the modern supermax contains echoes of both early Quaker penitentiaries and

like a good example of the kind of normalization of evil within an institutional structure of governance; the overall supermax phenomenon is, however, more complicated. I will argue in chapter one that the supermax has never been completely normalized, either within the governance structure of the prison, or within the American criminal justice system. Rather, both the purpose and the justifications for the supermax have been continuously contested.

²¹ Ruth Wilson Gilmore, *Golden Gulag: Prisons, Surplus, Crisis, and Opposition in Globalizing California* (Berkeley: University of California Press, 2007).

²² Alexandra Naday, Joshua D. Freilich, and Jeff Mellow, "The Elusive Data on Supermax Confinement," *The Prison Journal*, Vol. 88 (1): 69-92 (2008).

²³ Gustave de Beaumont and Alexis de Tocqueville, *On the Penitentiary System in the United States and Its Application to France* (1833), available online at: <http://www.archive.org/details/onpenitentiarysy00beauuoft> (last accessed 13 Mar. 2012); Charles Dickens, "Philadelphia and Its Solitary Prison," *American Notes for General Circulation* (London: Penguin Books, 1842, 1985), available online at: <http://www.online-literature.com/dickens/americanotes/8/> (last accessed 14 Apr. 2012).

twentieth-century isolation cells like “the hole,” the modern supermax differs from its punitive predecessors in a number of ways. First, it is hygienic, sanitized, and technologically advanced. Second, it is novel in the duration of isolation it imposes. Third, it imposes isolation through internal administrative procedures rather than through courts of law. While the supermax is novel, it also embodies classical visions of the prison, both as Bentham’s panopticon, in which every prisoner can be seen at any given moment, and as Foucault’s disciplinary institution, deploying sanitized technology to diffuse contact between the law and the body of the criminal.²⁴

Myriad social forces underlie the supermax explosion of the 1980s and 1990s. These include volatile racial tensions in U.S. prisons; changes to the structure of state criminal sentencing and, therefore, to state prison populations; increased federal court oversight of state prison systems; and statewide commitments of resources, if not of oversight, to investing in prison building and infrastructure. Each of these forces will be examined in detail in the coming chapters. Individuals like the Arizona architect, California correctional administrators, and Judge Thelton Henderson together created and refined an institution that responded to these social forces.

Although scholars have evaluated how and why the American criminal justice system expanded so drastically in the 1980s and 1990s, few have looked closely at the particular physical shape of the extreme end of this expansion: the supermax solitary confinement cell. This is in part because the supermax is a prison within a prison. Researching and understanding U.S. prisons presents many challenges at the basic level of information access. One in every twenty U.S. prisons is privately run and therefore not subject to public information reporting requirements.²⁵ Prisoners and their lawyers are actively discouraged from bringing lawsuits challenging prison conditions.²⁶ Indeed, there are no national and few state agencies explicitly charged with oversight of individual prisons.²⁷ And prison officials as a policy do not welcome journalists.²⁸ When the prison in question is a supermax, a prison within a prison, designed to hold the allegedly most dangerous prisoners in a state, these information access challenges redouble.

²⁴ Jeremy Bentham, *The Panopticon Writings*. Miran Bozovic, ed. (London: Verso, 1787, 1995), available online at: <http://cartome.org/panopticon2.htm> (last accessed 14 Apr. 2012); Michel Foucault, *Discipline and Punish: The Birth of the Prison*, Allan Sheridan, trans. (New York: Random House, 1977, 1995). See also Lorna A. Rhodes, “Supermax as a Technology of Punishment,” *Social Research*, Vol. 74.2: 547-566 (Summer 2007).

²⁵ James J. Stephan, *Census of State and Federal Correctional Facilities, 2005*, NCJ 222182 (U.S. Department of Justice: Bureau of Justice Statistics, Oct. 2008), available online at: <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=530> (last accessed 14 Apr. 2012); Nancy Cook, “How the Recession Hurts Private Prisons,” *Newsweek*, June 30, 2010, available online at: <http://www.newsweek.com/2010/06/30/how-the-recession-hurts-private-prisons.html> (last accessed 14 Apr. 2012). Private prison contracts with state governments sometime contain clauses in which the companies agree to be subject to federal reporting requirements, like the Freedom of Information Act, but exactly what information private companies must provide often remains ambiguous.

²⁶ See John Boston, *The Prison Litigation Reform Act* (New York: Legal Aid Society, Prisoners’ Rights Project, 2004), available online at: www.wnyc.net/pb/docs/plra2cir04.pdf (last accessed 14 Apr. 2012).

²⁷ The Special Litigation Section of the Civil Rights Division of the U.S. Department of Justice investigates prisons upon allegations of abuse or constitutional violations, but they do not regularly visit prisons absent such allegations. In New York and Illinois, there are non-profit organizations (The Correctional Association and the John Howard Association), which have public mandates to monitor conditions in state prisons, but most other states have no comparable organizations with independent monitoring mandates.

²⁸ See, e.g., James McFadden (retired warden, Arizona Department of Corrections), phone interview with author, May 19, 2011, notes on file with author.

But it is not just the structure of the supermax, as a prison within a prison, which discourages research. The institution itself developed outside of the public eye; in California, Judge Thelton Henderson first heard of the prison when he started getting petitions from prisoners complaining about the conditions there. Pelican Bay State Prison was already designed and built and up and running before the federal judiciary, let alone the public, had any idea what the California Department of Corrections had built. This then, is not a story about an electorate and their politicians cracking down on crime or advocating for victims' rights over criminals' rights.²⁹ This is, instead, a story of slow, internal administrative changes happening with little public oversight or intervention. Correctional administrators and architects worked together to design an entirely new kind of punishment – the modern supermax prison. Supermaxes represent the culmination of a Weberian bureaucratic rationalization process; correctional bureaucrats – rather than traditional policymakers such as legislators or lawyers – designed and implemented institutional policies through incremental, rule-driven decisions.³⁰ Bureaucrats and technical experts, rather than legislators or judges, permanently re-shaped the most extreme non-death penalty punishment in the United States.

Because supermaxes imprison U.S. citizens, many of whom will eventually be released back into society, and because supermaxes push against the outer boundaries of cruel and unusual punishment, the institutions are critical to understanding the development of criminal justice policies and punishment practices in the United States. This dissertation traces the development and spread of the institution, from its roots in mid-1970s prisoners' rights litigation and volatile racial tensions in U.S. prisons to the opening of the first supermax in Arizona in 1986, to the opening of the last supermaxes in Guantanamo Bay, Cuba in 2006 and in Colorado in 2010. In the process, the project both sheds light on an under-studied, little-discussed institution, and re-shapes common misconceptions about how criminal justice policy innovation happens.

A. Chapter-by-Chapter Outline

This introduction, along with a discussion of the methods underlying this research comprises Chapter I. Chapter II introduces the contested linguistic and theoretical concept of the “supermax,” provides an overview of the uses of high-security prisons throughout American history, and develops and justifies a four-part working definition of a “supermax prison.” Based on this definition, Chapter II also provides the most-up-to-date (as of 2012) working list of supermax institutions across the United States. Chapter III situates the supermax phenomenon in the context of mass incarceration in the United States and introduces the California case study at the center of this dissertation project. California may seem a surprising site of study for harsh punishment practices. As recently as the 1960s, the state was considered an enlightened leader in rehabilitative corrections policy,³¹ and even today it lags far behind exemplary tough-on-crime states, like Texas, at least in terms of some punitive measures such as executions actually carried

²⁹ For an example of this kind of argument, see generally Vanessa Barker, *The Politics of Imprisonment: How the Democratic Process Shapes the Way America Punishes Offenders* (New York: Oxford University Press, 2009); Shalev, *supra* note 13: 7, 28-41.

³⁰ Max Weber, *On Charisma and Institution Building*, S. N. Eisenstadt, ed. (Chicago: University of Chicago Press, 1968).

³¹ Shelley Bookspan, *A Germ of Goodness: The California State Prison System, 1851-1944* (Lincoln, NE: University of Nebraska Press, 1991).

out.³² In contrast to Texas, which does not have one concentrated supermax prison (isolation cells are spread throughout the system), California has three prisons with supermax units and maintains more than three thousand prison cells explicitly for long-term isolation. Moreover, California was one of the first states to open a supermax prison. Because of its early adopter status and the scale of its supermax confinement, California represents an important case study in the supermax phenomenon.

Chapters IV through VI focus on the administrative nature of the supermax innovation in California. Chapter IV examines the history of prisons and criminal justice reform in California, identifying which factors led correctional administrators to design and build a supermax, and arguing that critical power shifts between the executive, legislative, and judicial branches of government left a power vacuum, which correctional administrators quickly filled, in part through building supermaxes. Chapter V describes the legislative process that nominally underwrote the supermax, arguing that California legislators ceded both planning and moral authority to state correctional administrators. Chapter VI describes the administrative design process that actually produced the supermax institution.

Chapters VII through IX explore the implications of the administrative nature of the supermax innovation. Chapter VII introduces the various purposes that have been retroactively suggested to justify supermaxes, documenting how correctional administrators themselves describe contradictory purposes for the institution; the often-vague and contradictory institutional purposes provide another example of the un-checked power correctional administrators have had to design and operate the institutions. Chapter VIII describes how California's supermaxes have functioned over the last twenty years, since they were first opened, focusing in particular on how the institutions have not been used as intended – detaining prisoners for years and even decades at a time, disproportionately impacting minority prisoners, and releasing prisoners directly from supermaxes onto parole without any transitional services. Chapter VIII documents how correctional bureaucrats not only made the initial supermax design decisions in California, but over time, they have concentrated their power over supermax prisoners internal prison classification procedures. Chapter IX documents how the administrative discretion, which initially underwrote the supermax innovation, has been extended through judicial review of the institutions. Judges, like legislators, have deferred to correctional administrators about the necessity for supermaxes, in spite of a marked lack of empirical evidence to support these necessity claims. Chapter IX provides further examples of the contradictions between the articulated justifications for supermaxes and their day-to-day operation. This chapter presents evidence about double-bunking in institutions designed to impose solitary isolation, and documents the lack of evidence about whether supermaxes have had the positive effects on in-prison violence rates claimed by their designers.

Chapter X returns to America's centuries-long relationship with solitary confinement, analyzing the role of federal courts in engaging with this phenomenon in the nineteenth century, in the 1960s and 1970s, and in the twenty-first century. This chapter argues that federal court interventions in prison conditions cases in the middle of the twentieth century set minimum standards of constitutional confinement, and supermaxes were built to precisely these minimum standards in the 1980s and 1990s. This has made the institutions especially resistant to litigation challenging their constitutionality. The Conclusion discusses the implications of recent supermax-

³² Texas has executed 417 people since 1976; California has only executed 13 in the same period. Death Penalty Information Center, "State by State Database," available online at: http://www.deathpenaltyinfo.org/state_by_state (last accessed 14 Apr. 2012).

related trends, including prisoner protests about the conditions in the institutions and state-based movements to reduce supermax populations. In sum, because supermaxes manifest, both physically and legally, the outer limits of non-death penalty punishment policy, they are critical for understanding both the shape of the U.S. prison expansion, and the impacts of U.S. tough-on-crime policies.

This research draws on a combination of archival materials, including state legislative records, local news sources, and litigation documents, and more than thirty oral history interviews with prison administrators, justice architects, lawyers, psychologists, and former prisoners. The next section provides a description of the sources underlying this dissertation research.

B. Sources and Methods: Tracing Bureaucratic Innovation

This project began with a simple question – where and when did the supermax concept emerge in the United States? In *Sunbelt Justice*, Mona Lynch identified Arizona as the state that built the first supermax, in 1986.³³ California opened Pelican Bay State Prison, widely recognized as one of America’s prototypical supermax prisons, just a few years later in 1989.³⁴ California, then, seemed like a logical place to begin a study of the origins – and the replication – of the supermax concept. The work began with archival and legislative research, looking into the political record of prison building in California. Because this record was extremely limited, key informants, who could describe the supermax design decisions in California, were sought. In addition to researching the history of supermax design, the work also involved investigating the uses of supermaxes in California over the last twenty years, including both interviews with people who lived and worked in the institutions, and analysis of data requested from the California Department of Corrections and Rehabilitation.³⁵ From this California work, the project took on a more national perspective, involving systematic analysis of both case law and local news sources concerning solitary confinement and supermaxes. Each of these sources will be discussed in turn in four following sub-sections.

1. Archives

This project draws in part on the legislative record of prison building in California in the 1980s. What there is of this record exists in the California State Archives in Sacramento, California, in the papers of individual senators and assembly members who were active in the Joint Legislative Committee on Prison Construction in the 1980s, and in the records of the limited debates over prison construction-related legislation in the state in the 1980s. These papers include drafts of legislative bills, legislators’ notes from debates about these bills, notes from legislative committees overseeing prison building, and transcripts of oral history interviews with

³³ Mona Lynch, *Sunbelt Justice: Arizona and the Transformation of American Punishment* (Stanford: Stanford University Press, 2010): 136-7.

³⁴ See, e.g., T.L. Wells, W.W. Johnson, and R.J. Henningsen, “Attitudes of wardens toward administrative segregation and supermax prisons.” *Correctional Perspectives*, L. F. Alarid and P. F. Cromwell, eds. (Los Angeles: Roxbury, 2002): 171-180 (citing Pelican Bay as a prototypical supermax).

³⁵ Note that in 2003, the California Department of Corrections changed its name to the California Department of Corrections and Rehabilitation. Most of this dissertation concerns departmental history and decisions made largely prior to 2003; in these historical chapters, the Department will be referred to by its former name (CDC). In the chapters that analyze current data from the Department, however, it will be referred to by its current name (CDCR).

key legislators involved in the prison building process. The archival review for this dissertation involved (a) a search through California Legislative Bill records of 1986 and 1987 – the years funding for Pelican Bay State Prison was approved – for mentions of Pelican Bay State Prison and Del Norte County, where the prison was sited and (b) an examination of the available legislative history for the few bills that mentioned Pelican Bay or Del Norte, including any debates about the bills or prior drafts, records of legislators who drafted the bills, and records of the committees responsible for sponsoring the prison construction bills.

2. Interviews

Because of the limited legislative record of prison-building, this project involved identifying key informants, who had worked on prison building and design in California in the 1980s, and conducting semi-structured, qualitative, oral history interviews with these key informants. These interviews respond in particular to recent calls from historians to shift the perspective of prison histories from focusing on elite reformers to focusing on the people living and working in the prison institutions themselves.³⁶ In addition to the usual historical documents and evidence, then, this narrative draws in particular on more than thirty formal oral history interviews with correctional employees and administrators (twelve), lawyers and judges (two), prison architects (seven), and former prisoners (ten), as well as dozens more informational interviews.³⁷

Key informants included: the 1980s Undersecretary of Corrections and the 1980s Financial Director of the Department of Corrections, four former supermax wardens, five California correctional psychologists who have worked in supermaxes and supermax-like units in California, the judge who heard an early challenge to the constitutionality of supermax confinement in California, as well as current and former prison architects in California, Arizona, and the federal prison system. The correctional administrators are all referred to by their full names and titles. Both the architects and the correctional psychologists explicitly requested anonymity. The architects are referred to by the region they work or worked in – for example, California architect, Arizona architect, federal architect. The psychologists are referred to by the following simple, randomly assigned labels: Dr. A., Dr. B., Dr. C., Dr. D, and Dr. E. The former prisoners are referred to by their initials; none explicitly requested anonymity.

Because of access concerns – some interview subjects specifically asked not to be recorded, and others indicated they worried about speaking freely with a researcher from Berkeley, which they associated with liberal political leanings – most interviews were not recorded. The ten former prisoner interviews were, however, recorded, and transcripts of these interviews were produced. For the un-recorded interviews, careful notes were taken and transcribed immediately following the interviews. (The interviewer had prior training in taking

³⁶ See e.g., Larry Goldsmith, “History from the Inside Out: Prison Life in Nineteenth-Century Massachusetts,” *Journal of Social History*, Vol. 31 (Fall 1997): 109-125; Rebecca McLennan, “Punishment’s ‘Square Deal’: Prisoners and their Keepers in 1920s New York,” *Journal of Urban History*, Vol. 29 (2003): 597-619.

³⁷ For a discussion of the value of oral history interviews, in particular for documenting criminal justice history, see John H. Laub, “Talking About Crime: Oral History in Criminology and Criminal Justice,” *Oral History Review*, 12 (1984), 29-42. Although oral history interviews are inherently subjective, this subjectivity can be valuable for understanding new perceptions of social reality. See Ronald Fraser, *Blood of Spain: An Oral History of the Spanish Civil War* (New York: Pantheon Books, 1979): 29. Moreover, as Laub suggests, oral history interviews should be subject to tests of validity and reliability (citing James Hoopes, *Oral History: An Introduction for Students* (Chapel Hill: University of North Carolina Press, 1979)).

interview notes as a newspaper reporter.) Where direct quotes are used in this text, they were directly transcribed as quotes during interviews and later re-typed, or they are from interview transcripts, where available.

The interviews were open-ended, lasting from a minimum of one hour to as long as four hours. In some cases, key informants were interviewed twice. In other cases, key informants provided further follow-up information in e-mail exchanges. These e-mails, like the interview notes and transcripts, are on file with the author. In general, interviews began with questions about the subject's career or in-prison experiences, and then focused in on the subject's work with or life in supermax prisons. Subjects were identified initially through community contacts (re-entry organizations, prison education programs, and legal organizations) and subsequently through a kind of snowball sampling, asking each new contact for further introductions.

3. Corrections Data

This dissertation collects a wide variety of quantitative data, focused especially on California Department of Corrections and Rehabilitation (CDCR) population information. CDCR produces monthly and annual population reports, as well as annual statistical compilations of institution-level violence. These numbers were collected initially in Excel spreadsheets and then analyzed using Excel (for simple descriptive information) and Stata (for more complicated statistical analyses).

However, the vast majority of the publicly available CDCR statistics are provided at the institution-level. In California, most supermax prisons, or Secure Housing Units (SHUs), are part of larger prison complexes. So, for instance, both Pelican Bay and Corcoran State Prisons have SHU wings as well as general population, high-security wings. More precise data about supermax prisoners in particular requires targeted information requests from CDCR data analysts and statisticians. Therefore, in addition to analyzing publicly reported information about California prisons, this project analyzes data from multiple data requests made to CDCR.

Much of the data presented here are drawn from one particular data request, made in 2008, which sought to obtain basic demographic information about prisoners in California's supermaxes. The data covers the years 1997 through 2007 and constitutes unique, not previously public information. The initial data request sought: (1) demographic characteristics of prisoners in the state's two original supermaxes, Corcoran and Pelican Bay State Prisons, (2) information about how long these prisoners had spent in supermax conditions, and (3) information about recidivism rates of these prisoners (including how often these prisoners return to supermaxes once released into the general prison population and how often these supermax prisoners return to prison once released onto parole).

Instead of providing data about existing supermax prisoners in 2008, CDCR provided aggregate data about the demographics and prison experiences of prisoners *released* from supermaxes between 1997 and 2007, in response to information requests. Because CDCR does not keep archival records of the population of the supermaxes on every day, over time, the best way to analyze the population over a ten-year period is to look at people who are released, because releases are documented and archived on a day-by-day, incident-by-incident basis. In other words, these are point-prevalence statistics; as with any institution, like a hospital or a school, exit statistics are easier to get and more accurately reflect ongoing patterns, absent day-by-day snapshots of who is in a given institution. A recent article on prison rape described this snapshot problem, explaining that even the Bureau of Justice Statistics, the federal organization

that collects and analyzes data on prisons and jails in the United States, collects data based on a “snapshot technique”, that “represent[s] only a fraction of those incarcerated every year.” The annual jail admissions in the United States, for example, are likely seventeen times greater than the jail population on any given day.³⁸

In sum, in 2008, CDCR provided the following data: (1) ranges and average lengths of stay for all prisoners who had been released from a supermax unit (either into a general prison population or onto parole) between 1997 and 2007; (2) racial breakdowns of this same population of prisoners for each year between 1997 and 2007; (3) the frequency with which these prisoners served multiple terms in the supermax; and (4) the numbers of prisoners released directly from supermaxes onto parole in each of these years. An ideal data set might have included demographic characteristics and length-of-stay characteristics for prisoners in the supermax over the ten-year period (rather than those prisoners released from the supermax). Such data were not as readily available, however, because of the institutional snapshot problem. Indeed, four different CDCR administrators explained that the department does not have any data that track the length of stay of prisoners in supermax units. A researcher in CDCR explained that administrators “manage beds not people ... so their measurement is how long a bed is occupied ... they can’t tell you how long a guy has been there because they start the count over every time he moves to a new bed.”³⁹ So, CDCR officials know how many beds were occupied in an institution at any given time (and over time), but not who was occupying each of those beds, and for how long.

These statements further confirm that the data obtained through information requests and analyzed here is unique, not usually collected by CDCR, and the best available data on California supermax populations. One other study that looked at similar data about populations within a supermax was conducted in Washington state, which has just over 200 people in supermax conditions (less than one-tenth of California’s supermax population). The researchers obtained their data through case-by-case reviews of individual prisoner’s files.⁴⁰ Due to the significantly larger scale of supermax incarceration in California, such case-by-case reviews are not feasible at this time.

In addition to supermax release data, historical data about the numbers of deaths (including homicide and suicide) and assaults in CDCR, from 1970 through the present day, were also requested and received. This data provides some picture of the amount of violence in the department over the last forty years, supplementing what is available in public reports.

4. Case Law and Local Media Analysis

This dissertation also draws on case law and media analyses, in order to understand both the scale and nature of the supermax phenomenon in the United States and the history of litigation around harsh conditions of confinement. A combination of factors makes identifying and tracking any state-level correctional policy trend in the United States a labor-intensive process. First, there is the definitional problem discussed in Chapter II: for any given policy, a standardized definition must be established. For instance: what constitutes a supermax; who

³⁸ David Kaiser and Lovisa Stannow, “The Rape of American Prisoners,” *The New York Review of Books*, Vol. 57.4, Mar. 11, 2010.

³⁹ Departmental Researcher, phone interview with author, May 19, 2010, notes on file with author.

⁴⁰ David Lovell, Kristin Cloyes, David G. Allen and Lorna A. Rhodes, “Who Lives in Supermaximum Custody? A Washington State Study,” *Federal Probation*, Vol. 64.2 (Dec. 2000): 33-38.

defines the institution, and how? Then, there is the problem of each state setting its own correctional policies – from writing the laws about who goes to prison and how they are treated while they are there, to determining what data gets collected about prison institutions. Even when national organizations attempt to collect state-level data, state prisons often have a fair amount of discretion in how they define everything from a fiscal year to a level of security, and this determines how they report aggregated data. Therefore, in order to compile accurate national and state-level data about supermax prisons, this project required triangulating among a number of sources.

The then most-current 2010 ACA Directory,⁴¹ which provides institution-level descriptive statistics about each prison in the United States, served as a starting point for identifying high-security institutions and evaluating segregation practices in state prisons. Additional data sources were then used to verify the ACA Directory information, such as which prisons were characterized as “maximum” or “supermaximum security.” These additional sources included news archives about prison building and prison litigation (primarily those news sources archived through LexisNexis, or publicly searchable through Google), evidence documented in court cases challenging the institutions, data collected by advocacy organizations like Human Rights Watch and Solitary Watch, and state-level department of corrections annual population and budget reports. In order to identify institutions as supermaxes in this dissertation, at least two references were identified confirming the institution’s status. Such references either labeled any given institution as “a supermax,” or described institutions that held the “highest security” prisoners in the state, or the state’s “most dangerous” prisoners, and also described highly restrictive conditions of confinement in these institutions.

In focusing on the history of the building of Pelican Bay in particular, a LexisNexis search of California daily newspapers was conducted. The search sought any mention of Del Norte County or Pelican Bay State Prison between 1986 and 1990. This search produced twenty-seven news stories relevant to the design and construction of Pelican Bay; relevant information from these news stories appears throughout the analysis in the dissertation.

In focusing on the history of litigation around solitary confinement in the United States, a LexisNexis search of all *federal* cases including the terms “solitary confinement,” in combination with “prison,” for the years 1963 to 1993 was conducted. 1963 is the year that the Eighth Amendment was incorporated, or applied to citizens of the states, and 1993 is the year that a federal court in California heard one of the first major cases about supermax prisons, so it marks the end of the pre-supermax era of litigation. This search resulted in more than 900 cases. However, there was significant overlap among cases; each iteration of a case, at each level of appeal, for instance, appears as a separate search result. From the hundreds of cases pulled, cases were selected for analysis only if they involved some form of class action litigation, as these are the cases that are more likely to have significant impact on individual prisons and on broader state prison systems. Although some of the 1960s and 1970s prisoners’ rights litigation took place in state courts, the majority of these cases were litigated in federal courts, because the majority of the plaintiffs were claiming federal rights – to be free from cruel and unusual punishment under the Eighth Amendment to the U.S. Constitution, or to hold prison officials responsible for unconstitutional actions, under the federal Civil Rights Act. Therefore, only federal cases were searched for this portion of the project.

⁴¹ American Correctional Association, *2010 Directory of Adult and Juvenile Correctional Departments, Institutions, Agencies, and Probation and Parole Authorities*, 71st ed. (Alexandria, VA: American Correctional Association, 2010).

Given the hundreds of cases retrieved in the LexisNexis search described above, an examination of the procedural history and legal analysis in every case would be a lifetime project in itself. Therefore a selection of representative cases was made for the analysis presented in Chapter X; the selection reflected a combination of (1) geographic diversity, (2) diversity in scale of class action litigation (some cases involve a single prison and some involve an entire state prison system), (3) diversity in duration of litigation and (4) diversity in kind of remedy ordered by the federal court.

In sum, this project has required creative and persistent triangulation of a variety of sources and forms of analysis, in order to uncover the story of a previously hidden institutional innovation.

II. What Exactly Is a “Supermax”?

This chapter introduces and explores the concept of supermaximum security confinement, as it has developed in the United States in the late twentieth century. Through this exploration, the chapter develops a working definition of supermaxes, as a starting point for analyzing the institutional concept and the American phenomenon throughout the rest of the dissertation. Each of the first four sections in this chapter will serve as the foundation of one of the four prongs of the working definition of a supermax presented in the fifth section.

The chapter begins with a section that traces the first appearance of the words “super-maximum” and “super-max” in association with a prison, arguing that the term took on its specific present-day meaning only in the mid-1980s, though that meaning remains contested. The use of the term “supermax,” beginning in 1984, however, is an important chronological marker of the beginning of the modern supermax phenomenon. The many uses to which the term “supermax” was put throughout the twentieth century, however, foreshadow a continued confusion about how to define and categorize the highest security prisons in the United States.

The second section traces the often-public contestation, beginning in the 1980s, over what exactly constitutes a supermax prison. This section delineates the difference between disciplinary segregation and administrative segregation, two terms often used as correctional shorthand to distinguish short, fixed terms of isolation from longer, indefinite terms of supermax confinement. However, this section argues that the distinction is not especially useful, because it is often both linguistically and conceptually blurred between institutions and states.

The third section looks beyond supermax labels to the actual conditions of confinement in institutions labeled as supermaxes; this section argues that, as with the label supermax, the various labels associated with conditions of confinement in the institutions are contested, varying between institutions and states. This section examines correctional administrators’ claims about conditions of confinement in supermaxes – especially their frequent public denials that the institutions impose either solitary confinement or sensory deprivation.

In order to flesh out the concept of solitary confinement, the fourth section traces the uses of both solitary confinement and sensory deprivation throughout U.S. history, pointing out the similarities and differences in practices, working towards a common terminology of the conditions of confinement in supermaxes.

The fifth section details existing definitions of supermax prisons, explains their shortcomings in light of the conceptual discussions in the first four sections, and presents a working definition of supermax prisons. In other words, this section introduces a preliminary attempt to categorize the highest security prisons in the United States and presents terminology that will be used throughout this dissertation. The sixth and final section applies this working supermax definition. The institutions discussed throughout this chapter are categorized as supermaxes or not, and then a working list of current supermax institutions in the United States is presented. The tables associated with this section (which appear in Appendix A) represent the most-up-to-date and comprehensive list of supermax prisons in the United States.

A. The Origins of the Term “Supermax”

The term “super-maximum” has been used throughout the second half of the twentieth century to describe various forms of high-security prisons in the United States. The short-form “super-max,” however, only appeared later in the century, in the 1980s. Even today, the terms

continue to lack precision; states and the federal system vary both in the kinds of prisons they build and use and the labels they use to describe and categorize these prisons. Nonetheless, the term “supermax,” starting around 1984, took on the colloquial meaning of an extremely high security prison. This section will trace the development of this terminology.

The Oxford English Dictionary lists 1954 as the first time “super-maximum” was used in the prison context; the reference was in the *Annals of the American Academy of Political and Social Science* and was, appropriately, to a prison in California.⁴² Scudder, the author of the article and a superintendent (or warden) of Chino Prison, then a minimum-security prison in California, characterizes Folsom Prison as the state’s “super maximum-security prison.” Scudder recalls: “I once asked Bob Heinze, warden of Folsom, California’s super maximum-security prison, how many of his 2,600 men were too dangerous to be at large in the prison yard.”

And Heinze replied: “If I could lock up eighty men and keep them away from the general population, this place would be a paradise.” Scudder explained that, in response to Heinze’s wish, California’s department of corrections “furnished a new unit for such a purpose,” with room to house two-hundred prisoners. But Heinze could never keep the isolation unit filled. “Even the willful troublemakers would rather behave than be deprived of the meager freedom of a prison yard,” Scudder explained.⁴³ Folsom, then, was California’s highest security prison in the 1950s; in this sense it was a *super*-maximum security institution. Folsom, built in 1880, has been in continuous operation for more than a century; today the same physical structure built in the 1880s, and referenced by Heinze in the 1950s as supermaximum, operates as a minimum-to-medium security prison.⁴⁴ It is a physically different structure, with different operational policies, from California’s main modern supermaxes at Pelican Bay State Prison and at Corcoran State Prison (built in the mid-1980s). The supermax wings at Pelican Bay and Corcoran each keep close to 1,000 people in long-term isolation, as compared to the fewer-than-two-hundred prisoners Heinze maintained in short-term isolation at Folsom in the 1950s. Indeed, even in the 1950s, Folsom Prison operated in much the same way it does today – allowing the majority of prisoners to congregate together on a prison yard. So Folsom has never been a prison defined by total isolation or solitary confinement.

Alcatraz, like Folsom, has often been referred to as a “supermaximum security prison” or a “supermax.”⁴⁵ Alcatraz was a federal penitentiary, which the Bureau of Prisons operated from 1934 to 1963. Just as Folsom was California’s highest security prison in this era, Alcatraz was the federal Bureau of Prison’s highest security prison in the middle of the twentieth century. Also like Folsom, Alcatraz was a prison where most prisoners congregated together on a prison yard, ate meals in an open dining hall, and worked jobs to help run the prison. Also like Folsom, it was a prison that contained a few dozen isolation cells for troublemakers – cells which were often empty.⁴⁶ This is a stark contrast to the federal prison’s main modern supermax in Florence,

⁴² “Super-maximum,” *Oxford English Dictionary*, 3rd ed. (New York: Oxford University Press, 2006, online version Mar. 2012), available online at: <http://www.oed.com/view/Entry/249168> (last accessed 15 Apr. 2012).

⁴³ Kenyon J. Scudder, “The Open Institution,” *Annals of the American Academy of Political and Social Science*, Special Issue on *Prisons in Transformation*, Vol. 293 (May 1954): 79-87.

⁴⁴ “Folsom State Prison,” available online at: http://www.cdcr.ca.gov/Facilities_Locator/fsp.html (last accessed 20 Apr. 2012).

⁴⁵ See, e.g., David Ward, with Gene Kassebaum, *Alcatraz: The Gangster Years* (Berkeley: University of California Press, 2009); David A. Ward and Thomas G. Werlich, “Alcatraz and Marion: Evaluating Supermaximum Custody,” *Punishment & Society*, Vol. 5.1 (2003): 53-75, at 55-56.

⁴⁶ P. Odier, *The rock: A history of the fort/the prison* (Eagle Rock, CA: L’Image Odier Publishing Company, 1982): 113-117.

Colorado, the Administrative Maximum facility (built in the early 1990s), which holds more than 400 prisoners in long-term, total solitary confinement.⁴⁷ The term super-maximum, as a kind of superlative reference to the highest security facilities, then, has been tossed about for more than a half-century, but with a different connotation than the one it took on in the last decades of the twentieth century.

Indeed, calling Alcatraz a “supermax” is practically anachronistic, the short-form term “super-max” did not appear until the late 1970s, or early 1980s, decades after Alcatraz had been shut down. Again according to the *Oxford English Dictionary*, the first reference to “super-max” as a noun describing a prison appeared in a local Maryland paper, *The Frederick News*, in 1980, and the first reference to “super-max” as an adjective describing a prison appeared in *The National Journal* in 1981.⁴⁸ Both stories, however, were still using “super-max” to refer to old-style penitentiaries, built earlier in the 1900s. *The Frederick News* story referenced the plan for demolition of the so-called “super max” block at the Jessup House of Correction, following lawsuits about overcrowding at the decrepit facility.⁴⁹ The *National Journal* article described the growing federal and state emphasis on prison-building in the United States, highlighting in particular New Mexico’s decision to dedicate \$44 million to building a “super-max” prison, following a 1980 riot at the Penitentiary of New Mexico.⁵⁰ Another 1980 article, which focused explicitly on the New Mexico prison riot and its aftermath, similarly referenced the New Mexico corrections legislation, with the \$44 million “centerpiece” allocated to building a new “super-max” prison. But this article went on to explain that this so-called “super-max” was actually discussed by the legislature as a simple “maximum security prison” before the appropriations bill was passed.⁵¹ Indeed, New Mexico did not actually build a modern supermax for twenty more years; an October 1999 news story in the *Albuquerque Journal* noted that New Mexico correctional officials and lawmakers were touring a Colorado supermax, considering whether to copy the model – for the first time – in New Mexico. A state representative at the time expressed his skepticism that New Mexico needed a supermax at all: “[W]e need to take a real hard look at our entire (prison) system before we do a super-max.”⁵² The state did subsequently retrofit two existing state prisons, to implement super-max conditions, like those in the Colorado State Penitentiary, but not until the early 2000s.

The term “super-max,” then, became popular in the early 1980s, as a kind of short-hand reference to high-security prison facilities. But in the early references, the term, like its

⁴⁷ National Institute of Corrections, “Supermax Housing: A Survey of Current Practice,” *Special Issues in Corrections*, U.S. Department of Justice (Longmont, CO: LIS, Inc., Mar. 1997), available online at: <http://static.nicic.gov/Library/013722.pdf> (last accessed 11 Feb 2012); Stephanie Chen, “Terribly Tommy Spends 27 Years in Solitary Confinement,” *CNN Justice*, Feb. 25, 2010, available online at: http://articles.cnn.com/2010-02-25/justice/colorado.supermax.silverstein.solitary_1_solitary-confinement-federal-prison-system-cell/2?_s=PM:CRIME (last accessed 13 Feb. 2012).

⁴⁸ “Super-max,” *Oxford English Dictionary*, 3rd ed. (New York: Oxford University Press, 2006, online version Mar. 2012), available online at: <http://www.oed.com/view/Entry/249168> (last accessed 15 Apr. 2012); “Report recommends Jessup be renovated,” *The Frederick News*, Nov. 3, 1980 (“The penitentiary’s ‘super max’ or ‘C-block’, where the state’s most dangerous prisoners are housed”); Jerry Hagstrom, “Crowded Prisons Pose a Budget Problem For This Law-and-Order Administration,” *The National Journal*, Vol. 13.41, Oct. 10, 1981: 1821 (“The legislation’s centerpiece was \$44 million for a new ‘super-max’ prison.”).

⁴⁹ “Report recommends,” *The Frederick News*, *supra* note 48.

⁵⁰ Hagstrom, *supra* note 48.

⁵¹ Michael S. Serrill and Peter Katel, “The Anatomy of a Riot: The facts behind New Mexico’s bloody ordeal,” *Corrections Magazine*, Apr. 1980: 7-24, at 7, 24.

⁵² Loie Fecteau, “Tour Set For Super-Max Penitentiary,” *The Albuquerque Journal*, Oct. 27, 1999: B-3.

predecessor “supermaximum” tended to refer simply to a given correctional system’s highest security prison, rather than to a specific physical structure or set of operational procedures.

The first reference to the term “supermax” (non-hyphenated) in relation to a modern, new form of extremely high-security prison seems to be from 1984. In that year, the term “supermax” first appeared in *Corrections Today*, in an advertisement “for a lighting system dubbed Supermax.”⁵³ Two years later, in 1986, the Arizona Department of Corrections opened a new kind of high-security prison, touted at the time as a “supermax,” and copied just two years later by the California Department of Corrections.

At this point, in popular media at least, the term “supermax” began to take on a specific, colloquial meaning. References to “supermaxes” in both Arizona and California explained that the institutions would hold the “worst of the worst” prisoners in the state.⁵⁴ News stories about the institutions referenced the extremity of the isolation each would impose on these “worst” prisoners, with “high-tech” tools of security. For instance, a few months after Pelican Bay opened, a *Los Angeles Times* reporter described the facility, emphasizing how automated the isolation was:

*Pelican Bay is entirely automated and designed so that inmates have virtually no face-to-face contact with guards or other inmates ... inmates are confined to their windowless cells, built of solid blocks of concrete and stainless steel so that they won't have access to materials they could fashion into weapons ... Inmates eat all meals in their cells and leave only for brief showers and 90 minutes of daily exercise. They shower alone and exercise alone in miniature yards of barren patches of cement enclosed by 20-foot-high cement walls covered with metal screens. The doors to their cells are opened and closed electronically by a guard in a control booth.*⁵⁵

Indeed, Lynch notes that during the late 1980s, when the first modern supermaxes in Arizona and California opened, *Corrections Today* increasingly referenced commodities useful to supermax builders and operators:

*In 1988, the first marketing of actual supermax units as a security-oriented corrections product first appeared in my sample. The architectural firm that designed the first state-level supermax units in the USA – the Eyman SMU in Arizona and Pelican Bay in California – used these accomplishments to drum up more supermax construction contracts in their 1988 advertisement.*⁵⁶

Arizona architecture firms were advertising their supermax institutional floor plan, along with various construction products integral to the supermax design, including perforated steel doors. In this case, architects clearly attempted to associate particular design details with a specific institutional concept: the supermax. Rhodes has also analyzed the role of technology in the

⁵³ Mona Lynch, “Selling ‘securityware’: Transformations in prison commodities advertising, 1949-99,” *Punishment and Society*, Vol 4.3 (2002): 305-319, at 313. *Corrections Today* is “the professional membership publication of the American Correctional Association,” and it targets “individuals involved in every sector of the corrections and criminal justice fields.” American Correctional Association, “Publishing & Periodicals,” available online at: <http://www.aca.org/publications/ctmagazine.asp> (last accessed 16 Feb. 2011).

⁵⁴ See, e.g., Corwin, “High-Tech Facility,” *supra* note 3; John Griffith, “New Border Prison Spurs Concerns,” *The Oregonian*, Dec. 1, 1989: D-1; Christian Palmer, “Time’s running out for Arizona death row inmate Robert Comer,” *Arizona Capitol Times*, May 18, 2007 (describing Robert “Gypsy” Comer as “the state’s most dangerous inmate,” who had served 20 years in Arizona’s supermax, the SMU).

⁵⁵ Corwin, “High-Tech Facility,” *supra* note 3.

⁵⁶ Lynch, “Selling ‘securityware,’” *supra* note 53: 10.

supermax phenomenon, arguing that the deployment of new technologies in the institutions render them appealing, to administrators and the public alike, as well-run machines.⁵⁷

By 1990, then, “supermax” was a term being used by reporters and academics, correctional administrators and architectural firms alike. In each of these professional contexts, the term “supermax” referenced a new kind of prison, built in the mid-1980s, equipped with modern technologies of security, which facilitated the total isolation of a given state’s highest security prisoners. In 1990, the supermax concept seemed relatively straightforward. And yet, twenty-two years later, in 2012, there was no definitive national count of how many supermaxes existed in the United States, or of how many prisoners annually were held in supermax confinement. Estimates of the number of supermax facilities in the U.S. range from 20 to 57.⁵⁸ And estimates of the number of people confined in such facilities range from 20,000 to 80,000.⁵⁹ The next section explores the source of this wide variation in supermax counting.

B. Defining the Supermax

Estimates of how many supermax prisons and prisoners there are in the United States vary because the definition of what constitutes a supermax varies with which state, correctional administrator, lawyer, or architect is labeling and categorizing the institution. This variation is in part a product of state-based governance; each of the 50 states writes its own criminal laws, determines its own correctional budgets, and establishes conditions of confinement consonant with these laws and budgets. So of course prison security, and the labels assigned to different security levels, varies by state. This section will first describe the range of variation in labeling the highest security prisons in any given state. Second, the section will identify a common definition used by scholars to distinguish supermax prisons from non-supermax prisons: identifying supermax prisons as administrative segregation facilities, as opposed to disciplinary segregation facilities. This distinction, however, is difficult to apply and imprecise in practice. The variation in supermax decisions, though, is not simply due to accidental variation between states, or to imprecise linguistic categories. Variations in labeling and categorizing supermaxes, it turns out, often involve fairly public negotiation, between correctional administrators, legal advocates, and the media, over the pros and cons of certain labels and categories.

At one level, the variation in labeling and categorizing a given prison as a supermax is semantic: the California Department of Corrections calls its supermax cells Secure Housing Units, or SHUs; the Arizona Department of Corrections calls its supermax cells Special Management Units, or SMUs; the Massachusetts Department of Corrections calls its supermax cells Departmental Disciplinary Units, or DDUs; the federal Bureau of Prisons calls its supermax cells the Administrative Maximums, or ADX. Just as states (along with the federal government) control their own criminal laws and prisons, so they control the labels assigned to these institutions. Nonetheless, these disparate names represent labels for reasonably similar

⁵⁷ Lorna A. Rhodes, “Supermax as a Technology of Punishment,” *Social Research*, Vol. 74.2 (Summer 2007): 547-566, at 548-49.

⁵⁸ Chase Riveland, *Supermax Prisons: Overview and General Considerations* (U.S. Department of Justice, National Institute of Corrections, January 1999), available online at: <http://www.nicic.org/pubs/1999/014937.pdf> (last accessed 13 Feb. 2012); Naday, Freilich and Mellow, *supra* note 22.

⁵⁹ Jean Casella and James Ridgeway, “How Many Prisoners Are in Solitary Confinement in the United States?” *Solitary Watch*, Feb. 1, 2012, available online at: <http://solitarywatch.com/2012/02/01/how-many-prisoners-are-in-solitary-confinement-in-the-united-states/> (last accessed 21 Apr. 2012).

institutions; the SHUs, SMUs, DDUs, and ADXs each represent the highest security prison cells in a given prison system, and each singles out some prisoners for segregation – from the rest of the prison population – and for isolation – from virtually all human contact.

The disparity in naming, however, makes it hard for the average researcher, or data collection agency, to actually identify which institutions are supermaxes. So scholars and analysts have worked to come up with distinguishing characteristics of supermaxes. One conceptual distinction often made between supermaxes and non-supermaxes is: administrative segregation (supermaxes) versus disciplinary segregation (non-supermaxes). For instance, the Criminal Justice Institute (CJI), which published a semi-annual, survey-based *Corrections Yearbook* between 1978 and 2002, defined supermaxes as places of “administrative segregation,” which hold:

*Inmates who have been adjudged to be a threat to institutional security and therefore have been admitted to administrative segregation by administrative hearing rather than by the classification process ... for whom the greatest degree of observation and stringent security is applied.*⁶⁰

By contrast, CJI describes disciplinary segregation as “maximum security housing under stringent security for a fixed amount of time as punishment for an infraction of institutional rules.”⁶¹ So disciplinary segregation is a kind of segregation focused on “punishment” of *individual* prisoners who break prison rules. Administrative segregation, on the other hand, is a kind of segregation focused on “institutional security,” designed to control a *class* of prisoners who threaten that security. And disciplinary segregation, unlike administrative segregation, is for a “fixed amount of time.”

This neat distinction between administrative and disciplinary segregation is one that other organizations and scholars alike have deployed, often to distinguish large, free-standing supermaximum security facilities, where prisoners are in isolation for months at a time, from smaller units within prisons of any security level, often colloquially referred to as “the hole,” where prisoners are in isolation for short periods of time, as punishment for breaking a prison rule.⁶²

Upon examination of just the four supermax facilities listed as examples earlier in this section, however, this administrative-disciplinary distinction breaks down. First, states themselves do not consistently deploy this administrative-disciplinary distinction in their own institutional labels. California, for instance, calls its shorter-term, in-prison isolation units, which primarily hold prisoners who have broken in-prison rules and are serving fixed periods in punitive isolation, *Administrative Segregation Units* (ASUs), or Ad. Seg.; these are exactly the kind of units that CJI and others would ordinarily describe as disciplinary. By contrast, Massachusetts calls its supermax units, which hold prisoners for indefinitely long periods of time based on their status as institutional security threats, *disciplinary* units, or DDUs; this is the kind

⁶⁰ Camille Graham Camp, ed. *The 2002 Corrections Yearbook: Adult Corrections* (Middletown, CT: The Criminal Justice Institute, 2003): 43.

⁶¹ *Id.* at 42.

⁶² For references to the administrative versus disciplinary segregation distinction, see e.g., National Institute of Corrections, “Supermax Housing,” *supra* note 47; Naday, Freilich, and Mellow, *supra* note 22; Roy D. King, “The Rise and Rise of Supermax: An American Problem in Search of a Solution?” *Punishment and Society*, Vol. 1.2 (Oct. 1999): 163-86; Lorna A. Rhodes, “Supermax as a Technology of Punishment,” *Social Research*, Vol. 74.2 (Summer 2007): 547-566, at 549; Jerry R. DeMaio, “If You Build It, They Will Come: The Threat of Overclassification in Wisconsin’s Supermax Prison,” *Wisconsin Law Review*, (2001): 207-47.

of unit that CJJ and others would ordinarily describe as administrative. ADX, the federal Bureau of Prisons' supermax, is the one supermax example given above that actually seems to be appropriately named as an "Administrative" segregation facility, at least based on the *Corrections Yearbook* taxonomy.

Not only is the administrative-disciplinary distinction applied differently from institution to institution and state to state, but many states hold a variety of categories of prisoners in the same high-security institutions, under identical conditions. For instance, California's SHUs, like Pelican Bay and Corcoran State Prisons, house administrative segregation prisoners (those identified as institutional security threats and serving indefinite SHU terms) and disciplinary segregation prisoners (those being punished for breaking rules and serving fixed SHU terms) together. Arizona's SMU adds a third category of prisoners to the administrative and disciplinary categories: death-sentenced prisoners.⁶³ This further confuses the supermax taxonomy of administrative segregation.

In sum, although scholars and criminal justice data collection agencies attempt to distinguish between administrative and disciplinary segregation, the practical, on-the-ground reality is that (a) different states use different terminology to label similar institutional forms and (b) the alleged distinction between administrative and disciplinary segregation is blurred from institution to institution. Specifically, prisoners might be lumped together in extremely high-security, supermax units for one of three reasons: (1) they have been sentenced by a criminal court to death; (2) they have been found guilty, through an in-prison disciplinary hearing process, of breaking a prison rule and are serving fixed periods of time in isolation; (3) they have been found, through an in-prison administrative hearing process, to be threats to institutional safety and security and are serving indefinite periods of time in isolation.

Not surprisingly, these confusions in labeling and categorizing result in both (1) a wide range of rather disparate-looking facilities being labeled supermaxes and (2) contradictions from source-to-source, and even within sources, about which facilities are supermaxes. Two extremes of facilities often labeled as supermaxes provide an example of the disparities in form. The SHUs at Pelican Bay State Prison, often labeled as a supermax, have already been described in detail – prisoners remain alone in their windowless cells twenty-two or more hours per day; exercise in small, cage-like areas for an hour per day at most; and generally only have physical contact with other human beings if they are being hand- and leg-cuffed by correctional officers escorting them to visits with legal or medical professionals. Prisoners spend an average of two years in these conditions.⁶⁴ By contrast, Oak Park Heights, opened in Minnesota in 1982, is frequently referenced as one of the U.S. supermaxes.⁶⁵ However, all but about 50 of the 440 prisoners in this facility participate in group-based programs, like school or job training, so there

⁶³ Some states hold death row prisoners in relatively less secure conditions, allowing death-sentenced prisoners to have many tools and objects in their cells (e.g., the Donaldson Correctional Facility in Alabama) that would be forbidden to supermax prisoners and to have extended "contact" visits with lawyers and family (e.g., San Quentin State Prison in California), rather than the visits through glass or via teleconference that supermax prisoners would be permitted. But some states, like Arizona, house death-sentenced prisoners in supermax units, in the same prison-facilities with high-security, non-death-sentenced prisoners.

⁶⁴ See *infra* the section "Duration of Confinement" in Chapter VIII.

⁶⁵ See, e.g., C.S. Briggs, J.L. Sundt, and T.C. Castellano, "The effect of supermaximum security prisons on aggregate levels of institutional violence," *Criminology*, Vol. 41 (2003): 1341-1376; National Institute of Corrections, "Supermax Housing," *supra* note 47.

is no long-term solitary confinement for high-security prisoners at this institution.⁶⁶ In fact, the institution was explicitly designed to facilitate prisoner participation in full-time (seven to fifteen hours per day), out-of-cell programming and activities.⁶⁷ Not surprisingly, the categorization of Oak Park Heights as a supermax has been disputed in recent years.⁶⁸

But the problem of practically disparate facilities receiving comparable labels is just the first point of confusion when it comes to categorizing supermaxes. The second categorization problem arises in collecting and analyzing data about supermaxes, as for instance with the state department of corrections surveys conducted for CJI's *Corrections Yearbook* and the American Correctional Association's (ACA) *Directory of Correctional Departments*.⁶⁹ Both the CJI and ACA publications rely on self-reported data; state correctional departments provide data at will about how many prisoners they incarcerate at various security levels, and what kinds of programs they run in each state institution. In other words, a state determines whether to characterize any of its prison institutions as supermaxes. In general, states tend *not* to characterize their prisons as supermaxes; in the 2010 ACA directory, only eight states (Arkansas, Illinois, Maine, New Mexico, Ohio, Rhode Island, South Carolina, and Washington) acknowledged that they have any prisoners held at a supermax level of confinement.⁷⁰ Notably absent: California and Arizona, which are widely acknowledged in the news media and by correctional administrators in each of those states, to have four of the original supermax structures. These absences call into question the validity of the supermax labels reported in the ACA directory. Indeed, the directory itself sometimes contains contradictions, with a state listing zero prisoners held at a supermax-security level in the summary statistics table, but then identifying individual institutions within the state as supermax institutions.⁷¹

This labeling and categorization confusion is further perpetuated when state department of corrections officials enter debates with legal advocates about whether the state prison system includes supermaxes. New York State provides a good example of this. The state's department of corrections website simply identifies 17 of the state's 67 prisons as maximum-security facilities; nowhere on the website are any supermaximum facilities mentioned or identified.⁷² However, an investigative report by a non-profit watchdog organization in the state established that a number of facilities in the state maintain prisoners in "23-hour lockdown." For instance, Southport Correctional Facility maintains 700 prisoners in solitary confinement, for terms averaging more than two years, without any access to group-based programs or activities. As the investigative

⁶⁶ Minnesota Department of Corrections, "Minnesota Correctional Facility-Oak Park Heights," available online at: <http://www.doc.state.mn.us/facilities/oakpark.htm> (last accessed 17 Apr. 2012).

⁶⁷ Leena Kurki and Norval Morris, "The Purposes, Practices, and Problems of Supermax Prisons," *Crime and Justice: A Review of Research*, Vol. 28, Michael Tonry, ed. (Chicago: University of Chicago Press, 2001): 385-424, at 390-91.

⁶⁸ *Id.*

⁶⁹ American Correctional Association, *2010 Directory of Adult and Juvenile Correctional Departments, Institutions, Agencies, and Probation and Parole Authorities*. 71st ed. (Alexandria, VA: American Correctional Association, 2010).

⁷⁰ See American Correctional Association, *2010 Directory*, *supra* note 69: "Adult Population by Gender and Security Level on Sept. 30, 2009," at 36-37.

⁷¹ See Naday, Freilich, and Mellow, *supra* note 22: 75 (noting disparities in the 2003 ACA Directory). Similar disparities were noted by the author in the 2010 ACA Directory.

⁷² New York Department of Corrections and Community Supervision, "Facility Listing," available online at: <http://www.doccs.ny.gov/faclist.html> (last accessed 17 Apr. 2012).

report notes: “In some jurisdictions, these facilities would be called ‘supermaxes,’ but New York correction officials resist that term.”⁷³

Interestingly, the investigative report refers to all segregation in the state as “disciplinary” segregation; in this case, the label seems fairly accurate, as even the prisoners serving long periods of solitary confinement in New York’s newest and highest security prisons, are there for fixed periods of time, based on in-prison charges for breaking in-prison rules (as opposed to being there for indefinite periods of time, based on administrative assignment due to the status of being a danger to institutional safety and security).⁷⁴ The fact that prisons in New York, which the Correctional Association’s investigative report argues should be labeled as supermaxes, contain only prisoners in disciplinary segregation further confuses the administrative-disciplinary distinction discussed above.

This section has focused on the varieties of supermax definitions that exist and the challenges of labeling and categorizing that arise across states. As noted, states might use common terminology to describe widely disparate institutions (e.g., California’s Pelican Bay and Minnesota’s Oak Park Heights), or disparate terminology to describe functionally comparable institutions (e.g., California’s Pelican Bay and New York’s Southport). Although the CJI *Corrections Yearbook* definition of supermaxes suggested that they are (a) the highest security prisons in a given prison system and (b) hold prisoners who have been administratively deemed to be risks to institutional safety and security, this section has tried to demonstrate that this definition is both semantically and conceptually imperfect.

This raises the question of what descriptors might be used to adequately label and categorize a given high-security prison as a supermax. The Correctional Association report out of New York suggests that supermaxes are places of “23-hour lockdown” without group-based programs. But, what if the lock-down is only 22-hours per day, as at Pelican Bay, and what of the Oak Park Heights facility, which is called a supermax, but which has group-based programs? In short, what exactly is a supermax?

The next section will take a step towards developing a working definition of the form of the supermax institution, by focusing on whether there are defining characteristics of the conditions of supermax confinement. As it turns out, New York’s resistance to labeling its modern, highest-security “lockdown” prisons as supermaxes, in spite of pressure from advocacy organizations like the Correctional Association of New York, provides an important clue to the challenge of even establishing whether there are conditions common to all supermax prisons. Just as there are debates over whether any given prison is a supermax, and whether a supermax imposes administrative or disciplinary segregation, there are also debates over whether supermaxes imposes solitary confinement or not.

C. Is Solitary Confinement the Defining Characteristic of Supermaxes?

Most extant definitions of supermaxes, in addition to negotiating the administrative-disciplinary distinction in institutional assignment and population, emphasize the total isolation supermaxes impose. For instance, the National Institute of Corrections, which published one of

⁷³ The Correctional Association of New York, *Lockdown New York: Disciplinary Confinement in New York State Prisons* (Oct. 2003): 9, 19, available online at: www.correctionalassociation.org/publications/download/pvp/issue_reports/lockdown-new-york_report.pdf (last accessed 17 Apr. 2012).

⁷⁴ *Id.* at 17-18.

the first national surveys focused on identifying supermaxes, defined the institutions as “free-standing” segregation facilities, imposing non-routine, non-disciplinary segregation, and housing prisoners whose “behavior can be controlled only by separation, restricted movement, and limited direct access to staff and other inmates.”⁷⁵ The Criminal Justice Institute, discussed above for its focus on supermaxes as administrative segregation institutions, further described the conditions in the institutions as “restricting [inmates] to their cells for the majority of their time,” and requiring that prisoners be placed in “restraints when moving in the institution and on trips outside the secure perimeter, hand and leg restraints and armed supervision.”⁷⁶ The American Correctional Association, in its 1998 *Dictionary of Criminal Justice Terms* provided an even more detailed description of a “super-maximum custody institution”:

*Institution that provides the highest level of custody and security ... Inmates are housed in single secure units. They typically spend twenty-three hours per day in their cells with one hour for recreation. All programming involving staff is through cell doors, such as religious and casework services ... When inmates are removed from their cells, they often are strip searched, always placed in full restraints, and accompanied by more than one correctional officer.*⁷⁷

Likewise, the Correctional Association of New York focused on the conditions of supermax confinement, in defining the institutions: “twenty-three hour lockdown, enforced idleness, and extreme social isolation.”⁷⁸ And Morris and Kurki described supermaxes as, in part: (1) “regimes characterized by nearly complete isolation and deprivation of environmental stimuli,” with (2) “scant or no programs or activities.”⁷⁹

Focusing on the conditions aspects of these definitions, taken together, the emphasis is on the totality of the isolation supermaxes impose. Some definitions enumerate the long hours prisoners spend in their cells every day – a frequently referenced number is twenty-three hours per day. Some definitions describe the lack of programming, group activity, or work assignments for supermax prisoners – “enforced idleness” and “scant” programs. Some definitions emphasize the lack of physical contact with humans, or any living beings – all programming “through cell doors,” and “deprivation of environmental stimuli.” Implicit in these definitions: prisoners are in solitary confinement. In fact, a recent academic piece summarizing the definitional debates about supermaxes used “solitary” and “supermax” confinement interchangeably, just as the media does when reporting on these institutions.⁸⁰

Given the confusion detailed in this chapter over exactly what kind of institutions are and should be labeled and categorized as supermaxes, the descriptor “solitary confinement” provides a vernacular short-hand, a seemingly straightforward label for the conditions of confinement in America’s highest security prisons. The *Oxford English Dictionary* definitions of each word are similarly straightforward; someone who is *confined* is generally subject to “imprisonment,” “restriction,” and “limitation,” and someone who is in *solitary* is further “deprived of the

⁷⁵ National Institute of Corrections, “Supermax Housing,” *supra* note 47. *See also* Naday, Freilich, and Mellow, *supra* note 22: 72 (describing the National Institute of Corrections definition as “one of the earliest and most cited”).

⁷⁶ Camp, *2002 Corrections Yearbook*, *supra* note 60: 43.

⁷⁷ American Correctional Association, *Dictionary of Criminal Justice Terms* (Lanham, MD: American Correctional Association, 1998): 113.

⁷⁸ The Correctional Association of New York, *supra* note 73: 8.

⁷⁹ Kurki and Morris, *supra* note 67: 389-90.

⁸⁰ Naday, Freilich, and Mellow, *supra* note 22: 71.

company of others.”⁸¹ Indeed, the idea of solitary confinement, both domestically and internationally, has a public resonance – with classic literary figures, like Charles Dickens, who wrote about solitary confinement in both his fictional work *Hard Times* and in his public criticisms of American prisons in *American Notes*; with prisoners of war, like John McCain, who spent more than two years in solitary confinement in a North Vietnamese prison in the late 1960s; with victims of authoritarian repression, like Sarah Shourd, who was mistakenly accused of being an American spy and held in solitary confinement in an Iranian prison for 14 months between 2009 and 2010; and even with modern fictional movie characters, like Hannibal Lecter, the central villain in the 1991 film *Silence of the Lambs*.⁸²

John McCain and Sarah Shourd were both unequivocal in describing their confinement experiences as “solitary.” McCain said:

*I remained in solitary confinement ... for more than two years. I was not allowed to see or talk to or communicate with any of my fellow prisoners. My room was fairly decent-sized – I’d say it was about 10 by 10. The door was solid. There were no windows. The only ventilation came from two small holes at the top in the ceiling, about 6 inches by 4 inches. The roof was tin and it got hot as hell in there. The room was kind of dim – night and day – but they always kept on a small light bulb, so they could observe me.*⁸³

McCain also described how he managed to communicate with fellow prisoners, by tapping on the walls, and by holding metal cups up to the wall, to amplify the sound of his voice, and he was allowed to bathe, outside of his cell, every few days, and to leave his cell to empty his waste bucket. Shourd, likewise, described the intensity of her solitary confinement, broken only occasionally by visits with her alleged co-conspirators:

*I found myself pacing compulsively back and forth across my 10-foot-by-14-foot cell in Iran’s Evin prison, muttering reassurances to myself and kneading my nervous hands ... I had been in solitary confinement 24 hours a day. Only after going on a hunger strike for five days was I allowed to visit Shane and Josh for a few minutes at a time, all of us blindfolded in a padded interrogation room.*⁸⁴

Although Shourd described her experiences as solitary confinement, she noted that Juan Méndez, the United Nations’ special rapporteur on torture, had criticized the absence of an “accepted definition” of solitary confinement, and had proposed the definition “more than 22 to 24 hours isolated from anyone else except for guards.”⁸⁵ Shourd’s and Méndez’s comments, then, suggest that the label “solitary confinement” is contested, even as a vernacular short-hand for describing conditions of high-security confinement. Special Rapporteur Méndez, in fact, has recently been critical of the United States for failing to define (and to limit its use of) solitary confinement.⁸⁶

⁸¹ “Confinement,” and “Solitary,” *Oxford English Dictionary*, 2nd ed. (New York: Oxford University Press, 1989, online version Mar. 2012), available online at: <http://www.oed.com/view/Entry/38840> (last accessed 23 Apr. 2012).

⁸² See Charles Dickens, *Hard Times* (London: Bradbury and Evans, 1854): 29; Dickens, *supra* note 23; John S. McCain, III (Lieut. Commander, U.S. Navy), “John McCain, Prisoner of War: A First-Person Account,” *U.S. News & World Report*, May 14, 1973, posted online Jan. 28, 2008, available online at: <http://www.usnews.com/news/articles/2008/01/28/john-mccain-prisoner-of-war-a-first-person-account> (last accessed 23 Apr. 2012); Sarah Shourd, “Tortured by Solitude,” *The New York Times*, Nov. 5, 2011.

⁸³ McCain, *supra* note 82.

⁸⁴ Shourd, *supra* note 82.

⁸⁵ *Id.*

⁸⁶ Jean Casella and James Ridgeway, “UN Torture Investigator Calls on Nations to End Solitary Confinement,” *Solitary Watch*, Oct. 19, 2011, available online at: <http://solitarywatch.com/2011/10/19/un-torture-investigator-calls-on-nations-to-end-solitary-confinement/> (last accessed 23 Apr. 2012).

The term “solitary confinement” has been publicly contested in national media outlets in the United States in recent years in two main subject areas: how the U.S. military treats both American soldiers and prisoners of war, and how state departments of corrections treat their highest security prisoners. Special Rapporteur Méndez, for instance, was especially critical of the treatment received by Bradley Manning, a U.S. army intelligence analyst accused in May 2010 of leaking military secrets to the WikiLeaks blog, then run by Australian Julian Assange. National news outlets followed Manning’s case closely and described the conditions of his confinement, alone, twenty-three hours per day, in a 6-by-12-foot cell at the Marine Corps Base in Quantico, Virginia. One report referenced the fact that Manning was required to strip naked before entering or leaving his cell.⁸⁷ But, as the *New York Times* noted, military commanders resisted describing these conditions as “solitary confinement”:

*Colonel Johnson denied that Private Manning was in solitary confinement, as has been widely claimed, saying that he could talk with guards and with prisoners in nearby cells, though he could not see them. He leaves his 6-by-12-foot cell for a daily hour of exercise, and for showers, phone calls, meetings with his lawyer and weekend visits by friends and relatives, the colonel said.*⁸⁸

Colonel Johnson’s refusal to characterize the conditions of Manning’s imprisonment as “solitary confinement” echoed earlier refusals by other military officials to characterize the highest-security cell blocks in the military prison at Guantanamo Bay, Cuba as imposing “solitary confinement” on prisoners. In describing the conditions at the military prison in Guantanamo Bay, Cuba, State Department Legal Adviser John Bellinger, “rejected the label ‘solitary confinement’ in favor of ‘disciplinary segregation’ and ‘administrative segregation.’”⁸⁹ By contrast, Amnesty International and U.N. officials alike characterized the Guantanamo Bay prison conditions, especially in Camp 6, opened in 2006, and modeled on American supermaxes like California’s Pelican Bay State Prison, as conditions of “solitary confinement” and of “sensory deprivation.”⁹⁰

More recently, domestic high-security prisons, especially some of the early supermaxes, like the SHUs in California, Red Onion State Prison in Virginia, and the DDUs in Massachusetts, have been in the national news, as a result of a variety of advocacy groups challenging the conditions of confinement in these institutions. In July of 2011, more than 400 prisoners in the SHU at Pelican Bay State Prison initiated a hunger strike, to protest the harsh conditions of their “long-term solitary confinement.”⁹¹ Major news outlets in California and across the United States covered the strike.⁹² As with the Quantico Colonel example and the Guantanamo Bay Legal Adviser, California correctional administrators contested the characterizations of the

⁸⁷ Charlie Savage, “Soldier in Leaks Case Will Be Made to Sleep Naked Nightly,” *New York Times*, Mar. 4, 2011.

⁸⁸ Scott Shane, “Accused Soldier in Brig as Wikileaks Link is Sought,” *New York Times*, Jan. 13, 2011.

⁸⁹ Colin Dayan, *The Story of Cruel and Unusual* (Cambridge, MA: The MIT Press, A Boston Review Book, 2007): 79.

⁹⁰ Amnesty International, *Cruel and Inhuman: Conditions of Isolation for detainees at Guantanamo Bay*, AMR 51/051/2007, available online at: <http://www.amnesty.org/en/library/info/AMR51/051/2007> (last accessed 2 Mar. 2012).

⁹¹ “FINAL NOTICE: PBSP SHU D-Corridor Hunger Strike; Our Five Core Demands,” California Prison Focus Document, Jul. 1, 2011, available online at: <http://www.prisons.org/documents/FinalNoticewith5CoreDemands.doc> (last accessed 23 Apr. 2012).

⁹² See, e.g., Kevin Fagan, “Most State Prison Hunger Strikers Are Eating Again,” *The San Francisco Chronicle*, Oct. 15, 2011; Small, *supra* note 6; “Editorial: California’s Hidden Hunger Strike,” *Los Angeles Times*, Jul. 20, 2011; Colin Dayan, “Op-Ed: Barbarous Confinement,” *New York Times*, Jul. 17, 2011; Simon van Zuylen-Wood, “Pelican Bay Redux,” *The Nation*, Sept. 28, 2011.

Pelican Bay SHU conditions as “solitary confinement.” Terry Thornton, the spokesperson for California’s corrections department, said in commenting on the hunger strike: “Is it really solitary confinement if you can take correspondence courses and watch something like 27 channels on your own TV? ... If I went to prison, I wouldn't want to share a cell with anybody.”⁹³

In interviews conducted for this dissertation research, other California correctional administrators consistently contested the descriptor “solitary confinement.” For instance, on a panel to educate religious communities in the Alameda County area about California prison issues, Vernell Crittendon, a former associate warden of San Quentin State Prison, said that California’s SHUs do not impose solitary confinement, because: “Every inmate is entitled to ten hours of exercise a week.”⁹⁴ And Rich Kirkland, who served as associate warden and then as warden of Pelican Bay between 1992 and 2006, explicitly challenged both the label “solitary confinement” and the associated claim that solitary confinement imposes “sensory deprivation.” Kirkland said the Pelican Bay SHU does not involve total isolation, because “people need to go places – dental, law library, committee, showers, canteen, exchange clothing ... that’s a lot of movement in a day.” He further explained that the SHU conditions involve plenty of sensory stimulation: “It can’t be sensory deprivation. Almost every inmate has a TV. They have a library. They can read any book they want. They call out chess moves. I don’t call it sensory deprivation.”⁹⁵

Similarly, Virginia’s Red Onion State Prison, identified by Human Rights Watch in a 1999 report as one of the early and prototypical supermaxes in the United States,⁹⁶ came under public scrutiny in 2012 for the extremity of the conditions at the institution. A Virginia state delegate and human rights groups criticized the institution and asked the U.S. Department of Justice to investigate the conditions there. Reporting on the investigation, the *Washington Post* described the conditions of confinement at Red Onion: prisoners “spend 23 hours a day alone in a cell ... are moved in shackles and handcuffs,” only shower three times a week, and spend their five weekly hours of recreation in a “96-square-foot cell with metal wiring.”⁹⁷ Again, Virginia correctional administrators contested the characterization of the Red Onion State Prison conditions as solitary confinement. Harold W. Clarke, the director of the Virginia Department of Corrections, said to the *Washington Post*: “‘Segregation’ is not ‘solitary confinement’ ... There is no such thing as solitary confinement — nowhere in the country ... That went out the window a long time ago.”⁹⁸

Within a few weeks of the *Washington Post* story about Red Onion, the *Boston Globe* reported on high-security segregation conditions in Massachusetts’s prisons. The *Globe* story followed up on the fact that 15 prisoners committed suicide in the state’s prisons between 2005 and 2007, and most of these prisoners had been housed in the state’s highest security segregation units. Again, a state correctional spokesperson (Diane Wiffin) clarified for the news media: “It’s

⁹³ Jack Dolan, “Indefinite Solitary Confinement Persists in California Prisons,” *Los Angeles Times*, Sept. 5, 2011.

⁹⁴ Vernell Crittendon (retired Officer, California Department of Corrections and Rehabilitation), Comments on a public panel: Religious Communities of the Tri-Valley Area, “What Do You Know about Prisons,” Livermore, CA, Apr. 22, 2012.

⁹⁵ Rich Kirkland (former Project Director for Pelican Bay State Prison Construction Project), interview with author, Sacramento, CA, Sept. 9, 2010, notes on file with author.

⁹⁶ Jamie Fellner, *Red Onion State Prison* (New York: Human Rights Watch, April 1999), available online at: <http://www.hrw.org/legacy/reports/1999/redonion/index.htm#TopOfPage> (last accessed 17 Feb. 2012).

⁹⁷ Anita Kumar, “Virginia plans changes in prisoner isolation process,” *The Washington Post*, Mar. 30, 2012.

⁹⁸ *Id.*

not solitary confinement,” she said, explaining, “under the regulations, the inmates are allowed one hour of exercise per day outside their cells, unless security or safety considerations dictate otherwise.”⁹⁹

Although these examples of resistance to the label “solitary confinement” are all relatively recent, correctional resistance to the term “solitary confinement” preceded even the advent of the term and the concept of the “supermax.” As early as 1974, a federal court noted that prison officials in Iowa had resisted calling the conditions of one prisoner’s confinement in long-term isolation, “solitary confinement”:

*The plaintiff's confinement would be labeled by the prison administration as “administrative segregation,” but it has been referred to as solitary confinement by the plaintiff. The Court of course is not interested in a game of semantics but only in the conditions of confinement no matter what it is labeled by prison administrators.*¹⁰⁰

State and federal officials alike have declared in the *Los Angeles Times*, the *New York Times*, the *Washington Post*, and the *Boston Globe* that supermaxes and supermax-like prisons do not impose solitary confinement, often in the face of vivid descriptions of conditions of extreme isolation and solitude. Moreover, these correctional contestations do not just happen in national, public media forums; they happen in smaller venues, like federal courtrooms, and in private conversations, too. And the label “solitary confinement” is not the only point of contention; the label “sensory deprivation” has been challenged as well. The question remains: is this merely a “a game of semantics,” as the Iowa Southern District Court labeled it, or is there a substantive difference between “solitary confinement” and “supermaxes,” which might be important in categorizing the institutions, and developing a working definition?

Apparently there is some idea of solitary confinement “that went out the window a long time ago” (as stated above by the Director of the Virginia Department of Corrections). American correctional administrators and military officials alike argue that this “solitary confinement” concept is distinguishable from what exists today in institutions like Camp 6 at Guantanamo Bay, the military brig in Quantico, Red Onion State Prison in Virginia, the Massachusetts DDU, and the Pelican Bay State Prison SHU. Nonetheless, the frequency with which prisoner plaintiffs, the news media, and academics interchange the terms “supermax” and “solitary confinement” suggest that the two ideas are closely related.

In order to trace the development of the concept of solitary confinement, much as this chapter has already detailed the developing concept of the supermax, the next section provides a brief overview of the uses and varieties of solitary confinement deployed in American (and European) prisons, from the 1700s, through the 1980s. This background will provide critical context for establishing a working definition of the supermax, as tied to the past, yet distinguishable from its predecessors.

D. A Brief Overview of American Uses of Solitary Confinement

Solitary confinement is a longstanding, or at least long-experimented with, form of punishment. In the United States, it was first used in the Walnut Street Jail, beginning in the 1790s in Pennsylvania. In Walnut Street Jail, some prisoners worked at hard labor, but others lived in complete solitary confinement, in eight-by-six foot cells, without any work assignments

⁹⁹ Peter Schworm, “Before suicide, inmate pleaded for end to isolation,” *The Boston Globe*, Mar. 13, 2012.

¹⁰⁰ *Kelly v. Brewer*, 378 F. Supp. 447, 449, n.2 (S.D. Iowa 1974).

at all. These prisoners had limited access to daylight, reading materials, human contact, or any form of activity.¹⁰¹ Ignatieff describes these early American solitary confinement cells: “There was a toilet in each cell and a small penned exercise yard attached, so that prisoners remained in solitude even during recreation.”¹⁰² In this basic description, the conditions of solitary confinement at Walnut Street Jail sound quite similar to the conditions in modern supermax prisons. Prisoners in the Pelican Bay SHU, like prisoners in solitary confinement at the Walnut Street Jail, spend the majority of their days alone in cells smaller than 100-square feet, with some access to solitary, outdoor recreation. Despite this apparent similarity, the relationship between modern supermaxes and the centuries-old practice of solitary confinement is an often-contested one. This section traces the many uses and iterations of solitary confinement in American (and European) prisons over the last two centuries, providing context for how the label “solitary confinement” has been used, as well as a sense of how supermaxes compare to their predecessors.

Walnut Street Jail first opened in 1773 as a holding facility for Philadelphia citizens awaiting trials, but it was converted into Pennsylvania’s first state prison in 1790. In this year, sixteen solitary confinement cells for “hardened atrocious offenders” were added.¹⁰³ Pennsylvania’s capacity for solitary confinement was drastically expanded thirty years later, between 1822 and 1829, when the state built Eastern State Penitentiary (also known as Cherry Hill Penitentiary), with a capacity for 250 prisoners. The historical site for the prison notes that the 1820s building deployed never-before-seen technologies:

*Eastern’s seven earliest cellblocks may represent the first modern building in the United States ... Seven cell blocks radiate from a central surveillance rotunda. [The architect’s] ambitious mechanical innovations placed each prisoner [in] his or her own private cell, centrally heated, with running water, a flush toilet, and a skylight. Adjacent to the cell was a private outdoor exercise yard contained by a ten-foot wall. This was in an age when the White House, with its new occupant Andrew Jackson, had no running water and was heated with coal-burning stoves.*¹⁰⁴

Again, the similarities between Eastern State and a modern supermax, like the Pelican Bay SHU, are striking. Both institutions have central surveillance rotundas, running water and flush toilets in the individual cells, along with high-walled, solitary exercise yards. And like Eastern State, Pelican Bay was considered a cutting-edge, high-tech facility when it opened.¹⁰⁵ The differences between Eastern State and Pelican Bay actually made Pelican Bay seem potentially harsher; prisoners at Pelican Bay have no skylights in their cells, and there is only one exercise yard for every eight prisoners.

In the same decade in which Pennsylvania built and opened Eastern State, New York also built and opened Auburn State Prison (in 1821). At first, Auburn imposed total solitary

¹⁰¹ Lawrence Friedman, *A History of American Law*, 3rd ed. (New York: Simon & Schuster, 2005): 219-20; David Rothman, *The Discovery of the Asylum: Social order and disorder in the New Republic* (Boston: Little, Brown and Company, 1971): 69; Orlando F. Lewis, *The development of American prisons and prison customs, 1776–1845* (Whitefish, MT: Kessinger Publishing, 1922, 1950); A.J. Hirsch, *The rise of the penitentiary: Prisons and punishment in early America* (New Haven, CT: Yale University Press, 1992).

¹⁰² Michael Ignatieff, *A Just Measure of Pain: The Penitentiary in the Industrial Revolution, 1750-1850* (New York: Pantheon Books, 1978): 70.

¹⁰³ Norman Johnston, “Prison Reform in Pennsylvania” (The Pennsylvania Prison Society), available online at: <http://www.prisonersociety.org/about/history.shtml> (last accessed 22 Apr. 2012).

¹⁰⁴ Eastern State Penitentiary Historic Site, Inc., “History of Eastern State Penitentiary, Philadelphia,” available online at: <http://www.easternstate.org/learn/research-library/history> (last accessed 22 Apr. 2012): 2.

¹⁰⁵ See Corwin, “High-Tech Facility,” *supra* note 3.

confinement on all its prisoners; they labored alone in their cells during the day, just as prisoners at the Walnut Street Jail had. However, after only eighteen months, the New York governor intervened and ordered that the 26 prisoners who had survived the trial of the isolation be set free immediately.¹⁰⁶ After that initial eighteen-month period, Auburn prisoners were required to remain completely silent at all times, but they were allowed out of their cells during the day for congregate work. The Auburn System is often characterized as a competing disciplinary model, imposing a different kind of solitary confinement, from the Eastern System.¹⁰⁷ Auburn, overall, seems less like the Pelican Bay SHU than Eastern State; prisoners in the Pelican Bay SHU are never allowed to congregate together, and the prison administration does not require their complete silence.

The Walnut Street Jail, Eastern State Penitentiary, and Auburn State Prison were each visited by Europeans, and each influenced the development of European prison systems, especially in England and Denmark. However, the western practice of punishing through solitary confinement is generally traced to the Vatican, where, as of 1703, there was “a solitary prison connected with the hospital San Michele at Rome.”¹⁰⁸ As early as the 1700s, British pamphleteers were also extolling the virtues of solitary confinement as a punishment. In the 1770s, John Howard, who became an instrumental prison reformer in England and also an advocate for solitary confinement, visited the Maison de Force, in Ghent, which imposed solitary confinement, modeled on the Vatican’s San Michele Prison.¹⁰⁹ But the first major prison imposing solitary confinement in England was actually modeled after Eastern State.

Pentonville Penitentiary opened in London in 1842, with 450 solitary cells, divided into three tiers of cellblocks. New Pentonville prisoners spent their first eighteen months of incarceration in total solitary confinement. After this period, Pentonville prisoners only spent one hour daily, between 8 a.m. and 9 a.m., out of their cells; in this hour, they attended chapel, wearing masks, and locked into isolated boxes, and walked in a solitary exercise yard, to the orders of a warder, around a marching post.¹¹⁰ The rest of their waking hours, prisoners worked alone in their cells, as cobblers. Ignatieff describes the cells as 13-by-7-and-one-half feet, containing “a table, a chair, a cobbler’s bench, hammock, broom, bucket, and a corner shelf . . . a pewter mug and dish, a bar of soap, a towel, and a bible.”¹¹¹ Like Eastern State, after which it was modeled, Pentonville foreshadowed the Pelican Bay SHU, where prisoners also spend one-to-two hours per day outside of their cells. Unlike the Pelican Bay SHU prisoners, however, who are given very few materials to read, let alone tools with which to work a trade, the Pentonville prisoners were expected to work productively all day long.

Although Eastern State provided a popular prison design copied across the United States and Europe, the solitary confinement model soon produced problems. As early as 1842, Charles

¹⁰⁶ Peter Scharff Smith, “The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature,” *Crime & Justice*, Vol. 34 (2006): 441-528, at 457. See also Rebecca McLennan, *The Crisis of Imprisonment: Protest, Politics, and the Making of the American Penal State, 1776-1941* (New York: Cambridge University Press, 2008): 57.

¹⁰⁷ See *supra* note 101.

¹⁰⁸ For a discussion of the influence of Eastern State on English prisons, see Ignatieff *supra* note 102: 194. For a discussion of the influence of Eastern State on Danish prisons, see Scharff Smith, *supra* note 106. For the reference to the hospital San Michele, see *In Re Medley*, 134 U.S. 160, 168 (1890); Ignatieff confirms this dating, *supra* note 102: 53.

¹⁰⁹ Ignatieff, *supra* note 102: 53.

¹¹⁰ *Id.* at 6.

¹¹¹ *Id.* at 4.

Dickens visited the United States, and Eastern State Penitentiary. He unequivocally described what he saw there as “torture”:

*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.*¹¹²

Even earlier, in 1833, Tocqueville and Beaumont, who were largely impressed by the American criminal justice system, nonetheless described the use of solitary confinement at Auburn State Prison as an experiment “which . . . proved fatal for the majority of prisoners . . . It devours the victim incessantly and unmercifully; it does not reform, it kills.”¹¹³ Just as New York’s Auburn State Prison abandoned the practice of total solitary confinement soon after it opened, so did London’s Pentonville Prison. Throughout the 1850s, Pentonville relaxed its rigid isolation rules. The initial period of solitary confinement for prisoners was reduced from eighteen months to twelve months, and then to nine months. Eventually the separate chapel stalls, as well as the requirements that prisoners wear masks out of their cells and exercise alone and in silence, were abandoned.¹¹⁴

By the mid-nineteenth century, hundreds of deaths and cases of insanity had been documented and attributed to the uses of long-term solitary confinement in places like Auburn, Eastern State, and Pentonville. In light of this evidence, many jurisdictions took steps to limit the duration of solitary confinement, or to eliminate the practice entirely.¹¹⁵ The Supreme Court even condemned the practice, albeit in dicta. In 1890, in *In Re Medley*, the Supreme Court devoted more than a page (of a short, fifteen-page opinion) to describing the severity and futility of solitary confinement as a punishment. A brief excerpt reveals the certainty with which the Court condemned the practice:

*A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition . . . and others became violently insane; others, still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community.*¹¹⁶

In Re Medley marked the end of a century of on-again-off-again uses of extended solitary confinement in the early United States penitentiaries.

Although solitary confinement continued to be used in limited circumstances, even after 1890, it was neither the ideal nor even the norm in American prisons. The duration of confinement was usually short. (See, for example, the discussion of prisoners’ rights cases in Chapter X and the short periods of time courts reference prisoners spending in solitary confinement.) For instance, the warden of Alcatraz would occasionally throw recalcitrant prisoners into the “Spanish dungeons” for a few days at a time.¹¹⁷ And from the mid-1950s, San Quentin had an infamous “adjustment center” for temporary, punitive isolation in solitary

¹¹² Dickens, *supra* note 23.

¹¹³ Beaumont and Tocqueville, *supra* note 23: 41.

¹¹⁴ Ignatieff, *supra* note 102: 200.

¹¹⁵ Craig Haney and Mona Lynch, “Regulating prisons of the future: A psychological analysis of supermax and solitary confinement,” *New York University Review of Law and Social Change*, Vol. 23.4 (1997): 477–570.

¹¹⁶ *In Re Medley*, 134 U.S. 160, 168 (1890).

¹¹⁷ Odier, *supra* note 46: 117.

confinement.¹¹⁸ Jack Henry Abbott describes his own experiences, in and out of “the hole: solitary confinement” in state and federal prisons in the 1960s and 1970s, living in “a cell ten feet long and seven feet wide ... your bunk is just over three feet wide and six and a half feet long. Your iron toilet and sick combination covers a floor space of at least three feet by two feet.” Abbott further described his experiences in “the hole” as “sensory deprivation”:

*The first few times I served a couple of years like that, I saw only three or four drab colors. I felt only concrete and steel. When I was let out, I could not orient myself. The dull prison-blue shirts struck me, dazzled me with a beauty they never had. All colors dazzled me. A piece of wood fascinated me by its feel, its texture. The movements of things, the many prisoners walking about, and their multitude of voices—all going in different directions—bewildered me.*¹¹⁹

Although Abbott described spending a few years at a time in solitary confinement, he was an unusual prisoner, accused of multiple escape attempts and in-prison murders. Abbott described another experience in a “black-out cell,” similar to the hole, but with absolutely no light, where he was placed for 23 days following an escape attempt after he had killed a fellow prisoner.¹²⁰ Most prisons contained only a few “black-out” cells or “holes,” for keeping the most challenging prisoners for a few days, or at most weeks, at a time.

The warden of Alcatraz did briefly attempt to maintain a regime of silence, harking back to the Auburn System, but the silence policy met with the same kind of criticism solitary confinement had faced in the late nineteenth century, including vocal European critics and an exposé in the *Saturday Evening Post*.¹²¹ In 1963, the Federal Bureau of Prisons (BOP) closed Alcatraz. In explaining the decision to close the island prison, the BOP cited problems with prisoner escapes (four attempts took place in 1962 alone) and the expense of running the island prison, which had come to be seen as a relic of an outmoded, punitive philosophy.¹²²

To replace this end-of-the-line prison, the BOP opened a new United States Penitentiary (USP), in Marion, Illinois. USP-Marion had 500 beds for those “difficult to control” prisoners in the federal system.¹²³ Many of the high-security prisoners from Alcatraz were transferred to USP-Marion, which opened in 1963. As they had been permitted to do at Alcatraz, these prisoners congregated together in prison yards, dining halls, and work areas.¹²⁴ And as with Alcatraz, USP-Marion had a small handful of isolation cells, designed for shorter-term isolation of problem prisoners, and dubbed “the hole.”¹²⁵ However, two changes happened at Marion in the late 1960s and early 1970s, which altered the conditions of confinement at the institution and are relevant to the history of the uses of both sensory deprivation and solitary confinement.

First, in 1968, correctional administrators at USP-Marion implemented a new program of “treatment” – imposing sensory deprivation and solitary confinement on prisoners until they agreed to participate in a group therapy program. The program was dubbed Control and

¹¹⁸ Haney and Lynch, *supra* note 115: 489.

¹¹⁹ Jack Henry Abbott, with an Introduction by Norman Mailer, *In the Belly of the Beast: Letters from Prison* (New York: Vintage Books, 1981, 1991): 45, 51.

¹²⁰ *Id.* at 26

¹²¹ Haney and Lynch, *supra* note 115: 488.

¹²² Ward, with Kassebaum, *supra* note 45: 463.

¹²³ Jessica Mitford, *Kind and Usual Punishment* (New York: Vintage Books, 1974): 198-99.

¹²⁴ Paul W. Keve and Merle E. Alexander, *Prisons and the American Conscience: A History of U.S. Federal Corrections* (Carbondale: Southern Illinois University Press, 1991): 197.

¹²⁵ Keve, *supra* note 124: 198.

Rehabilitation Effort, or CARE.¹²⁶ CARE explicitly sought to use tools of brainwashing, studied and refined in the military context in the 1950s and 1960s, to control the prison environment. In 1962, Edgar Schein, a professor of organizational psychology at the Massachusetts Institute of Technology, gave a speech, sponsored by the National Institutes of Mental Health, to a group of Federal Bureau of Prisons officials. In his speech, Schein argued that brainwashing techniques, pioneered in U.S. and Canadian military research,¹²⁷ could and should be applied in the domestic prison context. Schein noted that the techniques could well be applied to create “deliberate changing of behavior and attitudes by a group of men who have relatively complete control over the environment in which the captive population lives.”¹²⁸ CARE ultimately institutionalized many of the brainwashing tactics Schein had advocated, including social isolation through solitary confinement and “character invalidation” through intensive and confrontational group therapy sessions with a “prisoner thought-reform team.”¹²⁹

The federal prisons were not the only ones to experiment with behavior modification techniques. In 1972, Missouri state prison officials implemented a similar kind of behavior modification program, dubbed the Special Treatment and Rehabilitation Training (START), in which prisoners were placed in solitary confinement and allowed no reading materials or other access to human contact until they achieved certain behavioral benchmarks.¹³⁰ Although behavior management programs, like CARE and START, were challenged in federal court,¹³¹ these challenges did not stop other prisons from implementing similar programs. As recently as 2005, California implemented its own Behavioral Management Unit, premised on the same principles of placing prisoners in extreme isolation, and gradually rewarding them with additional privileges, with the explicit goal of reforming prisoners’ behavior.¹³²

And the U.S. military also used these techniques throughout the latter half of the twentieth century. Based on the initial “brainwashing” research of Donald Hebb in the 1950s, the Central Intelligence Agency (CIA) developed a military training program dubbed SEREs, or Survival, Evasion, Resistance, Escape, in the 1960s. This program trained soldiers to withstand sensory deprivation techniques during interrogations. Initially, the CIA was training American soldiers to withstand Communist military tactics, during the Korean War. But data was collected during the trainings and deployed in later years. In the 2000s, facing criticisms of the conditions

¹²⁶ Mitford, *supra* note 123: 134-35.

¹²⁷ Donald Hebb was the first to conduct a “brainwashing” experiment. In the early 1950s, Hebb, a professor of psychiatry at McGill University, recruited students to participate in studies where they were isolated under sensory deprivation conditions, in silence and darkness, with gloves to prevent physical sensations. Hebb found that the conditions affected brain functioning, and many students, in spite of the \$20 per day payment for participation, defected from the studies. R.E. Brown and P.M. Milner, “The legacy of Donald O. Hebb: More than the Hebb synapse,” *Nature Reviews: Neuroscience*, Vol. 4 (Dec. 2003): 1013–1019; W. Heron, “The pathology of boredom,” *Scientific American*, Vol. 196 (1957): 52–56.

¹²⁸ Quoted in Chorover, Stephan L. *From genesis to genocide: The meaning of human nature and the power of behavior control* (Cambridge, MA: MIT Press, 1979): 200.

¹²⁹ Mitford, *supra* note 123: 134-35; Eddie Griffin, “Breaking men’s minds: Behavior control and human experimentation at the federal prison in Marion,” *Journal of Prisoners on Prison*, Vol. 4.2 (1993), the Formatted Online Version (2006): 7, available online at: <http://www.jpp.org/backIssuePages/volume4Number2.html> (last accessed 2 Dec. 2011).

¹³⁰ *Clonce v. Richardson*, 379 F. Supp. 338, 345 (W.D. Mo. 1974); Keramet Reiter, “Experimentation on prisoners: Persistent dilemmas in rights and regulation,” *California Law Review*, Vol. 97 (2009): 501–566, at 511-12.

¹³¹ *Adams v. Carlson*, 488 F.2d 619, 621-2 (7th Cir 1973); *Clonce v. Richardson*, 379 F. Supp. 338, 345 (W.D. Mo. 1974).

¹³² California Department of Corrections and Rehabilitation, “Administrative Bulletin,” dated Nov. 21, 2005, No. 05/02, on file with author; Charles Piller, “Guards Accused of Cruelty, Racism,” *Sacramento Bee*, May 9, 2010: 1A.

at the military prison in Guantanamo Bay, Cuba and criticisms of the tactics used in interrogating terrorists, federal executive advisors referenced evidence of soldiers' resilience, gathered through the SEREs program, to justify and defend the use of SEREs-like tactics against alleged terrorists.¹³³ Sensory deprivation practices in the United States, then, have gone hand-in-hand with the imposition of solitary confinement.

Indeed, just five years after the CARE program was implemented at USP-Marion, the federal facility began experimenting with another means of prisoner control: permanent lockdowns. This was the second historically relevant change at USP-Marion in the decade after it opened. In July of 1972, dozens of USP-Marion prisoners began a strike, refusing to leave their cells to work. The prisoners were protesting conditions, like those implemented through the CARE program. The strike continued, on and off, over the next few months. In response, the prison administration locked 115 prisoners into their cells, initiating a policy of indefinite segregation, or "lockdown." In the fall of 1972, the prisoners in segregation filed a lawsuit, challenging the conditions of their confinement in the segregation cells.¹³⁴ Meanwhile, in 1973, the prison designated two units, "H-Unit" and "I-Unit" as control units, where prisoners would remain in indefinite segregation.¹³⁵

By December of 1973, thirty-six prisoners had been locked in their cells for more than sixteen months. In litigation about the constitutionality of this practice, federal district court Judge James Foreman described in detail the conditions of these prisoners' confinement:

*Each inmate in H & I Units lives in an individual cell approximately eight feet by six feet and nine feet high and where each Plaintiff spends approximately 23 1/2 hours per day. The cells are relatively bare and contain only a single bed, a sink, and a commode. There is very little variability in the cells and almost no place to put personal effects. Mirrors and clocks are not permitted and commissary privileges are restricted. Inmates are compelled to eat their meals in their cells, although there is no table and, as a result, some inmates eat upon the floor. They are denied the privileges of attending educational classes or group religious services ... Generally, the only time an inmate is allowed to leave his individual cell is for approximately one-half hour each day during which the prisoner is permitted time for recreation. During this period, the inmate may shave, shower and do any physical exercise which he desires ... The cells are constructed in such a manner that when an inmate is in his cell, he is physically unable to see any other inmate ... Meaningful communication is, thus made more difficult by the lack of regular face-to-face contact.*¹³⁶

Judge Foreman ordered that the thirty-six prisoners in segregation be returned to the general population at the prison. This, however, was not the end of the federal court case, nor of the practice of imposing long-term segregation. *Adams v. Carlson* continued to weave its way through the federal courts over the next few years. In 1978, Judge Foreman ordered prison officials at USP-Marion to stop using "boxcar cells" for solitary confinement.¹³⁷

¹³³ Alexa K. Koenig, Eric Stover and Laurel E. Fletcher, "The Cumulative Effect: A Medico-Legal Approach to United States Torture Law and Policy," *Essex Human Rights Review*, Vol. 6.1 (Dec. 2009): 146-68; Scott Shane, "U.S. architects of Harsh Tactics in 9/11's wake," *New York Times*, Aug. 12, 2009: A-1.

¹³⁴ *Adams v. Carlson*, 352 F. Supp. 882 (E.D. Ill. 1973).

¹³⁵ *Adams v. Carlson*, 368 F. Supp. 1050, 1052 (E.D. Ill. 1973).

¹³⁶ *Id.*

¹³⁷ "'Boxcar' Cells Eliminated," *The Washington Post*, Apr. 21, 1978: A-10.

In spite of Judge Foreman's persistent interventions, administrators at USP-Marion continued to impose indefinitely long-term segregation conditions on some prisoners. In 1979, the Federal Bureau of Prisons added a sixth level of security to the federal prison system, and re-characterized USP-Marion as a "Level 6" institution.¹³⁸ And still, the unrest and violence continued. On October 22, 1983, two prisoners in Marion Control Unit area, which had originally been locked down eleven years earlier, killed two correctional officers in two separate incidents. The first incident took place in the morning; Thomas Silverstein killed Merle Clutts. The second incident took place in the evening; Clayton Fountain killed Robert Hoffman.¹³⁹ Following these two deaths, on October 28, 1983, prison administrators declared a state of emergency, and all 435 cells at USP-Marion were "locked down."¹⁴⁰ Permanently. Gradually, the lockdown policy became "normal procedure." Prisoner out-of-cell time was severely curtailed, and industrial programs were abolished.¹⁴¹

Meanwhile, high security prisons across the United States experienced similar events: work stoppages and prisoner-on-guard assaults. In California, in 1971, George Jackson attempted to escape from San Quentin state prison. In the process, he was killed, along with three correctional officers. Following this event, portions of San Quentin State Prison and Folsom State Prison were locked down for long periods of time.¹⁴² (This event, and its repercussions, is discussed further in Chapter IV.) In New York, later in 1971, prisoners at Attica State prison rioted, taking over the prison over the course of a week. In the end, the National Guard was called in to re-take control of the prison. The final death toll: twenty-nine prisoners and ten guards.¹⁴³ In Iowa, in 1972, a prisoner killed a guard at the maximum security Iowa State Penitentiary, and a number of prisoners were subsequently locked into their cells for long periods of time.¹⁴⁴ Then, in the 1981 and again in 1986, there were riots in the same prison.¹⁴⁵ In Massachusetts, in 1972, a prisoner killed a guard, an instructor, and then himself in an escape attempt from the high security Norfolk State Prison. Then, in 1973, the guards at the maximum security Walpole State Prison went on strike; prisoners ran the institution for three months. No one died during this period, though when the guards re-took the institution, long periods of lockdowns ensued.¹⁴⁶

The events at USP-Marion, then, and the subsequent extended lockdowns at that facility were far from unique. Many states across the country experienced similar events, including both

¹³⁸ Ward and Werlich, *supra* note 45: 57.

¹³⁹ Federal Bureau of Prisons (BOP), "Fallen Heroes: Merle E. Clutts," and "Fallen Heroes: Robert L. Hoffman," available online at: <http://www.bop.gov/about/history/heroes.jsp> (last accessed 25 Feb. 2012). Incidentally, Silverstein remains in solitary confinement to this day; he is currently housed in the federal supermax, the Administrative Maximum in Florence, Colorado. He has been in solitary confinement for more than twenty-seven years, one of the longest documented sentences of total isolation in the United States. *Silverstein v. Bureau of Prisons*, 704 F. Supp. 2d 1077 (D. Col. 2010). Fountain remained in prison, but died in 2004.

¹⁴⁰ Ward and Werlich, *supra* note 45: 57-8.

¹⁴¹ Keve, *supra* note 124: 198. See also David A. Ward and Alan F. Breed, *The United States penitentiary, Marion, Illinois: A report to the judiciary committee, United States House of Representatives* (October 1984).

¹⁴² See Eric Cummins, *The Rise and Fall of California's Radical Prison Movement* (Stanford: Stanford University Press, 1994): 186-190, 209-10, 232; *Toussaint v. McCarthy*, 597 F.Supp 1388, 1397, 1410 (N.D. Cal. 1984), *aff'd* 801 F.2d 1080 (9th Cir. 1986).

¹⁴³ *Attica: The Official Report of the New York State Special Commission on Attica* (New York: A Bantam Book, 1972).

¹⁴⁴ *Kelly v. Brewer*, 378 F. Supp. 447, 449 (S.D. Iowa 1974).

¹⁴⁵ "Riot Squad Quashes Iowa Prison Uprising." *Chicago Tribune*, Jan. 7, 1986: C-8.

¹⁴⁶ Jamie Bissonnette with Ralph Hamm, Robert Dellelo, and Edward Rodman, *When the Prisoners Ran Walpole: A True Story in the Movement for Prison Abolition* (Cambridge, MA: South End Press, 2008): 80-81.

prisoner-on-guard violence, and organized prisoner resistance. In many institutions, the response was the same: long-term lockdowns. The growing popularity of this operational policy, combined with federal court opinions criticizing the existing physical structures being used for the lockdowns, opened up a need for a new kind of physical structure.

In sum, solitary confinement was widely used in American prisons in the late 1700s and early 1800s. While most prisons at that time held a few hundred people at most, and lacked many of the modern amenities of twenty-first century prisons, solitary confinement in 1790 looked much like solitary confinement in 1990. In both instances, prisoners spent the vast majority of their days alone in their cells, but some provisions were made for regular out-of-cell exercise and hygiene. Beginning as early as the 1830s, critics of solitary confinement spoke out against the practice. By 1890, the U.S. Supreme Court had dismissed solitary confinement as an abandoned practice, which had caused most prisoners who experienced it to go insane. Between the 1890s and 1970s, solitary confinement existed in American prisons, but only as a limited, short-term, punitive measure.

Between the late 1970s and early 1980s, however, prisons across the United States returned to the practice of punishing through imposition of long-term solitary confinement. Starting in 1972 and 1973, portions of prisons in California, Illinois, and Massachusetts, to name just a few examples, were “locked down” following riots; prisoners were no longer allowed to leave their cells for meals, work, or other programming. The lockdowns lasted first for months, and then years at a time.¹⁴⁷ Within a decade, in the early 1980s, the federal Bureau of Prisons, and a number of state departments of corrections, would begin building new facilities to maintain these prisoners in even more restrictive conditions of indefinitely long-term solitary confinement. This was the beginning of the supermax phenomenon.

E. Re-Defining the Supermax

To date, there are four definitions of “supermax” institutions frequently referenced in criminal justice scholarship. Each will be summarized here, and then this section will offer (with justifications) a new working definition of “supermax,” as a starting point for exploring the institutional concept throughout the rest of this dissertation. The four existing supermax definitions come from four different sources, but share common themes: one is from a government agency, the National Institute of Corrections (NIC); one is from a professional organization, the American Correctional Association (ACA); one is from a non-profit research organization, the Crime and Justice Institute (CJI); and one is from the academic criminology literature, specifically an article by Morris and Kurki. Previous sections have parsed these definitions, providing segments of them, but this section provides each in full.

In 1997, the NIC provided an initial definition of the term “supermax”:

“[S]upermax” housing is defined as a free-standing facility, or a distinct unit within a facility that provides for the management and secure control of inmates who have been officially designated as exhibiting violent or serious and disruptive behavior while incarcerated. Such inmates have been determined to be a threat to safety and security in traditional high-security facilities, and their behavior can be controlled only by separation, restricted movement, and limited direct access

¹⁴⁷ See generally Fay Dowker and Glenn Good, “The proliferation of control unit prisons in the United States,” *Journal of Prisoners on Prison*, Vol. 4.2. (1993), the Formatted Online Version (2006): 1, available online at: <http://www.jpp.org/backIssuePages/volume4Number2.html> (last accessed 2 Dec. 2011).

*to staff and other inmates. Supermax housing, for purposes of this survey, does not include maximum or close custody facilities or units that are designated for routine housing of inmates with high custody needs, inmates in disciplinary segregation or protective custody, or other inmates requiring segregation or separation for other routine purposes.*¹⁴⁸

In 1999, the NIC published a follow-up report in which they shortened this definition a bit, to focus on the security of the facility and the kind of prisoners contained therein. NIC also added the word “isolation” to the definition:

*[A supermax is] a highly restrictive, high-custody housing unit within a secure facility, or an entire secure facility, that isolates inmates from the general prison population and from each other due to grievous crimes, repetitive assaultive or violent institutional behavior, the threat of escape or actual escape from high-custody facility(s), or inciting or threatening to incite disturbances in a correctional institution.*¹⁴⁹

As discussed in Section C. Is Solitary Confinement the Defining Characteristic of Supermaxes?, the ACA definition of “super-maximum custody” focuses almost entirely on the conditions of confinement in the institutions:

*Institution that provides the highest level of custody and security. Inmates assigned to these facilities have demonstrated an inability to adjust satisfactorily to general population units at other secure facilities. Inmates are housed in single secure units. They typically spend twenty-three hours per day in their cells with one hour for recreation. All programming involving staff is through cell doors, such as religious and casework services. Other programs are provided by correspondence courses or by closed-circuit television. When inmates are removed from their cells, they often are strip searched, always placed in full restraints, and accompanied by more than one correctional officer.*¹⁵⁰

CJI provides a definition of “supermaximum custody,” as custody for:

*Inmates who have been adjudged to be a threat to institutional security and therefore have been admitted to administrative segregation by administrative hearing rather than by the classification process; inmates for whom the greatest degree of observation and stringent security is applied thereby restricting them to their cells for the majority of their time. Both maximum security and super maximum custody inmates require restraints when moving in the institution and on trips outside the secure perimeter, hand and leg restraints and armed supervision.*¹⁵¹

Finally, Morris and Kurki, surveying the supermax definitions extant in 2001, noted that the various definitions share “at least four general characteristics”:

(1) “assignment to a supermax prison is long-term, indefinite ... [c]onfinement is measured in years rather than months,” (2) “administrative admission and transfer criteria and procedures typically allow wide discretion to the prison authorities,” (3) “many supermaxes maintain regimes characterized by nearly

¹⁴⁸ National Institute of Corrections, “Supermax Housing,” *supra* note 47: 1.

¹⁴⁹ Riveland, *Supermax Prisons*, *supra* note 58: 5.

¹⁵⁰ American Correctional Association, *Dictionary of Criminal Justice Terms*, *supra* note 77: 113.

¹⁵¹ Camp, *2002 Corrections Yearbook*, *supra* note 60: 43.

complete isolation and deprivation of environmental stimuli,” and (4) “characterized by scant or no program activities.”¹⁵²

The previous sections have suggested the many shortcomings with these definitions, including the importance of chronology to the development of the supermax, the difficulty in distinguishing between administrative and disciplinary confinement, and the debates over whether supermaxes impose solitary confinement. In light of these shortcomings, and as a starting point for exploring the supermax concept further in this dissertation, and more precisely in the future, this section proposes a new, four-part, working definition. Supermaxes are:

- (1) Technologically-advanced prison facilities built and opened after 1984,
- (2) Holding prisoners assigned to the facility through an in-prison bureaucratic process, rather than through a court of law,
- (3) Imposing meticulous control and rigid limitations over each prisoner’s physical movement, general activity, and any form of contact with another human,
- (4) On an unprecedentedly large and long scale, in terms of the number of people so detained and the durations of their confinement.

At an abstract level, this definition focuses on the chronology of the supermax, the process of supermax assignment, the general conditions of supermax confinement, and the scale of the supermax phenomenon. In other words, this definition focuses on the form of the institutions. Ultimately, of course, in any kind of taxonomy, an object, or a being, or an institution must be defined either by its form (what does it look like?) or by its function (what is its purpose?).¹⁵³ In the case of the supermax, form is relatively clear, but function remains ambiguous. This functional ambiguity will be a theme throughout this dissertation. Latter chapters will return to the questions of function, and the various purposes that have been offered up as explanations and justifications for the supermax; this chapter, however, focuses on labeling and categorizing the form of the supermax. Each of the four parts of this form-focused definition are explained and justified below.

Part (1) of this definition serves three purposes. First, it bounds the supermax phenomenon (and this dissertation project) in time, providing a critical era of focus. Second, periodizing the supermax to the early 1980s respects both the linguistic dating of the *Oxford English Dictionary* and the empirical dating of Mona Lynch, of the short-form terms “supermax” and “supermax” to the early 1980s, as discussed in Section A. The Origins of the Term “Supermax”. Finally, dating the supermax to the 1980s distinguishes the institutions from their predecessor, older facilities, like Marion and Folsom, where prisoners were first placed into long-term lockdowns in the 1970s and 1980s, but which institutions lacked the technologies and purposeful designs of a supermax structure.

Part (2) of this definition also serves three purposes. First, focusing on the process of supermax assignment as conducted by prison officials avoids the morass of failed attempts to distinguish between administrative and disciplinary confinement, as outlined in Section B. Defining the Supermax. Focusing on the in-prison assignment nature of supermax confinement

¹⁵² Kurki and Morris, *supra* note 67: 389-90.

¹⁵³ For a more theoretical discussion of means of categorization, see Eleanor Rosch, “Principles of Categorization,” *Cognition and Categorization*, Eleanor Rosch and Barbara B. Lloyd, eds. (Hillsdale, NJ: Lawrence Erlbaum Associates, Publishers, 1978): 27-49; Samir Okasha, “The Problem of Biological Classification,” *Philosophy of Science: A Very Short Introduction* (New York: Oxford University Press, 2002): 103-112; Steven L. Winter, *A Clearing in the Forest* (Chicago: University of Chicago Press, 2001).

(in conjunction with part (4) of the definition about long durations of confinement) incorporates prisoners serving both long, fixed sentences as a result of in-prison disciplinary infractions and prisoners serving long, indeterminate sentences as a result of in-prison administrative status as a general security threat. Definition part (2) also includes prisoners labeled as “protective custody” prisoners, as long as they are bureaucratically assigned to supermax conditions of confinement.¹⁵⁴ Second, definition part (2) precludes automatic inclusion of death row facilities in the supermax category. This is not to say that an institution, like Arizona’s SMU, which holds both prisoners assigned through an in-prison process and prisoners assigned because they have been sentenced to death by a criminal court is not a supermax. Definition part (2) simply distinguishes a death row facility, a place where a prisoner goes automatically following a particular category of criminal sentence, from a supermax, a place where a prisoner is assigned based on in-prison, bureaucratic determinations. Finally, definition part (2) highlights the bureaucratic discretion that defines supermaxes – a theme throughout this dissertation. Indeed, the hidden, bureaucratic nature of the institutions is one thing that distinguishes supermaxes from the solitary confinement cells at Walnut Street Jail and Eastern State Penitentiary; great intellectuals like Dickens and Tocqueville are not flocking to America to visit these supermaxes. In general, most supermax visitors are lawyers and experts, whom courts have ordered to be admitted inside, pursuant to litigation.

Part (3) of this definition seeks to avoid the contested terms “solitary confinement” and “sensory deprivation,” while also acknowledging the variety of deprivations a supermax might impose. Again, the focus is on the degree of total bureaucratic control within the institutions, though the details of that control might vary from institution to institution, state to state, and period to period. Definition part (3) accounts for the fact that a prisoner might experience relatively total isolation, even if he is permitted to watch a few channels on television, exercise alone out of his cell a few hours per day, meet with his lawyer while shackled, or talk on the telephone to his family members – all examples provided by correctional administrators to argue that supermax prisons do not impose solitary confinement. Definition part (3) also allows for the fact that some supermax institutions actually house two prisoners to a cell,¹⁵⁵ under the same restrictive conditions of twenty-two-or-more hours per day of locked-in-cell time, with meticulous control and rigid limitations on any out-cell communication or activities. Under definition part (3), even these “double-bunked” institutions would be considered supermaxes, as long as they meet the other three definitional conditions.

Part (4) does not specify either a minimum length of confinement or a minimum size for a supermax facility; instead, the focus is on *relatively* long durations of confinement and *relatively* large numbers of beds. The emphasis on relative, as opposed to absolute, scale is purposeful and necessary for three reasons. First, relative scales acknowledge the wide variety in lengths of stay between individual prisoners in supermax facilities. Even in facilities where most prisoners spend years in conditions of “meticulous control and rigid limitations,” a few prisoners will likely spend only a few weeks or months in these conditions. For instance, at the Pelican Bay SHU, almost half of the prisoners have been in the supermax for ten years or more. But on

¹⁵⁴ See, e.g. Lovell, Cloyes, Allen, and Rhodes, *supra* note 40 (describing how prisoners might also be assigned to supermaxes because they require “protective custody,” if their lives would be in danger in the general prison population, or because they are severely mentally ill and disruptive in the general prison population).

¹⁵⁵ Chapters VIII and IX discuss the practice of double-bunking in California’s two main supermaxes, Pelican Bay and Corcoran State Prisons. New York’s Upstate Correctional Facility, a supermax opened in 1999, is likewise double-bunked. Correctional Association of New York, *supra* note 73: 10.

any given day, there are a few prisoners who have spent very short periods of time in the SHU, either because (a) they just arrived, (b) they were placed there temporarily, or (c) their criminal sentence expired, and so the department of corrections released the prisoner onto parole, even though his in-prison behavior warranted temporary supermax placement. (These various processes are discussed further in Chapter VIII.) Simply because a facility holds some prisoners for only a few days, or one month, that facility should not be excluded from being categorized as a supermax, as long as that same facility holds other prisoners for longer periods of more than a few months, under the same conditions of meticulous control and rigid limitations. Definition part (4), then, explicitly avoids specifying a minimum duration for any one individual prisoner, but rather focuses on the generally long ranges of confinement supermax prisons impose.

Second, relative scales acknowledge the wide variety in sizes of state (and federal) prison systems, and the associated wide variety in sizes of supermax facilities and units. For instance, Montana only has 64 supermax beds (in contrast to California's 3,000-plus supermax beds). But the state's overall prison population is similarly small, at 2,500 prisoners (in contrast to California's 160,000-plus overall prison population). Montana's rate of supermax incarceration, at 2.5 percent of the total prison population, is about average for most states. (See *Table 2: Supermax & Segregation Housing, as a % of Prison Populations, by State, 2010*, in Appendix A.) Still other states have a series of small supermax units, as opposed to one or two concentrated, larger facilities. For instance, in recent years, California has built smaller "administrative segregation units" on the grounds of existing medium security prisons. These units were originally designed to hold prisoners in temporary segregation, or isolation, but some prisoners are spending years in these facilities.¹⁵⁶ Even though the facilities are small, and diffused throughout the state prison system, they otherwise resemble supermaxes. The relative scales aspect of definition part (4) attempts to incorporate this kind of practically similar facility in the working definition of supermaxes.

On the other hand, most states also continue to maintain small, short-term segregation cells in lower security prisons, as disciplinary tools, to temporarily control challenging prisoners. These cells, often colloquially dubbed "the hole," or confusingly referenced in the academic literature as "disciplinary segregation," differ from the working definition of supermaxes primarily in terms of scale, i.e. the shorter lengths of confinement, and the smaller number of cells. By focusing on the relative scales of facilities within states, definition part (4) attempts to distinguish the highest-security, newest institutions, like Pelican Bay, which are the subject of this dissertation, from the many other possible uses of isolation and segregation spread throughout a state prison system. In practice, however, the distinction is, unsurprisingly, rather grey.¹⁵⁷ The final section of this chapter further discusses the challenges in applying the working

¹⁵⁶ David R. Shaw (Inspector General), *Special Review: Management of the California Department of Corrections and Rehabilitation's Administrative Segregation Unit Population* (Office of the Inspector General, CA: Jan. 2009), available online at: www.oig.ca.gov (last accessed 13 Feb. 2012).

¹⁵⁷ For instance, Texas has more than 5,000 prisoners serving indefinite terms in nine-by-seven foot cells; they leave their cells only to shower, or for solitary recreation, and any time they leave their cells, they are hand- and leg-cuffed and escorted by two correctional administrators. Dane Schiller, "Some Prisoners in Solitary for Years in Texas," *Houston Chronicle*, Aug. 23, 2011, available online at: <http://www.chron.com/news/houston-texas/article/Some-prisoners-in-solitary-for-years-in-Texas-2132621.php> (last accessed 14 Feb. 2012). These conditions certainly resemble the meticulous control and rigid limitations described in definition part (3). Prisoners are assigned to these conditions based on their status as gang members, meeting the bureaucratic assignment requirement of definition part (2). However, these prisoners are spread throughout the Texas prison system, in dozens of smaller prisons. Identifying where these units are and when they were built still needs to be done. Based on the working supermax definition, then, Texas's 5,000 prisoners may or may not constitute supermax prisoners, depending on whether they

definition of supermaxes to actually identifying specific supermax institutions throughout the United States, and explains the case-by-case analysis applied for purposes of this dissertation.

While the relative scales proposed in definition part (4) do not completely resolve the question of how to differentiate between short and long-term segregation facilities, the relative scales are helpful in differentiating supermaxes from their predecessors – whether Walnut Street Jail, Auburn State Prison, the “black-out cells” described by prisoners like Abbott, or the lockdown units at USP-Marion and Folsom. Each of these earlier examples represented, at most, a few hundred isolation or segregation cells, as opposed to the tens-of-thousands of supermax cells in the United States today, as documented in the final section of this chapter. Even in the case of Walnut Street Jail and Auburn State Prison, the duration of solitary confinement was often limited to a few months; the entire isolation experiment was abandoned at Auburn after eighteen months. Similarly, Abbott described spending less than a month in the “black-out cell,” and the *Adams* court ordered prisoners released from lockdowns at USP-Marion after a few months. By contrast, supermax prisoners regularly spend years, if not decades, in comparable conditions.

Indeed, the combination of bureaucratic assignment described in definition part (2), with the deprivations described in definition part (3) and the long durations of confinement delineated in definition part (4) help to distinguish supermaxes from other, historical uses of solitary confinement, like those at Walnut Street Jail and Eastern State Penitentiary in the eighteenth and nineteenth century, as well as those deployed in the CARE and START programs in the 1970s. Prisoners were assigned to the earliest solitary confinement institutions by judges, not by correctional administrators. Moreover, institutions like Eastern State were explicitly dubbed “penitentiaries”; prison administrators provided both work and religious services to prisoners, with the goal of rendering them, first, penitent, and then, reformed. Likewise, 1970s programs like CARE and START sought to alter prisoner behavior, in exchange for gradual increases in the privileges available to prisoners. Supermax prisoners on the other hand, are often consigned to supermaxes indefinitely, with the explicit understanding that nothing the prisoner does, or refrains from doing, could possibly earn him either an increase in privileges, or a transfer to a lower security facility.¹⁵⁸ Supermax prisons, then, have shed the pretense that solitary confinement, or extreme isolation, is likely to make people better neighbors.

F. Labeling and Categorizing Supermaxes

To go back to a few of the examples explored in this chapter, the working definition of supermaxes excludes facilities like Alcatraz, Marion, and Oak Park Heights, but it includes facilities like Pelican Bay, New York’s Southport Correctional Facility, Camp 6 in Guantanamo Bay Cuba, and even some smaller in-prison units often labeled as protective or disciplinary custody, but functioning like supermaxes. Alcatraz is excluded based on both part (1) of the supermax definition and part (3). Alcatraz closed three decades prior to 1984, and dozens of Alcatraz prisoners at a time were allowed to congregate together in dining halls and on exercise yards, so neither their physical movements nor their human contacts were either meticulously controlled or rigidly limited. Marion and Oak Park Heights are both excluded based on definition part (1). Oak Park Heights, like Alcatraz, is also excluded passed on definition part (3); Oak Park

have been held in substantially similar conditions since the 1970s, when long-term lockdowns began in many state prison systems, or whether they are held in facilities that have since been retrofitted and explicitly designed as supermaxes.

¹⁵⁸ See, e.g., *Austin v. Wilkinson*, 545 U.S. 209, 220 (2005).

Heights allows for congregate prison programming, which precludes those meticulous controls and rigid limitations on activity that supermaxes impose.

Many scholars, in fact, have incorrectly characterized either Alcatraz or USP-Marion as the original “supermax.”¹⁵⁹ But the only sense in which Alcatraz and USP Marion were “super” is that they were designed to hold super notorious prisoners, like Al Capone and Robert Stroud. Nothing in the physical design of either prison actually facilitated the kind of long-term, meticulous control, which would distinguish and characterize the supermax prisons of the 1980s. In physical design, then, neither prison even foreshadowed the modern supermax structure. Other prisons built in the 1970s drew much more attention for their novelty, like the Federal Correctional Institution in Butner, North Carolina, opened in 1976, looking “more like a college than a prison,” with big windows, and wooden doors, to which prisoners held the keys.¹⁶⁰

Not only is the characterization of either Alcatraz or USP-Marion as a supermax technically incorrect based on the definition articulated in this section, but it is misleading as a means to characterize the supermax phenomenon. The mischaracterization of Alcatraz and Marion as the first supermaxes wrongly implies that the supermax phenomenon was a national one, implemented at the federal government level, popular and widespread. In fact, the supermax phenomenon was a state-based one, implemented at the institution-level, which spread only slowly across jurisdictions, over a period of almost twenty years. To the extent that the lockdowns at USP-Marion in the 1970s influenced decisions to build the federal ADX supermax, lockdowns at other state institutions, like Folsom in California and Walpole in Massachusetts, simultaneously influenced state-based decisions to build state supermaxes. Even in this theoretical sense, USP-Marion is merely an example of a broader phenomenon – a harbinger, but not a trailblazer.

Pelican Bay State Prison, unlike Alcatraz and Marion, meets all the requirements of a supermax. It was opened in 1989, all prisoners are assigned there based on in-prison behavior, each prisoner’s every movement is surveilled and controlled at any given moment, and it has more than 1,000 beds devoted to total isolation, with more than 500 prisoners who have been isolated there for more than 10 years. A similar analysis applies to the chronology, process, conditions, and scale of supermax confinement at New York’s Southport Correctional Facility – opened in 1991, holding 700 prisoners bureaucratically assigned under total control conditions for an average period of almost three years¹⁶¹ – and the U.S. Military’s Camp 6 in Guantanamo Bay Cuba – opened in 2006, holding 165 prisoners bureaucratically assigned under total control conditions for more than five years.¹⁶²

Just as there is no agreed upon definition of what a supermax is, there is no agreed upon definitive list of supermax institutions. Charting the geography and scale of the supermax phenomenon, however, is critical to understanding not only how it is bounded in space and time, but how the innovation has spread from locality to locality, in the span of just twenty years. Based on a case-by-case analysis of state department of corrections website and reports, local news stories, advocacy agency reports, prisoners’ rights litigation documents, and national surveys of correctional institutions, this section provides a list of the institutions identified to

¹⁵⁹ See, e.g., Ward, with Kassebaum, *supra* note 45: 445-460; Ward and Werlich, *supra* note 45: 55-56; Stephen C. Richards, ed., *USP Marion: The First Federal Super-Max Penitentiary* (Carbondale, IL: Southern Illinois University Press, forthcoming, 2013); Morris and Kurki, *supra* note 67.

¹⁶⁰ “A Sample of the Future; No Wall, No Bars, But Barbed Wire and Work.” *U.S. News & World Report*. Nov. 28, 1977:78.

¹⁶¹ The Correctional Association of New York, *supra* note 73: 8, 9, and 20.

¹⁶² Amnesty International, *Cruel and Inhuman*, *supra* note 90: 2-3.

date in the United States, which meet the four-part definition of a supermax laid out in the previous section. Specifically, *Table 1: Supermax Institutions, by year opened, 1986-2006*, in Appendix A, chronologically lists every identified prison (state, federal, or military) in the United States, which (1) opened after 1984, (2) holds prisoners assigned there based on an in-prison bureaucratic process, (3) in conditions of meticulous control and rigid limitations, (4) on a relatively large scale, i.e. with durations of confinement longer than a few months, and with more than a handful of cells. As suggested by the previous sections in this chapter, there are many additional prisoners in other forms of isolation, segregation, and short-term solitary confinement in the United States. *Table 2: Supermax & Segregation Housing, as a % of Prison Populations, by State, 2010*, in Appendix A, provides an alphabetical list of all 50 states (and also includes the federal Bureau of Prisons) and identifies the proportion of state prisoners in each jurisdiction held in (a) supermaxes and (b) in any form of segregation. Together, these two tables provide a preliminary sense of three important things: (1) the estimated scale of supermax use in the United States, in terms of how many facilities and how many people are included; (2) the variety of institutions incorporated in the working definition of supermaxes; and (3) the geography and chronology of the supermax phenomenon.

In total, *Table 1* identifies 56 supermax facilities in the United States, plus additional smaller units identified as supermax institutions and scattered throughout larger prison complexes in New York and Texas.¹⁶³ *Table 2* identifies forty-one states with at least one supermax unit; only nine states (Alaska, Hawaii, Kentucky, Minnesota, Missouri, New Hampshire, North Dakota, South Dakota, and Vermont) appear to have no supermax units. *Table 1* also lists the number of prisoners held in supermax confinement in each identified facility, where available. (If the current population was unavailable, the institutional capacity was used in the table, and to calculate the sum.) In total, as of 2010, there were an estimated 29,369 prisoners being held in supermax institutions. The number of prisoners held in any form of segregation, isolation, or solitary confinement, is estimated to be almost three times greater. Based on the numbers used to calculate the percentages in *Table 2*, there were an estimated 76,182 prisoners being held in any form of segregation in the United States.

Table 1 also indicates whether descriptions of the listed supermax identified it as a free-standing institution, built from the ground-up (indicated in the final column, with a checkmark). Supermaxes without checkmarks are institutions that were added onto existing buildings, or retrofitted within existing structures. Two of the first supermaxes listed on the chart provide a good example of the distinction. Arizona's SMU I, the first supermax, was designed to be a new kind of prison, built by justice architects working in collaboration with correctional administrators and opened with a capacity for nearly 1,000 supermax prisoners, in 1986. Alabama's Donaldson Correctional Facility, on the other hand, was built in 1982 as a low-security, dormitory-style prison; five years later, a segregation 300-bed unit was added onto this same physical structure, designed to hold the state's highest security prisoners, along with some overflow death-row prisoners.¹⁶⁴ Because much of this dissertation focuses on the Arizona SMU

¹⁶³ See Schiller, "Some Prisoners in Solitary for Years in Texas," *supra* note 157; The Correctional Association of New York, *supra* note 73.

¹⁶⁴ Alabama Department of Corrections, "Donaldson Correctional Facility," available online at: <http://www.doc.state.al.us/facility.asp?id=4> (last accessed 17 Feb. 2012); Alabama Department of Corrections, "Donaldson Corr. Facility," *2002 Annual Report Narrative*: 17-18, available online at: <http://www.doc.state.al.us/reports.asp> (last accessed 19 Feb. 2012).

prototype and its progeny, *Table 1* essentially seeks to identify those “free-standing” institutions that seem most closely related to this initial model.¹⁶⁵

Nevertheless, the distinction between free-standing supermaxes and retrofits or additions is often difficult to make. Sometimes entirely new units are built onto old prison grounds, as with New York’s S-Blocks, built between 1997 and 2000. Only the specific details, gleaned from site visits, and published in the report *Lockdown New York*, allowed for the assessment that these are actually new, free-standing facilities, which satisfy the four prongs of the working supermax definition.¹⁶⁶ In many other states, comparable information is not publicly available. Many southern states, for instance, report that they renovated existing high-security prisons in the 1980s and 1990s (e.g. Alabama, Georgia, Florida, Louisiana, Mississippi, South Carolina, and Texas). These states also each faced a variety of lawsuits in the 1970s and early 1980s concerning the conditions and procedures for placement in the then-existing highest-security segregation facilities.¹⁶⁷ This raises the question of whether these states were not simply renovating existing facilities to comply with court orders, as opposed to designing entirely new facilities, imposing a different degree of control and isolation on prisoners. Chapter X will further discuss the relationship between prison design, solitary confinement, and supermax prisons. For now, suffice it to say that these examples simply demonstrate what the supermax definition presented in the previous section is indeed a *working* definition, seeking to identify a category of high-security prisons, bounded in time and form, for study. As it turns out, the grey-area institutions, which may be too old or too small or too permissive to constitute supermax prisons are actually some of the more interesting categories of analysis.

The next chapter will focus more on the chronology and geography of the supermax phenomenon, as seen in *Table 1*, but briefly, the first supermax identified in *Table 1* opened in 1986, and the last opened in 2010. In fact, in the last five-to-ten years, the supermax phenomenon seems to have slowed considerably. As of 2012, it had been almost ten years since a state built a large supermax, with more than a few hundred beds (the last of these larger institutions opened in Maryland in 2003). Two of the five supermaxes built since 2003 were built in Guantanamo Bay, Cuba, by the U.S. military, on a detention base for non-citizen prisoners of war. And although Colorado opened a new supermax unit in 2010, the department of corrections never used all 316 beds available in the institution, and the state announced in April of 2012 that it planned to close the unit.¹⁶⁸

¹⁶⁵ Of note in *Table 1*, the Corcoran State Prison SHU opened in 1988, one year before the Pelican Bay State Prison SHU. However, the focus of much of this dissertation is on Pelican Bay, because it was actually the prototype for Corcoran, which was retrofitted at the last minute to be opened as a supermax.

¹⁶⁶ The Correctional Association of New York, *supra* note 73: 10.

¹⁶⁷ See e.g., *Pugh v. Locke*, 406 F.Supp. 318 (M.D. Ala. 1976), *aff’d as modified*, 559 F.2d 283 (5th Cir. 1977), *rev’d in part*, 438 U.S. 781 (1978) (*per curiam*) (discussed further in Chapter X); *McCray v. Bennett*, 467 F.Supp. 187 (M.D. Ala. 1978) (finding racially discriminatory segregation in Alabama prisons); *Guthrie v. Evans*, 93 F.R.D. 390 (S.D. Ga. 1981) (challenging conditions of confinement at Georgia State Prison, including racial segregation and disciplinary practices, filed originally in 1972); *Costello v. Wainwright*, 397 F.Supp. 20 (M.D. Fl. 1975) (challenging overcrowding and associated conditions in Florida; ultimately closed in 1995); *Fulford v. King*, 692 F.2d 11 (5th Cir. 1982) (challenging use of restraints and “black boxes” over handcuffs in segregation in Angola State Prison in Louisiana); *Vice v. Harvey*, 458 F. Supp. 1031, 1036 (D. S.C. 1978) (discussing question of procedures that must precede placement in solitary confinement or segregation); *Ruiz v. Estelle*, 503 F. Supp. 1265 (S.D. Tex. 1980) (challenging conditions of confinement in Texas prisons).

¹⁶⁸ Denise Maes, “Victory in Colorado: Closing Solitary Confinement Unit Good for Budget and Public Safety,” *ACLU Blog of Rights*, Mar. 21, 2012, available online at: <https://www.aclu.org/blog/prisoners-rights/victory-colorado-closing-solitary-confinement-unit-good-budget-and-public> (last accessed 24 Apr. 2012) (discussing closure

In sum, this chapter developed a working definition of the supermax, and also explored the history and uses of high-security prisons and solitary confinement in the United States. This history provided some context for the development of supermaxes, which were preceded by a combination of (a) experiments with sensory deprivation and (b) riots, work stoppages, prisoner-on-guard violence, and long-term lockdowns in prisons across the United States. Both the use of sensory deprivation and the increasingly popular correctional practice of long-term lockdowns represented a shift in institutional process: isolation, segregation, and solitary confinement shifted from being temporary punishments for prison wrongdoers to becoming systemic tools of institutional control. The anatomy of this shift towards greater institutional control will be explored in great detail, using the case of California as an example, in Chapter IV. The comparable role of federal courts in shaping the supermax phenomenon, hinted at in the discussion of *Adams v. Carlson* in Section D. A Brief Overview of American Uses of Solitary Confinement, will be explored further in Chapters IX and X. The next chapter, however, will focus in particular on part (4) of the working supermax definition: the scale of supermax confinement. Chapter III will explore the origins of the supermax, not just in the long history of American uses of solitary confinement, but in a particular moment of American mass incarceration.

of a 316-bed solitary confinement facility in the state); Jenny Deam, “Decline in inmates prompts closure of new Colorado prison,” *Los Angeles Times*, Apr. 2, 2012 (noting that the Colorado facility closed in March was never fully populated).

III. Mass Incarceration in the United States, the Sunbelt, and California

This chapter provides context for understanding the first and fourth parts of the working supermax definition proposed at the end of Chapter II. Specifically, this chapter introduces the idea of mass incarceration, explaining (1) why the early 1980s were a critical period in the supermax phenomenon and (2) the vast increases in the scale of prison building during this period – both in terms of the amount of money the government invested in building and in terms of the number of people incarcerated. The first section in this chapter discusses the national context of mass incarceration in the United States and its close relationship to the supermax phenomenon. The second section discusses the Sunbelt context of mass incarceration, focusing on the early supermaxes, which were concentrated in the Sunbelt. The third section introduces the California case study at the core of this dissertation.

A. The National Context of Mass Incarceration

The era preceding the opening of the first supermaxes in the United States was, ironically, a time of liberal prison attitudes, an era focused on rehabilitation.¹⁶⁹ Both incarceration rates and crime rates were relatively stable through the early 1970s. In fact, in 1973, Blumstein and Cohen published an article entitled “A Theory of the Stability of Punishment,” emphasizing the relative stability of U.S. imprisonment rates between 1930 and 1970.¹⁷⁰ The article is now famous for the scale of its mispredictions. In 1973, incarceration rates in the United States began a slow increase. By 1988, the U.S. incarceration rate was double what it had been in 1972. By 2007, the incarceration rate had doubled again. In 1972, the U.S. incarceration rate was just under 100 people incarcerated for every 100,000 population. In 2007, the rate was just over 500 people incarcerated for every 100,000 population – one of the highest incarceration rates in the world.¹⁷¹

As incarceration rates increased, the prisons overflowed, and the costs of incarceration soared. In 1985, state corrections budgets totaled \$12.7 billion. Ten years later, in 1995, state corrections budgets had more than doubled, totaling \$26.6 billion.¹⁷² The budgets continued to increase throughout the 1990s, reaching \$38 billion by 2001.¹⁷³ Increases in adult incarceration costs (of about 6.2 percent annually) “outpaced those of health care (5.8 percent), education (4.2 percent), and natural resources (3.3 percent).”¹⁷⁴ The federal corrections budget increased at a

¹⁶⁹ See, e.g. Cummins, *supra* note 142.

¹⁷⁰ Alfred Blumstein & Jacqueline Cohen, “A Theory of the Stability of Punishment,” *The Journal of Criminal Law and Criminology*, Vol. 64.2 (1973): 198-207.

¹⁷¹ Franklin Zimring, “The Scale of Imprisonment in the United States: Twentieth Century Patterns and Twenty-First Century Prospects,” *The Journal of Criminal Law and Criminology*, Vol. 100.3 (2010): 1225-46, at 1228-30.

¹⁷² These numbers are inflation-adjusted; they are given in 1996-comparable dollars. See James J. Stephan, “Appendix table - Surveys of government finances, 1985-96: Expenditures for total State corrections and for State prisons in 1996 constant dollars” in *State Prison Expenditures, 1996*, NCJ 17211 (Washington, D.C.: U.S. Department of Justice, Bureau of Justice Statistics, Aug. 1999), available online at: <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=1173> (last accessed 25 Feb. 2012).

¹⁷³ James. J. Stephan, “Appendix table - Surveys of government finances, 1986-2001: Expenditures for total State corrections and for State prisons in 2001 constant dollars,” in *State Prison Expenditures, 2001*, NCJ 202949 (Washington, D.C.: U.S. Department of Justice, Bureau of Justice Statistics, Jun. 2004), available online at: <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=1174> (last accessed 25 Feb. 2012).

¹⁷⁴ *Id.* at 2.

similar pace; between 1990 and 1996, federal prison expenditures increased 160 percent, from \$946 million to \$2.5 billion.¹⁷⁵

Within these massive budgets, capital outlays for prison construction remained relatively small, making up between 6 and 13 percent of the overall budgets. However, the raw numbers are still staggering; in 1984, state correctional departments spent \$874 million on capital expenses, like prison construction and renovation. In 1996, state correctional departments were spending almost 150 percent more on construction: \$1.3 billion in 1996 alone.¹⁷⁶ By the early 1980s, then, states had begun to invest in substantial new prison infrastructure.¹⁷⁷

The increasing investments in infrastructure opened the door not just to new operational philosophies of punishment and imprisonment, but to new physical structures, too. The openings of the first supermaxes coincided precisely with the prison building booms in states like California, Arizona, and Colorado. *Table 3: Supermax Infrastructure Investments, 1989-2010*, in Appendix A, provides a summary of available data about state investments specifically in supermax infrastructure, during the prison-building boom of the 1990s and early 2000s. A few examples convey the scale of the infrastructural investment in one decade alone. In 1990, Georgia built more than 600 supermaximum security beds at a cost of \$110,000 per bed, or \$66 million in total.¹⁷⁸ In 1993, Indiana opened a new, supermax facility, at a cost of \$124 million.¹⁷⁹ In 1994, the federal government opened the Administrative Maximum, a supermax in Florence Colorado. Construction cost: \$60 million.¹⁸⁰ In 1995, the Illinois Department of Corrections built a new, 500-bed supermax facility, at a cost of \$73 million.¹⁸¹ In 2000, the Delaware Department of Corrections built 300 supermax beds at a cost of \$110 million.¹⁸² Supermaxes, then, are one piece of a larger mass incarceration trend, including a nation-wide investment in corrections. As such, the context of mass incarceration does not just explain the sources of capital, which allowed states to build modern, expensive supermax prisons, but also provides an important theoretical backdrop to the supermax story.

Many researchers have explored the justifications for the massive expansion of the American criminal justice system, which took place in the 1980s and 1990s. Scholars have proposed a variety of factors, which might explain the incarceration boom, from an excess of constitutional proceduralism,¹⁸³ to the advent of mandatory minimum and determinate sentences,¹⁸⁴ to a decline in faith in the rehabilitative ideal,¹⁸⁵ to prison construction itself.¹⁸⁶

¹⁷⁵ *Id.* at iv.

¹⁷⁶ *Id.*

¹⁷⁷ See, e.g., Gilmore, *supra* note 21; Lynch, *Sunbelt Justice*, *supra* note 33.

¹⁷⁸ Georgia Department of Corrections. "FY2007 Costs Of Adult Offender Sanctions (State Funds Only)," Mar. 2008, on file with author.

¹⁷⁹ Jamie Fellner and Joanne Mariner, *Cold Storage: Supermaximum Security Confinement in Indiana* (New York: Human Rights Watch, 1997).

¹⁸⁰ "Fast Facts: Supermax Prison," *Fox News*, May 4, 2006, available online at: <http://www.foxnews.com/story/0,2933,194306,00.html> (last accessed 16 Feb. 2012).

¹⁸¹ Lloyd Dunkelberger, "Florida Considers Superjail: Inmate's Death Prompts Look at 'Supermax' Prison," *Ocala Star-Banner*, Aug. 22, 1999: B-1.

¹⁸² Delaware Department of Correction, "James T. Vaughn Correctional Center," last updated Feb. 2, 2012, available online at: <http://doc.delaware.gov/BOP/PrisonDCC.shtml> (last accessed 22 Feb. 2012).

¹⁸³ William J. Stuntz, "The Political Constitution of Criminal Justice," *Harvard Law Review*, Vol. 119.3 (Jan. 2006): 780-851, at 783.

¹⁸⁴ Michael Tonry, *Sentencing Reform Impacts* (Washington, D.C.: National Institute of Justice, 1987).

¹⁸⁵ Alfred Blumstein, "Prison Populations: A System Out of Control," *Crime and Justice: A Review of Research*, Michael Tonry and Norval Morris, eds., Vol. 10 (Chicago: University of Chicago Press, 1988); David Garland, *Culture of Control: Crime and Social Order in Contemporary Society* (Chicago: University of Chicago Press, 2001).

Zimring and Hawkins argue that none of these explanations are satisfactory and suggest instead that, perhaps, a sense of accountability to citizen-voters among decision-makers throughout the criminal justice system has led to a tendency to err on the side of prosecuting, sentencing, and incarcerating more criminals.¹⁸⁷

In addition to those who have explored legal-procedural and political explanations for mass incarceration, others have suggested broader sociological explanations for the mass incarceration trend, explanations rooted in more abstract and comprehensive social theories. For instance, Gilmore has argued recently, from a neo-Marxist perspective, that economic forces, especially the loss of small-scale farms and industrial plants in rural areas, increased the popular demand for prison-building, seen as a potential infusion of government investment and employment opportunities in impoverished and marginalized areas.¹⁸⁸ Wacquant has argued for an even more conspiratorial perspective on mass incarceration, suggesting that prisons result from a criminalization of poverty, through neoliberal economic policies, which in turn functions both to control the lowest rungs of the labor market and to oppress racial minorities, reinforcing existing hierarchies of power in the United States.¹⁸⁹ Simon has argued, more subtly, that changes “in the conditions of the working class and . . . in the mode of rationalizing state power,” as seen particularly through the lens of reductions in the use of parole as an alternative to imprisonment, contributed to mass incarceration.¹⁹⁰ And more recently, Simon has argued that federal and state governments have become dependent on anti-crime policies to establish legitimacy; this need for legitimacy, in turn, drives punitive politics.¹⁹¹ Other socio-legal scholars have argued that increasing punitiveness, in California and across the United States, results from a historical identity as a convict nation,¹⁹² or from a pervasive culture of politicized fear.¹⁹³

Researchers have also looked at the relationship between the mass incarceration trend and crime rates. Pure quantitative analyses find weak to non-existent relationships between increased incarceration and decreasing crime rates.¹⁹⁴ On the other hand, qualitative and quantitative analyses have found many detrimental impacts on communities, stemming from the drastic incarceration expansion; these impacts include higher unemployment and infectious disease rates as well as more overall social instability and unrest.¹⁹⁵

¹⁸⁶ Alfred Blumstein, Jacqueline Cohen, and William Gooding, “The Influence of Capacity on Prison Population: A Critical Review of Some Recent Evidence,” *Crime and Delinquency*, Vol. 29 (1983): 1-51.

¹⁸⁷ Frank Zimring and Gordon Hawkins, *The Scale of Imprisonment* (Chicago: University of Chicago Press, 1991).

¹⁸⁸ Gilmore, *supra* note 21.

¹⁸⁹ Loïc Wacquant, *The Place of the Prison in the New Government* (Minneapolis: University of Minnesota Press, 2006); Loïc Wacquant, “Deadly Symbiosis: When Ghetto and Prison Meet and Mesh,” *Punishment & Society*, Vol.3, No. 1, pp. 95-134 (2001); Loïc Wacquant, *Urban Outcasts: A Comparative Sociology of Advanced Marginality* (Malden, MA: Polity Press 2008).

¹⁹⁰ Jonathan Simon, “From the Big House to the Warehouse: Rethinking Prisons and State Government in the 20th Century,” *Punishment & Society*, Vol. 2, No. 2, pp. 213-34, 214 (2000); Jonathan Simon, *Poor Discipline: Parole and the Social Control of the Urban Underclass, 1890-1990* (Chicago: University of Chicago Press, 1993).

¹⁹¹ Jonathan Simon, *Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (New York: Oxford University Press, 2007).

¹⁹² Marie Gottschalk, *The Prison and the Gallows: The Politics of Mass Incarceration in America* (Cambridge: Cambridge University Press, 2006).

¹⁹³ Garland, *Culture of Control*, *supra* note 185.

¹⁹⁴ Franklin E. Zimring, *The Great American Crime Decline* (New York: Oxford University Press, 2007); *see also* Steven D. Levitt, “Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Decline and Six that Do Not,” *Journal of Economic Perspectives*, Vol. 18.1 (Winter 2004): 163-90.

¹⁹⁵ Marc Mauer and Meda Chesney-Lind, *Invisible Punishment: The Collateral Consequences of Mass Imprisonment* (New York: The New Press, 2002); Todd Clear, *Imprisoning Communities: How Mass Incarceration*

In the context of discussing both mass incarceration trends and the shift away from the rehabilitative ideal in punishment policy, a few theorists have both noted the expanding use of long-term isolation as one aspect of the mass incarceration trend, and commented on the growing popularity of the idea of the supermax. Specifically, in describing the “new penology” and the shift from the “Big House” prison of the 1950s and 1960s to the “Warehouse” prison of the 1990s, Simon has noted that “the public order of the warehouse prison increasingly relies on coercive regimes of total segregation to isolate the most threatening inmates.” Simon describes these coercive regimes as a part of the Warehouse Prison Era focus on “containment” and dependence on “technology and a militarized guard force.”¹⁹⁶ Similarly, as discussed in Chapter II, Lynch describes the first uses of the term “supermax” in mid-1980s advertisements in the professional magazine *Corrections Today*; she suggests that the term “supermax” gained popularity as correctional ideals shifted away from rehabilitation and towards segregation and security.¹⁹⁷

Nonetheless, despite all these descriptive observations and theorizing about broader mass incarceration trends, no analysis has systematically examined the specific justifications, uses, or impacts of supermaximum security confinement. This dissertation project seeks to do just that, in part in order to better understand both the mechanisms and collateral consequences of mass incarceration in the United States. The exact mechanism by which the prison system itself expanded and especially the decisions about what kinds of prisons were needed to house the new and growing prisoner population produced through mass incarceration has been under-explored. This under-exploration makes sense, in part, because the decisions about how to house these new prisoners happened outside of the public sphere.

B. The Sunbelt Context of Punitiveness

Historians of prisons and punishment in the United States have argued that the politics of punishment, and the resulting design of prisons, was distinctive in southern states.¹⁹⁸ Others have argued that certain economic and class themes pervaded prisons and punishment across the United States.¹⁹⁹ Recent historical works have sought to re-define the traditional regional divisions of the United States, highlighting certain shared characteristics between the American South and the American West, and suggesting that there exists a unified Sunbelt region.²⁰⁰ The Sunbelt stretches from California to Florida, incorporating states that, since the end of World War II especially, have (1) tended towards conservative local politics and (2) experienced economic infusions of industry and people, both migrating en masse into highly-planned Sunbelt

Makes Disadvantaged Neighborhoods Worse (New York: Oxford University Press, 2007); Ted Conover, *Newjack: Guarding Sing-Sing* (New York: Random House, 2000).

¹⁹⁶ Simon, “From the Big House to the Warehouse,” *supra* note 190: 228-9. *See also* Kurki and Morris, *supra* note 67 (describing the supermax phenomenon and identifying areas for future research); Malcolm M. Feeley and Jonathan Simon, “The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications,” *Criminology*, Vol. 30.4 (1992): 449-74.

¹⁹⁷ Lynch, “Selling ‘securityware,’” *supra* note 53: 309, 313.

¹⁹⁸ *See, e.g.*, Alex Lichtenstein, *Twice the Work of Free Labor: The Political Economy of Convict Labor in the New South* (New York: Verso Books, 1996); Edward L. Ayers, *Vengeance & Justice: Crime and Punishment in the 19th Century American South* (New York: Oxford University Press, 1984).

¹⁹⁹ *See, e.g.*, McLennan, *The Crisis of Imprisonment*, *supra* note 106.

²⁰⁰ Examples of such recent works include: Lynch, *Sunbelt Justice*, *supra* note 33; Matthew D. Lassiter, *The Silent Majority: Suburban Politics in the Sun-Belt South* (Princeton, N.J.: Princeton University Press, 2006); Lisa McGirr, *Suburban Warriors: the Origins of the New American Right* (Princeton: Princeton University Press, 2001); and Hal Rothman, *Neon Metropolis: How Las Vegas Started the 21st Century* (New York: Routledge, 2002).

communities like Houston, Phoenix, and Orange County, California.²⁰¹ This economic context is an important backdrop to the American prison-building boom of the 1980s and 1990s; by 2000, eleven of the “high-growth Sunbelt states” held almost half of all the state prisoners in the United States.²⁰² In other words, scholars have argued that the Sunbelt is characterized by distinctive politics and policies, which particularly influenced the design of criminal justice institutions in Sunbelt States.²⁰³ The prison-building boom, in turn, is an important backdrop to the history of the supermax prison.

Table 1, in Appendix A, reveals the prominence of the Sunbelt in the supermax phenomenon, especially in the early years. Of the first 12 supermaxes built in the United States at the beginning of the phenomenon, between 1986 and 1990, nine were in the sunbelt: one each in Arizona, Alabama, Florida, Maryland, Tennessee, Georgia, and Mississippi, and two in California. Of the 7,800 supermax beds distributed between these first 12 supermaxes, more than 6,600, or 85 percent, were in the Sunbelt. And the vast majority of these were in Arizona and California, which built two of the biggest new, free-standing supermaxes during this period.

Arizona and California are each classic examples of Sunbelt States. They both contain counties known for their conservative local politics (e.g., Orange County and the Central Valley counties in California, and Maricopa County, home to the infamous Sheriff Arpaio, in Arizona²⁰⁴), and they both contain highly-planned communities. In addition to building more prisons, incarcerating higher rates of people (Arizona) and more people (California) than other states, Arizona and California were both also setting national trends in punitiveness throughout the last quarter of the twentieth century. Arizona reintroduced chain gangs, pioneered the now-popular policy of charging prisoners for various living expenses (like seeing a doctor, or obtaining toothpaste), and bragged about how little of the corrections budget was devoted to “programming resources” for prisoners.²⁰⁵ Arizona also passed one of the harshest anti-immigration laws, criminalizing the status of being un-documented, in the United States.²⁰⁶

California in the last few decades has also taken the lead in popularizing other punitive innovations. California has often acted as an early adopter of other states’ innovations,

²⁰¹ For a clear summary of this phenomenon, see Lynch, *Sunbelt Justice*, *supra* note 33: 9. For other descriptions of post-World War II politics of the Sunbelt, see Peter Trubowitz, “Sectionalism and American Foreign Policy: The Political Geography of Consensus and Conflict,” *International Studies Quarterly*, Vol. 36.2 (Jun. 1992): 173-190; William H. Frey, “Three Americas: The Rising Significance of Regions,” *Journal of the American Planning Association*, Vol. 68.4 (2002): 349-355. For other descriptions of post-World War II economics of the Sunbelt, see Carl Abbott, *The New Urban America: Growth and Politics in Sunbelt Cities* (Chapel Hill: University of North Carolina Press, 1987); Carl Abbott, “Urbanizing the Sunbelt,” *Organization of American Historians Magazine of History* (Oct. 2003): 11-16; Bruce Schulman, “Politics in the New South: Republicanism, Race, and Leadership in the Twentieth Century,” *Reviews in American History*, Vol. 21 (1993): 340-45.

²⁰² Lynch, *Sunbelt Justice*, *supra* note 33: 9.

²⁰³ See *id.*; Robert Perkinson, *Texas Tough: The Rise of a Prison Empire* (New York: Metropolitan Books/Henry Holt, 2008).

²⁰⁴ For recent examples of politicized perspectives on Arizona, and on Arpaio, see, e.g., Jason Ryan, “DOJ Breaks Off Negotiations With Defiant Sheriff Joe Arpaio,” *ABC News: Legal*, Apr. 3, 2012, available online at: <http://abcnews.go.com/blogs/politics/2012/04/doj-breaks-off-negotiations-with-defiant-sheriff-joe-arpaio/> (last accessed 26 Apr. 2012) (discussing the Department of Justice investigation into Arpaio’s sheriff’s office and whether they were infringing on civil rights).

²⁰⁵ Lynch, *Sunbelt Justice*, *supra* note 33: 5.

²⁰⁶ See Ali Noorani, “Law-enforcement Leaders Agree: State Anti-immigrant Laws Encourage Discrimination,” *The Huffington Post: The Blog*, Apr. 24, 2012, available online at: http://www.huffingtonpost.com/ali-noorani/lawenforcement-leaders-ag_b_1446613.html (last accessed 26 Apr. 2012) (discussing the political attitudes towards criminalizing immigration in the state of Arizona).

modifying them in scale and detail to address California's needs. California passed one of the earliest Determinate Sentencing Laws, in 1976, for instance, joining ranks with Illinois, Indiana, and Maine.²⁰⁷ In 1994, California passed a Three Strikes Law, requiring a mandatory sentence of life in prison for a third felony conviction. Washington had passed the first such law just one year earlier, but California's law quickly gained national attention. By 2000, California had 90 percent of the prisoners in the United States serving life sentences for a third felony conviction.²⁰⁸ California had one of the first sex offender registry requirements, passed in 1947, but these laws were not widely publicized until 1992, when New Jersey passed Megan's Law, instituting a public, state sex offender registry. California then passed its own Megan's law in 1996.²⁰⁹ California, along with Arizona, has been setting punitive trends in both state-based and federal criminal justice policy since at least the 1970s.

Before 1970, California was setting trends in the other direction, leading the nation in rehabilitative initiatives.²¹⁰ But even when California's innovations were couched as rehabilitative, they were often somewhat punitive. For example, between 1903 and 1963, 20,000 people in state institutions in California were forcibly sterilized.²¹¹ (That's more than twice as many people as were sterilized in any other state during this period.)

Economic infusions of people and industry, and state government investments in incarceration and prison building explain how Sunbelt states like California and Arizona funded expensive punitive innovations like the supermax. Likewise, the punitive turn these states took in the 1970s and 1980s explain how the supermax might have made a kind of political sense in context. However, these regional contexts alone do not explain the on-the-ground mechanisms of the supermax innovation. Indeed the supermax innovation was not the same kind of popular, political innovation that some of the other policies described in this section were. Unlike California's Three Strikes Law, the Arizona's S.B. 1070 criminalizing undocumented immigrants, and state sex offender registries, supermaxes never appeared on the state ballot and were hardly discussed in the state legislatures, in either Arizona or California. Understanding the mechanisms of the supermax innovation, then, requires a close analysis of who actually designed the supermax and why. The focus of subsequent chapters is on the second supermax – Pelican Bay State Prison – because the institution provides a lens for understanding not just punitive innovation, but how these innovations are translated from place-to-place, state-to-state.

²⁰⁷ Franklin E. Zimring, "Sentencing Reform in the States: Lessons from the 1970s," *Reform and Punishment: Essays on Criminal Sentencing*, Michael Tonry and Franklin E. Zimring, eds. (Chicago: University of Chicago Press, 1983): 101.

²⁰⁸ Franklin E. Zimring, Gordon Hawkins, and Sam Kamin, *Punishment and Democracy: Three Strikes and You're Out in California* (New York: Oxford University Press, Inc., 2001). For a discussion of the Sunbelt states that have been trendsetters in criminal justice policy, see Lynch, *Sunbelt Justice*, *supra* note 33: 211.

²⁰⁹ "Sex Offender Registration and Exclusion Information" (State of California Department of Justice, 2009), available online at: <http://www.meganslaw.ca.gov/sexreg.aspx?lang=ENGLISH> (last accessed 4 Mar. 2011).

²¹⁰ For analyses of California's leadership role in the rehabilitation movement, see Volker Janssen, "From the Inside Out: Therapeutic Penology and Political Liberalism in Postwar California," *History of Science Society, Osiris*, Vol. 22 (2007): 116-134; Volker Janssen, "When the 'Jungle' Met the Forest: Public Work, Civil Defense, and Prison Camps in Postwar California," *Journal of American History*, Vol. 96 (Dec. 2009): 702-726; Cummins, *supra* note 142.

²¹¹ Elizabeth Cohen and John Bonifield, "California's Dark Legacy of Forced Sterilizations," *CNN*, Mar. 15, 2012.

C. The California Context of Local Innovation

As the westernmost state in the Union – the site of the Gold Rush, and the Hollywood movie industry, chronically electing popular actors as politicians – California has long captured the imagination of a nation. California’s prisons are no exception; the state has housed three of the most notorious prisons in the country. First, from 1934 to 1963, the federal Bureau of Prisons operated a maximum-security prison on an island off of the bayside coast of San Francisco. Known informally as “The Rock,” the prison is now a federal park. More than one million people a year visit Alcatraz Island, touring the insides of the old cell block, listening to recordings of famous former prisoners, like The Birdman of Alcatraz (Richard Stroud), recounting tales of their days on The Rock.²¹² In December 1937, two prisoners escaped from the island and were never found, perpetuating the public interest and mystery surrounding the place.²¹³

Second, from the 1960s on, California’s two oldest state prisons, Folsom and San Quentin, built in 1852 and 1880, respectively, long before Alcatraz was even imagined, seemed always to be in the news. In 1968, while incarcerated at Folsom, Eldridge Cleaver wrote *Soul on Ice* – a vivid tale of a life of crime complete with sexual violence and political calls to action – which became an immediate national bestseller in its first year in print. Also in 1968, Johnny Cash recorded a live album at Folsom Prison; the record has sold more than 3 million copies in the last forty years.²¹⁴ Just two years later, in 1970, George Jackson published the acclaimed *Soledad Brother*, while he was at San Quentin, awaiting trial for an in-prison murder, for which the state was seeking the death penalty. And in 1971, someone (whether visitor, lawyer, or correctional officer is still undetermined) allegedly helped Jackson to smuggle a gun into San Quentin, in an escape attempt that ended in a bloody death for Jackson, two other prisoners, and three correctional officers.²¹⁵ All this drama in the prisons, both federal and state, provoked intense critical public attention to prison systems. By the mid-1970s, San Quentin and Folsom, along with other prisons in California, faced scrutiny from an ever-growing coalition of prisoners’ rights advocates, lawyers, and legislators alike.²¹⁶

Perhaps it is not surprising, then, that the state with some of the prisons most open to public scrutiny, and most a part of the national imagination, eventually built one of the prisons most removed from both public scrutiny and national imagination: Pelican Bay State Prison. The very name Pelican Bay echoes the name Alcatraz; legend has it that Alcatraz is short for the Spanish *Isla de Alcatrazes*, or Island of the Pelicans. Unlike Alcatraz, however, Pelican Bay is not part of a national consciousness of imprisonment; outside of correctional administration experts, few people have ever heard of Pelican Bay, let alone know where it is located or what it looks like. And this is deliberate.

Pelican Bay State Prison opened in 1989 with 1,056 supermax beds. Just one year earlier, in 1988, Corcoran State prison opened, also with more than 1,000 supermax beds.

²¹² Federal Bureau of Prisons, “A Brief History of Alcatraz,” available online at: <http://www.bop.gov/about/history/alcatraz.jsp> (last accessed 30 Sept. 2010).

²¹³ The two are presumed to have died by drowning in the surrounding waters. Ward, with Kassebaum, *supra* note 45: 150-80.

²¹⁴ Thomas H. Green, “Johnny Cash at Folsom Prison: making of a masterpiece,” *Telegraph*, Jan. 14 2009, available online at: <http://www.telegraph.co.uk/culture/music/rockandjazzmusic/4240177/Johnny-Cash-At-Folsom-Prison-making-of-a-masterpiece.html> (last accessed 30 Sept. 2010).

²¹⁵ Cummins, *supra* note 142: 186-190, 209-10.

²¹⁶ See generally *id.*

California built some of the first and largest supermaxes in the 1980s. This was in the context of one of the first and largest prison building booms in the United States. In the 1980s, California's prison expansion was the largest in magnitude of any state's, and California today has more people incarcerated than any other state in the United States.²¹⁷ The state of California alone exceeds the scale and costs of the criminal justice systems in many other nations. California, then, makes for an important case study of supermaxes, both as a criminal justice policy trendsetter within the United States, and as a self-contained criminal justice system in itself.

The historical context of the state's punishment and prison history, in particular, is critical to understanding California's decision to build Pelican Bay, as well as additional supermax units constructed in the state since the late 1980s. Moreover, understanding California's criminal justice policy decisions helps to understand broader, national trends. These chapters seek to peer behind the barbed-wire fences and high cement walls of Pelican Bay, and California's other supermaxes, to explore the social and political forces that coalesced to produce this new kind of prison. In other words, these chapters seeks to unearth Pelican Bay, the windowless supermax institution hidden away in rural Crescent City, California, on the state's northernmost border with Oregon.

This not a simple story of the electoral politics of punishment;²¹⁸ in fact, almost none of the story is visible in the political record. Instead, this story requires understanding the mechanisms of innovation, not just at the state, but at the local, agency, and institution level. In this sense, this project builds on the work of other law and society scholars, who have sought to re-center the story of mass incarceration and punishment in America, from a monolithic national story, to a more nuanced, multi-faceted, micro-level story.²¹⁹ The story of the supermax is the story of politics and governance as it happens in the shadow of the law, within bureaucracies. Bureaucrats – specifically, prison administrators – in this story do their best to respond to what seem like overwhelming problems. And fail. Virtually the same problems with prison overcrowding and racial tensions that motivated prison administrators to build supermaxes in the 1980s persist today. By building supermaxes, though, prison administrators expanded and entrenched their power over prison administration and prison-related governance processes. The next three chapters explore this process, on the ground in California, in great detail.

²¹⁷ Louisiana, on the other hand, has the highest *rate* of incarceration at 858 prisoners per 100,000 population; California's *rate* is almost half of Louisiana's, at 471 prisoners per 100,000 population. In fact, California's rate of incarceration hovers just above the national average (of all 50 states) incarceration rate of 447 prisoners per 100,000 population. Heather C. West and William J. Sabol, *Prisoners in 2007*, NCJ 224280 (Washington, D.C.: Bureau of Justice Statistics, Dec. 2008): Table 2, available online at: <http://www.ojp.usdoj.gov/bjs/pub/pdf/p07.pdf> (last accessed 17 Feb. 2010).

²¹⁸ See e.g., Vanessa Barker, *The Politics of Imprisonment*, *supra* note 29.

²¹⁹ See, e.g. Michael Campbell, "Criminal Disenfranchisement Reform in California: A Deviant Case Study," *Punishment & Society*, Vol. 9 (2007): 177-99; Michael Campbell, "Politics, Prisons, and Law Enforcement: An Examination of the Emergence of 'Law and Order' Politics in Texas," *Law and Society Review*, Vol. 45 (Sept. 2011): 631-61; Lynch, *Sunbelt Justice*, *supra* note 33; Joshua Page, *The Toughest Beat* (New York: Oxford University Press, 2011); Heather Schoenfeld, "Mass Incarceration and the Paradox of Prison Conditions Litigation," *Law and Society Review*, Vol. 44.3-4 (Sept./Dec. 2010): 731-68.

IV. The Path to Pelican Bay California Prison History

Historical context is critical to understanding why California built Pelican Bay, what it built, how it used the institution it built, and why other states followed suit. Without this context, we cannot understand either the assumptions underlying punishment practices in the state or the comparative change represented in new practices.²²⁰ Pelican Bay State Prison is, of course, a product of correctional history in California and in the United States. It literally contains echoes of the name Alcatraz and theoretically contains echoes of the earliest solitary confinement cells in Quaker prisons in Pennsylvania in the eighteenth century, however different the practical goals of the two institutions were and are. Despite these echoes, Pelican Bay developed largely in opposition to much of the correctional ideology of prisons and punishment in California. Understanding how precisely it is different requires understanding what came before.

Until the mid-twentieth century, California was extolled as a national model, for its exemplary prison system, built on the foundations of the rehabilitative ideal. But, throughout the second half of the twentieth century, the state's prison system gradually became overcrowded and unmanageable, increasingly making national headlines for its failures instead of its accomplishments. Underlying this public shift in image, a number of important power shifts took place, which both changed the way the state managed crime and paved the way for the state to build its first supermax in the late 1980s. This chapter briefly details the early history of California's first prisons, and then focuses on the decades immediately preceding the state's decision to build a supermax. During the 1970s and early 1980s, the racial composition of California's prisons changed, the political climate in the state changed, and concrete legislative changes shifted the precarious balance of power that had previously kept the prison system functioning smoothly.

This chapter proceeds in five sections. The first section provides a brief overview of the institutional history of prisons and correctional policy in California from 1850 through the 1970s. The second section identifies the key historical events in California prisons in the 1970s, which represented ideological turning points in correctional policy. In particular, this section highlights the role of racialized violence in the 1970s in motivating administrative decisions in the 1980s. The subsequent three sections examine the role of each of the three branches of government in the supermax innovation: the legislature; the executive branch, especially the limited role of governors relative to correctional administrators; and the judiciary. Specifically, these sections argue that power shifts among each of these governmental branches paved the way for the supermax innovation. (This also foreshadows the subsequent chapters in the dissertation, which focus on the roles of each of these branches throughout the initiation and development of the supermax. Specifically, Chapter V focuses on the legislature, Chapters VI and VII focus on the administrators, and Chapters IX and X focus on the judiciary.) The final, sixth section in this chapter summarizes the key historical events and power shifts among government actors in California in the 1970s and 1980s and looks at the policy alternatives to the supermax that were proposed and rejected in these years.

Throughout this story, correctional administrators articulately identify the ways in which these power shifts resulted in important losses of power for correctional officers in prisons. In response, correctional administrators sought to control a variety of risks of danger, both from within the prison from prisoners, and from without from interveners like Marxist students, liberal

²²⁰ Simon, *Poor Discipline*, *supra* note 190: 17.

legislators, and so-called activist federal judges. Ultimately, the power lost to judicial interveners and legislative sentencers coalesced, somewhat incidentally, in the hands of correctional administrators.

To be clear, this chapter does not detail the specific intricacies of how supermaxes were designed, or why and to whom they seemed necessary. Instead, it focuses on the changes both within California prisons and in the state's overall governance structure, which took place in the 1970s and 1980s and paved the way for the supermax innovation. These changes are critical for understanding the overall shape of criminal justice innovations and prison building in the 1980s, both in California, and throughout other states, which often followed California's lead.

A. California's First Prisons: From Exile to Rehabilitation and Back Again, 1850-1970

California's first state prison opened in 1851; San Quentin State Prison, located just North of San Francisco, in Marin County, which today boasts some of the highest property values in the United States. The state's second prison opened in 1878; Folsom State Prison in the Central Valley, just outside of Sacramento, the state's now-capitol. Those first two prisons are still standing and in use 150 years later. Indeed, the rest of this chapter will argue that the earliest roots of California's supermax prison are, to some extent, here, in these two, early, high-security prisons.

Bookspan argues that, between 1851 and 1944, California gradually shifted from "the building of prisons as a form of exile to the building of prisons as corrective institutions designed to reintegrate the criminal into society."²²¹ One of the keystones of the reintegration-oriented, or rehabilitative, correctional policy was the passage of the Indeterminate Sentencing Law in 1917. This Law allowed criminals to be sentenced to range of years (e.g., five years-to-life), encouraging them to work towards and achieve rehabilitation, in order to earn the shortest possible sentence.²²² For the purposes of this chapter, this law is mainly interesting in that it was summarily reversed in 1976.

Until 1976, though, corrections in California continued the trend that Bookspan identified with the first half of the twentieth century – oriented towards rehabilitation and reintegrating prisoners back into their communities. In 1947, for instance, Herman Spector started a program of bibliotherapy at San Quentin, in which he hoped to track changes in prisoner mindsets as they read specific books. He ran the prison library for more than 20 years, until 1968.²²³ The California Department of Corrections also ran public work camps for prisoners in the post-war period.²²⁴ Also during this period, from the 1940s through the 1960s, parole officers worked closely with social scientists to attempt to scientifically reintegrate former prisoners back into their communities.²²⁵ In sum, for almost a century, California prisons were allegedly progressive places, at least by the reckoning of public commentators and administrative professionals.

In 1976, however, around the time the Determinate Sentencing Law was passed, the ideological commitment to the rehabilitative ideal was summarily reversed. As discussed in the third section, the Determinate Sentencing Law represented a compromise between leftist, pro-

²²¹ Bookspan, *supra* note 31: xi.

²²² Albert J. Lipson and Mark A. Peterson, *California Justice Under Determinate Sentencing: A Review and Agenda for Research*, prepared for the State of California, Board of Prison Terms, R-2497-CRB (Santa Monica: Rand, June 1980): 1, available online at: www.rand.org/pubs/reports/2005/R2497.pdf (last accessed 30 Sept. 2010).

²²³ Cummins, *supra* note 142.

²²⁴ See Janssen, "When the 'Jungle' Met the Forest," *supra* note 210.

²²⁵ Simon, *Poor Discipline*, *supra* note 190: 17.

rehabilitation advocates and more conservative advocates of more punitive ideologies. In the end, though, the Determinate Sentencing Law was implemented in a punitive way; the law ultimately became one more tool of an administrative and legislative shift, which took place between the 1970s and 1980s. The shift was away from the building of prisons as corrective institutions, *back* to the building of prisons as forms of exile, in rural areas of the state – and, in the case of the supermax, *back* to implementing conditions of extreme isolation, which the U.S. Supreme Court argued, in 1890, had been abandoned.

B. Racial Tensions, Violent Outbreaks, and Political Turning Points, 1970-1980

One critical date in California’s prison history is universally alive and well in the memories of current and former state correctional administrators: August 12, 1971. On this day, George Jackson attempted to escape from the Adjustment Center – San Quentin’s punitive segregation unit for rule-breaking prisoners, which was a very rough prototype for the later supermaxes. Jackson was killed during the escape attempt, along with three prison guards. High-level administrators, who were managing California’s prisons in the 1980s, mentioned this event in three different interviews, remembering the exact date, describing in graphic detail how the “officers were cut ear-to-ear,” and counting the unusually high number of correctional officers who had died throughout California prisons in 1971 (eleven).²²⁶ For California correctional administrators, George Jackson’s fatal escape attempt and the collateral correctional officer deaths represent a tense time throughout the state prisons system, when violence seemed imminent and administrators felt helpless.

George Jackson took his place among a series of radical African American leaders, including Eldridge Cleaver and Huey Newton, who crossed back and forth between the prison walls of San Quentin, the streets of Oakland, and the inner sanctum of radical and secretive organizations like the Black Panthers and the Black Muslims.²²⁷ Correctional administrators identified these racial tensions in and outside of prison as the source of many problems, including the lack of control on California prison yards. Meanwhile, the racial compositions of the state’s prisons were changing drastically. In 1970, whites accounted for 80 percent of California’s prison population. But throughout the 1970s and 1980s, the percentage of all white prisoners being admitted within the state fell to under 30 percent, until whites made up less than half of the state’s prison population in the 1990s. Blacks, Hispanics (as the California Department of Corrections labels Latinos), and so-called “Others” (as the California Department of Corrections labels people of Asian heritage), as well as people of mixed or ambiguous race, made up the difference, accounting for well over half of new prison admissions by 1980.²²⁸

In this same period, the prototypes of the gangs that still dominate California’s prisons today were born, building both strength and antagonism within the walls of the state’s prisons. These gangs included the EME, or Mexican Mafia, Nuestra Familia, the Aryan Brotherhood, and

²²⁶ Craig Brown (former Undersecretary of the Youth and Adult Correctional Authority, California), interview with author, Sacramento, CA, Jan. 22, 2010, notes on file with author; Steve Cambra (former warden of Pelican Bay State Prison), interview with author, Sacramento, CA, Apr. 14, 2010, notes on file with author; Larson interview *supra* note 8.

²²⁷ See generally Cummins, *supra* note 142.

²²⁸ Belinda I. Reyes, ed., *A Portrait of Race and Ethnicity in California: An Assessment of Social and Economic Well-Being* (San Francisco: Public Policy Institute of California, 2001): 155, available online at: www.ppic.org/content/pubs/report/R_201BRR.pdf (last accessed 6 Oct. 2010).

the Black Guerilla Family.²²⁹ The gangs were undeniably playing a powerful role in shaping the state's prisons and contributing to violence therein. Not only were racial alignments involved in Jackson's deadly escape attempt, but they contributed to other riots throughout the system, as well as to attempts at unionization and successful work stoppages, especially at San Quentin and Folsom, in the late 1960s and early 1970s. According to Eric Cummins, a historian of this period in California correctional history, annual assaults nearly tripled between 1969 and 1973, leading to "an unprecedented general lockup of all inmates at San Quentin, Folsom, and Deuel Vocational Institution."²³⁰

Prisoners and correctional administrators alike describe the power struggles – diffusions and consolidations – taking place at this time. For instance, former prisoner A.R., who spent 30 years in state prison in California, from 1980 through 2010, described the violent tensions he felt when he first entered the system. He described violence stemming from both prisoner gang members and correctional officers, who were on edge because of the gang violence that had been taking place in and out of prison over the past few years:

*You know what, of all the places I've been, of all the things I've done, I've never felt more danger, of my life being in danger than when I was at Folsom [in the early 1980s], and it wasn't from the other inmates, it was from the guards. Because they were on a campaign of killing us. At that time, when we went over there, the C.O.s already had an agenda, they were already against us, because they were at war with the Aryan Brotherhood [AB]. They [the AB] had just shot one of their officers on the streets, and they were coming down on us. Hard. And they made it well known that, that 'We are not playing.' And they wasn't playing. A lot of people got hurt on that yard. A lot of people got hurt on that yard that were victims of getting hurt by other inmates.*²³¹

As the quote from A.R. suggests, gang violence and brutality perpetrated by correctional officers co-existed in the 1970s and 1980s in California state prisons.²³² Either prisoners were experiencing violence that correctional administrators were powerless to stop, or correctional administrators set up the violence. Either way, a sense of instability, and imminent violent outbreaks, pervaded the system into the 1980s.²³³

Not only did correctional officer responses contribute to cycles of violent outbreaks in prisons, but social forces outside of the prison also allegedly contributed to the violence inside. Carl Larson, who was Chief Deputy Warden of San Quentin in the late 1970s, and later Director of Finance for the Department of Corrections during the prison-building boom, described how politics mixed with violence in the 1970s:

²²⁹ The Mexican Mafia allegedly first formed inside Deuel Vocational Institution in the late 1950s, gaining strength through the 1960s, and Nuestra Familia formed as a rival gang in the mid-1960s. Blatchford, *supra* note 8.

²³⁰ Cummins, *supra* note 142: 123, 202, 232.

²³¹ A.R. (former Pelican Bay prisoner), interview, *supra* note 4.

²³² See, e.g., *Toussaint v. McCarthy*, 597 F.Supp. 1388 (N.D. Cal. 1984), *aff'd* 801 F.2d 1080 (9th Cir. 1986) (class action lawsuit finding unconstitutionally abusive conditions in California prisons); "California Prison Riot," *The Washington Post*, July 19, 1980: C9; "Federal Officials Studying Cause of Violence at California Prison," *The New York Times*, Feb. 19, 1984 (noting guards blamed for violence). Note that the violence in California prisons was regularly making national news by the early 1980s.

²³³ In 1985, the Joint Legislative Committee on Prison Construction and Operations would hold a major hearing at Folsom state prison to explore the problems with violence and gangs in the institution. *Violence at Folsom Prison: Causes, Possible Solutions*, Hearing Held by the Joint Legislative Committee on Prison Construction and Operations, Jun. 19, 1985, transcript available in the California State Archives.

*We had this ‘revolution,’ and it manifested itself with a lot of rhetoric – in colleges and jails. The manifestation in colleges was mainly peaceful – a lot of rhetoric and thought. [But] in the prisons, it manifested in a lot of violence ... The Black Guerilla Family and the Black Panthers, they had a political side ... but they were mostly gangs, mafia.*²³⁴

Larson hints at an important observation about the 1970s: there were strong connections between people and political movements outside of prison and people and political movements inside of prison.²³⁵

The early 1970s were a time when everyone who was anyone seemed to have not only an opinion about prisons, but a say in how they functioned. Prisoners collaborated with each other to form unions and strike, dealing ultimately deadly blows to the once-profitable prison industries.²³⁶ Prisoners also collaborated with lawyers to challenge both individual sentences and collective conditions of confinement.²³⁷ Social scientists entered the prisons to study them and worked, sometimes collaboratively and sometimes contentiously, with prison administrators to develop different systems of confinement and better rehabilitation programs.²³⁸ University professors joined with undergraduate and graduate students in protesting the detention of political prisoners – a term often construed broadly enough to incorporate the vast majority of prisoners, as well as conditions inside prisons.²³⁹ In fact, activists like Angela Davis, a professor of philosophy at the University of California at Los Angeles in the 1960s, actually served time in jail, for allegedly intervening in various prisoner escape plots. Journalists and publishers snuck tape-recorders into prison and prisoners’ manuscripts out of prison, to be re-printed for publication in local papers and as nationally bestselling books.²⁴⁰ Even conservative legislators were intervening in prison business – passing laws about prisoners’ rights to read whatever they wanted, to conduct uncensored correspondence with their lawyers, and to earn royalties from what they published.²⁴¹ By the late 1970s, judges were stepping in to tell prison administrators how many prisoners they could put in a cell and how those prisoners should spend their days.²⁴²

²³⁴ Larson interview, *supra* note 8.

²³⁵ For a discussion of the development of race relations in the California prisons in the 1970s, see Heather McCarty, “Blood In, Blood Out: The Emergence of California Prison Gangs in the 1960s,” *Sunbelt Prisons* (forthcoming anthology; draft on file with author). For a discussion of the relationship between race relations and the punitive turn in particular, see Janssen, “When the ‘Jungle’ Met the Forest,” *supra* note 210; Mark Brilliant, *The Color of America Has Changed: How racial Diversity Shaped Civil Rights Reform in California, 1941-1978* (New York: Oxford University Press, 2010); Donna Murch, *Living for the City: Migration, Education, and the Rise of the Black Panther Party in Oakland California* (Chapel Hill: University of North Carolina Press, 2010).

²³⁶ See generally John Irwin, *Prisons in Turmoil* (Boston: Little Brown and Company, 1980); Cummins, *supra* note 142; Mike Fitzgerald, *Prisoners in Revolt* (New York: Penguin Books Ltd., 1977).

²³⁷ See generally Cummins, *supra* note 142; *Toussaint v. McCarthy*, 597 F.Supp. 1388 (N.D. Cal. 1984), *aff’d* 801 F.2d 1080 (9th Cir. 1986) (class action lawsuit finding unconstitutionally abusive conditions in California prisons).

²³⁸ See, e.g., Cummins, *supra* note 142: 1-20 (on “the experts pour in”); Simon, *Poor Discipline*, *supra* note 190: (on the clinical period in parole. See also James B. Jacobs, *Stateville: The Penitentiary in Mass Society* (Chicago: University of Chicago Press, 1977).

²³⁹ See Cummins, *supra* note 142; Angela Davis, *Angela Davis: An Autobiography* (New York: Random House, 1974).

²⁴⁰ See Cummins, *supra* note 142: 127-31.

²⁴¹ *Id.* at 131-32 (describing Penal Code 2600).

²⁴² See *Wilson v. Dukmejian*, 143 Cal. App. 3d 632 (Cal. App. 1st Dist. 1983) (ordering improvements to conditions at San Quentin); *Toussaint v. McCarthy*, 597 F.Supp. 1388 (N.D. Cal. 1984), *aff’d* 801 F.2d 1080 (9th Cir. 1986) (ordering changes at multiple California prisons, including San Quentin).

The struggles in California's prisons were part of a broad pattern throughout the United States. On September 9, 1971, allegedly in response to George Jackson's death at San Quentin, the prisoners at Attica state prison in New York rioted. Twenty-nine prisoners and ten employees died during the four-day event.²⁴³ This followed years of unrest in federal prisons, including work stoppages at the high-security federal prison in Leavenworth, Kansas in the 1970s, and the initiation of a long-term lockdown procedure at the federal prison in Marion, Illinois (which replaced Alcatraz), also in the 1970s.²⁴⁴ The 1970s represented a crisis period in corrections; this period also became the organizing ideological story to which prison administrators responded. George Jackson's escape attempt from San Quentin and the riots at Attica and Leavenworth, became a kind of negative creation myth justifying correctional change.

Some have described this period as a turning point in correctional mindsets throughout the United States, in which the focus shifted from rehabilitating prisoners to controlling risk.²⁴⁵ This key observation about the end of this period of turmoil fails to capture two interconnected factors: (1) the underlying chaos of multiple interveners and (2) the fact that risk control involves not just controlling the risk of dangerous prisoners but controlling the risk of "dangerous" interventions from across the political spectrum, whether Marxist students or so-called activist federal judges.

As the tension and violence of the 1970s wore on in California, there was indeed a shift away from the rehabilitative ideal. This shift was manifested in legislative activity, local reporting, and correctional department actions. In 1976, the California legislature eliminated the core manifestation of rehabilitation in the law: the indeterminate sentence.²⁴⁶ And by 1983, a number of legislators were actively involved in public investigations of overly lax conditions in some of the state's lower security prisons. These included investigations of California Institute for Men and California Institute for Women, "which uncovered favored inmate treatment ... misuse and waste of state purchased goods and services, and generally unacceptable administrative prison practices." Specifically, Senator Boatwright expressed concern over practices like allowing prisoners to watch violent films, to wear their own clothing, and to leave the prison property to attend college classes in the community. Boatwright also complained that "criminals are referred to as 'residents'" and the prison referred to as a "campus."²⁴⁷ In criticizing administrative attempts consciously designed to align prison life with life in the community, and to provide privileges to well-behaved prisoners, Boatwright was criticizing the fundamental characteristics of the rehabilitative ideal. Letters to and from constituents in Boatwright's correspondence file further document his concern with this overly lax treatment of prisoners, and his dedication to expressing this concern to his constituents.

Similarly, the media picked up on this ideological shift away from the rehabilitative ideal, reporting critically on both the violence in the prisons and on the lax treatment of prisoners uncovered by investigations like Boatwright's. Even before Senator Boatwright started his campaign criticizing the excessively comfortable conditions in the California Department of

²⁴³ See *Attica: The Official Report*, *supra* note 143.

²⁴⁴ See *Adams v. Carlson*, *supra* notes 134, 135 and surrounding text.

²⁴⁵ Feeley and Simon, "The New Penology," *supra* note 196.

²⁴⁶ The complex political motivations underlying passage of the Determinate Sentencing Law, and the relationship between the law and an ideology of rehabilitation, are further discussed in the subsequent section.

²⁴⁷ "Opening Statement of Daniel E. Boatwright, Chairman of the Committee on Revenue and Taxation," at the Investigation of Fiscal and Administrative Management at the California Institution for Women at Frontera, CA, Jun. 25, 1983, in the California State Archives AN: 2003-029, Joint Committee on Prison Construction and Operation, Subject Files, Hearing Files 1981-1999, Loc: B4181 – 2907.

Corrections, the Department had already started shifting away from its commitment to rehabilitation: reducing the once substantial collection of books in the San Quentin library, terminating its educational contracts with county school systems in 1977, and introducing televisions into widespread use throughout the prisons as early as 1973.²⁴⁸ As one former correctional administrator succinctly explained, “TVs are excellent babysitters.”²⁴⁹ Cummins argues, in fact, that the introduction of televisions was part of a conscious effort “designed to displace its analogue, reading,” but television “conveniently lacked any analogue for writing.”²⁵⁰ Where writing had once been encouraged as integral to the rehabilitative process, it eventually was discouraged as overly empowering.

Robert Martinson is often credited – and blamed – for the shift away from the rehabilitative ideal. In 1974, he published a meta-analysis of evaluations of in-prison “treatment” programs; the report, co-authored with Douglas Lipton and Judith Wilks, was entitled *The Effectiveness of Correctional Treatment: A Survey of Treatment Evaluation Studies*, but is known colloquially as the *Nothing Works* Report. The report received widespread popular attention as soon as it was released in 1974, due at least in part to Martinson’s widespread promotion of the report’s main finding that “nothing works” at public events and in the popular media.²⁵¹ Of course, indications are that by 1974, California had already taken steps to curb rehabilitative practices in its institutions, limiting prisoners’ access to reading materials and replacing educational programs with televisions. In California at least, criticisms of rehabilitation seemed to appear all at once, in legislative investigations, in correctional policy shifts, and in the popular media.

Regardless, for the purposes of understanding the supermax phenomenon, the fact of the popular shift away from a commitment to in-prison rehabilitation is more important than its explanation. Also important are the mechanisms of the ideological shift. In the CDC, shifting away from a commitment to rehabilitation involved slowly sealing its prisoners off from contact with the outside world – by excluding public educators from its institutions, by providing easily censorable televisions in place of less easily censorable books, and by limiting prisoners’ access and inclination to write, which prisoners had previously used as a means of easy communication with the outside world. Conversely, for the California legislature, shifting away from a commitment to the rehabilitative ideal involved actively intervening in the day-to-day affairs of state prisons, looking, for instance, at the financial accounts of the kitchen and entertainment budgets in the prison. This kind of legislative intervention likely provided further impetus to prison administrators actively engaged in the process of sealing prisons off from contact with the outside world.

Importantly, parallel with this ideological shift away from rehabilitation, there was also a practical shift of loci of power. Policy decisions implemented in this period functionally consolidated power over criminal sentencing and over prisoners’ daily lives in the hands of correctional bureaucrats, who would ultimately be almost completely free from intervention or oversight, either by other branches of government or by the public. There were two critical manifestations of this shift in both ideology and power. First, the 1976 Determinate Sentencing

²⁴⁸ Cummins, *supra* note 142: 249, 238.

²⁴⁹ Dave Runnels (assistant to court-appointed special master in Plata case; former warden of high-security facility, High Desert State Prison), interview with author, Sacramento, CA, Sept. 1, 2010, notes on file with author.

²⁵⁰ Cummins, *supra* note 142: 238.

²⁵¹ Jerome Miller, “The Debate on Rehabilitating Criminals: Is It True that Nothing Works?” *The Washington Post*, Apr. 23, 1989.

Act shifted broad discretion as to length of prison sentences out of the hands of Department of Corrections officials and into the hands of the legislature and of individual prosecutors.²⁵²

Second, officials in the Department of Corrections, faced with the violence and revolutionary tensions described above, as well as with increasingly crowded institutions as a direct result of the Determinate Sentencing Act, increasingly kept prisoners “locked down,” or confined to their cells all day long every day. These lockdowns were first initiated following George Jackson’s fatal escape attempt from San Quentin. The following two sections of this chapter address each of these power shifts – the legislative-initiated and the corrections-initiated – in turn.

C. Legislative Assertions of Power and the Determinate Sentencing Act of 1976

The shift towards determinate sentencing was ideological, but with very practical implications both for the balances of power in state government and for the everyday management of California’s prisons. For prisoners sentenced prior to the implementation of the Determinate Sentencing Act, sentence ranges were often quite broad, leaving open the possibility that a person might serve anywhere from a few years in prison to a lifetime, for crimes as petty as theft to crimes as serious as murder. George Jackson, for instance, was originally in prison on a sentence of one year to life, for the crime of second-degree armed robbery.²⁵³ Based solely on his in-prison behavior, however, he would eventually be charged with murder, and the state ultimately sought to impose the death penalty.

Once a judge set the “indeterminate” range of an individual’s sentence, such as Jackson’s one-year-to-life sentence, correctional administrators and Board of Prison Terms officials then decided, based on the individual’s in-prison behavior, when he or she had earned the right to be released (or, in ideological terms, had achieved rehabilitation). By the 1970s, this indeterminate sentencing system was facing close scrutiny from political groups on the right and the left. Traditionally liberal organizations like the American Friends Service Committee and the American Civil Liberties Union of Northern California argued that this kind of discretion produced racially biased outcomes and amounted to an extreme form of discrimination.²⁵⁴ Conservatives and members of the law enforcement community, on the other hand, argued that such sentences were too lenient; if a murderer “charmed” his prison keepers, he might only spend a few years in prison, rather than a lifetime.²⁵⁵ There was widespread agreement, then, that sentences should be fixed for a term of years, or determined, rather than being flexible and undetermined. A bi-partisan coalition passed what became known as DSL, or the Determinate Sentencing Law, in the California Legislature in 1976, and other states followed with similarly modeled laws quickly thereafter. In 1984, the U.S. Legislature passed the Sentencing Reform Act. This Act ultimately resulted in the federal sentencing guidelines, a contentious set of rules,

²⁵² Originally Senate Bill 42, codified at Chapter 1139 of the Statutes of 1976, as amended, entering into affect on July 1, 1977.

²⁵³ Cummins, *supra* note 142: 155.

²⁵⁴ *Struggle for Justice: A Report on Crime and Punishment in America*, prepared for the American Friends Service Committee (New York: Hill & Wang, 1971); Lipson and Peterson, *supra* note 222: 4.

²⁵⁵ Lipson and Peterson, *supra* note 222: 4. This attitude eventually led to a widespread political movement for “truth in sentencing,” or “you do the crime, you do the time.”

which provide specific sentences for specific crimes and criminal histories, organized in a complicated grid of formulas and rules.²⁵⁶

In the end, California's DSL reflected the ideologies of both sides of the bi-partisan coalition that advocated for it. The law did attempt to produce equity in sentencing, by assigning fixed sentences to specific crimes. But the law also re-articulated the purpose of imprisonment as punitive, rather than rehabilitative.²⁵⁷ And it fixed sentences for terms notably longer than the one-year term George Jackson *could* have served, if his behavior in prison had been perfect. In this sense, DSL epitomized the shift away from the rehabilitative ideal, and its implementation further entrenched a punitive politics of incarceration. Within three years, researchers were already documenting the dramatic effects the law was having on the state's prison population.²⁵⁸

An early report by the Rand Corporation about California's DSL argued that the law, above all, made "both legislators and judges ... more directly accountable to the public for sentencing decisions ... [and] also extend[ed] felons greater procedural protection, both at the time of sentencing and while serving prison terms." This "observation" about the accountability the law created was, perhaps, premature.²⁵⁹ Over time, the legislature did exert some control over sentencing, fixing the range of prison terms associated with various crimes, and increasing these terms to demonstrate the seriousness of their attitude towards crime and criminals.²⁶⁰

Ultimately, though, judges lost discretion, and criminal defendants lost procedural protections, as the length of a prisoner's sentence increasingly came to depend on the charge the prosecutor chose to levy. If a prosecutor chose to charge a defendant with first degree murder instead of second, or with burglary instead of simple theft, then the defendant automatically would be subject to a more severe sentence, based on the fixed terms codified in the DSL for any given crime. Once the prosecutor had this power, defendants had more incentive to engage in plea-bargaining, negotiating directly with the prosecutor about what charge the prosecutor would choose. Because plea-bargaining happens outside of the courtroom, prior to either a trial or sentencing, it is subject to few of the procedural protections associated with criminal trials. For instance, a plea-bargaining prosecutor is free to rely on damning evidence that might actually be inadmissible in a court of law, such as evidence obtained in violation of constitutional rights protecting against self-incrimination, or against invasive searches and seizures. Indeed, the way determinate sentencing laws have shifted power away from judges and into the hands of prosecutors has been both widely noted and criticized in the wake of these laws.²⁶¹ Even the American Friends Service Committee, originally one of the most vocal advocates of the need for laws like California's DSL, has since advocated for sentencing reform to shorten and relax the rigid sentencing guidelines currently in place throughout the United States.

²⁵⁶ United States Sentencing Commission, "An Overview of the United States Sentencing Commission," (Jun. 2009), available online at: http://www.ussc.gov/general/USSC_Overview_200906.pdf (last accessed 30 Sept. 30, 2010).

²⁵⁷ Lipson and Peterson, *supra* note 222: 2-4.

²⁵⁸ See David Brewer, Gerald E. Beckett and Norman Holt, "Determinate Sentencing in California: the First Year's Experience," *Journal of Research in Crime and Delinquency*, Vol. 18 (1981): 200-31.

²⁵⁹ Lipson and Peterson, *supra* note 222: v.

²⁶⁰ See, e.g., S.B. 709 (1978); Lipson and Peterson, *supra* note 222: Table 2, at 5.

²⁶¹ See Albert W. Alschuler, "Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for 'Fixed' and 'Presumptive' Sentencing," *University of Pennsylvania Law Review*, Vol. 126.3 (Jan., 1978): 550-577 (predicting the outcomes described); Frank J. Remington, "The Decision to Charge, The Decision to Convict on a Plea of Guilty, and the Impact of Sentence Structure on Prosecution Practice," *Discretion in Criminal Justice: The Tension between Individualization and Uniformity*, Lloyd E. Ohlin and Frank J. Remington, eds. (Albany: State University of New York Press, 1993): 73-134.

But criminal defense lawyers and prisoners' rights advocates are not the only critics of DSL, and judges are not the only ones who ceded power to prosecutors. Correctional administrators in California are also critical of the law. Specifically, correctional administrators in California express two core frustrations with DSL. They argue that the DSL, by removing the day-to-day discretion of correctional officers over the sentences of individual prisoners, also removed correctional officers' ability to control either overcrowding or violence.

First, correctional administrators explain, the law removed the correctional department's "safety valve." Previously, prison wardens and correctional management had the ability to release well-behaved prisoners serving indeterminate sentences, in order to relieve overcrowding in prisons.²⁶² Such releases happened through a back-door mechanism, quietly, without the kind of political fanfare required in California today. (Currently in California, ongoing litigation, which was first initiated in 2004, has challenged the overcrowded conditions in the state's prisons. Any proposal for releasing prisoners, whether the governor approving parole board recommendations for release, legislators authoring bills to require early releases, or courts ordering early releases, has incited challenges from the state's attorney general, heated letters to the editors of the major state newspapers, and a general stalemate as to any politically viable solutions.) Carl Larson, who was the Director of Finance for the CDC in the 1980s, summed up his feelings about DSL: "If I was going to rank things, I would say [the passage of DSL] is a deathblow." He called the law part of the "punishment hysteria" that "swept the nation" in the late 1970s and early 1980s. He explained, "With an indeterminate sentence, you have a back door to the prison system," and this door was closed with the passage of DSL, leading within a few years to unmanageable overcrowding.²⁶³

By 1985, when the California Legislature was holding hearings about prison overcrowding, prison construction, and prison violence, policy makers across the board seemed aware of the various mechanisms by which DSL had affected the prisons in California. A Senate Office of Special Research report to Senator Robert Presley,²⁶⁴ the chair of the Joint Legislative Committee on Prison Construction and Operations, listed a battery of legislative initiatives that had "increased both the length of sentences and the number of persons sentenced," including mandatory sentencing laws and determinate sentencing laws enacted in the late 1970s, and increased penalties for sex crimes and burglary enacted in the early 1980s.²⁶⁵ Similarly, in testimony before the Joint Legislative Committee on Prison Construction and Operations, U.C. Santa Cruz Professor and prison expert Craig Haney argued that the DSL passed in 1977 had eliminated the "release valve" of paroling people with indeterminate sentences, which had previously functioned as a tool for alleviating overcrowding, echoing the similar criticisms of correctional administrators. Haney further explained another bureaucratic mechanism that led specifically to overcrowding in higher security facilities: as sentence lengths increase, prisoners are automatically assigned to a higher level of security (based on their longer commitment sentence), producing a "massive overcrowding problem at the highest levels of security in the system, which is the least flexible level of security."²⁶⁶

²⁶² Larson interview, *supra* note 8.

²⁶³ *Id.*

²⁶⁴ Robert Presley was the Chairman of the Joint Committee on Prison Construction and Operations from 1984 to 1986 and the Chairman of the Joint Prison Committee from 1987 to 1994.

²⁶⁵ *Cities with Prisons: Do They Have Higher or Lower Crime Rates?*, A Special Report to Senator Robert Presley, Chair, Joint Committee on Prison Construction and Operations (California Senate Office of Research, Elisabeth Kirsten, Director, Aug. 1985): 5.

²⁶⁶ *Violence at Folsom Prison*, *supra* note 233: 29.

The second problem with DSL, according to correctional administrators, was that it removed the “carrot” of correctional officer discretion to reward good behavior in prison with recommendations for release to the parole board and advocacy for the shortening of an indeterminate sentence, leaving officers with nothing but the “stick” of punishment.²⁶⁷ The absence of the “carrot” created management problems for the Department of Corrections; without the promise of a potential early release, officers had few ways to manage violence, either in the global sense, by reducing overcrowding, or in the specific sense, by incentivizing good behavior. As Steve Cambra, who began working as a correctional officer in the CDC in 1970, and later served as warden of Pelican Bay in the 1990s, said, the philosophy under the indeterminate sentencing law was “get everyone on the streets we can.” Cambra explained: “Almost everyone was a lifer ... it was the way the prisons managed their violence.”²⁶⁸ And once this violence-management tool was removed, by legislative passage of the DSL, the prisons had no carrot with which to bargain prisoners out of their violent tendencies. At the conclusion of a determinate sentence, a prisoner gets out of prison, regardless of how he has behaved during his incarceration. Carl Larson pointed out that this policy not only creates management problems for the corrections department, but also for the public: “On an armed robbery, five-to-life sentence, you could spend 2.5 years in prison and 2.5 years on parole, or you could do the rest of your life, if you sodomized littler prisoners, had knives, joined a gang.”²⁶⁹ Larson’s implication? Now that sodomizing, knife-wielding gang member is released to the streets upon the expiration of his five-year sentence, regardless of his in-prison behavior.

Correctional administrators agree that DSL took away discretion that had been critical to their ability to smoothly run safe prisons. But these same administrators fail to point out that the DSL power shift, first to the legislature in crafting sentences, and ultimately to prosecutors in meting out those sentences, was met, as will be documented in the subsequent two chapters, with a kind of equal-and-opposite reaction in CDC. While CDC might have lost the power to release prisoners, whether for good behavior or to relieve overcrowding, they eventually gained an unprecedented power to segregate and detain prisoners in long-term solitary confinement, in supermaxes. This isolation and detention happens through processes markedly bereft of the barest of procedural protections, under conditions many intuitively assume would be unconstitutional. Indeed, as soon as judges and lawyers became aware of California’s Pelican Bay supermax and the conditions there, they brought a lawsuit in federal court challenging its very existence.²⁷⁰ But, on this existential point, the lawsuit failed. So, the power correctional administrators lost to DSL was reborn in another form of equally, if not more, destructive discretion.

D. Correctional Assertions of Power and Limitless Lockdowns, 1980-85

In response to the tensions and unrest of the early 1970s, the California Department of Corrections gradually shifted away from the rehabilitative orientation of the 1950s and 1960s. As noted above, they took steps to reduce library access and to decrease educational investments, for instance. At first, this ideological shift seemed relatively neutral. But as the Department started

²⁶⁷ Kirkland interview, *supra* note 95.

²⁶⁸ Cambra interview, *supra* note 226.

²⁶⁹ Larson interview, *supra* note 8.

²⁷⁰ Steve Fama (attorney with the Prison Law Office and co-counsel in the *Madrid v. Gomez* case), interview with author, Berkeley, CA, Oct. 13, 2010, notes on file with author.

to feel the effects of the DSL, especially overcrowding, which in turn compounded the violence in the prisons, the ideological shift turned increasingly punitive. Specifically, the Department of Corrections held more and more prisoners at higher and higher security levels.

This securitization of California's prisons took two forms. First, it involved an expanding use of long-term "lockdowns." During a lockdown, prisoners are locked in their cells for days, weeks, or even months at a time, without access to productive work, educational programs, the library, visitors from outside of the prison, or congregate social time. Second, the securitization involved new classification procedures that increasingly maintained more prisoners at higher levels of security. (Both lockdowns and classification will be explored in detail in two following sub-sections.)

This securitization trend in the California Department of Corrections exemplifies the New Penology that Feeley and Simon identified a few years later, in a 1992 *Criminology* article, where they argued that corrections systems had recently manifested a new concern "with techniques to identify, classify and manage groupings sorted by dangerousness," focusing on a "language of probability and risk" and "efficient control of internal system processes" through "deployment of new techniques ... [that] target offenders as an aggregate."²⁷¹ Although Feeley and Simon do not mention long-term lockdowns, or the way these lockdowns foreshadowed the supermax, as an example of the New Penology, their words do map directly onto the securitization trends in the Department of Corrections in the late 1970s and early 1980s. Specifically, the Department highlighted the violent risks posed by gangs – an aggregate offender group – and developed new techniques – long-term lockdowns and new classification procedures – to target these offender groups. The trend was not just *towards* rational risk-assessment, but *away* from the interventions of state legislators and federal courts. Moreover, the next chapter demonstrates how these long-term lockdowns, and the correctional department's subsequent development of the supermax, hold important implications, at which Feeley and Simon only hinted, for the New Penology.

Courts and the state legislatures scrutinized and criticized the new institutional changes – lockdowns and re-classifications, but ultimately neither succeeded in reversing the securitization trend. In fact, the trend was structured to resist exactly this kind of outside influence and intervention. Securitization actively isolated prisons and prisoners from any contact, not only with the public, but also with potential overseers, such as courts and legislators. The following two sub-sections explore each of these two institutional changes in turn, investigating the role of both lockdowns and classifications in the changing securitization policies applied to prisons throughout the California Department of Corrections.

1. Lockdowns

Temporary lockdowns were a common correctional tool, used to quell the tensions underlying the threat of a riot, or to provide a cooling off period following violence in prison, throughout the twentieth century. But the use of the use of lockdowns for extended, even indefinite, periods was a novel trend that took root in the mid-1970s in California. In fact, this trend first took root following George Jackson's fatal escape attempt from San Quentin in 1971.

For a few days after Jackson's death, San Quentin and three other prisons in the state were locked down. At first this system-wide lockdown appeared to be a normal, and temporary, response to unprecedented prison violence. But shortly after Jackson's death, correctional

²⁷¹ Feeley and Simon, *supra* note 245: 450, 452.

administrators dedicated a section of San Quentin as a longer-term lockdown unit designed to isolate potential revolutionaries indefinitely.²⁷² Over the next few years, additional blocks at three other prisons in California were dedicated to similar, indefinite lockdown conditions, ostensibly designed to segregate gang leaders and other alleged leaders of organized violence. Soon, frustrated prisoners sought to challenge both the conditions in these units and the duration of their confinement, without access to any congregate activities, or time out of their cells.

In 1976, a federal court certified a class of approximately 2,000 prisoners held in long-term segregation in four different California state prisons, including San Quentin and Folsom.²⁷³ Over the next ten years, this case wove its way through the federal court system in California. First, the district court issued mandates requiring that prisoners be provided with certain procedural rights prior to being placed in a long-term lockdown unit, such as written notice of the intention to place a prisoner in lockdown, and the opportunity to call witnesses and present documents in defense of the allegations justifying lockdown placement.²⁷⁴ The Ninth Circuit and the U.S. Supreme Court largely affirmed these mandates.²⁷⁵ Then, another district court found that multiple conditions in the lockup units at San Quentin and Folsom violated the Eighth Amendment prohibition against cruel and unusual punishment and ordered that money immediately be invested in infrastructure improvements to remedy the violations.²⁷⁶ In 1983, the *Toussaint* court noted that: “As of mid-August ... 548 inmates had been held continuously in lockup for more than one year, and 249 had been so held for over two years.” The court further explained that for many of these prisoners, their confinement in the lockdown conditions was indefinite:

*Many are retained there solely because the original belief that the inmate is a ‘gang leader’ has not been disproven. A vicious cycle emerges whereby the inmate, identified as a gang member is put in the same yard with other reputed members of the gang, and through his association with these inmates the gang membership identification is perpetuated. According to prison officials, an inmate cannot ‘disprove’ an established gang identification without the aid of other inmates or staff. Consequently inmates frequently lose all hope of securing release from lockup.*²⁷⁷

Despite these kinds of explicit condemnations and interventions by federal courts, the use of long-term lockdowns in California continued. In fact, the practice was increasingly institutionalized.

Prior to 1982, both Folsom and San Quentin had maximum-security units dedicated to confining particularly recalcitrant prisoners; at each institution this unit was called the Adjustment Center. (San Quentin State Prison still has such a unit today, and it is still called the Adjustment Center, though it is generally used today for shorter-term, punitive confinement, of a few months or less.) In the summer of 1982, however, following a riot at Folsom, another building was turned into a long-term lockdown unit and dubbed a Secure Housing Unit, or SHU, for short.²⁷⁸ The Pelican Bay supermax, and subsequent similar institutions constructed in California, would later be known by this same name: the SHU.

²⁷² Cummins, *supra* note 142: 225.

²⁷³ *Wright v. Enomoto*, 462 F. Supp. 397 (N.D. Cal. 1976).

²⁷⁴ *Wright*, 462 F. Supp at 405.

²⁷⁵ *Enomoto v. Wright*, 434 U.S. 1052 (1978).

²⁷⁶ *Toussaint v. McCarthy*, 597 F. Supp. 1388, 1415-21 (N.D. Cal. 1984).

²⁷⁷ *Toussaint*, 597 F. Supp. at 1407.

²⁷⁸ *Violence at Folsom Prison*, *supra* note 233: 4 (Testimony of Robert Dacy, prisoner).

In legislative hearings investigating problems with violence in the CDC in the early 1980s, prisoners, testifying experts, and legislators alike reiterated ten-year-old criticisms levied by the federal courts against the SHU-prototypes and SHUs. One of the prisoners at Folsom, who testified at one such hearing, noted that the kinds of lockdown conditions perpetrated in the SHU – being locked in a cell “day in and day out, and week in and month out” with one other person, receiving only two or three hot meals a week – cultivated hatred and violence between prisoners.²⁷⁹ University of California, Santa Cruz professor and psychiatrist Craig Haney agreed. Haney said that the department of corrections had avoided major riots by adopting “a strategy of isolating and segregating inmates and using force and a kind of intimidation to keep them under control.” But, he said, such practices come at “a great cost.”²⁸⁰ Lewis Fudge, a consultant to the Joint Legislative Committee on Prison Construction and Operations, agreed in a report he submitted to that Committee. He explicitly recommended that the department of corrections “discontinue the use of aged cell blocks at Folsom (and San Quentin) for segregation housing,” and “dispense with the failed notion that the use of weapons, segregation units and prolonged lockdowns are effective long-term means of control.”²⁸¹ Fudge argued that these extended periods of lockdown were the direct result of cultural shifts in correctional administration: the Department’s purpose had explicitly shifted from rehabilitation to punishment, the correctional officer’s union had grown in power, and administrators had generally practiced “acceptance of violence as a given.”²⁸²

Interestingly, prisoners, academics, administrators, and legislators proposed a number of solutions to resolve these criticisms (much as the federal and state courts had proposed possible solutions throughout the prior decade). These varied “reformers” suggested myriad ways to reverse negative innovations in the prison environment and administration, and to avoid the use of segregation and extended lockdown procedures. In recommendations prepared in response to the Folsom Hearings, the Senate Office of Research suggested improving education programs, preparing prisoners to return to their communities, and providing more jobs for prisoners inside.²⁸³ Both prisoners who testified at the Folsom Hearing emphasized the simple need for more humane treatment in order to alleviate some of the tensions within Folsom. “If you start dealing [with] people from a human position, you start eliminating frustration,” Redd said. He added: “If you start providing people with things to do, you start occupying people’s time where people don’t have to sit up in a cell and focus their attention on a – building up their anger.”²⁸⁴

Like Redd, many of the experts who advised legislators and prison administrators suggested that programming was key to reducing violence and improving prison conditions. Tom Murton, a former Alaska and Arkansas prison warden and correctional expert, who testified at the Folsom Hearings, proposed a number of reform possibilities. He described, for instance, a few different prison programs implemented in other countries, like Mexico – largely involving work regimens, which, he argued, successfully reduced recidivism to single digit percentages. Murton pointed out that such institutions leverage the fact that “inmates own and operate all institutions. I mean, no institution could run without the cooperation of the inmates.” He also suggested implementing elected councils and participatory management, involving prisoners at

²⁷⁹ *Id.* at 5-6.

²⁸⁰ *Id.* at 30 (Testimony of Craig Haney).

²⁸¹ *Id.* at A-30.

²⁸² *Id.* at A-27-29.

²⁸³ *Id.* at iii-vii.

²⁸⁴ *Id.* at 15 (Testimony of Paul Redd, prisoner).

each institution.²⁸⁵ Joe Marquez, former warden of California's state prison at Tehachapi, agreed with Murton: "Unless we start dealing with inmates as people ... let them know that we care and make a point to learn what their concerns are and try to address them, let them have a part in the decision making ... we're going to stay like we are from now on."²⁸⁶

A number of experts also proposed significant administrative changes, to be made by both prison officials and legislators. James Austin, from the National Council on Crime and Delinquency (NCCD), discussed some further policy reform proposals: early release, limited lock-up for gang members and dispersion throughout institutions; and open communication channels between prisoners, line staff, and upper level management in the prisons.²⁸⁷ Don Novey of the California Correctional Peace Officers' Association (CCPOA) testified, highlighting the high staff-to-inmate ratios in California (almost double the number of inmates per staff member as in the state of New York).²⁸⁸ He also suggested paying officers more and providing more officer training. Assemblyman Stirling suggested that a research institute be established within the University of California to work towards "the accumulation of collective wisdom about corrections" and to encourage "research think-tanking."²⁸⁹ Although the legislature ultimately established a correctional research institute at the University of California Riverside, it allocated only nominal funding to the project.

In fact, as the final section of this chapter will discuss, few of the policy recommendations detailed here were ever implemented. And correctional administrators often pursued policies in direct opposition to those proposed at legislative hearings like the ones discussed here. For instance, simultaneously with these legislative hearings about how to reduce the use of long-term lockdowns at Folsom and San Quentin, correctional administrators were engaging in another securitization practice: classifying an increasingly large number of prisoners as in need of increasingly high-security confinement. The next sub-section addresses this second 1980s correctional innovation.

2. *Re-classifications*

In addition to criticizing the increasingly entrenched CDC practice of using long-term lockdowns to control violence, legislators and experts also criticized the CDC's classification procedures, which they argued were contributing to the ever-growing need for lockdown units. Specifically, in the early 1980s, the California Department of Corrections implemented a new classification procedure, based at least initially, primarily on the sentence the incoming prisoner had received. In his testimony before the *Violence at Folsom Prison Hearing*, Murton, a national correctional expert, criticized the new classification system.²⁹⁰ Likewise, as noted earlier, Craig Haney suggested re-classifying prisoners to lower levels of security, sometimes in spite of the lengths of their sentences. Austin, of the NCCD, however, testified that California had been "the pioneer in classification systems in the country."²⁹¹

Legislators expressed interest in re-evaluating the security classification procedures. For instance, Assemblyman Stirling asked one of the prisoners testifying at the Folsom hearing

²⁸⁵ *Id.* at 67-73.

²⁸⁶ *Id.* at 82.

²⁸⁷ *Id.* at 86-88.

²⁸⁸ *Id.* at 90.

²⁸⁹ *Id.* at 25.

²⁹⁰ *Id.* at 64-5.

²⁹¹ *Id.* at 87.

whether some prisoners could be sent to lower security prisons, and Dacy said: “[Y]es,” and provided specific examples of people who would be good candidates. Stirling asked whether the prison population would be stable without the moderating influence of lower security prisoners, and Dacy again gave an emphatic and well-reasoned: “Yes.”²⁹²

In other words, there was both an open debate about how classification systems could work, and a willingness on the part of legislators, at least, to explore different options. There did seem to be agreement that overcrowding was particularly acute in higher security prisons, and an acknowledgement, by administrators and legislators alike, that some policy alternative needed to be considered, whether re-classification or some other innovation.

The legislature, in fact, seemed very interested in encouraging brainstorming around policy alternatives. They did this not only by bringing together experts, prisoners, and correctional administrators in legislative hearings, like the one at Folsom prison, but through passing legislation, which provided funding and structure for systematic investigation of policy alternatives. Specifically, one year after the hearing at Folsom prison, the California State Legislature passed Assembly Bill 277, which established the Presley Institute of Corrections Research and training, near the University of California Riverside, outside of Los Angeles. The Institute was to be a “public think tank, structured to study, understand and recommend solutions regarding: (a) Crime. (b) The impact on society after offenders are released for [stet] incarceration. (c) The growing financial burden of prison populations. (d) Prison violence.”²⁹³ The Institute was named after Senator Robert Presley, who served as the chairman of the Joint Legislative Committee on Prison Construction and Operations from 1984 to 1986 and was active in criminal justice policy in California during his twenty-year legislative tenure from 1974 to 1994.²⁹⁴

The existence of a Committee on Prison Construction and Operations indicates that, by 1984, California legislators were already invested in building prisons. Indeed, they were already honoring the man in charge of the legislative end of that building process by naming an institute after him. But the legislators also seemed to be invested in gathering information and developing evidence-based policies to both build the best prisons possible and to avoid building prisons where possible. Of course, AB 277 only appropriated \$150,000 from the general fund for this think tank project, so perhaps the legislative investment in research was only nominal and symbolic. In the same year, by comparison, the legislature would appropriate millions to prison construction, through bond measures and legislative initiatives, while appropriating barely any oversight to the building process, which they left largely to correctional administrators. (This is the subject of the next chapter.)

Interestingly, none of the solutions to the administrative challenges facing the California Department of Corrections, whether proposed by the courts or legislators, were to build a high-security, permanent lockdown facility, like the supermax at Pelican Bay. Proposed solutions focused on minimizing rather than maximizing placement in lockdown, by establishing better

²⁹² *Id.* at 8.

²⁹³ Assembly Bill 277 (California, Stirling), as amended Aug. 25, 1986. The Presley Institute would later be absorbed directly by the University of California Riverside, becoming a university research center that still exists today. Senate Bill 526 (California), chaptered at Sec. 2, Ch. 3.5 (commencing at Sec. 5085), Title 7, Part 3 of the Penal Code, Oct. 4, 1993; see also “Presley Center for Crime and Justice Studies,” available online at: <http://www.presleycrimeandjusticecenter.ucr.edu/> (last accessed 19 Oct. 2010).

²⁹⁴ “Biography,” Inventory of the Robert Presley Papers, California State Archives, available online at: <http://www.oac.cdlib.org/view?docId=kt4d5nc7nn;query=;style=oac4;view=admin#bioghist-1.3.3> (last accessed on 19 Oct. 2010).

lockdown screenings, employing targeted lockdowns, and changing classification systems that led to overcrowding at maximum-security prisons. Other recommendations included promoting more frequent contact between inmates and staff to alleviate grievance complaints, discontinuing double-celling, establishing early release programs, and building prisoner-designed and constructed facilities. In sum, both prison administrators and legislators considered a wide array of possible solutions to the admittedly dangerous and potentially unconstitutional lockdown units being used in the state. But most of these recommendations were ultimately ignored in favor of the entrenching the previously temporary lockdown facilities already in place by the mid-1980s in Folsom and San Quentin.

During legislative hearings addressing conditions in lockdown units, and throughout negotiations of consent decrees to resolve legal challenges to the units, more prison construction was also on the table. By the mid-1980s, California voters were already readily approving prison construction bonds.²⁹⁵ But the shape of this prison construction was as yet undetermined. Legislators, experts, prisoners, and even some correctional officials expressed interest in studying and evaluating best practices for a growing and changing prison population. The shape of the prison innovation – long-term isolation – had, nonetheless, already been initiated in 1982 at Folsom, with the opening of the first SHU.

In retrospect, the SHU innovation was deeply entrenched by the time of the 1985 legislative hearings on violence at Folsom. A kind of path dependence had already taken over.²⁹⁶ Specifically, the internal policy decisions in California’s department of corrections resonate with an economic model of policy innovation proposed by Paul Pierson. Pierson suggests that policy choices – like whether or not to implement a policy of segregating prisoners in long-term isolation under austere conditions – will often produce increasing returns over time, thereby rendering alternative policy choices less lucrative or viable as time goes on. Pierson, then, draws an analogy between increasing returns from investment decisions, which discourage alternative investment choices, and increasing returns from policy choices, which discourage alternative policy choices. In other words, in both economic investments and policy investments, “the probability of further steps along the same path increases with each move down that path.”²⁹⁷ In the case of California, once some prisons were locked down, the investment in isolating prisoners had already been made. Changing the policy to decrease the use of isolation would have involved changes in culture and existing infrastructural investments, making any alternative appear both more expensive and less viable than the existing policy. Pierson argues that “the increasing returns process in politics [is] particularly intense,” because of “the absence or weakness of efficiency-enhancing mechanisms of competition,” shortened timelines for political action, and a “strong status quo bias generally built into political institutions.”²⁹⁸ All of these factors were at play in California: there were no viable agencies or institutions offering to control violence in prisons (an absence of competition mechanisms); there was an urgent need to control this violence (shortened timelines for political action); and there was a developing sense that the SHU was not only necessary but normal (status quo bias).

²⁹⁵ John Hurst, “California Elections, Prison Bond Issue: Voters are Asked to Ante Up Again,” *Los Angeles Times*, Oct. 15, 1986: 3.

²⁹⁶ Paul Pierson, “Increasing Returns, Path Dependence, and the Study of Politics,” *The American Political Science Review*, Vol. No. 94.2 (June 2002): 251-67.

²⁹⁷ *Id.* at 252.

²⁹⁸ *Id.* at 257.

Once a few high-security prison blocks were locked down, correctional administrators had a system in place that functioned well by three measures anyway: the SHU effectively minimized staff contact with dangerous prisoners; it minimized prisoners' contact with other prisoners and the outside world; and it was an unpleasant prospect for prisoners, and so a potential deterrent. Such conditions at the very least would prevent a re-enactment of Jackson's deadly escape attempt. This escape attempt drew criticism from correctional line officers, who felt insufficiently protected from dangerous prisoners like Jackson, as well as from correctional management, who felt Jackson had had too much access to the outside world – what with his publishing of books not approved by the prison administration and his frequent visits from radical lawyers.²⁹⁹

As time went on, the SHU developed another apparent benefit; it ultimately seemed resistant to interventions from the legislature and the courts. The practice of using the SHU went on and expanded, in spite of the criticisms leveled by experts and legislators at the Folsom hearings. And, in response to court criticisms in cases like *Toussaint*, the Department of Corrections simply opened newer prisons, which more efficiently perpetrated the lockdown techniques. As one correctional administrator explained: “We have to have a place to put [dangerous prisoners] ... you've got other jurisdictions [like Arizona] that were also using a supermax for their system ... We had the credibility of proven experts that could weigh in on why we needed that function.”³⁰⁰ In other words, as critical as a judge or a legislator might be of the conditions in the lock-up units, correctional administrators could convincingly argue that the conditions were necessary to safety and security.

In sum, the increasing use of lockdowns reflected the correctional shift towards controlling the risk of dangerous prisoner activity that Feeley and Simon describe,³⁰¹ but it also reflected a shift towards controlling the risk of dangerous interventions in prison life from outsiders like legislators or public advocates. After all, if a prisoner could not work, he could not participate in a strike; if he could not go to school, he could not form a study group reading radical literature; if he could not have visitors, he could not conspire to sneak radical ideas in or out of the prison. Likewise, the practice of re-classifying prisoners at higher levels of security worked to entrench the securitization process initiated with the first long-term lockdown at San Quentin following Jackson's escape attempt. In sum, maintaining more prisoners in more secure conditions kept prisoners isolated from each other, from activists, from legislators, and also from the courts.

E. Judicial Assertions of Power and Legal Interventions, 1976-present

This section addresses the role of the courts, in relation to the legislature and the correctional administrators, in shaping prison policy in California in the 1970s and 1980s. The legal challenges to the first long-term lockdowns at San Quentin and Folsom, mentioned in the previous section, represented one piece of a powerful new litigation movement, driven almost entirely by one small law office, operating just outside of the grounds of San Quentin State Prison in Marin County. In 1976, the Prison Law Office brought their first class action lawsuit against the California Department of Corrections, on behalf of prisoners “confined in or subject to confinement in administrative segregation in four California state prisons:” San Quentin,

²⁹⁹ Cummins, *supra* note 142: 132, 172.

³⁰⁰ Kirkland interview, *supra* note 95.

³⁰¹ Feeley and Simon, *supra* note 245.

Folsom, Duel Vocational Institute at Tracy and the California Training Facility at Soledad.³⁰² The lawsuit resulted in a number of injunctions controlling who could be punished in administrative segregation conditions, for how long, and subject to what minimum standards. The court also appointed a long-term monitor to evaluate whether the prisons were complying with court orders.³⁰³ This was only the first of many lawsuits the office brought to challenge conditions and administrative policies within the Department of Corrections. In fact, Donald Specter, the lead counsel for the plaintiffs in the 1984 *Toussaint v. McCarthy* case, still directs the Prison Law Office in 2009. And the office continues to be a major force in correctional policy in the state of California in 2009, almost thirty years later.³⁰⁴

Litigation by prisoners' rights advocates and the resulting judicial interventions, then, are the last piece of relevant history underlying the supermax innovation. In addition to the passage of the Determinate Sentencing Law by the California state legislature in 1976, and the increasing use of long-term lockdown units in the state in response to violence and unrest in 1970s and early 1980s, one other power shift paved the way for the supermax innovation: judicial interventions in prison administration. These judicial interventions had two important effects: (1) they inspired resistance, from both correctional administrators and legislators, and, (2) paradoxically, they reinforced the breadth of administrative discretion in classifying and controlling the highest security prisoners in the state.

On the one hand, the judges overseeing legal challenges to prison conditions in the state of California were seen by correctional administrators and legislators alike as meddlers. For instance, at the hearing at Folsom prison on violence at the prison, Senator Robert Presley called Greg Harding, the Deputy Director for Court Compliance to testify about the impacts of two significant court cases, one federal (the *Toussaint* case) and one state (*Wilson v. Deukmejian*, also brought by attorneys at the Prison Law office). Harding noted with frustration that: "The [*Toussaint*] injunction prescribes certain procedures by which the Department can lockup inmates and place inmates in segregated housing."³⁰⁵ Harding further noted that the *Wilson* order, which prohibited double-celling at San Quentin, put additional pressures on the overcrowded population at Folsom, the only other prison in the state of California that could house the "level four" prisoners (the highest security classification at the time) being pushed out of San Quentin by the court order.³⁰⁶ Together, Harding's two statements strongly implied that the court had tied the hands of both prison administrators and legislators; both were limited in their ability to propose creative solutions in an attempt to solve problems with violence and overcrowding.

At the same hearing, Assemblyman Stirling expressed intense frustration at the interventions of the federal judge in the *Toussaint* case – noting that he thought the use of a law clerk as a monitor in the case was "an outrage" and suggesting the judge be "impeached" for ordering California to provide programs to prisoners in lockups.³⁰⁷ Another testifier at the Folsom hearing, Rod Blonien, Undersecretary of the Youth and Adult Correctional Agency,

³⁰² *Toussaint v. McCarthy*, 597 F. Supp. 1388, n.1 (N.D. Cal. 1984).

³⁰³ *Toussaint*, 597 F. Supp. at 1392.

³⁰⁴ See Prison Law Office, "Major Cases and Achievements," available online at: <http://www.prisonlaw.com/cases.php> (last accessed 26 Apr. 2012) (listing Prison Law Office cases litigated from the early 1980s through today on topics as varied as uses of excessive force, generally inhumane conditions, disability rights, healthcare and parole board policies).

³⁰⁵ *Violence at Folsom Prison*, *supra* note 233: 56.

³⁰⁶ *Id.* at 58.

³⁰⁷ *Id.* at 57.

emphasized that not only state prisons but also jails were “under one type of judicial order or another in requiring that the sheriffs empty the jail, reduce the populations in the jail.”³⁰⁸ Blonien noted that such orders affected thirteen counties, and had collateral consequences judges had not anticipated. He explained that judges in districts with crowded jails were simply doling out longer sentences (of more than a year), so that the convicted criminals could crowd the state prisons instead of the local jails.³⁰⁹

In sum, the *Toussaint* case, along with the general flurry of litigation coming out of California prisons, was frequently mentioned in legislative reports and hearings, as well as in correctional planning documents.³¹⁰ In interviews, correctional administrators nonetheless often denied that their supermax design decisions were directly influenced by 1970s and 1980s court decisions, which dictated specific conditions of confinement in the state’s prisons. For instance, Craig Brown, who succeeded Rod Blonien as Undersecretary of Corrections in California during the 1980s prison-building boom, said definitively: “Litigation had nothing to do with [building the SHU]; [litigation] wasn’t one one-hundredth of the problem it is today.” He argued, in fact, that the 1970s and 1980s litigation involved concrete settlements for specific remedies regarding resource allocation, like minimum staffing levels. By contrast, he said, modern court interventions tend to involve constitutional questions and standards, instead of explicit remedies.³¹¹ Brown makes an astute point; resolutions to cases like *Toussaint* did, in some cases, set very specific standards for minimum constitutional conditions. Contrary to Brown’s assertion that litigation did not effect the supermax design, however, evidence from both the legislative record and the physical design of the supermax institution, as we shall see, suggests that the specific, minimum standards the *Toussaint* Court delineated were actually quite influential in the design of the supermax at Pelican Bay.

Even before the idea of Pelican Bay existed, the CDC had already undertaken a careful implementation of precisely the minimum prison conditions outlined by the *Toussaint* court, eliminating existing privileges and amenities that were not explicitly delineated in the court settlements. In a 1986 Auditor General (AG) Report investigating the lock-up facilities at Folsom Prison, the AG noted that the *Toussaint* court had not required contact visits for prisoners in the SHU. The report, therefore, recommended eliminating contact visits for these prisoners.³¹² In a response to the audit, prison administrators agreed that this was a reasonable goal, and

³⁰⁸ *Id.* at 49.

³⁰⁹ *Id.* at 50.

³¹⁰ See, e.g., *Violence at Folsom*, *supra* note 233; Thomas W. Hayes, *A report of an audit of security measures at two California prisons* (State of California, Office of the Auditor General, March 14, 1986), Sacramento: California State Archives AN: 2003-029, Joint Committee on Prison Construction and Operation Subject Files, Hearing Files 1981-1999, Loc: B4181 – 2907 (Box 1 of 2), copy on file with author (containing specific recommendations on isolating and consolidating prisoners in the SHU from Folsom, at 155); Daniel J. McCarthy, “Response to: A report of an audit of security measures at two California prisons (California Department of Corrections, Mar. 1986), Sacramento: California State Archives AN: 2003-029, Joint Committee on Prison Construction and Operation Subject Files, Hearing Files 1981-1999, Loc: B4181-2907 (Box 1 of 2), copy on file with author (responding to recommendations on isolating and consolidating prisoners, at 44-45); *Anatomy of a Prison, Folsom: Examination of Selected Operational, Policy, and Fiscal Questions Affecting California’s Prisons Today*, Special Report (Joint Committee on Prison Construction and Operations Publication, 1990), California State Archives AN: 2003-029, Joint Committee on Prison Construction and Operation: Subject Files, Hearing Files 1981-1999, Loc: B4181 – 2907 (Box 1 of 2), copy on file with author (referencing frustrations with prison litigation).

³¹¹ Brown interview, *supra* note 226.

³¹² Auditor General of California, *A report on an audit*, *supra* note 310: 155.

committed to work towards providing adequate space for *non*-contact visits.³¹³ In other words, privileges were actually *reduced* to only those minimums specifically delineated by the *Toussaint* Court. This process of minimizing privileges and conditions to include only what the courts had required would continue through the design and development of the supermax at Pelican Bay. So, litigation at least indirectly affected prison building by setting minimum standards, which correctional administrators were careful not to embellish in the least.

The few documents that do exist from the legislative record, like the archives of the Joint Prison Building Commission and executive branch policy reports, suggest that the 1970s and 1980s prison conditions litigation in California was also a *direct* factor in shaping the prison building that took place in the later 1980s. Correctional administrators, at least, would find ways to effectively channel their frustration with judicial interventions into a variety of mechanisms of compliant resistance. They meticulously observed the absolute minimum standards laid down by federal courts, but avoided the spirit of humane (or at least not cruel and unusual) confinement underlying the court orders.³¹⁴

And indeed, the resulting institutions were doubly resistant to judicial intervention. First, just as correctional administrators ran existing prisons under the barest minimum of court specifications, they also built new institutions to these same bare specifications. So, even where these conditions, built to only a bare minimum constitutional standard, were at least potentially unconstitutional, they were more difficult to challenge, because they were so precisely tailored to the court's earlier specifications. Second, correctional administrators built institutions that were explicitly isolated from the public view, in hard-to-reach rural locations, with rigid limitations on prisoners' access to mail, phones, and visitors. In other words, correctional administrators implemented rules within these new supermax institutions that, in practice if not in principle, discouraged prisoners from accessing the courts. (Chapter VI, on the design of the supermax, will explore this process more thoroughly.) In sum, one effect of judicial intervention in the prisons was to encourage frustration and resistance in correctional administrators. This frustration and resistance often manifested itself in policies tailored to do no more than meet bare minimum standards for constitutional conditions.³¹⁵

But, there was a second, even more perverse effect of judicial intervention. In their efforts to mediate and reach viable solutions to intractable problems, judges did leave some discretion in the hands of correctional administrators. This deference, in turn, reinforced a status quo of ever broadening administrative discretion vested in the correctional department, in such areas as classifying and controlling the most problematic prisoners. For instance, the *Toussaint* Court ordered correctional administrators to move the allegedly most violent prisoners in the California system out of the crowded, decrepit cells in Administrative Segregation at San Quentin.³¹⁶ But the Court left the question of where to put those most dangerous prisoners, and how to re-classify them, up to the department of corrections. And correctional administrators came up with their own solution: they argued that they needed a new, extremely high security prison to satisfy the court's demands. In the Senate Bill files of Robert Presley, the Senator who chaired the legislative committee on prison building, a May 1986 letter from Undersecretary of

³¹³ *Id.* at 44-5.

³¹⁴ See also Lisa Guenther, *The Gift of the Other: Lévinas and the Politics of Reproduction* (Albany, NY: SUNY Press, 2006) (discussing how focusing on minimal basic rights can cause stagnation in rights discourses).

³¹⁵ See Keramet Reiter, "The Most Restrictive Alternative: A Litigation History of Solitary Confinement in U.S. Prisons, 1960-2006," *Studies in Law, Politics, and Society*, Austin Sarat, ed. Vol. 57 (2012): 71-124 (discussing this trend in multiple states, from a national perspective).

³¹⁶ *Toussaint v. McCarthy*, 597 F.Supp 1388 (N.D. Cal. 1984), *aff'd* 801 F.2d 1080 (9th Cir. 1986).

Corrections Rodney J. Blonien argued that the legislature should fund, and the Department should commit to, “a replacement facility ... at a cost of an estimated \$250 million.” Blonien alluded to plans already in the works to build a new, high-security prison to replace the long-term lockdown unit at San Quentin, which two courts had already found to be unconstitutional. The Undersecretary explicitly argued that this commitment was necessary to appease the judges in the *Toussaint* and *Wilson* courts, and to reach a financially sustainable agreement to minimize repairs at San Quentin itself.³¹⁷

Attorney Steve Fama, who represented the plaintiffs in the *Toussaint* case, reiterated this idea that the department of corrections had figured out that they could avoid litigation over constitutional conditions by simply building new prisons. Specifically, Fama said that he thought a Ninth Circuit opinion issued in the *Toussaint* case might have helped to pave the way for the idea of the supermax at Pelican Bay. Fama said: “At a particular point there, the Department opened New Folsom [later re-named California State Prison – Sacramento], and the Ninth Circuit held that the [*Toussaint*] order did not apply, and this gave the Department the idea of a way out of the consent decree.”³¹⁸ Assembly Comments on drafts of the legislation that ultimately authorized Pelican Bay State Prison reiterate the link between the CDC’s decision to build high-security prisons and the consent decree governing San Quentin. Specifically, the assembly comments note that “CDC’s recently released *Long Range Plan for San Quentin* proposes to build a new maximum security prison on the grounds of San Quentin ‘or elsewhere’” and queries whether Pelican Bay will be this “new maximum security prison” referred to in the earlier report.³¹⁹ No responses to this query are recorded, but the very question links Pelican Bay to the Department’s plans for San Quentin, written in response to *Toussaint* court decrees.

Schoenfeld describes a very similar process in Florida, where she argues that courts placed the “responsibility of compliance” on correctional administrators, and this responsibility came with broad discretion. In turn, correctional administrators leveraged this burden and their discretion to “pry needed resources from the state legislature.”³²⁰ In the case of California, correctional administrators used the court orders in the *Toussaint* and *Wilson* cases to their advantage in two very different ways. As Schoenfeld found in Florida, correctional administrators in California leveraged the discretion the court left them in handling to high-security prisoners to argue for the need for funding new prisons. But, as noted above, correctional administrators also used the *minimum* constitutional standards for lock-down conditions, as set out by these courts, not as a baseline from which to build more humane institutions, but as an outer limit of privileges and concessions that would be made to maximum-security prisoners in the state.

F. The Road Not Taken: Potential Solutions Proposed and (Implicitly) Rejected, 1985

By 1985, judges, prison administrators, legislators, academics, and the general public alike agreed that the California prisons were in crisis. Between 1980 and 1987, the California Legislature, especially the Joint Committee on Prison Construction and Operations, held dozens

³¹⁷ Rodney J. Blonien, letter to Robert Presley, dated May 30, 1986, Presley’s Bill File on SB-2098, 1986, Sacramento: California State Archives, Loc: LP347: 367 – Robert Presley Papers – Subject Files – Corrections (copy on file with author).

³¹⁸ Fama interview, *supra* note 270. The decision he referred to is: *Rowland v. United States Dist. Court for Northern Dist.*, 849 F.2d 380 (9th Cir. 1988).

³¹⁹ Senate Bill 1222 (California, Keene), Assembly Comments to the Third Reading, Jun. 30, 1986: 5.

³²⁰ Schoenfeld, *supra* note 219: 15.

of hearings, and published a number of reports on the state of corrections in California. Of these, a few are particularly revealing: *The New Prison Construction Program at Midstream* (1986); *Violence at Folsom Prison: Causes, Possible Solutions* (1985); *Cities with Prisons: Do They Have Higher or Lower Crime Rates* (1985), and *A Report on Alternative Methods of Housing Convicted Felons* (1980). Judging from the concerns raised in these reports, the biggest underlying problem facing the Department of Corrections, and by extension the Legislature, was prison overcrowding in the state. In the *Violence at Folsom Prison* report, both prisoners and academics alike testified about the significant problems at Folsom stemming from overcrowding.³²¹ Similarly, the *Cities with Prisons* report noted, “overcrowding in the California State Prison system has been critical and growing worse,” citing the fact that California prisons in 1985 were operating at 150 percent of capacity.³²² See *Figure 1*, in Appendix B, showing the steep increase in the raw numbers of the prison population in California, growing from just over 20,000 people in prison in 1979 to almost 80,000 people in prison in 1989. Indeed, each of the above reports mentions the overcrowding and includes analyses predicting that the prison population would continue to grow. These legislative hearings and reports were widely reported in the popular press, drawing front page attention in the major state papers, including *The L.A. Times*, *The Sacramento Bee*, and *The San Francisco Chronicle*.

Despite the widespread agreement that California corrections had reached a crisis point, there was equally widespread disagreement about what to do about it. Every player in the policy-making arena seemed to have a different idea about what alternatives existed and what solutions were viable and preferable. In this sense, California was at a “branching point,” as Pierson might say.³²³ How would the state relate to its prison-overcrowding problem? What policy innovations would be proposed? And what factors would influence the eventual path of policy innovation? Legislators, judges, experts, and the media would present a variety of possible solutions to prison overcrowding, from changing sentencing laws and releasing prisoners to building new community-oriented prisons in urban areas. None of the publicly proposed solutions discussed at legislative hearings or in the newspapers involved institutionalizing the long-term lockdowns in place at San Quentin and Folsom, or building a newer, more high-tech, higher security prison in Del Norte County. But this is exactly what happened.

Table 4: Changes & Factors Affecting the California Correctional System Crisis, 1976-1985, in Appendix A, summarizes the various structural changes in and out prison that took place in the 1970s and 1980s in California, as discussed in this chapter. The many individual factors are grouped into four categories of change that took place in California prisons in the 1970s and 1980s: prison population changes, legislative changes, administrative changes, and judicial changes. These categories correspond roughly to the organization of the sub-sections in this chapter.

While these structural changes created a variety of management problems that paved the way for the supermax innovation, the supermax innovation was not the only possible solution to the problems detailed in this section and summarized in the chart below. In fact, as the preceding section detailed and the chart below summarizes in the third column entitled “Proposed Alternatives,” a variety of recommendations were made in various public forums to address the ostensible problems perceived to exist in the California Department of Corrections. Note,

³²¹ See, e.g., *Violence at Folsom Prison*, *supra* note 233: 16, 24 (Testimony of Paul Redd and Testimony of Craig Haney).

³²² *Cities with Prisons*, *supra* note 265: 2.

³²³ Pierson, *supra* note 296.

however, that none of the changing factors listed under “prison population changes” had actually been proven at the time they were identified. For instance, *Figures 2 and 3*, in Appendix B (and discussed further in the subsequent chapter) suggest that violent assaults were not actually increasing during this period. Moreover, Zimring and Hawkins have shown that much of the 1980s prison population increase was attributable not to longer prison sentences but to more prison admissions.³²⁴

While both correctional administrators and legislators identified changing prison population factors of questionable validity, they also identified a number of responses to perceived changes in prison populations, and an array of policy alternatives to long-term lockdowns and re-classification of prisoners to increasingly high security levels. None of these recommendations, importantly, involved institutionalizing the lockdown units and SHUs at San Quentin and Folsom, which were so harshly criticized by courts, legislators, and experts alike.

The history presented in this section provides critical context for understanding what was going on in California – in terms of how legislators and constituents and even correctional administrators were thinking about punishment in the 1980s, when Pelican Bay was designed. As we have seen, the 1970s and early 1980s were a critical time period in the California Department of Corrections. Power shifted among government agencies and was consolidated in a variety of ways that had implications for the shape of the prison-building boom that was about to take-off in the state. These power shifts, however, were fundamentally unintended; they happened incidental to policy changes that had other purposes, like making prison conditions more humane, or streamlining and equalizing sentencing practices.

Incidental power consolidation happened first when the legislature passed the Determinate Sentencing Law, and state prosecutors eventually found themselves with nearly total power over sentencing. Correctional officers noticed the implications of DSL for their own loss of control over sentences; they could no longer promise prisoners who behaved a shorter sentence, or threaten those who misbehaved with longer sentences. For correctional officers, this loss of control over sentences translated directly into a loss of control over the prison population as a whole. This is the so-called “correctional free lunch.”³²⁵ This led to the next incidental consolidation of power, when prison administrators, out of fear and frustration, started locking down prisons. They quickly found that, despite court interventions and a battery of legislative recommendations for alternative policies, no one actually intervened to stop the lockdowns.

These power consolidations were incidental in that they lacked any kind of underlying, purposive agenda. State prosecutors and public-safety-oriented politicians did not lobby alone for determinate sentencing; they were joined by a liberal, anti-prison coalition of civil rights activists, like the American Friends Service Committee. Similarly, correctional administrators, desperate to control what they saw as a violent and volatile prison population, did not argue for the most punitive possible conditions of confinement for all prisoners; rather they joined in conversations about alternatives to incarceration and sometimes even defended rehabilitative policies. And correctional administrators tried, however they were able, within the confines of federal law, to identify, isolate, and segregate the problem prisoners.

Later, as Page chronicles so well in his recent book, *The Toughest Beat*, the California Correctional Peace Officers Association would ascend to power in the state, develop purposive

³²⁴ Franklin E. Zimring and Gordon Hawkins, *Prison Population and Criminal Justice Policy in California* (Berkeley: Institute of Government Studies Press, 1992): 14.

³²⁵ Zimring and Hawkins, *The Scale of Imprisonment*, *supra* note 187: 211-15.

agendas, and fund specific policy initiatives.³²⁶ In 1980, however, there are fewer clearly identifiable critical players in California prison politics. The power consolidations that took place in California in the late 1970s and early 1980s looks like a tug-of-war gone wrong; policy makers and players were habitually tugging at the rope of correctional control and suddenly finding themselves with the entire rope in their hands, because the opposition at the other end had fallen away. In fact, the process in California from the passage of DSL to the building of the first supermax reveals an important pattern in the state's criminal justice policymaking in the 1970s and 1980s: small policy changes produced big power shifts, which in turn facilitated the entrenchment policies, like long-term lock-downs and the supermax innovation, which were experimental at best and detrimental at worst.

The theory of checks and balances underlying American government has a certain logic: there are equal-and-opposite reactions that theoretically prevent any one institution or actor from ending up with total power over any one individual citizen. The executive might arrest a person on the street, but that person has a right of habeas corpus, to challenge his arrest before an independent, federal judiciary. In the criminal justice system in California, these kinds of equal-and-opposite reactions seem to have been disrupted at multiple different levels, so that first prosecutors, and then correctional administrators, happened to end up with total power over individual criminal defendants, in terms of sentence lengths and punitive conditions of confinement. These power consolidations, the next chapter argues, led not only to the supermax innovation, but to the institution's deep roots, its resistance to reform, and its ready replication.

³²⁶ Page, *The Toughest Beat*, *supra* note 219.

V. Legislating (or Not?) the California Supermax

By the early 1980s, it was obvious to California's legislators, correctional officials, and citizens alike that the state's prison system was overcrowded, and that the most politically acceptable solution to the problem was to build more prisons. As the chair of the Joint Committee on Prison Construction and Operation said, reflecting back on his career: "When we did this shifting from the indeterminate to determinate [sentence] and then we enhanced those penalties, anybody with any brains at all could see the prison population's going to increase because we're getting tougher on crime, and we're going to need more prisons."³²⁷ In 1982 and 1984, California voters approved two separate general bond measures, providing for \$795 million in funding to build new state prisons.³²⁸ And so, California embarked on the largest prison-building project any state had ever undertaken; within ten years, California would add more prison beds to its state prison system than existed within the entire U.S. federal prison system in 1985.³²⁹

Although California had already allocated millions of dollars to prison building by 1985, and had even opened the first few of its 23 new prisons, neither the California state legislature nor the California Department of Corrections had imagined Pelican Bay State Prison, let alone purchased any land in Del Norte County, where the prison would ultimately be built. In 1985, legislators were still involved in holding hearings, commissioning reports, and funding research institutes to brainstorm policy solutions to the overcrowding and violence facing the California Department of Corrections (CDC).³³⁰ Experts proposed a variety of solutions, a variety of ways to invest money and time into re-structuring and augmenting resources within CDC. But, in the end, the legislature simply allocated money to the CDC, and the CDC decided exactly what kinds of prisons to build with this money.

In 1989, then, California opened its "prison of the future," proclaimed to be the harshest prison in the United States and designed to contain the alleged "worst of the worst," in conditions of extreme isolation.³³¹ Not only were prisoners completely isolated from each other, in small pods of eight windowless cells, but they were completely isolated from correctional officers, who could press a button from a central control tower, allowing a prisoner to move out to a shower or to a solitary exercise yard with minimal access to natural light. The prison was located in rural Del Norte County (the state's second poorest county), on the northern border with Oregon, 363 miles from San Francisco, the nearest major urban area. So the prison and its prisoners were also isolated from most of the rest of the California state population. In 1989, only a few other states had a prison that imposed a similar degree of isolation on a similar scale:

³²⁷ Patrick Ettinger, *Oral History Interview with Honorable Robert Presley, California State Senator, 1974-1994, Agency Secretary, Youth and Adult Correctional Agency, 1999-* (California State University, Sacramento: California State Archives, State Government Oral History Program, Dec. 18, 2001, April 17, 2002, July 18, 2002, June 5, 2003): 53.

³²⁸ Assembly Bill 2545 (California, Robinson), Jul. 10, 1986 (detailing the history of the prison construction bonds); Hurst, "California Elections," *supra* note 295.

³²⁹ The population of the U.S. federal prison system was roughly 40,000 in 1985; California added 23 prisons to its existing 16 prisons between 1984 and 2000, for a total of more than 40,000 beds. Norval Morris, "Introduction," in *Prison Population and Criminal Justice Policy*, *supra* note 324; Gilmore, *supra* note 21.

³³⁰ Richard Keller, under the supervision of Gerald Beavers, *The New Prison Construction Program at Midstream* (Sacramento: Legislative Analyst's Office, Apr. 1986); *Violence at Folsom Prison*, *supra* note 233.

³³¹ *Madrid v. Gomez*, 889 F. Supp. 1146 (N.D. Cal. 1995); Corwin, "High-Tech Facility," *supra* note 3; Griffith, *supra* note 54.

Arizona.³³² In the ten years after Pelican Bay State Prison opened, more than forty other states built and opened supermax prisons.³³³ California, then, was the one of the first of many states to copy Arizona's model.

Whereas many tough-on-crime policies, especially in California, were subject to an active public debate and even a popular vote,³³⁴ the decisions about what kinds of prisons to build were not subject to public debate. Prison building and design decisions were in fact hardly even subject to debate behind the closed doors of legislative committee meetings. To better understand how prison siting, building, and designing decisions were made in the 1980s, this chapter explores the legislative process that underwrote one particularly punitive and influential prison: the supermax prison that became Pelican Bay State Prison. It analyzes primary historical sources – including state archives of legislators' papers and legislative decisions as well as oral history interviews with key informants – to understand how legislators, executive officials, and bureaucrats collaborated to produce Pelican Bay State Prison, the second and largest supermax in the United States.

The analysis reveals that, throughout the 1980s, California legislators gradually ceded planning and operational authority to California Department of Corrections administrators. This ceding of power ultimately allowed correctional administrators to make not only planning and operational decisions, but also moral decisions about who would be punished in California, under what conditions, and for how long. The California Department of Corrections decided in particular to build a novel form of prison: a supermax, which kept prisoners in complete "solitary confinement," for indefinitely long periods of time, determined exclusively by administrators within the Department of Corrections. Correctional bureaucrats in effect both envisioned and implemented the innovation of the supermax, with little input or oversight from either the governor or state legislators.

This chapter explores in detail the political and administrative process underlying the design and building of Pelican Bay State Prison. First, the chapter provides an overview of the prison construction process in California, introducing the key actors and reviewing their articulations of their goals for California's prison building project. Second, the chapter documents the key government processes, including the mechanisms of bond financing and the role of the standing legislative committee on prison construction, which oversaw prison construction in the state. These processes are critical to understanding (a) the priority California's elected officials and agency bureaucrats placed on building prisons quickly and (b) the lack of transparency and minimization of public and legislative oversight that ensued as a result. Finally, the chapter reviews the brief legislative dialogues, which did take place about Pelican Bay, and explores the implications of the power shift from legislative oversight of prisons to more total bureaucratic discretion over prison building and operation.

A. Overview of the Politics of Prison Construction in California

California politicians first started talking about building new prisons in the late 1970s, during the second term of Governor Jerry Brown's administration. According to Presley, who served as a California state senator from 1975 to 1994, and who introduced the first prison

³³² Lynch, *Sunbelt Justice*, *supra* note 33.

³³³ See Table 1 in Appendix A.

³³⁴ Vanessa Barker, "The Politics of Pain: A Political Institutionalist Analysis of Crime Victims' Moral Protests," *Law and Society Review*, Vol. 41(3): 619-664 (2007); Barker, *The Politics of Imprisonment*, *supra* note 29.

construction bills during the late 1970s, the first few years of design and construction initiatives were full of stops and starts. The governor's office would give the legislators money for planning, and the legislators in turn would "give the money over to Corrections," who would come up with prison plans. But, Presley said, every year, he would "run into trouble with ... the [Assembly] Ways and Means Committee." According to Presley, the Assembly Committee also said they would rather spend money on education than on welfare.³³⁵ Within five years, however, Presley completely overcame his initial troubles getting prison construction started in California.

In 1982, the California legislature authorized three new prison facilities in Riverside (Presley's district), Los Angeles, and San Diego Counties and sought and received voter authorization for a \$495 million general obligation bond measure.³³⁶ Shortly thereafter, the legislature, again at State Senator Presley's behest, created the Joint Legislative Committee on Prison Constructions and Operations (JLCPCO). Presley would chair the committee for the next ten years. The next two sections detail the mechanisms by which California's prisons were funded, through a variety of complicated bonds, as well as the important procedural implications, for both prison design and correctional discretion, of the formation of the JLCPCO. First, though, the political context in which these procedural changes took place is critical to understand.

Presley, in an oral history interview in 2003, called himself a conservative Democrat. He came from a law-and-order background, having been Undersheriff of Riverside County for the twelve years before he first won a bid for state senate seat in 1974. In his 20 years as a state senator, Presley was consistently involved in criminal justice issues. On the one hand, he was responsible for a number of progressive, Democrat-supported reforms, favorable to criminal defendants, including authoring one of the first laws that permitted medical marijuana use (in 1979), working to de-institutionalize at-risk youth, seeking compassionate release for aging and ill state prisoners, and establishing county-run domestic violence shelters across California. On the other hand, Presley also presided over Republican-supported, prosecution-oriented criminal law changes, which significantly enhanced the lengths of criminal sentences and the range of crimes eligible for felony status, throughout the California criminal code.³³⁷ He ultimately oversaw the largest prison-building project ever undertaken by any state. In 1988, Presley went so far as to accept \$10,000 to speak at a Correctional Peace Officer Association convention meeting in Reno, Nevada.³³⁸ In California, accepting money for these kinds of speaking engagements from the state's powerful prison guard's union is often considered to be an indication of, or a proxy for, tough-on-crime, prosecution-oriented political leanings.³³⁹

Presley's engagement with this broad spectrum of criminal justice issues, along with this wide range of political constituencies represents not only the diversity of his political commitments, but the leverage he held within the California State Senate over his twenty years in office. Presley's district was Riverside County, just north of Los Angeles, known colloquially as the "Inland Empire," and Presley was its emperor. He represented a particular brand of California political leadership in which certain legislators dominated an entire category of political decision-making, like criminal justice, or energy policy, or state budgeting, for decades at a time.³⁴⁰ During the 1980s, Presley's proposed bills averaged an 80 percent passage rate, well

³³⁵ Ettinger, *supra* note 327: 53-54.

³³⁶ Gilmore, *supra* note 21: 93.

³³⁷ Ettinger, *supra* note 327: 50-53.

³³⁸ *Id.* at 126-27.

³³⁹ See generally Page, *The Toughest Beat*, *supra* note 219.

³⁴⁰ Term limits, which became popular in the early 1990s, altered this model of the entrenched and professionalized legislator, which critics argued had become corrupt and powerful. Bruce E. Cain and Marc A. Levin, "Term Limits,"

above the 50 percent average pass rate of most of his colleagues in the legislature.³⁴¹ (As of 2011, Presley was still alive, and still works as an adviser to his namesake institution, the University of California – Riverside’s Presley Center for Crime and Justice Studies.)

With his legislative success rate, Presley was a perfect choice to chair the legislative committee on prison building (the JLCPCO), which was founded just as George Deukmejian, a Republican, took over state leadership from Democrat Governor Jerry Brown. Deukmejian would be an active supporter of prison building in California throughout his two terms as governor (1983-1991). Deukmejian had served as a state senator from 1974 to 1978 and then as Attorney General for California from 1979 to 1983. In the mid-1970s, while he was a state senator, Deukmejian collaborated with Presley on strengthening criminal laws and lengthening criminal sentences in the state.³⁴² During his campaign for governor, Deukmejian renewed his explicit promises not only to be tough on crime, but to build more prisons throughout the state.³⁴³ Indeed, according to state polls, crime was the number one issue in that 1982 campaign year.³⁴⁴ Deukmejian was also particularly critical of federal court intervention in the criminal law, arguing throughout his years as California state attorney general and during his gubernatorial campaign that the Chief Justice of the California State Supreme Court, Rose Bird, should not be re-elected to the judicial bench, because of her overly liberal decisions, especially her anti-death penalty views.³⁴⁵ Deukmejian’s election, then, heralded not just a tough-on-crime political era, but an anti-court oversight stance in California state government.

Although California voters elected tough-on-crime Deukmejian by a narrow majority (he defeated Democratic candidate Tom Bradley, who had been projected to win the election), they readily approved two separate jail and prison-building bond measures in the same year. The first prison bond measure appeared as Proposition 1 on the June 1982 primary election ballot. Both outgoing governor Jerry Brown and gubernatorial candidate George Deukmejian supported the proposition. The *Los Angeles Times* argued in an editorial that the measure was both fiscally responsible, spreading prison building costs out over 20 years, and necessary, given prison overcrowding and the resulting tensions. The *Times* cited 290 prisoner violent deaths, 15 staff deaths, and 117 prisoner suicides over the preceding 20 years as support for their claim that violent tensions were running too high in the state’s prisons.³⁴⁶

Whether the prisons were actually as explosive as correctional officers and the *L.A. Times* claimed is debatable. *Figure 2*, in Appendix B, shows the *raw number* of annual prisoners who died by homicide, prisoners who committed suicide, and correctional officers who died by homicide in every year from 1970 through 1990. *Figure 3*, in Appendix B, shows the *rate* of annual violent deaths, per 10,000 prisoners. These graphs reveal two important facts. First, a dramatic increase in violent deaths took place in the CDC in the early 1970s. But from 1976 on,

Annual Review of Political Science, Vol. 2 (1999): 163-88; Robert Kurfirst, “Term-limit logic: paradigms and paradoxes,” *Polity*, Vol. 29 (1996): 119-41.

³⁴¹ Ettinger, *supra* note 327: 75-6.

³⁴² *Id.* at 116.

³⁴³ William Endicott, “Support of Fight on Crime Seen,” *Los Angeles Times*, Apr. 8, 1981: B23; William Endicott, “The Governor’s Race,” *Los Angeles Times*, Jun. 6, 1982: A3.

³⁴⁴ Jeffrey Perlman, “Issue Second Only to Crime Among County Residents Surveyed,” *Los Angeles Times*, Oct. 13, 1982: Orange County Edition, A1.

³⁴⁵ “Open Season on the Chief Justice,” *Los Angeles Times*, Nov 4, 1981: Orange County Edition, A12. The *Los Angeles Times* article argues “that Deukmejian took a more principled stance in his dislike for Bird than his primary challenger Mike Curb,” who wanted to orchestrate a mid-term recall of the justice.

³⁴⁶ “Prison Construction: Yes on 1,” *Los Angeles Times*, May 20, 1982: F10.

violent deaths in the CDC decreased steadily every year. Second, when the numbers of violent deaths are compared to the overall population increases in the CDC in the 1980s, i.e., measuring rate, the decreasing violent deaths trend is even more dramatic. Together, these graphs show that violent deaths (the most reliable measure of overall violence³⁴⁷) actually decreased steadily in the ten years before legislators and correctional administrators began discussing the building of Pelican Bay State Prison.

Regardless of the actual rates of violence in the Department of Corrections, voters approved an additional prison construction bond measure of \$280 million in the November 1982 general election; this bond was earmarked specifically for construction and renovation of county jails.³⁴⁸ As Deukmejian took over the office of California governor, he had a clear public mandate to continue to be tough on crime, even in the face of the multi-million-dollar expense of prison building necessitated by recent legislative and popular changes to criminal sentences.

As Presley said, Deukmejian “not only put all these criminals in prison but he wanted to keep them there, and that’s why he wanted us to embark on this prison building effort that we did in the [‘80s and] ‘90s. And he was, in a lot of ways, the driving force behind all of that.”³⁴⁹ Correctional administrators who worked on prison building in the 1980s argued that Deukmejian was critical in motivating the prison-building project. Craig Brown, who was Undersecretary of Youth and Adult Correctional Agency in the 1980s, reiterated Deukmejian’s role as a driving force behind prison building in the 1980s: “The governor wanted prisons built; we were going to build prisons . . . we hired people who knew how to build.” Not only did Deukmejian want prisons built, he wanted them built fast. As Brown said: “Budget and schedule were the only two important commodities.” When Brown oversaw his first prison-building project, a state prison being constructed in Vacaville, not far outside of Sacramento, the state capital, he prioritized getting the prison built in a year, “proving it could be done.” To do this, Brown had lime added to the muddy soil of the prison’s foundation, at a cost of a quarter of a million dollars, so that construction could continue uninterrupted through the rainy season, and he had wooden doors installed at the last minute, painting them to look like the steel doors that would eventually be installed, once their slow manufacturing process was completed.³⁵⁰

In spite of the urgency with which prison building proceeded in California in the 1980s, Presley argued that, for Deukmejian, prison building was a moral choice, not a political ploy: “Again, this was not a political thing with him. A lot of people may have thought it was, but it was just sincerely felt.”³⁵¹ Regardless of the motivations of elected politicians like Presley and Deukmejian, or appointed administrators like Brown, they were all integral to a prison construction project, which would shape not just criminal justice policies but state budget priorities, election politics, and the day-to-day life of people in the state of California through the present day.

³⁴⁷ Non-death violence statistics are subject to discretionary reporting. For instance, assault statistics are subject to discretionary reporting requirements, such as how a corrections department defines “assault” at a given point in time, whether or not a correctional officer feels assaulted and reports an interaction as an assault, or whether a prisoner feels assaulted and reports an interaction as an assault. Violent death statistics, on the other hand, are verifiable, since “death” is subject to less definitional debate and discretionary reporting than “assault.”

³⁴⁸ “A Commitment to the Future,” *Los Angeles Times*, Nov 4, 1982: E10.

³⁴⁹ Ettinger, *supra* note 327: 116.

³⁵⁰ Brown interview, *supra* note 226.

³⁵¹ Ettinger, *supra* note 327: 116.

B. A Quick Lesson in Government Issued Bonds

The building of 23 new prisons in California between 1984 and 1996 was financed through a complicated series of bond measures – some publicly approved and some negotiated in the halls of the legislature, between state administrative agencies. California legislators first financed prison building through the voter-approved issuance of general obligation bonds. Over time, however, legislators increasingly turned to a less public, quicker, and slightly more expensive process for financing prison-building: lease-revenue bonds. This transition from the use of general obligation bonds to the use of lease-revenue bonds highlights two important themes in the history of prison construction in California. First, legislators and administrators alike often prioritized speed over cost-efficiency. So a slightly more costly lease-revenue bond, which allowed legislators to bypass the slow and potentially contentious process of voter approval for general-obligation bonds, neatly complimented the big rush to construct as many prisons as quickly as possible. Second, as lease-revenue bond financing replaced general obligation bond financing, voters had less of a say in the rising costs of the prison construction agenda. In the process of building prisons quickly (and creatively), prison-building was increasingly removed from public scrutiny and decreasingly transparent.

Legislators first turned to general obligation bonds as a means to finance California's prison construction, because they thought the tough-on-crime populace would be more willing to approve prison-construction than would either tight-fisted or pro-welfare legislators. Senator Presley recalled first suggesting general obligation bonds as a means to fund prison construction, because he was frustrated with the Assembly Ways and Means Committee's refusal, in the late 1970s, to allocate funding to prison building. Presley said that, throughout the 1980s, "about every two years – well, every election cycle – we'd have a bond issue on prison bonds."³⁵² General obligation bonds were a convenient way to fund prison construction not only because they took the budget allocation out of Assembly Member's hands and placed it in the hands of voters, but because California law exempts public debt incurred through voter-approved general obligation bonds from being part of the state's constitutionally-required balanced budget calculations.³⁵³ These general obligation bond ballot measures succeeded at the polls three times: in 1982 (\$495 million), 1984 (\$300 million), and 1986 (\$500 million).³⁵⁴

In the late 1980s, though, criticisms of these multi-million dollar general bond measures surfaced. In her Marxist-oriented account of the economics of prison-building in California, Gilmore suggests that California legislators were afraid of a tax revolt along the lines of Proposition 13.³⁵⁵ (Proposition 13 was a popular ballot proposition, passed in California in 1978; it virtually eliminated property tax increases for home-owners and also constrained and slowed the issuance of general obligation bonds.³⁵⁶) So, with Proposition 13 lingering in the background of state politics, and a few multi-million dollar general bond issuances already approved, legislators might have been worrying about the electorate's willingness to approve further debt. Gilmore argued that politicians had to figure out how to "expand a politically popular program

³⁵² Ettinger, *supra* note 327: 118.

³⁵³ Gilmore, *supra* note 21: 97.

³⁵⁴ Paula Alger and Theresa Molinari, "The Use of General Obligation Bonds by the State of California" (Sacramento: California Debt Advisory Commission, Sept. 9, 1987): 8, available online at: www.treasurer.ca.gov/cdiac/reports/go_use.pdf (last accessed 25 Feb. 2011).

³⁵⁵ Gilmore, *supra* note 21: 97.

³⁵⁶ Phillip Mattera, ed., "Public Finance and Public Debt," *Corporate Research Project of Good Jobs First*, Jun. 2004, available online at: http://www.publicbonds.org/prison_fin/prison_fin.htm (last accessed 13 Dec. 2010).

(prisons) without running up against the politically contradictory limit to taxpayers' willingness to use their own money to defend against their own fears."³⁵⁷ But legislative fears of taxpayer resistance to further debt obligations were not the only factors mitigating against issuing another round of general bond obligations.

Elected officials also worried about the stability of the state's economy and financial well-being, in light of its growing public bond obligations. Specifically, in 1987, the California Debt Advisory Commission (composed of publicly-elected and appointed officials), chaired by the California State Treasurer Elizabeth Whitney, published a report on "The Use of General Obligation Bonds" in the state. Whitney noted, in a letter introducing the report, that it was prepared in response to "concerns and questions raised by Commission members and others regarding the State's ability to assume additional general obligation debt."³⁵⁸ The report notes that, although California continued to receive strong municipal credit ratings in 1987, it also had the most outstanding general obligation debt of any state, at \$8 billion and counting. The report was prescient; as of the 2000s, California's strong municipal credit rating had fallen; the state's general obligation bonds now have one of the lowest credit ratings in the United States.³⁵⁹

Whether because of fears of voter disapproval of further general obligation bonds, or fears about the financial well-being of the state, legislators looked for other ways to finance the ongoing prison construction projects in the second half of the 1980s. They turned to a different kind of bond, called a "lease-revenue bond." These bonds are usually created through a less public, and slightly more complicated process than general obligation bonds. First, the government creates a lease-purchase agreement with some form of funder, like a corporation, or a non-profit agency. (In California, in the 1980s, the Public Works Board created these lease-purchase agreements with private funders.) Second, a public project, like a prison, is built using the funds obtained through the lease-purchase agreement. Third, the state government appropriates funds, so that the government agency using the public project, like a correctional agency using a prison, can make "lease" payments to the private funders. The government only gets title to the facility when the bonds are fully repaid, through these ongoing lease payments.³⁶⁰

Gilmore explains in detail how California politicians negotiated this process to fund prisons in the late 1980s. First, a California investment bank worked in collaboration with Deukmejian, Presley, and other elected leaders of the prison construction projects, to set-up lease-revenue bond agreements. In California, these lease-revenue bonds were not backed by "full faith, credit, and taxing power" repayment guarantees of general obligation bonds.³⁶¹ So the state's Public Works Board issued bonds to private investors, but the state was not constitutionally required to re-pay these bonds. Instead, the state maintained only a moral obligation to re-pay these lease-revenue debts. The debts, therefore, were slightly riskier, because of the decreased guarantees of repayment; this means that lease-revenue bonds require higher interest payments be made to investors, in order to compensate investors for the higher risk of the bonds. In the end, this means these bonds are more expensive to the state to issue. More importantly, these kinds of riskier bond investments were created by a legislative sub-committee and issued by the Public Works Board, without the general election voter approval required for

³⁵⁷ Gilmore, *supra* note 21: 97.

³⁵⁸ Alger and Molinari, *supra* note 354.

³⁵⁹ Mattera, *supra* note 356.

³⁶⁰ Kevin Pranis, "Doing Borrowed Time: The High Cost of Backdoor Prison Finance," *Prison Profiteers: Who Makes Money from Mass Incarceration*, Tara Herivel and Paul Wright, eds. (New York: The New Press, 2007): 37; Mattera, *supra* note 356.

³⁶¹ Gilmore, *supra* note 21: 98; Alger and Molinari, *supra* note 354: 6.

general obligation bonds.³⁶² In other words, while more expensive, these bonds were (and are) much faster and simpler to issue, so they facilitate speedy prison construction.

This shift in procedures underlying the approval for funding prison construction in the California legislature is representative of the overall prison construction process in the state in the 1980s. First, tough-on-crime rhetoric dominated political conversations, made or broke political campaigns, solidified the power of elected leaders like Deukmejian and Presley, and underwrote the approval of massive quantities of general obligation bonds (upwards of \$1 billion dollars in such bonds, in fact). Next, the prison construction project became so gargantuan that even \$1 billion in general obligation bonds was insufficient to fully fund the endeavor. Moreover, prison building increasingly became a question of political, if not actual, urgency. “Efficiency” referred to the speed with which a prison project could be completed, not the cost-effectiveness of the endeavor. Recall how Craig Brown described installing a back-up set of wooden doors, painting them to *look* like steel, so that the first prison construction project he oversaw *appeared* to be complete in record time. Finally, the legislators designed a form of public bond financing, which, as we have seen, allowed prisons to be built not only faster, but with less direct public oversight and input into the building process. The governor, legislators, prison administrators, and private actors from banks and architecture firms, collaborated together to design systems that allowed legislators to build prisons fast, if not exactly cost-effectively, and often very much outside of the traditional process of democratic oversight. The Joint Legislative Committee on Prison Construction and Operations, headed up by Presley, was instrumental in facilitating this process of building dozens of prisons, quickly.

C. The Joint Legislative Committee on Prison Construction and Operations

The Joint Legislative Committee on Prison Construction and Operations (JLCPCO) would interface directly with the California Department of Corrections, overseeing the procedures (if not the actual designs) by which prisons were built in California over the next decade. Senator Presley authored the bill that set-up the JLCPCO in 1982. The creation of the Committee had a number of immediate impacts on prison construction procedure, because the Committee explicitly exempted the CDC from existing construction approval processes and oversight mechanisms. State correctional administrators often explicitly sought these exemptions, for the purpose of expediting the prison building process. But the exemptions had the secondary consequence of severely limiting the extent to which California state legislators either knew about or engaged with significant policy questions, like the kinds of conditions of confinement and the forms of punitive institutions the state of California committed to building and running in the 1980s and beyond.

This section describes the gradual ceding of planning and operational authority to the CDC during the 1980s. The subsequent section then details one of the interesting results of this power shift: a novel punitive institution (Pelican Bay State Prison) was designed and built without a single, substantive legislative comment on the record about that institution’s unusual purpose or design. The absence of any legislative comment about the specifics of institutional design is important, in particular in the case of prisons, because prison design fundamentally implicates normative policy questions about the purposes of punishment. Certain prison designs, for instance, preclude rehabilitative programming, or institute restrictions on prisoners’ rights that rise to the level of constitutional deprivations. As such, these prison designs shape not just

³⁶² Gilmore, *supra* note 21: 100-01.

the everyday conditions of confinement, but the state's overall punishment policy. Just as correctional administrators are not left with the discretion to decide whether to impose the death penalty, so perhaps they should not be left with the discretion to decide whether to physically institutionalize, through particular prison designs, the practice of indefinite solitary confinement. In California in the 1980s, however, the JLCPCO relinquished exactly this kind of discretion to the California Department of Corrections; prior to the 1980s, legislators played a more direct role in overseeing prison design and prison building.

According to correctional bureaucrats who worked on prison construction in the 1980s, California Department of Corrections (CDC) managers were the first to propose some of these key procedural exemptions, which eventually imbued the CDC with broad discretion in prison design and building. Craig Brown, who had worked for California's Youth and Adult Correctional Agency (YACA),³⁶³ first as Deputy Secretary for Finance (1983-85) and then as Undersecretary (1987-mid-1990s), described the active role he played in obtaining these very exemptions from legislative oversight on behalf of CDC. During his first year working at YACA, Brown said he worked to get a legislative bill passed that would give his agency more control over prison building. According to Brown, up until 1983, the General Services Office in California had had the final say over prison building – the CDC was simply a customer of this building-and-budgeting branch of the executive arm. But, Brown worked to shift some of these same building-and-budgeting powers to the CDC, and its overseer, YACA, so that he could build prisons independently (and quickly), without going through General Services Office protocols and approval processes. Indeed, he was quite successful in this project.

When Senator Presley created the JLCPCO, he created a direct bridge between the legislature and the CDC, bypassing the usual intermediary, the Office of General Services.³⁶⁴ In bypassing this intermediary, the legislature exempted CDC from the state's standard construction budgeting process, the very budgeting process Craig Brown had been arguing against, because, he said, it created bureaucratic slow-downs. Of course, in the same year Presley created the JLCPCO, the legislature had already exempted the CDC from another aspect of the state budgeting process by seeking approval directly from the electorate for the first batch of general obligation bonds to fund prison construction. (Recall from the preceding section that these general obligation bonds exempted prison construction funding allocations from the state's budget balancing process.) Brown also took credit for orchestrating this budgeting exemption inherent in the general obligation bond measures. Brown explained that, not only did he negotiate the shift in building-and-budgeting powers from the General Services Office, but he negotiated the bond measures that funded prison building, so that "we got to do what we wanted" with the money.³⁶⁵ The JLCPCO, then, in collaboration with correctional administrators, provided a means of simplifying, or at least expediting, the prison construction process.

Gilmore argues that the JLCPCO nonetheless played a significant oversight role in the prison building process. By requiring public hearings for approval of prison construction projects, Gilmore explained, the JLCPCO also kept the CDC's prison-building projects in the public eye, providing the CDC with "a highly visible platform [from which] to promulgate dire

³⁶³ The Youth and Adult Correctional Agency (YACA) was the administrative agency, located within the executive offices of the governor, which oversaw the California Department of Corrections in the 1980s. According to Brown, YACA functioned as an intermediary between CDC and politicians in the executive branch. California's Department of Corrections has since been re-structured at least twice, and YACA no longer exists.

³⁶⁴ Gilmore, *supra* note 21: 94.

³⁶⁵ Brown interview *supra* note 226.

projections about an imminent prison overcrowding crisis.”³⁶⁶ Gilmore is certainly right that prison construction in California remained high profile news throughout the 1980s. Every two years between 1982 and 1986, the voters were asked to approve multi-million dollar general obligation bond measures intended to fund new prisons. And some of the proposed sites for new prisons inspired heated public debates; for instance, citizens in Los Angeles fought for years to prevent a prison from being sited within the city limits. In northern California, courts continued to hear cases challenging the conditions of confinement, especially at Folsom and San Quentin.³⁶⁷ Meanwhile the CDC and legislature both projected that prison populations would continue to grow, based on the sentencing changes implemented in the 1970s. Zimring and Hawkins convincingly argued that these projections were based on false premises and were greatly exaggerated, but they arguably did so too late and too quietly.³⁶⁸

Gilmore argues that the formation of the JLCPCO “kept the CDC’s ordinary and extraordinary activities under close scrutiny and direction by elected officials.”³⁶⁹ While the JLCPCO at least nominally oversaw prison construction in California, this section and the next will show that the oversight was just that: nominal. In particular, when the CDC implemented novel prison designs, like the Pelican Bay State Prison supermax, the legislature was hardly even aware of the innovative design, let alone engaged in scrutinizing it. As Craig Brown said about the state legislature’s role in construction projects: “You’re not going to find much in the record; it was all negotiated [off the record], and we [YACA] pretty much had our way with the legislature.”³⁷⁰ So while the legislature was holding hearings and making public attempts to address problems with overcrowding and violence in the California prisons, as discussed in the previous chapter,³⁷¹ the CDC was actually implementing policy innovations on their own terms, largely free from legislative oversight, and often in contradiction to legislative recommendations.

The initial structure of the JLCPCO, which allowed CDC to bypass the Office of General Services procedures for oversight of new state construction projects, was just the first of many steps the Committee took over the next decade to minimize the oversight to which the CDC construction projects were subject. In a 1986 report assessing the “New Prison Construction Project at Midstream,” the Legislative Analyst’s Office (LAO) enumerated the special exemptions that had been granted to the CDC by Presley’s Committee. Specifically, the LAO report notes that the legislature approved allocations of funding to the CDC based on “general specifications for each proposed prison.” These specifications included minimal information – general location, security level, and expected bed count. The legislature, then, had no influence over either the exact location of the prison, or the design of the facility. Both of these factors, the LAO Report noted, would have significant economic and long-term budgeting impacts, ranging from the allocation of land-use rights and the costs of varied prison staffing levels to the overall tone of correctional management policies. Not only did the legislature relinquish control over these substantial correctional policy decisions, but it also “provided the Department of Corrections with extraordinary delegations of authority and exemptions from existing law,” including exempting the CDC from requirements for environmental review by independent

³⁶⁶ Gilmore, *supra* note 21: 94-96; Marie Gottschalk, “The Long Reach of the Carceral State: The Politics of Crime, Mass Imprisonment, and Penal Reform in the United States and Abroad,” *Law & Social Inquiry*, Vol. 34.2 (Spr. 2009): 439-72, 453.

³⁶⁷ *Toussaint v. McCarthy*, 597 F.Supp. 1388 (N.D. Cal. 1984), *aff’d* 801 F.2d 1080 (9th Cir. 1986).

³⁶⁸ Zimring and Hawkins, *Prison Population and Criminal Justice*, *supra* note 324.

³⁶⁹ Gilmore, *supra* note 21: 94.

³⁷⁰ Brown interview, *supra* note 226.

³⁷¹ *Violence at Folsom*, *supra* note 233.

agencies, requirements for supervision by the Office of State Architect Design, and requirements for following a streamlined state process in selecting construction consultants.³⁷²

As the JLCPCO continued to “oversee” prison construction in the second half of the 1980s, it also continued to increase the procedural exemptions available to the CDC. For instance, in 1986, Presley sponsored Senate Bill 2098, which mainly dealt with funding renovations to San Quentin. But, this bill also included an additional provision to both prolong the existence and tweak the governing rules of the Joint Legislative Committee on Prison Construction and Operations. Along with a provision that extended the life of the Committee for another seven years, through 1993, the bill provided for a slight change to the prison construction plan approval process: adding a legislative review of suggested prison construction 30 days before any hearings would be held. The bill also provided for 45 days, instead of 30, for the Committee to review the plans post-hearing. However, approval was automatically assumed, if the Committee did not notify the correctional administrators of any objections, 45 days after the hearing.³⁷³ In other words, the simple bill, which renewed the JLCPCO’s existence for another seven years, also provided a mechanism for automatic legislative approval of construction plans. So the bill provided yet another means to streamline prison construction approval, by exempting the construction plans from normal procedures, like post-hearing legislative discussion and active, formal approval of state agency construction plans from a legislative oversight committee. Instead, Senate Bill 2098 instituted approval-by-default.

Craig Brown explained that he first began to design procedural exemptions, and advocate for the legislature to implement these exemptions, on behalf of the CDC in order to streamline and expedite the prison-building process. However, the broad range of procedural exemptions for the CDC, which the JLCPCO ultimately enacted, were not merely convenient. In a 2003 oral history interview, Presley explained that the exemptions were also principled. Presley argued first that he founded the Committee explicitly “to try to contain costs” of prison construction. And he argued that the Committee was successful in achieving this cost-containing goal: “And believe me, we saved the taxpayers millions of dollars. You couldn’t believe how we’d hold hearings and beat on these contractors and beat on these architects about how ‘You reduce costs.’ Otherwise it would have been an awful lot of money spent. So it did a lot of good.”³⁷⁴ Of course, the prisons constructed in California in the 1980s cost the taxpayers billions of dollars, despite any cost savings Presley and JLCPCO were able to beat out of contractors and architects. Moreover, the evidence presented in the preceding sections suggests that administrators and legislators alike often prioritized quick prison building over cost-effective prison building.

While Presley’s rhetoric about the “good” the JLCPCO did in reducing prison construction costs might be just rhetoric, the words Presley chose to describe the Committee’s oversight mandate are telling. Specifically, Presley said the legislature held hearings targeting “these contractors” and “these architects.” He did not mention correctional administrators as a target of legislative control and pressure. Indeed, later in the oral history interview, Presley expressed frustrations with subsequent chairs of the JLCPCO (who served in the 1990s) for targeting anyone *but* contractors and architects with legislative oversight. First, Presley said he “should have left off ‘operations’” from the Committee’s name, because “most of our time

³⁷² Keller, *supra* note 330: v, 10-13.

³⁷³ Senate Bill 2098 (Presley, California), California State Archives, Loc: LP220: 30-79; LP228:57-114; LP347:1-347– Robert Presley Papers – Bill File on SB-2098.

³⁷⁴ Ettinger, *supra* note 327: 65.

during that period was spent over-sighting construction because that was the big problem.”³⁷⁵ But, Presley argued, once the prison construction was largely done and he was no longer chair of the JLCPCO, Senator Boatwright took over leadership of the Committee, and “right away he starts beating on Corrections from the standpoint of Operations.” Presley explained that he was philosophically opposed to this kind of intervention:

*I was always a little bit reluctant to move into that too much because I felt we, over here in the Legislature, should not be trying to run Corrections. We're not qualified, and we don't have the information. We're not the authority. It's the Executive branch ... I certainly didn't feel that I should be trying to beat on some director of Corrections and tell him how to run his shop.*³⁷⁶

Presley's statement is remarkable in contrast to the lack of deference he displayed towards contractors and architects, who arguably deserve more deference as experts in building and construction than correctional officers. After all, contractors and architects are usually required to establish evidence of their expertise through relatively objective processes, such as state licensing exams and the negotiation of competitive, highly regulated government contracts. On the other hand, the correctional administrators charged with designing prisons in the 1980s brought a range of rich experiences working in these facilities to their design and management tasks, but little-to-no formal training in how to best design physical structures to achieve correctional management goals through structural design.

While perhaps remarkable, Presley's statement is nonetheless particularly representative of the relationship between legislators and correctional administrators throughout the 1980s prison construction era. Legislators nominally oversaw prison construction, occasionally holding hearings in which they engaged with contractors and architects over questions of cost-efficiency, or signed off on correctional administrators' building plans. But in terms of “operations,” and most other significant details of projects, legislators deferred to correctional expertise and correctional administrators' inherent executive power, lumping most significant decisions, like how many cells a prison would have, and what degree of isolation the prison would impose, into Presley's virtually untouchable “operations” category.

Perhaps Presley's separation of construction questions (susceptible to legislative oversight) from operations questions (immune to legislative oversight) represented a logical division of power. Legislative committees allocated funds to prison-building, and correctional experts spent these funds to build prisons that met correctional needs, or that allowed the California Department of Corrections to operate effectively. Similar legislative funding allocations to specialized agencies and professionals take place everyday – for instance, to state education systems that then build and run schools, or to state health care systems that then build and run hospitals. However, the design and implementation of punishment practices, unlike the design and implementation of schools and hospitals, has traditionally been a policy question addressed by state or federal legislators and overseen by state or federal courts. For instance, the conditions under which a state uses the death penalty, and how long a convicted criminal will spend in prison for any given crime are generally questions which legislators resolve in generalities and courts apply in specificities. But in the 1980s in California, the question of what shape punishment would take in the state – in terms of how prisons would be constructed and the conditions under which prisoners would be held – was left to the almost total discretion of the California Department of Corrections. In earlier centuries, as discussed in Chapter II, Section D.

³⁷⁵ *Id.* at 65.

³⁷⁶ *Id.*

A Brief Overview of American Uses of Solitary Confinement, both governors and legislators were more involved in prison design and operations. Recall the governor of New York who intervened at Auburn State Prison and ordered an end to the solitary confinement experiment, or the intellectuals in London, like Bentham, Tocqueville, and Howard, who wrote pamphlets and lobbied their governments for their preferred model of imprisonment.

D. From Planning and Operational Authority to Moral Authority

In their classic article about the “New Penology,” Feeley and Simon provided the first step towards an explanation of this power shift. They argue explicitly that the New Penology fills in the “gap” left between the “seemingly coherent command of legislatures and governors to ‘lock ‘em up’” and “existing resources allocations.” And they explain that, in order to fill in this gap, criminal justice systems shifted from a normative focus on reforming individuals to a managerial focus on “aggregate classification systems for purposes of surveillance, confinement and control.”³⁷⁷ In other words, correctional bureaucrats, left in charge of managing a growing prison population, consolidated bureaucratic control and focused increasingly on a rhetoric of risk-management.

But the California case study on prison building presented here suggests an important extension of the argument about the dominance of risk-management policies in Feeley and Simon’s New Penology. Bureaucrats and bureaucracies did not simply consolidate power and focus on risk-management. This consolidation and shift in focus also changed the character of the key decision-makers charged with designing punishment. By making punishment about risk-management, correctional bureaucrats shifted major punitive decisions from legislatures (who make normative punishment decisions, or should) to bureaucracies (who make practical implementation decisions, or “operations” decisions, as Senator Presley might have called them), thereby erasing the normative questions that should underlie punishment policies.

In the subsequent sections, which describe how correctional administrators went about designing and building Pelican Bay State Prison in Del Norte County, one thing is notably absent from the decision-making process correctional administrators describe: any concern with the ethical implications of building institutions explicitly structured to keep prisoners in solitary confinement, under conditions of extreme sensory deprivation, for indefinite periods of time. Correctional administrators in California successfully deployed the rhetoric of expertise in risk-management, talking about these principles so loudly that they drowned out any normative questions or challenges to the design principles shaping the prisons they were building.

In practice, however, the ever-growing discretion inherent in the CDC’s planning and operational authority gradually began to resemble moral authority. This discretion grew out of a number of power shifts, which were entrenched in California policy-making arenas by 1983. Specifically, the Determinate Sentencing Law had been in place for seven years, and subsequent changes in the way sentences were meted out at the county level led to an astronomical increase in the state’s prison population.³⁷⁸ The legislature had tweaked sentencing under the law, and DSL’s day-to-day implementation was firmly in the hands of state prosecutors, who chose the charges – and therefore, implicitly, the associated sentences – to levy against the accused. And

³⁷⁷ Feeley and Simon, “The New Penology,” *supra* note 196: 451-2.

³⁷⁸ *Prison Population and Criminal Justice*, *supra* note 324. Specifically, Zimring and Hawkins detail how specific sentencing provisions within the Determinate Sentencing Law shifted who was being sent to prison in California, increasing the number of drug offenders and nonviolent property offenders with prison sentences in California.

the CDC, stripped of its ability to release prisoners whenever approving correctional officers and the Board of Prison Terms deemed them ready, had already grown accustomed to developing its own coping mechanisms for controlling violence and overcrowding: using long-term lockdowns. Moreover, CDC found these mechanisms rather resistant to government intervention, whether from federal courts, which dictated conditions in lock-down units but did not prohibit their use, or from legislators, who suggested policy alternatives to lock-downs, but demonstrated no will to actually implement these alternatives. From the perspective of correctional administrators invested in perpetuating existing policies, Craig Brown's careful negotiations with the legislature for control, with as much flexibility and as little oversight as possible, over the prison building process in California, seems like a completely unsurprising, certainly necessary, and perhaps even natural, extension of the existing correctional practices and power balance in California state government in the early 1980s.

Once the California Legislature acknowledged the significant problems with prison violence and overcrowding in the state, and decided to build a few prisons, and build those prisons quickly, the CDC's growing power over this process was already deeply entrenched. Perhaps at this point, there was little hope of a change-of-course towards greater legislative intervention or oversight. Just as Pierson suggests, once one policy decision is made, it becomes easier to make the same decision again and again, rather than shifting gears towards an alternative policy.³⁷⁹

In some cases, policy analysts have suggested that legislators might want to distance themselves from potentially unpopular correctional management decisions. When the "right" thing to do is in direct contradiction with the politically feasible thing to do, shifting discretionary power to non-elected officials, like judges, or administrators, makes sense and might help to explain some of the deference California legislators showed to correctional administrators in California in the 1980s. For instance, in an editorial in the *Los Angeles Times*, Zimring suggested the helpful role a federal court can play, when legislators do not have the political will to remedy unconstitutional prison conditions: the federal court could order unpopular budget allocations, thereby solving expensive problems with unconstitutional healthcare provisions in California state prisons.³⁸⁰ The California Legislature's decisions, in the 1980s, to diffuse political responsibility through deference to correctional administration experts, in a politically charged arena like crime control, might make a similar kind of sense. The Legislature might have had a political motivation to let correctional experts make potentially politically-charged or contentious decisions. Indeed, the legislative record suggests that at least one aspect of the prison building process was politically contentious: where to site prisons. The legislature first attempted to dictate that all the new prisons would be built in Southern California, near Los Angeles, where the vast majority of the state's prisoners were from, in a thoughtful effort to keep prisoners better connected to the communities to which they would eventually return. But residents of these relatively wealthy urban and suburban areas fiercely resisted the idea of prison construction in their backyards.³⁸¹

Prison building itself was not an unpopular social solution from which the California Legislature had any need to distance itself, however. Indeed, the voters in California willingly approved, on three separate occasions, millions of dollars in prison-building bonds. Given the popularity of these measures, the legislature seemingly could have gained political power and

³⁷⁹ Pierson, *supra* note 296.

³⁸⁰ Franklin E. Zimring, "A Sick System," *Los Angeles Times*, Oct. 25, 2008: A-23.

³⁸¹ Gilmore, *supra* note 21: 105; Ettinger *supra* note 327: 73.

public accolades from more frequent interventions in correctional decisions, such as what kinds of prisons to build. But once the state was committed to a massive prison-construction plan, and courts and legislators had already deferred to correctional administrators in making decisions about how to manage correctional populations, there was little room left for the legislature to step in and re-gain control of the building process. The requisite power shifts from courts and legislators to correctional administrators had already become entrenched by the early 1980s. These power shifts were critical to the ultimate entrenchment of the supermax. The legislature hardly seemed to notice exactly what kind of prisons the Department of Corrections was building, and so legislators never even had a chance to take credit for the tough-on-crime innovation that the Department of Corrections orchestrated in the form of the Del Norte County supermax.

Governor Deukmejian, by contrast, vociferously took credit for the prison building projects he oversaw. At the dedication for Pelican Bay State Prison, he described the new institution as fitting into a broader scheme of tough-on-crime punishments in California. He defended costly and restrictive imprisonment wholesale, reminding his audience that: “While we were trying to ‘understand’ these criminals, California’s crime rate soared ... The number of major crimes quadrupled. By 1980, one in every 25 Californians was robbed or beaten, raped or murdered, their homes burglarized or their car stolen.” As the *Los Angeles Times* noted, in its 1990 story covering the dedication of the prison, Deukmejian had already seen the California prison population more than double (from 24,000 to 51,000), and he had already witnessed the building of ten new prisons. As part of his speech, Deukmejian encouraged the building of even more prisons; he suggested that Los Angeles residents should be more cooperative and welcoming towards prisons, in the way the residents of Del Norte County had been towards the plan to build Pelican Bay State Prison.³⁸² Even while he took credit for facilitating the building of prisons like Pelican Bay, Deukmejian said little about the specificities of the design of the institution. In this sense, he was aligned with the legislature, deferring to the planning and operational authority, cum moral authority, of the CDC.

In total, between 1984 and 1996, the Joint Legislative Committee on Prison Construction and Operations oversaw the building of 23 new state prisons. Though neither the legislature nor the governor commented specifically on the fact, one of the most interesting of California’s 23 new prisons, in terms of novel design, underlying decision-making processes, and system-wide implications for criminal justice in California was Pelican Bay State Prison, in Del Norte County.

E. A Limited Legislative History of Pelican Bay State Prison

One of the first mentions of any kind of a prison in Del Norte County appeared in Senate Bill 95, in July of 1985. State Senator Barry Keene proposed Senate Bill 95, which required that the California Department of Corrections explore the feasibility of building a prison in Del Norte County, hold public hearings, and submit a prison construction plan to the Joint Legislative Committee on Prison Construction. In fact, Senate Bill 95 authorized the building of a Del Norte County prison (subject only to legislative sign-off on the construction plan) even before the site had been officially approved and purchased. Only one other bill, Senate Bill 1222, which was passed just over one year later in August of 1986, dealt substantively with the authorization and construction of a prison in Del Norte County. Senator Keene also authored Senate Bill 1222. Both bills ultimately passed in the Senate and the Assembly by unanimous approval.

³⁸² Daniel M. Weintraub, “Deukmejian Defends Buildup of Prison System,” *Los Angeles Times*, Jun. 15, 1990: A-3.

A thorough review of state legislative archives in Sacramento, California produced very few additional details about the legislative discussion of the prison that was built in Del Norte County. The Del Norte County prison is not specifically mentioned in oral history interviews with either State Senator Barry Keene, who authored the two bills dealing with the prison, or State Senator Robert Presley, who chaired the JLPCO. In other words, the written record of exactly how California legislators conceptualized prison construction in the 1980s, and in particular how they conceptualized the construction of the prison in Del Norte County, is limited.

While in his state-archived oral history interview Senator Keene does not explicitly discuss the bills he sponsored to authorize the building of a prison in Del Norte County, he does discuss his political background in criminal justice issues and his opinions about various other legislative initiatives relating to 1980s criminal justice policies and prison-building in California. His perspectives on these issues at least suggest his motivations for sponsoring the Del Norte County prison bill and what issues (aside from high-security prison design) he thought were important to focus on within prison-building policies.

Senator Keene was a Democrat. He represented the Second Congressional District of California, which, in 1986, encompassed a northwestern band of counties in the state, including Del Norte County.³⁸³ Keene had served as a Deputy District Attorney in Santa Rosa, in Sonoma County before he ran for legislative office, winning an assembly seat on his second try in 1972. He quickly moved on to a state senator position. In 1986, when he sponsored the two legislative bills that mentioned the prison in Del Norte County, Keene had about seven years of experience as a state senator. (In total, he would serve for fourteen years as a state senator.) Keene's experience as a district attorney suggests that he was a law-and-order man, who supported criminal prosecutions. And his long tenure as senator suggests he was a respected and experienced legislator.

During his legislative tenure, Keene advocated for a number of substantial policy reforms – from environmental protection legislation, particularly in response to oil spills in the 1980s, to tort reform and medical malpractice, for which he authored the first comprehensive statute in California. In addition, he served in a number of leadership roles, including Chair of the Senate Judiciary Committee and Democratic Majority Leader of the Senate. Keene said he thought the Judiciary Committee probably had the largest workload of any in the state, with the possible exception of the Finance Committee. Consequently, as Chair of the Judiciary Committee, he was not able to develop “any major policy effort,” because “chairing the committee was a massive burden in and of itself.”³⁸⁴ In 1985, Keene also became the Democratic Majority Leader in the Senate; in this role, he said he sought to be “programmatically and require the members to participate in a leadership program.” Specifically, Keene described treating his adversaries well, “creating an esprit de corps,” and proposing policy initiatives for systemic legislative reform, like public campaign financing, removing re-districting discretion from the legislator's hands, and eliminating the two-thirds vote requirement for approving state budgets.³⁸⁵ (Incidentally, these are key legislative reform policy questions that are still being debated in California today.

³⁸³ Carol Hicke, *Oral History Interview with Barry Keene, July 7 - Sept. 16, 1994* (Sacramento: California State University, California State Archives, State Government Oral History Program): 148, available online at: <http://www.archive.org/details/barrykeeneoral00keenrich> (last accessed 29 Oct. 2010). Today, the Second Senate District stops at the northern border of Humboldt County, and Del Norte County is part of the Fourth Senate District. California State Senate, “Senate Districts,” available online at: <http://senate.ca.gov/senatedistricts> (last accessed 27 Apr. 2012).

³⁸⁴ Hicke, *supra* note 383: 215.

³⁸⁵ *Id.* at 229-30, 233.

The November 2010 list of ballot propositions in the state included questions about both the two-thirds vote requirement for passing a budget and about the structure of an extra-legislative commission that might determine re-districting boundaries.) Keene's many roles, as chair of a number of significant state senate committees in the 1980s, suggest that he was extremely busy with administrative tasks and leadership roles during these years.

Although prison building was not among the major policy initiatives Keene took credit for in his oral history interview, he nonetheless expressed opinions about the massive state prison system that was financed in the 1980s. In fact, Keene expressed frustration with the scale of investment that state legislators and governors allocated to prison building in the 1980s, while neglecting other pressing social needs, or failing to move on legislative initiatives like Keene's own attempts to reform campaign finance and to make balancing the state budget easier. For instance, Keene said that during the 1980s: "California [wa]s stuck in neutral for eight years with almost nothing happening, except the construction of prisons." Keene was critical not just of the legislature, but of the governor, as well: "Deukmejian began using his veto to prevent anything from happening, took no initiatives other than prison construction, which really came a little later." Towards the end of the interview, Keene sounded regretful about the extent to which the legislature had invested in prisons in California: "The prison systems are working in some states much better than they're working in California at lower cost ... We're about to see a full employment act for prison guards, at the expense of higher education and welfare." Throughout the interview, in fact, Keene was critical of the state correctional officers and their union: "So the prison guards – they don't like to be called prison guards – the correctional officers are going to be protected like the teachers are by Prop. 98. They'll have their Prop whatever it is, 'three strikes and you're out' [referencing Proposition 184, passed in November of 1994]."³⁸⁶

Keene was critical not just of the growing political power of the correctional officers within the state, which he identified as a product of the legislature's massive investments in prisons; he was also critical of the incoherence of policies that spent more money on punishing crime than preventing crime. In discussing budget allocations, and the 1994 passage of California's Three Strikes Law, the interviewer said: "I noticed in this crime bill that in order to get it passed, one of the things they did was take out money for what I would consider crime prevention, and put it into prisons. Isn't that about what happened?" Keene agreed emphatically, presenting a pointed analogy to work he had done to require gun registration: "Yes. There's a certain irony, though, in all of that stuff – people fighting for guns at the same time that they're trying to reduce crime in the streets. Somebody from Mars will come here and look at this society, and the decline and fall, and they'll be amazed that something like that can happen."³⁸⁷ At least with the wisdom of hindsight, Keene seemed to think prison spending had become excessive in California by the late 1990s. He did not, however, reference his own role in facilitating the building of at least one of California's 23 new prisons.

At the time he proposed Senate Bill 95, authorizing a prison in Del Norte County, Keene was both Chair of the Senate Judiciary Committee and Majority Leader of the Senate. He would not have been likely to be able to give much attention or scrutiny to two bills that were simply rubber-stamping a by-then well-established process by which California Department of Corrections administrators sought nominal legislative sign-offs on their prison building plans. In all likelihood, Keene sponsored the bills for simple geographic reasons; he represented the district in which the prison would be built. Perhaps it is not surprising, then, that in the 280-plus

³⁸⁶ *Id.* at 215, 217, 274, 199-200.

³⁸⁷ *Id.* at 200.

page transcript of an oral history interview conducted with him over the course of five days, Keene does not once mention his work in sponsoring the bill that created Pelican Bay State Prison. In fact, as described in the previous section on the role of the Joint Legislative Committee on Prison Construction and Operations, the legislature's role in authorizing and overseeing prison construction was rather minimal. In some cases, construction plans would be authorized by default, if the legislature did not explicitly state any concerns within 45 days of the legislative hearing on the plan.

So Senate Bill 95 is quite representative of the kind of discretion the JLCPCO, on behalf of the California legislature, regularly allocated to the California Department of Corrections. Senate Bill 95 authorized CDC to do everything from purchasing the proposed Del Norte County land to assessing the environmental impacts of any proposed facilities, designing floor plans, and hiring construction agencies to erect the buildings. Not only is the bill representative of the breadth of discretion state legislators allocated to the California Department of Corrections, but it also is representative of the speed with which California officials were funding and building prisons in the 1980s.

For instance, in a Senate bill considered in September of 1985, the twelfth of thirteen prison-construction provisions exempted the "proposed prisons in Riverside and Del Norte Counties from the California Environmental Quality Act." The bill provided instead for an alternative environmental assessment study, conducted by the CDC and approved by a local public works board, prior to actual purchase of the land on which the prisons would be cited.³⁸⁸ So the legislature was concerned with assessing environmental impacts, but assessing them quickly, through expedited administrative procedures within the discretion of the CDC, so that prison construction would not be delayed.

Within one year, even before the environmental impacts of a Del Norte County prison were fully assessed, the legislature would allocate millions of dollars for purchase of the land and design of the institution. In August of 1986, the California Legislature passed Senate Bill 1222 authorizing the construction of the two-thousand bed "maximum security complex in Del Norte County," to be funded with up to \$325 million in lease-purchase revenue bonds.³⁸⁹ The bill also appropriated \$27 million from prison bond measures for the initial Del Norte County site studies, site purchase, planning, and construction of the facility. According to this bill, "up to half of the facility" *could* be used "for special cases."³⁹⁰ At this point in the process, California legislators still seemed strikingly unconcerned with the details of the design of the Del Norte County prison; the only specification in the bill that funded the prison was that the prison could hold "special cases." But these special cases were not defined, and there was no reference to the particular institutional design that would be used to manage them.

Assembly Comments about an earlier draft of the bill criticize this phrase "special cases" as "a term undefined" and query whether the term refers to "lock-ups," or to something else. These same Assembly Comments also criticize both the expedited process and the broad

³⁸⁸ Senate Bill 253 (Presley, California). Read Sept. 13, 1985 (microfilm text).

³⁸⁹ As discussed in the section on government-issued bonds, lease-purchase contract requires the state to pay a third party, who acquires a property outright, in installments, with interest, so that the state gradually acquiring rights to the property over time. In this case, the state's payments to the third-party purchaser would be funded through the sale of public bonds. James P. Monacell, *Bond Practice: Overview of Lease Purchase Financing and COPs*, Smith, Gambrell & Russell Briefing, Jun. 6, 2007, available online at: http://www.sgrlaw.com/resources/briefings/bond_practice/457/ (last accessed 20 Oct. 2010).

³⁹⁰ Senate Bill 1222 (Keene, California), 1986 Leg., Gen. Sess. (Ca. 1986) (enacted). Assembly Comments to the Third Reading Comments, Jun. 30, 1986. Enacted Aug. 13, 1986.

discretion granted to CDC in planning the Del Norte County prison. Specifically, the comments question the exemption of the Del Norte County site from the independent environmental review process: “Given that a prison is a major public institution with an expected life span of a century, should there be some independent review of its planning?” The comments reference both the absence of management details in the legislation – “the bill contains no per-cell cost ceilings or staff ratio targets,” which would help to manage construction and operation costs – as well as the absence of adequate details provided by the CDC – “the CDC has not settled upon a site,” nor “completed the feasibility study required by last year’s legislation.”³⁹¹ Despite these notably ambiguous phrases, missing details, and unsatisfied reporting requirements, the Senate Bill passed, allocating \$352 million dollars to the Del Norte prison project.

The Assembly Comments are notable not just for what they criticized, but also for what they did not criticize. The comments focused on the process by which the CDC was designing and seeking approval of the Del Norte County facility plans, rather than focusing on the design itself. The comments contain only one reference to the mission of the proposed institution, and this reference only hints at the proposed design, without referencing it directly. The eighth comment asks: “Why only maximum security?” Under the heading of this question, the comments reference conditions at San Quentin and Folsom as evidence that concentrating high-security prisoners in one institution creates management problems. The comments further suggest two possible resolutions to the management problem of concentrated, high-security prisons: either lower-security facilities should be strategically located near higher-security facilities, so that prisoners can be quickly and easily moved around between security levels; or multi-level security facilities should be built, so that prisoners can “work their way through lower custody levels,” without incurring high transportation costs between facilities.³⁹² This well-reasoned criticism of the proposed mission of the Del Norte County institution – designed to be solely a high security prison, in a remote location that would make transfers to lower security institutions time-consuming and expensive – apparently lacked any actual reformatory will. In fact, this criticism, recorded in the Assembly Comments but not acted on, echoes many of the criticisms and alternative policy proposals recorded in legislative hearings held and reports produced in the first half of the 1980s, as detailed in Chapter IV.

Ironically, throughout his oral history interview, Senator Keene, who sponsored Senate Bill 1222, describes his frustration with the Assembly “killing” a number of the key policy reform initiatives, which would have allowed for re-structuring of the legislature.³⁹³ Perhaps in this case, too, Senator Keene found the state assembly members’ critical comments annoying and simply ignored them in substance. Senate Bill 1222 ultimately passed with no major revisions to the vague language, the expedited and discretionary approval process, or the proposed institutional mission of the Del Norte County facility, suggesting that these Assembly Comments had little influence on the shape of the facility.

F. The Dungeness Dungeon

While there was little interest among legislators about what the Del Norte institution would look like, there was plenty of interest in what it would be called. The concern with what to name the institution was itself unusual; most of the 23 prisons authorized by the state legislature

³⁹¹ Assembly Comments to the Third Reading of Senate Bill 1222, Jun. 30, 1986: 2-5.

³⁹² *Id.* at 4.

³⁹³ Hicke *supra* note 383: 273.

and constructed by the California Department of Corrections in the 1980s and 1990s have very functional names, indicating the county or town in which they are located, or the mission of the institution. For instance, the facility designed to treat serious medical issues was designated California Medical Facility, and the facility opened next to Folsom Prison was first called New Folsom and was eventually re-named California State Prison – Sacramento, referring to the nearest town of any size. But in the case of the Del Norte prison, the legislature took two years and multiple bills to settle on a name for the new, remote institution, nestled between the redwoods and the ocean in the fifty-seventh poorest county (of fifty-eight total counties) in the state of California.³⁹⁴

Senate Bill 1222 designated an initial name for the Del Norte County facility: “Prison of the Redwoods.” Two years later, another bill was passed re-designating the institution “Pelican Bay State Prison.”³⁹⁵ The Conference Committee notes on Senate Bill 1685, which approved the name change for the Del Norte County facility, refer to an apparently flippant discussion about the various possible names for the place. Suggested names, as recorded in the committee notes, include: “Slammer by the Sea,” “Dungeness Dungeon,” and “Casa No Pasa.” The Committee notes assert that the latter two names, Dungeness Dungeon and Casa No Pasa, “have no official dignity,” but record that legislators reserved the right to refer to the institution as the “Slammer by the Sea.” (There is no reference in the legislative record associated with this bill as to who proposed the name Pelican Bay or to the fact that it echoes the name of Alcatraz, which translates roughly as Island of the Pelicans.) The record of the extreme name proposals, and a reference to a “name that prison contest” discussion, suggest that legislators were aware that this Del Norte prison would be somehow different or special. Furthermore, references to dungeons and houses that no one could leave suggest that legislators were aware that the conditions in this prison would maintain prisoners in extremely high, perhaps even unprecedentedly high, security conditions. But the references are oblique at best, and there is no record of any actual legislative engagement with the specificities of institutional design.

The legislative history thus tells little about who decided to build Pelican Bay and how they reached the decision; in fact, there is virtually no written record of this decision. The legislative record does not even reveal whether the legislature knew what kind of institution would be built in Del Norte County, let alone how novel the institution would be in the extremity of the isolation it would impose.

Carl Larson, who served as Director of Finance for the Department of Corrections in the 1980s, and who ultimately decided on the Pelican Bay design, explained that he was careful to make sure the key players in the legislative and executive branches of government agreed with his design decision, before the legislature even learned of any design details. Larson remembered: “I took Don Novey and some of the union leaders down there [to the Arizona supermax on which Pelican Bay was modeled] to look at it, got their buy off.” Then, Larson charged Craig Brown, who was the Undersecretary of the Youth and Adult Correctional Agency at the time, with obtaining the “buy off” from Senator Presley and Governor Deukmejian. Larson recalled that the legislature struggled only briefly with the idea that the Pelican Bay design was single-purpose: the prison could never be anything but a supermax, keeping people in total isolation without access to any form of programming, like education or group drug treatment.³⁹⁶

³⁹⁴ In 1986, the county had a 25 percent unemployment rate, and the median income was 57 out of 58, in rank order of the state’s counties. Assembly Comments to Senate Bill 1222, Jun. 30, 1986.

³⁹⁵ Senate Bill 1685 (Keene, California), read Jun. 20 1988 (microfilm text).

³⁹⁶ Larson interview, *supra* note 8.

In the end, Larson said, he simply defended the Pelican Bay supermax to legislators in these terms: “It’s not Draconian, it’s Spartan.”³⁹⁷

In fact, Rich Kirkland, who was in charge of the Pelican Bay construction project and who presented the final Pelican Bay design plans to the legislators for their sign-off, said the legislative concerns with the design were secondary to other political concerns. Kirkland remembered that when he presented the final Pelican Bay construction plan to the Joint Legislative Committee on Prison Construction and Operations, the Committee was much more concerned with the environmental impact of the prison – “Where would the sewage go? How many trees would be cut down?” – than they were with the actual details of the design of the institution.³⁹⁸

Perhaps because the legislature was so un-concerned with these details, Pelican Bay arose out of the redwoods in Northern California, unnoticed, for at least a few years. Steve Fama, the lawyer who would litigate *Madrid v. Gomez*, which challenged the constitutionality of the very existence of such an institution, said he couldn’t remember when he first heard about Pelican Bay, but it wasn’t until after it was built, and prisoners were already living there. He said at first, Pelican Bay just seemed like another of the Department’s new prisons: “It wasn’t all that unusual or extraordinary – another prison.” Fama said he thought he probably first became aware of the extremity of the conditions at Pelican Bay when he was asked to visit the institution in 1992, three years after it opened, as part of a monitoring team appointed by San Francisco area federal district court judges, who were concerned about the conditions there.³⁹⁹ The judges had noticed a number of strikingly similar *pro se* legal petitions filed by Pelican Bay prisoners, in the two years since the institution had opened, alleging floridly unconstitutional conditions at the institution. What Fama found when he toured the prison, and what was later recorded in the trial conducted by Judge Thelton Henderson to assess allegations of excessive uses of force and unconstitutional conditions in the Pelican Bay supermax, were prisoners who were beaten up to the point of being hospitalized in response to minor infractions, prisoners who were held naked outside in cages in the winter for hours at a time, and prisoners who died of treatable illnesses because they had severely limited access to either medical or mental health care.⁴⁰⁰

These egregious constitutional violations of the Eighth Amendment right to be free from cruel and unusual punishment surprised both Fama and the *Madrid* court. The fact that the violations were undiscovered for a few years suggests again, just how little oversight Californians – especially legislators, but also the general voting public – exercised over the design and implementation of the supermax project at Pelican Bay State Prison. Not only was there little oversight, but the unusual conditions at the prison went unnoticed, at least at first, by either legal advocates or prisoners’ rights-minded judges in California.

G. Implications

The research presented in this chapter has a number of important implications for our understanding of the incarceration boom and the nature of tough-on-crime policies in the United States. First, politics – whether in the form of an electorate supporting tough-on-crime ballot

³⁹⁷ Carl Larson (former Director of Finance, California Department of Corrections), second interview with author, Sacramento, CA, Apr. 14, 2010, notes on file with author.

³⁹⁸ Kirkland interview, *supra* note 95.

³⁹⁹ Fama interview, *supra* note 270.

⁴⁰⁰ *Madrid v. Gomez*, 889 F. Supp. 1146, 1162, 1171 (N.D. Cal. 1995).

propositions, or in the form of politicians establishing their own legitimacy through expanding the number of felonies on the books and the lengths of prison sentences associated with these felonies, are not solely responsible for some of the more extreme and literally tough-on-criminals policies within U.S. prisons. Indeed, scholars have noted that in the 1960s and 1970s, correctional experts and bureaucrats were playing important roles in the development of criminal justice policy in the United States.⁴⁰¹ In California in particular, laws like the Determinate Sentencing Law, passed in 1976, were explicitly designed to remove this discretionary power from correctional bureaucrats.⁴⁰² However, the continued importance of these very correctional bureaucrats has been overlooked. Correctional bureaucrats like Brown and Larson and Kirkland were critical in the process of developing the supermax – not just in shaping “system performance and rationality,”⁴⁰³ but also in determining the outer extremes of constitutionally acceptable conditions of punishment, through the design and implementation of long-term solitary confinement facilities.

Second, the research seeks to place these correctional bureaucrats in closer dialogue with the public. (Simon and Feeley note in a recent reflection of the developing concept of the new penology that criminal justice professionals regularly “fail to engage the public.”⁴⁰⁴) In so doing, this research reveals more precisely how and when the interests of criminal justice professionals diverged from those of the public. The divergence is not just between correctional experts, who prioritize efficient management of security concerns over public priorities to reduce and control crime. Rather, correctional experts, at least in California, were intimately engaged with shaping the terms of punishment in California, choosing to place prisoners in conditions condemned by some experts as cruel, in violation of the U.S. Constitution, and as torture, in violation of international legal treaties.⁴⁰⁵ In designing and implementing prison conditions at this boundary line between constitutional and unconstitutional punishment, California correctional administrators overstepped the bounds of planning authority, and entered the realm of moral authority, making decisions about punishment, which the constitution generally leaves to policy makers, with oversight from the judiciary.

Of course, the research also leaves a number of questions unanswered. Did other states follow California’s model in allocating moral authority to correctional administrators, who then designed unprecedentedly harsh prisons? Lynch’s research suggests that Arizona certainly followed this model,⁴⁰⁶ but what about the states that built supermaxes subsequent to Arizona and California? Are there tough-on-crime policies, other than supermaximum custody prisons, that were actually designed and implemented by correctional bureaucrats rather than by elected officials, or through public ballot proposition? Research addressing these questions poses a particular challenge because, where decisions are made in the bureaucratic sphere, there may be

⁴⁰¹ Sheldon L. Messinger, “Introduction,” *The Art of Corrections Management, California 1967-1974*, Government History Documentation Project, Ronald Reagan Gubernatorial Era (Berkeley, CA: Regional Oral History Office, 1984): ix; Garland, *Culture of Control*, *supra* note 185: 35-37.

⁴⁰² Sheldon L. Messinger and Philip E. Johnson, “California’s Determinate Sentencing Statute: History and Issues,” *The Criminal Justice System: Materials on the Administrations and Reform of the Criminal Law*, Franklin E. Zimring and Richard S. Frase, eds. (Boston: Little, Brown and Company, 1987): 950-87.

⁴⁰³ Jonathan Simon and Malcolm M. Feeley, “The Form and Limits of the New Penology,” In *Punishment and Social Control*, Thomas G. Blomberg and Stanley Cohen, eds. (New York: Aldine D. Gruyter, 2003): 107.

⁴⁰⁴ *Id.*

⁴⁰⁵ Craig Haney, “A Culture of Harm: Taming the Dynamics of Cruelty in Supermax Prisons,” *Criminal Justice Behavior*, Vol. 35.8 (2008): 956-84; Jules Lobel, “Prolonged Solitary Confinement and the Constitution,” *Journal of Constitutional Law*, Vol. 11 (2008): 115-138.

⁴⁰⁶ Lynch, *Sunbelt Justice*, *supra* note 33.

no written record of the decisions. Any research agenda must thus identify the key decision makers who made the critical policy design decisions, and then obtain access to them. Where this is possible, it appears the results have the potential, as with the supermax example, to truly alter our assumptions about how crime policies get made and replicated.

VI. Administrating the California Supermax, Part I Location, Scale, and Construction

Surprisingly, the supermax idea was first formulated in California in the early 1980s, at a time when legislators appeared to be taking discretion out of prison administrators' hands, by eliminating the indeterminate prison sentence, and when federal courts also appeared to be intervening in day-to-day prison administration, by dictating specific conditions of confinement and details of prison programming. However, when it came to prison building in California, the state legislature ceded vast swaths of authority to Department of Corrections officials, allocating money raised from bond measures and from the general fund directly to the California Department of Corrections, and rubber-stamping the design decisions correctional administrators proposed, with little legislative oversight. Ultimately, correctional bureaucrats made the supermax design decisions in California, concentrating their power in hyper-automated control of buildings and people and in internal prison classification procedures. This chapter focuses on the justifications for and mechanisms of these decisions – how did correctional administrators decide to design a supermax, and what made it, uniquely, a supermax?

This chapter first identifies the problems correctional administrators hoped to address in designing and building high-security prisons in the 1980s. The chapter then reviews how correctional administrators decided to scale the state's supermaxes – how many solitary confinement cells did they think California needed and why? Next the chapter documents the relationship between California's Security Housing Unit at Pelican Bay State Prison, in Crescent City, California, and its predecessor, the Security Management Unit in Florence, Arizona. The subsequent two sections detail the specific design decisions correctional administrators and architects made in creating the maximally restrictive and totally isolating institution at Pelican Bay. The final section considers, briefly, whether these supermax designers had any discomforts with the institution they designed in the 1980s, as they discussed and analyzed these institutions twenty years later, in 2010.

This chapter draws on archival records from the California state legislature and government, as well as on oral history interviews with correctional administrators, government bureaucrats, and architects, who collaborated together to design California's supermax, Pelican Bay State Prison, as well as Arizona's supermax, the Security Management Unit. In sum, this chapter provides a precise description of the unique design features that made Pelican Bay State Prison a prototypical supermax, as well as an analysis of how and why these design features were implemented. In essence it constitutes a "strategic narrative," analyzing every step of the supermax innovation, from problem, to proposed solution, to translation of this solution into practice.⁴⁰⁷

The focus of this chapter is Pelican Bay, because it was conceived and designed, from the get-go, as California's ultimate, highest security, "gold star SHU [Security Housing Unit]" prison.⁴⁰⁸ Although Corcoran State Prison, California's other major supermax, or SHU, opened one-year before Pelican Bay, it was actually modeled after the already-drawn-up plans for Pelican Bay. In fact, Corcoran was the first in a series of institutions that would be opened in California, replicating as closely as possible the conditions at Pelican Bay, and housing an ever-growing number of prisoners in extreme isolation. This chapter, then, also touches on the process

⁴⁰⁷ Schoenfeld, *supra* note 219 (citing Robin Stryker, "Beyond History vs. Theory: Strategic Narrative and Sociological Explanation," *Sociological Methods and Research* 24 (1996): 304-52).

⁴⁰⁸ Brown interview, *supra* note 226.

by which the supermax idea was replicated and expanded within California throughout the 1990s.

A. Carl Larson, Administrator

Carl Larson started his fifty-odd-year career in the California Department of Corrections as a prison guard at San Quentin State Prison in July of 1960, straight out of high school. In his early years at San Quentin, he worked on death row, and he also enrolled in a bachelor's program at San Francisco State University. Within a few years, he was promoted, within the CDC, to Sergeant and transferred to the Southern California Correctional Center in Chino, California. There, he continued to work as a prison guard, but he also managed individual prisoners' cases and supervised two case managers, or social workers. As part of his work, he managed prisoners working in the institution's print shop; he worked with them to design on-the-job training modules for prison staff and prisoners alike. Meanwhile, he completed his bachelor's work at California State Los Angeles, earning a B.A. in police administration in 1971. In the same year he completed his B.A., he remembered, violence in the Department of Corrections peaked; eleven prison guards died that year, according to Larson. In the early 1980s, Larson returned to San Quentin, this time as Chief Deputy Warden.

In 1981, Ruth Rushen, the new (and first woman) director of the entire state department of corrections tapped him to come work at corrections headquarters in Sacramento. Larson did not think of himself as a management person; he said: "I firmly believed that anybody that worked in headquarters was too stupid to run a prison." But Larson saw that the Department of Corrections was struggling, and he thought he saw a chance to design and implement better policies. At first, at "headquarters," Larson worked on setting up systems of legal incentives and good-time credits to counteract the perceived detrimental impacts (e.g., overcrowding) of California's Determinate Sentencing Law, and he started to develop new prison construction guidelines.

He was quickly promoted to Director of Finance, where he took charge of designing and overseeing the new prison construction projects. In 1986, in this role, he toured the United States, visiting more than fourteen state correctional departments, looking for the newest, most efficient prison designs coming on line. The most memorable prison Larson visited was in Arizona; the novel prison design Larson saw in Florence, Arizona would change the shape of corrections policy in California, and across the United States, in the decades to come.⁴⁰⁹ That prison, and Larson's efforts to replicate it in California constitute the central subject of this chapter.

But Larson's career serves as an important backdrop to the story of the first supermaxes. Larson's career echoes many important themes in the history of late twentieth century prisons in California, and throughout the Sunbelt. Larson started out working for a correctional department known as a leader in prison rehabilitation initiatives, at an institution known for being a rehabilitative innovator within that department.⁴¹⁰ So Larson didn't just guard prisoners; he also counseled them, supervised their job training, and collaborated with them to run better prisons. By the 1970s, however, Larson believed he was working in a department of corrections that was spiraling out of control; his fellow officers were being killed, by prisoners, at an unprecedentedly

⁴⁰⁹ Larson interview, *supra* note 8.

⁴¹⁰ California's prison system pioneered rehabilitative ideals, rooted in a Western ideology of individualism, that sought to "expand ... individual potential." Bookspan, *supra* note 31: xix.

high rate. To Larson, the violence often seemed racially motivated, bleeding into the prisons from the civil rights movement taking place on the streets.⁴¹¹ And changes in sentencing policies in California, which shifted the balance of sentencing power from parole boards to prosecutors, further aggravated the loss of control Larson described experiencing first-hand.⁴¹² When he was tapped to oversee a massive prison building initiative, then, he had a good sense of what he thought the California prison system needed, and he set about creating what he thought would be a stronger, safer, more efficient system. The arc of Larson's career, then, is not only representative of a particular era in California prison history, especially as detailed in Chapter IV. It is also representative of an often-overlooked mechanism of prison reform: correctional bureaucrats played a critical role in shaping the punishment innovations within the prison building boom of the 1980s, especially in the Sunbelt, where many of these innovations were initiated.

*B. Justifying the California Supermax: "We got a problem; what the hell can we do?"*⁴¹³

As Larson suggested and Chapter IV detailed, in the mid-1980s, California prisons were reeling from high rates of violence experienced in the 1970s, facing a new and challenging determinate sentencing scheme, and also negotiating with increased federal and state court interventions in the day-to-day operations of prisons. Recall that Chapter IV also identified a number of California legislators' proposed solutions – from instituting inmate advisory councils and reducing sentences and security levels of prisoners to funding research institutes to design even better solutions – to address problems with overcrowding and unconstitutional conditions in the California Department of Corrections (CDC). However, correctional administrators had different ideas. As Chapter V detailed, by 1984, correctional administrators had taken over the biggest prison-building project in the state's (and the nation's) history, and they were in charge of choosing prison designs, managing prison construction, and developing statewide prison management protocols. As one 1986 legislative report noted, while the California Legislature authorized prison building and allocated funds, the elected officials left the actual plans for siting and construction to the Department of Corrections, in an "extraordinary delegation of authority."⁴¹⁴

In practice, correctional administrators were extremely careful with this extraordinary authority. Correctional administrators described how they identified correctional needs, researched their prison design choices, and articulated principles to justify their overall construction plan. Specifically, correctional administrators from a variety of management positions agreed about the necessity of the supermax at Pelican Bay, justifying the institution on two grounds in particular. First, they argued that the Pelican Bay supermax was an important part of a state-of-the-art prison system, which required a fixed number of extremely high-security, isolation beds. Second, they argued that the only way to make prisons safe for the vast majority of prisoners, who only want to do their time and be left alone, is to isolate those few violent prisoners who will disrupt the otherwise safe institutional functioning. These are valid

⁴¹¹ See *supra* Chapter IV, Section B. Racial Tensions, Violent Outbreaks, and Political Turning Points, 1970-1980, for a more thorough discussion of the development of race relations in the California prisons in the 1970s.

⁴¹² See *supra* Chapter IV, Section C. Legislative Assertions of Power and the Determinate Sentencing Act of 1976, a more thorough discussion of the shift from indeterminate to determinate sentencing in California and the impacts of this shift.

⁴¹³ Brown interview, *supra* note 226.

⁴¹⁴ Keller, *supra* note 330: v, 10.

correctional goals, fulfilling the mission of the department of corrections to “enhance public safety through safe and secure incarceration of offenders.”⁴¹⁵ However, these administrative goals completely overshadowed the goals of courts, to have prisoners housed in conditions that meet or exceed minimum constitutional standards, for instance, as well as the goals of legislators, to find alternatives to incarceration and to prepare prisoners for re-integration into their communities upon release from prison, for instance.

Correctional administrators focused instead on pressing correctional needs – to house more prisoners and control violence within the prisons – first and foremost. Correctional administrators generally justified the need for Pelican Bay first in the context of a systematic prison-building project. They conceptualized of the prison construction project not just one prison at a time, but as an entire statewide prison system of multiple, interlocking parts. According to Larson, the supermax at Pelican Bay was part of a holistic vision of prison building: “We hired a firm out of Atlanta, Georgia: Paul Rosser. [Rosser] said, ‘Based on the fact that you guys are going to build a lot of prisons ... you’re going to need to think about building a system, and what kind of units the system should have.’”⁴¹⁶ Within this system of new prisons that correctional administrators were designing, administrators said they knew they needed a certain number of high security beds.

Craig Brown, who was Undersecretary of Corrections in California in the 1980s, explained: “At the heart of corrections is a good classification system.” According to Brown, California’s 1980s classification system was well-respected and time-tested. And this state-of-the-art classification system indicated that a certain percentage of the prisoners in the department of corrections were inevitably going to be extremely violent. Where this is the case, Brown said, “You need a SHU [Secure Housing Unit].” Brown summed up the necessity of the SHU, explaining that the Department of Corrections often operated by simply responding to basic needs as functionally as possible: “We got a problem – what the hell can we do?”⁴¹⁷

In developing a holistic prison-building plan, and one that would respond to the violence problem, Larson described looking to standards of professional correctional organizations, including the National Institute of Justice and the American Correctional Association. But, he explained, this was early enough in the national prison-building boom that no standards yet existed governing extremely high security prisons. So Larson worked to design his own standards. Based on classification and security in California prisons in the mid-1980s and projections of future high security needs, Larson calculated that the CDC needed more high security institutions: “When we looked at the system, the formula we figured we needed was [for] two percent SHU inmates.”⁴¹⁸ In other words, Larson made a holistic estimation of how many long-term segregation cells would be needed relative to the overall and projected prison population in the state, and he chose to build one prison to serve this purpose within the entire state system. He simply took for granted that his two-percent formula for the need for long-term segregation probably represented a relatively inevitable (and necessary) state of affairs.

Correctional administrators articulated not just their vision for an integrated, state-wide prison system, but their particular justification for the most secure part of this system: the supermax in Del Norte County. Specifically, correctional administrators described the Pelican

⁴¹⁵ California Department of Corrections and Rehabilitation, “Mission Values,” available online at: www.cdcr.ca.gov/About_CDRCR/docs/mission.pdf - 2010-05-16 (last accessed 26 Oct. 2010).

⁴¹⁶ Larson interview, *supra* note 8.

⁴¹⁷ Brown interview, *supra* note 226.

⁴¹⁸ Larson interview, *supra* note 8.

Bay supermax as a necessary response to escalating violence within the California Department of Corrections. As Brown said: “We had to deal with violence – how do you deal with violence?” Brown described the idea of SHU as intuitive: “the theory was, take the leaders” and isolate them.⁴¹⁹

Like Brown, Larson explained that the problems the SHU was designed to address centered around violence. Before Larson would consent to an interview, he required a brief book report on *The Black Hand*, a gruesome account of the kinds of violence the Mexican Mafia has committed in, but mostly out of, prisons in California.⁴²⁰ Larson was invested in conveying the intractable problems with violence facing the CDC in the 1980s (and continuing into the present day), as well as in connecting these problems to his justification for building the Pelican Bay supermax. Larson said that there was no question, when he was thinking about what kind of prisons to build in the 1980s, that: “We needed a SHU [Secure Housing Unit] ... we were having a hell of a time ... we had eleven staff members murdered in 1971.”⁴²¹ Pelican Bay, though, was designed around 1987, nearly 16 years after those deaths.

Other administrators similarly referred to violence, especially in the 1970s, as an explanation for the necessity of building the Pelican Bay supermax. For instance, Steve Cambra, who was an associate warden at San Quentin during the 1970s, years of peak violence there, and who later became the second warden of Pelican Bay, explained his perspective on the motivation behind supermaxes: uncontrolled violence. Cambra said Ruth Rushen, who stepped into the position of Director of the California Department of Corrections (a gubernatorial appointment) in the 1970s, was facing “high violence and a rising prison population.” Cambra described what Rushen, as Director of Corrections, must have been thinking: “I don’t owe these guys perpetrating that violence nothing ... I owe the other prisoners something.”⁴²²

Here, Cambra clearly identifies the concentration philosophy behind the supermax: segregate and isolate the worst prisoners, so that everyone else can participate in programs, like education, work, and addiction treatment. With the worst prisoners separated from the general population, the remaining prisoners at least “stand a chance of doing [their] own time,” as another administrator described it.⁴²³ Based on this segregation-and-isolation philosophy, Cambra explained: “[Rushen] decided to lock-up gang members, locking ‘em up just for being gangsters ... all the bad eggs in a couple barrels ... starting to go to a supermax philosophy.”⁴²⁴ In other words, Cambra describes how violent and potentially violent prisoners were already being concentrated in old cellblocks at Folsom and San Quentin in the late 1970s and early 1980s, and how the supermax at Pelican Bay simply institutionalized this policy.

Steve Fama, a lawyer who would later challenge the conditions at Pelican Bay, described this theory of concentration and isolation: “I believe that they [correctional department administrators] were true believers in the idea that this new prison, that would concentrate and isolate, was going to break the backs [of the gangs] ... and make the general population something closer to Shangri-la.” Fama said that the CDC was relatively obsessed “with the idea

⁴¹⁹ Brown interview, *supra* note 226.

⁴²⁰ Blatchford, *supra* note 8. Among other theories, the book suggests that the California State Assembly Members who have advocated in recent years for prison reform in California, including Gloria Romero, are pawns of the Mexican Mafia, and the lawyers who have represented prisoners in challenging indeterminate (i.e. indefinitely long) assignments to the supermax at Pelican Bay have knowingly accepted mafia money as payment for their work.

⁴²¹ Larson interview, *supra* note 8.

⁴²² Cambra interview, *supra* note *supra* note 226.

⁴²³ Kirkland interview, *supra* note 95.

⁴²⁴ Cambra interview, *supra* note 226.

of creating safe prisons,” because they had come to understand “that prisons like San Quentin ... the James Cagney style ... were particularly ill-suited” to the prisoners the Department was dealing with. Fama said he thought this correctional management realization was based on some combination of common sense and experience dealing with court orders requiring better prison conditions.⁴²⁵ So even Fama, one of the lawyers who would later challenge the supermax at Pelican Bay, agreed that correctional administrators worked hard to design a logical framework for building an integrated, statewide correctional system.

In addition to the safety and security benefits correctional administrators hoped to see when they isolated the perpetrators of violence, administrators also hoped to see economic benefits accrue from this isolation. As Craig Brown explained, as long as prisons were locked down because of violence, prisoners could not be counted on to perform labor contracts, and industries would not invest in prison labor. So, Brown explained, the need to isolate violence was in part inspired by then-Governor Deukmejian’s interest in cultivating sustainable prison industries: “Lockdowns don’t work in PIA [Prison Industry Authority] prisons, so we took the view that we had to get the violence out.” Lockdowns, according to Brown, are a proxy measure for violence in an institution.⁴²⁶ And one way to decrease lockdowns and get the violence out is to concentrate and isolate the worst of the worst in one or two institutions.

As correctional administrators decided what kinds of prisons they should build in California in the 1980s, they prioritized the isolation of violent (and potentially violent) offenders. They hoped that, in isolating these prisoners in an extremely high security institution, they would be able to maintain safety and security throughout the state prison system.

In sum, correctional administrators chose to build institutions that fulfilled key correctional goals, like isolating problem prisoners, while ignoring competing goals of other governmental branches, such as federal court goals to create humane prisons, or legislative goals to find alternatives to incarceration. Adequate oversight from other branches of California state government, like the courts or the legislature, might have forced correctional administrators to consider policy alternatives to the expensive and extremely punitive form of the supermax at Pelican Bay. Judges, for instance, might have raised constitutionality objections to this form of confinement, or implemented basic human rights standards and protections, say, as part of the supermax design. But these oversight mechanisms were absent. In the end, everyone deferred to the correctional experts, who described the supermax, or SHU, at Pelican Bay, as absolutely necessary. No one, not a legislator, or a judge, or even a correctional administrator, ever asked *whether* total isolation was necessary, or *whether* a supermax should be built. The questions instead were, simply: what form would the total isolation take and what would the supermax look like?

C. Locating the California Supermax

In the early 1980s, legislators intended to build the majority of California’s new prisons in urban areas, especially in southern California, where the majority of the state’s prisoners were from. Even in the 1970s, California’s existing prisons were primarily located in the Central Valley; legislators noted that this kept prisoners unreasonably far from home and family. But, despite the best intentions, legislators found that getting public approval to site prisons in urban areas, let alone anywhere in southern California, was extremely difficult. Gilmore’s *Golden*

⁴²⁵ Fama interview, *supra* note 270.

⁴²⁶ Brown interview, *supra* note 226.

Gulag covers the politics and economics of this prison siting process in great detail. Similarly, many of the administrators interviewed for this research mentioned their frustrations with the prison siting process, as well as the inevitability of prison-after-prison ending up in rural locations. This is how Pelican Bay, the most extremely secure of the state's new prisons, also ended up in one of the most extremely rural location in the state. Brown, for instance, said: "Every prison in the history of California was built in the boondocks." In the 1980s, he said, "everybody wanted a prison." Or at least, everybody in rural areas wanted a prison, because, he explained, "We are a great economic engine; you bring a payroll like that," he said, and "the community is eager for a prison, and the prison serves the community well."⁴²⁷

Del Norte County represented just the kind of rural county, in need of an economic engine and a steady payroll, to which Brown referred. Del Norte had once thrived on a "wood products economy," but by the mid-1980s only one of seventeen sawmills remained in the area. Similarly, only six of twenty-five previously functioning dairies remained. Unemployment was at 20 percent in the county, making it one of the poorest in the California. Newspaper reports alleged that Oregon residents crossing the border into California in search of more generous welfare benefits further burdened Del Norte County.⁴²⁸ As Brown predicted, then, residents of Del Norte County lobbied eagerly in the mid-1980s to have their county designated as the location for one of California's new prisons. Once county residents learned that the proposed prison would be a maximum-security prison, however, some expressed concerns about the facility about to open in their backyards. One resident, interviewed in an August 1990 *Los Angeles Times* story complained: "We were tools in someone else's game . . . Some people made a lot of money off this prison . . . And we got something completely different than was promised; we weren't told what was happening until it was too late."⁴²⁹

In spite of county residents' concerns about the security status of the prison, early projections suggested that Pelican Bay State Prison had "injected life into the moribund economy of Crescent City" and helped the city "bounce back" from its economic woes.⁴³⁰ An early headline read: "Crescent City Gets Welcome Boom from New Prison / State Institution to Add Millions to Economy."⁴³¹ And indeed, early economic indicators suggested some benefits to the destitute community. According to local business leaders, the unemployment rate dropped, property values increased, and so did sales tax revenues.⁴³² In addition, there was a housing boom in the late 1980s, just before the prison's scheduled opening; more than 100 houses were built. Basic economic infrastructures like shopping centers were also built.⁴³³ The state and Center for the Continuing Study of the California Economy in Palo Alto predicted further employment jumps and population jumps, which would combine to produce an increasingly healthy employment rate.⁴³⁴

Of course, housing booms, more shopping districts, and even economic protections led not only to increased housing and rent prices, as the Crescent City Manager noted in a December

⁴²⁷ Brown interview, *supra* note 226.

⁴²⁸ Griffith, *supra* note 54; Corwin, "High-Tech Facility," *supra* note 3.

⁴²⁹ Miles Corwin, "Residents Rattling Local Prison Bars." *Los Angeles Times*. Aug. 6, 1990, A-3.

⁴³⁰ Griffith, *supra* note 54.

⁴³¹ Bill Calder, "Crescent City Gets Welcome Boom from New Prison \ State Institution to Add Millions to Economy," *The Oregonian*, Feb. 9, 1988: B-10.

⁴³² Corwin, "High-Tech Facility," *supra* note 3.

⁴³³ Griffith, *supra* note 54.

⁴³⁴ Harry Anderson, "California & Co.; Prisons: Economic Tonic for Rural Areas," *The Los Angeles Times*, Oct. 9, 1990: D-1.

1989 interview,⁴³⁵ but also to increased costs of living across-the-board. Del Norte County residents faced many unseen costs as Pelican Bay was built and prepared for prisoners. Once the department of corrections decided to build the prison in Del Norte County, the residents soon faced a “spiraling county budget and a rising crime rate”; neighboring communities watched the spiral and voted to reject prisons. A *Los Angeles Times* headline suggested that the prison had brought “near-bankruptcy,” because it forced the town to fund millions of dollars of new infrastructure from roads to utilities to hiring new teachers, building inspectors, and law enforcement officials. Furthermore, while the new prison was projected to increase employment opportunities in the county, only 20 percent of the new correctional officers were actually drawn from among local residents.⁴³⁶

In the end, Del Norte County got not just any prison, but one of the most secure and punitive prisons in the United States. While a few residents expressed concerns that high security prisoners might be bussed into and out of their county, increasing the potential for dangerous crime, few discussed the actual specificities of the new prison’s design, or seemed to know that the maximum-security prison would actually be a hyper-maximum, or supermaximum security facility.

D. Finding the Supermax: Inspiration in Arizona

Having settled on the idea of a supermax, to be located in Del Norte County, California, correctional administrators then needed a design, a floor plan, a vision for the new prison. The story of who decided to build Pelican Bay and how the decision was made is surprisingly simple. The story is surprising in that there is no public, written record of the supermax design process, either in legislative documents, media sources, or historical accounts. The story is simple in that one man put together a team of prison building experts, sent them out to find the best, newest, most state-of-the-art prison, and almost precisely replicated everyone’s favorite choice – the Arizona State Penitentiary at Florence.⁴³⁷

Carl Larson almost single-handedly orchestrated the supermax innovation in California. As described in Section A, Larson was (and is) a career correctional bureaucrat. So, the man who argued for the need for a high-security prison in Del Norte County, researched the best design for this facility, and oversaw implementation of this design, from hiring the project director to presenting the idea to the legislature and gaining the governor’s support for the project, was a true correctional expert, in terms at least of career experience. He had worked at every level of corrections, from line officer to warden to bureaucratic manager, and he had witnessed first-hand the upticks in violence and increasing racial tensions in the California prisons in the 1970s.

As to choosing the design for Pelican Bay, Larson said that the staff member in charge of choosing the architectural design “had every architect in the world trying to sell him different designs.” So, Larson decided to have his staff “identify every maximum security and lock-up the U.S. built in the last ten years.” Larson went to visit them all, with a representative from the Kitchell architecture firm, which the Department had chosen to coordinate the construction of the Del Norte County institution. Larson took a long trip, circling around the country, starting in

⁴³⁵ Griffith, *supra* note 54.

⁴³⁶ Corwin, “High-Tech Facility,” *supra* note 3.

⁴³⁷ Larson interview, *supra* note 8; Justice architect (California), phone interview with author, Aug. 4, 2010, notes on file with author.

“Oregon, Washington, Montana, Utah, Michigan, Wisconsin⁴³⁸ – they were proud of Stillwater, their lock-up [that] was fully programmed and real heavily staffed, New York, New Jersey, North Carolina, South Carolina, Georgia, Texas, New Mexico, and finally, Arizona.” Larson said that, with the exception of Arizona: “None of those states had SHUs. They had lock-up units.”⁴³⁹ But, Larson explained, these “lock-up units” were like those that already existed in California for the purposes of short-term isolation or segregation.⁴⁴⁰

Notably, of these lock-ups, only the prison in Stillwater, Minnesota stood out to Larson, as being a high-security prison that was nonetheless, “fully programmed.” Larson did not explain exactly why the Stillwater model (i.e. Oak Park Heights, discussed in Chapter I) was dismissed as a possible prototype for Pelican Bay, although his comment that the institution was “real heavily staffed,” suggests that perhaps he thought it was inefficiently run. Or perhaps he thought Minnesota had fewer problem prisoners than California and so could run an essentially less secure lock-up. As one architect who worked on the Pelican Bay design project said: “The facility was designed to house the worst of the worst, the Hannibal Lecters of the world. And in the state of California, you find more Hannibal Lecters.”⁴⁴¹

Arizona, however, was the exception in the states that Larson and the Kitchell representative visited: “The last place we went was Arizona, and what we found ... they were in the process of construction; it was almost finished. It was the prototype for Pelican Bay.”⁴⁴² At the time California correctional administrators decided to copy the Arizona supermax model, the Arizona institution was not even yet operative. The Arizona supermax opened in 1986, the year that California correctional administrators started traveling the country in search of a model on which to base Pelican Bay.

Like Larson, Craig Brown, who was Undersecretary of Corrections during the final stages of the Pelican Bay design process, also remembered the appeal of Arizona’s newest prison as a supermax model. He said he first heard about Arizona’s supermax through a kind of old boys’ club of correctional administrators. “Corrections guys all talk. There’s this little secret club of state corrections department directors; they meet and talk.” After he heard about Arizona’s supermax, Brown said he himself visited Arizona about five times, watching the progress of the state’s prison building in the 1980s. Like Larson, Brown also visited a few other examples of high security prisons in other states, but none compared to the Arizona model. For instance, Brown recalled visiting a high-security state institution built in Cañon City, Colorado in the early 1980s. (The Colorado Department of Corrections would eventually build a supermax institution at this site, but it did not open until 1993). Brown argued that Arizona’s supermax seemed like the best available response to intractable problems with violence in state prisons. Brown argued that correctional administrators were not simply copying the newest, coolest prison that Arizona had built: “It wasn’t ‘a SHU is a cool thing, let’s go build one’” that motivated the design. Brown reiterated what Larson had said about looking to other states for ideas and best practices: “We

⁴³⁸ The lock-up Larson was referring to in Stillwater was actually Oak Park Heights in Stillwater, Minnesota.

⁴³⁹ Larson interview, *supra* note 8.

⁴⁴⁰ In the ten original prisons that then-corrections director Richard McGee built in the 1940s and 1950s, four had “lock-up units,” where prisoners could be held in short-term segregation or isolation. McGee’s philosophy, Larson explained, was to have “a small unit, in each prison” for lock-up. Larson said that, later, lock-ups were added in two additional prisons.

⁴⁴¹ Justice architect (California) interview, Aug. 4, 2010, *supra* note 437.

⁴⁴² Larson interview, *supra* note 8.

tried to visit every new prison that was being constructed.”⁴⁴³ In one sense, then, correctional administrators did their research.

In another sense, though, research about new prison designs was completely lacking. Brown said: “There was not a lot of evidence good or bad,” about the effectiveness of supermaxes, but “the anecdotal stuff was that they were great.” He added that the evidence continues to be largely anecdotal, twenty years later. “I don’t think there’s much empirical research. I don’t even know if there’s more than anecdotal evidence that we’re driving them crazy,” Brown said, implicitly referring to the criticisms of psychiatrists and lawyers that the supermaxes tend to exacerbate and sometimes even cause serious mental illness.⁴⁴⁴

Arizona has recently been in the national news for a controversial law, passed by the state’s legislature, which provides for wide scale criminalization of immigrants, allowing police to stop anyone who looks like a potential non-citizen, with no other cause than an individual officer’s perception of the stopped individual’s physical appearance.⁴⁴⁵ While Arizona’s recent law has set off a contentious national debate about immigrant rights, and enraged Warren Court Era liberals, who support broader civil rights protections, it turns out that this new law is actually just the most recent in a long line of Arizonian policy innovations in the criminal justice arena. As Mona Lynch has documented, Arizona has actually been setting the tone of criminal justice policy, innovating creative solutions like the first supermax, for more than 20 years.⁴⁴⁶ And correctional administrators noticed, even if the public and elected state officials elsewhere in the Sunbelt have been oblivious.

E. Designing the Supermax: “Improving” on the Arizona Model

Once California’s high-level correctional administrators identified Arizona’s first supermax as the prototypical design on which they wanted to model the Del Norte County institution, they set about drawing up construction plans. According to construction managers and architects who supervised the supermax design project, California’s design virtually copied the Arizona design; even the architects had minimal input as to the design. As one architect who worked on the project explained:

There was really little or no option to exercise planning alternatives or judgments ... they knew what they wanted ... they had visited the SMU [supermax] in Arizona, and they said, ‘This is the facility we want.’ So our job was solely, largely a technical implementation and a site plan master planning.⁴⁴⁷

In fact, no one outside of correctional administrators and correctional project managers seemed to have much input on the design of the Pelican Bay supermax.

The preceding chapter reviewed the minimal input legislators had in the design, and correctional administrators themselves described the project as one driven by upper levels of bureaucratic management. For instance, then-Undersecretary Brown emphasized how

⁴⁴³ Brown interview, *supra* note 226.

⁴⁴⁴ *Id.*

⁴⁴⁵ Russell Goldman, “Arizona Law Promises to Be ‘Toughest’ on Illegal Immigration,” *ABC News*, Mar. 26, 2010, available online at: <http://abcnews.go.com/US/arizona-state-law-promises-toughest-illegal-immigration/story?id=10212698> (last accessed 30 Mar. 2012).

⁴⁴⁶ Lynch, *Sunbelt Justice*, *supra* note 33: 136-7; Mona Lynch, “Punishment, Purpose, and Place: A Case Study of Arizona’s Prison Siting Decisions,” *Studies in Law, Politics, and Society*, Austin Sarat, ed., Vol. 50 (2010): 105-137.

⁴⁴⁷ Justice architect (California) interview, Aug. 4, 2010, *supra* note 437.

correctional managers made the supermax design decisions: “It was management initiative,” but “we viewed ourselves honestly as one big team with corrections.” Brown said, in particular, that though the correctional officer’s union made small tweaks to the prison designs, they did little to assist in conceptualizing overall projects, like Pelican Bay. There was no “union-management conflict” in the building decisions, Brown said. In fact, Brown said he could not recall that the union ever objected to any broad design plans. “They wanted violence down [too],” he said, implying that union and management interests were aligned, at least when it came to decisions to construct high-security prisons.⁴⁴⁸

Brown said the correctional officers’ union (known as the California Correctional Peace Officers Association, or the CCPOA) did have a nominal role in signing off on designs, before construction began. Specifically, a group of (administrative) representatives from different agencies and groups signed off on each new prison plan; the group included a line-officer representative on behalf of the correctional officers’ union, based on an agreement reached with Don Novey, the union’s first powerhouse president. This union representative, according to Brown, was mainly interested in technical details relating to security: “sight line issues, locking mechanisms, little details like sectional switches to open doors, where you have guns.”⁴⁴⁹ Larson added to Brown’s analysis of the role of non-correctional management players, explaining that, in the early days of the prison construction projects, he kept getting into arguments with union management about small details of construction. The union would want things changed, late in the design process, when making structural changes would incur a significant expense. So, Larson said, “I called up Don Novey [then-president of the union], asked for a union guy to participate in the work.”⁴⁵⁰ Ever since then, the Department of Corrections has had a union representative on the prison building team, according to Larson. So, by all accounts, the correctional officers’ union in California, which would be a powerful political force in the state by the time Pelican Bay opened in 1989,⁴⁵¹ played only a minimal role in the design of the supermax.

Correctional administrators were adamant that the discretion they had in designing the Pelican Bay supermax was appropriate. Rich Kirkland, who was the Project Director on the Pelican Bay construction project, said of the discretion the CDC had in designing the institution: “I think that is how it should be!” He added, later, that he and other CDC administrators deserved deference as experts. “We had the credibility of proven experts that could weigh in on why we needed that function.”⁴⁵² Another long-time correctional administrator said: “Political interventions, the legislature, the governor’s office shouldn’t be [intervening] in [prison] operations ... They have a right to oversight.” But, he was careful to distinguish oversight from, essentially, meddling. For instance, he said, the legislature might dictate a sex offender’s sentence, but they should not control the details of parole, such as conditions of parole and parole investigatory practices.⁴⁵³ Similarly, Brown, who had himself orchestrated much of the discretion granted to the CDC and who was Undersecretary of the administrative agency overseeing the CDC when Pelican Bay opened, said: “We had fair classification info ... accurate demographic projection models ... I think we built the right stuff ... most of the arguments about the SHU

⁴⁴⁸ Brown interview, *supra* note 226.

⁴⁴⁹ *Id.*

⁴⁵⁰ Larson interview, *supra* note 8.

⁴⁵¹ See generally Page, *The Toughest Beat*, *supra* note 326.

⁴⁵² Kirkland interview, *supra* note 95.

⁴⁵³ Runnels interview, *supra* note 249.

were after the fact.”⁴⁵⁴ In sum, correctional administrators were aware of the discretion they had in designing Pelican Bay, and they argued that this discretion was appropriate, because they brought their unique expertise and managerial skills to the design and construction projects.

Mona Lynch describes a similarly discretionary process in Arizona, where correctional administrators were also responsible for designing the state’s supermax, largely without being noticed or supervised by the legislature, governor, or media. Lynch explains that the Arizona Department of Corrections’ descriptions of their planned prison facilities were generally unconcerned with the day-to-day life of prisoners; the descriptions were concerned, instead, with the economics of running smooth prisons. So, Lynch summarizes an early document describing the prison that would become the SMU I, the first supermax:

*The account continues on to describe how many gallons of raw sewage would be processed at the prison daily, how many meals would be cooked and pounds of laundry cleaned, and provides details about its advanced security and communications systems. No discussion is offered in this description of what life will be like inside the prison for its 4,150 residents.*⁴⁵⁵

Indeed, Lynch notes that the SMU I was hardly mentioned in “departmental materials, government papers, or press accounts” as “anything more than a maximum-security prison.”⁴⁵⁶ Apparently correctional administrators in California were more aware of what was going in Arizona, as Craig Brown’s comments about visiting the construction site multiple times suggest, than were politicians and the media in Arizona itself. Lynch cites an April 1987 *Corrections Today* article by the architects of the Arizona facility as “the earliest indicator[] of its avant garde nature.” According to this article, the main design innovations of the facility were the complete absence of windows (although there were some skylights) and “small pods” of cells, which were more efficient, both for minimizing staffing level requirements and for maximizing surveillance capabilities.⁴⁵⁷

Although the California supermax in Del Norte County was largely based on the Arizona prototype, correctional administrators in California describe a number of small, but they allege important, design tweaks that were made during planning and construction. Larson argued that California’s supermax represented an even more advanced, high-tech design than Arizona’s. He explained: “[Arizona] had some budget constraints, though, and we had a better budget.” So, Larson said: “My recommendation was to use [the Arizona facility] as a prototype with enhancements to meet [California’s] policies.” In terms of enhancements that Larson added to the Arizona design, he described focusing mainly on “lethal gun coverage.” Lethal gun coverage refers to the positioning of correctional officers in secure guard posts, from which the officer can both see and shoot, with a deadly weapon like a gun, at any prisoner anywhere in an institution. In general, correctional officers directly supervising prisoners on cell blocks or in exercise yards do not carry guns, in order to eliminate the risk of a prisoner overpowering an officer and coming into possession of a gun.

Larson said that, although “most prisons in the country do not have lethal gun coverage,” he had always felt strongly that it was an important policy, and he highlighted the policy in his departmental manuals. In explaining his commitment to this policy, Larson again highlighted the role of memories of violence in shaping prison policy and design:

⁴⁵⁴ Brown interview, *supra* note 226.

⁴⁵⁵ Lynch, *Sunbelt Justice*, *supra* note 33: 129.

⁴⁵⁶ *Id.* at 136-37.

⁴⁵⁷ *Id.* at 137.

*I carried it over from our tradition ... you're looking at the guy that made it [the lethal gun policy] happen ... I was the Associate Warden at Soledad when we had eleven staff members murdered. We had 54 staff members stabbed. If you had a melee going on, you couldn't get a gun in there ... any place that inmates can congregate unclassified, we would have wherewithal for lethal force.*⁴⁵⁸

At the SHU, Larson explained, he ensured that there would be gun coverage in each pod, on each tier, but he did not mandate gun coverage on the “yards,” because they were designed to be just single-person “dog pens.”

The Arizona architect, who designed the first supermax on which Pelican Bay was modeled, and who consulted on the Pelican Bay design project, remembered that the California correctional administrators “had a whole different philosophy,” relative to Arizona. The California correctional administrators “wanted to be able to have weapons in their control rooms.” The Arizona Architect remembered: “That’s when we built a quarter of a full-size control room in a warehouse for Carl Larson and those guys to go and stand in and hold their weapons, to make sure they could shoot at everything they wanted ... that was their innovation, their model.”⁴⁵⁹

Rich Kirkland, who was actually the project manager for the construction of the entire prison at Pelican Bay, described three additional significant changes he oversaw to the Arizona supermax design. First, he described a series of innovations designed to make the institution “as light and airy as possible.” The resulting solid, windowless concrete structure, sunk partially underground, and surrounded by layers upon layers of electrocuted barbed wire hardly seems “light and airy.” But Kirkland argued that the Pelican Bay design explicitly attempted to increase the amount of light that reached the supermax pods. “We made the hallways between the cell and the wall wider ... We put in more skylights at a less sharp angle ... [and] we used perforated steel doors ... [also for] letting in more light.”⁴⁶⁰ Kirkland also argued that the perforated steel doors were “better for visibility,” although correctional officers who work in the supermax units complain that these perforated doors allow prisoners to throw liquid mixtures of feces and urine onto passing officers.⁴⁶¹ Kirkland noted that the doors are a definite improvement over the old-fashioned, widely-spaced steel bars in nineteenth-century prisons like Folsom and San Quentin. And, he added, it is a special class of prisoner who is willing to experience the inevitable backwash, when he attempts to throw liquid through the finely perforated steel doors. “[T]here is a different class of inmate who will be willing to get a little [gassing liquid] on the officer and a lot on themselves,” Kirkland admitted. But, he said, this class of prisoner certainly exists, and, the experience tends to be memorable and unpleasant for officers.⁴⁶²

Kirkland noted a second important innovation in the designs of the doors at Pelican Bay: there is one port in the doors that serves as both cuff-port (where a prisoner puts his hands to be cuffed before leaving the cell) and food-port (where trays of food are pushed into the cell at mealtimes). “It’s like the double mints,” Kirkland said. Indeed, one justice architect noted that the doors of supermaxes present one of the most complicated challenges of designing and constructing these facilities.⁴⁶³

⁴⁵⁸ Larson interview, *supra* note 8.

⁴⁵⁹ Justice architect (Arizona), *supra* note 9.

⁴⁶⁰ Kirkland interview, *supra* note 95.

⁴⁶¹ Casual conversations with correctional officers between December 2009 and December 2010; Rhodes, *Total Confinement*, *supra* note 13: 48.

⁴⁶² Kirkland interview, *supra* note 95.

⁴⁶³ Justice architect (California), phone interview with author, May 25, 2010, notes on file with author.

The second Pelican Bay design innovation, according to Kirkland, was the poured-concrete nature of the cells. Kirkland said: “If you look in a typical cell, you will see a bunch of metal in there – it’s pretty crowded.” By contrast, he described the cells in the Pelican Bay supermax as “efficient and spacious.”⁴⁶⁴ Again, describing the eight-by-ten-foot cells (“the size of a small bathroom”) as spacious seems a bit like calling the solid concrete structure light and airy.⁴⁶⁵ But, Kirkland argued just this. He described the innovative Pelican Bay cells as windowless, interlocking pods, made completely of poured concrete – with a continuous ledge for the bed, lockers fitted neatly under the bed, and a poured concrete ledge forming a desk continuous with the wall, with an attached poured concrete stool. In other words, each cell was made of a single, concrete mold. Kirkland said: “I wish I had a picture. It’s just beautiful.”⁴⁶⁶ The final touch, according to Kirkland, was painting the poured cement a deep, rust red. By contrast, according to Kirkland, the first supermax in Florence, Arizona, was originally unpainted, plain, cold concrete.

F. The Pelican Bay Footprint

So, the Pelican Bay supermax is made of smooth, poured concrete, shaped into bathroom-sized cells, interlinked in small groups of pods. It sounds like a feat of modern, modular architecture, but what really makes the design so special? The ability to keep prisoners extremely isolated from each other seems more like punishment policy than a design structure; after all, Americans have been isolating prisoners one from another since the earliest Quaker penitentiaries in seventeenth century Pennsylvania. So what was so exciting to Carl Larson and Craig Brown and others like them when they saw Arizona’s first supermax, SMU I? Most correctional administrators simply described the supermax as “modern” or “efficient,” but its floor plan appears to be what actually distinguishes it from other high security prisons.

Specifically, Arizona’s SMUs and California’s SHUs resemble a new generation of panopticon, a kind of panopticon squared, or cubed. Jeremy Bentham first proposed the idea of the panopticon in the 1780s. The idea was to build a perfect prison, defined as: “The more constantly the persons to be inspected are under the eyes of the persons who should inspect them, the more perfectly will the purpose of the establishment have been attained.” In order to construct this constant surveillance, Bentham imagined, and drew, a circle of prison cells, in which prisoners were completely isolated from each other, separated by high walls, but a guard, standing in a central location, could potentially see into every single cell at any given time.⁴⁶⁷ Of course, Bentham drew windows into these cells, and imagined that prisoners would still be permitted to work, or to participate in education programs.

In essence, Arizona’s SMU I, and the copycat structure that became the Pelican Bay SHU, take Bentham’s idea to another level. As Bentham imagined, the cells completely isolate each prisoner, one from another, but the cells are further grouped into pods of eight cells, which are in turn, completely divided one from another. A correctional officer can see not just into every cell in the pod, but into each of six pods, simultaneously. So: a panopticon cubed.

⁴⁶⁴ *Id.*

⁴⁶⁵ Michael Montgomery, “Transcript A,” *Locked Down: Games in the Supermax*, (American Radioworks Documentary, 2010), available at online at: <http://americanradioworks.publicradio.org/features/prisongangs/transcript.html> (last accessed 26 Oct. 2010).

⁴⁶⁶ Kirkland interview, *supra* note 95.

⁴⁶⁷ Bentham, *supra* note 24.

The architect, who designed the Arizona supermax on which Pelican Bay was modeled, explained that these interlocking pods were particularly space efficient. “Because we didn’t have windows, I was able to interlock the buildings like jigsaw puzzles, so we were able to do this facility on 30 percent less land . . . So what would have been an outside wall was a common-use wall for other housing units, so it was a huge savings on construction costs, probably 30 percent.” The Arizona architect explained that he thought this was this critical piece of the design that convinced California to model their supermax on Arizona’s: “That’s why California came and said, ‘That’s what we want.’”⁴⁶⁸ The Arizona architect further explained that windows, in addition to being inefficient for tessellating pods of isolation cells, were relatively unnecessary. “The windows were always a problem anyway. Inmates always covered them up. They were always a potential way for inmates to communicate [with each other]. So we decided we would do the windowless cells.”⁴⁶⁹

Specifically, the Secure Housing Unit, or SHU at Pelican Bay, as the supermax wings of the institution are called, is composed of twenty-two capital-T-shaped pods. Each pod has three wings, or segments (imagine the three segments made by the intersecting lines of a capital “T”). Each wing, in turn, has a wall bifurcating it down the middle, meaning that each T essentially contains six self-contained blocks, two per segment of the T. Each block has two tiers of four cells each, for a total of eight cells, one exercise “yard,” one shower, and direct access (through a door) to the one central control post, from which a correctional officer can see all six blocks. In other words, each block of eight cells is completely “self-contained,” but each officer can see six blocks of eight, for a total of forty-eight cells, at once. The central guard post for each T is brilliantly designed so that the guard can see down either side of the wall bifurcating each wing of the T, with simultaneous visual access to six different pods of cells. From the central control tower, looking into a pod, an officer can see and hear, through the perforated cell doors, what is happening in each cell. As Kirkland put it, “From the center [of the T], the concrete wall essentially disappears.” Keep in mind, though, that any one prisoner only has access (visual or auditory, but not physical) to seven other prisoners on a single block at any given time. In total there are 22 T-shaped pods, times 48 cells per T, for a total of 1,056 SHU cells.

Kirkland explained that the T-shaped pods are not full crosses, with a fourth wing (imagine the four segments made by the intersecting lines of a plus sign “+”) because: “Having one wall [behind the officer in the control room] is key to orientation.” Kirkland said a cross, leaving the officer at the center of four wings, would be completely disorienting; the officer would lose track of what wing he was looking down. Kirkland said orientation could have been encouraged with differently colored wings, but the T was determined to be a better design.

This idea that a correctional officer standing in the central control tower of this panopticon-like structure could lose all sense of orientation suggests just how disorienting the modern supermax can be, for correctional officers and prisoners alike. The pods of cells are barren of any form of differentiation or individualization, as are the people in the cells. As Foucault predicted in *Discipline and Punish*, the “contact between the law, or those who carry it out, and the body of the criminal” would be increasingly reduced, until the point of contact is no more than a “split second.”⁴⁷⁰ In the Pelican Bay SHU, the only point of contact between law and criminal is the glance of the correctional officer’s eye, as it roves over forty-eight different cells.

⁴⁶⁸ Justice architect (Arizona) interview, *supra* note 9.

⁴⁶⁹ *Id.*

⁴⁷⁰ Foucault, *supra* note 24: 13.

Actually, one of the architects who worked on the Pelican Bay design explained that the supermax provides for an additional sight line, in the form of cat walks over the cell pods. “The SHU unit is buried . . . it is a sub-terranean unit . . . it has a grating on top of the cells, so the officers can walk on top of the cells and see down into them,” he explained.⁴⁷¹

Kirkland pointed out that the T-design also assumed that the prisoners in these units would never congregate together, for casual recreation or for structured programs. Given this assumption, the design made the space maximally efficient. “This came up because what we had done before was take a perfectly good housing unit with programming space, and lock it up,” he said, implying that this wasted space, if nothing else. Pelican Bay, on the other hand, has no “wasted” space dedicated to programming. “What you don’t see is a bunch of dayroom tables . . . ancillary spaces.” Kirkland said that, when Pelican Bay was designed: “We knew we needed it for a class of people . . . and we wanted a single-purpose institution that would do that [totally segregate people].”⁴⁷² Larson reiterated this, explaining that the Pelican Bay supermax is a “single purpose design”; the SHU cannot be re-structured for general population. “It’s never going to be a programming facility.”⁴⁷³

Larson’s very language echoes Foucault, who described the development of the prison as one that claims “not to punish the offence, but to supervise the individual, to neutralize his dangerous state of mind, to alter his criminal tendencies, and to continue even when this change has been achieved.”⁴⁷⁴ Foucault practically predicted the supermax, the ultimate “security measure” seeking to control not the body, but the mind, removed, much like the modern execution chambers Foucault marvels at, into the darkest depths of the prisons, or in the case of California, the most rural corner of the state.

G. Scaling the California Supermax

Having settled upon the idea of building a supermax, the supermax designers had to resolve the question of scale. How much supermax was needed? How many beds, how many cells, how many pods? Carl Larson described how he thought about this question of scale:

*Everything we did had a formula based on a principle . . . We were advised to build a prison system [as opposed to one institution at a time]. When we looked at the system, the formula we figured we needed was two percent SHU [supermax] inmates. We went to Pelican Bay because of the size of the department . . . it was based on a formula . . . we needed a SHU unit . . . we were having a hell of a time [emphasis added].*⁴⁷⁵

In other words, Larson made a holistic estimation of how many long-term segregation cells the California Department of Corrections would need relative to the overall and projected prison population in the state, and he chose to build one prison to serve this purpose within the entire state system.

⁴⁷¹ Justice architect (California), Aug. 4, 2010, *supra* note 437.

⁴⁷² Kirkland interview, *supra* note 95.

⁴⁷³ Larson interview, *supra* note 8. Corcoran, Larson noted, is different from Pelican Bay. “Corcoran was not designed as a SHU. It’s a 180 [degree] housing unit. I would call it a temporary SHU. We left all the space in perimeter security . . . If this department ever operates so well that you don’t need a SHU beyond Pelican Bay, Corcoran will become a fully programming Level IV facility.” Larson explained that Corcoran was designed to make retro-fitting possible, with all the necessary space to create congregate living environments and yard access.

⁴⁷⁴ Foucault, *supra* note 24: 18, 92.

⁴⁷⁵ Larson interview, *supra* note 8.

However, Larson's original estimates about how many supermax beds were needed were rather off, as he quickly found out. There were two main problems with the estimates, and each will be discussed in turn. Larson and other CDC officials first had trouble (1) estimating the proportion of isolation beds they needed at any given time and (2) projecting the overall prison population throughout the state, which population would in turn determine the raw number of isolation beds needed.

As to the first estimation problem, in the mid-1980s, the CDC was already housing a significant number of prisoners in conditions of long-term isolation, at older, decrepit institutions, like Folsom and San Quentin. Specifically, there were roughly 2,600 prisoners housed in what CDC called "administrative segregation," or long-term isolation, at Folsom and San Quentin in 1984.⁴⁷⁶ There were roughly 43,000 prisoners throughout California at this time.⁴⁷⁷ In other words, even in 1984, six percent of the prison population, or four percent more of the population than Larson estimated needing segregated housing for, was already housed in segregation and isolation. Moreover, these institutions were under federal court consent decrees to improve the conditions in these long-term isolation, administrative segregation units in particular.⁴⁷⁸ According to the federal courts, either the CDC had to reduce the number of people in isolation at Folsom and San Quentin, or CDC had to move these prisoners to newer facilities. And as the previous section revealed, correctional administrators were committed to the idea that at least some prisoners needed to be housed in long-term isolation conditions.

So while Larson was planning Pelican Bay, to accommodate two percent of the prison population, California was already in desperate need of isolation cells for at least six percent of its prison population. In fact, the pressure was so great to move prisoners out of the unconstitutional conditions at San Quentin and Folsom, that these prisoners were moved into new prison facilities temporarily, while Pelican Bay was still under construction. So when the CDC opened a new maximum-security prison in Tehachapi, California in 1986, a portion of the cells at this new facility served as interim long-term segregation cells, until Pelican Bay State Prison opened, three years later. Tehachapi is in California's Central Valley "prison alley," as Gilmore calls it.⁴⁷⁹ Although Tehachapi looked like a general population prison, with a "180-degree" design, meaning that the housing units had semi-circular floor plans, and room for prisoners to congregate together in common areas, it was used for its first few years as supermax prison. Prisoners at the new, maximum-security Tehachapi unit were kept in solitary confinement, in cells with solid steel doors, twenty-three-to-twenty-four hours a day, every day.

However, there were no solitary dog-runs at the maximum-security prison in Tehachapi. Instead, prisoners exercised together, in small groups. As one former prisoner explained, prisoners could choose to exercise only with friendly races and gang members, or, if they wanted

⁴⁷⁶ See *Toussaint v. McCarthy*, 597 F.Supp 1388, 1394 (N.D. Cal. 1984).

⁴⁷⁷ *California Prisoners and Civil Narcotics Addicts: 1983, 1984, 1985* (Sacramento, CA: Youth and Adult Correctional Agency, Department of Corrections Administrative Services Division, Offender Information Services Branch, 1986), available online at: http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/CalPris/CALPRISd1983_84_85.pdf (last accessed on 28 Jul. 2011).

⁴⁷⁸ See *Toussaint v. McCarthy*, 597 F.Supp 1388 (N.D. Cal. 1984), *aff'd* 801 F.2d 1080 (9th Cir. 1986).

⁴⁷⁹ Gilmore, *supra* note 21: 129. The town of Tehachapi had housed the California Correctional Institute complex since 1933, but in 1986, as part of their 1980s prison building spree, CDC had built and opened a maximum-security prison at the Tehachapi complex. "California Correctional Institution: Special Historical Notes," California Department of Corrections and Rehabilitation, available online at: http://www.cdcr.ca.gov/Facilities_Locator/CCI-Special_Notes.html (last accessed on 16 Dec. 2010).

a chance to work their way out of this unit, they would have to exercise with rival gang members.⁴⁸⁰ The maximum-security prison at Tehachapi, then, served as a transitional place, where CDC warehoused prisoners who had been “locked down” in administrative segregation at San Quentin and Folsom, prisoners whom the courts had ordered to be housed elsewhere, before the newest, highest security prison opened at Pelican Bay.

Then, in 1988, long-term segregation prisoners from Tehachapi were transferred to yet another interim facility: Corcoran State Prison, also a “180-degree design” facility in California’s Central Valley prison corridor, a bit north of Tehachapi. Like Tehachapi, Corcoran was originally conceived not as a supermax, but as a general population prison. Unlike the new maximum-security prison at Tehachapi, however, Corcoran was retrofitted just before it was opened, in 1988, to be a more permanent segregation unit than Tehachapi was ever designed to be.

Perhaps retrofitted is the wrong term; the congregate living spaces were simply never completed at Corcoran. While the units face an enclosed indoor space, equipped to have televisions plugged in, tables installed, and access to large, open exercise yards, the televisions and tables were never installed, and the access to the open exercise yards was never provided. Instead, solitary multiple, “dog runs” were attached to the units, and the units were opened as a Secure Housing Unit, or SHU. “SHU” is the label the California Department of Corrections refers to its highest security, supermax facilities.⁴⁸¹

Larson obviously hoped, when he converted the Corcoran unit to a SHU in 1988, and even when he remembered the decision in 2010, that Corcoran would not always necessarily need to operate as a SHU. As Larson explained: “If this Department ever operates so well that you don’t need a SHU beyond Pelican Bay, Corcoran will become a fully programming Level IV facility.”⁴⁸² But by the time Corcoran opened, in 1988, Carl Larson and the California Department of Corrections had already decided that the 1,000-plus supermaximum-security cells being built at Pelican Bay State Prison would not be sufficient to meet the Department’s highest security needs. And the Corcoran units have functioned continuously as a SHU from 1988 to the present day. To sum up, then, the first problem with Larson’s population estimates was that even in the mid-1980s, California needed a proportion of supermax cells that was greater than two percent of the overall state prison population.

The second problem with the estimates, though, was that Larson and the California Department of Corrections officials had difficulty projecting (or guessing) what the overall prison population would be in California from year-to-year and over time. Indeed, Zimring and

⁴⁸⁰ J.E. (former Central California Correctional Institution, Tehachapi prisoner), interview with author, San Francisco, CA, Dec. 10, 2010, transcript on file with author. Unsurprisingly, the practice of encouraging prisoners to exercise on small prison yards with rival gang members proved to be a dangerous one. Multiple prisoners died in the late 1980s and early 1990s because of these practices, either at the hands of other prisoners, or when correctional officers shot them, in alleged attempts to break up fights. A few correctional officers were ultimately prosecuted, and then acquitted, on charges that they set up fights between prisoners from rival gangs, gladiator-style. See Matthew Heller, “They Shoot Prisoners, Don’t They?,” *Independent*, Jan. 28, 2001; Robert B. Gunnison, “8 Prison Guards at Corcoran Indicted / Civil rights charges in slaying of inmate,” *San Francisco Chronicle*, Feb. 27, 1998, available online at: http://articles.sfgate.com/1998-02-27/news/17714584_1_exercise-yard-guard-christopher-bethea-corcoran-state-prison (last accessed 17 Jul. 2011).

⁴⁸¹ Incidentally, the legislative history of Corcoran State Prison largely followed that of Pelican Bay State Prison. Corcoran was funded by various publicly approved bond measures, exempted from the independent environmental impact review process, generically designated as an institution that would contain high-security beds, and approved in the mid-1980s. Assembly Bill 2251 (California, Costa), as amended Sept. 11, 1985.

⁴⁸² Larson interview, *supra* note 8.

Gordon have suggested that these prison population projections and overcrowding estimates have been flawed since the 1980s.⁴⁸³ And even when the CDC's estimates were accurate, they could not build prisons fast enough to keep up with the estimates. As Larson explained, at the same time he was estimating how many high-security prison beds he needed, he was also establishing formulas, which permitted significant overcrowding within these facilities. So, he explained, he established maximum capacity levels at "130 percent of capacity for celled institutions and 120 percent of capacity for dormitories."⁴⁸⁴ Even though Larson explained the importance of principles and formulas, he also freely admitted that these numbers represented imprecise estimates of actual populations and departmental needs. For instance, Larson noted that in 2010, prison experts and a federal judge decided that an acceptable level of overcrowding in California prisons was 137.5 percent of design capacity. Larson asked rhetorically: "Do you know how they calculated that number?" He answered, colorfully: "Well, they picked it out of their noses."

In 1985, when Larson was first developing formulas for estimating the number of prison beds and the relative subset of supermax beds that CDC would need, he probably could not have imagined how much California's prison population would increase over the next twenty years. Today, California has more than four times as many people in prison as it did in 1985. (Today's population is more than 160,000 prisoners.) And the Department still suffers from severe overcrowding problems, so severe, in fact, that the U.S. Supreme Court ordered that the state find a way to decrease its state prison population by more than 30,000 people.⁴⁸⁵ Nonetheless, even in the mid-1980s, Larson was making accommodations for potential overcrowding in his department-wide planning schemes.

He built "celled" institutions, designed to hold the state's higher security prisoners, with the idea that prisoners in cells could be housed at 130 percent of the institutional design capacity. I only found out later that, by implication, Larson allowed for overcrowding even in the most secure, supposedly most isolating prison facilities. In fact, Larson explained that although the Corcoran and Pelican Bay SHUs were "designed for one inmate per cell," he built accommodations for one additional person into each of these isolation cells. As Larson explained, "[W]e added a second bunk and a second locker to each cell and increased the utility infrastructure"⁴⁸⁶ These small cells, with a single continuous ledge for a foam bed pad were originally conceptualized as cells for one person. Indeed, Larson emphasized throughout his description of prison-building in California that standard prison capacities in the state are based on prisoners being housed one per cell, and Pelican Bay also was built on this assumption that one prisoner would be housed per cell.⁴⁸⁷ However, Larson ultimately built the Pelican Bay SHU cells (and the Corcoran SHU cells) with two cement ledges, to accommodate the possibility of "temporary overcrowding," and two prisoners to a SHU cell. From the time both the SHUs at Corcoran and Pelican Bay opened, as many as half of the cells in each unit housed two prisoners at a time. This in spite of the stated purposes of these cells – as absolutely necessary to keep the prison system safe from the most dangerous, violent prisoners in the state, who could not safely have contact with officers or other prisoners. Today, only about five percent of the prisoners in

⁴⁸³ See generally Zimring and Hawkins, *Prison Population and Criminal Justice*, *supra* note 324.

⁴⁸⁴ Larson interview, *supra* note 8. As he explained, dormitories should have lower overcrowding capacities than celled units, because prisoners have less personal space in dormitories, and simply adding an officer in a dormitory setting will not always increase the safety of the open spaces.

⁴⁸⁵ *Brown v. Plata*, 563 U.S. ___, 131 S.Ct. 1910, No. 09–1233 (May 23, 2011).

⁴⁸⁶ Carl Larson, e-mail exchange with author, Jul. 20, 2011, on file with author.

⁴⁸⁷ Larson interview, *supra* note 8.

the Pelican Bay SHU are double-celled, but well over half of the prisoners in the Corcoran SHU are double-celled. Subsequent chapters return to the justifications for and impacts of this practice of double-celling, or double-bunking.

As the last-minute decisions to operate Corcoran as a SHU, along the lines of Pelican Bay, and to add extra bunk beds into both facilities, suggests that the CDC in the 1980s and 1990s seemed to be always short of its highest security prison cells. Although planners like Carl Larson hoped that the Department would limit its use of SHU cells, he made plans to accommodate what he called “temporary overcrowding.” And today, as noted above, Corcoran houses more than 1,400 prisoners in the 1,024 cells allocated for long-term isolation at the prison; this means that almost half of the prisoners in these isolation units are housed two to a cell. And even with the “retrofitted” Corcoran supermax units (a total of 1,024 cells, housing a total of more than 1,400 prisoners), the Department has converted even more prison blocks into supermax units over the past decade. Ironically, in the 2000’s, the CDC again converted portions of the maximum-security prison at Tehachapi into a supermax unit, to house the Department’s overflowing and overcrowded population of prisoners in long-term segregation and isolation.⁴⁸⁸

H. Design Qualms?

There is one notable absence in the conversations and justifications detailed in the preceding sections about the design and construction of the SHU at Pelican Bay; none of the correctional administrators (or architects) who designed the institution explicitly engaged with the ethical implications of imposing the harsh conditions inherent in the institutional design. Perhaps the closest anyone came to engaging with the ethical implications of the institution was Carl Larson, when he argued that the Pelican Bay design was “not Draconian but Spartan.” In fact, to the extent that correctional administrators engaged with the implications of their design decisions, it was to minimize or deny any detrimental side effects of long-term solitary confinement, under sensory deprivation conditions. (Recall Chapter II, Section C. Is solitary confinement the defining characteristic of supermaxes?)

These correctional administrators did acknowledge that Pelican Bay’s design was susceptible to misuse, but none described this susceptibility as inherent to the actual design of the facility. For instance, Larson emphasized that, inasmuch as correctional administrators fail to make significant efforts to move people out of long-term segregation conditions (“lock-ups”), they are failing in their correctional (and implicitly their moral) missions. “Lock-up wasn’t a cure ... your goal was always to push ‘em out.”⁴⁸⁹ So, while Larson did not say he regretted designing the SHU at Pelican Bay, he did express regret that the institution had been used to detain people for decades at a time in the extremely harsh conditions he implemented. Craig Brown simply noted that, even though any prison, of any kind of design, could potentially drive an occupant mad, the SHU does have “a human impact and a huge cost.”⁴⁹⁰

Independent of their descriptions of the supermax innovation, each administrator identified a central problem with the California corrections in the 2010s as involving a lack of programming and an overdeveloped willingness to “lock prisons down.” Somehow no one explicitly identified this problem as connected with the ultimate non-programming institution: the Pelican Bay SHU. Steve Cambra, who did not design the Pelican Bay SHU but did serve as

⁴⁸⁸ *Id.*

⁴⁸⁹ Larson interview, *supra* note 8.

⁴⁹⁰ Brown interview, *supra* note 226.

the second warden of the institution a few years after it opened, was particularly eloquent about the problem with overuse of lockdowns and a lack of programs for prisoners to participate in. Cambra said: “When I was coming up, if a warden did that [locked down a prison], he would be fired. Now, he would be fired if he didn’t.” Cambra said: “What I liked about the old system, the inmates’ program was valued. Now inmates are practically locked down all the time.” In fact, Cambra made a direct link between programming and violence, arguing that if prisoners had programming they valued, they would find an excuse to avoid participating in violent activities, so that they could continue to participate in the programs. Cambra suggested that many of the gang problems in the CDC could be indirectly caused by CDC’s own policies: “Gang stuff – all this craziness ... I blame management ... there’s nothing they [inmates] value enough.” Cambra, like the original designers of California supermax, did not explicitly draw a link between the policies institutionalized in the design of the Pelican Bay SHU – permanent lockdowns for some prisoners – and the frequent use of lockdowns in other prisons throughout the state.

One correctional administrator identified some technical aspects of the design of the Pelican Bay SHU, which he thought created systematic problems throughout the California Department of Corrections. Specifically, Dave Runnels, who was only on the periphery of the supermax design process in the 1980s, but who later worked in supermax facilities, said that the prison designers of the mid-1980s “didn’t realize the importance of the absence of a key.” In other words, he explained, by designing and constructing automated cell doors, correctional administrators absolved correctional line officers from the responsibility of engaging directly with prisoners. Runnels said: “Our job is supposed to be maintaining control; you have to talk to people.”⁴⁹¹ But, if a correctional officer can press a button in a central control booth, to open a cell door, and allow a prisoner to go to a shower, or out to an exercise yard, that officer never actually has to talk to the prisoner. Although Runnels was critical of some technical aspects of the design of the Pelican Bay SHU, he was not critical of the overall institutional design. Indeed, he was responsible for designing a similarly restrictive program at another of California’s state prisons, High Desert State Prison, in 2010.

In sum, each of the correctional administrators, who worked on the design of the Pelican Bay SHU, articulated specific critiques of current California correctional policies, which were rooted in decisions made in the 1980s, during the prison building boom. But none identified the Pelican Bay SHU itself as the direct source of any shortcoming in departmental or prison-level operations. Prisoners and their legal advocates, on the other hand, would argue that Pelican Bay, and especially the design of the SHU, produced some of the worst abuses ever seen in the California prison system. (The litigation revolving around these allegations is the subject of Chapters IX and X.) As this chapter and the previous show, between 1982, when California voters first approved a multi-million dollar general obligation bond measure to fund prison construction, and 1989, when the California Department of Corrections opened a prison in Del Norte County on the state’s northern border with Oregon, California legislators funded, and correctional administrators designed and built, a novel prison. Specifically, the prison was designed to keep more than one-thousand prisoners in long-term, total isolation, separated from other prisoners, without access to any natural light, save a small patch of sky visible from a solitary exercise yard, to which each prisoner would have access a few hours per week, at most. The doors to each cell were completely automated, so that a single correctional officer, from a central control tower, could simultaneously see and control six pods of eight cells, or forty-eight prisoners, at any given time. This correctional officer, however, would never even need to

⁴⁹¹ Runnels interview, *supra* note 249.

approach the cell-front-door and talk directly or individually to specific prisoners, let alone have physical contact with these prisoners.

Following a heated debate, legislators agreed to name this unprecedentedly high security institution Pelican Bay State Prison, echoing the name of Alcatraz, an earlier extremely high security (federal) prison in the state. Little else about the design of the prison was publicly debated on the record by legislators, however. And, according to correctional administrators who designed the institution and sought legislative approval for their design, there was not much off-the-record debate either. Correctional administrators explained that they designed the institution in an attempt to respond to and control violence within the California Department of Corrections; they argued that the legislature had properly delegated prison design decisions to the correctional experts. In essence, they argued that Pelican Bay State Prison was a necessary risk-management tool. Correctional administrators' predictions about the number of prisoners who would need to be held at various levels of security classifications suggested that at least one-thousand prisoners would require the highest-level of security classification, which the Pelican Bay SHU would provide.

In practice, however, the institution these correctional administrators built look extremely punitive. It strips prisoners of their most basic human rights – to have access to natural light during the day and to dark at night, to have contact with other human beings, and to participate in activities that engage their minds, whether reading, school, or working. In fact, the institution appears to take human beings and to put them in cages, more barren than those one might find at the zoo. The purpose of the Pelican Bay SHU, in fact, has been little discussed in this chapter. Was it a tool of punishment? A tool of security? The next chapter turns in particular to the various, competing purposes offered up as justifications for the institution and suggests that, in fact, the purpose has never been entirely clear. Subsequent chapters look at how institutional purpose has been articulated in different contexts – in the context of collecting and analyzing data about supermax operation, and in the context of litigation challenging supermaxes.

VII. Administrating the California Supermax, Part II Understanding Purpose

This chapter suggests that there is, perhaps, a fifth defining characteristic of the supermax, which should be added to the four discussed in Chapter II: supermaxes are distinguished by a discursive practice through which their purpose and meaning is constantly being re-negotiated. The discussion in Chapter II, Section C. Is solitary confinement the defining characteristic of supermaxes?, about whether supermaxes impose solitary confinement hinted at this discursive negotiation. Whereas minimum-security institutions might vary from state-to-state and might include a whole range of facilities from fire camps and half-way houses to dormitory-style prisons with work facilities,⁴⁹² the negotiation over what constitutes a minimum security facility is both less heated and less intricate than the negotiation over what constitutes a supermaximum-security facility. When it comes to supermax prisons, however correctional administrators negotiate over how to label every aspect of the conditions of confinement, and how to categorize the resulting institutions. This chapter will argue that this persistent negotiation is not simply a politically-motivated negotiation about whether the conditions in supermaxes are actually conditions of solitary confinement and sensory deprivation, but the negotiation is also bureaucratically-motivated, implicating who controls the supermax institutions, for what purposes and to what ends.

In order to understand how the idea of the supermax was justified, and what its original purpose was, this chapter explores correctional administrators' reflections on the design and building of Pelican Bay State Prison, California's archetypal supermax. The decisions, which resulted in the building of Pelican Bay State Prison, took place nearly 25 years ago; California correctional administrators first conceptualized the institution in 1985. Therefore, the institution's original designers have had a chance to reflect on what they designed, with the wisdom of 25 years of experience in state corrections generally and of working with and within the supermax institution specifically. The designers are aware of the supermax's successes and failures, aware of both the public fascination with the institution and the public critiques of its extreme conditions. This chapter seeks to explore the reflections of these "institutional entrepreneurs."⁴⁹³ Each institutional entrepreneur, whether correctional administrator or architect, provided justifying accounts for the institution he or she collaborated in designing.⁴⁹⁴ These justifying accounts, in turn, deployed specific discourses that combined a variety of institutional logics, including the logic of prison experts, the logic of politicians and lawyers, and the logic of public morality.⁴⁹⁵

⁴⁹² Philip Goodman, "A Brief History of California's Prison Camps," Jun. 2010, available online at: www.cdcr.ca.gov/Conservation_Camps/docs/History_of_firecamps.pdf (last accessed 31 Mar. 2011); Federal Bureau of Prisons, "Prison Types & General Information," available online at: <http://www.bop.gov/locations/institutions/> (last accessed 31 Mar. 2011).

⁴⁹³ For discussions of institutions and entrepreneurs, see Paul DiMaggio, "Interest and Agency in Institutional Theory," *Institutional Patterns and Organizations: Culture and Environment*, L.G. Zucker, ed. (Cambridge, MA: Ballinger, 1988): 3-22; Michal Lounsbury and Ellen T. Crumley, "New Practice Creation: An Institutional Perspective on Innovation," *Organization Studies*, Vol. 28 (2007): 993-1012.

⁴⁹⁴ For discussions of "accounting," see C. Wright Mills, "Situating Actions and Vocabularies of Motive," *American Sociological Review*, Vol. 5.6 (Dec. 1940): 904-913 (discussing the language of institutional motivation); Marvin B. Scott and Stanford M. Lyman, "Accounts," *American Sociological Review*, Vol. 33.1 (Feb. 1968): 46-62 (discussing the process of accounting).

⁴⁹⁵ For discussions of the logic of various experts, see generally Erving Goffman, *Asylums: Essays on the Social Situation of Mental Patients and Other Inmates* (Garden City, NY: Anchor Books, 1961); Murray Edelman,

The language these correctional bureaucrats used to describe the institutions they created reflects an active negotiation with three different institutional logics, which resonate with three justifications that scholars have suggested for punishment more broadly: a “new penology” language of security,⁴⁹⁶ a culture of punitive control,⁴⁹⁷ and civilizing and rehabilitative ideals.⁴⁹⁸ The first three sections of this chapter discuss each of these institutional logics, in turn. Each is presented as a narrative: the narrative of security, the narrative of punishment, and the narrative of rehabilitation and civilizing ideals. These narrative categories co-exist; each institutional designer references multiple categories. But the narrative categories are also inherently contradictory. While these logics were often inconsistent, or in direct conflict, this very inconsistency reinforces and expands the bureaucratic power correctional administrators had in shaping the supermax institution.⁴⁹⁹ As discussed in the previous three chapters, correctional bureaucrats,⁵⁰⁰ rather than elected legislators, executive officials, judges or lawyers, had the power in designing the supermax institution, however it is defined. These bureaucratic accounts ultimately highlight both the complexity of the supermax concept and the multiplicity of goals the institution has been expected to satisfy.

A. The Narrative of Security

Perhaps the most logical, and also the least morally charged, justification for the “Spartan” conditions of the Pelican Bay supermax lie in its alleged necessity as a tool of modern security. Correctional administrators and legislators alike argued that, in the 1970s and 1980s, the California Department of Corrections faced new racial tensions and a growing population of gang members (as described in Chapter IV). This new prison culture required new management techniques. So, the argument goes, California’s “worst of the worst” needed to be managed and controlled, as a group. Specifically, the institutional entrepreneurs who designed Pelican Bay argued (1) that the supermax was necessary as a tool to control this gang-induced violent uptick, and (2) that the supermax did successfully control violence after it opened.

This two-pronged argument about the necessity for the security measures inherent in the supermax and the subsequent improvements in safety and security after the supermax opened aligns remarkably well with the three key elements of the “New Penology,” as outlined by Feeley and Simon in 1992.⁵⁰¹ The supermax designers speak in the “language of probability and risk,” specifically of the probability and risk of violence; they reference “efficient control of internal system processes,” like classification and isolation of violent offenders throughout the state prison system, and they engage in “the deployment of new techniques,” like the design and construction of the supermax.⁵⁰²

Political Language: Words That Succeed and Policies That Fail (New York: Academic Press, 1977); Stuart A. Scheingold, *The Politics of Law and Order* (New York: Longman Inc., 1984); Simon and Feeley, “The Form and Limits of the New Penology,” *supra* note 403.

⁴⁹⁶ Simon and Feeley, *supra* note 495.

⁴⁹⁷ Garland, *Culture of Control*, *supra* note 185.

⁴⁹⁸ Simon and Feeley, *supra* note 495: 105.

⁴⁹⁹ See Michel Crozier, *The Bureaucratic Phenomenon* (Chicago: University of Chicago Press, 1964) (discussing bureaucratic power).

⁵⁰⁰ Correctional bureaucrats, for the purposes of this project, include prison administrators, department of corrections managers appointed by the governor, architects, and psychologists.

⁵⁰¹ Feeley and Simon, “The New Penology,” *supra* note 196: 450.

⁵⁰² *Id.*

In terms of the language of probability and risk, the institutional entrepreneurs who designed the supermax talked about specific characteristics and incidents of violence, which necessitated a supermax, or SHU (for Secure Housing Unit), as the Pelican Bay supermax unit was dubbed. For instance, Carl Larson explained the intertwined problems with both violence and revolutionary attitudes, which he saw as justifying the need for the supermax:

We had this 'revolution,' and it manifested itself with a lot of rhetoric – in colleges and jails. The manifestation in colleges was mainly peaceful – a lot of rhetoric and thought ... in the prisons, it manifested in a lot of violence ... the Black Guerilla Family and the Black Panthers, they had a political side ... but they were mostly gangs ... mafia.

Larson explained that these revolutionary elements perpetrated violence, which necessitated institutionalizing a long-term lock-up unit. “We needed a SHU unit ... we were having a hell of a time ... we had 11 staff members murdered in 1971.”⁵⁰³

Brian Parry, who worked as a gang investigator from 1981 to 1995 in the California Department of Corrections echoed Larson’s narrative about the security-management purpose of the supermax: “Gangs certainly were a driving factor to the supermaxes, because they [gangs] were responsible for the vast majority of the violence.” Parry explained that the Pelican Bay supermax sought to isolate gang members even from other prisoners, who had been sent to the supermax because they had broken prison rules: “Keep all the gang members in the SHU separate from those purely there for behavior.”⁵⁰⁴

Craig Brown, Undersecretary of Corrections in the 1980s, also referenced this policy of maintaining gang members in supermaxes indefinitely. Brown said: “An analysis of gang members in the SHU would be interesting; people complain that the SHU is too hard on gang guys, and [that] indeterminate sentences are inappropriate.” In other words, Brown was particularly interested in evaluations of whether the CDC in general, and the supermax in particular, was functioning efficiently. Brown emphasized: “At the heart of corrections is a good classification system.”⁵⁰⁵

Of note here is that Parry and Brown both focused on problems contained within the prison walls: gang membership in prison and gang classification procedures in prison. While Larson did reference the external world, and the revolutionary rhetoric that existed in both colleges and jails, he also focused on internal system processes: the violence inside California prisons, and the number of people killed working inside the prisons. In explaining the *necessity* of the supermax, Larson, Parry, and Brown all focused on safety and security concerns, often to the exclusion of other concerns, like rehabilitation or retribution. And they assessed the efficiency of the prison in terms of safety and security, too, referencing rates of violence, but not rates of recidivism or other possible measures of a prison’s efficiency.

The California and Arizona Architects who collaborated with Larson and Brown in designing the Pelican Bay supermax – the new tool deployed within the California Department of Corrections to manage the alleged violence problems – reiterated this emphasis on safety and efficiency. The California Architect said of planning the supermax:

The first and most primary concern is safety and security ... of both the staff and inmate population. Most people think of public safety, which is a primary

⁵⁰³ Larson interview, *supra* note 8.

⁵⁰⁴ Brian Parry (former gang investigator, California Department of Corrections), phone interview with author, Apr. 25, 2010, notes on file with author.

⁵⁰⁵ Brown interview, *supra* note 226.

*concern, but then safety of the staff, but safety of the inmate population internally is equally important ... but that is the first issue ... you cannot compromise on safety and security. After that, the most important issue is staff efficiency ... the capital cost over the life of a facility is a fairly minor cost – 10 or 15 percent. Your big costs are operation costs, and 75 to 80 percent of [those] are people, staff costs. The idea of being able to have an efficient facility is the next most important ... so that's a big driving force.*⁵⁰⁶

This California architect literally emphasized the issue of internal, institutional safety over public safety, and he also raised the importance of designing institutions that achieved internal safety efficiently, minimizing staff and operation costs. Similarly, the Arizona architect, who consulted on the Pelican Bay project, recalled that in the Arizona supermax he designed: “We cut the staff ration to 1-to-4 instead of 1-to-1. That’s what impressed California.” When Larson visited Arizona, this architect recalled, Larson said: “That’s the management style that we need.”⁵⁰⁷ Efficiency, as well as safety, is a key goal of these correctional entrepreneurs, just as the New Penology would predict.

The Arizona architect argued that the supermaxes, both in Arizona and California, largely achieved their goals: “The people working there are safer ... the inmates there are safer.”⁵⁰⁸ Larson and Brown both agreed that the supermax was successful in achieving its goals. For instance, Brown said:

*We had a severe violence problem, and it got a lot better [after Pelican Bay opened] ... less officers are killed at the hands of inmates than in the '70s ... I think the SHU [the CDC term for the supermax units] did what it was supposed to do ... I actually think gangs got better; the SHU took the gang leaders out [of the general population] ... The SHU is pretty successful. I think it dealt with it [violence] at the time; we did damage the gang's ability to manage gang members; we did isolate the violence.*⁵⁰⁹

Later in the conversation, in response to a question about what research data about supermaxes would be valuable to have, Brown said “a systematic analysis of violence” in supermaxes would be useful, although he added that violence is incredibly hard to measure, because what officers report as violence depends both on how the institution defines violence and on whether correctional officer think the violence report will result in an appropriate administrative response. Brown implicitly acknowledged, then, that evidence about the impact of the Pelican Bay supermax on violence was, perhaps, lacking. (The available evidence about this debate is thoroughly examined in Chapter IX.)

In fact, Steve Cambra, who served as one of the early wardens of Pelican Bay, suggested that the supermax actually aggravated problems with violence. Like Larson and Brown, Cambra acknowledged the violence-management purpose of the supermax: “The supermax is not the cure for the bad guys of the world; it’s just another way to manage violence.” But, Cambra was less optimistic than either Larson or Brown about the ability of the supermax structure to actually reduce violence: “All the physical barriers in the world are not going to help violence.” Cambra explained that physical barriers must be matched with appropriate leadership and rules. “It’s just not a good way to manage people ... you gotta have it but you gotta know how to use it.”

⁵⁰⁶ Justice architect (California), Aug. 4, 2010, *supra* note 437.

⁵⁰⁷ Justice architect (Arizona) interview, *supra* note 9.

⁵⁰⁸ *Id.*

⁵⁰⁹ Brown interview, *supra* note 226.

Cambra pointed out that when Pelican Bay opened, “violence went up.” It was possible, he said, that the supermax “helped with the severity of assaults,” but the institution did not protect against all violence. Cambra said, “There are more staff assaults at Pelican Bay than at any other prison.” On the one hand, he said, “That’s expected.” After all, Pelican Bay allegedly contains the most dangerous prisoners. On the other hand, the prison is designed to reduce violence. “But you built me all this stuff,”⁵¹⁰ Cambra said, implying again that, in his experience, physical barriers alone could not prevent violence.

In sum, the institutional entrepreneurs, who designed Pelican Bay and later worked in that same institution, justify it as a necessary means to prevent violence, especially gang violence in the Department of Corrections. The institutional designers, like Larson and Brown, argue that the supermax institution succeeded in achieving its goals, but they provide little evidence of this success. In fact, Cambra, who actually worked in the institution, directly contradicted the claims of successful violence reduction made by the supermax designers.

All of these institutional actors, however, emphasized the importance of security management, whether through the physical structure of the supermax (Larson and Brown) or through the operational procedures in place (Cambra). In this sense, their explanations about why the supermax is necessary and their narratives about how it has been used echo elements of the New Penology, which emphasizes the importance of managing risk through the establishment of internal system processes and the deployment of new technology.

In other states, which built supermaxes in the 1980s and 1990s, the security narrative was similarly present, in official justifications for the need for the institutions, as articulated on department of corrections websites, in interviews with journalists, and in justifications articulated in court cases, when the institutions were legally challenged. For instance, Alabama’s highest security prison, Donaldson Correctional Facility, which has more than 200 total isolation, supermax beds, describes its mission as specializing “in controlling repeat and/or multiple violent offenders with lengthy sentences that are behaviorally difficult to manage.”⁵¹¹ Similarly, Colorado State Penitentiary, a supermax with more than 700 total isolation cells, describes its mission as one of risk management: “to preserve order by effectively managing the most disruptive offenders who have demonstrated the inability to function at a less secure facility by providing a safe, secure, and humane environment.”⁵¹² In Kansas, the Warden of that state’s supermax, the El Dorado Correctional Facility, was even more specific about the security purpose of his prison. He explained that the facility holds the prisoners that are:

considered to be the State’s most violent, aggressive, predatory and recalcitrant inmates. They present a threat to themselves or to others and require lockdown status for 23 hours per day. Some of the reasons inmates are placed on long term segregation status are as follows: displaying consistent bad behavior, demonstrates leadership status in security threat groups; demonstrating

⁵¹⁰ Cambra interview, *supra* note 226.

⁵¹¹ Alabama Department of Corrections, “Donaldson Correctional Facility.” Available online at: <http://www.doc.state.al.us/facility.asp?id=4> (last accessed 17 Feb. 2012).

⁵¹² Colorado Department of Corrections. “Colorado State Penitentiary,” and “Centennial Correctional Facility,” and “Death Row, Daily Routine.” Available online at: <http://www.doc.state.co.us/facility/csp-colorado-state-penitentiary>, <http://www.doc.state.co.us/facility/ccf-centennial-correctional-facility>, <http://www.doc.state.co.us/daily-routine> (last accessed 20 Feb. 2012).

*predatory behavior; has a history of self-mutilation; is deemed to be an escape risk; and/or has been convicted under the capital murder statute.*⁵¹³

However, unlike California correctional administrators, like Brown and Larson, the Kansas warden did not argue that the El Dorado facility necessarily had a beneficial impact on rates of in-prison violence. More like California's Warden Cambra, in fact, the El Dorado warden argued that the supermax actually functioned to concentrate violence: "Most of the batteries on correctional officers occur in the three segregation units."⁵¹⁴

Even within individual narratives, then, and between narrators, there is debate about how to deploy new security techniques to manage violence and whether those new techniques have worked. So, Larson and Brown describe how new technology is critical to managing to violence, while Cambra focuses on the importance of adequate management within these physical structures. Similarly, Brown talks both about how supermaxes have successfully controlled violence in prison, at the same time he suggests that more and better studies of rates of violence in and out of supermaxes are needed.

As other states copied California's supermax model, they tried to improve upon both design and operation, refining these security techniques. For instance, George C. Welborn, the future warden of Tamms Correctional Center in Illinois, described how he hoped to improve on the Pelican Bay model, by avoiding incarcerating prisoners with diagnosed psychiatric conditions in his new supermax facility, and by limiting the overall number of prisoners in the facility – to a maximum capacity of 500.⁵¹⁵ Even the first supermax institutional entrepreneurs, either within California or between the various states that copied California's model, did not reach consensus about how the institution would achieve its security purpose, and they are not in agreement about whether the institution ever achieved its purpose. The supermax concept was apparently ambiguous from the beginning. And the security narrative is just one of three dominant narratives articulated to explain and justify the necessity for the supermax.

B. The Narrative of Expressive Punishment

While completely isolating a person indefinitely might be justified as a necessary security measure, the combination of deprivations present in the supermax – from lack of access to natural light to total absence of human contact to denial of basic dignity-enhancing privileges like pants and shirts (supermax prisoners are usually given one-piece jumpsuits) – look, at least to the outside observer, highly punitive. Indeed, David Garland has argued that "'tough on crime' measures," like supermaxes, have both "an instrumental register, attuned to public protection and risk management" and "an expressive, punitive scale that uses the symbols of condemnation and suffering to communicate its message."⁵¹⁶ Garland suggests that highly punitive institutions tap into a collective unconscious, which "others" the criminal, and condones public expressions of punitive intentions.⁵¹⁷ Garland's analysis, in turn, relies on Durkheim, who argued that punishment should be an expressive action that reinforces social solidarity.⁵¹⁸ Colin Dayan has argued that "legitimacy, security, and necessity" justifications for punishment do not

⁵¹³ Kansas Department of Corrections. "El Dorado Correctional Facility: Warden's Page." Available online at <http://www.doc.ks.gov/facilities/edcf/edcf-rdu> (last accessed 24 Feb. 2012).

⁵¹⁴ *Id.*

⁵¹⁵ Hallinan, Joseph T. *Going up the River: Travels in a Prison Nation* (New York: Random House, 2001): 127-28.

⁵¹⁶ Garland, *Culture of Control*, *supra* note 185: 142.

⁵¹⁷ Garland, *Culture of Control*, *supra* note 185: 9, 134.

⁵¹⁸ Emile Durkheim, *The Division of Labor in Society*, W.D. Halls, trans. (New York: Simon & Schuster, 1984).

merely co-exist with punitive justifications, but serve to actively mask the extent of the punitive action. For instance, Dayan notes that long-term solitary confinement is often “couched in euphemisms: first “disciplinary segregation,” and later “administrative segregation” (nominally based on security classifications rather than wrongdoing). Since prison officials claim that these units are non-punitive, they are difficult to fight under either the Eighth or the Fourteenth Amendment.”⁵¹⁹

As both Garland and Dayan suggest, the narrative of expressive punishment underlies many of the explanations and justifications the supermax designers provided, as they reflected on both the necessity for the supermax and how the institution had functioned over the last twenty years. In fact, these institutional entrepreneurs often simultaneously acknowledged and negated the potentially punitive nature of supermax conditions. For instance, in explaining the necessity for the supermax, Brown Larson, and Cambra talked about the violence in the department of corrections in the 1970s, vividly recalling, in particular, one specific, dangerous moment (George Jackson’s escape attempt from San Quentin), which they hoped to prevent in the future, by building supermaxes. The powerful resonance of this one example of violence, this single moment, in 1971, fifteen years before the supermax at Pelican Bay was even imagined, mentioned in conjunction with the purpose of the supermax, suggested implicitly that the supermax was necessary not just as a tool of security, but as a symbol of the retaliatory power and the potentially absolute control of correctional officials over defiant prisoners.

Cambra remembered that in August of 1971, just six months after he started working at San Quentin as a correctional officer, four officers were stabbed. In fact, he remembered that the stabbing took place on “Saturday, August 21.” So he remembered not only the exact date, but the day of the week. And he described the stabbings in graphic detail – “officers were cut ear-to-ear.”⁵²⁰ Similarly, Carl Larson remembered that, while he was the Associate Warden at Soledad Prison in the early 1970s, he saw “eleven staff members murdered ... [and] 54 staff members stabbed.”⁵²¹ Again, he remembered precise dates and numbers. Craig Brown, who was not working as a correctional officer in the CDC in the 1970s, was more vague, but he also cited “officers killed at the hands of inmates ... in the ‘70s”⁵²² as the reference point for the violence in the department of corrections that necessitated the supermax. None of these institutional entrepreneurs called the supermax a punitive response to George Jackson’s attempt to escape from San Quentin, or to the spike in violent deaths that took place in the CDC in the early 1970s. (See Figures 2 and 3 in Appendix B.) However, they did each reference these events and these deaths as characteristic of the violence that necessitated the supermax. Given the reality of violent death trends in the CDC in the late 1970s and early 1980s (i.e. consistent decline), this focus on the more distant and more violent past suggests that the supermax had not just a functional use to these administrators, as a tool of security, but a symbolic use, as an emblem of correctional re-assertions of control and power.

In other states, too, supermaxes are implicitly and explicitly associated, through various symbolic articulations, with violence against correctional officers. In Alabama, for instance, the prison containing the state’s supermax unit, was re-named Donaldson in 1990, after a prisoner

⁵¹⁹ Dayan, *supra* note 89: 9, 54.

⁵²⁰ Cambra interview, *supra* note 226.

⁵²¹ Larson interview, *supra* note 8.

⁵²² Brown interview, *supra* note 226.

stabbed and killed a correctional officer there.⁵²³ Similarly, in Massachusetts's, the state's modern supermax is named Souza-Baranowski, "in the memory of two correctional staff, Corrections Officer James Souza and Industrial Instructor Alfred Baranowski, who were killed at MCI Norfolk in 1972 during an aborted escape attempt by a convicted murderer."⁵²⁴

In California, even when correctional administrators acknowledged the supermax's punitive appearance, they sought to counteract this appearance by re-characterizing the supermax as a place of segregation, rather than punishment. Rich Kirkland, who directed the Pelican Bay construction project and then later worked as a warden in the institution, directly referenced the potentially punitive nature of the Pelican Bay supermax.⁵²⁵ Kirkland explained that, for correctional administrators, sending a prisoner to the supermax is akin to deploying tough love, "like when a parent says this hurts me more than it hurts you." Although this reads like a description of a punitive action and a punitive place, Kirkland clarified: "This [the supermax] isn't punishment. It's segregation ... to allow the rest of the inmates a statistically significant better chance to program ... it's part of what helps keep the lid on."⁵²⁶ The punishment-segregation distinction is one that international legal bodies have drawn, holding that long-term solitary confinement for punitive purposes rises to the level of torture, while long-term solitary confinement for safety-and-security purposes is acceptable in limited circumstances. Federal courts in America have also largely justified long-term solitary confinement as a safety-and-security necessity, rather than in punitive terms.⁵²⁷ Kirkland, then, was describing something apparently punitive, but identifying it instead as a safety-and-security measure.

The narrative of punishment, then, is a subtle one, but it exists in the structure of the justifications for the supermax, which the institutional entrepreneurs provided. The long chronology of their narrative justifications – referencing events that took place forty years before the interviews cited here, as well as the identification of specific incidences of violence, suggest an underlying punitive motivation for the supermax. Moreover, institutional actors, like Rich Kirkland, described the institution in explicitly punitive terms – parental "tough love," but re-characterized these descriptions as "segregation, not punishment."

The Pelican Bay SHU's Spartan cement cells, where prisoners are in long-term and total segregation from human contact, geographically isolated in the northernmost county in California, appear symbolic, communicating a clear message that violence against correctional officers will not be tolerated. Whether the institution is labeled "punitive" or something else, like "secure housing," "disciplinary segregation," or "administrative segregation," the very extremity of its conditions, at least historically, pushed the outer bounds of the Eighth Amendment

⁵²³ Slack, James D. "Chapter 5: The Real of Misery: Prison without Parole," in *Abortion, Execution, and the Consequences of Taking Life* (New Brunswick, NJ: Transaction Publishers, 2011): 135-176.

⁵²⁴ Massachusetts Department of Corrections, "Souza-Baranowski Correctional Center," available online at: <http://www.mass.gov/eopss/law-enforce-and-cj/prisons/doc-facilities/souza-baranowski-correctional-center.html> (last accessed 24 Feb. 2012).

⁵²⁵ Rich Kirkland was not working as a correctional officer in the Department of Corrections in the 1970s. Not surprisingly then, he did not reference the early 1970s spike in violent deaths in the CDC, or George Jackson's failed 1971 escape attempt.

⁵²⁶ Kirkland interview, *supra* note 95.

⁵²⁷ See U.N. General Assembly, *Convention Against Torture, Cruel, Inhuman and Degrading Treatment or Punishment*, 10 Dec. 1984. Entry into force 26 Jun. 1987, United Nations Treaty Series, Vol. 1465: 85, Article 16 (identifying solitary confinement inflicted for retributive, or punitive, purposes as a practice of torture, in violation of the treaty); see also Dayan, *supra* note 89: 23-33 (discussing a shift in federal courts from a focus on the prisoner and the conditions of his confinement to a focus on the imprisoner, and his intentions in implementing confinement).

prohibition against cruel and unusual *punishment*.⁵²⁸ The expressive punishment narrative, then, is another of the justificatory accounts underlying the supermax concept.

C. *The Narrative of Civilizing and Rehabilitating*

While institutional entrepreneurs justified the supermax as a necessary security measure, and implicitly acknowledged its expressively punitive functions, they also referenced the importance of maintaining humane conditions and of prioritizing prisoner rehabilitation throughout the California Department of Corrections. This emphasis on rehabilitation reflects a kind of old-school perspective on corrections, a holdover mentality from an earlier era with a commitment to the Rehabilitative Ideal, or penal welfarism, as Garland has labeled the prevailing correctional attitude of the mid-twentieth century.⁵²⁹ Specifically, as discussed in Chapter IV, Section A. California's First Prisons: From Exile to Rehabilitation and Back Again, 1850-1970A. California's First Prisons: From Exile to Rehabilitation and Back Again, 1850-1970, scholars identify the decades between the 1950s and 1970s as a Rehabilitative Era in corrections.⁵³⁰ During this period, correctional administrators and politicians alike focused on intervening in the lives of individual criminal defendants, improving their lives, and re-integrating them back into their communities. Punishment during this era, then, was an instrumental means to rehabilitation, rather than a purely retributive act. But by the mid-1980s, when Pelican Bay was designed and built, scholars were already commenting on the death of the Rehabilitative Ideal, allegedly precipitated by studies and journalistic accounts criticizing rehabilitative practices, like Robert Martinson's 1974 article "What works?" – often mistakenly referred to as the "nothing works" thesis – and Jessica Mitford's *Cruel and Usual Punishment* (1973).⁵³¹

Nonetheless, the ideal of rehabilitating, and even civilizing prisoners, lived on for the institutional entrepreneurs who designed the California supermax. As Elias has argued, the civilizing process involves seeing other people not as "individual[s] in isolation," but rather as individuals constituted by their contexts, "as a human being in his relation to others, as an individual in a social situation."⁵³² Indeed, the institutional entrepreneurs who designed the supermax persistently returned to the idea that the prisoners in the supermax were still human, and needed to be related to as such, even within the supermax context. For instance, Steve Cambra, who served as an early warden of Pelican Bay, said that when he took over management of the institution, one of the first things he said to the correctional officers working there was: "We're not going to play games with these guys ... You [officers] don't belong in lock-up if you

⁵²⁸ See, e.g., *In Re Medley*, 134 U.S. 160, 168 (1890). (finding that long-term solitary confinement constituted a severe punishment, and ordering the release of a death-sentenced prisoner, because he had been held in solitary confinement, in violation of the *ex post facto* clause).

⁵²⁹ Garland, *Culture of Control*, *supra* note 185: 34.

⁵³⁰ Garland, *Culture of Control*, *supra* note 185; Simon, *Poor Discipline*, *supra* note 190; Irwin, *Prisons in Turmoil*, *supra* note 236.

⁵³¹ For a discussion of the death of the rehabilitative ideal, see Garland, *Culture of Control*, *supra* note 185: 58. For the Martinson "nothing works" piece, see Robert Martinson, "What Works? – Questions and Answers About Prison Reform," *Public Interest*, Vol. 35 (1974): 22-54; Douglas Lipton, Robert Martinson, and Judith Wilks, *The Effectiveness of Correctional Treatment: A Survey of Treatment Evaluation Studies* (New York: Praeger, 1975). Finally, see Mitford, *supra* note 123.

⁵³² Norbert Elias, *The Civilizing Process*, Edmund Jephcott, trans. (Malden, MA: Blackwell Publishers Inc., 1939, 2000): 401.

ever stop looking at them [prisoners] as human beings.”⁵³³ Other institutional entrepreneurs referred not to the inherent humanity of the prisoners in the supermax, but to their frustration with supermax prisoners being treated as other than human. For instance, Carl Larson argued that as California’s prisons, and its supermaxes, have become increasingly overcrowded, the places have become more like zoos full of animals than like institutions full of people. Larson said: “Today ... there are two guys in every cell ... then the officers are afraid to talk to the inmates ... we’re running a zoo.” Larson expressed this frustration a few times – that keeping prisoners packed into their crowded cells was “like running a zoo,” or “managing monkeys.”⁵³⁴

Craig Brown was even more explicit in arguing that the supermax should not only treat prisoners as human beings, but also rehabilitate them, so that prisoners would leave the supermax as better, more well-adjusted people. Brown explained: “I don’t think any of us liked the idea of knowing inmates would be released from SHU [supermax] to the street ... The goal was they would mellow out ... get older ... go to a level IV general population.”⁵³⁵ Brown pointed out that, when the Pelican Bay supermax was designed, the institution had been directly adjoined with a general population (Level IV) prison, so that prisoners could be transferred into less restrictive conditions prior to being released onto parole and the streets. Brown’s acknowledgement of the importance of some kind of transitional process for prisoners leaving the supermax, coupled with his awareness that prisoners would need to transition from the supermax back into society, suggests he had a sense that supermaxes should, at the least, not be destructive to humanity.

When institutional entrepreneurs like Cambra, Larson, and Brown mentioned the need for supermax prisoners to be treated like human beings, and the hope that the institution would help to “mellow out” its occupants, they did so in the context of critiquing the shortcomings and failures of both the supermax at Pelican Bay and of the California Department of Corrections overall. In other words, they talked about civilizing and rehabilitating prisoners as things prisons and correctional departments *should* do, but also as things prisons and correctional departments *fail* to do. On the other hand, when they talked about the security narrative justifying the supermax, and referenced the potentially punitive nature of the institution, they were talking about the institution as they intended it to be, and they often asserted that the institution achieved its security and isolation purposes. (Recall Brown’s assertion that the supermax reduced prison violence, and Parry’s claim that the institution effectively isolated gang members from the security narrative section.)

Of course security, isolation, and expressive punishment are priorities that might well conflict with the priority of civilizing and rehabilitating prisoners. However, the institutional entrepreneurs, who designed the supermax, neither acknowledged this potential conflict, nor made any connection between the policies they implemented in the 1980s and the failures they identified in the 2000s. The civilizing and rehabilitating narrative, then, like the expressive punishment narrative and the security narrative, contains both contradictions internal to the narrative and external contradictions with the other two narratives.

The narrative of civilizing and rehabilitating co-exists with the other narratives of purpose in many states with supermaxes across the United States. For instance, correctional administrators in Massachusetts, which has a supermax symbolically named for two correctional

⁵³³ Cambra interview, *supra* note 226.

⁵³⁴ Larson interview, *supra* note 8. Larson emphasized that in using this phrasing, he meant to express frustration with policy implementation.

⁵³⁵ Brown interview, *supra* note 226.

employees who died at the hands of prisoners, also describe their supermax as a place where prisoners might have time to think, and, possibly, reform: “And now, at night, when they put their head on their pillow, they’ve got to be thinking, ‘I got myself in here, I made the choice on my own, and it was the stupidest thing I’ve ever done.’ And that’s what they don’t like.”⁵³⁶ Other supermaxes have explicitly been designed to work with prisoners to help them to “earn” their way into less restrictive housing situations. For instance, the Maryland Department of Corrections describes one of their supermax units as having “a structured program to aid participants in the development of life skills that will assist them in obtaining less restrictive housing and help to reduce violence.” The department emphasizes the rehabilitative and humanizing elements of this “program”: “The focus of this program is to teach cognitive, social and behavior skills while providing the participants the tools to succeed.”⁵³⁷ Similarly, the New Mexico Department of Corrections describes their supermax management philosophy, which involves providing additional privileges to prisoners who follow the strict supermax rules: “Management of such inmates will be based upon behaviorally based step programs, in which increased privileges are granted for inmates who demonstrate appropriate behavior for a specified period of time.”⁵³⁸ The rehabilitative narrative, then, seems to go hand-in-hand with the symbolically punitive and risk-management narratives, not just in California, but for supermax institutions across the United States.

These contradictory narratives contribute to the definitional problem, which renders the supermax difficult to identify, describe, and evaluate. If the purpose of the supermax is both to rehabilitate and punish, both to civilize and isolate, how can its success at achieving these competing goals be measured? The institutional entrepreneurs who designed the supermax did not articulate clear benchmarks – either as part of the institutional design process, or in reflecting back on the relative success of the institution they designed – by which the institution’s success should or could be measured. They did, however, level multiple criticisms about the institution’s failures. The next section explores these criticisms, and the way they actually seem to result from an inability to reconcile the variety of contradictory narratives of purpose the supermax designers have offered.

D. The Critical Reflections of Institutional Entrepreneurs

Larson’s critique of the way the supermax functions as “a zoo” was representative; the criticisms, broadly speaking, challenged the supermax’s failure to either civilize – in the sense of treating prisoners like human beings – or rehabilitate its occupants. A further exploration of the problems these institutional entrepreneurs identified with the supermax, then, will both provide further context for understanding the rehabilitative and civilizing narrative and also reiterate just how inherently contradictory the many competing goals of the supermax institution were and are.

⁵³⁶ Porter, Bruce. “Is Solitary Confinement Driving Charlie Chase Crazy?” *New York Times Magazine*, Nov. 8, 1998: 52.

⁵³⁷ Maryland Division of Correction. Annual Report: Fiscal Year 2010. Available online at: www.dpscs.state.md.us/publicinfo/publications/pdfs/DOC2010AnnualRpt.pdf (last accessed 24 Feb. 2012): 47.

⁵³⁸ New Mexico Corrections Department. “Prisons: Penitentiary of New Mexico.” Available online at: <http://corrections.state.nm.us/prisons/pnm.html> (last accessed 2 Mar. 2012). *See also* Wisconsin Department of Corrections. “Wisconsin Secure Program Facility.” Available online at: <http://www.wi-doc.com/WSPF.htm> (last accessed 28 Feb. 2012). Also FY 2010 Annual Report. Available online at: www.wi-doc.com/FY10%20WSPF%20Annual%20Report.pdf (last accessed 28 Feb. 2012).

Correctional administrators – both those who were involved in the design of Pelican Bay and those who later helped to run the institution – identified (1) errors in judgment in running the supermax institution in its early years, as well as (2) current operational policies, which contradict their original design intentions. The errors these correctional administrators identified often related to their frustrations with the absence of a rehabilitative or civilizing ideal anywhere in the Department of Corrections. (Chapter VIII provides a quantitative analysis of how California’s supermaxes have functioned over the last twenty years, integrated with these correctional administrators’ critiques.) For now, this section focuses on the articulation of the critiques and how these critiques relate to the justifications for the supermax institution and to the fundamental ambivalences of the institution’s correctional designers, including both correctional administrators and architects, about the institution’s purpose.

Carl Larson was particularly articulate in expressing his two main critiques with operational policies at Pelican Bay and within the state Department of Corrections overall. Larson described two common correctional practices in the 2000s, which directly contradicted the principles on which he said he designed new prisons, like Pelican Bay, in California in the 1980s. First, Larson argued that Pelican Bay, like many institutions in the California Department of Corrections, was too overcrowded to be run well. Overcrowded prisons, in turn, Larson argued often make correctional officers afraid to interact with prisoners, because the correctional officers feel outnumbered, or like the institution is out of their control. Second, Larson argued that the CDC as a whole tended towards keeping people locked in their cells twenty-four hours a day, rather than providing programming in the form of education or treatment or work, for prisoners capable of participating in these activities. Surprisingly, Larson did not explicitly link these two criticisms to the existence of Pelican Bay and its permanent institutionalization of the very policies he criticized elsewhere in the system. Fundamentally, Larson envisioned the idea of the supermax as something that could be contained and limited to the 1,056 supermax cells he designed and built at Pelican Bay State prison. In practice, the supermax concept was neither so easily limited, nor so easily controlled.

In terms of overcrowding, Larson described how carefully he adhered to American Correctional Association principles governing both ideal cell sizes and ideal numbers of prisoners to house together in self-contained units. Larson explained that he designed Pelican Bay (as he designed many of California’s new prisons in the 1980s and 1990s) to have a specific amount of space allotted to each prisoner, and to house a specific number of prisoners together in strategically-designed pods, under the supervision of a specific number of engaged guards. However, Larson complained, California’s prisons, including the state’s supermaxes, have since become overcrowded. Because of this overcrowding, both the space allotments Larson designed and the prisoner-to-staff ratios he calculated have been largely ignored or superseded. And this, Larson argued, has created a place less akin to a human institution and more akin to a zoo.⁵³⁹ So Larson articulated first a legitimate frustration with prison cells designed for one prisoner being used to house two prisoners, or with prison cellblocks designed to house a total of eight prisoners being used to house sixteen. But then he argued that this overcrowding leads to officers being “afraid to talk to inmates” in increasingly overcrowded cells. However, this critique fails to acknowledge the explicit original purpose of the supermax design: to physically institutionalize minimal contact between prisoners and staff. The architect who designed the first supermax in Arizona and who consulted on the Pelican Bay replication of the Arizona model, explained that the challenge of his first supermax project was “to come up with a configuration that would keep

⁵³⁹ Larson interview, *supra* note 8.

[prisoners] separated, not have to inject our staff every time they have to go to a shower, to go to [get] food.” The design he ultimately implemented did just this: “It allowed us to put an inmate in his cell, ... and [allowed] a time to go [to] exercise, and ... get those guys through a daily routine never requiring two inmates in the room at the same time. We cut the staff ration to 1:4, instead of 1:1. That’s what impressed California.”⁵⁴⁰ Interestingly, the Arizona architect expressed a criticism directly opposite to Larson’s; he said that although the supermax was designed to obviate the need for any guard-on-prisoner contact, in practice, correctional officers do engage with prisoners, escorting them from place-to-place and interacting with them on a more regular basis.

This lack of acknowledgement of the relationship between the core principles of the supermax design – “getting those guys through a daily routine never requiring two inmates in the room at the same time” – and the resulting complete lack of human contact between prisoners and minimal contact between prisoners and officers was pervasive among correctional administrators interviewed. For instance, Dave Runnels, who served as the warden of a high-security prison in California in the 1990s and then as Undersecretary of Corrections in California in the 2000s, described one of the central problems with the state’s Department of Corrections in the 2000’s as “the absence of a key.” Runnels explained that prisons designed with automatic cell doors, which can be opened via a button in a central control tower, obviate the need for correctional officers to stand at the cell-front and communicate with the prisoners as individual human beings. Runnels explained that, in the supermax unit, which eventually opened in High Desert State Prison, where he served as warden in the 1990s, he “required floor cops to be present at the cell door when it opened. Even in the SHU [supermax unit], [officers] should be at the door, interacting ... You [correctional officers] get paid to talk to inmates ... the taxpayers of California don’t owe you a job.”⁵⁴¹ In this case, Runnels articulated a specific criticism of the supermax design, which he attempted to overcome through implementing a policy requiring correctional officers to interact with prisoners.

So the first two criticisms leveled against the supermax involved the increasing overcrowding in the institution, and the absence of interaction between prisoners and correctional officers within supermaxes and within the department of corrections as a whole. Ironically, the critique of the absence of interactions seems like a critique of the fundamental design of the institution. This critique, in fact, illuminates just how contradictory the various purposes and justifications for the supermax were. Security might require a complete absence of contact between prisoners and correctional officers, but rehabilitating and civilizing, or treating prisoners like human beings in context, requires some form of human interaction. While the supermax’s institutional entrepreneurs did not always use the language of human rights, or even of civilizing and rehabilitating, they implied again and again that every human institution requires a basic level of minimum, humanizing conditions, whether through providing adequate space for prisoners, or by insuring that prisoners have some form of day-to-day human contact with their keepers.

A third criticism leveled against the supermax similarly implicated rehabilitative and civilizing ideals. A number of the supermax’s institutional entrepreneurs criticized the institution for either failing to prepare prisoners to re-enter society, or for releasing supermax prisoners directly onto parole, without providing a transitional period of less restrictive

⁵⁴⁰ Justice architect (Arizona) interview, *supra* note 9.

⁵⁴¹ Dave Runnels (assistant to court-appointed special master in Plata case; former warden of high-security facility, High Desert State Prison), interview with author, Sacramento, CA, Sept. 1, 2010, notes on file with author.

imprisonment between the supermax and the streets. Both critiques implicitly acknowledge the potential for the supermax conditions to be detrimental to individual prisoners' well-being and the idea that prison time should at least avoid making prisoners worse off, if not actually rehabilitate them. Dave Runnels, for instance, explicitly acknowledged and took responsibility, on behalf of the California Department of Corrections, for the frequent deterioration in mental health of supermax prisoners:

*And we wonder why people go insane and why people get so frustrated that they beat the shit out of the cell door. We created them. If it's that bad in the SHU [supermax], think about how it migrates down ... You lock him up for seven years, call him a mushroom, and then give him a bus ticket.*⁵⁴²

Runnels' reference to giving supermax prisoners "a bus ticket" references the fact that prisoners are sometimes released directly from the extremely restrictive conditions of supermax confinement onto parole, and the streets. Steve Cambra echoed Runnels' frustration with the idea of releasing prisoners directly from the supermax onto the streets: "Guys getting on a Greyhound bus from Pelican Bay: now that's crazy."⁵⁴³

Each of these institutional entrepreneurs explicitly acknowledged that something in the conditions of the supermax was so extreme that the institution made its inhabitants decreasingly able to function in general society. They argued that releasing a prisoner directly from a supermax into general society was, at best bad policy – "crazy," as Cambra said, and at worst dangerous – with people "beat[ing] the shit out of cell doors," as Runnels said. Although these correctional administrators criticized policies that allowed this sort of release to happen, they stopped short of directly criticizing the underlying institutional structure of the supermax. However, their comments strongly imply that the institutional structure of the supermax makes people into "mushrooms," or into people too dangerous to release back into society, even once their criminal sentence has expired.

But even within these justificatory accounts, which assert that prisoners need to be treated humanely, and should, potentially, even be rehabilitated, there are internal, logical conflicts. For instance, Craig Brown said he did not like the idea of releasing prisoners directly from the supermax onto the street; this discomfort strongly implies that Brown thought prisoners who had spent time in the supermax might have become less well-adjusted, or more dangerous as a result of their supermax incarceration. But, Brown also asserted earlier in the conversation that he did not think supermaxes caused mental illness, and he thought more research was needed to evaluate this question. At some points then, Brown demanded more evidence, while at other points he either presumed the evidence existed, or ignored the existing evidence. For Brown, there are conflicts between the competing goals of (1) ensuring institutional security and (2) civilizing or rehabilitating individuals. There are also conflicts between the initially stated goals for the supermax institution – to provide transitional programs between the supermax and the street – and the on-the-ground reality of the institution. In fact, the very first prisoners transferred to the supermax at Pelican Bay, when the institution opened in 1989, were prisoners who had been identified as gang members and who had already been assigned to solitary confinement conditions for the duration of their confinement.⁵⁴⁴ Many of these prisoners were serving

⁵⁴² Runnels interview, *supra* note 541.

⁵⁴³ Cambra interview, *supra* note 226.

⁵⁴⁴ J.E. interview (former Central California Correctional Institution, Tehachapi prisoner), author's interview, San Francisco, CA, Dec. 10, 2010, transcript on file with author; B.M. interview (former Pelican Bay prisoner), author's phone interview, Feb. 6, 2011, transcript on file with author.

criminal sentences of a fixed term of years (as opposed to life sentences), and they had been assigned to indefinite isolation terms. So, on the day Pelican Bay State Prison opened, at least some of the prisoners there were scheduled to be released directly from solitary confinement, upon the expiration of their criminal sentences.

The architects who worked with correctional administrators like Brown and Larson to design Pelican Bay articulated a similar mix of justificatory accounts of the supermax. The architects, like Larson, Brown and Runnels, referenced the importance of rehabilitating and civilizing ideals and criticized the supermax of 2010 for failing to achieve rehabilitative and civilizing goals. At the same time, however, the architects, much like Larson and Brown, failed to acknowledge that the supermax had been designed such that achievement of these civilizing and rehabilitative goals would never be possible. For instance, the California and Arizona architects expressed frustration that the California supermax had been used to house gang members in solitary confinement for extended, indefinite periods of time. Both argued that the facilities were not intended for this kind of purpose. The Arizona architect said he worried about using the supermax design to isolate gang members: “Gang leaders is the worst case [of possible uses]. They’re [trying] to use it to isolate gang leaders. It’s maybe just too harsh of an environment [for them].” And later, the Arizona architect said: “I’m not sure ... that’s the right building for that type of person ... Sometimes I wonder if I ever should’ve done that.”⁵⁴⁵ The California architect agreed with the Arizona architect that housing gang members, indefinitely, in supermax conditions, was potentially problematic. “They have started using the unit as a gang disruption unit ... as an incentive for gang members to squeal ... that part of the equation was inappropriate.”⁵⁴⁶ Interestingly, of course, the correctional administrators who collaborated with these architects to design the supermax were well aware that it would be used to control gangs. Recall Larson’s comment about the racial unrest that motivated him to want to build a supermax in the first place in the 1970s. And recall Parry’s mention of the supermaxes as an explicit tool to control gangs. Indeed, by 1986, when Pelican Bay was first conceptualized, the California Department of Corrections had already instituted the practice of keeping prisoners, especially those associated with gangs, in total segregation for extended periods of time. (See Chapter IV, Section D. Correctional Assertions of Power and Limitless Lockdowns, 1980-85.)

In addition to expressing frustration with how California had used the supermax model, to house gang leaders in indefinite isolation, the supermax architects described how they thought the institution had the potential to be a mechanism for rehabilitation. For instance, the Arizona architect, who consulted on California’s Pelican Bay design project, argued that Arizona’s supermax worked better than California’s because of a commitment to the idea of rehabilitating prisoners. In Arizona, the architect explained, correctional administrators removed privileges from prisoners in the supermax, for indeterminate periods, but they also gave prisoners “the chance to earn those privileges, those rights back by behavior.” In California, by contrast, correctional administrators often assigned prisoners to the supermax for a fixed period of time, taking away any reason these prisoners had “to change their behavior,” because the Arizona architect explained, imagining the California prisoner’s mindset: “When I’m out, I’m out.”⁵⁴⁷ So the Arizona architect saw the ideal supermax as a tool of rehabilitation, to encourage prisoners to improve their behavior, by gradually rewarding them with greater privileges. And he criticized the California Department of Corrections for failing to use the supermax as this kind of

⁵⁴⁵ Justice architect (Arizona) interview, *supra* note 9.

⁵⁴⁶ Justice architect (California) interview, Aug. 4, 2010, *supra* note 437.

⁵⁴⁷ Justice architect (Arizona) interview, *supra* note 9.

rehabilitative tool. The California architect expressed a similarly rehabilitative sentiment, explaining that the supermax design process allowed architects to collaborate with correctional administrators to make humanitarian design decisions:

People often ask us as individuals politically and socially about the work we do ... It's not an unusual question. The logical answer: 'Somebody's going to do it, so we might as well do it.' I don't think that's the way we look at it. This is an area where we can do it better, from a humanitarian perspective, than other architects. We look at it as [if] each facility is an opportunity to improve the system ... We kind of look at it as ... I think anyone who does this kind of work and is committed to it over the years ... and there aren't many of us ... one is, we probably have a basic belief that you need a correctional system of some form, [and] what shape that will take is partly influenced by us as individuals. After that we say, well now that we are in it, how can we improve it? The people I work with, I think are pretty solidly committed to, as we are able, re-vamping the system to make it a better and better system (emphasis added).⁵⁴⁸

In other words, this California architect saw his role as essentially creating the most civilized environment possible – improving departments of corrections, bringing a “humanitarian perspective” to design, and making “better and better” systems. Like the other institutional entrepreneurs, who collaborated to design the supermax, he saw his role as one of making the best system possible. The “best” system however, is an ambiguous concept, composed of multiple competing purposes from efficiency and security and expressive punishment to civilizing and rehabilitating.

As these institutional entrepreneurs, including both correctional administrators and architects, reflected back on what they designed, they expressed frustrations with the shortcomings of the institutional design, which became overcrowded, distanced prisoners from correctional administrators, allowed dangerous prisoners to be released directly back into society, and maintained prisoners in long-term isolation based solely on their gang member status. Many of these criticisms, however, could have been predicted. After all, these so-called design flaws were built into the physical and procedural frameworks of the supermax institution. The institution sought to create rigid barriers between prisoners and correctional administrators and was designed to systematize a practice of permanently isolating known gang members from the rest of the prison population, meaning that it lacked a rehabilitative ideal and was likely to result in releasing these people directly from solitary confinement onto parole upon the expiration of their criminal sentences.

The fact that the institutional entrepreneurs nonetheless leveled these somewhat predictable criticisms at the supermax institution suggests two important conclusions. First, the institutional entrepreneurs invested in providing legitimate justificatory accounts for the institution, and so they reference a variety of explanations for why extreme punishments might be necessary, from the need for security, to the need to rehabilitate. Second the supermax institution had contradictory purposes from its initiation, and these contradictory, never reconciled purposes, have made the institution particularly hard to define and its benefits and detriments difficult to assess.

⁵⁴⁸ Justice architect (California) interview, Aug. 14, 2010 *supra* note 437.

E. Definitional Problems Re-Visited

The conflicting institutional logics of security, punishment, and rehabilitation, in the end, produce a fundamental inability to either describe or define the supermax. In some cases, the supermax's institutional entrepreneurs explain that the institution exists to promote security; in other cases, they explain it exists to rehabilitate and civilize its occupants. The same correctional administrators argue that the supermax *has* reduced violence in the Department of Corrections and that more information is needed to know *whether* reductions in violence have actually occurred. Corrections administrators describe the institution as a way to isolate gang members, and “the worst of the worst,” indefinitely, but these same administrators also argue that there should be “a way out” of the supermax and that there should be transitional programs to help prisoners move from the supermax to the general prison population and, eventually, back into our communities. Given these competing narratives about the purpose, uses, and success of the supermax, the problems with defining the institution seem both less surprising and more fundamental. In other words, the problems with defining the supermax are not simply about negotiating the proper words with which to brand the institution; the problems are also about negotiating competing concepts to explain and justify the institution. This section picks up the thread from Chapter II, Section C. Is solitary confinement the defining characteristic of supermaxes?, which explored the definitional negotiations over the terms “solitary confinement and “sensory deprivation” and explores two more recent linguistic negotiations. First, the section discusses the frequent comparisons between supermax prisoners and animals, which correctional administrators referenced in reflecting about the supermax. Second, the section discusses the concept of the “therapeutic treatment module.”

1. Monkeys, Tunas, Mushrooms, and Zoos

Of note in this chapter is not just the logic of the institutional entrepreneurs, but also the language they chose to describe prisoners and conditions in the supermax. Correctional administrators, in designing and later in managing California's supermaxes, consistently used analogies to the animal kingdom to both describe and justify the situation in the supermaxes. Larson referred to “the zoo” and “monkeys.”⁵⁴⁹ Kirkland referred to the process of assigning prisoners to supermaxes as akin to the process of separating tuna from dolphins: “Sometimes when you're going out there to catch tuna, you get dolphin ... [so we must always ask ourselves:] ‘Did we get tuna?’ ... If we get a dolphin, or a mix, then maybe there's something in between [the supermax and general population] ... [and we must re-assess:] Did we choose well?”⁵⁵⁰ Runnels talked about how prisoners who leave the supermax are “mushrooms”⁵⁵¹ – implying that they are literally flattened and grey.

This language is notable for a few reasons. First, it implicitly critiques the supermax institution, describing it in negative terms, as a place that seems to be a zoo, or a place that sometimes mistakenly captures dolphins along with its tuna. Second, the language reveals ambivalence about the institution, clearly articulating the way in which it is potentially dehumanizing without saying so in explicit terms. Even though these correctional administrators seemed to want to avoid terms with potentially negative connotations, like “solitary

⁵⁴⁹ Larson interview, *supra* note 8.

⁵⁵⁰ Kirkland interview, *supra* note 95.

⁵⁵¹ Runnels interview, *supra* note 541.

confinement” or “sensory deprivation,” they are still willing to describe the ways in which the supermax institution is potentially de-humanizing, and even imperfect at achieving its goals. Third, the language is notable for what it fails to describe: the connection between the design of the supermax institution, or the conditions therein, and the resulting problems in operating the institution. The richness of the language reflects the complexity of the competing logics, which render the supermax institution difficult to define and its purposes mysterious.

In sum, while institutional entrepreneurs justified the supermax initially as a necessary response to safety and efficiency concerns, and, on some occasions, at least implicitly acknowledged its punitive nature, they also expressed disappointment, looking back on the institution they designed, with some of its failures. These failures were largely failures of rehabilitation and failures to provide basically civilized environments, even if these goals seemed apparently impossible to achieve, based on the original supermax design. Among these failures, correctional administrators identified problems with: overcrowding, excessive limitations on contact between staff and prisoners, the practice of releasing prisoners directly from the supermax onto parole, and the ways the supermax was used to house gang members indefinitely, without a rehabilitative agenda. These policy critiques, in turn, suggest (a) just how much power and responsibility correctional administrators had in the supermax design process, (b) how little they knew about what the actual impacts of the institution would be when it was designed, and (c) and how far the institution has diverged from their claimed original intentions.

2. Therapeutic Treatment Modules or Cages?

As discussed in Chapter II, Section C. Is solitary confinement the defining characteristic of supermaxes?, correctional administrators and prison architects in some cases refused to use specific terms, like sensory deprivation, to identify the facilities they designed, implemented and worked in. In other cases, these policy-makers and experts carefully used terms that echoed the language of courts that had found supermaxes to be constitutional under specific conditions. In still other cases, these key informants coined their own terms to describe the conditions in supermaxes and used these terms insistently, even where the terms obscured the actual nature of the thing being described. The most notable example of this is the term “therapeutic treatment module.”

In the supermax, if a prisoner needs to interact with a staff member or service provider for an extended period of time, he is sometimes placed in a vertical, phone-booth-shaped vestibule, made of fencing materials, and placed on wheels. The prisoner can stand, or lean against a ledge in this structure, and he can be wheeled from place to place. For instance, a supermax prisoner might need to see a psychological counselor in private, or he might need to attend a hearing to determine whether he has committed a violation of prison rules, or, in some rare cases, he may be permitted to participate in a group program, like addiction treatment. In all of these cases, the supermax prisoner would be placed in one of these vestibules, and wheeled to the appropriate place. The vestibule, the logic goes, allows the prisoner to move about free of leg and handcuff restraints, while protecting any staff member interacting with the prisoner from actually having to be in contact with the dangerous person. The vestibule is in fact, reminiscent of a “cage,” which the Oxford English Dictionary defines as “a structure of bars or wires in which birds or other animals are confined,” and figuratively, as “a prison cell or camp.”⁵⁵²

⁵⁵² “Cage,” *Oxford English Dictionary*, 3rd ed. (New York: Oxford University Press, 2006, online version Mar. 2012), available online at: <http://www.oed.com/view/Entry/249168> (last accessed 15 Apr. 2012).

However, calling the object a “cage” in a correctional administration context is a politically incorrect faux-pas, to say the least.

One psychologist, Dr. E., who worked at Pelican Bay State Prison from 1995 to 2000 and continues to work in long-term solitary confinement units in California, described how the therapeutic treatment module had become popular in recent years. She described the module as a “small, self-contained room.”

Being an engaged listener, I commented: “I think I have seen a picture of those – the portable cages?”

She replied, quickly and forcefully: “They are not cages. They have room for a desk and a chair and sound control.”⁵⁵³

This exchange is not representative, however, of a psychologist who had prioritized a custodial mindset over a treatment mindset, or who was viewing her patients as prisoners rather than people. Indeed, this particular psychologist was especially empathetic to prisoners, pointing out that, contrary to popular correctional lore, prisoners rarely feign mental illness or pretend to be suicidal. In her estimation no more than one percent of the prison population would threaten suicide to be manipulative: “I don’t think people really say they are going to commit suicide unless that’s really an option for them.” This psychologist even freely used the term “sensory deprivation” to define the conditions at Pelican Bay State Prison, where she described prisoners who had “no windows, so there was no signaling or communicating with people outside ... [and] the cells don’t face anything, they face a wall.”⁵⁵⁴ This particular psychologist, then, was sensitive to what she felt were inaccurate correctional claims that prisoners exaggerate their mental health problems, and she was comfortable describing the Pelican Bay supermax as a place that created sensory deprivation. Yet she insisted on using the euphemistic term “therapeutic treatment module” to describe the cage-like structures from which supermax prisoners receive mental health care.

Of the five California SHU psychologists interviewed, only one used the term “cage” to describe the “therapeutic treatment modules.” Dr. B., who had worked for the California Department of Corrections and Rehabilitation for eight years, and in one of the state’s supermaxes for two years, said that she sees her clients in “what we are told to call a therapeutic treatment module, but it’s a cage.” Dr. B. said, in reference to the terminology “and we do reality testing,” referencing the fact that she is supposed to use a euphemism like “therapeutic treatment module,” at the same time she would see use of reality-avoidant language like this as a symptom of a mental health problem in a patient. Even despite her frustration with the allegedly euphemistic term therapeutic treatment module, Dr. B. said, “The cages ... it gives us privacy, and that’s the most important thing ... It gives you security ... The cages [are] offensive as they are work[able]. They’re the best option. And they get their handcuffs off, because handcuffs are very uncomfortable.”⁵⁵⁵ In other words, Dr. B. highlighted the negotiation over the proper terminology for what she called cages, but she also acknowledged that the vestibules provide security and some measure of both privacy and comfort to her patients. So she explicitly acknowledged both how the cages are at the intersection of the competing goals of the supermax, and how the terminological debate captures these competing goals.

⁵⁵³ Dr. E. (California Department of Corrections and Rehabilitation psychologist), phone interview with author, Jul. 27, 2010, notes on file with author.

⁵⁵⁴ *Id.*

⁵⁵⁵ Dr. B. (California Department of Corrections and Rehabilitation psychologist), author’s phone interview, Aug. 29, 2010, notes on file with author.

A newspaper interview with the psychiatrist who designed the therapeutic treatment module perhaps explains why the Pelican Bay psychologist above was so insistent in using the term therapeutic treatment module. Jeffrey Metzner, who was appointed in the early 1990s to oversee mental health care in the Pelican Bay supermax, following a lawsuit about the lack of mental health treatment there, told the *Los Angeles Times*: “the enclosures offer better security and more freedom of movement than alternatives used in most states, which include handcuffing patients to their chairs or shackling an ankle to the floor. Once the inmates are inside the cage, their handcuffs are removed.” Moreover, Metzner highlighted the importance of the (euphemistic) name: “The name is important, because if you call them cages, people inside might feel like animals and respond accordingly.”⁵⁵⁶ In sum, the therapeutic treatment modules represent a compromise: a way to provide mental health treatment while addressing correctional security concerns. Importantly, to psychologists, like Dr. E., who helped to open the first psychological services unit for supermax prisoners, the therapeutic treatment modules represent a step forward, towards better mental health care.

On a meta-level, however, the therapeutic treatment modules also represent the ongoing discursive negotiation that is fundamental to the supermax concept. Even in 2010, twenty-four years after the institutional entrepreneurs first conceptualized the supermax, the people working in and managing the institutions were negotiating over the precise terms by which conditions in the institutions would be described. The negotiation, like the institution itself, reflects an attempt to navigate competing logics of security (keeping prisoners isolated and contained) and rehabilitation (ensuring that people are not treated like animals and do receive mental health care).

* * *

The subsequent chapters examine the relationship between these competing purposes for the supermax and the operation of the institutions in the last twenty years. Specifically, the next chapter examines how supermaxes have operated in California in the last twenty years, and how the operation of the institutions compares to the expectations of the designers. The subsequent chapters examine how courts have examined the question of the supermax’s purpose, and how correctional administrators have engaged with court examinations and interventions.

⁵⁵⁶ Jack Dolan, “California prisons’ use of cages questioned,” *Los Angeles Times*, Dec. 29, 2010.

VIII. Parole, Snitch, Or Die Holding and Release of California's Supermax Prisons and Prisoners, 1987-2007

Recall that prisoners are not sentenced by a court of law to supermax prisons, nor are they usually sent to supermaxes as a result of an initial classification of dangerousness. Rather, supermaxes are designed to hold prisoners who cannot be controlled in the general population of a state prison system, prisoners whom correctional officials assign, after an administrative hearing, to supermaximum, deprivation conditions. (This is part (2) of the working supermax definition, described in Chapter II, Section E. Re-Defining the Supermax.) However, supermaxes do not hold prisoners forever. Because placement in supermax prisons is based on in-prison behavior, or in-prison determinations of gang status, such placement usually has no effect either on a prisoner's initial sentence or on the prisoner's overall time-served. Indeed, just as with 97 percent of the prisoners across the United States, many supermax prisoners are eventually released from prison.⁵⁵⁷ This chapter focuses on this process of supermax release, examining how prisoners move into, through, and out of supermax prisons, in California.

In California, an average of 75 prisoners per month are released directly from their supermax cells onto parole, returned to the county from which they were originally sentenced. This means that in any given year in California, almost 40 percent of the state's total supermax population is released directly from supermaxes onto parole. Who are these prisoners? How long have they spent confined in supermax conditions? How often do they return to prison, or to supermaxes? What are their racial backgrounds? How do these supermax populations and supermax parolees compare to general prison populations and to overall parolee populations? And, finally, do supermaxes today operate the way their builders intended them to operate, in terms of who is incarcerated and for how long? The analysis in this chapter reveals that supermaxes detain more people, for longer periods than intended, and release them directly back onto the streets. California's two supermaxes, then, represent an important case study for assessing the impacts of supermax confinement and for understanding how and when criminal justice practice departs from intent.

⁵⁵⁷ The 97 percent figure is based on my own calculation: adding the number of people sentenced to death in the United States (3,305) and the number of people sentenced to life without the possibility of parole (41,095) together, and dividing by the number of sentenced people currently in state or federal prison (1,540,805), to get a percentage of people who will never be released: 2.88 percent. *Sourcebook of Criminal Justice Statistics Online* (Washington, D.C.: Bureau of Justice Statistics, 2009), available online at: <http://www.albany.edu/sourcebook/pdf/t6802009.pdf> (last accessed 16 Dec. 2010); Ashley Nellis and Ryan S. King, *No Exit: The Expanding Use of Life Sentences in America* (Washington, D.C.: The Sentencing Project, 2009), available online at: http://www.sentencingproject.org/doc/publications/publications/inc_noexitseptember2009.pdf (last accessed 16 Dec. 2010); West and Sabol, *supra* note 217. Similarly, the number of people sentenced to death in California (678) plus the number of people sentenced to life without the possibility of parole (3,679) divided by the number of sentenced people in prison in California (173,320) produces 2.51 percent, slightly lower than the national percentage of people who will never be released from prison. *Id.* Of course, in some states, including California, life *with* parole terms can turn into de facto life without parole terms if especially conservative parole boards refuse to release parole-eligible prisoners; however, the potential for release, especially for older or terminally ill prisoners, remains a possibility, so these "lifers," who make up 20 percent of California's prison population, are not included in the calculation of people who will never be released. Solomon Moore, "Number of Life Terms Hits Record," *New York Times*, Jul. 22, 2009. Joan Petersilia uses a similar calculation in her book *When Prisoners Come Home* (New York: Oxford University Press, 2003).

The first section of this chapter provides background information about how prisoners, and in particular supermax prisoners, leave supermaxes in California, by paroling, by snitching, or by dying. The second sections explore how supermaxes were designed to function in the 1980s, and the third section describes how prisoners enter supermaxes. Subsequent sections examine new data obtained from an information request to the California Department of Corrections and Rehabilitation. This data includes: (1) overall supermax populations, (2) duration of supermax confinement, (3) racial demographics of supermax prisoners, (4) supermax release data, and (5) supermax recidivism data. The findings in these sections constitute descriptive data about how many people are being released from the California supermaxes, with what frequency, and after what duration of stay. In addition, the data reveal a decade's worth of trends in these descriptive statistics. While this is fairly basic information, it is information that has, until now, been unavailable. It sheds light on exactly who has been in supermaxes over the last ten years and exactly how the supermaxes have been functioning. The final two sections of this chapter summarize the mismatch between the intended operation of supermaxes and their practical operation, delineate the shortcomings in the data analyzed and suggestions for directions for future research.

A. Paroling (and Snitching and Dying)

Just as scholars in the early 1990s studied the United States' incarceration and prison building boom, so, in the last few years, have scholars turned to one of the most significant long term effects of this boom: the hundreds of thousands of people in the United States who are now being released annually from prison. An obvious, but until recently, overlooked corollary of our prison policies is that most people sentenced to prison will eventually be released from prison. Although sentence lengths have increased steadily with the incarceration expansion, the percentage of people in the United States being sentenced to death or life without the possibility of parole is still well under five percent of all those sentenced to prison. An additional seven percent of the prison population is serving life sentences *with* the possibility of parole.⁵⁵⁸ The vast majority of the two million people currently in prison in the United States are, thus, serving sentences shorter than life and will eventually be released from prison.

In the United States, as of January of 2007, there were almost 800,000 people on parole, with over one-half-million people entering the parole system annually.⁵⁵⁹ The state of California is the most significant contributor to this national parole population. There are 120,000 parolees at any given time in California; this is 15 percent of all parolees in the United States.⁵⁶⁰ Petersilia

⁵⁵⁸ *See id.*

⁵⁵⁹ Lauren E. Glaze and Thomas P. Bonczar, "Statistical Tables," *Probation and Parole in the United States, 2007*, NCJ-224707 (Washington, D.C.: Bureau of Justice Statistics, Aug 2009), available online at: <http://www.ojp.usdoj.gov/bjs/pub/pdf/ppus07st.pdf> (last accessed 17 Feb. 2010). Unfortunately, accurate data about average lengths of parole terms is not readily available through the National Bureau of Justice Statistics.

⁵⁶⁰ Ryken Grattet, Joan Petersilia, and Jeffrey Lin, *Parole Violations and Revocations in California* (Washington, D.C.: U.S. Department of Justice, Oct. 13, 2008). By comparison, California's overall state prison population accounts for just 11 percent of the United States' total federal and state prison population. In California, the combination of a mandatory three-years of parole for all prison releasees and rigidly enforced rules for behavior on release, contribute to a relatively large number of parolees as well as to higher incarceration rates in the state. Specifically, when a California parolee (which includes everyone released from prison in the state over the past three years) violates a condition of his or her parole, he or she participates in an administrative hearing, rather than a criminal court adjudication. This administrative process often bypasses many of the procedural protections of a

has done extensive work nationally and in California describing the demographics of parolees, who largely reflect the demographics of prisoners: minorities, the undereducated, and the mentally ill are all over-represented with respect to the general state population.⁵⁶¹ And Mauer and others have argued for attention to collateral consequences: administrative policies not officially part of a prison sentence, which nonetheless prevent released prisoners from successful re-integration into society, such as limitations on welfare and education access for drug offenders, or disenfranchisement of those with criminal records.⁵⁶²

Despite the research focus on understanding the scale, demographics, and mechanisms of the parole population in the United States in general and California in particular, little attention has been paid to the release of prisoners from supermax prisons. Only one recent article has addressed the recidivism rates of prisoners released from Florida supermaxes, by comparing them to matched groups of prisoners who had not spent time in a supermax; the researchers found no evidence that supermax prisoners were any more likely than other prisoners to be violent recidivists.⁵⁶³ This lack of attention to supermax releasees might reflect the inaccurate assumption that, because the prisoners in supermaxes are the “worst of the worst,” they are never released from prison. Even those prisoners serving long or indefinite terms in supermaxes eventually parole, however, upon the expiration of their criminal sentences.

Supermax releasees, much like supermax prisoners within overall prison populations, are not often looked at as a separate demographic within parole populations. Just as supermax prisons are important to understanding exactly how America’s prison building boom has taken shape, so supermax releasees are an important and under-studied segment of the population of people released from prison in the United States. Moreover, given (1) the allegation that these prisoners are “the worst of the worst,” who could not adjust to life within prison, and (2) the conditions of supermax confinement – conditions documented to cause a variety of health and psychological problems⁵⁶⁴ – supermax parolees are likely to face additional barriers to successful reintegration into their communities beyond the usual collateral consequences of having a criminal record. Are prisoners released from supermax prisons demographically similar to those released from the general prison population? How much time have they spent in prison? How likely are they to return to prison, and to supermaxes?⁵⁶⁵

In California, well over 1,000 people are detained in supermaxes for indefinite (rather than fixed) terms, because the Department of Corrections has “validated” them as dangerous

criminal trial and results in the parolee being re-incarcerated, and serving some portion of the three-year “parole” term in prison. *Id.*

⁵⁶¹ Petersilia, *When Prisoners Come Home*, *supra* note 557.

⁵⁶² Mauer and Chesney-Lind, *supra* note 195; Ryan S. King, *Expanding the Vote: State Felony Disenfranchisement Reform, 1997-2008* (Washington, D.C.: The Sentencing Project, Sept. 2008), available online at: http://www.sentencingproject.org/doc/publications/fd_statedisenfranchisement.pdf (last accessed 19 Jun. 2010).

⁵⁶³ Daniel P. Mears and William D. Bales, “Supermax Incarceration and Recidivism,” *Criminology*, Vol. 47.4 (2009): 1131-65.

⁵⁶⁴ Haney, *supra* note 11; Terry Kupers, *Prison Madness: The Mental Health Crisis behind Bars and What We Must Do about It* (San Francisco: Jossey-Bass, 1999).

⁵⁶⁵ Unfortunately, no individual-level or annual recidivism data are available regarding California’s supermax parolees. However, this is an important question that should be addressed as soon as data are available. This chapter will, however, present some data about how often prisoners serve multiple terms in supermaxes during a given prison sentence., which provides some indication of supermax recidivism rates, at least.

gang members.⁵⁶⁶ “Parole, snitch, or die” is common prison slang, which refers to the three ways such a gang member can leave the supermax. He can parole (recall that a supermax assignment affects only the conditions of incarceration, *not* the overall criminal sentence); he can renounce his gang membership by “snitching” on other gang members and about gang activity, in which case he will likely be placed in “protective custody,” in conditions often indistinguishable from standard supermax conditions;⁵⁶⁷ or he can die. In other words, parole is often the only viable way out of supermax confinement.

Annually, California releases hundreds of prisoners from supermaxes into counties across California. These supermax releasees are part of a distinctive (and distinctively large) state parole population. Simply documenting this process, and the scale of the process, raises questions about how supermaxes actually function. Are supermaxes actually detaining the “worst of the worst” prisoners, if over the course of a year, forty percent of California’s supermax population is released directly onto the streets of the state? (See *Figure 10*, in Appendix B.) And what can release data tell us about little-known aspects of the demographics inside supermaxes? This study will explore these questions and attempt to provide some preliminary answers. First, however, the next section turns to the question of how the supermax designers intended supermaxes would function. (At the end of the chapter, these intentions will be compared to the reality of day-to-day supermax operation.)

B. Framework: Best Intentions at Inception

As detailed in Chapter V, when the California Legislature passed Senate Bill 1222 authorizing the construction of a two-thousand bed “maximum security complex in Del Norte County,” they provided few details about what form the prison would take, or what its ultimate purpose would be within the state prison system. These details, then, have to be gleaned from interviews with the correctional administrators and architects, who ultimately designed and ran Pelican Bay State Prison. These California supermax designers described three critical principles, which they attempted to implement through both structural designs of the supermaxes and the scale of supermax bed allocations: (1) limited durations of confinement, (2) limited use of supermax cells throughout the department of corrections, and (3) integrated step-down programs to prevent releases directly from supermax cells onto parole. This section presents a selection of relevant quotes from key informants, in order to explore each of these three principles of supermax confinement, which are critical to understanding the contradictions between how the supermax was conceptualized and how it actually functions. (The data in subsequent sections will be used to evaluate how well the supermaxes these administrators designed achieved these goals.)

In terms of limited durations of confinement, Craig Brown, a former, senior correctional official from the 1980s, explained of the supermax at Pelican Bay: “I don’t think we ever conceptualized it as a permanent thing for anyone other than a handful of inmates.” Brown said “the assumption” was that people would serve a set term at Pelican Bay, for “something like nine

⁵⁶⁶ California Department of Corrections and Rehabilitation, “Weekly Report of Population” (Data Analysis Unit, Estimates and Statistical Analysis Section, Offender Information Services Branch, February 22, 2010), available online at: http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/WeeklyWed/TPOP1A/TPOP1Ad100217.pdf (last accessed 16 Dec. 2010) (with interpretation provided by Jim Derby, Mar. 2, 2010, e-mail on file with author).

⁵⁶⁷ See Blatchford, *supra* note 8.

months, but no more than eighteen months.”⁵⁶⁸ In other words, the Pelican Bay designers presumed that individual prisoners would “mellow out ... get older,” essentially decide cooperation and co-existence was better than living alone in the supermax. In addition, the Pelican Bay designers suspected that people might end up in the supermax who did not belong there, and this potential for error provided another important reason for limiting supermax terms in some way: “Now there should be a way out, if a guy does a lot of time. Some guys maybe go in there that don’t need that kind of restraint,” said Carl Larson, another former senior correctional administrator.⁵⁶⁹ The data examined in subsequent sections in this chapter suggest that many supermax terms are indefinite, providing few ways out, and that the *average* term is longer than eighteen months at Pelican Bay. Indeed, Brown expressed frustration at this outcome: “The biggest disappointment to some of us was how long people got in there.”⁵⁷⁰

The officials who implemented the supermax project not only foresaw the need to limit terms of confinement in the supermax, they also foresaw both a demand for more supermax cells, and a need to curb this demand by limiting the availability of supermax cells. “We knew there would be a tendency to lock too many people in,” Brown said. So, he explained, when Pelican Bay was built, Youth and Adult Correctional Agency managers explicitly wanted to keep supermax cells “a relatively scarce resource, or corrections officers would be comfortable leaving inmates there.”⁵⁷¹ Larson further elaborated that Pelican Bay was the original prison with a supermax design, and the only one with a “single purpose design” – the Pelican Bay supermax cannot easily be re-structured to house general population prisoners. “It’s never going to be a [general population] programming facility,” he explained.⁵⁷² Although Larson acknowledged the severity of the conditions at Pelican Bay, he noted that the prison was unique in the Department of Corrections; Larson intended to operate only one such extremely high security department in the entire California prison system.

Of the twenty-one new correctional facilities California built in the 1980s, Pelican Bay was the only one that was explicitly designed to be a “non-programming”⁵⁷³ supermax. Corcoran State Prison, on the other hand, was built as a maximum security, general population prison. However, as soon as Corcoran opened in 1988 (one year before Pelican Bay opened), two of the buildings within the new prison were converted to supermax units, functioning to detain prisoners in long-term solitary confinement. Larson said of Corcoran: “I would call it a temporary [supermax].” He added: “If this department ever operates so well that you don’t need a [supermax] beyond Pelican Bay, Corcoran will become a fully programming ... facility.” Specifically, he explained that Corcoran was designed to make retrofitting possible, with all the necessary space to create congregate living environments and prisoner programming, like access to a communal exercise yard.⁵⁷⁴ This discussion of Corcoran reveals two particular goals of the administrators who designed and built California’s supermaxes: they wanted to limit the number of supermax cells available within the state; and they hoped, even as they were revising building

⁵⁶⁸ Brown interview, *supra* note 226.

⁵⁶⁹ Larson interview, *supra* note 8.

⁵⁷⁰ Brown interview, *supra* note 226.

⁵⁷¹ *Id.*

⁵⁷² Larson interview, *supra* note 8.

⁵⁷³ California correctional administrators often distinguish supermaxes as facilities where prisoners have no access to “programming,” which in a general population prison might include everything from group free time on a prison yard to actual work, education, or substance abuse treatment programs.

⁵⁷⁴ Larson interview, *supra* note 8.

plans at the last minute to add more supermax cells, that needs for these cells would decrease, not increase.

Despite these goals of limiting the availability of supermax cells, the demand for supermax cells within the California Department of Corrections continued to rise in the 1990s, and more high security prisons were converted, like Corcoran, into supermaxes, detaining prisoners in long-term solitary confinement. Today, in addition to Pelican Bay and Corcoran, the department of corrections operates two supermax units at the California Correctional Institution in Tehachapi, California, and one at Valley State Prison for Women in Chowchilla, California. One other principle of supermax confinement is revealed in the design of Pelican Bay State Prison, and in conversations with the designers. Specifically, the designers thought that prisoners should not be released directly from supermax confinement onto parole, so they designed an institution like Pelican Bay, which included both supermaximum security units and maximum security units, where prisoners would have some access to programs and human contact. The idea was that prisoners would be released from the supermax into this general population, before they were paroled. As Brown said: “I don’t think any of us liked the idea of knowing inmates would be released from [supermax] to the street . . . The goal was they would mellow out . . . get older . . . go to a [maximum], general population.”⁵⁷⁵ Larson was more explicit about his concerns with releasing prisoners directly from a supermax onto parole: “Do you want him [any prisoner] to come straight out of Pelican Bay, the zoo, to the street?”⁵⁷⁶

In sum, the correctional administrators who designed California’s supermaxes described three critical principles, which they attempted to implement through both structural designs of the supermaxes and the scale of supermax bed allocations. The data analyzed in the remainder of this chapter show that none of these principles were actually successfully implemented. Supermaxes, therefore, appear to be functioning very differently from the original intentions of their designers.

C. Who Gets Sent to Supermaxes

This section presents basic information about the mechanics of supermax confinement in California. The supermax wings at California’s two highest security men’s prisons are called the Secure Housing Units, or SHUs. The CDCR promulgates a Departmental Operations Manual, which sums up the SHU: “SHUS provide secure housing for inmates whose conduct endangers the safety of others or the security of the institution.”⁵⁷⁷ In a federal court case in which a judge found “patterns of abuse” in the use of excessive force and withholding of adequate medical care in the Pelican Bay SHU in the 1990s, the judge described the two possible modes of assignment to the SHU: “SHU cells are reserved for those inmates in the California prison system who become affiliated with a prison gang or commit serious disciplinary infractions once in prison.”⁵⁷⁸

For those prisoners affiliated with a gang, their SHU assignment is indefinite. The CDCR *Operations Manual* explains that these prisoners are people whose “continued presence in general population would severely endanger lives of inmates or staff, the security of the

⁵⁷⁵ Brown interview, *supra* note 226.

⁵⁷⁶ Larson interview, *supra* note 8.

⁵⁷⁷ California Department of Corrections and Rehabilitation, *Department Operations Manual* (2009), available online at: http://www.cdcr.ca.gov/Regulations/Adult_Operations/DOM_TOC.html (last accessed 16 Dec. 2010).

⁵⁷⁸ *Madrid v. Gomez*, 889 F. Supp. 1146 (N.D. Cal. 1995).

institution, or the integrity of an investigation into ... criminal activity.”⁵⁷⁹ When the CDCR completes an administrative process to “validate” a prisoner as a member of a recognized gang, through documenting membership in any “association or group of three or more persons which has a common name or identifying sign or symbol whose members ... engage or have engaged ... in two or more acts which include planning, organizing, threatening, financing, soliciting, or committing unlawful acts or acts of [serious] misconduct,” that prisoner may then be automatically assigned to an indefinite SHU term.⁵⁸⁰ As the definition of gang membership suggests, the validation process is rather discretionary; any documentation of potentially illegal *group* activity could lead to gang validation. This means that not all potential or actual gang members will actually end up in the SHU.

When an alleged gang member does receive an indeterminate SHU term, the CDCR requires that such terms be reviewed every six months. However, “review” does not mean that a prisoner has a chance at a change in status every six months; the process is often rather nominal. State rules explicitly state that a prisoner cannot become gang “invalidated” unless he either “debriefs,” proving he is no longer a member of the gang by “snitching” on gang activity, or remains uninvolved in gang activity for a minimum of six years.⁵⁸¹

According to the U.S. Supreme Court, an indefinite assignment to supermax conditions is perfectly constitutional, as long as certain minimal due process protections are in place during the administrative hearing at which correctional officials determine the grounds for the SHU sentence. Specifically, prisoners must have notice of the facts justifying their confinement in the SHU, and they must have some opportunity to rebut these facts. This “opportunity for rebuttal,” is extremely limited, however; it does not necessarily allow the prisoner the right to call witnesses, or to have an attorney, or even a non-attorney advocate, present at any administrative hearing.⁵⁸² After a prisoner has been assigned to an indefinite SHU term, federal courts have required some minimal, but regular, review of the prisoner’s status, on at least an annual basis; the review need not identify what the prisoner could do to earn release from the supermax, however.⁵⁸³

Prisoners who commit a specific, serious disciplinary offense are assigned to the SHU for a definite term, based on the Department’s SHU Term Assessment chart.⁵⁸⁴ SHU terms range

⁵⁷⁹ CDCR *Operations Manual*, *supra* note 577.

⁵⁸⁰ California Code of Regulations, Title 15: Crime Prevention and Corrections, Division 3 Rules and Regulations of Adult Institutions, Programs and Parole, Department of Corrections and Rehabilitation (2009): Sec. 3000, 3341.5, available online at: http://www.cdcr.ca.gov/Regulations/Adult_Operations/docs/Title%2015%202009.pdf (last accessed 16 Dec. 2010).

⁵⁸¹ *Id.* at Sec. 334.15(C)(5). As of 2012, these regulations were under revision, and shortening the minimum required periods of gang inactivity was under consideration. See California Department of Corrections and Rehabilitation, *Security Threat Group Prevention, Identification and Management Strategy: Proposed Implementation of the Security Threat Group Identification System and Step Down Program for Gang Interdiction and Management*, Version 5.5. (Mar. 1, 2012), available online at: <http://www.cdcr.ca.gov/Reports/index.html> (last accessed 12 Apr. 2012).

⁵⁸² *Austin v. Wilkinson*, 545 U.S. 209 (2005).

⁵⁸³ *Id.*

⁵⁸⁴ The *Department Operations Manual* notes that a prisoner might also be assigned to a SHU voluntarily, if he requests protective custody and prison officials validate the legitimacy of the request, or for brief, involuntary terms of less than 10 days, if the prisoner is newly arrived at a high security institution, and officials need to determine whether that prisoner will be safe in the general prison population. CDCR *Operations Manual*, *supra* note 577. However, these two forms of assignment are not part of the evaluation of SHU populations or the focus of this chapter; prisoners in protective custody are counted separately, as residents of “Protective Housing Units” rather than “Secure Housing Units,” and prisoners who spend less than ten days in the SHU are not captured by most of the

from a minimum of two months, for participation in a “disturbance, riot or strike,” for destruction of state property, or for bribery of a non-prisoner, to a maximum of five years for murder or attempted murder of a non-prisoner.⁵⁸⁵ Tellingly, murder or attempted murder of a prisoner merits a maximum SHU term of only three years – an explicit, legal devaluation of the lives of prisoners relative to the lives of prison staff. Attempted murder can involve what might ordinarily be considered a minimally aggressive activity outside of prison, such as spitting on an officer. Within the uniquely enclosed world of the prison, where a prisoner is more likely than someone outside of prison to be HIV-positive, or to have Hepatitis C, spitting is seen as an extremely dangerous and aggressive action, which might rise to the level of a serious offense meriting a SHU term of at least two-to-six months (for “throwing a caustic substance on a non-inmate”), or an attempted murder charge, with the associated SHU term of up to five years, at worst.⁵⁸⁶ In other words, as with the gang validation process, correctional officers possess broad discretion regarding what violation to charge a prisoner with and what length of SHU term to impose, should the prisoner be found guilty of the violation. Moreover, the administrative hearing process itself is rather discretionary; as discussed above, the requirements for basic due process at such hearings are minimal. A prisoner facing a serious rule violation charge in prison has none of the rights a criminal defendant would have in a court of law, and the prison official conducting the hearing is not constrained by standard criminal law requirements, such as the usual requirement that a defendant be guilty beyond all reasonable doubt.

Historically, there was one other unofficial path to supermax confinement: severe mental illness. Prisoners who were confined in the general prison population but who had mental illness so severe that they had difficulty adjusting to prison life and following prison rules often incurred the punishment of a term in the SHU. However, this is one practice that federal courts have curbed, finding that confining the already mentally ill in extreme isolation conditions constitutes cruel and unusual punishment in violation of the Eighth Amendment. In 1995, a federal court in California ordered the state’s department of corrections to cease the assignment of prisoners with documented, pre-existing mental illnesses to the SHUs; prisoners’ rights attorneys in the state agree that this order has largely been obeyed.⁵⁸⁷

In sum, prisoners in California can be sent to the SHU either because correctional administrators determine they are gang members, or because correctional administrators find they have committed a serious rule violation. Both processes – gang validation and rule violation

data in this chapter, which focuses on longer term confinements to the SHU. To the extent that a prisoner who spent only ten days in the SHU is counted in the aggregate, average length-of-stay data discussed below, such short stays might be pulling down the overall average stay data, which already indicates long average stays of close to two years.

⁵⁸⁵ California Code of Regulations, Title 15, *supra* note 580: Sec. 3341.5(C)(9).

⁵⁸⁶ Another problem particularly associated with SHU confinement itself is “gassing” – the correctional lingo for the action of a prisoner who takes a mixture of his own feces and urine and throws it through the cell door at an officer. Rhodes, *Total Confinement*, *supra* note 13: 40. Correctional officers dwell on this particularly unpleasant experience; one high-ranking official told me that he had never heard of gassing taking place before the advent of the SHU at Pelican Bay, but once the Pelican Bay SHU opened, gassing became a frequent occurrence – a means for prisoners to torment correctional officers.

⁵⁸⁷ See *Madrid v. Gomez*, 889 F. Supp. 1146 (N.D. Cal. 1995). However, a recent *Sacramento Bee* feature story found that mentally ill prisoners have been placed in new, SHU-like wings of six prisons in California since 2005; these new prison wings, originally designed as intermediary units for prisoners who cannot function in a general prison population, but who do not require the intense security of a SHU placement, are called Behavior Management Units and have functioned practically like SHUs, imposing long-term total isolation, with little prisoner access to outdoor time, or to programming of any sort. Piller, *supra* note 132.

findings – are codified in elaborate detail in Title 15 of California state law. Ironically, however, the elaborate codification allows broad discretion to correctional administrators through flexible terms like “gang,” a wide array of potentially “serious offenses,” and a significant range in potential supermax sentence lengths, even for a given serious offense, like attempted murder. This kind of discretion has been demanded by correctional officers and lauded by federal courts as absolutely necessary to running secure institutions.

But with such internal administrative flexibility in place, determining exactly who is in the SHUs and why presents a challenging question that could well require analysis of thousands of separate case files on any given day. For instance, four separate correctional administrators, who work in management at CDCR headquarters, said there were no data describing the percentage of prisoners serving determinate and indeterminate SHU terms in the state of California; each agreed that that information was not readily available.⁵⁸⁸ Subsequent sections, present and analyze the facts and figures that are available – what is known, and what can be logically deduced, about how many people are confined in supermaxes and why.

D. Supermax Statistics, 1997-2007

There is limited public information available, on the California Department of Corrections and Rehabilitation (CDCR) website, about who is currently detained in California’s supermaxes. California administrative regulations and CDCR operations rules provide a thorough explanation of when and how a supermax sentence may be imposed, however. Additional information about supermax confinement can be gleaned from the supermax release data, obtained through a specific information request and analyzed for the first time in this chapter, including average lengths of supermax stay, some demographic information about the race of those confined in supermaxes, and details about supermax cycling and recidivism in California.

1. Overall Population in California’s SHUs

Pelican Bay State Prison has a SHU with a capacity for 1,056 prisoners.⁵⁸⁹ Corcoran State Prison has a SHU with a capacity for 872 prisoners.⁵⁹⁰ In addition, in the past few years, CDCR has converted two additional units at a third prison, the Central California Institution at Tehachapi, to SHU units; this SHU has a capacity for 378 prisoners.⁵⁹¹ Finally, Valley State Prison for Women, California’s higher security women’s prison has a small SHU wing. It is built to house 44 women in supermax conditions.⁵⁹² (Note that the bulk of this analysis focuses on the male SHU prisoners; few states have a female supermax facility at all, and California’s facility is

⁵⁸⁸ James S. Derby (Deputy Director of Facilities Planning Branch, California Department of Corrections and Rehabilitation), Ross Meier (Chief, Population Management Unit, CDCR), Robert Neuschmid (Chief, Program Support Unit, CDCR), and Jay Atkinson (Chief, Offender Information Services Branch, CDCR), e-mail exchange with author, Mar. 2, 2010, on file with author.

⁵⁸⁹ California Department of Corrections and Rehabilitation, “Weekly Report of Population,” *supra* note 566.

⁵⁹⁰ *Id.*

⁵⁹¹ *Id.*

⁵⁹² California Department of Corrections and Rehabilitation, “Valley State Prison for Women,” available online at: http://www.cdcr.ca.gov/Visitors/Facilities/VSPW-Institution_Stats.html (last accessed 16 Dec. 2010).

so small that the available data are too limited to analyze.) In total, then, CDCR has what it calls a “design capacity” for 2,350 SHU cells.

The total SHU population in CDCR is much higher than the design capacity, however. On February 17, 2010, the SHU population was 3,384. Incidentally, the exact numbers reported on the department of corrections website are different from these numbers reported in the more precise, Data Analysis Unit Weekly Population Report, as explained in an e-mail exchange with the Deputy Director of the Facilities Planning Branch at CDCR. The Deputy Director explained that “the inmate population is a fluctuating number and will change daily, so all CDCR reports reflect a ‘moment in time,’” and that the design capacity and occupied capacity statistics are not always precisely accurate, because they depend on who is defining design capacity, which can vary.⁵⁹³

This means that, despite the SHU cell design as single-occupancy cells, some prisoners in the SHU in California are actually double-bunked. In general, the vast majority of prisoners in the Pelican Bay SHU are single-bunked, but two prisoners occupy more than half of the cells in the Corcoran and Tehachapi SHUs. Specifically, in an e-mail exchange, the Deputy Director of the Facilities Planning Branch at CDCR said: “Due to various factors, double-celling of the state’s most difficult and violent inmates who are housed at [Pelican Bay] is only 5 percent.” However, “CDCR tries to achieve double-celling in 40 percent of the [SHU] cells” at Corcoran, Tehachapi, and the women’s unit at Valley State Prison.⁵⁹⁴ On February 17, 2010, Pelican Bay had 1,118 prisoners in SHU cells. There were 62 more prisoners than the single-cell design capacity of the institution could accommodate (1,118 population - 1,056 design capacity); therefore, 124, or 11 percent of Pelican Bay’s 1,118 prisoners were sharing a cell. On February 17, 2010, Corcoran had 1,439 prisoners in SHU cells. In other words, there were 567 more prisoners than the single-cell design capacity of the institution could accommodate (1,439 population - 872 design capacity); therefore 1,134, or 79 percent of Corcoran’s 1,439 prisoners were sharing a cell. The CDCR, then, appears to be using high rates of double-bunking, significantly exceeding institutional design capacities: 6 percent of Pelican Bay SHU cells house two prisoners, and 65 percent of Corcoran SHU cells house two prisoners. *Table 5: California Supermax Cell Population, by Prison, as of February, 2010*, in Appendix B, provides an overview of this data for all four of California’s SHU blocks. *Table 6: Rates of Double-Bunking and of SHU Use, 1989-2010* in Appendix A and *Figure 4: Percentage of Double-Bunked Prisoners, 1990-2010* in Appendix B describe the double-bunking rates in California’s two main supermaxes, Pelican Bay and Corcoran, in the twenty years since those two institutions first opened.

California is unique for the proportion of its supermax cells that contain two prisoners per cell. Little analysis exists on whether solitary confinement in a cell twenty-three to twenty-four hours per day, with the lights always on, or confinement in a cell with one other person twenty-three to twenty-four hours per day, with the lights always on, is preferable. Both situations present severe hardships: solitary confinement seems to present a greater danger of self-harm than double-bunking, while double-bunking presents a greater danger of cellmate-on-cellmate assault than solitary confinement.⁵⁹⁵

⁵⁹³ James S. Derby e-mail exchange, *supra* note 588.

⁵⁹⁴ *Id.*

⁵⁹⁵ Although data about assaults and self-harm by prison, broken down by prison and SHU units, was requested, this data is currently only available from CDCR, aggregated by prison institution. Proving the accuracy of the hypotheses that single-celling might be more dangerous for self-harm and double-bunking might be more dangerous

In total, then, California houses more than 3,300 prisoners, at any given time, in supermax conditions. The overall state prison population in California is over 170,000 people; roughly two percent of the state prison population is assigned to supermax conditions. Of these prisoners, roughly half are in solitary confinement; roughly half are double-bunked. The final column in *Table 6*, in Appendix A, also shows the proportion of the entire state prison population housed in California's supermaxes over time. (Chapter X provides further analysis of this double-bunking data, in the context of correctional administrators' claims about supermaxes and court litigation over the institutions.)

As mentioned above, exact data about how many of the people assigned to supermax confinement are serving indefinite SHU terms and how many are serving definite terms are not readily available. Based on a combination of publicly available data and analysis of the data presented here regarding people paroled from supermaxes, however, some estimates of the breakdown between indefinite and definite terms can be made. The CDCR website notes that all of the beds in the Corcoran SHU are reserved for validated gang members.⁵⁹⁶ By definition, people serving SHU terms solely because they are validated gang members are serving indefinite terms.⁵⁹⁷ The CDCR provides no comparable information on their website about how many people in the Pelican Bay SHU are validated gang members, although court cases and eyewitness accounts suggest that many prisoners in the Pelican Bay SHU are also validated gang members.⁵⁹⁸ One analysis of the Pelican Bay SHU suggests that two-thirds of the people detained there are validated gang members, although no source was provided for this estimate.⁵⁹⁹

In addition, the data analyzed in greater detail below, about people paroled directly from the Pelican Bay SHU, indicate that the average lengths of stay in the Pelican Bay SHU are quite long – two-to-three times as long as the average lengths of stay in the Corcoran SHU. Moreover, Pelican Bay SHU releases are more likely to be significantly disproportionately Hispanic than Corcoran SHU releases, or than the general parole population, as discussed in greater detail below. Because validated gang members are likely to be detained indefinitely, and are also likely

for prisoner-on-prisoner assault, therefore, is virtually impossible. However, a number of recent studies have suggested that suicides happen more frequently when prisoners are in solitary confinement than when they are housed in general prison populations. For instance, in 2005, 70 percent of the 44 prisoners who committed suicide in the California State Prison system were in solitary confinement. Don Thompson, "Convict Suicides in State Prison Hit Record High." *Associated Press*, Jan. 3, 2006. In New York, between 2004 and 2007, five times as many suicides occurred in solitary confinement as in the general prison population. May Beth Pfeiffer, "Special Report: Prison suicide rates rise; solitary confinement adds to risk." *Poughkeepsie Journal*, Apr. 11, 2011, available online at: <http://www.poughkeepsiejournal.com/article/20101017/NEWS01/112030002/SPECIAL-REPORT-Prison-suicide-rates-rise-solitary-confinement-adds-risk> (last accessed 1 Mar. 2012). National studies have found a similar relationship between solitary confinement and suicide. In 1986, two-thirds of the more than 400 jail suicides that took place across the United States involved prisoners held in total isolation. Lindsay Hayes and Joseph Rowan, *National Study of Jail Suicides: Seven Years Later* (Alexandria, VA: National Center on Institutions and Alternatives, Feb. 1988), available online at: static.nicic.gov/Library/006540.pdf (last accessed 1 Mar. 2012). Chapter IX presents some statistical models, which attempt to flesh out the possible relationships between double-bunking and violence in California.

⁵⁹⁶ California Department of Corrections and Rehabilitation, "California State Prison – Corcoran," available online at: <http://www.cdcr.ca.gov/Visitors/Facilities/COR.html> (last accessed 16 Dec. 2010).

⁵⁹⁷ See CDCR *Operations Manual*, *supra* note 577.

⁵⁹⁸ *Madrid v. Gomez*, 889 F. Supp. 1146 (N.D. Cal. 1995); Blatchford, *supra* note 8.

⁵⁹⁹ Shaley, *supra* note 13.

to be Hispanic,⁶⁰⁰ extended SHU terms and disproportionately Hispanic releases likely indicate that at least some indefinitely sentenced validated gang members are assigned to Pelican Bay.

Indeed, recent CDCR snapshot data from August of 2011 confirmed this hypothesis. Following criticism of the harsh conditions in the Pelican Bay SHU in August of 2011, CDCR released snapshot data about the prisoners in the SHU at Pelican Bay in that month. According to CDCR, of the 1,111 prisoners housed in the SHU at Pelican Bay in August of 2011, 513 had been there for ten years or more.⁶⁰¹ Because the longest determinate SHU term the Department imposes is for five years, these 513 prisoners are likely serving (very long) indeterminate SHU terms. (It is possible that a prisoner would be assigned to a determinate SHU term, break a prison rule during that term, and be assigned to a second, or third or fourth, consecutive SHU term, so the 10-year terms do not unequivocally represent indeterminate SHU terms).

In sum, with the more than 1,000 people at Corcoran likely serving indefinite SHU terms, and the unknown number of people at Pelican Bay serving indefinite SHU terms (estimated at up to two-thirds of the 1,000 to 1,500 people in the Pelican Bay SHU), at least half of the three-thousand-plus SHU prisoners in California, and maybe even a greater proportion than half, have been assigned to indefinite SHU terms. Indefinite SHU terms are important, in part, because they likely contribute to the long periods – up to twenty years or more – that some prisoners spend in solitary confinement.

2. Duration of Confinement

While data about the average lengths of stay of prisoners *currently* detained in the Corcoran and Pelican Bay SHUs are not available, this section analyzes data (presented in *Table 7: Range of Lengths of Stay, in Months and Days, by Prison, 1997-2007*, in Appendix A and in *Figures 5 and 6* in Appendix B) indicating the average lengths of stay of prisoners *released* from the Corcoran and Pelican Bay SHUs over a ten-year period from 1997 through 2007. Although the previous section discussed the current SHU populations in four prisons in California, the focus of the remainder of the analysis will be on the Corcoran and Pelican Bay SHUs, the larger supermax institutions, which have been operating for the longest periods of time, and on which more data is therefore available. These data capture people within a given year who either paroled directly from one of these two SHUs, or people who were paroled from another prison, but who had spent time in the SHU prior to being paroled. Because an average of 2,300 people per year, who have spent time in one of these California's two main SHUs, are paroled from prison, release data capture a substantial portion of the incarcerated SHU population in any given year (2,300 represents more than two-thirds of the 3,384 prisoners in the SHU on any given day).

⁶⁰⁰ According to the National Youth Gang Survey, approximately 50 percent of all gang members in the United States in 2006 were Hispanic. National Youth Gang Center, "Race/Ethnicity of Gang Members," *National Youth Gang Survey Analysis* (Washington, D.C.: Office of Juvenile Justice and Delinquency Prevention, 2009), available online at: <http://www.nationalgangcenter.gov/Survey-Analysis/Demographics#anchorregm> (last accessed 16 Dec. 2010). Furthermore, four of the seven gangs recognized by the CDCR are Hispanic. California Department of Justice, Division of Law Enforcement, Criminal Intelligence Bureau, *Organized Crime in California: 2005 Annual Report to the California Legislature* (2005), available online at: http://www.ag.ca.gov/publications/org_crime2005.pdf (last accessed 19 Jun. 2010).

⁶⁰¹ Small, *supra* note 6.

Unless otherwise noted, the data in this section concerns both people paroled directly from the Pelican Bay and Corcoran SHUs and people paroled from the general prison population within a given year, who had previously spent time within the Pelican Bay and Corcoran SHUs.⁶⁰²

For the Corcoran SHU, the average number of people released annually from CDCR who have spent time in the Corcoran SHU is more than the average daily population of the SHU, indicating that the facility experiences substantial turnover every year. (However, without knowing the lengths of stay of every person currently *in* the Corcoran SHU, the exact proportion of the population turned over every year cannot be determined.) For the Pelican Bay SHU, the average number of people released annually from CDCR who spent time in the SHU ranges from 140 to 586 people, indicating that less of the Pelican Bay SHU population turns over annually. These release data reflect the fact that, on average, prisoners serve longer terms in the Pelican Bay SHU than in the Corcoran SHU.⁶⁰³

The fact that so few of the people being released from CDCR have spent time in Pelican Bay suggests that well over half of the people detained at the Pelican Bay SHU fall into one of two categories. Either they are serving indefinite SHU terms *and* have very long overall prison sentences, so they are not being released from the SHU, or they are serving definite SHU terms and are released from the SHU back into general prison populations elsewhere in the state, but have long prison terms left to serve in general population prison settings, and so are not released onto parole. In sum, even the absences in the parole release data are helpful for what they indicate about those people not captured in the data. Moreover, by evaluating release data of thousands of supermax parolees, over a ten-year period, these sections are able to examine point-prevalence statistics for the SHU that are likely quite representative in the aggregate.

The remainder of this section presents and analyzes two graphs detailing the lengths of SHU stays in California between 1997 and 2007. *Figure 5: Range & Average Lengths of Stay in Pelican Bay & Corcoran SHUs, 1997-2007*, in Appendix B, shows both the *average* lengths of stay, by month (marked by the diamond on the line representing the range of stays in each year) as well as the *range* of lengths of stay, from shortest to longest, of all the prisoners, who had previously served a term in the supermax, paroled from CDCR in a given year. For ease of reading, three markers indicate where five, ten, and fifteen years fall on the graph.

Over time, both the average lengths of stay as well as the maximum stays have increased for people in both the Corcoran and the Pelican Bay SHUs. Between 1997 and 2007, the average lengths of stay increased from 10 months, or just under one year, to 18 months, or one-and-one-half years. While an increase in the average SHU term of eight months over ten years might seem moderate, recall the extremity of the conditions. This is the number of months that a person spends in a cell, alone, with no human contact (or, sometimes, with only the contact of a single cellmate), fluorescent lights on twenty-four hours per day, an hour or less of exercise per day, and limited access to a television or radio. An additional eight months of incarceration under these conditions might make a significant difference to any given individual's well-being. During this same ten-year period, the minimum stay in the SHU remained relatively short, at less than a month.⁶⁰⁴ So, in order for the average length of stay to increase by eight months, the

⁶⁰² However, *Figure 9: Annual Releases from Supermaxes Directly to Parole, 1997-2007*, in Appendix B, concerns a more narrow population of paroled supermax prisoners.

⁶⁰³ Note that only data about longest, shortest, and average lengths of stay for a given year in each supermax are available. Median length of stay data, if available, would have provided additional helpful perspective on lengths of supermax stays; unfortunately, these data are not available.

⁶⁰⁴ Note that one month is less than the usual minimum SHU term of two months; this shortest possible stay is likely the result either of prisoners finishing their criminal sentence and being paroled prior to finishing their SHU term, or

longest stays were necessarily increasing by much more than eight months. Indeed, this trend of the maximum SHU terms increasing over time is visible in looking at the upper reaches of the lines in *Figure 5*.

Figure 6: Average Lengths of Stay and Maximum Stays, in Years, by Prison, in Appendix B, shows more specific data about the length of SHU terms at both Corcoran and Pelican Bay State Prison. The four lines in this figure represent the average (squares) and maximum (triangles) lengths of stay in the Corcoran (lighter dotted line) and Pelican Bay SHUs (darker solid line), displayed as a trend over 10 years. *Figure 6* demonstrates how much longer both average and maximum SHU stays are at Pelican Bay than at Corcoran (with the exception of one spike at Corcoran in 2003). Indeed, Pelican Bay is the prison most notorious as both the “state-of-the-art” supermax and the highest security institution in California; it has been plagued by allegations of abuse within the SHU since just a few years after it opened, and it remains under a federal consent decree, which requires regular monitoring of conditions in the SHU by prisoners’ rights attorneys in California.⁶⁰⁵

In addition, *Figure 6* shows that the *maximum* lengths of stay in both the Pelican Bay SHU and the Corcoran SHU climbed steadily between 1997 and 2005, but then began to decrease between 2005 and 2007. However, the *average* SHU stay at Pelican Bay increased steadily over the entire period between 1997 and 2007, rising from just over one year of average stay-time to almost two-and-one-half years of average stay-time. The *average* SHU stay at Corcoran, on the other hand, has hovered right around one-half to three-quarters of a year. This suggests that the shorter *maximum* stays seen in 2006 and 2007 on the graph are not indicative of shorter *overall* stays in the SHU. Indeed, average stays in the Pelican Bay SHU appear to be increasing, while average stays in the Corcoran SHU have remained relatively stable. Of course, the data fail to capture those people who have never been released or paroled from the SHU, so there are likely people in Pelican Bay and Corcoran who have spent periods of time in excess of seventeen or eighteen years in the SHU who are not captured in release data.

The average ranges of stay in the Pelican Bay and Corcoran SHUs are also significant. Over the 10 years between 1997 and 2007, the average stay in the SHU, for those who paroled from CDCR, ranged from a low of one half-year (or 6 months) in the Corcoran SHU in 2001, to a high of almost two and one half-years (or 29 months) in the Pelican Bay SHU in 2007. In sum, the data presented here about how long prisoners who have been released from the California prison system have spent in supermax conditions provide the first picture of both the range of lengths of stays in the SHU and the average lengths of stay over time. The data reveal both that prisoners over the past ten years have consistently spent an average of at least six months and up to two-and-one-half years in the SHU and that some prisoners have served incredibly long sentences in the SHU – up to seventeen years – prior to being released. The data demonstrate that prisoners assigned to the SHU in California are spending extended periods in confinement there. Moreover, the data show significant differences between lengths of stay in Corcoran and in Pelican Bay; prisoners tend to serve shorter terms of SHU confinement at Corcoran than at Pelican Bay. In one sense, then, Pelican Bay is functioning as intended: maintaining the most severe conditions for the longest periods of time. In another sense, though, both institutions are

to some other administrative glitch in security classification and assignment, like a prisoner being mistakenly assigned to the SHU, or being housed there temporarily to relieve overcrowding elsewhere. Unfortunately, because these graphs are based on aggregate numbers provided by CDCR, there is no way to tell how many prisoners served these short terms, nor to remove these “outliers” from the analysis.

⁶⁰⁵ *Madrid v. Gomez*, 889 F. Supp. 1146 (N.D. Cal. 1995).

detaining prisoners for significantly longer periods of time than their designers intended, indicating that SHUs are potentially being overused, at least relative to their original intentions.

3. Racial Demographics of SHU Populations

While the racial demographics of those people paroled from CDCR who have served SHU terms may not precisely represent the racial demographics of all those prisoners detained in the SHU, there is likely a close fit between the two populations. First, as discussed in the Section above on the Overall SHU Population, a substantial portion of the SHU population turns over every year (annual releases represent about two-thirds of the average daily population). Second, studies have found substantial similarities between prison populations and parole populations in California and in the United States.⁶⁰⁶ *Figure 7: Racial Demographics of Supermax Populations, 2007*, in Appendix B, provides the demographics for those prisoners paroled from CDCR in 2007 who had previously served time in the SHU. *Figure 8: Racial Demographics of General Parole Population, 2007*, in Appendix B, provides the demographics for the general California parole population.

In general, prisoners on parole who have spent time in the SHU are slightly less likely to be either white or African American than the average prisoners on parole. However, prisoners on parole who have spent time in the SHU are significantly more likely to be Hispanic⁶⁰⁷ than the average prisoners on parole; in 2007, almost 56 percent of the prisoners paroled after having spent time in the SHU were Hispanic, while only 42 percent of the general parole population was Hispanic. This is, perhaps, not surprising, given (1) the already-discussed phenomenon of correctional officers “validating” gang members and assigning them to indefinite SHU terms and (2) the fact that some of the largest and most feared gangs in California, like the Norteños and Sureños, are composed largely of Latina members.

In sum, *Figures 7 and 8* show that Hispanics are disproportionately more likely to have spent time in the California SHUs than other racial and ethnic categories of prisoners. Indeed, a chi square test, comparing ten years’ worth of California parole data with ten years’ worth of SHU release data confirms that the disproportionate impact seen on Hispanics in 2007 has been consistent and significant over the past ten years. Specifically, the chi square calculation compares the number of SHU releases in each of the CDCR’s four racial categories (Other, Black, Hispanic, White) to the number of SHU releases that we would expect to see in each racial category, if the racial demographics of SHU releases were identical to the racial demographics of all prisoners on parole in California. Based on this calculation, the higher proportion of Hispanic prisoners released from the SHU in each year between 1997 and 2007

⁶⁰⁶ See Petersilia, *When Prisoners Come Home*, *supra* note 557.

⁶⁰⁷ “Hispanic” is an ethnicity category, identified separately from the race categories, the CDCR uses Hispanic as a race category to identify prisoners of Latino and Hispanic heritage. Note that the percentages shown in this chart represent the average of the racial demographics of prisoners released from the Corcoran SHU and of the racial demographics of prisoners released from the Pelican Bay SHU, rather than a raw calculation based on the total number of SHU releases from both institutions. As discussed below, the disproportionate impact of SHU terms on Hispanics is more extreme at Pelican Bay than at Corcoran, although Pelican Bay also releases fewer prisoners annually than Corcoran. Therefore, the average numbers presented here better capture the overall disproportionate impact of SHU terms on Hispanics. However, Table 1, in Appendix A, provides a more specific analysis of the numbers, disaggregated by both institution and year.

was found to be significant, or very unlikely to be due to chance, in every year but 2001.⁶⁰⁸ The racial demographics of people released specifically from the Pelican Bay SHU in each year are even more disproportionately Hispanic and even more consistently significant, when subjected to a chi-square test. In fact, in every year but 2006, the number of Hispanics released from the Pelican Bay SHU was significantly disproportionate to the overall parole population in that year (p-value < 0.001 in every year but 2001, when p-value < 0.01).

Table 8: Results of Chi-Squared Test Comparing Racial Demographics of SHU Releases to Racial Demographics of California Parole Populations, 1997-2007, in Appendix A, shows the percentage of Hispanics on parole in each year, the percentage of Hispanics released from the Pelican Bay and Corcoran SHU in each year, and the percentage of Hispanics released just from the Pelican Bay SHU in each year, along with the results of the chi square test for each demographic distribution.

While the disproportionate impact of the SHU on Hispanics, documented in the disparate racial demographics shown in the pie graphs in *Figures 7* and *8* and in the chi square test results shown in *Table 8*, is probably related to gang validation procedures in California state prisons, it is also important for understanding just who is most likely to experience confinement in the SHU and why. If the SHU is disproportionately targeting some minorities, this disproportionate impact needs legal scrutiny, to determine whether the disparate impact of supermaxes on Hispanics is justified by gang activity or by other potential safety concerns.

4. Supermax Departures

This section surveys available data on how many people parole from supermaxes annually. The first, most basic question, in terms of parole and community re-entry is: how many people leave supermaxes annually? I.e. is there significant turnover in the supermax population? The data reveal that the CDCR releases hundreds of people annually, directly from supermaxes, into their communities, under parole supervision. (Some prisoners captured in the data spent 90 days or fewer in the general population at the institution where they served their SHU term.) Specifically, from 1997 through 2007, the average combined, annual supermax population at Pelican Bay and Corcoran was 2366 prisoners. On average, 909 prisoners were released annually from the supermaxes directly to parole; 909 prisoners constitute roughly 38 percent of the overall annual supermax population in California. The fewest direct supermax releases in one year was 655 people (27 percent of the overall supermax population), in 1999. The most direct supermax releases in one year was 1,123 people (47 percent of the overall supermax population), in 1997.

Figure 9: Annual Releases from Supermaxes Directly to Parole, 1997-2007, in Appendix B, shows annual releases over the last ten years. The darkly-shaded, bottoms of the bars represent releases from the Pelican Bay SHU, and the lightly-shaded, tops of the bars represent releases from the Corcoran SHU; clearly many more prisoners are released directly from Corcoran than directly from Pelican Bay.

Figure 10: Percentage of Total Annual SHU-Experienced Parolees Who Paroled Directly from Pelican Bay or Corcoran, 1997-2007, in Appendix B, reveals that about one-third

⁶⁰⁸ Note, however, that in two additional years, 2002 and 2004, the overall percentage of SHU releases who were Hispanic was the same or less than the overall percentage of people on parole in California who were Hispanic. These percentages are still significant, however, because the overall racial demographics of SHU releases in those years still differed significantly (in terms of percentages of Whites, Others, and Blacks) from the overall racial demographics of people on parole in California.

of all prisoners who are paroled after having spent time in the Corcoran SHU are paroled directly from the Corcoran SHU, while the majority of all prisoners who are paroled after having spent time in the Pelican Bay SHU are paroled directly from the Pelican Bay SHU. So just as prisoners in the Pelican Bay SHU are serving longer average sentences than prisoners in the Corcoran SHU, they are also more likely to parole directly from the SHU.

The data suggest that hundreds of prisoners every month are paroling directly from the SHU, or from a high security prison within a few weeks of being released from the SHU. These prisoners have spent an average of one to two years, and up to seventeen or eighteen years, in near-complete solitary confinement, or, possibly, with contact with only one other cellmate. The fact that they are released from these conditions directly onto parole raises questions about re-entry and what it is like for someone to re-adjust to a world with natural light, grass, and constant human contact. The following section addresses what little is known about the recidivism of supermax parolees – both in terms of returns to prison from the street, and returns to the supermax from within prison.

5. Supermax Cycling

This section first analyzes how frequently prisoners serve more than one term in the SHUs at Pelican Bay or Corcoran, and then presents the limited data that are available about how often prisoners who are paroled to the streets from the SHU return to prison. This data reveal that a prisoner who goes to the SHU once is extremely likely to return to the SHU again and might also be more likely to return to prison once he is paroled. Again, these data are yet another indication that SHUs may not be functioning to deter either misbehavior or violence in prison; despite the harsh conditions of the supermaxes, prisoners seem to cycle in and out of these units.

A prisoner might serve multiple SHU terms in one of two ways: either he breaks a rule in the SHU and so is assigned to a subsequent, consecutive term, or he is released from the SHU, returns to the general population of prison, commits another violation, and returns to the SHU. In order to provide some sense of how often prisoners serve multiple SHU terms, or cycle in and out of the SHU, *Figure 11: Percent of SHU-Experienced Parolees with Multiple SHU Terms, 1997-2007*, in Appendix B, shows the percentage of the SHU population, in any given year, that has served multiple terms in the SHU.⁶⁰⁹ These data again reveal that there are significant differences between the two institutional populations at the Pelican Bay SHU and the Corcoran SHU. In all but one year (2001), prisoners paroled after having served time in the Pelican Bay SHU were more likely to have served multiple SHU terms than prisoners paroled after having served time in the Corcoran SHU. In some years, in fact, all of the prisoners paroled after having served time in the Pelican Bay SHU had served multiple SHU terms there. This again suggests that the Pelican Bay SHU detains prisoners who are more problematic or challenging to the prison order than those prisoners at the Corcoran SHU.

No data exist regarding the recidivism statistics for prisoners paroled directly from the Corcoran or Pelican Bay SHUs, or for prisoners who are paroled from elsewhere in the department of corrections, but who have previously served a term in the SHU. In response to a request for this information, CDCR, provided one aggregate number: the number of prisoners

⁶⁰⁹ More specifically, this percentage was calculated by dividing the number of people paroled in any given year, who had served *more than one* term in the SHU during their prison sentence, by the number of people housed in the SHU during that year. This provides a rough estimate of what percentage of the SHU population in any given year has served more than one term in the SHU.

who had been paroled directly from the Pelican Bay or Corcoran SHU between January 1997 and December 2007, and who had been returned to prison for violating parole by March of 2008.

In total, 6,195 prisoners, over ten years, were in this category of recidivists, who had paroled directly from the SHU, and returned to prison within ten years. This amounts to 62 percent of the total number of prisoners paroled directly from the SHU over this period. Over the same ten-year period, the average recidivism rate for all prisoners paroled from the CDCR was 46 percent. However, recidivism rates are generally calculated for two or three (rather than ten) years after a prisoner is released. The CDCR's ten-year aggregation of data, then, cannot in any rigorous sense of how supermax parolees fare on parole; the data simply suggest that supermax parolees might face greater challenges than the average prisoner and might have a higher likelihood of recidivating. More data, however, disaggregated by year, by criminal history, by age, and by length of stay in the supermax, are necessary to provide a truly rigorous analysis of recidivism.

E. Are California's Supermaxes Functioning as Intended?

In brief, California's supermaxes are *not* functioning as intended. The state's supermaxes have been continuously expanding in terms of the sheer number of people detained in the total control conditions of the SHU. By 2001, CDCR was operating two additional supermax units (at the California Correctional Institution), beyond the original two supermax units at Corcoran and Pelican Bay. The new units detain hundreds of additional prisoners. And, over the past twenty years, California has resorted on-and-off to double-bunking at least some prisoners in supermax conditions, even though the supermax institutions were initially conceptualized as single-celled institutions. Pelican Bay, the institution explicitly designed to be California's supermax, is the one prison that seems to function at least partially as intended, in terms of primarily single-celling its prisoners. Corcoran, and the additional supermax cells added to the California Correctional Institution, tend to double-cell prisoners, indicating in part that these supermaxes were after-thought institutions that remain overcrowded today. Additionally, the fact that each of the state's supermaxes operates differently – detaining prisoners under different conditions for different periods of time – suggests just how inconsistent supermax practices are.

Even more strikingly, prisoners are spending long periods of time in supermaxes – an average of more than two years in Pelican Bay State Prison, and as long as seventeen or eighteen years. These long sentences suggest that “getting out” – whether by paroling, snitching, or dying – of supermaxes can be hard, if not impossible.

One explanation as to why supermaxes in California are not functioning as intended is the role of discretion in correctional administration. As the discussion of how prisoners are assigned to definite and indefinite supermax terms, in Section C. Who Gets Sent to Supermaxes and How, suggested, correctional administrators have broad discretion in assigning prisoners to supermax terms. Even though the correctional officials who originally designed and built Pelican Bay and Corcoran hoped that the Secure Housing Units would provide a small, fixed number of supermax beds, forcing correctional administrators to limit (a) how many people were assigned to these institutions and (b) the duration of those assignments, the original designers had no control over how their buildings would ultimately be used within CDCR.

Just as with the data about who is inside supermaxes, the data about who is released from supermaxes suggest that California's supermaxes are not functioning as originally intended. First, hundreds of people annually are released directly from supermaxes onto parole, having

spent at most 90 days outside of a supermax cell before being released. Second, hundreds more people every year are cycling in and out of the supermaxes; more than half of the supermax population in any given year has served two or more terms of confinement in the supermax. The correctional administrators who designed and built California's supermaxes in the 1980s envisioned a functional, deterrent punishment: people would spend a fixed term in intensive solitary confinement, then return to the general prison population, hopefully avoiding the supermax in the future. In practice, the same people appear to be cycling again and again through the supermax.

F. Missing Data and Further Research

Better data about who is in supermaxes, why, and for how long are needed. Rigorous data collection about the effect of supermaxes on violence within institutions and departments of corrections is needed. And studies of the experiences of supermax releasees on parole – and their likelihood of returning to prison – are also needed. Understanding more about how supermaxes function and whether they are effective at managing difficult prisoners or controlling in-prison violence is critical to evaluating the success of one of the most popular trends in punishment in the twenty-first century: long-term solitary confinement in conditions of near-complete sensory deprivation. This chapter reveals as much about what is *not* known about these institutions as what is known, and suggests many further avenues of study.

This chapter does provide some preliminary answers, however. It reveals that supermaxes are not functioning as their designers intended them to function. Prisoners are spending longer periods of time in supermax cells than the designers ever intended. Moreover, prisoners do not appear to be deterred from misbehavior by the existence of supermax cells; well over half of supermax prisoners in any given year appear to be spending multiple terms in the supermaxes, suggesting that the institutions might not be deterrents to individuals.

The data in this chapter also reveal two potentially problematic facts: SHU prisoners appear to be disproportionately Hispanic, relative to the general prison and parole populations in California, and SHU prisoners are frequently released directly from the SHU onto parole. These facts raise questions about whether the SHU functions in a discriminatory way; whether the SHU adequately prepares prisoners to survive on the streets, given the number of people who are released annually from long-term solitary confinement onto parole; and whether the SHU makes our communities safer.

The next chapter picks up some of the themes from this chapter, further exploring the implications of double-bunking in the supermax, and also evaluating whether there is a relationship between supermaxes and violence. The chapter also documents how courts have related to the limited empirical evidence about supermax operation in California.

IX. Litigating (Or Not?) the Constitutionality of the Supermax Discretion, Deference, and Double-Bunking, 1986-2010

Chapter V established in detail how California's first supermax, Pelican Bay State Prison, was an innovation not of the California legislature, but of California correctional administrators. Legislators paid little attention to what kind of prison was built in California's Del Norte County, and asked very few questions of the correctional administrators who told them this "Spartan, not Draconian" facility was necessary. Importantly, federal courts across the United States, when they examined the constitutionality of these "Spartan, not Draconian" facilities, followed a similar pattern of deference to the expertise and articulated needs of correctional administrators. This pattern of deference, however, is unjustified by the goals of the supermax institution, as articulated by correctional administrators.

This chapter analyzes the relationship between the administrative design of the supermax and the way it has been constitutionally analyzed in federal courts, in the context of Eighth Amendment challenges to supermax conditions of confinement. While the chapter draws on case law from a variety of jurisdictions, the central focus is, again, Pelican Bay State Prison in California and the *Madrid v. Gomez* case in which a northern district court (Judge Thelton Henderson) evaluated, for the first time, the constitutionality of the modern supermax. This chapter first introduces the frameworks applied in *Madrid* to analyzing the constitutionality of the Pelican Bay supermax. Ultimately, the *Madrid* court deferred to correctional administrator's claims that the supermax was a necessary tool of safety and security, rather than addressing the question of whether the conditions in the institution actually rose to the level of cruel and unusual punishment. Next, this chapter introduces evidence about how correctional administrators have justified California's supermaxes, and how these justifications are in direct contradiction with the day-to-day operation of the institutions. These contradictions call into question the validity of deferring to correctional administrator's expertise and articulated justifications for the institutions. After all, these institutions developed outside of the purview of the legislature, and now they are operating largely outside of the purview of the federal courts, as well. Perhaps this would be justifiable, if correctional administrators had provided clear evidence of the purpose of the institution and the ability of the institution to fulfill this purpose. No such evidence exists in California. Third, this chapter discusses two other representative federal court cases, which have considered the constitutionality of supermax prisons in other states, detailing how these courts have followed the example of the *Madrid* court, deferring to the safety-and-security justifications of correctional administrators.

The supermax prison, and the lack of control exerted by either legislators or courts over the institution, highlights the perverse incentives that have developed in the modern political economy of hyper-imprisonment. Correctional administrators have incentives to develop mechanisms to control behaviorally challenging and ever-growing prison populations. The harsher the tools of control they develop, the better able they are to manage populations with threats of harsh punishments like long-term and total isolation. Through practical threats and actual control, hundreds of thousands of prisoners remain manageable to a given department of corrections. Indeed, correctional administrators have very few incentives to treat prisoners either gently or humanely. The federal courts, on the other hand, with their mandate to interpret and apply the law, have the incentives to mandate humane treatment. But they have not.

A. *Madrid v. Gomez and Judicial Deference*

The first federal court to consider a constitutional challenge to the idea and practice of the modern supermax was, not surprisingly, in the Northern District of California.⁶¹⁰ After all, in 1989, California opened the second, and the biggest supermax in the United States, so Pelican Bay State Prison was ripe for challenging by the early 1990s. And the Northern District of California, which had been deciding questions about how California administrators should operate their prisons since the mid 1970s,⁶¹¹ was a logical place for advocates to expect a constitutional challenge to the very existence of the institution to get a fair hearing.

This section first describes why the procedural history of *Madrid* suggests that the Northern District Court of California was predisposed to find that the conditions in the Pelican Bay supermax violated the Eighth Amendment prohibition against cruel and unusual punishment. The section then explains the genesis of the two-pronged test, which incorporated the principle of judicial deference to prison officials, and which the *Madrid* court applied to evaluating the constitutionality of the conditions at the Pelican Bay supermax. The section next outlines how the *Madrid* court applied this two-pronged test, incorporating deference to correctional administrators' penological justifications, about the necessity of the supermax as a tool for maintaining safety and security, into each step of its Eighth Amendment analysis. Finally, the section discusses a particular condition of confinement in the Pelican Bay supermax, to which the *Madrid* court gave special consideration: the condition of double-bunking some prisoners under the harsh segregation conditions of the supermax. Yet again, the *Madrid* court deferred to correctional administrators' claims about why this different degree of confinement was also penologically reasonable, and therefore found this variation on the conditions of supermax restrictive confinement constitutional.

This history of the *Madrid* case, which interweaves oral history interviews and contextually important case law, reveals that the *Madrid* court analyzed the penological justifications for the California supermax, instead of analyzing the actual seriousness and severity of the conditions in the institution. In other words, the *Madrid* court demonstrated great deference to the claims of correctional administrators about the necessity for the supermax institution. This section, then, uses the *Madrid* litigation as a lens for exploring both the mechanisms of judicial review of the prison system in the late twentieth century, and the changing allocation of legal responsibility for making punitive determinations. The subsequent section will present empirical evidence that contradicts the penological justifications for the California supermax, and suggests both a new judicial relationship with empirical evidence and a new allocation of legal responsibility for making the kind of punitive determinations at issue in designing and imposing supermax confinement.

⁶¹⁰ Other courts had considered the constitutionality of long-term lock-downs in older facilities. See *Toussaint v. McCarthy*, 597 F. Supp. 1388, 1415-21 (N.D. Cal. 1984) (considering the constitutionality of long-term lockdowns at San Quentin and Folsom State Prisons in California); *Caldwell v. Miller*, 792 F. 2d 589 (7th Cir. 1986) (considering the constitutionality of a long-term lockdown at Marion Federal Penitentiary). As the *Madrid* Court noted, the constitutional challenges to Pelican Bay were different from these earlier challenges, because Pelican Bay is “[c]onsidered a ‘prison of the future,’ the buildings are modern in design, and employ cutting-edge technology and security devices. This, then, is not a case about inadequate or deteriorating physical conditions.” *Madrid v. Gomez*, 889 F. Supp. 1146, 1155 (N.D. Cal. 1995).

⁶¹¹ See e.g., *Wright v. Enomoto*, 462 F. Supp. 397 (N.D. Cal. 1976); *Toussaint v. McCarthy*, 597 F. Supp. 1388, 1415-21 (N.D. Cal. 1984).

1. *The Procedural History of Madrid: Isn't that Unconstitutional?*

The procedural history of the initial stages of the *Madrid* case suggest just how friendly the northern district court of California was predisposed to be to claims that the new supermax at Pelican Bay State Prison was unconstitutional. In fact, a federal district court judge (as opposed to prisoners' right lawyers) actually initiated the investigation that ultimately led to a class action case on behalf of the prisoners in Pelican Bay State Prison. In the early 1990s, Judge Thelton Henderson, who was Chief Judge of the Northern District of California from 1990-1997, started receiving letters from prisoners at Pelican Bay State Prison, detailing the extremity of the conditions at the institution. Henderson recalled: "One of your jobs as chief judge is to notice things that are happening on and to your court ... one of the things that started happening is we got a ton of handwritten letters and petitions from this place we had never heard of before – Pelican Bay."⁶¹² So Henderson summoned the warden of the new Pelican Bay State Prison for a meeting with a group of Northern District of California judges. Henderson described his reaction upon first hearing the warden's explanation of why Pelican Bay existed:

*This was a nice warden. He proceeded to tell us essentially about the supermax prison ... that it was patterned after Arizona, [that it was] California's attempt to deal with our prisons being run by gangs, [that it was] an attempt to put the worst of the worst in one place, to tell us how they [the prisoners] were dangerous, [they] were trying to break the gangs by putting them in isolation, keeping them in their cells for 22 and a-half hours a day ... as he went on, it was interesting and he was forthright ... we were looking and our mouths were open, and we said [the judges to each other]: 'You can't do that. That's unconstitutional.'*⁶¹³

Judge Henderson's unequivocal preliminary instinct about the isolation conditions at Pelican Bay State Prison? Unconstitutional. So unconstitutional, in fact, that Judge Henderson appointed a private firm, Wilson and Sonsini, to represent some of the *pro se* prisoner appellants, who had initially alerted him to the problems with conditions at Pelican Bay.⁶¹⁴ This was in 1992, less than three years after Pelican Bay State Prison first opened.

Within a year, Judge Henderson was overseeing a three-month long class action trial, considering the constitutionality of multiple aspects of the conditions and operational practices throughout Pelican Bay State Prison, including the conditions and practices in the 1,056 cells in the Security Housing Unit (SHU), or supermax, portion of the institution, as well as the conditions and practices in the 2,000-person general population portion of the institution. In January of 1995, Judge Henderson issued a 137-page opinion in the case.⁶¹⁵ For the next fifteen years, he would oversee operational practices of the institution, reading regular monitoring reports from prisoners' rights attorneys who visited the institution.

And yet, Judge Henderson never found that the conditions in the SHU at Pelican Bay State Prison were, in and of themselves, unconstitutional violations of the Eighth Amendment prohibition against cruel and unusual punishment. This is surprising in light of the initial instinct he described experiencing, when he first heard the Pelican Bay warden describe the SHU: "You can't do that, it's unconstitutional." What happened to his initial instinct about the institution?

⁶¹² Henderson interview, *supra* note 16.

⁶¹³ *Id.*

⁶¹⁴ Fama interview, *supra* note 270.

⁶¹⁵ *Madrid v. Gomez*, 899 F. Supp 1146 (N.D. Cal. 1995).

2. Prisoner vs. Prison Official: The Principle of Judicial Deference

In the final analysis, the *Madrid* court ultimately deferred to correctional administrators' claims that the SHU was absolutely necessary for institutional safety and security and held that these claims justified the harsh conditions in the SHU. In analyzing the question of whether the conditions in the SHU violated the Eighth Amendment, the *Madrid* court applied a then-newly minted Supreme Court rule, articulated in *Farmer v. Brennan*, to the facts of the California conditions of confinement case. In *Farmer*, a 1994 prisoners' rights case, the Supreme Court established a two-prong rule for evaluating the constitutionality of a condition or conditions of confinement: (1) The prisoner must claim a serious actual deprivation, or a serious risk of harm. This claim requires an objective evaluation of seriousness. (2) The prison officials inflicting the deprivation or imposing the risk of harm must have done so unnecessarily and wantonly, i.e. the official must have known of the risk of harm. This claim requires a subjective evaluation of the state of mind of prison officials.⁶¹⁶

In other words, the *Farmer* test requires not only a finding of harm, but a finding that prison officials knew they were causing the harm. On its face, the test is reasonable. It gives prison officials the benefit of the doubt, implicitly acknowledging the challenges prison officials face in managing prisoners, and it seeks to hold officials accountable only for things they can actually control.⁶¹⁷ Moreover, the deference the *Farmer* test codifies towards prison officials maintains a delicate balance of power between the legal experts in federal courts and the security experts who run state prison systems.⁶¹⁸ In fact, *Farmer* represented the culmination of a trend throughout federal courts to incorporate and codify deference to prison officials into the law.⁶¹⁹

The problem with the *Farmer* test, though, is not the deference codified in its second prong, but rather the particular way the test has been applied in the specific context of the modern U.S. prison system. First, as the *Madrid* challenge to conditions at California's Pelican Bay prison exemplifies, the deference to prison officials has not been confined to the second prong of the *Farmer* analysis. In fact, the structure and scale of the deference has expanded, and this expansion is (potentially) unwarranted. Second, in applying the *Farmer* test, federal courts, like the *Madrid* court, have been too lenient with prison official defendants, while placing an unduly heavy burden of proof on prisoner plaintiffs, who are at a particular disadvantage in the context of the American prison system of the late twentieth and early twenty-first centuries. The *Farmer* test requires a prisoner alleging an Eighth Amendment violation to not only establish the existence of a significant harm, but also to prove that the harm was intended, or at least that the prison official knew of the likelihood of the harm.⁶²⁰ In this case, the prisoner begins in a more

⁶¹⁶ *Madrid v. Gomez*, 899 F. Supp. at 1246 (citing *Farmer v. Brennan*, 511 U.S. 825, 833 (1994)).

⁶¹⁷ *Farmer*, 511 U.S. at 837-38.

⁶¹⁸ This explanation for judicial deference in the prison context appears in an earlier prison conditions case, *Turner v. Safley*, 482 U.S. 78, 84-85 (1987). See also Giovanna Shay, "Ad Law Incarcerated," *Berkeley Journal of Criminal Law*, Vol. 14 (2010): 329-94, at 339-44 (describing the institutionalization of deference to prison officials in federal court cases through the 1980s and 1990s); Richard H. Fallon, "Judicially Manageable Standards and Constitutional Meaning," *Harvard Law Review*, Vol. 119 (2006): 1274-1332.

⁶¹⁹ *Id.* See also Raja Raghunath, "A Promise the Nation Cannot Keep: What Prevents the Application of the Thirteenth Amendment in Prison?" University of Denver Sturm College of Law, Legal Research Paper Series, Working Paper 09-22, at 5-13, available online at: <http://ssrn.com/abstract=1452892> (describing patterns of judicial deference to prison officials).

⁶²⁰ *Farmer*, 511 U.S. at 837 (defining deliberate indifference), 842 (describing what a plaintiff must show, i.e. the burden of proof). Interestingly, two of the concurrences in *Farmer* revolved around the question of the

vulnerable position than the prison official – he has already been stripped of many of the rights of citizenship,⁶²¹ and he is likely to be uneducated and to have limited access to a lawyer or legal advising.⁶²² And yet the prisoner is responsible for establishing in a court of law both that he was harmed and that the prison officials responsible knew of the harm. In other words, this initial power imbalance between prisoner and imprisoner is another means by which the broad discretion of correctional administrators is further expanded, in the federal court context, just as it had been in the legislative context, as described in Chapter V.

3. *Supermax Conditions: Penologically Justified*

In the case of the SHU, or the supermax units at Pelican Bay State Prison, the *Madrid* court applied the *Farmer* analysis to multiple claims about specific allegedly unconstitutional conditions of confinement. For each claim, the court first established facts about the conditions in the supermax units; second evaluated whether there was a serious risk of harm to prisoners in these units based on these conditions (the objective prong of *Farmer*); and then, if the objective prong was satisfied, evaluated the “state of mind” of the correctional administrators who designed and operated these units (the subjective prong of *Farmer*). At each point of analysis – factual description, evaluating risk of harm, and evaluating state of mind – the court incorporated a deferential consideration of whether correctional administrators had articulated a legitimate penological justification for the potentially unconstitutional restrictive condition at issue.

For instance, the *Madrid* court describes the conditions in the SHU in stark terms – “the conditions in the SHU may press the outer bounds of what most humans can psychologically tolerate” and “[t]he overall effect of the [supermax] is one of stark sterility and unremitting monotony. Inmates can spend years without ever seeing any aspect of the outside world except for a small patch of sky.”⁶²³ But even within these kinds of descriptions, the court notes that “the totality of the SHU conditions *may be* harsher than necessary to accommodate the needs of the institution with respect to these populations.”⁶²⁴ In describing the institution, then, the court is

reasonableness of this second prong, questioning the requirement that a prison official’s subjective state of mind be established. *Id.* at 852 (Blackmun concurring), 858 (Stevens concurring).

⁶²¹ For instance, in all but two states, prisoners are not allowed to vote. In most other states, even people who have been released from prison are disenfranchised for some period of time, and sometimes permanently. See Brennan Center, “Criminal Disenfranchisement Laws Across the United States,” available online at: http://www.brennancenter.org/content/section/category/voting_after_criminal_conviction (last accessed 23 Feb. 2012).

⁶²² According to the Prison Policy Initiative, 19 percent of the U.S. prison population is completely illiterate, and 40 percent are “functionally illiterate,” which means someone would be “unable to write a letter explaining a billing error.” Peter Wagner, *The Prison Index: Taking the Pulse of the Crime Control Industry* (2003), available online at: <http://www.prisonpolicy.org/prisonindex/rootsofcrime.html> (last accessed 23 Feb. 2012). Moreover, prisoners seeking to bring lawsuits challenging the conditions of their confinement face not just the social barrier of low literacy but legal barriers as well, like the Prison Litigation Reform Act, national legislation passed in 1996 to limit the ability of prisoners to bring civil rights claims. See SAVE Coalition, “Prison Litigation Reform Act (PLRA): Myths and Facts,” <http://www.savecoalition.org/myths.html> (last accessed 14 Oct. 2008) (noting that between 1981 and 1995, the rate of prisoner filings of civil rights cases decreased from twenty-nine per thousand prisoners to twenty-five per thousand prisoners, while the prison population itself doubled). See also Margo Schlanger, “Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders,” *New York University Law Review*, Vol. 81 (2006): 550-630, at 558-64.

⁶²³ *Madrid*, 899 F. Supp. at 1267, 1229.

⁶²⁴ *Id.* at 1263 (emphasis added).

engaged in a balancing analysis, weighing the harsh characteristics of the institution, against what is necessary for institutional safety and security.

The *Madrid* court explained, in the opening paragraphs of its findings of fact, that the SHU was not just a potentially intolerable place of stark and sterile conditions, but also a place that houses “some of the most anti-social and violence-prone prisoners in the system.” Prison administrators, the court notes, have “the paramount responsibility” and “remarkably difficult undertaking” of managing these prisoners. The court, then, connected the description of the conditions in the SHU to the necessity for these conditions, as tools “to maintain the safety and security of both staff and inmates.”⁶²⁵ This description of the nature of the prisoners at Pelican Bay, and the importance of maintaining institutional safety and security represents a clear deference to two the two critical claims of correctional administrators, which justify the supermax: (a) certain individual prisoners are “anti-social” and “violence-prone” and (b) the supermax maintains institutional safety and security in the face of these dangerous prisoners.

Once the court established the facts of the supermax – a stark place of restrictive confinement, but one necessary for isolating dangerous prisoners in order to maintain institutional safety and security – the court then evaluated the constitutionality of the supermax. Although the court acknowledged in vivid terms the severity of the conditions in the Pelican Bay SHU, the court found that the risk of harm to most prisoners housed in these conditions did not rise to the level of a truly serious deprivation or risk. (The court did find a serious risk of constitutional deprivations for mentally ill prisoners and ordered that they be removed from the SHU.⁶²⁶) In analyzing the question of the seriousness of the harm to prisoners housed in SHU conditions, the objective prong of the *Farmer* analysis, the *Madrid* court deferred again to the correctional administrators’ claims about the necessity of and the safety-and-security purpose of the SHU: “The severe restrictions on social interaction further defendants’ legitimate interest in precluding opportunities for disruptive or gang related activity and assaults on other inmates or staff.”⁶²⁷ As the *Madrid* court explained, an established penological interest in certain conditions of confinement must be considered, along with the relative harm of that condition of confinement, in a kind of careful weighing of the purpose of the restriction against the potential harm of the restriction.

The *Madrid* court’s final conclusion about the serious restrictiveness of the conditions in the SHU, and whether they rose to the level of a constitutional violation, in order to satisfy the first prong of the *Farmer* analysis, was that prison officials had adequately justified these conditions, given “the wide-ranging deference they are owed”:

*It is not the Court’s function to pass judgment on the policy choices of prison officials ... Defendants are thus entitled to design and operate the SHU consistent with the penal philosophy of their choosing, absent constitutional violations ... However, giving defendants the wide-ranging deference they are owed in these matters, we cannot say that the conditions overall lack any penological justification.*⁶²⁸

Because the court found that the need for the SHU conditions justified their seriously restrictive nature, the court did not reach to the second prong of the *Farmer* analysis – the subjective question of whether the prison officials operating the SHUs knew the conditions might be

⁶²⁵ *Id.* at 1159-60 (internal citations omitted).

⁶²⁶ *Id.* at 1267.

⁶²⁷ *Id.* at 1263.

⁶²⁸ *Id.* at 1262-63.

generally harmful. In sum, the court weighed the severity of the conditions against the justifications for the conditions, and found that the justifications adequately rationalized the severity.

Rather than incorporating the principle of deference to prison officials into the second, subjective prong of the *Farmer* test, which was explicitly designed to be deferential to prison officials, the *Madrid* court incorporated the principle of deference to prison officials into its findings of fact as well as into the objective prong of the *Farmer* test. In this way, the court both expanded the principle of judicial deference and also accentuated the already-disadvantaged position of the plaintiff prisoners, who initially raised the conditions of confinement claim. The *Madrid* court essentially found that few if any conditions of confinement (short of sedating prisoners against their will) would actually be so severe as to outweigh prison officials' claims of necessity, defending supermax conditions as tools of safety and security required to control the most dangerous prisoners.

4. *Supermax Double-Bunking: Penologically Justified*

In addition to deferring to prison officials' claims about the need to house some prisoners in the restrictive conditions of the Pelican Bay supermax, the *Madrid* court also deferred to prison officials on another safety-and-security point: the permissibility of double-bunking some prisoners, two-to-a-cell, in the same restrictive supermax conditions. As with the prisoners' claims challenging the harshness of the conditions of supermax confinement, discussed in the previous sub-section, the *Madrid* court first outlined the facts about double-bunking in the supermax, and then applied the objective and subjective prongs of the *Farmer* analysis to assess the prisoners' claims about the unconstitutionality of the conditions at Pelican Bay. Again, at each step of the analysis, the *Madrid* court weighed descriptive facts about prison conditions and prisoners' claims of unconstitutionality against prison officials' articulations of the rationality and necessity of the conditions at issue.

First, the *Madrid* court described the practice of double-bunking. The court explicitly noted that as many as two-thirds of the Pelican Bay supermax prisoners had been double-bunked in the prison's first few years of operation. The *Madrid* court explained that all supermax prisoners were segregated from the general prison population, but "the degree of segregation and restrictions may vary ... depending on a variety of factors, including penal philosophy and the underlying reason for the inmate's segregation."⁶²⁹ Even in the factual analysis of the condition of double-bunking, the *Madrid* court also addressed the "penal philosophy" justifying those conditions, weighing harsh conditions against institutional necessity.

Next, the *Madrid* court evaluated the seriousness of the injuries that had resulted from double-bunking. The court tallied the hundreds of cell fights that had taken place between 1989 and 1993 at Pelican Bay and noted that "[m]any of these cell fights have resulted in serious injuries to the victimized inmate," including fractured ribs, paralysis, and brain damage.⁶³⁰ But, as with the question of whether the restrictive conditions of supermax confinement were sufficiently serious to establish a constitutional violation, the court weighed the serious injuries resulting from double bunking against the claims of prison officials, who explained that cell fights are virtually un-avoidable. The court noted: "[C]ell fights are an inevitable fact of prison life, particularly in maximum security prisons and security housing units where inmates are more

⁶²⁹ *Id.* at 1228.

⁶³⁰ *Id.* at 1239.

likely to have violent histories or tendencies.”⁶³¹ In the end, given the “inevitability” of fights between prisoners with “violent histories or tendencies,” the court found that the objective prong of the *Farmer* analysis – the seriousness of the alleged constitutional violation – was not satisfied. Again, a valid penological justification essentially mitigated the court’s assessment of the seriousness of the condition of confinement.

In the double-bunking analysis, the court did not stop with the first, objective prong of the *Farmer* test, but also considered the second, subjective prong. The *Madrid* court found that, without proof that prison officials actually knew they were housing repetitively assaultive prisoners with bunkmates, there could be no Eighth Amendment liability for these administrators.⁶³² If the prison officials did not have actual knowledge of how dangerous some of the double-bunked prisoners were, then the subjective, state-of-mind prong of the *Farmer* analysis was not satisfied.

As it turns out, the *Madrid* court deferred to the expertise of Pelican Bay prison officials on two important, and potentially contradictory points. First, the *Madrid* court deferentially accepted prison official’s claims that the most dangerous prisoners from throughout the California department of corrections were housed in the SHU, without proof of how and why each individual prisoner was dangerous. The court simply acknowledged that (1) some prisoners were “unsuited for intermingling” with others, and (2) correctional administrators had a “difficult task” in managing these prisoners. At the same time, the court declined to hold these same prison officials liable for Eighth Amendment violations, stemming from housing these same dangerous prisoners together, two-to-a-cell, because there was no proof that these administrators knew exactly how dangerous these prisoners were.

In the end, then, each relevant governmental branch deferred to California Department of Corrections officials in general and Pelican Bay prison administrators in particular, accepting without interrogating claims that the supermax was a necessary tool of safety and security. Specifically, correctional officials had initial deference, from the California legislature, in designing the supermax, and they subsequently received judicial deference as to the day-to-day details of operating the institutions, both in terms of which prisoners they segregated, and how totally they segregated these prisoners. The next section suggests that the penological justifications prison officials have given for the supermax are unsupported by empirical evidence. In fact, statistics describing the operation of California’s supermaxes over the last twenty years contradict the penological justifications for the institutions.

The supermax context, then, and the deference judges have shown to supermax administrators, highlights the problems with the judicial deference codified in *Farmer* and expanded by application in cases like *Madrid*. Specifically, the deference has allowed prison officials, rather than judges, to both assign punitive deprivations, and to establish and control the outer limits of these deprivations. Empirical evidence about the operation of California’s supermaxes both reveals the disincentives to constitutional restraint, which develop when prison officials make these decisions, and also suggests a roadmap for the kinds evidence that should be provided, to facilitate judicial (and public and political) analysis of the constitutional limits of punitive deprivations.

⁶³¹ *Id.* at 1269.

⁶³² *Id.* at 1269.

B. An Empirical Examination of the Penological Justifications for Supermaxes

This section presents a variety of empirical evidence, drawn from both oral history interviews with the correctional administrators who designed California's first supermaxes and statistical analyses of data about the operation of these institutions over the last twenty years, based on a combination of publicly available department of corrections documents and the more targeted public information requests. From a superficial perspective, this evidence simply serves to document the inherent contradictions between the justifications for California's supermaxes, to which the *Madrid* court deferred, and the reality of their day-to-day operation. Specifically, this section documents (1) the rationales for the first supermaxes, as articulated by their designers; (2) the operation of these institutions in contradiction to these rationales, mainly through the consistent and persistent use of double-bunking prisoners in institutions specifically designed to totally isolate prisoners; (3) and the lack of evidence that these institutions have achieved their safety-and-security goals. From a legal-analytic perspective, this evidence suggests that the deference courts have shown to correctional administrators, in cases like *Madrid*, is unjustified by the empirical evidence about institutional operation. From a policy perspective, the analysis suggests how, practically and legally, the public, the legislature, and courts might all benefit from better empirical evidence with which to assess the legitimacy of correctional administrators' claims about prison operation.

1. Correctional Administrators Present Legitimizing Justifications for Supermaxes

The correctional administrators who designed the first supermaxes provided two key *legitimizing justifications*⁶³³ for the institutions: (1) they explained that the institutions were designed to control and isolate the worst, most dangerous prisoners in the California prison system, and (2) they explained that the restrictive isolation conditions of the supermaxes would promote safety and security throughout the department of corrections. In other words, correctional administrators provided both an individual security rationale and a system-wide governance rationale for supermaxes. These explanations functioned as "legitimizing justifications" not only because they fit neatly with the "overarching mission" of the California Department of Corrections, "to improve public safety,"⁶³⁴ but also because they ultimately became the very basis on which the *Madrid* court upheld the constitutionality of the supermax, when prisoners' rights lawyers challenged the legitimacy of the institution.

This section will explore exactly how correctional administrators have discussed these two legitimizing justifications for the supermax, as well as the legal and theoretical implications of the extent to which correctional administrators (as opposed to legislators or judges, for instance) have been the ones to justify and legitimize the supermax. Specifically, both the original design and the subsequent operation of California's supermaxes provide an important example of the kind of legal endogeneity Lauren Edelman has described in the civil employment context, and Val Jenness has documented in the criminal justice policy-making context: the

⁶³³ See Scott and Lyman, *supra* note 494, in Chapter VII, as well as surrounding text, for a discussion of legitimizing accounts.

⁶³⁴ The statement continues, "...through evidence-based crime prevention and recidivism reduction strategies." California Department of Corrections and Rehabilitation, "About CDCR: Vision, Mission, Values, and Goals," available online at http://www.cdcr.ca.gov/About_CDCR/vision-mission-values.html (last accessed 12 Sept. 2011).

genesis of law within the very organizations that the law is meant to regulate.⁶³⁵ So although court cases like *Madrid* appear to be regulating the conditions of confinement in California supermaxes, the terms of the regulation were actually generated by correctional administrators, as they designed and justified the supermaxes they built. By tracing how correctional administrators explained the need for California's first supermaxes, this section demonstrates the ways in which these administrators ultimately shaped the *Madrid* court review of the very constitutionality of the institutions.

The first critical legitimizing justification the designers of the supermax articulated was that the institutions were tools for controlling “the worst of the worst” and “the most dangerous”⁶³⁶ prisoners in the correctional system. As one architect who worked on the Pelican Bay design and construction project described it: “The facility was designed to house the worst of the worst, the Hannibal Lecters of the world. And in the state of California, you find more Hannibal Lecters.”⁶³⁷ The analogy between potential supermax prisoners and the infamous serial murderer (and cannibal) from the 1991 movie *Silence of the Lambs* reveals this architect's perception that California in the 1980s housed a prison population that included hundreds, if not thousands, of extremely violent, uncontrollable prisoners.

Rich Kirkland, who oversaw the Pelican Bay construction project, similarly explained that the Pelican Bay SHU was designed to control a large number of potentially very violent prisoners. Kirkland explained that the SHU was ultimately intended to “keep them [the most predatory prisoners] from turning this [the California Department of Corrections] into a Kurt Russell New York Island movie.”⁶³⁸ Like the Pelican Bay architect, who referenced the horror film *Silence of the Lambs* in order to evoke a popular image of a dangerous prisoner, Kirkland referenced the 1981 action film *Escape from New York*, in which the island of Manhattan is portrayed as a chaotic, maximum-security prison, in order to evoke a popular image of a prison plagued by uncontrollable violence.

Together, Rich Kirkland and the Pelican Bay architect clearly articulated one problem that the supermax was designed to solve: supermaxes would curb the potential for chaotic violence within the department of corrections, by housing the most dangerous prisoners, alone. Indeed, news reports of the first prisoners who were transferred to California's then-new supermaxes validated the legitimizing justifications of both the Pelican Bay architect and Rich Kirkland; California papers reported that infamous cult leader and serial murder Charles Manson, along with Robert Kennedy's assassin Sirhan Sirhan, and Juan Corona, who was convicted of killing 25 itinerant laborers in California, were some of the first prisoners transferred to the Corcoran SHU (which opened just one year before the Pelican Bay SHU).⁶³⁹

⁶³⁵ Lauren B. Edelman, “Law at Work: The Endogenous Construction of Civil Rights,” *Handbook of Employment Discrimination Research* (Dordrecht, The Netherlands: Springer, 2008): 337-352, at 339 (arguing that “[a]s organizations respond to legal ideals by themselves becoming legalized, they shape social understandings of law and of the meaning of compliance”). See also Valerie Jenness and Michael Smyth, “The Passage and Implementation of the Prison Rape Elimination Act: Legal Endogeneity and the Uncertain Road from Symbolic Law to Instrumental Effects,” *Stanford Law & Policy Review*, Vol. 22.2 (2011): 489-528, at 493 (applying the concept of legal endogeneity to the criminal justice policy making context).

⁶³⁶ Griffith, *supra* note 54.

⁶³⁷ Justice architect (California) interview, Aug. 4, 2010, *supra* note 437.

⁶³⁸ Kirkland interview, *supra* note 95.

⁶³⁹ John Howard, “Highest-Risk Prisoners are Moved from San Quentin,” *Los Angeles Times*, May 7, 1989, Bulldog Edition: A-3.

Both the description of the proposed supermax prisoners as “the worst of the worst” and the “most dangerous,” and the widely publicized transfer of prisoners like Charles Manson and Sirhan Sirhan into these supermax facilities as soon as they opened, were pivotal to the legitimizing justifications underlying the supermax. Correctional architects and administrators described a class of prisoners so dangerous that they required the totally restrictive isolation conditions of the supermax, and then demonstrated which prisoners they were talking about – Charles Manson, Sirhan Sirhan, and Juan Corona – by immediately transferring these prisoners to the new supermax facilities.

Of course, labels like “worst-of-the-worst” often imply that these prisoners are dangerous to society as a whole; the general public might reasonably assume that supermax prisoners are the prisoners, like Charles Manson, who committed the worst crimes against society and received the harshest prison sentences from judges and juries. This is not the case. Correctional administrators, not judges or juries, assign prisoners to supermaxes. By definition then, supermax prisoners are the prisoners deemed most dangerous to prison security and discipline specifically, rather than to society generally.

Indeed, in discussing the need for supermax prisons, some correctional administrators highlighted the prison-specific problem of prisoners who kill correctional officers. Carl Larson, who was Director of Finance for the California Department of Corrections in the 1980s and who was instrumental in selecting the supermax design for Pelican Bay, explained that the supermax was a necessary response to uncontrollable violence against staff within the state’s department of corrections. Larson said: “We were having a hell of a time . . . we had 11 staff members murdered in 1971.”⁶⁴⁰ Steve Cambra, who served as the second warden at Pelican Bay State Prison, described what he thought Larson was thinking when he picked the design for Pelican Bay: “When we build these prisons, we don’t want inmates to be able to kill officers.”⁶⁴¹

Depending on whom you ask, supermaxes were designed to isolate prisoners dangerous to the general public, or they were designed to isolate prisoners dangerous to each other, or they were designed to isolate prisoners dangerous to correctional staff. Regardless of who defines dangerous prisoners and how, correctional administrators agree that supermaxes were unequivocally designed to *isolate*; isolation was the tool correctional administrators planned to use, in order to maintain institutional safety and security in the face of the most dangerous prisoners. The supermax designers describe how they built the institutions with the explicit purpose of eliminating all physical contact between prison guards and prisoners and between prisoners themselves.

James McFadden, who participated in the design of the prototype supermax in Arizona (on which the Pelican Bay supermax was modeled) and later served as the first warden of the Arizona supermax, explained how the fundamental principle of physical isolation was built into the institutional design:

It was a hard-scale facility. There wasn’t a lot of bells and whistles. But it was a good design. We had small pods, eight cells, four up and four down. If an inmate did what he was supposed to do, if he would cooperate and go out to his exercise, do everything he was expected, an officer never had to come into physical contact

⁶⁴⁰ Larson interview, *supra* note 8.

⁶⁴¹ Cambra interview, *supra* note 226.

*with him ... The key design was trying to be able to control the most dangerous group of inmates without having to physically lay hands on them.*⁶⁴²

McFadden, then, emphasized that the supermax prevented any physical contact between prisoners and prison guards. But he also explained that the supermax was designed to prevent contact between prisoners. The physical structure of self-contained pods of eight-to-ten individual cells ensure that each prisoner in a given pod has time to exercise alone, shower alone, and visit the law library alone: “You’ve got 8 hours of daylight, and you can only move people out for exercise so many hours a day. So we kind of did a time study; 10 is the maximum we can handle feeding, and housing, and exercising and [taking to the] law library.”⁶⁴³

In California, the correctional administrators who coordinated the design of the Corcoran and Pelican Bay supermaxes similarly explained that the institutions were designed to keep prisoners isolated from staff, and also from each other. Rich Kirkland explained:

*Here we have a class of folks that we’ve determined . . . need to serve their term segregated ... These are people who we can’t trust to just do their time . . . We knew we needed [the SHU] for a class of people ... and we wanted a single-purpose institution that would do that ... totally segregate people.*⁶⁴⁴

Both Kirkland and McFadden, in fact, pointed out that double-bunking prisoners assigned to the supermaxes would inevitably create problems. Kirkland described how prisoners in California often prefer to be double-bunked and so request permission from correctional administrators to have a cellmate. “Inmates like to double cell, for the most part . . . both cellies have to request it.” But, Kirkland, said, double-bunking supermax prisoners is a dangerous proposition. The assessment of whether two supermax prisoners can be housed in one cell together is usually: “I don’t trust the guy in the cell to be with you.”⁶⁴⁵ In sum, the first legitimizing justification for the supermax was that correctional administrators needed the new, technologically-advanced total confinement prison, in order to completely isolate the most dangerous, “worst of the worst” prisoners in the system from staff and from each other.

The second legitimizing justification for the supermax was that this tool of isolation would promote department-wide safety and security. Carl Larson explained, for instance, that he saw the supermaxes at Pelican Bay and Corcoran as an integral part of the entire department of corrections system: “We were advised to build a prison system [as opposed to one institution at a time]. When we looked at the system, the formula we figured we needed was two percent SHU inmates.”⁶⁴⁶ And Craig Brown, who was Undersecretary of the agency that oversaw the California Department of Corrections in the 1980s, when the supermaxes were built, explained that the supermaxes were all about reducing system-wide violence: “We had a severe violence problem, and it got a lot better.”⁶⁴⁷ The rhetoric of the supermax designers, like Larson and Brown, emphasizing both that supermaxes isolate individual, dangerous prisoners and the ultimate safety-and-security purpose of the institution, has shaped not just the public perception of the institution but also its legal interpretation.

Even fifteen years after he first heard the *Madrid* case, in an interview reflecting back on his role in the case, Judge Henderson said of the prisoners at Pelican Bay, “These are some bad

⁶⁴² James McFadden (retired warden, Arizona Department of Corrections), phone interview with author, May 19, 2011, notes on file with author.

⁶⁴³ *Id.*

⁶⁴⁴ Kirkland interview, *supra* note 95.

⁶⁴⁵ *Id.*

⁶⁴⁶ Larson interview, *supra* note 8.

⁶⁴⁷ Brown interview, *supra* note 226.

people.” Henderson laughed, then, adding that prisoners’ advocates remind him that the Pelican Bay prisoners are not “bad people,” but “people who have done bad things.” But Henderson reiterated: “These are some bad people ... They’re geniuses. I saw knives made of toilet paper. They’re geniuses. Close supervision is called for.”⁶⁴⁸ A decade-and-a-half after he first evaluated the constitutional challenges to Pelican Bay, Judge Henderson highlighted the continued importance of the institution as a “close supervision response” to the kind of “bad people” who can make knives out of toilet paper. In other words, just as he had done in his initial order in the case, Judge Henderson continued to defer to correctional administrator’s claims that supermax prisoners were dangerous and required the restrictive conditions of confinement imposed by the supermax. Judge Henderson’s continued deference reinforces the resonance of the correctional administrator’s legitimizing justifications for the institution they designed. The idea that dangerous prisoners existed and required total isolation, for the purposes of maintaining institutional safety and security, stuck. The idea, in fact, shaped the application of the federal constitution to legal analyses of supermaxes, which have deferred to correctional administrator’s justifications for supermaxes.

In a classic article modeling organizational choice, Cohen, March, and Olsen argue that organizations often explain their actions as problem-solving after-the-fact, working backwards from an existing practice or idea to retroactively identify a problem.⁶⁴⁹ In the case of the supermax, this model of organizational choice resonates with correctional administrator’s articulations of the legitimizing justifications for the supermax. In referencing the initial justifications for supermaxes, correctional administrators, like Kirkland, Larson, and Cambra referenced both their own ideas of what constituted a prisoner dangerous to prison security (those who might murder staff), as well as more popular ideas about what constituted a prisoner dangerous to society (Charles Manson, for instance). So they worked backwards from the solution (the supermax they had designed), retroactively defining the problem (i.e. Hannibal Lecter, Charles Manson, or killers of correctional officers) it served to solve. Indeed, because correctional administrators had wide discretion in designing new prisons in California, as described in Chapters V and VI, they were not required to articulate their justifications for supermaxes until after the institutions were built. The retroactive nature of the legitimizing justifications for the supermax, then, are relevant both for evaluating the legitimacy of the judiciary’s deference to the stated justifications and for evaluating the empirical evidence underlying the justifications.

In terms of the judicial deference to the legitimizing justifications, the justifications themselves, importantly, shaped the way the court evaluated the constitutionality of the new supermax. Essentially, the correctional administrators articulated justifications, which shaped the way the law was applied to the institutions they designed. Correctional administrators first explained that supermaxes were necessary to isolate dangerous prisoners; twenty years later, the judge who heard the case remembered vividly how dangerous the prisoners at issue were. Correctional administrators second explained that supermaxes were necessary tools of safety and security; the *Madrid* court evaluated the institutions on this basis, focusing on the necessity of various deprivations for safety and security, rather than evaluating the constellation of deprivations as a new form of potentially cruel and unusual punishment. This process, through which the correctional administrators described the institution in terms that became the basis for

⁶⁴⁸ Henderson interview, *supra* note 612.

⁶⁴⁹ See Michael D. Cohen, James G. March, and Johan P. Olsen, “A garbage can model of organizational choice,” 17 *Administrative Science Quarterly* 1 (1972).

its constitutional evaluation, represents an example of the kind of legal endogeneity Edelman has described in the civil rights and private employment context, when employers shape the laws that are applied to employment decisions, for instance.⁶⁵⁰

In sum, correctional administrators had nearly unchecked administrative authority, not only in how they designed and implemented California's first supermax prison, as described in Chapter V, but also in how they explained and justified the institution they built. Their explanations were largely retroactive, in part because the supermax design process was so administratively controlled that few public justifications were articulated during the design process. The *Madrid* court later deferred to the authority of correctional administrators, especially to the explanations correctional administrators provided to justify the necessity for the supermax. In this way, the *Madrid* court allowed correctional administrators to shape the parameters of the constitutional evaluation of the newly punitive institution they had designed, further expanding and entrenching correctional administrators' authority.

The remainder of this chapter uses a combination of historical and statistical evidence to evaluate the legitimacy of the justifications correctional administrators provided in explaining the need for California's supermaxes and in defending the operation of the institutions to a northern district federal court. In light of more than twenty years of hindsight, covering the two decades in which California's supermaxes have now been in operation, supermaxes appear to have been operated in contradiction to their legitimizing justifications. This empirical evidence is important both for (1) understanding how the mysterious institution of the supermax, the prison within the prison, actually operates on a day-to-day basis and (2) re-considering the degree of judicial deference these institutions have been accorded.

2. The Practice of Supermax Overcrowding and Its Intrinsic Contradictions

This sub-section evaluates one important and basic measure of the functioning and operation of California's supermax institutions: the population over time of the state's supermax units. (The next sub-section evaluates another measure: rates of violence.) Specifically, this sub-section documents the rates of prisoner double-bunking in California's supermaxes over the last twenty years and suggest that the patterns of double-bunking appear to be driven not by safety-and-security concerns, but rather by prison overcrowding. This sub-section provides historical data about the practice of double-bunking, statistical data about the actual rates of double-bunking, and then explores the various possible correctional justifications for the practice of double-bunking, as well as two important legal implications of these justifications.

In researching the number of prisoners in California's supermax units, or SHUs, in 2010, I was surprised to find that the prisoner populations in these units were significantly greater than the number of cells correctional administrators like Carl Larson and Richard Kirkland had described designing and building in the 1980s. Specifically, the Corcoran State Prison SHU has a "design capacity," or intended prison population, of 1,024 single-occupancy cells, but in February of 2010, 1,439 prisoners were housed in the Corcoran SHU.⁶⁵¹ So 58 percent of the prisoners in the Corcoran SHU were double-celled in 2010.⁶⁵² The overcrowding rate in the

⁶⁵⁰ See Edelman, *supra* note 635.

⁶⁵¹ James S. Derby (Associate Director, Division of Planning, Acquisition and Design, California Department of Corrections and Rehabilitation), e-mail message to author, Jul. 20, 2011, on file with author.

⁶⁵² I calculated the percentage of prisoners who are double-bunked by subtracting the design capacity of the Corcoran SHU (1024) from the total population (1439). This number (415) represents the "extra" prisoners being

Pelican Bay State Prison SHU was lower, but still suggested that at least one in every ten prisoners had a cell mate. Specifically, the Pelican Bay SHU has a design capacity for 1,056 single-occupancy cells, but in February of 2010, 1,118 prisoners were housed there.

At first, I assumed that there would be a clear point in time at which the California Department of Corrections changed the policy articulated by the supermax designers I interviewed and decided to double-bunk the majority of the prisoners housed in the Corcoran SHU. I imagined that, if I found the identifiable moment when the SHU bunking policy changed, this would create an ideal “natural experiment.” I would be able to empirically test whether the SHU was actually promoting institutional safety and security in the California Department of Corrections, by totally isolating the most violent prisoners, the Hannibal Lecters and Sirhan Sirhans. There would finally be evidence with which to evaluate both the correctional administrator’s legitimizing justifications for supermaxes, as described in the previous subsection, as well as the penological, safety-and-security justifications on which the *Madrid* court based its conclusion that the supermax conditions were constitutional.

I combed through the monthly, unit-by-unit population reports published by the California Department of Corrections in the 1990s, hoping to find the moment in time when the SHU bunking policy changed. At first I thought I had found my moment in May of 1995. In that month, the population of the Corcoran SHU nearly doubled. California’s supermax designers, like Carl Larson, had told me that the Corcoran SHU was built to hold roughly 800 prisoners in isolation. Between April and May of 1995, the population of the Corcoran SHU jumped from just under 800 to just over 1300. So the near-doubling of the population between April and May of 1995 appeared to be just the moment-in-time I was looking for. As it turned out, however, the jump in the Corcoran SHU population was due to an increase in the housing capacity, not to a policy shift towards double-bunking in the SHU.⁶⁵³

Next, I looked at the Pelican Bay SHU population counts throughout the 1990s, and I noticed something surprising: the Pelican Bay SHU population regularly numbered between 1400 and 1600 prisoners throughout the 1990s. This represented hundreds more prisoners than the institution’s design capacity of 1,056 single-occupancy cells. In 1995, of course, the *Madrid* court had noted that a few dangerous prisoners had been double-bunked together in the Pelican Bay SHU in the first years the institution was open. But, double-bunking, it appeared, had been used consistently and frequently in every year of Pelican Bay’s operation. California had apparently been double-bunking the majority of prisoners in both of its SHUs throughout the 1990s.

I contacted Carl Larson, who had been instrumental in designing and building the SHU at Pelican Bay, to seek some clarification on these confusing numbers. Had I misunderstood the design capacities of these institutions? Had I misunderstood the mandate of total segregation? As it turned out, the Corcoran SHU, like the Pelican Bay SHU, had been at least partially double-bunked since the day it opened. Larson further explained that:

[Although] the Corcoran SHU and all of the other new prisons designed and constructed since 1982 were designed for one inmate per cell ... based on our

housed in the SHU; every “extra” prisoner is necessarily housed in a cell with one other prisoner, so the number of double-bunked prisoners is twice the number of “extra” prisoners (830). The percentage of prisoners double-celled is therefore 830 divided by the total SHU population (1439): 0.576, or 58 percent.

⁶⁵³ Larson later explained that it had taken a few years for the California Department of Corrections to operate all of the planned supermax cells in the Corcoran SHU, so from 1989 through 1995, only 512 cells were operating as SHUs, and then from 1995 onward, 1024 cells were operating as SHUs. Carl Larson (former Director of Finance, California Department of Corrections), e-mail exchange with author, Jul. 20, 2011, on file with author.

*inmate population projections at the time, which proved to be accurate, to accommodate “temporary overcrowding” we added a second bunk and a second locker to each cell and increased the utility infrastructure.*⁶⁵⁴

Larson elaborated that this second bunk and second locker were added to every SHU cell in California, including all 1,024 cells at the Corcoran SHU and all 1,056 cells at the Pelican Bay SHU. Based on Larson’s clarification of the design capacities and populations of the Corcoran and Pelican Bay SHUs, I calculated the double-bunking rate at each institution in each year from 1989 (when both institutions were first fully operational) through 2010 (the most recent year for which population statistics were available). *Table 6*, in Appendix A, and *Figure 4*, in Appendix B, show the results of these calculations. (Recall that these data were also discussed in Chapter VIII, Section D. Supermax Statistics, 1997-2007.)

The pattern of SHU double-bunking in California throughout the 1990s and 2000s obviously makes it impossible to identify a point in time that might represent a dramatic policy change with respect to double-bunking in isolation units in California prisons. My intentions of rigorously evaluating violence statistics over time, comparing single-bunked SHU periods to double-bunked SHU periods, were thwarted.

The pattern of double-bunking seen in *Figure 4*, however, revealed something philosophically much more interesting and legally much more de-stabilizing: at least one-third, and often more than one-half of the prisoners in California’s supermax units were double-bunked, from the day the “total isolation” units first opened. *Figure 4* reveals what the *Madrid* court hinted at in 1995, in the first years of Pelican Bay’s operation: there is a dual system of supermaximum-security confinement in California. One set of prisoners experiences conditions of grossly restricted liberty, in total isolation. Another set of prisoners – often equally as large – experiences conditions of grossly restricted liberty, with a bunkmate.

Of course, part of the job of any prison system is to sort and classify prisoners, often using a numeric scale or assessment rubric that accounts for the crime for which the individual is serving a prison sentence, the length of the individual’s sentence, and the quality of the individual’s behavior in prison.⁶⁵⁵ So what is surprising about the observation that California essentially maintains two degrees of supermaximum-security confinement – one kind of confinement where prisoners experience severely restricted liberties in total isolation, and one kind where prisoners experience severely restricted liberties with a cellmate? The surprise is two-fold. First, the pattern of double-bunking over time suggests that institutional pressures other than a concern with safety-and-security – for example, population overcrowding – are actually driving conditions of confinement in supermaxes. Second, double-bunking in solitary confinement contradicts the legitimizing justifications articulated for the institutions.

The first surprise about double-bunking is that the rates of double-bunking have fluctuated widely over time in the California Department of Corrections. In some years, as many as two-thirds of all supermax prisoners have been double-bunked; while in other years, only one-quarter of all supermax prisoners have been double-bunked. In other words, the policy of double-bunking has itself been inconsistent. Have shifting rates of violence, or shifting rates of gang membership impacted rates of double-bunking? Or has overcrowding throughout the prison system been driving double-bunking rates in the supermaxes?

⁶⁵⁴ *Id.*

⁶⁵⁵ See, e.g., Richard A. Berk and Jan de Leeuw, “An Evaluation of California’s Inmate Classification System Using a Generalized Regression Discontinuity Design,” *Journal of the American Statistical Association*, Vol. 94.448 (Dec. 1999): 1045-1052.

One further statistic sheds some light on the double-bunking practice. At the same time there have been fluctuations in rates of double-bunking, the proportion of supermax prisoners relative to the overall prison population has remained relatively constant, at between 1.6 and 2.3 percent of the overall prison population. (See the final column of *Table 6*, in Appendix A, for these numbers.) The fact that the overall proportion of California prisoners housed in supermaxes has been relatively constant suggests that the *prevalence* of violent or dangerous prisoners in the California prison system has also been relatively constant. So, double-bunking variations must be caused by something besides a change in the *prevalence* of violent or dangerous prisoners in the California prison system.

Perhaps there are variations in the kinds of violence this steady stream of prisoners commits, or the kinds of dangers they present. Or perhaps double-bunking rates in the SHU are driven by rates of overcrowding throughout the Department of Corrections. After all, the raw number of supermax prisoners has increased steadily, with the increases in the raw numbers of the overall prison population. (This explains how the rate of supermax use has remained relatively constant.) So, in 1995, an extra supermax unit was opened at Corcoran State Prison, and in 2000, an overflow supermax unit was opened at the Central California Institute at Tehachapi.⁶⁵⁶ Correctional administrators claim that supermax use is based on dangerousness, or violence-proneness of prisoners, but this data suggests that supermax use might actually be based, at least in part, on overcrowding rates in the California Department of Corrections. Double-bunking rates might be driven as much by overall population rates, as by individual assessments of the dangerousness or violence-proneness of specific prisoners.

This contradiction – between a safety-and-security purpose of the supermax and a managing-overcrowding purpose – is one that the *Madrid* court did not consider. In other words, when the court deferred to correctional administrators’ penological justifications for both (1) the restrictive conditions of supermax confinement and (2) the differently restrictive conditions of double-bunking in supermax confinement, the court did not consider that the actual justification for the conditions could have been overcrowding pressures, rather than safety and security concerns. If the degree of restrictive conditions of supermax prisons are in fact being determined by rates of overall prison overcrowding, then this might present a constitutional problem. After all, the Supreme Court recently held in *Brown v. Plata* that overcrowded prison conditions were no excuse for the perpetuation of Eighth Amendment constitutional violations and therefore had to be remedied, even if the remedy would require the release of thousands of prisoners.⁶⁵⁷ In May of 2011, the U.S. Supreme Court found that California’s prisons were so overcrowded that the conditions violated the Eighth Amendment prohibition on cruel and unusual punishment.⁶⁵⁸ On average, one California prisoner a week commits suicide, and one prisoner a week “needlessly dies . . . due to constitutional deficiencies” in provision of medical care, the Court noted.⁶⁵⁹ In light of these and other similarly disturbing facts, the Supreme Court upheld a federal district court’s order to release more than 35,000 prisoners from California’s

⁶⁵⁶ Larson e-mail exchange, *supra* note 653; California Department of Corrections and Rehabilitation, “Population Reports,” available online at: http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Population_Reports.html (last accessed 23 Feb. 2012).

⁶⁵⁷ See *Brown v. Plata*, 563 U.S. ___, 131 S.Ct. 1910, No. 09–1233 (May 23, 2011).

⁶⁵⁸ *Id.*

⁶⁵⁹ *Plata*, 131 S.Ct. at 1924, 1941.

overcrowded prison system. The *Plata* case received national news coverage,⁶⁶⁰ and many people asked me whether it would affect the prisons I study – would *Plata* change conditions in supermaxes? The simple answer should have been: “No.” Supermaxes are the antithesis of overcrowded prisons; they keep individual prisoners in total isolation, one to a cell. By definition, total isolation cells cannot be overcrowded. Or so one might think.

The statistics about double-bunking rates over time in the California supermaxes, however, suggest that there is indeed overcrowding in California’s supermaxes. The decision in *Plata*, in turn, suggests that if the conditions of supermax confinement are being determined not by safety concerns but by institutional overcrowding concerns, the supermax may deserve renewed constitutional scrutiny. By analogy to *Plata*, if overcrowded prison conditions are forcing prison officials to either (a) assign prisoners, who otherwise would be housed in less restrictive conditions, to the “stark sterility and unremitting monotony” of supermax conditions of confinement, or (b) assign prisoners, who otherwise would be housed in total isolation for the safety of other prisoners or staff, to have cellmates, then there may be a constitutional problem. The *Madrid* court held that imposing these conditions to isolate dangerous prisoners, in order to promote institution-wide safety-and-security, was justified; the court did not hold that imposing these conditions to relieve problems with overcrowding was justified.

Indeed, the second surprise about double-bunking under restrictive supermax conditions is that it contradicts the very principles that justify the restrictive conditions in the first place. The principle justifying the harsh conditions and severe restrictions inherent in supermax confinement, as outlined the previous sub-section, is that supermax prisoners are the most dangerous prisoners in the entire prison system, the ones who are so dangerous that they cannot safely be in contact, either with each other, or with prison staff. This high-level of dangerousness, epitomized by references to both fictional serial murderers and real-life cult leaders like Charles Manson, justifies the extremely restrictive conditions of supermaximum confinement: at least twenty-two hours per day locked in a cell, the absence of windows, lights on twenty-four hours per day, visits with doctors and lawyers and family only permitted behind bullet-proof glass, or from an upright telephone-booth-like cage.

But what justifies these restrictive and harsh conditions of confinement when prisoners are housed two to a cell? Are their lives not, by definition, in danger, if both prisoners are too dangerous to be housed in the general prison population? Perhaps these double-bunked prisoners are gang leaders, who must be isolated not because they will themselves be violent, but because they will order other people to be violent. But then the supermax is serving a more complicated array of functions than the designers originally articulated, with their references to Charles Manson and murders of correctional officers. If the supermax is serving a complicated array of functions, isolating a variety of kinds of prisoners, then this raises the question of whether the other restrictions imposed through supermax confinement – lights always on, no time out-of-the-cell, no physical contact with family and friends during visits – are any more necessary for all of these varied prisoner than the (apparently unnecessary) condition of total isolation? In sum, the second surprise of double-bunking is that it contradicts the justifications for supermaxes, as tools of total isolation for the most dangerous prisoners, raising a whole series of questions about which of the various supermax restrictions are actually connected to which safety and security concerns.

In California, at least, there is a fundamental contradiction between the manifest theory of

⁶⁶⁰ See, e.g., Adam Liptak, “Justices 5-4, Tell California to Cut Prisoner Population,” *New York Times*, May 23, 2011.

supermax confinement – total isolation of the most dangerous prisoners to achieve institutional safety and security – and the practice of supermax confinement – housing as many as two-thirds of the allegedly most dangerous prisoners two-to-a-cell. Of course, as Carl Larson explained in response to my queries about double-bunking in the SHU, the contradictions between theory and practice were, literally, built into the architecture of the Pelican Bay and Corcoran SHUs. The theory was total isolation, but the physical construction involved the addition of a second bunk bed in each cell – to accommodate “temporary overcrowding.” But as former supermax warden James McFadden, who worked on the design of the first supermax in Arizona said, overcrowding or not: “Double-bunking your worst of the worst is not a good idea.”⁶⁶¹ In the case of California, historical details about how supermaxes were designed (with an extra bunk added at the last minute) and how they have been used over the last twenty years (with high and variable rates of double-bunking) undermine correctional administrators’ claims about the manifest functions of the institutions.

In the end, the fact of double-bunking in California – both as a historical detail of design built into the state’s supermaxes, and as a statistical pattern over time – blurs the definition not just of the supermax as an institution of solitary confinement, but as a place that maintains institutional safety and security. As discussed in the sub-section on *Madrid*, the fine gradations in security, and the legal analysis about whether each restriction is appropriate, actually masks the overall harshness of the conditions of confinement. Moreover, the widespread use of double-bunking, at high, if variable, rates over time in California’s supermaxes suggests that perhaps the supermax restrictions are unjustified. After all, in some years, as few as one-third of California’s supermax prisoners apparently required the harsh restrictions of total isolation, supermax confinement.

The tale of double-bunking in California supermaxes might seem at first like a simple story about bureaucrats saying one thing (total isolation of dangerous prisoners) and doing another (double bunking dangerous prisoners). Or, it might seem like an only slightly more complicated story about bureaucrats using their discretion to manage challenging problems of violence and overcrowding, by creating fine gradations of security (double and single-bunking in the supermax). However, in the context of understanding not only how punishment innovation happens initially, but how the innovations get justified and entrenched over time, the tale of double-bunking in California takes on a broader meaning. Specifically, the persistence of double-bunking in California’s supermaxes, even though the practice contradicts the manifest purpose of the supermax, as described by its original designers, provides further evidence that correctional administrators have significant discretion and control not only in operating prisons, and sometimes even in designing new forms of punishment.

Moreover, the historical details presented in this sub-section about the design and operation of California’s supermaxes suggest that their purpose has been ambiguous since the moment they were conceived, reiterating a core theme from Chapter VII. If supermaxes are not actually totally isolating the state’s most dangerous prisoners, then what are they doing, and to what end? Indeed, the evidence about the contradictions between the supermax theory and operation demonstrates how and why supermaxes defy both administrative definition and legal challenge. The two ambiguities are interrelated. The existence of double-bunking makes the various kinds of supermax confinement appear to be simply fine gradations of security, masking the novelty of the particular constellation of deprivations supermax confinement imposes; the

⁶⁶¹ James McFadden (Warden, Arizona Department of Corrections, retired), e-mail exchange with author, Jul. 26, 2011, on file with author.

practice of double-bunking renders the supermax both harder to define and more challenging to categorize as a new form of extreme punishment. However, the very persistence of the practice of supermax double-bunking, in direct contradiction to the articulated principles behind supermax confinement, suggests that correctional administrators' legitimizing justifications for punishment deserve renewed scrutiny. In sum, the persistent practice of double-bunking, like the initial legitimizing justifications for the supermax, has shaped the way the institution has been publicly perceived, and, more importantly, legally evaluated.

3. In Search of a Relationship between Supermaxes, Overcrowding, and Violence

Because correctional administrators have claimed, both in interviews explaining the need for the first supermaxes, and in court cases challenging the conditions in these prisons, not just that these institutions are about total isolation, but that they are necessary for safety and security, a natural corollary question to the one about whether supermaxes have been used for total isolation is: Have supermaxes had a positive impact on institutional safety and security? And, has double-bunking in supermaxes compromised any positive impact supermaxes might have had? This section evaluates the available data collected by the California Department of Corrections over the last twenty years about various rates of violence, in an attempt both to answer these questions and to outline what data would be needed in order to conclusively answer these questions.

Based on the claims of correctional administrators about the safety-and-security value of total isolation incarceration, two hypotheses about the structure and value of supermax incarceration should be considered. The first hypothesis: the use of supermax incarceration decreases violence throughout a state prison system, by isolating the most dangerous, violence-prone prisoners. The second hypothesis: double-bunking the most dangerous prisoners in conditions designed for total isolation increases rates of violence. This section will evaluate the available data about supermax housing practices and incarceration, based on twenty years of supermax incarceration in California. The short story: the available data can neither confirm nor reject the hypotheses suggested above. This section will conclude by suggesting what data might be collected in an effort to evaluate these hypotheses.

First: why is there no reliable statistical data with which to conclusively evaluate the two hypotheses proposed above? There are two problems with violence data collected and published by the California Department of Corrections and Rehabilitation. The biggest problem is a collection problem: the department collects and releases data about violent incidents – including homicides, suicides, suicide attempts, prisoner-on-guard assaults and prisoner-on-prisoner assaults – at the institution, rather than the unit level. So violent incident data from Corcoran and Pelican Bay includes violent incidents that took place throughout the institution, both within the supermax units (which make up roughly one-quarter to one-third of the total population at each) and within the general population units. Prisoners in the general population units spend many more hours per day out of their cells, congregating with each other and participating in group activities, than prisoners in the supermax units, who spend only an hour, or two at most, out of their cells, in a solitary exercise yard. The second problem with violent incident data is an interpretive problem. Either (a) very small numbers of incidents are involved, as in the case of homicides and suicides, or (b) where larger numbers of incidents are involved, as in the case of assault statistics, incident reporting is subject to correctional administrators' discretion about how to characterize and whether to report non-fatal incidents of violence.

In spite of these two serious problems with the California violent incident data, this subsection presents two different analyses of the data. First, the data is charted descriptively, over time, in order to investigate whether there are any obvious or consistent trends in the data. Second, a differences-in-differences regression model is presented, again in order to explore whether there are any consistent trends in the data. California's two supermaxes have now been open for just over twenty years; the fact that there are two institutions' worth of statistics to compare, and two decades' worth of multiple violence measures, provides some hope that some trends over time might be visible, such as long-term increases or decreases in multiple measures of violence. If there were consistent trends, these might compensate for the two main flaws in the data, as collected. Unfortunately, no such trends are visible. Each method of analysis will be discussed in turn below.

First, the results of the descriptive graphs appear in Appendix B (*Figures 12 through 26*); the graphs are labeled and grouped together based on the kind of violence measure each describes. Five measures of violence are included: homicides, suicides, suicide attempts, prisoner-on-prisoner assaults and prisoner-on-correctional officer (or guard) assaults. For each measure of violence, there are three graphs: one graph compares the rate of a given kind of violence at Corcoran, Pelican Bay, and throughout the California prison system (labeled as DOC, for Department of Corrections, on the graphs); one graph compares the rates of double-bunking in the SHU at Corcoran to the rates of violence throughout that institution; and one compares the rates of double-bunking in the SHU at Pelican Bay to the rates of violence throughout that institution.

Based on the two hypotheses identified at the beginning of this section, two possible trends might be visible in these graphs. Based on the first hypothesis, there might be a consistent trend in overall rates of violence, over the last twenty years, in institutions with supermaxes, and throughout the department of corrections. Did various measures of violence consistently decrease, or increase, as the department of corrections operated more and more supermax units? Based on the second hypothesis, there might be a consistent relationship between fluctuating rates of double-bunking in the supermaxes and fluctuating rates of violence throughout the department of corrections. Unfortunately, the descriptive trends in the graphs in Appendix B fail to tell one obvious story about either overall rates of violence in the California prisons, or about the relationship between rates of violence and double-bunking in California.

In looking at *Figures 12, 15, 18, 21, and 24*, which each compare a single measure of violence (homicides, suicides, suicide attempts, prisoner-on-prisoner assaults and prisoner-on-correctional officer assaults) at Corcoran, Pelican Bay, and throughout the department of corrections since 1989, when the first supermaxes opened at Corcoran and Pelican Bay, one fact does stand out. Rates of violence at Corcoran and Pelican Bay, whatever the particular measure, are consistently higher than the rates of violence throughout the California Department of Corrections. But again, the violence data do not reveal whether these violent incidents occurred in the supermax units at these prisons, in the general population units, or in both. Moreover, there is no way to tell, based on these data, whether the violence rates at Corcoran and Pelican Bay would have been higher or lower, if these prisons had not had supermax units. The data, then, cannot even suggest, let alone allow for a conclusion, about whether supermaxes have either exacerbated or reduced violence in the California prison system.

Figures 13, 14, 16, 17, 19, 20, 22, 23, 25, and 26 each compare rates of double-bunking in the supermax units at Corcoran and Pelican Bay, respectively, to rates of violence in each unit. Again, the story is one of absences. For some measures of violence in some institutions, violence

seems to increase as double-bunking rates increase. For instance, *Figures 14 and 26* show this kind of pattern. In *Figure 14: Rate of Violent Death Compared to Proportion of Prisoners Double-Bunked, Pelican Bay State Prison, 1989-2006*, between 1994 and 1998, the peak years of double-bunking in the Pelican Bay SHU, homicide rates at the institution also peaked. Similarly, in *Figure 26: Rate of Prisoner-on-Prisoner Assaults, Compared to Proportion of Double-Bunked Prisoners, at Pelican Bay, 1989-2006*, in those same years of SHU double-bunking at Pelican, prisoner-on-prisoner assaults also peaked. But for other measures of violence, violence actually seems to decrease as double-bunking rates increase. See *Figure 22: Rate of Prisoner-on-Guard Assaults Compared to Proportion of Double-Bunked Prisoners, Corcoran, 1989-2006* for an example of this; as rates of double-bunking in the Corcoran SHU increased, rates of prisoner-on-guard assaults actually decreased.

However, even the apparently contradictory trends seen in these graphs could be capturing changes in violence rates due to violent incidents that took place outside of the supermax units, elsewhere in the prison institutions. Modeling these apparent relationships with a bi-variate regression, for instance, is futile, because there is no way to directly evaluate the relationship between double-bunking in the supermax units and rates of violence in the supermax units, since the only data available here actually consists of institution-wide violence rates.

One possibly creative statistical model, through which the relationship between supermax housing practices and violent incidents might be teased out, is a differences-in-differences estimation. This model allows a comparison between variables across panels of data, if the panels of data are drawn from the same broader context. Differences-in-differences estimations, then, might be used to compare employment outcomes in different firms operating within the same, broader state policy context.⁶⁶² In the instant case, violence outcomes in different prisons operating in the same broader policy context of one state corrections department are compared using a differences-in-differences model. Between Corcoran and Pelican Bay, a differences-in-differences model estimates the relationship between the independent variable of supermax housing and the dependent variable of violence outcomes. Specifically, the model presented in *Table 9: SHUs, Double-Bunking, and Violence in California Prisons – Correlation Models & Results*, in Appendix A, estimates the effect of (1) the *differences* in the proportion of all prisoners housed in the SHU between each institution (Model A) and (2) the *differences* in the double-bunking rates between each institution (Model B) on the *differences* in violence rates between each institution, over a decade. Model A tests the first hypothesis presented in this section: that the use of supermax housing, isolating some prisoners, will produce overall reductions in violence throughout institutions. Model B tests the second hypothesis presented in this section: that double-bunking dangerous supermax prisoners will produce increases in violence in these institutions.

In theory, such a panel-based, differences-in-differences model might isolate the effect of changes in (1) rates of prisoners housed in supermaxes and (2) rates of double-bunking among these prisoners on institutional violence rates. Indeed, this model provides a creative way to explore whether there is a clear relationship between supermax housing practices and rates of violence in California. However, even with the two panels of data, drawn from Corcoran and Pelican Bay, there are a limited number of observations; for some measures, as few as nine years of data are available, and no more than 17 years of data are available for any measure. (Unfortunately, the data are reported annually, not monthly.) Moreover, for many measures, like

⁶⁶² See Stephen G. Donald and Kevin Lang, “Inference with Difference in Differences and Other Panel Data,” *The Review of Economics and Statistics*, Vol. 89.2 (2007): 221-233 (discussing differences-in-the-differences modeling).

homicides and suicides, there are very few instances of violence in any given year.⁶⁶³ Given these data limitations, the inconclusive results reported in *Table 9* are unsurprising.

Specifically, the directions of the relationships between supermax housing practices and violence rates are inconsistent; sometimes the coefficient in the regression is positive, and sometimes it is negative, suggesting that sometimes violence rates increase with increased rates of supermax housing use, or with increased rates of double-bunking, but sometimes violence decreases with changes in housing practices. Moreover, very few of these relationships are significant; the standard errors are large, so the apparent relationships could well be due to chance and may not predict future relationships with much accuracy.

Model A evaluates the hypothesis that increased use of supermax housing might lead to decreases in institutional levels of violence. The results reported in *Table 9* suggest that this hypothesized relationship might be true for three of the five measures of violence: homicides, attempted suicides, and prisoner-on-prisoner assaults. For all three of these measures, the regression coefficient is negative; as supermax housing rates increase, homicide rates decrease, attempted suicide rates decrease, and prisoner-on-prisoner assault rates also decrease. The regression coefficient remains negative even when a year variable is included in the regression model (columns labeled (2)), to control for the effects of time (and, by extension, other variables that might be closely correlated with time). However, none of these results are significant; the standard errors are relatively large, so the possibility that the apparent relationships are due to chance cannot be ruled out.

Moreover, the results for two other measures of violence—suicides and prisoner-on-guard assaults—further complicate the findings. For each of these two measures of violence, the apparent relationship reverses when the control variable for the year is included in the model. So, suicides appear to be negatively related to supermax housing for the basic differences-in-differences regression estimation (as supermax housing use increases, suicides go down), but positively related when a year variable is included in the model (as supermax housing use increases, suicides increase).⁶⁶⁴ The exact reverse is true for prisoner-on-guard assaults. However, the relationship between prisoner-on-guard assaults and supermax housing, in the basic differences-in-differences regression estimation, without a control variable for year included, is the only significant relationship in Model A. So, the positive relationship between increased supermax housing and increased prisoner-on-guard assaults is one of the more robust relationships in this model. This relationship, however, contradicts the first hypothesis presented in this section, suggesting, by contrast, that an increased use of supermax housing might actually exacerbate rates of violence in the prison. However, the significant relationship disappears (and the apparent relationship also reverses, becoming negative) when the control variable for year is included in the model. The fact that controlling for more variables in the model reverses the apparent relationships is another indication that the potential positive relationship between supermax housing and prisoner-on-guard violence is weak and not likely predictive.

⁶⁶³ Note that the regression results presented in *Table 9* are based on the natural logs of the housing rates and violence rates. In some years, however, there were no suicides or no homicides at a particular institution; in this case, rather than dropping the variable (because there is no natural log of 0), a zero was used.

⁶⁶⁴ In fact, of all the measures of violence, completed suicides might be the one that could be expected to increase with increased uses of isolation; mental health professionals have argued that isolation is a risk factor for suicide. Don Thompson, “Convict Suicides in State Prison Hit Record High,” *Associated Press*, Jan. 3, 2006 (noting that 70 percent of the 44 prisoners who committed suicide in California in 2005 were in solitary confinement); *Solitary Watch*, “Fact Sheet: Psychological Effects of Solitary Confinement,” available online at: solitarywatch.files.wordpress.com/2011/06/fact-sheet-psychological-effects-final.pdf (last accessed 3 Feb. 2012).

In sum, for three measures of violence, Model A suggests that increased rates of supermax housing use are associated with decreased homicide rates, suicide attempts, and prisoner-on-prisoner assaults, but the standard errors for these associations are large, so the significance of these findings is limited. Moreover, for two measures of violence, suicides and prisoner-on-guard assaults, the relationships between increases in rates of supermax housing are more ambiguous.

Model B evaluates the hypothesis that increased rates of double-bunking in supermaxes might lead to increased rates of institutional violence. In fact, this model reveals that, for three measures of violence, increased rates of double-bunking are negatively correlated with rates of homicides, prisoner-on-guard assaults, and prisoner-on-prisoner assaults (i.e. as double-bunking rates increase, those three violence rates decrease). For the assault statistics, these relationships have low standard errors; they are significant and unlikely to be due to chance. For suicides and attempted suicides, which admittedly constitute a different kind of violence, increased rates of double-bunking are correlated with increased rates of self-inflicted violence. The standard errors are relatively large; only the relationship between double-bunking and suicides, without controlling for year, produces a significant p-value.

In sum, for three measures of violence, Model B suggests a possible negative relationship between double-bunking and violence. As double-bunking rates increase, violence rates decrease. This finding might suggest that either (a) the prisoners in the supermaxes are not so dangerous as alleged, because double-bunking them does not produce aggravations in rates of violence or (b) that the right prisoners are being double-bunked together, so possible violent altercations are being avoided by safely bunking known friends together. Either way, there is an absence of evidence to support the claim that total isolation of certain individually dangerous prisoners is strongly associated with reductions in institutional levels of violence, across a variety of measures of violence. In sum, the statistical data in California is conclusively inconclusive as to the effectiveness of supermaxes in general or of double-bunking in particular.

As with the descriptive graphs discussed above, the differences-in-differences estimation fails to reveal a clear relationship between supermax housing practices and violence rates at Corcoran and Pelican Bay. The results reported in *Table 9* are, like *Figures 12* through *26* in Appendix B, inconclusive. However, the statistics are useful for what they do not show. They fail to either confirm or reject the claims of correctional administrators about the relationship between the restrictive conditions of supermax prisons and the safety and security of prison systems with supermaxes. In this sense, the absence of statistical evidence further calls into question the deference courts have shown to correctional administrators, in justifying supermaxes as necessary tools of safety and security.

In sum, there are three problems with the degree of deference afforded to correctional administrators' claims about the purposes of supermaxes. First, the correctional administrators' rhetoric, focusing on the existence of individual dangerous prisoners, like gang leaders, and the safety and security justifications for the supermaxes, has shaped the way the law was applied to the new institution they designed. The correctional administrators successfully framed the terms of the debate, as a safety-and-security assessment, rather than as a punishment assessment. Second, correctional administrators in California, at least, have operated the state's supermaxes in contradiction to their own claims about their purposes. Third, correctional administrators have produced little-to-no evidence of whether the supermax institution has succeeded or failed at its

stated safety-and-security purposes, for more than twenty years now.⁶⁶⁵ In light of this empirical evidence (or in some cases, lack thereof), the *Madrid* opinion, and others like it, deserve to be reconsidered. The claims of correctional administrators about the purposes of supermaxes should be evaluated based on empirical evidence: have the institutions achieved their goals? And if the institutions have not achieved their goals, as I suggest, then courts should look more closely at the restrictive conditions of supermaxes, considering whether, perhaps, something less than total sedation of a prisoner might still rise to the level of serious, restrictive, cruel and unusual punishment.

4. Recommendations for Future Data Collection

The critique of the empirical data available from the California Department of Corrections and Rehabilitation (CDCR), presented in the previous section, raises an important question about what data the department should be collecting about housing practices and violence. This section suggests two key principles: one simple and information-gathering based, and one more complicated and procedure-based.

First, prison systems like CDCR should be collecting more precise data and regularly making it more publicly available, so that legal advocates and researchers alike can analyze the claims of correctional administrators about policy justifications and effectiveness, before court involvement is even sought. To this end, violence data should be collected at the unit level (identifying in which section or security level of a prison violence occurs), at least monthly, if not weekly, so that more robust and precise analyses of where violence is taking place and what factors impact violence rates might be conducted.

Second, correctional administrators should consider working with social scientists to evaluate the impacts and effectiveness of supermax prisons. A regression discontinuity model, or even a simple matching model, could be used to evaluate the impacts of supermax confinement, if the right data were collected and made publicly available. For a regression discontinuity, which works especially well in analyzing smoothly continuous independent variables like security level, variations in who receives “treatment” (i.e. supermax assignment) and when can be used to examine the impacts of supermax confinement on functionally similar populations. For instance, groups of prisoners could be transferred to supermaxes in measured stages, so that similar prisoners would experience the confinement at different (or delayed) points. Over time, these differences in security and housing assignments could be used to isolate the impact of security levels on various outcome measures, like institutional rates of violence. In other cases, prisoners already assigned to a given security level can be retroactively compared based on shared characteristics. Ho and Rubin explain the principles of this kind of analysis: “The key assumptions of regression discontinuity (RD) are that (a) treatment assignment is discontinuous at a threshold of the forcing variable, which cannot be precisely manipulated, and (b) all other covariates are smooth (or balanced) at the threshold. Under those assumptions, units just below and above the threshold are plausible comparison groups. Outcome distributions that differ

⁶⁶⁵ Indeed, very few analyses of the relationship between supermaxes and violence, in any state, exist. The few studies that do exist suggest that, perhaps, supermaxes actually exacerbate violence between prisoners and staff. See, e.g. Peter C. Kratcoski, “The Implications of Research Explaining Prison Violence and Disruption,” *Federal Probation*, Vol. 52 (1988): 27-33 (finding 71 percent of assaults on staff occurred in a maximum security unit that housed less than 10 percent of the facility’s prisoners); Briggs, Sundt, and Castellano, “The effect of supermaximum security prisons on aggregate levels of institutional violence,” *supra* note 65 (finding some relationship between supermaxes and prisoner-on-staff assaults).

sharply can be attributed to the treatment.”⁶⁶⁶

C. *The Resonance of Madrid: Two Examples of Continued Deference*

Perhaps not surprisingly, given the extremity of the conditions in supermaxes, prisoners and their legal advocates have challenged the institutions in most states in which they have been built. Prisoners allege that administrative assignment to supermaxes violates their constitutional right to due process, under the Fourteenth Amendment to the U.S. Constitution, and that continued detention in extreme isolation violates their constitutional right to be free from cruel and unusual punishment, under the Eighth Amendment.⁶⁶⁷ While courts have considered these challenges carefully, and often ordered modifications to specific policies and procedures governing supermax confinement, such as the procedures by which prisoners may be assigned to supermaxes,⁶⁶⁸ and the training correctional officers must receive if they are to work in supermaxes,⁶⁶⁹ no U.S. court has declared the imposition of long-term solitary confinement in supermax institutions to be unconstitutional, as a violation of the Eighth Amendment prohibition against cruel and unusual punishment. In fact, in every case in which a court has considered the constitutionality of supermax confinement, the court has noted the safety and security justifications for supermaxes, as articulated by correctional administrators, and deferred to these safety and security concerns as sufficient reasons in and of themselves to justify the extremely restrictive conditions imposed on prisoners housed in supermaxes. In other words, courts have followed the pattern *Madrid* established, as discussed in Section A.

This sub section evaluates two representative federal court cases, in order to show how the reasoning in *Madrid* is representative of the reasoning applied in other federal courts. First, I discuss the only case in Arizona, in which a federal court specifically addressed the conditions of confinement in that state’s supermax and explicitly provided legal justifications for the extremity of the supermax conditions. In *Comer v. Stewart*, an Arizona district court assessed the constitutionality of the conditions in Arizona’s Security Management Unit, a supermax, in the context of evaluating a death-sentenced prisoner’s competency to decide to relinquish his

⁶⁶⁶ Daniel E. Ho and Donald B. Rubin, “Credible Causal Inference for Empirical Legal Studies,” *Annual Review of Law and Social Science*, Vol. 7, 3.1-3.24 (2011): 3.13.

⁶⁶⁷ Prisoners and their legal advocates have brought legal challenges questioning both the ability of correctional administrators to accurately and fairly identify the most dangerous prisoners in the prison system and the overall methods by which correctional administrators assign prisoners to supermaxes, alleging due process violations under the Fourteenth Amendment to the U.S. Constitution (as incorporated through the Fourteenth Amendment). *See, e.g., Castillo v. Alameida, Jr.*, No. 94-2874 (N.D. Cal. 1994), described in Charles F.A. Carbone, “California Changes Policies for Prison Gangs and Security Housing Units,” 15.9 *Prison Legal News* 33 (Sept. 2004); *Lira v. Herrera*, 427 F.3d 1164 (9th Cir. 2005), *reconsidered by Lira v. Cate*, No. C 00-0905 SI, 2009 U.S. Dist. LEXIS 91292, at *7-8 (N.D. Cal. Sept. 30, 2009) (upholding prisoner challenge to rules governing placement in California’s SHUs); *Austin v. Wilkinson*, 545 U.S. 209 (2005). Prisoners have also challenged supermaxes as violations of their rights to be free from cruel and unusual punishment. Specifically, prisoners have alleged that their duration of confinement in supermaxes constitutes cruel and unusual punishment (*Silverstein v. Bureau of Prisons*, 704 F. Supp. 2d 1077 (D. Col. 2010)), that the conditions of total solitary confinement constitute cruel and unusual punishment (*Madrid v. Gomez*, 889 F. Supp 1146 (N.D. Cal. 1995)), and that the operation of the institutions constitutes cruel and unusual punishment (*Id.*).

⁶⁶⁸ *See, e.g., Lira v. Cate*, No. C 00-0905 SI, 2009 U.S. Dist. LEXIS 91292, at *7-8 (N.D. Cal. Sept. 30, 2009) (finding that Lira was improperly “validated” as a gang member and unjustly spent eight years in the SHU at Pelican Bay).

⁶⁶⁹ *See, e.g., Madrid v. Gomez*, 889 F. Supp. at 1280 (finding that correctional officers mistreated prisoners due to a lack of adequate training).

appeals. Arizona is an interesting case study, of course, because their supermax is the one on which Pelican Bay State Prison was modeled and was, in fact, the first modern supermax in the United States. Second, I discuss the one Supreme Court case, which has considered the constitutionality of long-term solitary confinement. As with the California and Arizona cases, *Wilkinson v. Austin* is not a case that turns primarily on an analysis of Eighth Amendment questions, but rather one that turns on questions of the due process required before a prisoner can be legally assigned to a supermax institution. However, in the context of evaluating the due process question, the *Wilkinson* Court provides legal justifications for the supermax conditions at issue in the case.

1. District Court of Arizona: Comer v. Stewart

In Arizona, as in California, when a federal district court considered the constitutionality of long-term solitary confinement in Arizona's supermax, the Security Management Unit (SMU), the court held that the interests of correctional administrators in protecting staff from prisoners and prisoners from each other outweighed any interest prisoners had in less restrictive, or less harsh, conditions of confinement. In *Comer v. Stewart*, Arizona prisoner Robert Comer sought to waive his right to appeal his death sentence. But Comer's lawyers argued that the conditions in SMU I, the Arizona supermax where Comer was being held, were so extremely harsh that the conditions inspired Comer to withdraw his appeals and seek his own execution. The *Comer* court found that these claims about the coercive impacts of the SMU conditions were unfounded, and Comer was ultimately allowed to waive his right to appeal his death sentence.

Throughout the *Comer* opinion, the Arizona district court detailed how restrictive Comer's conditions of confinement were in the SMU, and how these restrictive conditions responded directly to how extremely dangerous Comer was. So the *Comer* court detailed the harsh reduction in privileges Comer experienced in the SMU, including the modification of his cell "to remove the desk and stool and to reinforce the bunk to make it more difficult for Mr. Comer to fashion weapons."⁶⁷⁰ The court further elaborated on the necessity of these conditions, explaining just how dangerous Comer was, citing his history of disciplinary infractions, "including making weapons and assaulting other inmates and staff," and even referencing media comparisons between Comer and Hannibal Lecter.⁶⁷¹ As in the *Madrid* case, the *Comer* court deferred to correctional administrator's assertions about the extreme dangerousness of certain prisoners and held that this dangerousness justified total isolation in long-term solitary confinement, even under conditions that might otherwise constitute constitutional violations.

However, in contrast to the *Madrid* case, which involved a class of prisoners, and so referenced categories of dangerous prisoners without specifically evaluating many correctional administrators' individual assessments of dangerous, the *Comer* case specifically assessed one individual prisoner's dangerousness. And the assessment was convincing; Comer was accused of multiple well-documented assaults of staff and other prisoners. The restrictions in Comer's housing conditions were explicitly tied to the kinds of risks he posed as an individual. The *Comer* case is important not just for the individual assessment it provides, though. First, the *Comer* case might be used to justify the restrictive conditions of supermax confinement more generally, for any Arizona prisoner who might challenge the constitutionality of the restrictive conditions. Once the safety-and-security conditions have been upheld in one archetypal case, like

⁶⁷⁰ *Comer v. Stewart*, 230 F. Supp 2d 1016, 1023, 1033-34, 1071 (D. Az. 2002).

⁶⁷¹ *Id.*

that of *Madrid v. Gomez*, or Richard Comer, they are implicitly allowed to stand for hundreds of other prisoners who have not received a similarly individualized assessment of dangerous. Second, the *Comer* case reinforced yet again the power of the rhetorical justifications articulated by the original supermax designers to explain the institutions they built. Indeed, the comparison the *Comer* court made between Robert Comer and the popular trope of the dangerous Hannibal Lecter, echoed the descriptions of dangerous prisoners articulated by the correctional administrators and architects who designed the first supermaxes in Arizona and California, in the 1980s.

2. *Supreme Court: Wilkinson v. Austin*

The U.S. Supreme Court considered the constitutionality of a modern state supermax for the first (and only) time in 2005, in *Wilkinson v. Austin*. As the *Madrid* court had done ten years earlier, the court described in great detail the “severe” and “harsh” conditions in the Ohio State Penitentiary (OSP), a supermax:

*Incarceration at OSP is synonymous with extreme isolation ... OSP cells have solid metal doors with metal strips along their sides and bottoms which prevent conversation or communication with other inmates. All meals are taken alone in the inmate's cell instead of in a common eating area. Opportunities for visitation are rare and in all events are conducted through glass walls. It is fair to say OSP inmates are deprived of almost any environmental or sensory stimuli and of almost all human contact . . . Aside from the severity of the conditions.*⁶⁷²

However, the Court also noted that the “harsh conditions” in the Ohio supermax were justified by the existence of prisoners so dangerous that they required total isolation from all other prisoners and correctional staff. Specifically, the *Wilkinson* Court stated: “OSP’s harsh conditions may well be necessary and appropriate in light of the danger that high-risk inmates pose both to prison officials and to other prisoners.”⁶⁷³ In other words, the Court accepted an explanation underlying the necessity of the supermax much like the justifications articulated by the first supermax designers in Arizona and California: the Court agreed that the institution is necessary (a) to completely isolate high-risk prisoners from staff and from each other (b) in order to manage risk, or to maintain institutional safety and security.

Ultimately, the *Wilkinson* Court reviewed the procedures by which a prisoner could be assigned to OSP and upheld the requirements for minimal procedural due process imposed by lower courts. The *Wilkinson* Court, however, did not evaluate whether OSP conditions violated the Eighth Amendment prohibition against cruel and unusual punishment. The case, in fact, turned from its initiation on the question of whether OSP prisoners had a liberty interest in avoiding placement in supermaxes (they do), but did not raise the question of whether the OSP supermax conditions violated the Eighth Amendment prohibition on cruel and unusual punishment. In fact, by the time the Supreme Court heard arguments in *Wilkinson*, numerous

⁶⁷² *Wilkinson v. Austin*, 545 U.S. 205, 214-15 (2005).

⁶⁷³ *Wilkinson* 545 U.S. at 224. In *Wilkinson*, the Court focused on the procedural policies necessary to meet minimum constitutional due process requirements in assigning individual prisoners to the Ohio State Penitentiary (OSP). The discussion of the harsh conditions at OSP and their justification as necessary safety and security measures constituted the extent of the (implicit) Eighth Amendment analysis in the *Austin* case. I argued in Chapter 3 that, in the Eighth Amendment context, legal analyses of procedural rights have largely replaced legal analyses of whether a punishment is actually cruel and unusual, in both the context of the death penalty and the context of the supermax.

lower federal courts, including the *Madrid* court, had already decided that supermax conditions did not violate the Eighth Amendment.

In each of these cases, courts evaluated some aspect of the constitutionality of long-term solitary confinement in modern supermax institutions. And in each of these cases, courts deferred to the two principles of high-security confinement articulated by the first supermax designers and repeated by other correctional administrators: (1) some prisoners are extremely dangerous and would injure other prisoners or correctional staff if allowed to live in a general prison population; (2) therefore, in order to maintain institutional safety and security, these prisoners must be isolated from each other and from correctional staff. In other words, the total isolation conditions of supermax prisons have been upheld as constitutional based on claims made by correctional administrators about the specific characteristics of prison populations: certain prisoners are so dangerous that institutional safety and security requires their total incapacitation, or isolation.

Even in cases where correctional administrators housed these dangerous prisoners two-to-a-cell, as the *Madrid* case in California documented happened in the early 1990s at Pelican Bay State Prison, the legal analysis still turned on the relationship between certain restrictive conditions of confinement and certain prisoners' dangerous characteristics, rather than on the overall new kind of punishment imposed by long-term isolation in supermax institutions. The justifications for the institutions, as articulated by the designers in the 1980s, then, shaped the legal analysis of the institutions, as evaluated by the courts in the 1990s and 2000s. Indeed, in *Madrid*, *Comer*, and *Wilkinson* each federal court interpreted each supermax as a series of increased restrictions on the freedoms of certain prisoners, useful for managing an especially dangerous population, rather than as a new kind of extreme punishment.

Even if the harsh restrictions of the Arizona supermax were potentially necessary in order to maintain institutional safety and security in the face of a prisoner like Robert Comer, these harsh conditions may not be necessary to maintain institutional safety and security in the face of thousands more prisoners who may or may not be like Robert Comer. Indeed, in California, the empirical evidence about how supermaxes have been operated in the state suggests that hundreds of prisoners are at least somewhat less dangerous than Robert Comer, because they have been double-bunked together, albeit in highly restrictive conditions. The contradiction between the theory of total isolation and the practice of double-bunking, along with the absence of empirical evidence about the impacts of either the theory or the practice, suggest that perhaps correctional administrators do not deserve the broad deference they have received, either in designing supermaxes, or in continuing to operate them, free from a careful analysis of whether the restrictive conditions might potentially violate the Eighth Amendment prohibition against cruel and unusual punishment.

D. Conclusion

This chapter examined how courts have evaluated the constitutionality of the conditions of confinement in supermaxes. Courts have repeatedly deferred to correctional administrator's legitimizing justifications about the necessity for supermax prisons, as tools of institutional safety and security. Empirical evidence, however, demonstrates that supermaxes were built and operated in direct contradiction to these correctional administrators' claims. For instance, although correctional administrators have described supermaxes as institutions of total isolation, designed to protect staff and prisoners alike from "the worst of the worst," "most dangerous"

prisoners in the system, they have regularly housed two prisoners to a cell in these institutions. In fact, correctional administrators (a) failed to clearly articulate the many purposes a supermax would serve, (b) consistently operated the institutions in contradiction to the purposes they have articulated, and (c) failed to collect and analyze evidence that supports their claims to expertise and to being skilled promoters of institutional safety and security.

These failures call into question the pattern of deference federal courts have shown to correctional administrators in evaluating the constitutionality of these institutions. In fact, the pattern of deference courts have shown to correctional administrators echoes the pattern of deference initiated by California legislators, who deferred to the correctional administrators who originally designed the supermax institutions. Moreover, this double deference, by both legislators and judges, has essentially left the prisoners in supermaxes at the total mercy of inconsistently disorganized and inexperienced (at least in terms of analyzing and applying empirical evidence) administrators, with little, if any, public mandate behind the institution, and no judicial will to actually constitutionally evaluate the conditions in supermaxes.

Paying empirical attention to American imprisonment is something that criminal law scholars should (in fact must) do in order to make determinations about how the law does and should work. It took two years of research to uncover the interesting fact that more than half of California's supermax cells have been double-bunked in the twenty years since the institutions first opened. And it took embedded networks and contacts within the criminal justice system in California to get the information about how the cells were designed, from day one, with an extra bunk. This research puts in stark relief the enormous difference between the theories of criminal law, taught in the academy, and applied by judges, and the creation and administration of imprisonment, as a criminal punishment. In fact, this chapter documents how the creation and administration of imprisonment happens outside of, or in the shadow of the law. Empirical evidence – not only statistical, but also historical – is absolutely vital both to better understanding this process of creating and administering imprisonment and to accurately applying legal frameworks to analyses of punishment practices.

X. The Most Restrictive Alternative A Litigation History of Solitary Confinement in U.S. Prisons, 1960-2006⁶⁷⁴

This chapter turns from a focus on prison administrators and how they have operated supermaxes towards a focus on courts, especially federal courts, and how courts have interacted with these correctional administrators over conditions of confinement. This chapter will explore the role of the courts in the long American history of punitive isolation, examining how courts have addressed questions about the constitutionality of solitary confinement and isolation in two main periods: (1) during the two decades *before* states started to build supermaxes and (2) during the two decades just *after* Arizona and California built the first supermaxes. The subsequent chapter will focus in particular on California and the case of *Madrid v. Gomez*, which considered the constitutionality of the Pelican Bay supermax.

The first section of this chapter returns to an early Supreme Court case mentioned at the beginning of this dissertation: *In Re Medley*. This section presents the procedural history of this case, which foreshadows the procedural history of subsequent prisoners' rights cases in the twentieth century. The second section of this chapter examines the explosion of litigation challenging conditions in U.S. prisons, which took place in the 1960s and 1970s. This section then looks in detail at the two Supreme Court cases that considered prison conditions during this era, focusing especially on how the Court developed a very detail-oriented rubric for assessing the constitutionality of conditions of confinement in prisons. The third section examines six representative lower court cases, which considered the constitutionality of prison conditions, and especially of solitary confinement, isolation, and segregation conditions, in six different state prison systems. The fourth section argues that the court decisions in these cases ultimately shaped the conditions of confinement designed into supermaxes in subsequent decades. In sum, this analysis documents the direct impact 1960s and 1970s courts had in shaping supermax prisons in the 1980s and 1990s.

The fifth and final section of the chapter examines the post-1980s prisoner litigation challenging the supermax institution. These challenges attack the institutions from a variety of angles, including: the extremity of the sensory deprivation conditions in supermaxes, such as the absence of windows and out-of-cell time; the limitations on prisoners' privileges, like access to family visits or to educational programs; the duration of confinement in these conditions; and the procedures by which correctional administrators assign prisoners to supermaxes. In spite of this proliferation of challenges to the fundamental constitutionality of the conditions of supermax confinement, the analysis of this post-supermax litigation period reveals that supermaxes have been especially resistant to litigation. When courts have considered individual challenges to supermaxes, or, in a few instances, certified class action challenges to the institutions, their criticisms and reforms of the institutions have been extremely limited. Indeed, the jurisprudence of supermaxes reflects the (much more frequently explored) jurisprudence of the death penalty, developed in federal courts since the 1970s. Federal courts evaluating challenges to both long-term solitary confinement and death sentences have focused mainly on two kinds of claims: (1) the application of scientific evaluations (of mental health, competency, DNA evidence, etc.) to highly individualized cases and (2) the procedural rights that should accompany either a sentence to death or an assignment to solitary confinement. This chapter argues that the resistance of supermaxes to systemic constitutional challenges is partially attributable to the role the courts

⁶⁷⁴ A version of this chapter appeared in *Studies in Law, Politics, and Society*, Vol. 57 (2012): 69-123.

played in the preceding decades in shaping the ultimate design of the modern supermax, and partially attributable to a focus on proceduralism.⁶⁷⁵ Understanding the history of litigation around supermaxes, therefore, is an important piece of understanding the development of Eighth Amendment jurisprudence in the United States over the last half-century.

Some scholars have argued, in fact, that eighteenth-century American jurisprudence laid the groundwork for twenty-first century American jurisprudence condoning abusive military practices, including those practices rooted in the sensory deprivation and brainwashing experiments of the 1950s and 1960s, as discussed in Chapter II, Section D. A Brief Overview of American Uses of Solitary Confinement.⁶⁷⁶ This chapter, in turn, argues that twentieth-century American jurisprudence rationalized and entrenched these sensory deprivation practices, along with the use of long-term solitary confinement in U.S. prisons.

The prisoners' rights litigation history in this chapter fits within a growing body of historical literature, which re-centers the prison narrative in explorations and analyses of the civil rights movement and its aftermath.⁶⁷⁷ Moreover, exploring the role of the courts in shaping the constitutional forms of isolation and solitary confinement in U.S. prisons contributes to legal historiography debates about how important courts are to the development of legal rights and the codification of moral values. Specifically, questioning the exact role of the courts in the supermax phenomenon implicates Willard Hurst's critique of legal history, which he alleges tends to over-emphasize the role of courts and to under-emphasizes the role of inertia and social drift.⁶⁷⁸ This analysis explores which factors were at play in the case of the supermax: inertia or concerted action? Lawrence Friedman, on the other hand, has suggested that law can be not only instrumental and powerful, but also symbolic and moral. Exploring the question of how the courts affected the supermax phenomenon speaks to exactly this dichotomy, as well as the dichotomy between "official law and actual behavior."⁶⁷⁹ In sum, this legal historical project implicates questions at the core of legal realism, about whether and how court-made-law shapes social institutions.

A. One Lone Discussion of Solitary Confinement in 100 Years: In Re Medley

The U.S. Supreme Court's discussion of solitary confinement in *In Re Medley* was discussed briefly in Chapter II, in Section D. A Brief Overview of American Uses of Solitary Confinement. Recall that, in a brief, fifteen-page opinion, the Court condemned the practice of solitary confinement, noting that "a considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition."⁶⁸⁰ The procedural context in which the Court made this statement is particularly interesting, and foreshadowed the tone of much of the litigation

⁶⁷⁵ See generally William Stuntz, *The Collapse of American Criminal Justice* (Cambridge: Harvard University Press, 2011): 196-215 (discussing excessive emphasis on proceduralism in American justice).

⁶⁷⁶ Dayan, *supra* note 89.

⁶⁷⁷ See, e.g., Heather Ann Thompson, "Why Mass Incarceration Matters: Rethinking Crisis, Decline, and Transformation in Postwar American History," *The Journal of American History* (Dec. 2010): 703-734; Robert Chase, "Civil Rights on the Cell Block: Race, Reform, and Violence in Texas Prisons and the Nation, 1945- 1990" (Ph.D. diss. University of Maryland, 2009).

⁶⁷⁸ William Hurst, "The law in United States history," *American law and the constitutional order: historical perspectives*, Lawrence M. Friedman and Harry N. Scheiber, eds. (Boston: Harvard University Press, 1988).

⁶⁷⁹ Lawrence M. Friedman, "American legal history, past and present," *American law and the constitutional order: Historical perspectives*, Lawrence M. Friedman and Harry N. Scheiber, eds. (Boston: Harvard University Press, 1988).

⁶⁸⁰ *In Re Medley*, 134 U.S. 160, 168 (1890).

around solitary confinement, which would take place almost 100 years later, in the 1990s and beyond.

Specifically, in *Medley*, the Court held that a change in Colorado law requiring that death-sentenced prisoners be held in solitary confinement (rather than sharing cells with other prisoners in a local jail) constituted a significant increase in punishment for death-sentenced prisoners. For those prisoners who committed their crime before the statute was passed, subjecting them to the extreme solitary confinement conditions would violate the *ex post facto* prohibition on changing the punishment for a crime after the crime was committed.⁶⁸¹ In other words, James Medley, who was found guilty of first-degree murder and sentenced to death in 1889 in the state of Colorado, could not be held in solitary confinement, under the terms of a statute, which was enacted after Medley committed the murder for which he was sentenced. If a new law “alters the situation of the accused to his disadvantage,” then an *ex post facto* violation may occur.⁶⁸² Imprisoning Medley in solitary confinement would be tantamount to punishing him for an act that was not criminal at the time he committed it. The Court, in fact, was so upset by this new solitary confinement practice that it ordered that Medley go entirely free, even though the Court conceded the problem was not an error in the trial process, which resulted in Medley’s conviction and sentence, but an error in the conditions of his detention.

The Court’s distaste for solitary confinement, however, was limited to this intricate procedural framework, revolving around questions of the reach of the *ex post facto* prohibition in the Constitution, and not engaging questions of the actual constitutionality of the punishment itself. In fact, after *Medley*, the Court found few problems with solitary confinement. In 1891, the Court held that extended, pre-execution stays in solitary confinement in New York State were perfectly constitutional.⁶⁸³ Over the next fifty years, the Court only mentioned solitary confinement off-hand a few times, noting that it was a comparatively severe (though not unconstitutional) form of punishment.⁶⁸⁴

Although prisons continued to use isolation and solitary confinement as short-term punishments for misbehaving prisoners, the early Quaker penitentiary model, which kept prisoners in total isolation for the duration of their confinement, was largely abandoned by 1890, again, as discussed in Chapter II, Section D. A Brief Overview of American Uses of Solitary Confinement. Courts in the 1970s acknowledged these temporary uses of solitary confinement, but explicitly noted that confinement under such conditions was always limited, usually to a day, or a few weeks at most.⁶⁸⁵ However, in the late 1970s, both the duration of solitary confinement terms and the number of people confined began a steady expansion, which paralleled, in fact, the expansion of prison conditions lawsuits in federal courts.⁶⁸⁶

⁶⁸¹ 134 U.S. at 166.

⁶⁸² 134 U.S. at 171.

⁶⁸³ *McElvaine v. Brush*, 142 U.S. 155 (1891).

⁶⁸⁴ See *United States v. Moreland*, 258 U.S. 433, 449 (1922) (Brandeis, J., dissenting); *Chambers v. Florida*, 309 U.S. 227, 237-38 (1940); Haney and Lynch, *supra* note 115: 540.

⁶⁸⁵ See, e.g., *Sostre v. McGinnis*, 442 F.2d 178 (2d Cir. 1971), *en banc*, *rev’d in part sub nom Davidson v. Scully*, 694 F.2d 50 (2d Cir. 1982); *Gates v. Collier*, 501 F.2d 1291, 1305 (5th Cir. 1974).

⁶⁸⁶ Throughout this chapter, *solitary confinement* is used interchangeably with *segregation* or *isolation* conditions, reflecting the variety of terms deployed by federal courts over the last century. All three terms refer to prison conditions in which prisoners have minimal out-of-cell time; minimal intellectual stimulation, such as access to books, radios, televisions, or human conversation; no programming, like access to education or in-prison jobs; and severe limitations of the most basic privileges, such as access to fresh air, daylight, exercise, and a normal diet. Fundamentally, the terms isolation and segregation simply refer to the fact of some prisoners being isolated, or segregated, from the rest of the prison population. However, isolation or segregation might involve detention in a

B. Prison Reform, Isolation, and Solitary Confinement, 1953-1981

Although American courts received prisoner complaints about both sentences and conditions of confinement from the eighteenth century on, few of these complaints were met with careful consideration, until the second half of the twentieth century. This section first details the three changes in federal law in the mid-twentieth century, which both expanded the civil rights available to prisoners and facilitated litigation challenging prison conditions. The section then provides a procedural history and analysis of the prototypical mid-twentieth century prisoners' rights case: *Hutto v. Finney*, a case that originated in Arkansas in 1965. The case is prototypical in two senses: (1) its procedural history and the claims it encompasses are fairly representative of the procedural history and type of prisoners' claims raised in cases throughout the United States in this period and (2) it was the first of the 1960s state prison conditions challenges to reach the Supreme Court. Following the *Hutto* analysis, this section discusses the other Supreme Court case to evaluate state prison conditions and isolation conditions in the 1970s (*Rhodes v. Chapman*, which originated in Ohio). The subsequent section then provides overviews of the specific kinds of prison isolation conditions lower federal courts found unconstitutional in six separate states. These six state sites of litigation represent a variety of regions across the U.S. and to focus on those cases with the broadest impacts, in terms of the scope of the litigation and the kind of remediation, especially as to isolation conditions, which the courts ordered.

1. More Rights and More Litigation

When the American criminal law system was first codified, in the eighteenth century, prisons hardly existed. So when the framers drafted the Eighth Amendment prohibition against cruel and unusual punishment, they were codifying a ban against uncivilized, public corporal punishments, like beheadings and drawing-and-quartering. Federal courts would take more than a century to make the link between the Eighth Amendment and the apparently more civilized and definitively more private and less corporal punishment of long-term imprisonment. Similarly, the right to habeas corpus is codified in Article One of the U.S. Constitution, but traditionally, habeas corpus claims were only available as a means to challenge the legitimacy of a criminal conviction, and the only associated remedy was for a court to order the prisoner's release from custody, or to overturn a criminal sentence in its entirety. (Recall that the 1890 case *In Re Medley* was a habeas corpus challenge to the legitimacy of a death sentence preceded by a term of solitary confinement, and the remedy for the unconstitutionality of the solitary confinement was *not* to change the conditions of the confinement, but simply to release the prisoner from custody, overriding his sentence of death.)

In 1953, however, two federal court cases changed the scope of habeas corpus rights available to prisoners. First, a federal appellate court in Washington, D.C. permitted a convicted "sexual psychopath" to file a habeas corpus claim in which he challenged not the legitimacy of

cell with another prisoner. Isolation and segregation may be imposed for a period of a few days or for weeks at a time. Both state departments of corrections and federal courts often use these terms interchangeably. Between the 1890s, when prisons abandoned long-term solitary confinement, and the 1980s, when prisons re-instituted the practice, with the advent of supermaxes, most state prison systems (and the federal prison system) maintained some form of short-term isolation or segregation cell, in order to control and punish recalcitrant prisoners.

his conviction and sentence, but the conditions of his confinement.⁶⁸⁷ In *Miller*, the D.C. Circuit Court evaluated the habeas corpus petition of a convicted sexual psychopath and found that he had a right to challenge the conditions of his confinement – specifically his placement in a ward with criminally insane prisoners, who assaulted him during his stay. The existence of a prisoner’s right to challenge the conditions of his confinement, in turn, implies the right of a court to remedy any unconstitutional conditions with a specific order about where or how the prisoner may be held, rather than with a blanket order that the prisoner be released from custody.

In the same year that the D.C. Circuit Court decided *Miller*, the U.S. Supreme Court heard another case about the scope of a convicted criminal defendant’s right to bring a habeas corpus challenge. In *Brown v. Allen*, the Court held that a federal court may review a state court’s death sentencing decision, and may even hold a hearing and review new evidence, if the state court left any federal constitutional questions unresolved. In other words, the case expanded the rights of state criminal defendants to have challenges to their state criminal sentences heard in federal court.⁶⁸⁸ These two cases represented two of the first twentieth century cases that expanded the rights available to prisoners throughout the United States.

Over the next twenty years, federal courts, and especially the Supreme Court, would continue to expand and specify the rights available to both criminal defendants and prisoners. Indeed, 1953 was the year that Earl Warren became Chief Justice of the U.S. Supreme Court (just after *Brown v. Allen* was decided), and Warren in particular was known for leading the Court in this “rights revolution.”⁶⁸⁹ Nine years after *Brown v. Allen*, the Supreme Court took a second step to expand the civil litigation rights available to prisoners. Specifically, in 1962, the Court incorporated the Eighth Amendment prohibition on cruel and unusual punishment against the states.⁶⁹⁰ Prior to *Robinson*, a state prisoner would have had to rely on rights accorded to him under the constitution of the state in which he was imprisoned, rather than on the *federal* bill of rights. After *Robinson*, a state prisoner could bring a claim in federal court challenging the conditions of his confinement in state prison, thereby further expanding the scope of constitutional rights state prisoners could claim. One year after *Robinson*, in 1964, the Supreme Court took a third step to expand the civil litigation rights available to prisoners; the Court subjugated prison officials’ actions to the constraints of the Civil Rights Acts.⁶⁹¹ According to the Court’s decision in *Cooper*, a prisoner had the right to sue an individual state prison official for a violation of his civil rights, in federal court. Together, these three changes – expansion in habeas corpus rights, application of the Eighth Amendment to state prisoners, and authorization of suits against prison officials under the Civil Rights Act – led to an explosion in prisoner lawsuits during the 1960s and 1970s.⁶⁹²

⁶⁸⁷ *Miller v. Overholder*, 206 F.2d 415 (D.C. Cir. 1953).

⁶⁸⁸ *Brown v. Allen*, 344 U.S. 443 (1953). The specific scope of the habeas corpus writ has been the subject of much litigation and legislation since 1953, so these cases do not represent the final law on the subject. *Miller* and *Brown* are discussed here for the changes they represent in the law of prisoners’ rights in the 1950s in the United States, i.e. in the period of interest here, when prisoners first began to litigate their conditions of confinement with greater frequency.

⁶⁸⁹ Charles R. Epp, *The rights revolution: Lawyers, activists, and Supreme Courts in comparative perspective* (Chicago: University of Chicago Press, 1998).

⁶⁹⁰ *Robinson v. California*, 370 U.S. 660 (1962).

⁶⁹¹ *Monroe v. Pape*, 365 U.S. 167 (1961); *Cooper v. Pate*, 378 U.S. 546 (1964).

⁶⁹² Malcolm M. Feeley and Edward L. Rubin, *Judicial policy making and the modern state: How the courts reformed America’s prisons* (New York: Cambridge University Press, 1998): 37.

Although many of these lawsuits began as individual claims, brought by prisoners representing themselves (as *pro se* petitioners), these single legal challenges quickly combined and expanded into sprawling class action cases, litigated over decades. These lawsuits resulted in court orders that subjugated prisons, and sometimes entire state departments of corrections, to expert monitoring, federal court oversight, and enforceable promises to alter and improve conditions of confinement. In a 1981 Eighth Amendment challenge to prison conditions in Arkansas, Justice Brennan noted that there were 8,000 pending prisoner lawsuits challenging conditions of confinement in the United States, and 24 states with individual institutions or entire prison systems under consent decrees or orders remedying findings of unconstitutional conditions of confinement.⁶⁹³ In a book about judicial policy making in the 1970s, Feeley and Rubin identified even more jurisdictions with unconstitutional prisons; they counted more than thirty jurisdictions with at least one prison institution that had been declared unconstitutional as of 1975.⁶⁹⁴ This explosion in prisoners' rights lawsuits reflected a steep increase in overall civil rights lawsuits throughout the United States. Between 1970 and 1982, the total number of civil rights claims filed annually increased seven-fold. In 1970, 2,793 cases were filed; in 1982, 15,575 cases were filed.⁶⁹⁵

The explosion in prison conditions and prisoners' rights litigation paralleled the Warren Court's so-called due process revolution in the rights of criminal defendants.⁶⁹⁶ While socio-legal scholars have thoroughly assessed and debated the effect of the Warren Court's due process decisions on criminal procedure,⁶⁹⁷ the parallel effects of the prisoner litigation decisions on prisons (and on the prison-building boom of the 1980s and 1990s⁶⁹⁸) have hardly been explored. Feeley and Rubin wrote one of the few assessments of the role of prisoner rights litigation, in the context of analyzing judicial policymaking; however, their analysis stops with the conclusion of the litigation explosion, without exploring specific after-effects.⁶⁹⁹

This section suggests a concrete relationship between prisoners' rights litigation in the 1960s and 1970s and the shape of the prison-building boom in the 1980s and 1990s. Specifically, eight state-based case histories of litigation addressing isolation, segregation, or solitary confinement conditions in the 1970s suggest that federal court interventions in state prisons in the 1960s and 1970s influenced the design of the prisons that were built in the 1980s and 1990s, especially the design of supermax institutions, which would institutionalize the practice of maintaining prisoners in long-term solitary confinement and isolation.

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

⁶⁹³ *Rhodes v. Chapman*, 452 U.S. 337 (1981).

⁶⁹⁴ Feeley and Rubin, *supra* note 692: 40.

⁶⁹⁵ Roberta Sue Alexander, *A place of recourse: A history of the U.S. district court for the southern district of Ohio* (Athens: Ohio University Press, 2005): 207.

⁶⁹⁶ Friedman, *supra* note 101: 300-01.

⁶⁹⁷ See, e.g., Charles D. Weisselberg, "Mourning Miranda," *California Law Review*, Vol. 96 (2008): 1519-1601; "Symposium: The Jurisprudential Legacy of the Warren Court," *Washington and Lee Law Review*, Vol. 59 (Fall 2002).

⁶⁹⁸ Zimring and Hawkins, *The Scale of Imprisonment*, *supra* note 187.

⁶⁹⁹ Feeley and Rubin, *supra* note 692.

also considered the constitutionality of either long-term isolation and segregation or long-term solitary confinement.

2. *Arkansas: The Prototypical Prison Conditions Case*

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

First, the procedural history of *Hutto* is representative of how individual prison conditions claims of the 1960s became statewide class action reform cases in the 1970s. Three prisoners in Arkansas initially filed three individual lawsuits against Dan Stephens, who was then the Superintendent, or warden, of the Arkansas State Penitentiary. Prisoners Talley, Hash, and Stone each challenged specific conditions of their confinement at the Arkansas State Penitentiary, including the amount of hard field labor expected of them, the availability of medical care, the imposition of corporal punishments in the form of whippings, and specific instances of obstruction of access to the courts. The federal district court in Arkansas appointed lawyers to represent the prisoners, who had initially filed their claims *pro se* (representing themselves), and consolidated the three original petitions into a single case.⁷⁰⁰ So, Talley was, first, a single *pro se* prisoner petitioner arguing his claims before the federal district court in Arkansas; the district court, observing similarities between Talley's claims and those of Hash and Stone, joined the three petitions together. Within five years, *Talley* had expanded to include the entire Arkansas State Prison system; Chief Judge Henley of the Eastern District of Arkansas had found that conditions in prisons throughout the state violated the Eighth Amendment prohibition against cruel and unusual punishment.⁷⁰¹

Judge Henley, too, was characteristic of the judges who oversaw – and shaped – the 1960s and 1970s prison conditions litigation. Like U.S. Supreme Court Justice Earl Warren, Henley was a Republican and an Eisenhower appointee. Henley served on the Arkansas Eastern District court from 1959 through 1975 and then on the Eighth Circuit Court of Appeals until his death in 1997. Throughout his 38 years as a federal court judge, he enforced and interpreted civil rights protections. In the early 1960s, Henley oversaw the legally enforced de-segregation of the Arkansas public schools.⁷⁰² Next, he turned to the state's prison system, where, for almost two decades, he oversaw a gradual improvement of prison conditions, repeatedly ordering state prison officials to develop and maintain minimum constitutional standards of treatment in their institutions.

From the first three lawsuits brought by three state prisoners representing themselves, the *Talley* case (and its successors *Holt* and *Hutto*) wound its way through the federal courts. The

⁷⁰⁰ *Talley v. Stephens*, 247 F. Supp. 683, 685-90 (E.D. Ark. 1965).

⁷⁰¹ *Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970).

⁷⁰² Patrick Henry, "Judge who reformed prison system dies; ruled 'Dark and Evil World' unconstitutional," *Arkansas Democrat-Gazette*, Oct. 20, 1997: B-1.

case bounced back and forth between the Eastern District court and the Eighth Circuit Court of Appeals, with the appellate court largely upholding the lower court's findings and orders. And, in 1978, thirteen years after the federal district court in Eastern Arkansas first considered Talley's single challenge to the conditions in one Arkansas prison, the case reached the Supreme Court, now as a class action under the name *Hutto v. Finney*.⁷⁰³ In this way, a single case challenging specific conditions in a single prison became a class action case challenging an entire prison system.

A successive hierarchy of federal courts in *Hutto* not only found conditions in Arkansas prisons unconstitutional, but these courts ordered specific changes to prison conditions. For instance, Judge Henley ordered: legislative allocations of funds to the Arkansas prison system, the elimination of a system in which some prisoners acted as guards over other prisoners, improvements in basic living conditions, and limitations on the durations of confinement in isolation cells.⁷⁰⁴ A few years later, Henley enjoined prison officials from taking specific actions in retaliation against prisoners filing lawsuits, and threatened to close down certain prisons entirely if prison officials did not comply with his orders.⁷⁰⁵ Henley made multiple, in-person visits himself to the state's prisons.⁷⁰⁶ Over time, Henley's orders became increasingly detailed, setting acceptable overcrowding levels; specifying healthcare provisions, grievance procedures, and visiting regulations; and requiring both affirmative action hiring and prisoner desegregation plans.⁷⁰⁷

Finally, in 1978, the U.S. Supreme Court agreed to hear an appeal, brought by Arkansas corrections officials, of these sweeping district court orders. (The Eighth Circuit Court of Appeals had generally upheld these orders throughout the 1970s, and in some cases even encouraged further intervention by Judge Henley's district court.) The Arkansas state prison administrators did not dispute, on appeal, the district court's finding that the conditions in Arkansas state prisons violated the Eighth Amendment prohibition on cruel and unusual punishment. Rather, they disputed the right of the district court (i.e. of Judge Henley) to impose two specific remedial orders on prison officials: a 30-day limit on confinement in punitive isolation and a requirement that the Department of Corrections pay the attorneys' fees of the prisoners' court-appointed attorneys.⁷⁰⁸

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

More importantly for the purposes of this chapter, the Court explicitly discussed various aspects of punitive isolation in the Arkansas prison system. This was the first time in almost a century that the Supreme Court had considered the constitutionality of long-term isolation in

⁷⁰³ *Hutto v. Finney*, 437 U.S. 678 (1978).

⁷⁰⁴ See generally *Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970).

⁷⁰⁵ *Holt v. Hutto*, 363 F. Supp. 194 (E.D. Ark. 1973).

⁷⁰⁶ Feeley and Rubin, *supra* note 692: 70-1.

⁷⁰⁷ See, e.g., *Finney v. Hutto*, 410 F. Supp. 251 (E.D. Ark. 1978).

⁷⁰⁸ *Hutto*, 437 U.S. at 681.

prison. Unlike the solitary confinement cells at issue in *Medley*, however, the “isolation” cells at issue in *Hutto* were not solitary confinement cells. In fact, one of the problems the district court identified with these isolation cells was the degree to which they were overcrowded.

The isolation cells in Arkansas prisons were eight-foot-by-ten-foot cells in which anywhere from four to eleven prisoners would be locked in twenty-four hours per day, served only “four-inch squares of grue” – “a substance created by mashing meat, potatoes, oleo, syrup, vegetables, eggs, and seasoning into a paste and baking the mixture in a pan,” and left in these conditions indefinitely.⁷⁰⁹ Although the Arkansas isolation cells did not maintain prisoners in complete solitary confinement, they shared many characteristics with both the solitary confinement cells that had been used in early penitentiaries in the United States in the eighteenth century, and with those cells that would be used in modern supermax prisons in the 1990s. Specifically, prisoners were detained indefinitely in isolation cells, without access to the outdoors, fresh air, or work programs, and with severely limited privileges, limited lighting, no books or radios, and food purposefully cooked to be unappetizing. The Arkansas district court ordered that punitive isolation in these conditions be limited to a maximum term of thirty days; the Supreme Court upheld this order.⁷¹⁰ The worse the conditions, the more reasonable a limitation on the length of confinement seemed to the Court: “[T]he length of confinement cannot be ignored in deciding whether the confinement meets constitutional standards. A filthy, overcrowded cell and a diet of ‘grue’ might be tolerable for a few days and intolerably cruel for weeks or months.”⁷¹¹

The Court also expressed concern with the “atmosphere of violence” in the isolation cells, which contributed to the “interdependence of the conditions” that justified the district court’s specific remedial orders directed towards Arkansas prison officials.⁷¹² *Hutto*, then, stands for the proposition that a combination of severe deprivations of basic living conditions, with an extended period of confinement, easily rises to the level of a constitutional violation, under the Eighth Amendment. The particular conditions with which the Court was concerned – the size of the cell, the duration of the confinement, the incidence of violence under the conditions – echoed concerns in lower court cases, and foreshadowed the necessity of a different kind of punitive isolation, although not necessarily a more humane kind.

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

In sum, *Hutto* represented the first time the Supreme Court directly considered the application of the Eighth Amendment to a state prison system, or to prison conditions at all, for that matter. *Hutto* also represented the first time since *In Re Medley* that the Supreme Court had addressed the question of the constitutionality of long-term isolation in a prison cell. So *Hutto* set the tone of prison litigation in general, and of federal court evaluations of isolation and solitary confinement in particular. The tone that was set permitted detail-oriented and fairly intrusive

⁷⁰⁹ *Hutto*, 437 U.S. at 683.

⁷¹⁰ *Hutto*, 437 U.S. at 685.

⁷¹¹ *Hutto*, 437 U.S. at 686-7.

⁷¹² *Hutto*, 437 U.S. at 688.

federal court interventions in the day-to-day management of state prison systems. Especially permissible were federal court interventions governing the way prison officials managed the most serious prisoners allegedly in need of the highest degree of secure confinement.

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

Three years after *Hutto*, in 1981, the Supreme Court heard its second major case regarding the application of the Eighth Amendment to prison conditions: *Rhodes v. Chapman*. *Rhodes* was the first case in which the Court considered the application of the Eighth Amendment to the conditions of confinement at a particular prison, as opposed to an entire prison system, as in *Hutto*.⁷¹³ Unlike the litigation underlying *Hutto*, the *Rhodes* litigation did not concern a battery of alleged constitutional violations, but rather focused on one question: Did double-celling prisoners in cells designed for only one person constitute a violation of the Eighth Amendment prohibition against cruel and unusual punishment? The district court in Ohio found that double-celling was unconstitutional and ordered that the practice be stopped. If the practice was not stopped, the district court threatened to order the release of prisoners from the offending prison: Southern Ohio Correctional Facility in Lucasville.⁷¹⁴ *Rhodes*, in this sense, resembled *Hutto*; Judge Hogan, an engaged federal district court judge, intervened in a state prison system, ordering specific changes to practices and procedures.⁷¹⁵ Judge Hogan even bolstered his remedial orders with threats of prisoner releases, just as Judge Henley had raised the threat of prison closures in Arkansas.

In *Rhodes*, however, the Supreme Court did not find the same interdependence of multiple deprivation conditions that had existed in Arkansas, as raised in the *Hutto* case, and so refused to uphold the district court's order that the Southern Ohio Correctional Facility stop double-celling its prisoners. So the prisoners seeking better conditions of confinement ultimately lost in *Rhodes*. In fact, *Rhodes* represented a turn not only of the Supreme Court, but of the federal courts in general, away from both (1) willingly hearing conditions of confinement challenges and (2) frequently finding Eighth Amendment violations.⁷¹⁶ Nonetheless, a number of the Court's observations in *Rhodes* are revealing, both for establishing what kinds of minimum standards of confinement are necessary, and for understanding how the Court saw its role in the prison reform cases.

First, even though the Supreme Court found that the conditions at Southern Ohio Correctional Facility did not rise to the level of a constitutional violation, the Court noted many specific details about the Ohio prison, including: the exact size of the cells (63 square feet), the presence of an adequate ventilation system and windows, the number of double-celled prisoners who were allowed out of their cells six hours or less per week (350), and the fact that double-celling had, in practice, "been substantially eliminated" at the prison.⁷¹⁷ In sum, the Court found that the conditions in the Ohio prison met the "minimal civilized measure of life's necessities."⁷¹⁸ In other words, some double-celling, even including extensive time in small cells, was not unconstitutional. The Court also noted what conditions were absent in the Ohio prison:

⁷¹³ *Rhodes v. Chapman*, 452 U.S. 337, 345 (1981).

⁷¹⁴ *Chapman v. Rhodes*, 434 F. Supp. 1007, 1022 (S.D. Ohio 1977).

⁷¹⁵ Alexander, *supra* note 695: 139.

⁷¹⁶ Feeley and Rubin, *supra* note 692: 48.

⁷¹⁷ *Rhodes*, 452 U.S. at 342-40, n.1.

⁷¹⁸ *Rhodes*, 452 U.S. at 346.

there were no “deprivations of essential food, medical care, or sanitation,” nor was there an “increase [in] violence among inmates or . . . other conditions intolerable for prison confinement.”⁷¹⁹ By describing the conditions that were absent in Ohio, the Court outlined exactly what conditions might, at least in some combination, produce an Eighth Amendment violation.

While the Court found no violation in the Ohio double-celling practice, the majority was quite concerned about delineating the specific facts, down to the square footage of cells, and the exact number of hours per day prisoners spent in these cells, that did not rise to the level of a constitutional violation. Similarly, the Court was concerned to delineate a different, specific set of facts – regarding food and health – that *would* rise to the level of a constitutional violation. This level of specificity is indicative of the degree to which courts were defining the precise conditions under which extreme punishments, like long-term isolation, could take place. The close and focused eye the Court turned to examining Ohio’s practices certainly indicated that correctional administrators were not free to use just any punitive practice.

Furthermore, although the Court did not find double-celling to be unconstitutional, their conclusion was neither unanimous nor summary. A number of justices, writing separately in a concurrence and a dissent in *Rhodes*, reiterated the importance of judicial oversight of prisons; Justice Brennan, in fact, asserted that the courts had played a critical role in improving prison systems and encouraging appropriate legislative appropriations to prisons.⁷²⁰ Justice Marshall’s dissent, however concludes the *Rhodes* opinion on a warning note, suggesting: “the majority’s admonitions might eviscerate the federal courts’ traditional role of preventing a State from imposing cruel and unusual punishment through its conditions of confinement.”⁷²¹ Indeed, the specificity of detail the Court provided, regarding the conditions at the Ohio prison in question, suggested clear bounds for prison administrators to work within, in order to both avoid future lawsuits and to maintain facially constitutional prisons.

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

Exploring how federal courts assessed conditions of confinement in the 1960s and 1970s is important to understanding how the courts drew (and draw) boundary lines around the constitutionally acceptable limits of extreme punishments. The framework which the courts applied to assessing “isolation cells,” like those in both *Hutto* and *Rhodes*, cells which represented the extreme of in-prison punishment in the 1970s, will become relevant to understanding the frameworks courts might apply to assessing supermax prisons, which represent the extreme of in-prison confinement in the 1990s and today.

⁷¹⁹ *Id.*

⁷²⁰ *Rhodes*, 452 U.S. at 354, 359.

⁷²¹ *Rhodes*, 452 U.S. at 375.

C. Between *Hutto* and *Rhodes*: Lower Courts Evaluate Isolation Conditions

*The indescribable conditions in the isolation cells required immediate action to protect inmates from any further torture by confinement in those cells. As many as six inmates were packed in four foot by eight foot cells with no beds, no lights, no running water, and a hole in the floor for a toilet which could only be flushed from the outside.*⁷²²

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

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

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

Instead, the courts placed a number of restraints on the uses of punitive isolation. This combination of permitting isolation, but specifying the exact conditions under which it would be permissible, contributed to the development of the modern supermax. Of course, the exact relationship between courts, social policy, and institutions like prisons is often hard to trace definitively. However, as these state-based case studies of federal court interventions in specific prisons suggest, the parallels between the precise conditions federal courts condoned for long-term isolation and the structure of the supermaxes developed in the late 1980s are striking. Moreover, in each of the state case studies discussed below, in which federal courts addressed isolation conditions and ordered remediation, department of corrections officials eventually built a supermax of some form.

The following sub-sections will review six representative Eighth Amendment challenges to isolation conditions in prison, spanning 1971 to 1989. The cases are drawn from six states representing cross-section of U.S. regions: two southern states (Alabama and Mississippi), one

⁷²² *Pugh v. Locke*, 406 F.Supp. 318, 327-28 (MD Ala. 1976), *aff'd as modified*, 559 F.2d 283 (5th Cir. 1977), *rev'd in part*, 438 U.S. 781 (1978) (per curiam).

mid-west state (Illinois), two western states (Colorado and California), and one northeastern state (Pennsylvania). Each state also highlights a different problem with isolation conditions identified by a federal court, including: darkness in isolation (Mississippi), torture – through the denial of basic human needs – in isolation (Alabama), procedural flaws preceding placement in isolation (Illinois), decrepit and violent conditions in isolation cells (Colorado), inadequate procedures governing daily life in isolation (California), and decrepit and crowded isolation cells (Pennsylvania).

Together, these cases demonstrate the kinds of isolation conditions lower federal courts identified in the prison reform cases and the kinds of restraints these courts imposed on the uses of punitive isolation. Three themes will be apparent in every state example. First, in each state, district (and often appellate) courts found egregious constitutional violations in the conditions of isolation or solitary confinement in the state’s prisons. Second, in each state, courts ordered very specific changes to these conditions, either in terms of provisions of specific amenities, or in terms of procedural reforms, like limitations to the durations of confinement. Third, in each state, courts stopped short of declaring the entire practice of either isolation or solitary confinement, as imposed in any given state institution, unconstitutional. Following these state-based case presentations, this chapter will explore the specific connections between the conditions courts identified as unconstitutional and the changes courts ordered in the 1970s and 1980s to specific design characteristics of supermaxes built in the 1980s and 1990s.

1. Mississippi: Dark Hole Solitary Confinement

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

*The inmates are placed in the dark hole, naked, without any hygienic material, without any bedding, and often without adequate food. It is customary to cut the hair of an inmate confined in the dark hole by means of heavy-duty clippers. Inmates have frequently remained in the dark hole for forty-eight hours and may be confined there for up to seventy-two hours. While an inmate occupies the dark hole, the cell is not cleaned, nor is the inmate permitted to wash himself.*⁷²³

The Fifth Circuit Court of Appeals agreed with the district court that such confinement was “unassailab[ly] ... constitutionally forbidden.”⁷²⁴ However, both the district and the appellate court stopped short of completely forbidding the use of the dark hole for punitive solitary confinement. Instead, the district court ordered that confinement to the dark hole be limited to one, twenty-four hour period, and include adequate food, clothing, hygiene items, and temperature control. In 1974, the Fifth Circuit affirmed both the district court’s finding that unconstitutional conditions existed in the Parchman dark holes and the court’s order limiting use of the dark hole.⁷²⁵

In sum, the conditions in the Parchman dark holes were egregiously unconstitutional. However, the court-ordered remedy did not involve shutting down the dark-hole-practice entirely (as both the district court judges in *Hutto* and *Rhodes* had threatened to do to remedy their

⁷²³ *Gates v. Collier*, 501 F.2d 1291, 1305 (5th Cir. 1974).

⁷²⁴ *Id.*

⁷²⁵ *Id.*

respective findings of unconstitutional prison conditions in Arizona and Ohio). Rather, the dark holes became subject to specific court orders about (1) the specific rights prisoners held in those conditions had – to food, clothing, hygiene, and minimal comforts and (2) the specific length of time a prisoner might be kept there – twenty-four hours at a time.

2. Alabama: Torture in Isolation

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

*As many as six inmates were packed in four foot by eight foot cells with no beds, no lights, no running water, and a hole in the floor for a toilet which could only be flushed from the outside . . . Inmates in punitive isolation received only one meal per day, frequently without utensils. They were permitted no exercise or reading material and could shower only every 11 days. Punitive isolation has been used to punish inmates for offenses ranging from swearing at guards and failing to report to work on time, to murder.*⁷²⁶

In order to improve these conditions, the district court in Alabama neither forbid the use of such cells, nor the use of long-term isolation. Rather, the court simply required that the conditions in the isolation cells meet minimum basic standards, including a minimum size (40-60 square feet per prisoner), provision of three meals per day, daily outdoor exercise, hygiene items, and regular examination by a health professional (every third day). The court also ordered that only one prisoner be confined per one isolation cell. In addition, the court suggested that prison administrators make particular efforts to segregate prisoners known to “engage in violence or aggression.”⁷²⁷ The Fifth Circuit affirmed the district court’s findings and order.⁷²⁸

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

3. Illinois: Procedural Negotiations

In October of 1971, following a fight in June of that year on the Stateville Penitentiary baseball fields, more than one hundred Illinois prisoners, who correctional administrators had identified as “agitators” and “trouble makers” in the earlier altercation, were transferred to a new, “Special Program Unit” at the Joliet Correctional Center.⁷²⁹ According to the district court, which reviewed the constitutionality of this Special Program Unit, the place was designed as a “three-stage progressive system, whereby an inmate can earn greater privileges and promotion to successive stages and ultimately can progress to the point where he will be considered for release.”⁷³⁰ However, according to the lawyers who originally challenged the conditions in the Special Program Unit, in practice “prisoners were transferred to strip cells covered with chicken

⁷²⁶ *Pugh v. Locke*, 406 F.Supp. 318, 327-28 (MD Ala. 1976).

⁷²⁷ *Id.*

⁷²⁸ *Pugh v. Locke*, 559 F.2d 283 (5th Cir. 1977).

⁷²⁹ *U.S. ex rel. Miller v. Twomey*, 479 F.2d 701, 710 (7th Cir. 1973).

⁷³⁰ *Id.*

wire” and left there indefinitely.⁷³¹ In 1972, the Illinois district court certified a class of those prisoners in the Special Program Unit, and evaluated their challenges to both the conditions of confinement in the Special Program Unit and to the procedures by which they were placed there; the district court found that the Special Program Unit was punitive and ordered that correctional administrators design some form of due process, so that prisoners could learn why they were being placed in the unit.⁷³²

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

In reviewing both the challenges to the Special Program Unit and Thomas’s individual challenge to his placement in solitary confinement, the Seventh Circuit held that placement in solitary confinement might “involve ‘grievous loss,’” and therefore might require “an adequate and timely written notice of the charge, a fair opportunity to explain and to request that witnesses be called or interviewed, and an impartial decision maker.”⁷³³ In fact, the Seventh Circuit not only specified what kind of due process might be appropriate, but also ordered the lower district courts to oversee the development of precise due process procedures that prison administrators would be required to implement prior to placing prisoners in either the Special Program Unit, or solitary confinement. As the circuit court stated: “The judiciary cannot avoid its ultimate responsibility for interpreting the constitutional requirements of due process. Certainly that responsibility cannot be delegated to prison authorities.”⁷³⁴

Eight years later, another district court in Illinois again considered the question of whether a prisoner deserved any kind of due process, in the form of some kind of hearing, prior to being placed in solitary confinement.⁷³⁵ Herbert Black argued that his constitutional right to due process was violated when he was placed in punitive segregation for 18 months without any hearing or access to the courts.⁷³⁶ Black further argued that his constitutional right to be free from cruel and unusual punishment was violated when he was kept in isolation without basic toilet articles, in conditions that lacked basic cleanliness.⁷³⁷ In a brief opinion, the district court agreed that both Black’s due process right and his right to be free from cruel and unusual punishment had been violated and found that Black was entitled to \$5,000 in damages, and his attorneys were entitled to attorney’s fees. The Seventh Circuit affirmed the damages order.⁷³⁸

These two Illinois cases are important for a few reasons.⁷³⁹ First, they demonstrate how even a single prisoner’s *pro se* petition can weave through the federal court system over a few

⁷³¹ People’s Law Office. “Our prison work.” Available online at: <http://www.peopleslawoffice.com/archives/our-prison-work/> (last accessed 11 Jun. 2011).

⁷³² *U.S. ex rel. Miller*, 479 F.2d at 711.

⁷³³ *U.S. ex rel. Miller*, 479 F.2d at 717.

⁷³⁴ *U.S. ex rel. Miller*, 479 F.2d at 719.

⁷³⁵ *Black v. Brown*, 524 F. Supp. 856 (N.D. Ill. 1981), *rev’d in part and aff’d in part* at 688 F.2d 841(7th Cir. 1982).

⁷³⁶ *Black*, 524 F. Supp. at 857.

⁷³⁷ *Black*, 524 F. Supp. at 858.

⁷³⁸ *Black v. Brown*, 688 F.2d 841(7th Cir. 1982).

⁷³⁹ Although the focus of this section is on federal court interventions in *state* prison cases, one other major prisoners’ rights case, which arose in Illinois federal district courts, deserves a reference. In the case, *Adams v.*

years, bouncing back and forth between district and appellate courts, like Thomas's claim did, within the *Twomey* case. And, in the case of *Black*, a single procedural error can be costly to correctional administrators, whom the court found liable to Black for \$5,000 worth of damages, not to mention attorney's fees.

The cases are relevant, though, not just for their procedural complexity, but for the nature of the court's concern in each case. As with the district court's findings of egregiously unconstitutional conditions in Alabama and Mississippi, the Illinois district courts found on at least three occasions that procedures for placement in solitary confinement, or Special Program Units, were inadequate. However, the court's remedy was to tweak the procedures, requiring specific kinds of procedural protections prior to placement in isolation. Indeed, the Seventh Circuit, in the *Twomey* case, ordered the district court to develop the procedures itself, albeit in collaboration with correctional administrators from the Joliet Correctional Center.

4. Colorado: Dilapidation and Violence

In Colorado, in 1979, a district court found conditions at the "Old Max," the state's highest security prison, unconstitutional.⁷⁴⁰ Old Max made up one unit, or group of seven cellblocks, within the Colorado State Penitentiary complex, located in Cañon City, Colorado. Two of the chief problems the Colorado district court identified with the Old Max were "idleness" and "isolation." According to the *Ramos* court, the majority of the Old Max prisoners were unemployed and, therefore, spent twenty hours or more per day confined to their cells.⁷⁴¹ In addition, "a large number of prisoners" at Old Max were explicitly subject to "long-term isolation under oppressive conditions of confinement" – namely being locked in their cells for twenty-two or more hours every day, with neither regular showers nor regular exercise.

The *Ramos* court was concerned not just with the facts of idleness and long-term isolation but with the conditions of this idle isolation. Specifically, the district court specified a battery of public health problems with the Old Max facility itself, including: inadequate plumbing, unbearable humidity, intolerable noise levels, and a food service program that "fail[ed] to meet any known public health standards."⁷⁴² In fact, the court detailed the specific structural problems, and the ensuing public health problems on each cell block in the Old Max institution:

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

Carlson, 488 F.2d 619 (7th Cir. 1973), a class of federal prisoners challenged the constitutionality of long-term isolation and solitary confinement in United States Penitentiary in Marion, Illinois. In *Adams*, the Seventh Circuit found that these prisoners were entitled at least to due process protections, including the ability to access the courts, and the right to a hearing prior to being placed in isolation.

⁷⁴⁰ *Ramos v. Lamm*, 485 F. Supp. 122 (D. Colo. 1979).

⁷⁴¹ *Ramos*, 485 F. Supp. at 137-38.

⁷⁴² *Ramos*, 485 F. Supp. at 135-36.

*moisture, humidity and overgrowths of mold, fungus and slime have resulted from inadequate ventilation. ... The unsanitary conditions present a source of infection from fungal buildup and a hazard to users due to metal stubs sticking up through the floor and uncovered electrical boxes that are sources for electrical shock. In cellhouse 3, one inmate was burned on the arms, hands, neck, back and face by being exposed to excessively hot water in the shower; his injuries required plastic surgery.*⁷⁴³

All these conditions, the court found, coalesced to create an atmosphere of violence, which had produced “severe injury and death.”⁷⁴⁴

The remedy: the district court ordered that Old Max be closed. The Tenth Circuit agreed that many of the conditions were unconstitutional, but reversed on the question of remedy, finding that the state had already taken significant steps towards building a new institution. Specifically, between 1976 and 1979, the Colorado General Assembly allocated \$22.5 million towards the building of a new, high security prison.⁷⁴⁵ Indeed, following an earlier conditions-of-confinement lawsuit in Oklahoma, the Tenth Circuit had found that a prisoner required at least sixty square feet of living space, and Colorado was building its new prison to exactly these specifications.

The *Ramos* case is interesting, because the district court attempted to take a step that none of the other district court judges in other states, like Arkansas and Ohio, Alabama and Mississippi, were willing to take. Specifically, Judge Kanekane of the federal district court of Colorado actually ordered the closure of an unconstitutional prison facility. However, his order was overturned on appeal. Even though the Tenth Circuit overturned the prison closure order, the appellate court agreed with Judge Kanekane’s findings that the conditions at the Old Max prison had been unconstitutional. Both courts agreed that the Old Max facility, primarily because of its decrepit physical structure, had been unconstitutionally dirty, unhealthy, and noisy. These conditions, in turn, had not only caused serious health problems but had incited violence. As in the previously reviewed prison conditions cases, the court-ordered remedies were incredibly detailed, down to specifying the exact size of new prison cells being built.

5. California: Institutionalizing Routine and Procedure

In 1976, the northern district court in California certified a class of all male prisoners confined in one of four maximum security prison units, designated for prisoners who had broken prison rules, or who had requested protective custody in an isolation unit.⁷⁴⁶ The prisoners in *Wright* challenged both the conditions of confinement in these isolation units and the procedures prison administrators applied for finding prisoners guilty of rule infractions, prior to placing prisoners in these units. The *Wright* court described the conditions in these isolation units succinctly:

Prisoners in the maximum security units are confined in cells approximately five feet wide by eight feet long. The cells are without fresh air or daylight, both ventilation and lighting being poor. The lights in some cells are controlled by guards. It is difficult for prisoners to get needed medical attention. They must eat

⁷⁴³ *Ramos*, 485 F. Supp. at 134-35.

⁷⁴⁴ *Ramos*, 485 F. Supp. at 136.

⁷⁴⁵ *Ramos v. Lamm*, 639 F.2d 559, 585 (10th Cir. 1980).

⁷⁴⁶ *Wright v. Enomoto*, 462 F. Supp. 397, 398 (N.D. Cal. 1976).

*in their cells or not at all. They are allowed very limited exercise and virtually no contact with other prisoners. They cannot participate in vocational programs. They are denied those entertainment privileges provided for the general prison population.*⁷⁴⁷

Furthermore, the *Wright* court characterized the administrative process by which correctional administrators assigned prisoners to these units as full of “vagaries and irregularities,” with no guarantee that a prisoner would receive “prior notice, a hearing, [or] a written decision” about the assignment to isolation.⁷⁴⁸ The *Wright* court ordered remedies to these procedural flaws, including requirements that prisoners have notice of their placement, a hearing, and some kind of representation at that hearing.⁷⁴⁹

For the next ten years, this case bounced back and forth between the northern district court in California and the Ninth Circuit court of appeals; each time the district court re-considered the conditions in California’s four maximum security “lock-up units,” or “Secure Housing Units,” the court ordered further, increasingly detailed remedies to the unconstitutional conditions. For instance, in 1983, the northern district court of California ordered the California Department of Corrections to provide clean cells, bedding, clothing, and cleaning supplies to all prisoners in the state’s four maximum security units. The court further ordered that prisoners be allowed three showers and eight-to-ten hours of outdoor exercise per week, be double-celled for no more than 30 days in any given year, and be permitted to visit with family members and friends.⁷⁵⁰ The Ninth Circuit court of appeals affirmed these remedies ordered by the lower court.⁷⁵¹

In California, as in the other states examined in this section, district courts heard legal challenges to both the allegedly unconstitutional conditions in state prison isolation units and to the allegedly unconstitutional procedures by which prisoners were assigned to these units. The northern district court in California agreed with the prisoners’ claims, finding a battery of unconstitutional conditions and procedures, and crafting remedies, which involved court interventions in the day-to-day management of the state prisons, including very specific orders about how prisoners should be treated. In California, these interventions took place over a period of more than ten years and were largely upheld on multiple reviews by the Ninth Circuit Court of Appeals. Again, however, no court ever declared California’s four lock-up units to be wholly unconstitutional. Eventually, prison administrators, frustrated with the ever-growing list of requirements for the prisoners in the state’s four lock-up units, focused on designing and building new prisons, rather than trying to fix the existing ones.

6. Pennsylvania: Dilapidation and Overcrowding

In Pennsylvania in 1989, a district court found that conditions in the state’s maximum-security prison were unconstitutional. The court noted that some prisoners in the State Correctional Institution at Pittsburgh spent twenty-one to twenty-two hours per day in cells for up to four weeks at a time. The court was particularly concerned that some of these prisoners, and others throughout the institution, were double-celled in dilapidated, unsanitary conditions. In addition to the problem of long-term isolation, the court noted that the institution had

⁷⁴⁷ *Wright*, 462 F. Supp at 399.

⁷⁴⁸ *Wright*, 462 F. Supp at 400-01.

⁷⁴⁹ *Wright*, 462 F. Supp at 404.

⁷⁵⁰ *Toussaint v. Rushen*, 553 F. Supp. 1365, 1385 (N.D. Cal. 1983).

⁷⁵¹ *Toussaint v. McCarthy*, 801 F.2d 1080 (9th Cir. 1986).

“endemic bed bugs,” especially in the area of the institution where prisoners were in long-term isolation, as well as broken windows that allowed birds into the institution, and inadequate cell lighting.⁷⁵² An expert also testified during the trial that the conditions in the prison were dangerous and potentially violent, because prisoners were so “on-edge,” living “elbow to elbow.”⁷⁵³ The district court ordered, among other remedies, that double-celling in the prison, especially in the most dilapidated cell blocks, where the prisoners were confined for the most hours per day, be eliminated. State officials appealed this order requiring the elimination of double-celling, but the Third Circuit upheld the district court’s order.⁷⁵⁴ Prison officials, meanwhile, moved forward with a plan to build a new, maximum-security institution.

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

D. From Maximum Security to Supermaximum Security

Each of these eight state cases exemplifies the manner in which courts handled questions of long-term, punitive isolation involving near-complete deprivation of basic living privileges, like exercise, fresh air, and intellectual stimulation. No court ordered the cessation of such practices entirely, nor found any such practice to be unequivocally unconstitutional. Instead, courts sometimes placed limitations on the duration of confinement, as in the case of the isolation cells at Parchman prison in Mississippi. More often, courts suggested, instead, changes to the conditions of the confinement. Sometimes these changes were structural, as in the district court’s order to shut down Old Max in Colorado. More often, these changes sought to reduce overcrowding, by forbidding double-celling as in the cases challenging the Alabama prisons and the maximum security prison in Pennsylvania. Courts also sought to improve basic living conditions by requiring prison officials to provide minimum life necessities, such as food, clothing, light, and exercise, as in California. These minimum rights, and the way they have been interpreted over the past two decades, are the subject of this section. First, the kinds of minimum rights courts established in cases like *Gates*, *Pugh*, *Twomey*, *Ramos*, *Toussaint*, and *Tillery*, will be discussed in greater detail, and their relationship to the conditions in supermax prisons will be considered. Second, the way correctional administrators have interpreted these minimum rights will be examined.

1. From Minimum Rights to Supermaximum Security

Many of the improvements to isolation conditions, which the courts mandated in the eight federal prisoners’ rights cases discussed in the previous two sections, were ordered again and again by courts across the country. The main improvements can be divided into a few key

⁷⁵² *Tillery v. Owens*, 719 F. Supp. 1256, 1265 (W.D. Pa. 1989).

⁷⁵³ *Tillery*, 719 F. Supp. at 1266.

⁷⁵⁴ *Tillery v. Owens*, 907 F.2d 418 (3d Cir. 1990).

categories, notable because they foreshadow the basic principles of supermax confinement throughout the United States today: (1) requirements that prisoners have access to some basic routines of daily life, like showers and regular outdoor exercise; (2) requirements that prisoners have minimum physical comforts, largely geared towards avoiding health problems, such as provisions for adequate lighting as well as adequate hygiene, and limitations on noise; (3) requirements that prisoners be physically safe from attacks by other prisoners, and relatedly, not be isolated in overcrowded cells.

In terms of basic routines of daily life, by 1980, federal courts generally agreed that prisoners should have access to some regular form of outdoor exercise for a minimum of about five hours every week, as well as access to at least a few opportunities to shower weekly. For instance, in 1979, the Ninth Circuit noted that “there is substantial agreement among the cases in this area that some form of regular outdoor exercise is extremely important to the psychological and physical well being of the inmates.”⁷⁵⁵

In terms of minimum physical comforts, courts frequently expressed concerns with the potential health impacts of excessively decrepit, or uncomfortable isolation conditions. For instance, a federal district court in California, in 1984, echoed the concerns of the district court in Colorado with the detrimental health impacts of the “unrelenting, nerve-racking din” in the Old Max facility. The California district court held that prisoners must be held in an environment “reasonably free of excess noise.”⁷⁵⁶ Similarly, a number of courts were concerned, as in the case of Pennsylvania’s high security prison, with inadequate lighting in isolation cells. In reviewing conditions in a Washington state prison isolation unit, the Ninth Circuit held in 1982 that adequate lighting is a fundamental attribute of adequate shelter, which is itself a requirement implicit in the Eighth Amendment prohibition on cruel and unusual punishment.⁷⁵⁷ In the same year, the Ninth Circuit also held, again reviewing Washington state prison conditions, that the Eighth Amendment requires access to personal hygiene supplies, like a toothbrush and soap.⁷⁵⁸

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

Strikingly, of the states highlighted in the previous two sections for their unconstitutional prison conditions in the 1970s and 1980s, every one subsequently either transformed an existing section of a prison into a supermax unit, or built a brand new supermax. Mississippi transformed a portion of the Parchman prison that was challenged in the 1970s litigation into a supermax unit, holding the state’s death row and more than 900 administrative segregation cells, in which prisoners were detained, indefinitely, in solitary confinement, locked in their cells twenty-three to twenty-four per day, every day.⁷⁵⁹ Alabama opened Donaldson prison in 1982, complete with 300 segregation cells equipped to control the allegedly most difficult behavioral problem

⁷⁵⁵ *Spain v. Procunier*, 600 F.2d 189, 199 (9th Cir. 1979).

⁷⁵⁶ *Toussaint v. McCarthy*, 597 F. Supp. 1388, 1397 (N.D. Cal. 1984).

⁷⁵⁷ *Hoptowit v. Spellman*, 753 F.2d 779, 783 (9th Cir. 1984).

⁷⁵⁸ *Hoptowit v. Ray*, 628 F.2d 1237, 1246 (9th Cir. 1982).

⁷⁵⁹ Terry A. Kupers, Theresa Dronet, Margaret Winter, et. al., “Beyond Supermax Administrative Segregation: Mississippi’s Experience Rethinking Prison Classification and Creating Alternative Mental Health Programs,” *Criminal Justice and Behavior*, Vol. 20.2 (July 2009): 2-14.

prisoners in the state.⁷⁶⁰ Illinois opened the Tamms Correctional Center, with 500 supermax beds, in 1998.⁷⁶¹ Colorado opened the Centennial Correctional Facility in 1980, per the plans laid out by state officials, who sought a stay to prevent the district court from forcing them to close the Old Max in 1979, before the new, replacement prison opened. Today, Centennial (now Colorado State Prison) has more than 700 cells designated for administrative segregation, which maintain prisoners in solitary confinement, locked in their cells twenty-three or more hours per day.⁷⁶² As discussed in prior chapter, California opened Pelican Bay State Prison with 1,056 supermax beds, in 1989. Pennsylvania opened a special management and long-term segregation unit in 2000.⁷⁶³ The Ninth Circuit cases cited in the preceding paragraph also referenced prisons in Washington State in the 1970s. Washington opened its first Intensive Management Unit, within the older Washington Correctional Center, in 1984, to house 124 of the allegedly most difficult prisoners in the Washington state prison system, locked in their cells, for twenty-three hours per day or more.⁷⁶⁴

In these institutions, numerous design features resolve problems the courts raised with health, safety, and routines in earlier high-security prisons. For instance, these units all contain prisoners for extended periods of time in isolation; solitary confinement minimizes crowding and the often-associated problems with violence. Cells are grouped into pods of eight-to-ten with one or two showers and a single, attached outdoor exercise yard, sometimes called a dog pen, because it is the size of a cell, or a few cells combined; the pod groups are carefully structured to allow each prisoner in the pod adequate weekly access to the solitary outdoor exercise yard and the showers. As the architect who designed the first supermax in Arizona said, the pod-design “allowed us to put an inmate in his cell, to take him to his cell, and [allowed] a time to go [to] exercise, and ... get those guys through a daily routine never requiring two inmates in the room at the same time. We cut the staff ration to 1:4, instead of 1:1.”⁷⁶⁵

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

They give the inmates control of the lights. I think that unit up there [in California], and our units [in Arizona] have what they call a touch-bolt. It's another reaction to [the idea that] 'inmates tear everything up.' It's a carriage-head-bolt ... with a flat, round head, and that bolt comes through the light fixtures, and when you touch it, the static electricity in your body sends a charge into that bolt, and on the other end of it is a sensor ... so there's no moving parts

⁷⁶⁰ Alabama Department of Corrections, “Donaldson Correctional Facility,” available online at: <http://www.doc.state.al.us/facility.asp?id=4> (last accessed 17 Feb. 2012).

⁷⁶¹ J.L. Sundt, T.C. Castellano, and C.S. Briggs, “The sociopolitical context of prison violence and its control: A case study of supermax and its effect in Illinois,” *Prison Journal*, Vol. 88.1 (2008): 94–122.

⁷⁶² Colorado Department of Corrections, “Centennial Correctional Facility,” available online at: <http://www.doc.state.co.us/facility/ccf-centennial-correctional-facility> (last accessed 20 Feb. 2012).

⁷⁶³ *Beard v. Banks*, 548 U.S. 521, 536 (2006).

⁷⁶⁴ Rhodes, *Total Confinement*, *supra* note 13; Washington State Department of Corrections, “Washington corrections center – history,” available online at: <http://www.doc.wa.gov/facilities/prison/wcc/default.asp> (last accessed 11 Jun. 2011).

⁷⁶⁵ Justice architect (Arizona) interview, *supra* note 9.

... You've seen the lamps, where you walk up to it and touch it? That's the same technology.⁷⁶⁶

The Arizona architect's precise description of the technology that allows prisoners to control the lights in their cells, through a complicated touch-sensor mechanism, harks eerily back to the *Wright* court's observation in 1976 that, in addition to ventilation and lighting being poor, and medical attention being lacking, "the lights in some cells are controlled by guards."⁷⁶⁷ The modern supermax ensures that lighting is always on, addressing concern of the *Wright* court and others with inadequate lighting in dark isolation cells. In addition, some state's supermaxes, including those in California and Arizona, allow prisoners limited control over the brightness of the lighting in their cells, addressing the *Wright* court's additional concerns with who controls cell lighting.

In a sense, supermax prisons represent the opposite of the many abuses courts documented in the 1970s and 1980s prison reform cases. The supermax prison keeps people in absolute isolation; no overcrowding.⁷⁶⁸ The supermax prison is brand new – made of clean steel and smooth concrete, with technologically advanced central control rooms, from which officers can open and close cell doors at the push of a button without even the necessity of human sound, let alone contact; no dilapidation, no filth. Heavy doors with perfect seals muffle the sounds; no intolerable din. Supermax prisons keep individual prisoners contained, each in his own steel box, for twenty-three to twenty-four hours every day; no violence.

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

2. Supermax Designers Disaggregate Rights from Privileges

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

For instance, an architect, who worked on Pelican Bay, California's supermax, noted that he was very aware that he might have to justify his design decisions to a federal court, and so he followed court cases about prisons conditions closely. For instance, he remembered actually observing the hearings for the federal court case involving a challenge to the conditions at Pelican Bay State Prison (discussed further in the next section):

⁷⁶⁶ *Id.*

⁷⁶⁷ *Wright*, 425 F. Supp. at 399.

⁷⁶⁸ The next chapter will address the questions of "overcrowding" and "double-bunking" in supermax cells in California. Even though supermax cells are sometimes double-bunked, they are still never "crowded," the way, say the dark isolation cells were in Alabama's prison in the 1960s and 1970s.

*I sat in on one or two sessions. I was actually quite surprised that the state never contacted us to engage us in the defense of the architecture ... and they never did ... The case was convened in San Francisco, so I sat in one or two days on it. I just did it out of curiosity to see what they were doing over there ... but they never did ask us to come forward We were not named as a defendant, of course, but it is not unusual in those situations to ask anyone involved in the project to ask us to assist in defense ... that was fine with us [that they didn't ask].*⁷⁶⁹

Another California correctional administrator noted that, in designing and building Pelican Bay, “[We] wanted to make sure that we were building something that would stand court scrutiny.”⁷⁷⁰

In some cases, the supermax designers were even more explicit about the relationship between court decisions and the physical design of the supermax prison. For instance, the Arizona architect who designed the first supermax in the early 1980s clearly delineated rights from privileges. When he talked about rights, he referenced the specific kinds of conditions federal courts had ordered in prisons across the United States, like light, showers, and a space to exercise: “Arizona [correctional officials wanted to] ... take all their privileges away, [but] give them all their rights ... they can have their natural light, shower, exercise, all with one guy in the room at a time ... there’s no right to have twelve people in your room together.”⁷⁷¹

In other words, this Arizona architect, although he did not explicitly reference the role of the courts, had internalized the basic minimum rights courts had accorded to prisoners throughout the 1970s, and he worked to physically institutionalize these rights – at the barest minimum level delineated by courts – in the supermax design. As this architect explained, the challenge of the supermax design was that: “We need[ed] to find a way to separate them [prisoners], bring them all the privileges and rights they have, but come up with a configuration that would keep them separated, not have to inject our staff every time they have to go to a shower, to go to [get] food.”⁷⁷² So prison designers instituted a form of compliant resistance – building institutions to comply with the precise minimum standards courts had articulated for punitive isolation conditions, but resisting the provision of any unnecessary, or non-required privileges.⁷⁷³

As mentioned in Chapter IV, Section E. Judicial Assertions of Power and Legal Interventions, 1976-present, a 1986 California Auditor General’s Report investigating the lock-up facilities at Folsom Prison, provides a particularly good example of this kind of compliant resistance. In this report, the AG, Thomas Hayes, noted that the *Toussaint* court did not require contact visits for prisoners in the SHU. The report, therefore, recommended eliminating contact visits for these prisoners.⁷⁷⁴ In a response to the audit, Daniel J. McCarthy, the Director of Corrections, agreed that this was a reasonable goal, and committed to work towards providing adequate space for *non*-contact visits.⁷⁷⁵ So privileges were actually *reduced* to only those minimums specifically delineated by the *Toussaint* Court. This process of minimizing privileges and conditions to include only what the courts had required would continue through the design and development of the supermax at Pelican Bay. Litigation at least indirectly affected prison

⁷⁶⁹ Justice architect (California) interview, Aug. 4, 2010, *supra* note 437.

⁷⁷⁰ Quoted in Shalev, *supra* note 13: 106-07.

⁷⁷¹ Justice architect (Arizona) interview, *supra* note 9.

⁷⁷² *Id.*

⁷⁷³ See Guenther, *supra* note 314, and discussion in surrounding text.

⁷⁷⁴ Hayes, *supra* note 310: 155.

⁷⁷⁵ McCarthy, *supra* note 310: 44-45.

building by setting minimum standards, which correctional administrators were careful not to embellish in the least.

Other supermax designers described more explicitly building institutions that would successfully avoid the kind of court intervention correctional administrators had been subject to in the 1970s. For instance, in California, correctional administrators argued that they needed a new, extremely high security prison in order to satisfy the court's demands in the 1970s class action case challenging the conditions in the state's four highest security units (*Toussaint*). In the Senate Bill files of Robert Presley, the Senator who chaired the California legislative committee on prison building, a May 1986 letter from Rodney J. Blonien, the Undersecretary of Corrections, argued that the legislature should fund, and the Department of Corrections should commit to "a replacement facility ... at a cost of an estimated \$250 million," to replace the long-term lockdown unit at San Quentin, which two courts had already found to be unconstitutional. Undersecretary Blonien explicitly argued that this commitment was necessary to appease the judges in the *Toussaint* and *Wilson* courts, and to reach a financially sustainable agreement to minimize repairs at San Quentin itself.⁷⁷⁶

Attorney Steve Fama, who represented the plaintiffs in the *Toussaint* case, reiterated this idea that the California Department of Corrections had figured out that they could avoid litigation over unconstitutional conditions by simply building new and better prisons. Specifically, Fama said that he thought a Ninth Circuit opinion issued in the *Toussaint* case might have helped to pave the way for the idea of the supermax at Pelican Bay. Fama said: "At a particular point there, the Department opened New Folsom [later re-named California State Prison – Sacramento], and the Ninth Circuit held that the [*Toussaint*] order did not apply, and this gave the Department the idea of a way out of the consent decree."⁷⁷⁷

One former federal prison architect was even more explicit about how prison designers in the 1980s and 1990s sought both to remedy and avoid the mistakes of correctional administrators in the 1970s. This architect described how the federal supermax in Florence, Colorado was purposely, physically concealed from public view, so as to avoid both publicity and the litigation often associated with publicity:

They acquired this site in Florence, Colorado, that had a ridge down the middle. The ridge allowed them to design the administration building on the public side of the approach and then there was in effect a tunnel that went through the ridge into the secure part of the facility. That sort of helped conceal the facility from casual public view ... The Bureau feels the less public exposure a facility like that can get the better. If it were in the news constantly it would be a negative thing from the standpoint of trying to operate the facility in a normal way ... the idea is not to be secretive ... It's to sort of take it out of the minds of people.⁷⁷⁸

Together, the comments of architects, like this former federal prison architect, the Arizona architect, and the California architect, along with evidence from archival records about prison building conversations in states like California, demonstrate how the frequency and scale of litigation around specific prison conditions, especially the conditions in isolation and solitary confinement cells, across the United States, ultimately shaped the supermax prison design.

⁷⁷⁶ Blonien, *supra* note 317.

⁷⁷⁷ Fama interview, *supra* note 270. The decision Fama referred to is: *Rowland v. U.S. Dist. Court for Northern Dist.*, 849 F.2d 380 (9th Cir. 1988).

⁷⁷⁸ Justice architect (formerly with the federal Bureau of Prisons) interview, *supra* note 2.

Although supermax prison designs were initiated at the state level, in states like Arizona and California, the design ultimately became popular throughout the United States. And its popularity is partially attributable to the ways in which the supermax design adequately satisfied the specific requirements of federal courts for minimum prison conditions standards and basic prisoners' rights, as laid out in the 1960s and 1970s litigation.

Although supermax prisons at least appear to respond neatly – and conclusively – to the many concerns prisoner advocates and courts raised in the prison reform period, they also perpetuate many of the problems with isolation and solitary confinement that have been documented since the first uses of solitary confinement in the United States at Walnut Street Prison in 1787. Solitary confinement, even in the clean, quiet, largely-violence-free conditions of a supermax, has been documented to make people crazy. Psychiatrists, psychologists, and anthropologists across the United States have documented the mental de-compensation that occurs in long-term solitary confinement, and testified to it in countless court cases.⁷⁷⁹ Human rights activists have also alleged that long-term solitary confinement, even in supermax conditions, constitutes torture, in violation of multiple international law treaties and norms.⁷⁸⁰ Indeed, within a year or two of each supermax prison's opening, prisoner litigants from these facilities were knocking on the doors of the courthouse, or at least, bombarding the courthouse mailboxes with complaints.

Some scholars have suggested that by the mid-1980s, the prison reform movement was “in retreat.”⁷⁸¹ In spite of the “retreat” of prison reform, and the passage of two significant pieces of federal legislation in the mid-1990s (the Prison Litigation Reform Act and the Anti-Terrorism and Effective Death Penalty Act), which severely limited the ability of prisoners to bring conditions-of-confinement challenges in federal court,⁷⁸² prisoners and prisoners' advocates have challenged the constitutionality of supermax prisons in every state where such an institution has been built.

E. The Supermax: An Overview of the Litigation, 1990-2006

Trying to explain it is like trying to explain what an endless toothache feels like ... I wish I could paint what it's like ... slow constant peeling of the skin, stripping of the flesh, the nerve-wracking sound of water dripping from a leaky faucet in the still of the night while you're trying to sleep. Drip, drip, drip, the minutes, hours, days, weeks, months, years, constantly drip away with no end or relief in sight.
~ Tommy Silverstein, describing decades of solitary confinement⁷⁸³

⁷⁷⁹ See, e.g., Haney and Lynch, *supra* note 115; Kupers, *Prison Madness*, *supra* note 564; Rhodes, *Total Confinement*, *supra* note 13.

⁷⁸⁰ Lobel, *supra* note 405; Fred Cohen, “Prison reform: Commission on safety and abuse in America's prisons: Isolation in penal settings: The isolation-restraint paradigm,” *Journal of Law and Politics*, Vol. 22 (2006): 295–324.

⁷⁸¹ Feeley and Rubin, *supra* note 692.

⁷⁸² Boston, *supra* note 26.

⁷⁸³ Tommy Silverstein has spent more than 32 years in solitary confinement. Alan Prendergast, “The caged life: Is Thomas Silverstein a prisoner of his own deadly past – or the first in a new wave of locked-down lifers?” *Denver Westword News*, Aug. 16, 2007.

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

1. The Limitations of the Eighth Amendment

The few Eighth Amendment challenges to supermaxes that have succeeded have usually revolved around the detrimental mental health impacts of long-term solitary confinement, especially on those prisoners who had pre-existing mental health conditions prior to their detention in solitary confinement. While courts have not found indeterminate punitive solitary confinement terms to be unconstitutional in general, some courts have held such terms to be unconstitutional for the mentally ill.⁷⁸⁴ However, even these decisions mandating gentler minimum standards for people with pre-existing mental illnesses fall far short of either limiting the use of long-term solitary confinement in prisons more generally, or even protecting all people with mental health conditions.

One psychologist, who has extensively studied supermax conditions and their effects, argues that courts, in assessing challenges to supermax conditions, have systematically and repeatedly displayed a “superficial understanding of nature of the psychological harm inflicted” in supermax conditions, deferred unreasonably to the discretion of correctional administrators, and permitted the practice to spread and then used this spread as a “de facto justification” for the continued use of solitary confinement.⁷⁸⁵ Indeed, another expert, testifying before a national commission on prison conditions, argued that conditions in supermaxes are so severe that imposition of such conditions should be treated analogously to the imposition of mechanical restraints (such as restraint chairs, which lock a person into a fixed position and allow for virtually no movement).⁷⁸⁶ Courts have held that mechanical restraints can only be applied for extremely limited periods of time, under conditions of extreme necessity, and not for purely punitive purposes; Cohen suggests identical provisions should apply to the “application” of supermax conditions.⁷⁸⁷ However, no court has adopted such a standard to govern the imposition of supermax confinement.

⁷⁸⁴ See, e.g., *Madrid v. Gomez*, 889 F. Supp. 1146 (N.D. Cal. 1995); Lobel, *supra* note 405: n.44.

⁷⁸⁵ Haney and Lynch, *supra* note 115: 542-43.

⁷⁸⁶ J.J. Gibbons and N.B. Katzenbach, “Prison reform: Commission on safety and abuse in America’s prisons: Confronting confinement,” *Journal of Law and Politics*, Vol. 22 (2006): 385–547, at 462.

⁷⁸⁷ Fred Cohen, *supra* note 780.

Instead, courts have focused on reforming the policies that govern supermax confinement. In the context of Eighth Amendment challenges, this involves limiting the placement of the mentally ill in supermaxes and ensuring that correctional officers do not physically abuse prisoners in supermaxes. The *Madrid* case, which considered challenges to Pelican Bay State Prison in California, and was one of the first cases to assess the constitutionality of the modern supermax, is representative of how Eighth Amendment challenges have proceeded in the supermax context. In his initial order in *Madrid*, Judge Thelton Henderson found numerous violations of individual prisoners' rights – including a memorable passage detailing how correctional officers bathed a prisoner at Pelican Bay in scalding water, and the prisoner subsequently sustained third-degree burns all over his body – and ordered specific policy reforms at the institution, from diversion of mentally ill prisoners from the supermax to improved training and oversight programs for correctional officers.⁷⁸⁸ However, Henderson stopped short of finding that the physical structure of long-term solitary confinement at Pelican Bay State Prison was itself an unconstitutional violation of the Eighth Amendment. In an interview in which he reflected on the case, Henderson recalled the shock he first experienced when he learned about conditions at Pelican Bay State Prison, from prisoners' petitions received in the courthouse:

I was chief judge at the time Pelican Bay was built ... one of your jobs as chief judge is to notice things that are happening on and to your court ... one of the things that started happening is we got a ton of handwritten letters and petitions from this place we had never heard of before – Pelican Bay ... [So] I contacted the warden and asked to talk to him and see what was going on ... He kindly agreed to come down ... and meet with a group of our judges ... just to talk and understand what's behind the unusual [number of] petitions ... What was surprising to me was the inhumanity of the thing. They were treating prisoners like animals. They were either ignorant or didn't care about constitutional rights.⁷⁸⁹

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

I thought the concept of a supermax was not unconstitutional. I thought the implementation [was the problem] – it seemed the mentality at Pelican Bay was that these are really bad people, and so they don't really have any rights to mention, so whatever we do to them is OK ... The concepts were fine. They had a lot of tough guys.⁷⁹⁰

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

⁷⁸⁸ *Madrid v. Gomez*, 889 F. Supp. 1146 (N.D. Cal. 1995).

⁷⁸⁹ Henderson interview, *supra* note 16.

⁷⁹⁰ *Id.*

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

Lower state and federal courts, however, have been quite hesitant to find Eighth Amendment violations inherent in supermax prison conditions, and the Supreme Court has never directly addressed the question. An Eighth Amendment violation based on prison conditions requires both objective and subjective harms. First, the deprivation wrought by the prison conditions must be “objectively sufficiently serious.” Second, the correctional official must have, subjectively, been deliberately indifferent to prisoner health or safety, during the time of the deprivation.⁷⁹¹ Added to this analysis, of course, is the traditional Eighth Amendment concept of evolving standards of decency – specifically, “whether society considers the risk that the prisoner complains of to be so great that it violates contemporary standards of decency to expose anyone unwillingly to such a risk.”⁷⁹² Lobel, an attorney who has represented a number of prisoners in Eighth Amendment challenges to the conditions in supermax prisons suggests that these two conditions for an Eighth Amendment violation – serious harm and deliberate indifference – should be easy to prove, based on the conditions present in many supermaxes.⁷⁹³ And yet, no lawyer has successfully convinced a federal judge that supermaxes inherently involve Eighth Amendment violations. Given the specificity with which courts in the 1970s, 80s, and 90s, as discussed in the previous section, determined what conditions of isolation and solitary confinement would and would not comport with the requirements of the Eighth Amendment, their recent hesitation to find any violation of the prohibition against cruel and unusual punishment inherent in the conditions of modern supermaxes, built at least in part to compensate for the constitutional violations found in earlier decades, is not surprising.

2. *The Fourteenth Amendment: Room for Reform?*

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

⁷⁹¹ *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

⁷⁹² *Helling v. McKinney*, 509 U.S. 25, 36 (1993).

⁷⁹³ Lobel, *supra* note 405.

played, as the case may be) in recent years in overseeing, or in any way intervening to alter, the conditions of confinement in modern supermax facilities.

As with the *In Re Medley* case more than a century earlier, the Court's assessment of the constitutionality of the conditions in the Ohio supermax was merely implicit in the rigorousness of the procedural standards it laid out, under the Fourteenth Amendment, rather than explicit under (an entirely absent) Eighth Amendment analysis. There were two central principles to the *Wilkinson* holding. First, prisoners detained in Ohio's supermaximum security prison, the Ohio State Penitentiary (OSP), have an unequivocal liberty interest in avoiding assignment to a facility with the kinds of restrictive conditions of confinement in place at OSP: "assignment to OSP imposes an atypical and significant hardship under any plausible baseline."⁷⁹⁴ In holding that a prisoner has a liberty interest in not being assigned to OSP, the Supreme Court noted two particular limitations on liberty that are relatively unusual at OSP: (1) confinement there is indefinite, with only an annual review, and (2) an otherwise parole-eligible prisoner who is in OSP is barred from parole consideration.

While *Wilkinson* is a landmark decision for establishing that a prisoner *might* have a liberty interest in avoiding being placed in a supermax cell, the decision is severely limited in scope. First, the Court noted in particular the two "added components" of solitary confinement in OSP, which constitute greater limitations than are characteristic of "most" such facilities: indefiniteness and parole ineligibility. Second, the Court did not hold that officials at OSP had actually infringed any prisoner's liberty interest through implementing the facility's policy of indefinite solitary confinement.

In fact, the second central principle in the *Wilkinson* holding was that the limited procedural protections in place for prisoners assigned to OSP – "notice of the factual basis" for the assignment, and a limited "opportunity for rebuttal" – were sufficient to prevent any unconstitutional liberty deprivation.⁷⁹⁵ The Court overturned the earlier Sixth Circuit holding that OSP placement policies were *insufficient* to protect prisoners' due process rights. Balancing the individual prisoner's interests in avoiding erroneous placement in OSP against the government's "dominant" interest in maintaining a safe and secure institution, the Court found that the existing OSP placement policy was perfectly constitutional.⁷⁹⁶

The *Wilkinson* case represents two notable trends in late twentieth century review of prisoner cases. First, the federal appellate courts have been much more reluctant to tell correctional administrators how to run their prison facilities than district courts have been.⁷⁹⁷ Of course, appellate decisions are binding on multiple courts and institutions, whereas the kinds of settlement agreements and consent decrees district courts have the flexibility to negotiate are, at least in terms of binding precedent, off the record, and therefore binding only on one institution at a time.⁷⁹⁸ The fact that circuit courts are reluctant to codify these agreements as legal precedents, especially in a conservative legal period and tough-on-crime era, makes sense.

In *Wilkinson*, for instance, the district court in Ohio ordered a number of revisions to the OSP placement policy – both substantive revisions limiting the permissible justifications for OSP

⁷⁹⁴ *Austin v. Wilkinson*, 545 U.S. 209, 224 (2005).

⁷⁹⁵ *Wilkinson*, 545 U.S. at 226-27.

⁷⁹⁶ *Wilkinson*, 545 U.S. at 230.

⁷⁹⁷ See, e.g., *Sandin v. Conner*, 515 U.S. 472, 482 (1995).

⁷⁹⁸ David Fathi, a nationally renowned prisoners' rights lawyer, has argued that the fact that so many prisoners' rights cases are settled deprives "the bench and bar of a readily accessible account of the litigation's result." David Fathi, "Anatomy of the Modern Prisoners' Rights Suit: The Common Law of Supermax Litigation," *Pace Law Review*, Vol. 24 (Spr. 2004): 675-90, at 677.

placement, and procedural revisions allowing prisoners to prevent documentary and testimonial evidence at placement hearings and increasing administrative requirements for written determinations regarding placement. But the Sixth Circuit overturned the district court's substantive revisions and held that only the procedural revisions were required. This limitation on the district court's far-reaching order is not surprising; in terms of tough-on-crime policies, the Sixth Circuit is not a "soft" circuit. Sixty-seven percent of its judges were appointed by Republican presidents; Republican appointees are often more likely to side against defendants in criminal cases and with defendants in civil rights challenges.⁷⁹⁹ Moreover, the states constituting the Sixth Circuit tend to be tough-on crime themselves: Ohio and Tennessee are two of the ten states with the largest death rows in the United States.⁸⁰⁰ Nonetheless, despite the Sixth Circuit's relatively conservative decision in the *Wilkinson* case, the Supreme Court struck down even those limited due process revisions the Circuit had left in place.

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

In other words, although the plaintiff's lawyers in *Wilkinson* negotiated critical improvements in conditions at OSP, those improvements are not codified in a publicly searchable legal opinion, and have not joined the ranks of valuable legal precedent that might help to shape institutional standards in other districts and states. Indeed, even conditions at OSP remain severely punitive and, at least potentially, unconstitutional. One lawyer, who litigated the case in the Supreme Court, noted that, even after the Supreme Court decision in *Austin*, the District Court again heard complaints from OSP and found that "Ohio was not following, nor was it prepared to follow, the procedures it had represented to the Supreme Court that it would implement."⁸⁰¹ In other words, perhaps the limited Fourteenth Amendment, procedural challenge route to restraining the imposition of supermax conditions is itself not even working. But, perhaps this is of little concern to courts, who see supermaxes as implementing vast and systemic improvements, inspired by earlier iterations of those same courts, over the conditions at prisons like Parchman in Mississippi and throughout states like Alabama that existed in the 1960s and 1970s.

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

⁷⁹⁹ See Cass R. Sunstein, D. Schkade, L. Ellman, and A. Sawicki. *Are judges political? An empirical investigation of the federal judiciary* (Washington, DC: Brookings Institution Press, 2006); Lawrence Lessig, William Landis, and Michael Solimine, "Judicial influence: A citation analysis of federal courts of appeals judges," *Journal of Legal Studies*, Vol. 27 (1998): 271-332; Sheldon Goldman, *Picking federal judges: Lower court selection from Roosevelt through Reagan* (New Haven: Yale University Press, 1997).

⁸⁰⁰ Death Penalty Information Center, *supra* note 32.

⁸⁰¹ Lobel, *supra* note 405.

unprovoked beating at the hands of a correctional officer and (2) whether an institution's administrative process for placing a prisoner in long-term solitary confinement or isolation adequately protects each prisoner's liberty interest in living in a less restrictive prison environment.

This development of a jurisprudence of punishment around supermaxes parallels the development of death penalty jurisprudence in the United States. In death penalty cases, too, federal courts tend to address legally complex procedural questions directly, and to only indirectly assess the basic constitutionality of a state executing a criminal. For instance, the procedure by which a prisoner can challenge the method of his execution has been litigated almost as frequently as the method of the execution itself.⁸⁰²

* * *

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

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

Although the courts have come full circle regarding the constitutionality of isolation and solitary confinement in the last 200 hundred years, the courts played a critical and often overlooked role in the interim, especially between the 1960s and 1980s. Specifically, courts did hear a significant number of cases regarding isolation conditions and solitary confinement in these years; courts scrutinized isolation conditions quite carefully, down to questions of precise amounts of square footage, light, and out-of-cell hours required to render conditions constitutional; and courts ordered very specific remedies to the violations they found. In response, states across the United States built a specific kind of structure, neatly streamlined, at least in part, to respond to the conditions courts mandated: the supermax. The role of the courts in this correctional phenomenon, shaping a very specific outcome, demonstrates the ways in which courts can not only set policies, but sometimes even produce specific structures. Once

⁸⁰² See, e.g., *Beardslee v. Woodford*, 395 F.3d 1064 (9th Cir. 2005); *Cooey v. Strickland*, 479 F.3d 412 (6th Cir. 2007); *Grayson v. Allen*, No. 07-12364-P, 2007 WL 2027903 (11th Cir. July 16, 2007) (all three litigating the timing and procedural rules under which a prisoner may challenge the constitutionality of a given state's lethal injection execution protocol).

produced, these structures are all the harder to challenge, even if they replicate the torturous conditions courts were seeking to avoid, because they are literally physical embodiments of judicial precedent. So, one question remains: Have federal courts inadvertently established uniform and regulated, but inhuman, standards of confinement?

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

Conclusion

This dissertation has traced the origins of supermax innovation in the Sunbelt and the spread of the institution across the United States, with a particular focus on one of the nation's prototypical supermaxes: the Pelican Bay State Prison Secure Housing Unit in California. Beginning with the questions of how to define a supermax and how to describe the conditions therein, the first substantive chapter (II) offered a working definition of the institution as a basis for subsequent analyses. Chapter II also described how supermaxes fit into a long history of American uses of solitary confinement; the institutions are both more and less harsh than early penitentiaries, but they are definitely grander in scale – detaining more people for longer periods of time. Chapter III further contextualized the supermax phenomenon in a particular American moment: 1980s mass incarceration. Supermaxes, indeed, were born out of a massive prison-building boom; where the scale of imprisonment increased so drastically, the increase in the scale of the nation's highest security facilities was a logical corollary. California built more than 20 new prisons in the 1980s and 1990s; among these were not one but two supermaxes, with more than 2,000 cells dedicated to imposing extremely restrictive conditions of long-term isolation. Chapters IV through VI detailed the strikingly administrative nature of the supermax innovation in California, and Chapters VII through IX detailed the strikingly administrative nature of day-to-day supermax operation in California. Chapter X detailed the unintended consequences of 1970s and 1980s prisoners' rights litigation: supermax institutions, which were very resistant to subsequent litigation. In many ways, this story seems hopeless – reform efforts gone wrong, inadequate oversight governing extreme punishments, and abusive conditions resulting directly from these failures.

Supermaxes were the culmination of reform efforts that sought to reduce inequality and inefficiency in the criminal justice system, through re-structuring of criminal sentencing (as detailed in Chapter IV), through new physical construction (as detailed in Chapter VI), and through litigation (as detailed in Chapter X). Pelican Bay and Corcoran State Prisons in California, like the Security Management Units in Arizona, represent the ultimate unintended consequence of these years of reform. The history of the supermax, then, is a representative case study of failed regulation of the criminal justice system in the United States, where reform efforts produce alternative systems that may be different, but are rarely better. Or, if the systems are better, or cleaner, they are still never quite humane.⁸⁰³ Worse, the more bad systems are refined, especially in response to judicial interventions seeking to mandate better conditions, the more resistant the systems become to subsequent improvement efforts, as demonstrated by the litigation history presented in Chapter X.

Supermaxes have been remarkably free from both legislative and judicial oversight of their design and operation. Chapter VI detailed the cursory legislative process underlying the supermax innovation, in which legislators talked about what to call the supermax, instead of talking about whether the supermax was even necessary. California correctional administrators actively sought unprecedented freedom from legislative oversight and, with this newly gained freedom, built a newly punitive super-prison in a remote location on the state's northern border.

⁸⁰³ Lisa Guenther is currently working on a book, *Social Death and Its Afterlives: A Phenomenological Critique of Solitary Confinement*, which grapples with whether “humane” and “human rights” are themselves discriminatory terms, privileging humans over animals, and rationalizing the treatment of both de-humanized people and animals in ways that fundamentally disrespect life. I use the term “humane,” here to reference a familiar sense that living beings, human or animal, deserve to be treated with dignity and respect.

Chapters IX and X detailed how courts have only expanded the administrative discretion over supermax confinement, deferring to correctional administrators' claims about the necessity for the institutions, and codifying broad discretion for correctional administrators over assigning prisoners to these institutions.

Chapter VII detailed how, in articulating why supermaxes were necessary, correctional administrators conflated security rationales with punitive motives. They built an institution to control the prisoners they saw as most dangerous to the *prison* order. But society ostensibly uses prisons to control the people who are most dangerous to the *social* order. Where correctional administrators have been left to articulate the purposes for prisons, and to design facilities that meet these purposes, abuses have resulted. The scalding of Vaughn Dortch detailed in the introduction, the high rates of suicide documented in supermaxes, and the growing body of literature describing other detrimental impacts on mental health of supermax confinement represent just a few of many examples of the danger of the unchecked power built into the physical structure and procedural norms of the supermax.

* * *

The supermax story, however, is not hopeless. In fact, events in 2011 and 2012 suggest that perhaps the supermax phenomenon is at a turning point. As incarceration rates and crime rates have stabilized in the United States, new, large-scale supermax building has faltered. The state of Washington opened a free-standing supermax with 132 beds in 2005.⁸⁰⁴ Then, five years passed before any state built a supermax unit of any substantial size. In 2010, Colorado added a 316-bed supermax unit at an existing prison, but the unit was never filled to capacity, and that same unit is now slated for closure in 2013.⁸⁰⁵ Between 2005 and 2010, only the U.S. military built a supermax facility – with 165 beds, to house detainees at the Guantanamo Bay, Cuba military base.⁸⁰⁶ (See *Table 1*, in Appendix A, for a more comprehensive list of supermax opening dates.) Not only did new supermax building virtually cease, but existing supermaxes came under a series of internal pressures (from prisoners) and external pressures (from human rights bodies and financially-strapped governments alike), which have made national news again and again in the twenty-first century.

On July 1, 2011, 400 prisoners in the Pelican Bay State Prison SHU went on a hunger strike. Most of these prisoners had been living alone, in the restrictive conditions of the SHU, for five or more years; a few had been in isolation for more than 20 years.⁸⁰⁷ The prisoners vowed to refuse food until several core demands were met. These demands were poignantly simple, including: provision of warm clothes for their one-hour-per-day of outdoor exercise in the “dog run”; permission to make one phone call per week; a supply of adequate food; and the possibility that indefinite assignment to the SHU might be reviewed after some number of years.⁸⁰⁸ Within two weeks, major national papers like the *Los Angeles Times* and the *New York Times* had reported on the strike; over the summer and fall, the *New York Times* published two pointed op-eds condemning the use of solitary confinement in U.S. prisons.⁸⁰⁹ In August, the California

⁸⁰⁴ Cody McCullough, “Two firms selected in joint venture for design & construction of Walla Walla prison project,” *Daily Journal of Commerce*, Jun. 1, 2005.

⁸⁰⁵ Maes, *supra* note 168 and Deam, *supra* note 168 (discussing the closure of a supermax wing in Colorado’s state prison system).

⁸⁰⁶ Amnesty International, *Cruel and Inhuman*, *supra* note 90: 3.

⁸⁰⁷ Small, *supra* note 6.

⁸⁰⁸ “Editorial: California’s Hidden Hunger Strike,” *supra* note 92; “FINAL NOTICE: PBSP SHU,” *supra* note 91.

⁸⁰⁹ Dayan, “Op-Ed: Barbarous Confinement,” *supra* note 92; Shourd, *supra* note 82.

Assembly held an afternoon of hearings about long-term isolation in the California Department of Corrections and Rehabilitation.⁸¹⁰ In November, Amnesty International sent a team of British criminologists to visit Pelican Bay, and the United Nations special rapporteur on torture published a report condemning the widespread use of long-term solitary confinement in the United States.⁸¹¹

By the fall of 2011, then, national media and the international human rights community alike had taken unprecedented notice of the scale, duration, and intensity of solitary confinement deployed in prisons in California and across the United States. As public outcry about the harsh conditions in supermax prisons has increased, some states have had a bit of buyer's remorse about their supermax institutions. Four states closed supermax units, or significantly reduced their supermax populations between 2009 and 2011 – Colorado, Illinois, Maine, and Mississippi.⁸¹² As of 2012, California and Virginia were considering reductions to their supermax populations, and Illinois was considering closing its supermax entirely.⁸¹³

But public condemnation and supermax closures do not necessarily translate to the end of supermax-like conditions. As *Table 2*, in Appendix A, estimates, there are at least 73,000 prisoners held in some form of isolation or segregation (e.g. “the hole,” or short-term isolation; protective custody; disciplinary and administrative segregation; etc.) across the United States. So, the number of people in supermaxes represents one half, or less, of the total number of prisoners in all forms of isolation and segregation in the United States. Other estimates suggest ranges as high as 100,000, or more, prisoners in any form of isolation.⁸¹⁴

There are indications that this number might be growing. Although fewer (if any) states are building new, free-standing supermax facilities, states have continued to add small segregation units to existing prisons. For instance, in California in the early 2000s, many small, allegedly shorter-term segregation units, dubbed Administrative Segregation Units (ASUs) were added to existing prison facilities. A 2009 state inspector general report, however, suggested that prisoners were spending months, or longer, in these facilities.⁸¹⁵ States like Texas and New York have always had their supermax units spread throughout the state prison system, and these states have continued to add additional units in the 2000s.⁸¹⁶ In a sense, then, there has simply been a correctional policy shift from concentrating isolation facilities in one or two mega-prisons to diffusing them throughout a prison system.

⁸¹⁰ Sal Rodriguez, “Historic California Assembly Hearing on Solitary Confinement,” *Solitary Watch*, Aug. 24, 2011, available online at: <http://solitarywatch.com/2011/08/24/historic-california-assembly-hearing-on-solitary-confinement/> (last accessed 24 Apr. 2012).

⁸¹¹ Juan Mendez, *Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment* (United Nations, General Assembly: Aug. 5, 2011, A/66/268).

⁸¹² See Kupers, Dronet, and Winter, *supra* note 759 (discussing the closure of Mississippi's supermax); Lance Tapley, “Reform comes to the supermax,” *The Boston Phoenix*, May 25, 2011 (discussing the reduction in Maine's supermax population from 132 to 60); Illinois Department of Corrections, *Annual Report 2010*, available online at: <http://www.idoc.state.il.us/subsections/reports/default.shtml> (last accessed 16 Feb. 2012) (discussing reduction in supermax population from 234 to 208 prisoners); Maes, *supra* note 168 and Deam, *supra* note 168 (discussing the closure of a supermax wing in Colorado's state prison system).

⁸¹³ See CDCR, *Security Threat Group Prevention, Identification and Management Strategy*, *supra* note 581; Kumar, *supra* note 97; Sal Rodriguez, “Testimony from Hearing on Closure of Tamms Supermax Prison,” *Solitary Watch*, Apr. 21, 2012, available online at: <http://solitarywatch.com/2012/04/21/testimony-from-hearing-on-closure-of-tamms-supermax-prison/> (last accessed 23 Apr. 2012).

⁸¹⁴ See Casella and Ridgeway, “How many prisoners,” *supra* note 59.

⁸¹⁵ Shaw (Inspector General), *Special Review*, *supra* note 156.

⁸¹⁶ See, e.g., Dolan, “Indefinite Solitary Confinement Persists,” *supra* note 93.

This diffusion happens in more subtle ways, as well, when courts order states to remove mentally ill or physically unhealthy prisoners out of supermaxes. In these cases, states often re-create supermax conditions in new units, with different names. For instance, in response to two conditions of confinement lawsuits settled in the early 1990s, California correctional administrators converted 64 of the supermax beds at Pelican Bay into a Protective Services Unit (PSU) in 1995.⁸¹⁷ The PSU was designed to divert prisoners with serious mental illnesses from the SHU. Dr. D., a PSU psychologist, described the SHU and the PSU as virtually interchangeable; the main difference, she explained, is increased access to mental health professionals in the PSU. According to Dr. D., psychiatrists working in the PSU have smaller caseloads and organize more group therapy. “I think the inmates even use crayons and coloring books in some of the groups,” she said. But these group treatment sessions still take place in therapeutic treatment modules (or isolation cages, as discussed in Chapter VII, the sub-section on “Therapeutic Treatment Modules or Cages”); prisoners are still cuffed at the hands, waist, and legs; and prisoners still spend twenty-three or more hours of every day alone in their cells. At 64 beds, the Pelican Bay PSU might not be as large in scale as California’s other SHUs, but it meets the other requirements for a supermax laid out in the working definition in Chapter II: the PSU opened in 1995, well after 1984; prisoners are sent there based on an in-prison administrative assignment process, rather than a judicial one; and the conditions involve meticulous control and rigid limitations. In other words, the PSU closely resembles a supermax.

In addition to these PSUs, there are now also special units in the SHU at Corcoran, housing prisoners who have been found guilty, through an internal, administrative process, of indecent exposure – or “IEX,” as the prison lingo goes. There is one 20-bed IEX Unit within the Corcoran SHU. Dr. A., who works in this unit, explained that roughly half of the IEX Unit prisoner population at any given point committed their first act of indecent exposure while already housed in a California SHU.⁸¹⁸ Indeed, engaging in indecent exposure has been observed to be a frequent practice among supermax prisoners,⁸¹⁹ and characterized by some scholars as a coping mechanism, which allows prisoners to feel a sense of control over their indefinite solitary confinement.⁸²⁰ These IEX prisoners, like SHU prisoners and PSU prisoners, have extremely limited out-of-cell time, and rigid restrictions on their movements and activities.

A third kind of specialized isolation unit, dubbed a Behavioral Management Unit (BMU), was opened in 2005 at High Desert State Prison, and in five other prisons statewide. Like the SHU, the BMU was an administrative innovation, which was open for a number of years before the public, or prisoners’ rights advocates, took notice. In May of 2010, the *Sacramento Bee* published a series of articles describing these BMUs. The original intention for the units was to provide intensive therapy and anger management programs for disruptive prisoners, in an effort to improve their ability to function as members of the prison community, and to keep them out of more restrictive, long-term isolation units elsewhere in the state.⁸²¹ Unfortunately, despite the name “behavior management” and the intention that these units would provide therapeutic interventions, the *Sacramento Bee* articles describe prisoners who were locked into their cells for

⁸¹⁷ For the two lawsuits, see *Coleman v. Wilson*, 912 F.Supp. 1282 (E.D. Cal. 1995); *Madrid v. Gomez*, 889 F. Supp. 1146 (N.D. Cal. 1995). For a discussion of this conversion process, see Dr. E. interview, *supra* note 553.

⁸¹⁸ Dr. A. (California Department of Corrections and Rehabilitation psychologist), phone interview with author, Aug. 19, 2010, notes on file with author.

⁸¹⁹ Kupers, *Prison Madness*, *supra* note 564.

⁸²⁰ Rhodes, *Total Confinement*, *supra* note 13: 40 (discussing prisoners throwing their own excrement out of their cells).

⁸²¹ Charles Piller, “Guards Accused of Cruelty, Racism,” *Sacramento Bee*, May 9, 2010: 1A.

up to five months, with absolutely no access to the outdoors, as well as numerous incidences of extreme abuse, including outdoor strip searches in the dead of winter and correctional officer beatings of prisoners that resulted in permanent organ damage.⁸²²

Dave Runnels, who was the warden at High Desert State Prison when he designed and opened the first BMU there, explained that his intention in designing the units was to “provide non-disruptive inmates the ability to program without continual interruption.”⁸²³ He intended the BMUs to function like short-term supermaxes, keeping prisoners in extremely restrictive conditions for three to six months and then gradually providing additional treatment and programming to prisoners who complied with the strict BMU rules. Runnels said he was extremely frustrated by the mischaracterizations in the *Sacramento Bee* exposé, but he refrained from publicly condemning the articles, because “prisons can’t win any argument in a public debate.”⁸²⁴ But he also noted that the units had never quite functioned as he intended, because the funding for the additional treatment and programming he envisioned never materialized.

Regardless of names and acronyms, the more total isolation under extremely restrictive conditions persists as a correctional practice, the more it merits scrutiny – and genuine oversight. Bureaucratic designers of the supermax and supermax-like institutions, like Carl Larson and Dave Runnels, described the kind of prisoner who might require isolation for a few months at a time, but they never articulated the outer bounds of the policy – a maximum length of confinement, or a maximum number of prisoners who might be subjected to isolation. Critical questions about the necessity and scale of supermaxes remain: (1) Does anyone actually require total isolation for security purposes? If some people do require this isolation, why? How many people need this isolation? (2) How long should the isolation last? How should the duration be established? (3) If necessary, is isolation susceptible to administrative determination and control, or does it require independently established guidelines regarding scale and duration of confinement, along with judicial and legislative oversight? Not only were these questions never answered by the supermax designers, but they are the questions still in need of further research, twenty-five years after the first supermaxes opened. In the public pressures to reduce reliance on supermax confinement, and in state decisions to close supermax facilities or reduce supermax populations, there is, for the first time, some hope that more attention, including public attention, might be paid to these questions.

There is one other, hopeful lesson in the history of the American supermax: it suggests a new way to look at tough-on-crime innovations in the United States, and new possible avenues for reform. There is a tendency, in academic and popular literature about criminal justice policy, both to identify the many well-intentioned reforms gone wrong, saying “nothing works,”⁸²⁵ and to presume that the criminal justice system is bigger than any one group of well-intentioned reformers. Works like Gilmore’s *Golden Gulag* and Garland’s *Culture of Control* suggest that economic and social forces drive high incarceration rates, incentivize tough-on-crime politicians, and galvanize anti-crime voters. These works make it virtually impossible to imagine that any single reformer, or any one idea, could change the system for the better. Mass incarceration, tough-on-crime policies, and extreme punishments alike all start to seem pre-determined.

⁸²² *Id.*

⁸²³ California Department of Corrections and Rehabilitation, “Administrative Bulletin,” dated Nov. 21, 2005, No. 05/02, on file with author.

⁸²⁴ Runnels interview, *supra* note 541.

⁸²⁵ See Martinson, “What Works?” *supra* note 531.

But the history of the American supermax actually suggests that the tough-on-crime story is both more complicated – shaped more by administrators and bureaucrats than by politicians and voters – and more susceptible to intervention and reform than Gilmore, Garland, or others might allow. Although the bureaucrats who designed the supermax acted in the context of a populist fear of crime and political commitment to investing in prisons, they still made fairly independent decisions about how they structured the prison system they built and the shape of the punishments they imposed. While, in some cases, different decisions might have produced better outcomes, the supermax story suggests that different decisions *could* have been made and *could yet* be made. If we regard these decisions as products of politics as usual, modifying the decisions seems hopeless; if we understand the decisions as products of a poorly understood and poorly controlled bureaucratic process, the possibility of change emerges.

An Arizona architect designed a new kind of prison; different architects might design different prisons. Carl Larson saw the Arizona design, and he decided to copy it in California; a different bureaucrat could copy a different prison model, or move toward non-carceral punishments entirely. These simple actions suggest that a single concept, implemented by a few people with administrative discretion, actually can change the criminal justice system, from local to national levels.

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Appendix A
Tables

Table 1: Supermax Institutions, by Year Opened, 1986-2010

No.	Year Opened	State	Institution	Supermax Population	Free-standing?
1	1986	Arizona	Arizona State Prison Complex-Eyman, Special Management Unit I (SMU I)	985	✓
2	1986	Montana	Montana State Prison, Deer Lodge	64*	
3	1987	Alabama	Donaldson Correctional Facility	192	
4	1988	California	California State Prison-Corcoran	1426	✓
5	1988	Michigan	Ionia Maximum Security Facility	421*	✓
6	1989	California	Pelican Bay State Prison	1140	✓
7	1989	Florida	Charlotte Correctional Institution	780	✓
8	1989	Maryland	Maryland Correctional Adjustment Center	286*	✓
9	1989	Nevada	Ely State Prison	430*	✓
10	1989	Tennessee	Riverbend Maximum Security Institution	480	✓
11	1990	Georgia	Georgia State Prison	624*	
12	1990	Mississippi	Mississippi State Penitentiary-Parchman, Unit 32	[1000**]	
13	1991	Indiana	Maximum Control Facility, Westville	156	✓
14	1991	Kansas	El Dorado Correctional Facility	328	✓
15	1991	Oklahoma	Oklahoma State Penitentiary, H-Unit	392*	✓
16	1991	Oregon	Oregon State Penitentiary, Intensive Management Unit	161	✓
17	1991	New York	Southport Correctional Facility	700	✓
18	1992	Florida	Florida State Prison, X-Wing & Union Correctional Institution	1074	
19	1992	Massachusetts	Massachusetts Correctional Institution-Cedar Junction, Departmental Disciplinary Unit	124*	

* Allotted number of cells, as opposed to the actual supermax population, as of 2010.

** Mississippi had roughly 1,000 prisoners in Unit 32 between 1990 and 2007, but the state began allowing prisoners in this unit to socialize communally in November of 2007. Kupers, Dronet, Winter, et. al., *supra* note 759.

No.	Year Opened	State	Institution	Supermax Population	Free-standing?
20	1993	Connecticut	MacDougall-Walker Correctional Institution	22	✓
21	1993	Indiana	Wabash Valley Correctional Institution, SHU Annex	191*	✓
22	1993	Colorado	Colorado State Penitentiary	757	
23	1993	South Carolina	Kirkland Reception and Evaluation Center	36	
24	1994	Federal BOP	United States Penitentiary, Administrative Maximum (ADX)	400	✓
25	1995	Connecticut	Northern Correctional Institution	281	✓
26	1995	Pennsylvania	State Correctional Institution-Greene	251	✓
27	1995	West Virginia	Mt. Olive Correctional Complex, Quilliams 1 and 2	238*	✓
28	1996	Utah	Utah State Prison, Uinta Unit	144*	
29	1996	Arizona	Arizona State Prison Complex-Eyman, Special Management Unit II (Browning)	681	✓
--	1997-2000	New York	Multiple Facilities (nine total), S-Blocks (200 cells each)	1800	✓
30	1997	New Jersey	New Jersey State Prison, Maximum Control Unit	96*	
31	1998	Illinois	Tamms Correctional Center	208	✓
32	1998	Massachusetts	Souza-Baranowski Correctional Center	224*	✓
33	1998	North Carolina	Polk Youth Institution, High Security Maximum Control Unit (HCON)	100	✓
34	1998	Virginia	Red Onion State Prison	503	✓
35	1998	Ohio	Ohio State Penitentiary	84	
36	1999	Virginia	Wallens Ridge State Prison	1200*	✓
37	1999	Wisconsin	Wisconsin Secure Program Facility (Supermax Correctional Institution)	249	✓
38	1999	New York	Upstate Correctional Facility	1200	✓
39	2000	Delaware	James T. Vaughn Correctional Center	281	✓
40	2000	Pennsylvania	State Correctional Institution-Pittsburgh, Restricted Housing, Secure Management, & Long-Term Segregation Units	58	✓

No.	Year Opened	State	Institution	Supermax Population	Free-standing?
41	2000	New Mexico	Penitentiary of New Mexico	450	
42	2001	Arkansas	Varner SuperMax Unit	467	✓
43	2001	Nebraska	Tecumseh State Correctional Institute	194*	✓
44	2001	Louisiana	Louisiana State Penitentiary-Angola, Closed Cell Restricted Unit	101	
45	2001	Wyoming	Wyoming State Penitentiary, High Security Special Needs Facility	122	
46	2002	Iowa	Iowa State Penitentiary, Maximum Security Unit & Clinical Care Unit	232	
47	2002	Maine	Maine State Prison	100	
48	2002	Rhode Island	High Security Center	90	
49	2003	Florida	Santa Rosa Correctional Institution	1170	
50	2003	New Mexico	Southern New Mexico Correctional Facility	172*	
51	2003	Maryland	North Branch Correctional Institution	1396*	✓
52	2004	U.S. Military	Guantanamo Bay Detention, Camp 5	100	
53	2005	Idaho	Idaho Maximum Security Institution	190*	
54	2005	Washington	Washington State Penitentiary	132*	✓
55	2006	U.S. Military	Guantanamo Bay Detention, Camp 6	165	
56	2010	Colorado	Centennial Correctional Facility, CSP-II-South	316*	
--	n/a	Texas	Multiple Facilities	5205	

Total Supermax Population, as of 2010: 29,369 prisoners

Table 2: Supermax & Segregation Housing, as a % of Prison Populations, by State, 2010

State	Supermax Unit(s) (Y/N)	% Prison Population in Supermaxes	% Prison Population in any Segregation
Alabama	Y	0.7	5.6
Alaska	N	NA	NA
Arizona	Y	4.3	6.7
Arkansas	Y	3.5	10.2
California	Y	1.5	5.3
Colorado	Y	5.3	5.7
Connecticut	Y	1.6	2.3
Delaware	Y	4.3	13.6
Federal BOP	Y	0.2	5.0
Florida	Y	3.0	5.9
Georgia	Y	1.2	2.2
Hawaii	N	NA	NA
Idaho	Y	2.6	NA
Illinois	Y	0.5	5.0
Indiana	Y	0.9	1.4
Iowa	Y	2.8	4.2
Kansas	Y	3.8	8.8
Kentucky	N	NA	1.7
Louisiana	Y	0.3	0.7
Maine	Y	4.2	6.2
Maryland	Y	7.7	10.1
Massachusetts	Y	3.5	5.6
Michigan	Y	0.9	4.7
Minnesota	N	NA	0.4
Mississippi	Y	NA	4.2
Missouri	N	NA	10.1
Montana	Y	2.5	2.5
Nebraska	Y	4.3	15.9
Nevada	Y	3.1	3.1
New Hampshire	N	0.0	3.5
New Jersey	Y	0.4	3.9
New Mexico	Y	11.8	5.3
New York	Y	6.2	8.4
North Carolina	Y	0.2	1.5
North Dakota	N	NA	2.4
Ohio	Y	0.3	3.9
Oklahoma	Y	1.6	2.0
Oregon	Y	1.1	1.3
Pennsylvania	Y	0.6	5.5
Rhode Island	Y	2.6	3.5
South Carolina	Y	0.2	0.2

State	Supermax Unit(s) (Y/N)	% Prison Population in Supermaxes	% Prison Population in any Segregation
South Dakota	N	NA	1.7
Tennessee	Y	2.5	9.4
Texas	Y	3.4	5.5
Utah	Y	2.3	2.3
Vermont	N	NA	NA
Virginia	Y	5.7	10.7
Washington	Y	0.8	1.8
West Virginia	Y	3.7	4.6
Wisconsin	Y	1.1	1.6
Wyoming	Y	5.8	5.8

Total Segregation Population, as of 2010: 76,182 prisoners

Table 3: Supermax Infrastructure Investments, 1989-2010

Year Opened	State	Cost (in millions of \$)
1989	California (Pelican Bay)	230
1989	Maryland (Correctional Adjustment Center)	21
1989	Tennessee (Riverbend)	35
1990	Georgia (State Prison)	69
1991	Kansas (El Dorado)	58
1993	Indiana (Wabash)	124
1994	Federal BOP (ADX)	60
1995	West Virginia (Mt. Olive)	61.8
1996	Utah (Uinta Unit)	6.6
1997-2000	New York (10 lockdown facilities)	238
1998	Illinois (Tamms)	73
1998	North Carolina (Polk)	9
1998	Ohio (State Penitentiary)	50
1999	Wisconsin (Secure Program Facility)	75
2000	Delaware (Vaughn)	110
2005	Washington (State Penitentiary)	100
2010	Colorado (CSP-II-South)	10

Table 4: Factors Affecting the California Correctional System Crisis, 1976-1985

Category	Changing Factors	Proposed Alternatives
Prison Population Changes	<ul style="list-style-type: none"> • Increased gang membership* • Increased numbers of violent assaults* • Overcrowding* • Prisoners serving longer sentences (which in turn increases their security classifications)* 	<ul style="list-style-type: none"> • Encourage legitimate power structures, through inmate advisory councils • Establish early release programs • Disperse gang members throughout prison system
Legislative Changes	<ul style="list-style-type: none"> • Determinate Sentencing Law • Increasingly punitive focus • Investigations challenge correctional administration decisions • Initiating bond measures for massive funding for prison construction 	<ul style="list-style-type: none"> • Legislate a shock treatment program, to minimize sentences to state prison • Site prisons in urban areas, near where prisoners are from • Form a University of California Institute to study the crime and prison problems and recommend solutions.
Administrative Changes	<ul style="list-style-type: none"> • Increasingly punitive focus • Increased use of lockdown protocols • Decreased availability of programming in prison • Security classification procedure changes 	<ul style="list-style-type: none"> • Improve conditions in lock-ups • Provide more programming • Work to hold prisoners at the lowest possible security level
Judicial Changes	<ul style="list-style-type: none"> • Courts intervene to shape prison conditions through class action lawsuits • Courts have less flexibility in sentencing prisoners 	<ul style="list-style-type: none"> • Avoid unconstitutional conditions • Legislate limitations on prisoners' rights

* These factors have been disputed in subsequent empirical analyses as noted at footnote 324, and in the surrounding text.

Table 5: California Supermax Cell Population, by Prison, as of February, 2010

Prison	Design Capacity (DC)	Population	Double-Bunked Prisoners (Pop - DC * 2)	Single-Celled Prisoners	% Prisoners Double-Bunked
Pelican Bay State Prison	1,056	1,118	124	994	11%
Corcoran State Prison	872	1,439	1134	305	79%
California Correctional Institution (Tehachapi)	378	764	756 (plus 8 overflow prisoners housed elsewhere)	0	100%
Valley State Prison for Women	44	63	38	25	60%
TOTAL	2,350	3,384	1,678	1,706	50%

Table 6: Rates of Double-Bunking and of SHU Use, 1989-2010

	Corcoran		Pelican Bay		DOC
	SHU Population	Percent Double- Bunked	SHU Population	Percent Double- Bunked	SHU Population as a Percent of Total Prison Population
1989	0	0%	0	0%	5.35%
1990	720	58%	1238	29%	7.69%
1991	764	66%	1176	20%	6.82%
1992	759	65%	1520	61%	7.08%
1993	785	70%	1642	71%	6.47%
1994	786	70%	1504	60%	6.07%
1995	1318*	45%	1470	56%	5.18%
1996	1266	38%	1570	65%	4.67%
1997	1369	50%	1573	66%	4.71%
1998	1212	31%	1394	48%	4.22%
1999	1134	19%	1251	31%	4.24%
2000	1115	16%	1172	20%	4.29%
2001	1221	32%	1148	16%	4.56%
2002	1213	31%	1162	18%	4.38%
2003	1231	34%	1215	26%	4.59%
2004	1223	33%	1113	10%	4.45%
2005	1220	32%	1101	8%	4.49%
2006	1319	45%	1089	6%	4.55%
2007	1292	41%	1100	8%	4.40%
2008	1358	49%	1098	8%	4.48%
2009	1382	52%	1117	11%	4.40%
2010	1439	58%	1118	11%	4.53%

* In May of 1995, the California Department of Corrections opened a second Security Housing Unit at Corcoran State Prison. This housing unit had been planned as a SHU since the prison was built, but was not operated as one until 1995. E-mail exchange with Carl Larson (former Director of Finance, California Department of Corrections), July 20, 2011, on file with author. So, prior to 1995, the design capacity of the Corcoran SHU used for calculating overcrowding in this chart was 512 single-occupancy cells. In 1995 and thereafter, the design capacity of the Corcoran SHU used for calculating overcrowding in this chart was 1024 single-occupancy cells. So the calculation for the percentage of double-bunked SHU prisoners is as follows. First I subtracted the SHU Design Capacity from the SHU population; this tells me how many prisoners are housed in the SHU in excess of the design capacity. Every prisoner in excess of the design capacity is, by definition, double-bunked with a second prisoner, so the total number of double-bunked prisoners is two times the difference between the design capacity and the population. The percentage double-bunked is the total number of double-bunked prisoners divided by the total population.

Table 7: Range of Lengths of Stay, in Months and Days, by Prison, 1997-2007*

	Pelican Bay				Corcoran			
	No. Prisoners paroled w/ prior SHU terms	Max. Stay (Months)	Min. Stay (Days)	Avg. Stay (Months)	No. Prisoners paroled w/ prior SHU terms	Max. Stay (Months)	Min. Stay (Days)	Avg. Stay (Months)
1997	586	117	1	14	1327	107	1	7
1998	565	111	1	15	1466	100	1	8
1999	395	140	1	20	1344	111	1	8
2000	288	137	1	19	1145	101	1	8
2001	263	147	1	21	1877	130	1	6
2002	199	174	3	24	2426	109	1	6
2003	223	178	4	25	2620	109	1	7
2004	194	168	1	25	2789	208	1	6
2005	182	210	1	28	2543	174	1	7
2006	140	203	3	28	2552	134	1	7
2007	140	151	4	29	2814	133	1	7

* Based on prior SHU terms of prisoners paroled from CDCR within a given year.

Table 8: Results of Chi-Squared Test Comparing Racial Demographics of SHU Releases to Racial Demographics of California Parole Populations, 1997-2007

	% Hispanic on Parole	% Hispanic Total Supermax Releases	% Hispanic Pelican Bay Releases
1997	42%	47%*	55%**
1998	42%	50%*	58%**
1999	42%	47%*	53%**
2000	42%	49%**	58%**
2001	41%	42%	52%*
2002	41%	38%**	52%**
2003	39%	41%*	53%**
2004	39%	39%*	57%**
2005	40%	43%**	62%**
2006	41%	46%**	54%
2007	42%	46%**	66%**

* p < .01

** p < .001

Table 9: SHUs, Double-Bunking, and Violence in California Prisons –
Correlation Models & Results*

<i>(Observations)</i>	Homicide			
	<i>(17)</i>			
<i>A. Overall Effect of SHU</i>				
<i>Population on Violence</i>	(1)	(2)		
<i>Coefficient</i>	-0.755	-1.145		
<i>(Standard Error)</i>	(0.532)	(1.073)		
<i>P-Value</i>	0.176	0.304		
<i>R-Squared</i>	0.119	0.13		
<i>B. Overall Effect of</i>				
<i>Double-Bunking on Violence</i>				
<i>Coefficient</i>	-0.134	-0.391		
<i>(Standard Error)</i>	(0.316)	(0.357)		
<i>P-Value</i>	0.678	0.293		
<i>R-Squared</i>	0.012	0.133		

<i>(Observations)</i>	Suicide		Attempted Suicide	
	<i>(9)</i>		<i>(9)</i>	
<i>A. Overall Effect of SHU</i>				
<i>Population on Violence</i>	(1)	(2)	(1)	(2)
<i>Coefficient</i>	-4.773	3.9	-4.773	3.9
<i>(Standard Error)</i>	(2.154)	(3.181)	(2.154)	(3.181)
<i>P-Value</i>	0.062	0.266	0.062	0.266
<i>R-Squared</i>	0.412	0.771	0.412	0.771
<i>B. Overall Effect of</i>				
<i>Double-Bunking on Violence</i>				
<i>Coefficient</i>	0.882	0.443	0.882	0.443
<i>(Standard Error)</i>	(0.229)	(0.343)	(0.229)	(0.343)
<i>P-Value</i>	0.006	0.244	0.006	0.244
<i>R-Squared</i>	0.68	0.776	0.68	0.776

* Notes: Standard Errors in Parentheses; grey-shading indicates significant p-values; Model (1) is a simple regression relating the natural log of the independent variable (SHU population or double-bunking) to the natural log of the dependent variable (violence rate); Model (2) includes the year in the regression to control for the possible effects of time. Models (A) and (B) both use differences-in-differences estimations, comparing the panel of Corcoran data to the panel of Pelican Bay data, and evaluating the relationships, if any, between the differences in these two panels, i.e.: does a comparative change in double-bunking rates between two institutions relate to an overall change in violence rates between two institutions?

	Prisoner-on-Guard Assaults		Prisoner-on-Prisoner Assaults	
(Observations)	(17)		(17)	
<i>A. Overall Effect of SHU Population on Violence</i>				
Coefficient	(1)	(2)	(1)	(2)
	0.484	-0.109	0.484	-0.109
(Standard Error)	(0.189)	(0.336)	(0.189)	(0.336)
P-Value	0.022	0.749	0.022	0.749
R-Squared	0.305	0.466	0.305	0.466
<i>B. Overall Effect of Double-Bunking on Violence</i>				
Coefficient	-0.318	-0.199	-0.318	-0.199
(Standard Error)	(0.097)	(0.099)	(0.097)	(0.099)
P-Value	0.005	0.065	0.005	0.065
R-Squared	0.417	0.581	0.417	0.581

Appendix B
Figures

Figure 1: Prison Population in the California Department of Corrections, 1979-1989

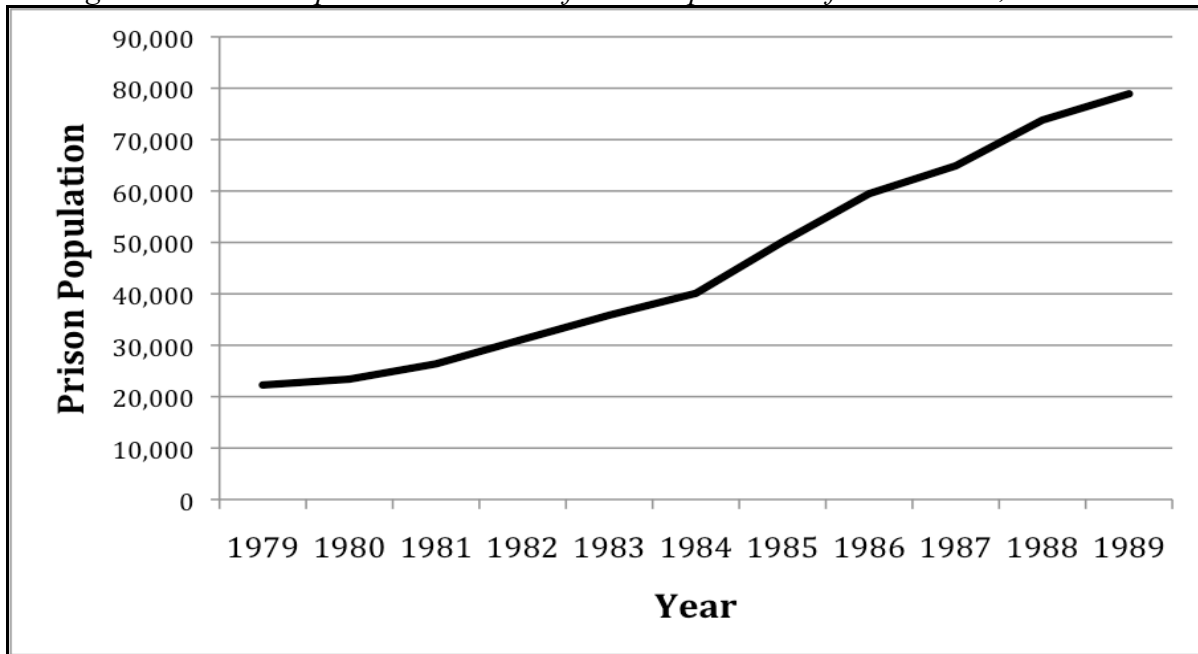


Figure 2: Raw Numbers of Violent Deaths in CDC, 1970-1990*

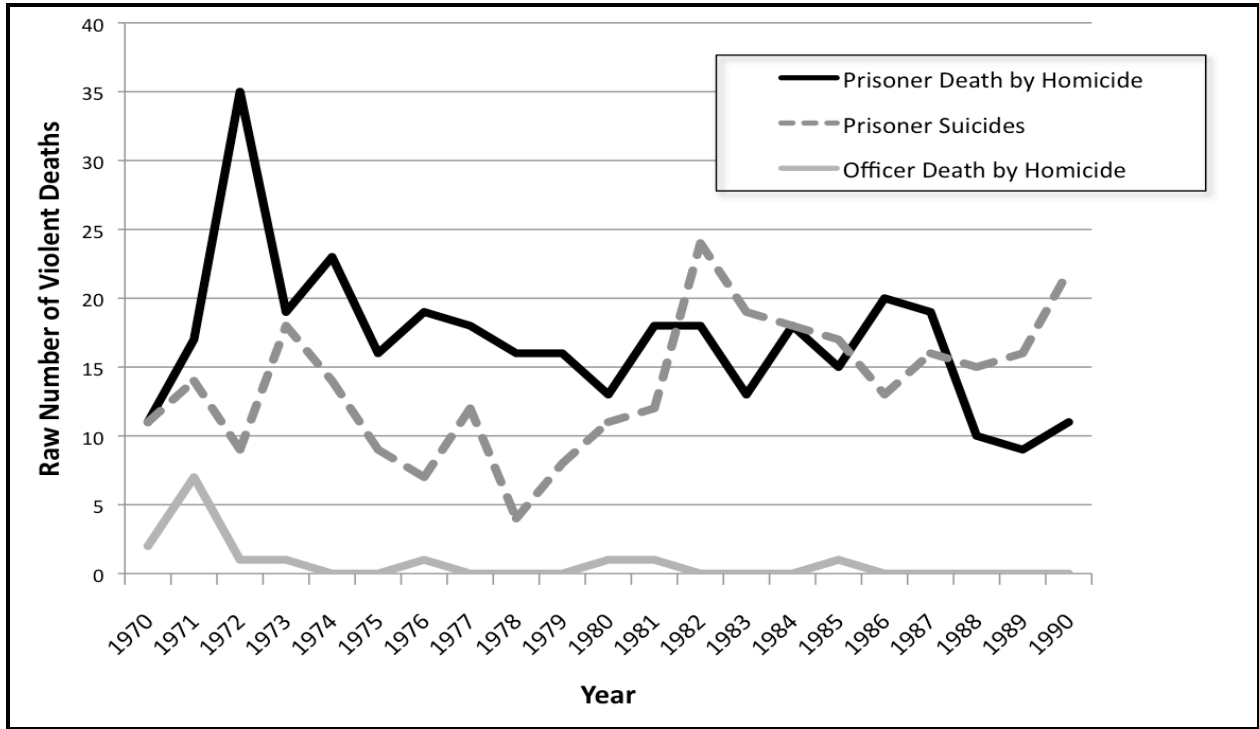
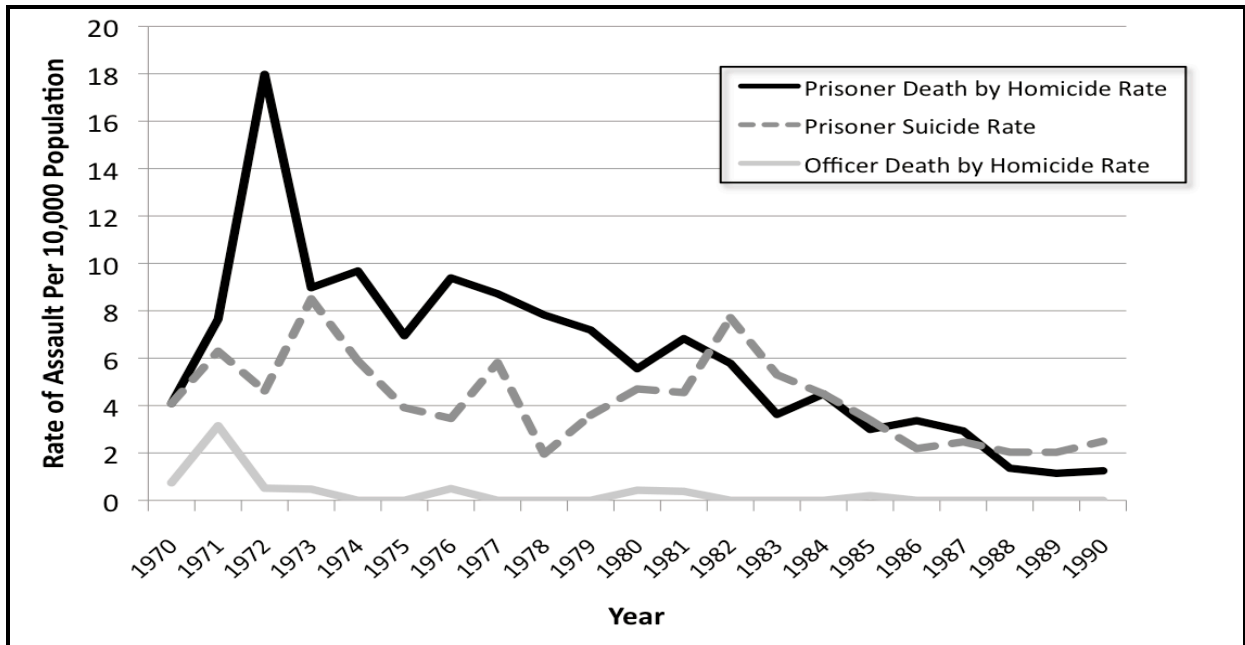


Figure 3: Rate of Violent Deaths in CDC, 1970-1990



* Statistics compiled by author from a combination of publicly available documents and archival reports. Raw numbers and specific sources available upon request.

Figure 4: Percentage of Double-Bunked Prisoners, 1990-2010

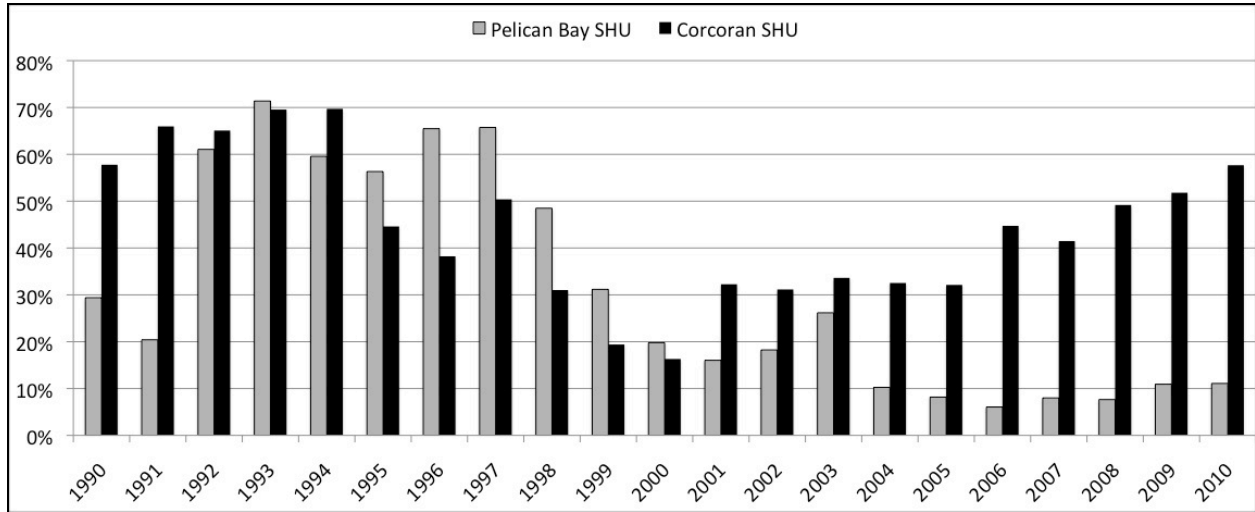
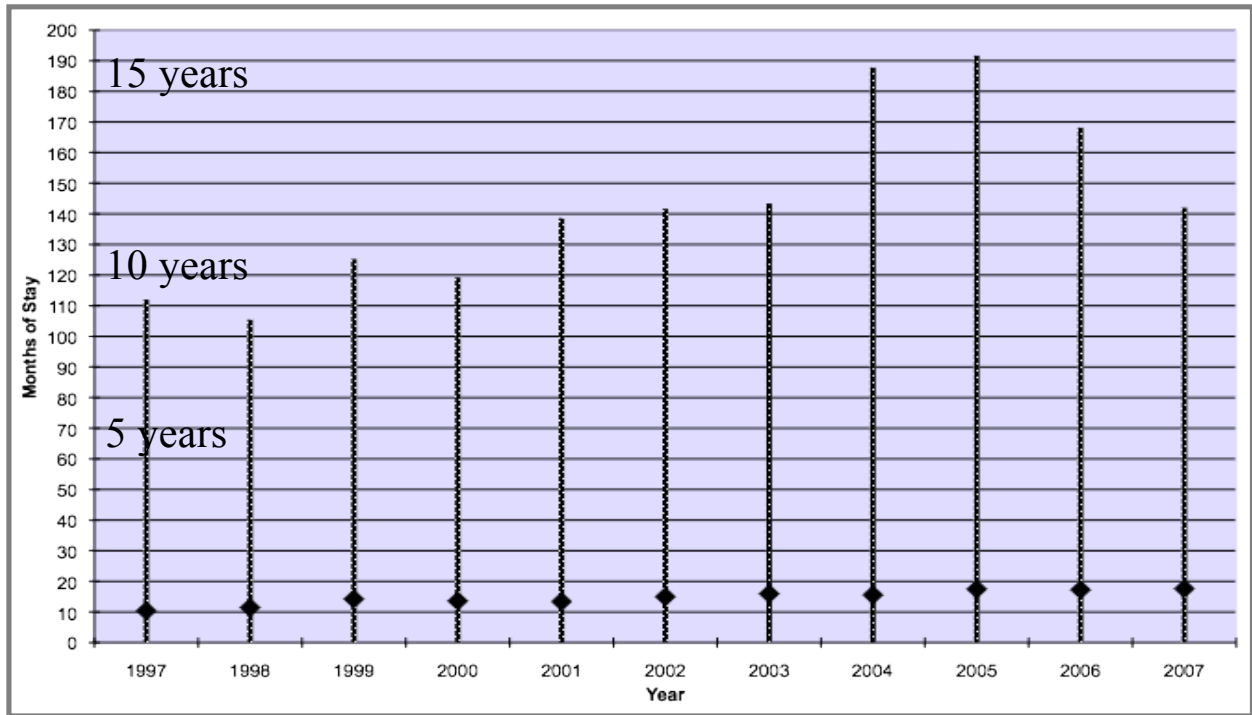
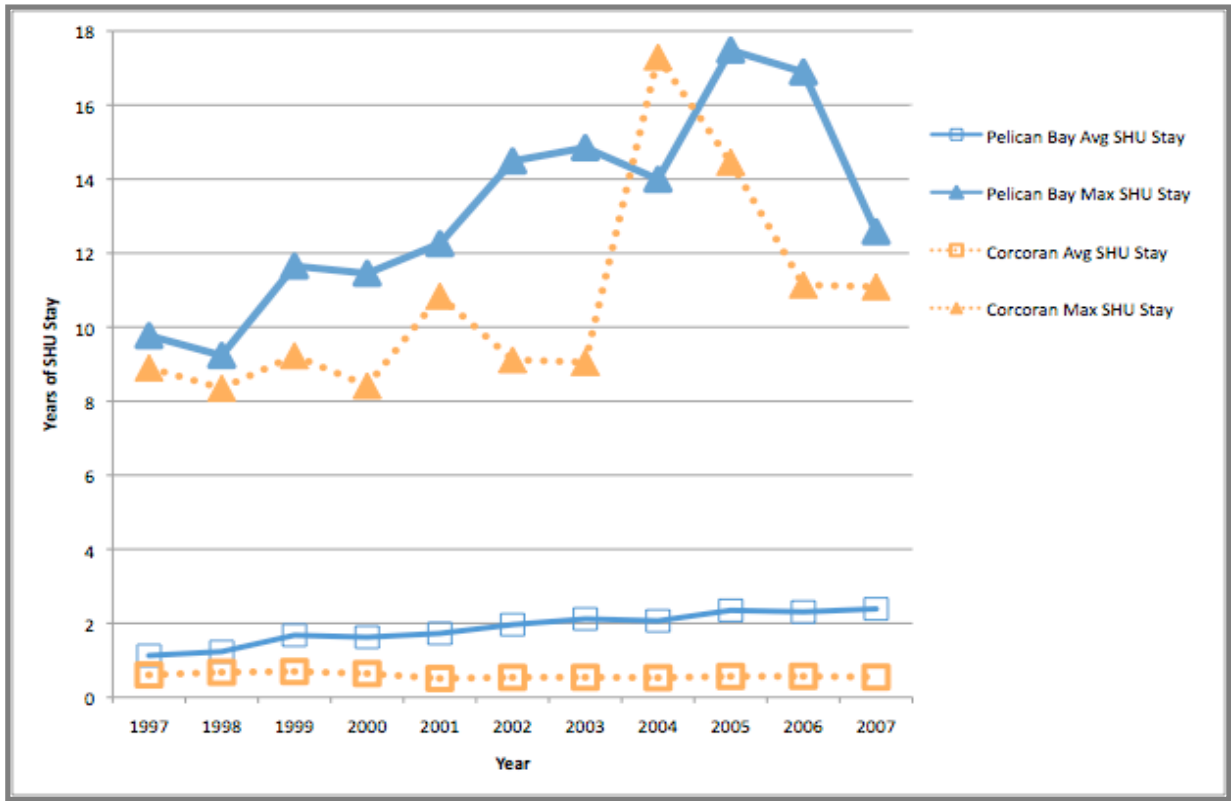


Figure 5: Range and Average Lengths of Stay in Pelican Bay and Corcoran SHUs, 1997-2007*



* Based on prior SHU terms of prisoners paroled from CDCR within a given year. If median lengths of stay were available, a box plot would be an ideal way to represent this data; however, given the availability only of minimum, maximum, and average stays, I chose this alternate format.

Figure 6: Average Lengths of Stay and Maximum Stays, in Years, by Prison*



* Based on prior SHU terms of prisoners paroled from CDCR within a given year.

Figure 7: Racial Demographics of Supermax Populations, 2007*

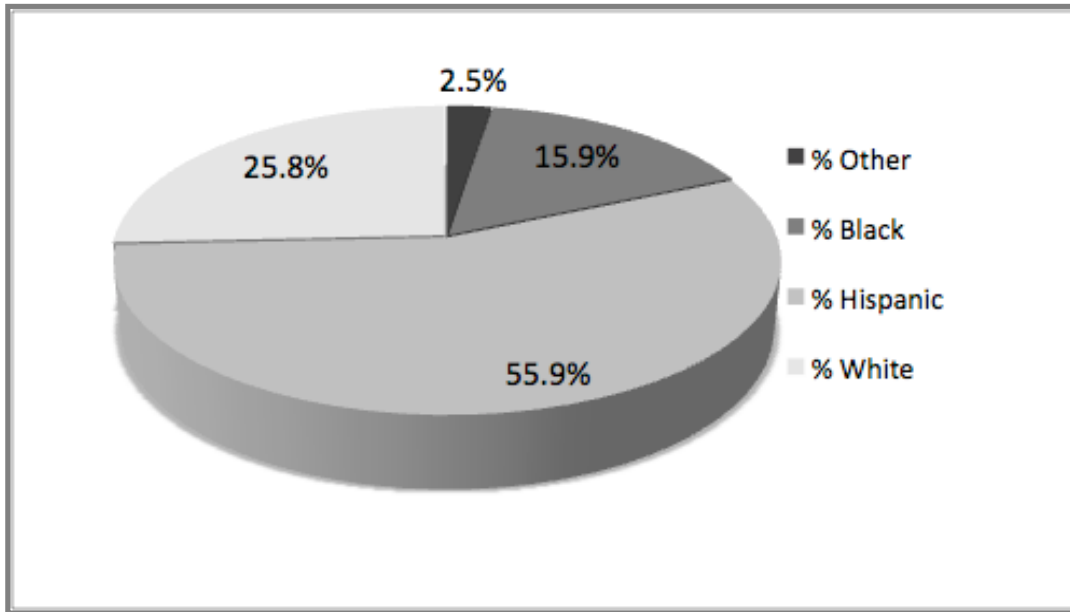
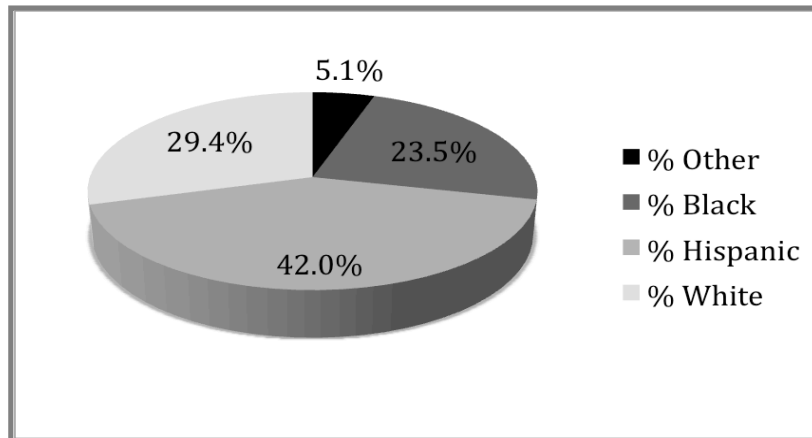


Figure 8: Racial Demographics of General Parole Population, 2007



* Based on prior SHU terms of prisoners paroled from CDCR within a given year.

Figure 9: Annual Releases from Supermaxes Directly to Parole, 1997-2007

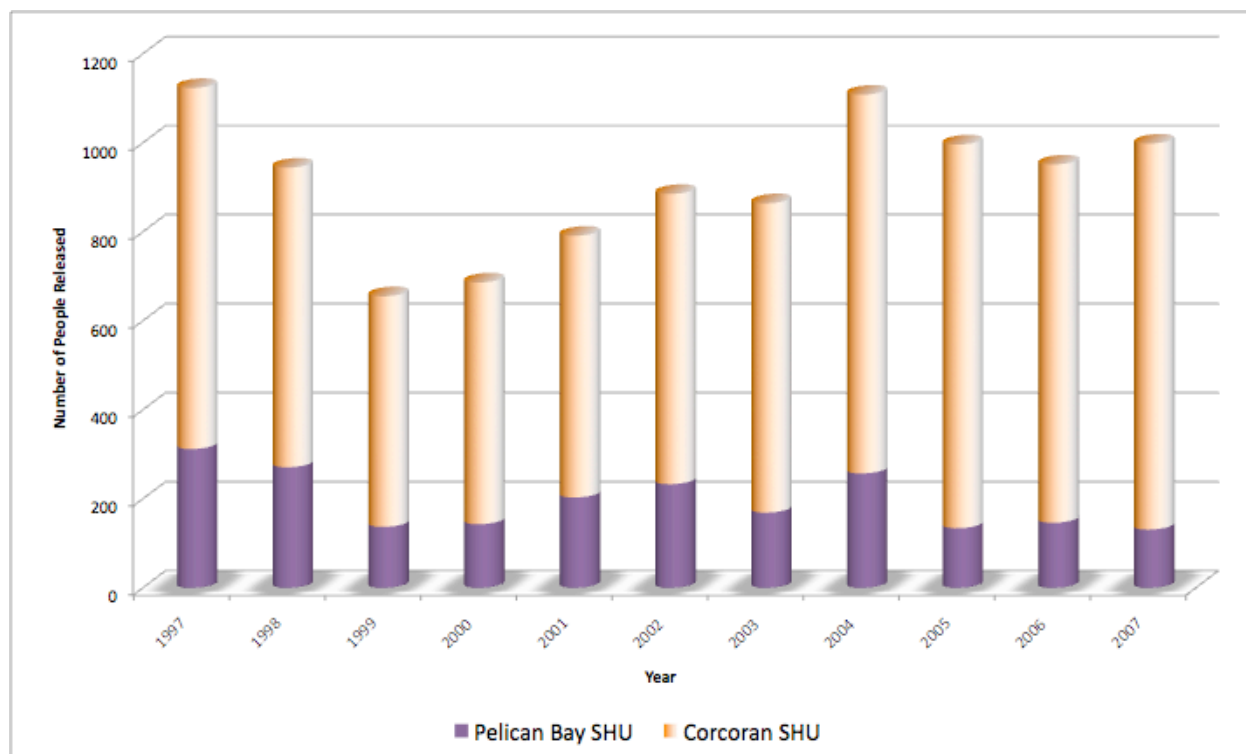
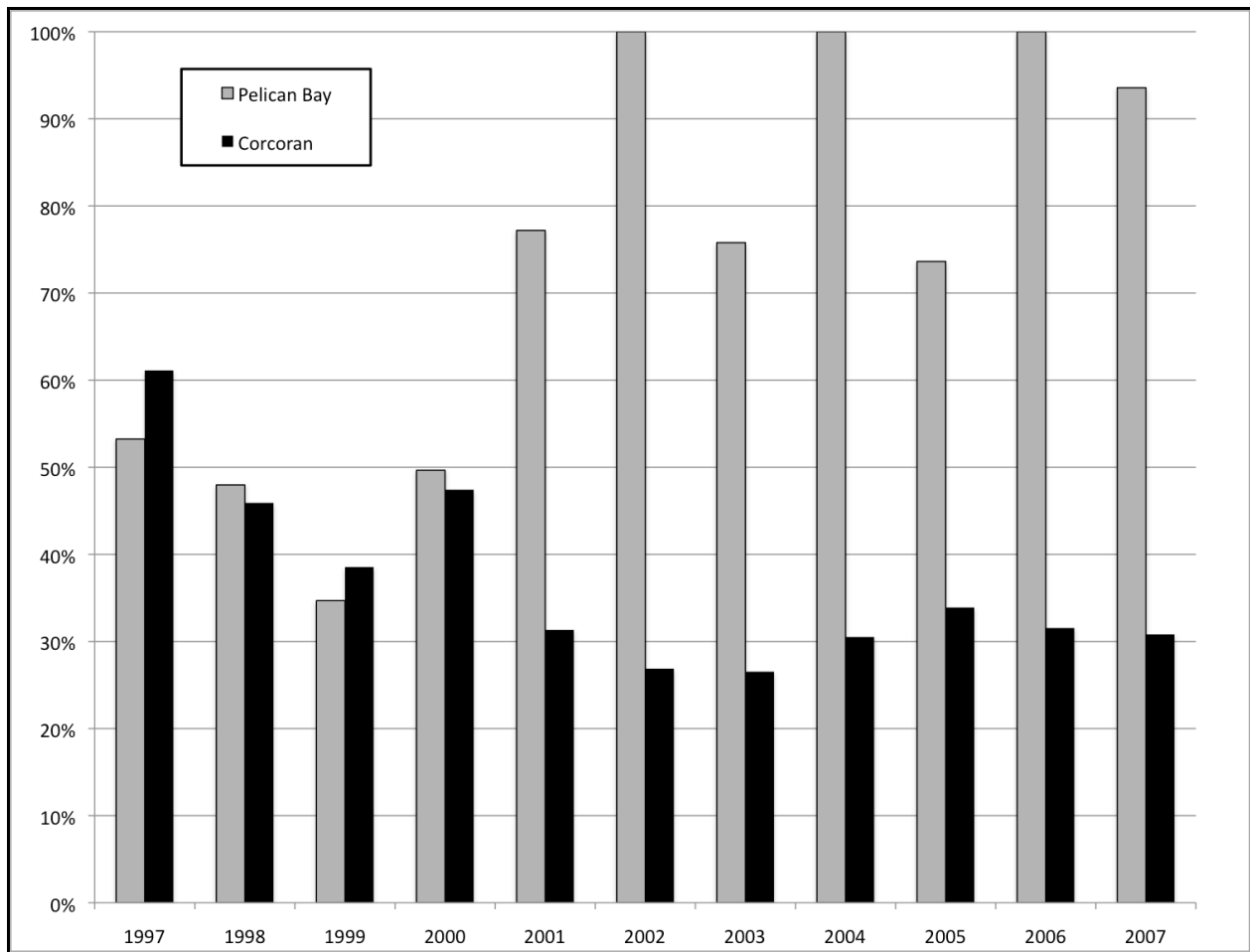
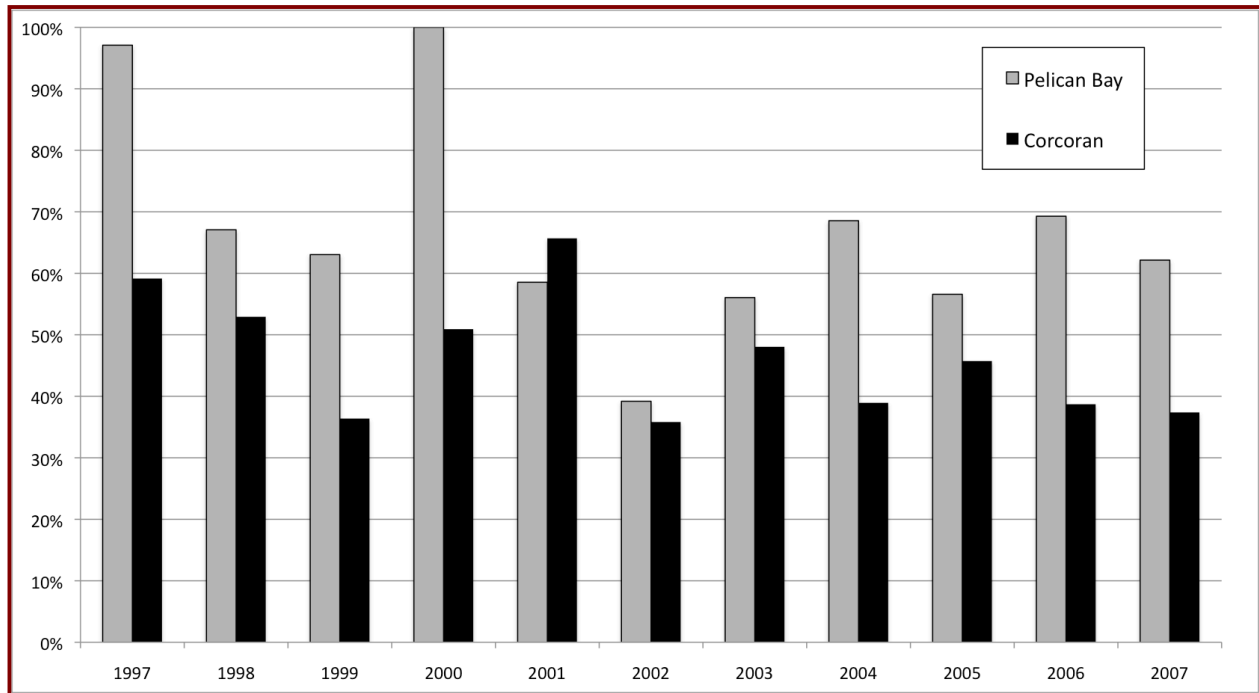


Figure 10: Percentage of Total Annual SHU-Experienced Parolees, Who Paroled Directly from Pelican Bay or Corcoran, 1997-2007*



* Note that in 2002, 2004, and 2006, the California Department of Corrections and Rehabilitation reported that a few more prisoners paroled directly from the Pelican Bay SHU than paroled from throughout the prison system, with a prior history of having served time in the Pelican Bay SHU. This suggests that in each of these three years, one of these two calculations about supermax parolees was mis-reported.

Figure 11: Percent of SHU-Experienced Parolees with Multiple SHU Terms, 1997-2007*



* Note that in 2000, the California Department of Corrections and Rehabilitation reported that 298 prisoners were paroled after having served multiple SHU terms, but that only 288 prisoners in total, who had served time in the Pelican Bay SHU, were paroled in that year. This suggests that one of these two calculations about supermax parolees in 2000 was mis-reported

Figure 12: Rate of Violent Deaths at Corcoran, Pelican Bay, and All Prisons, 1989-2006

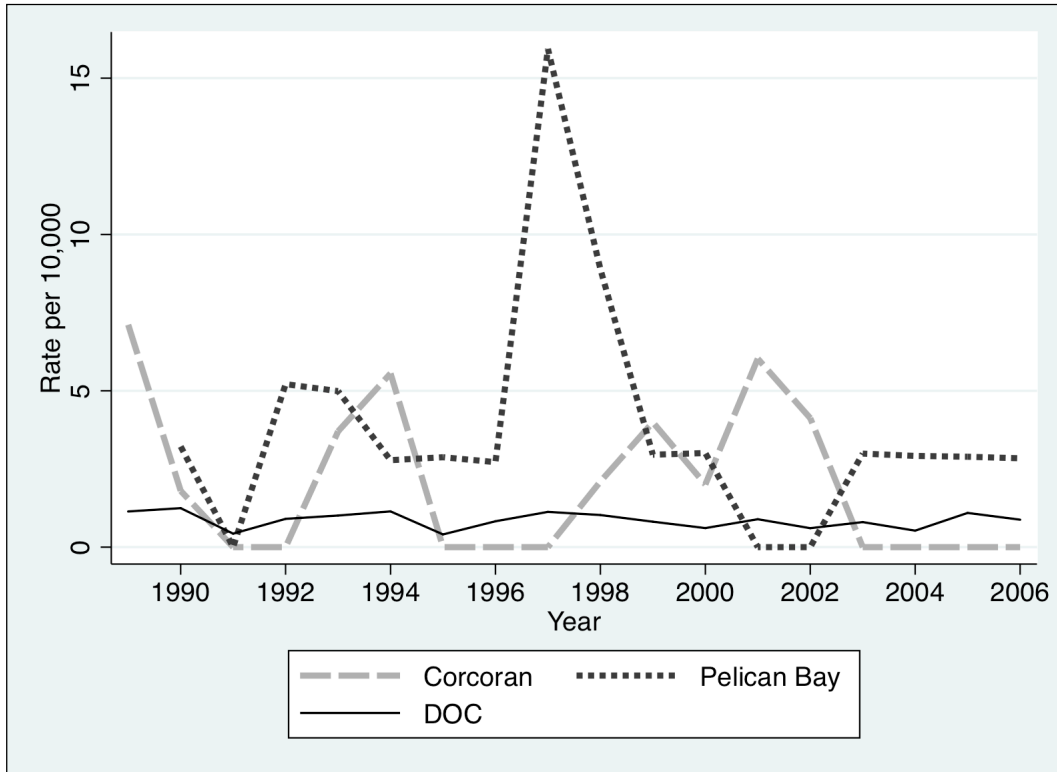


Figure 13: Rate of Violent Death Compared to Proportion of Prisoners Double-Bunked, Corcoran State Prison, 1989-2006

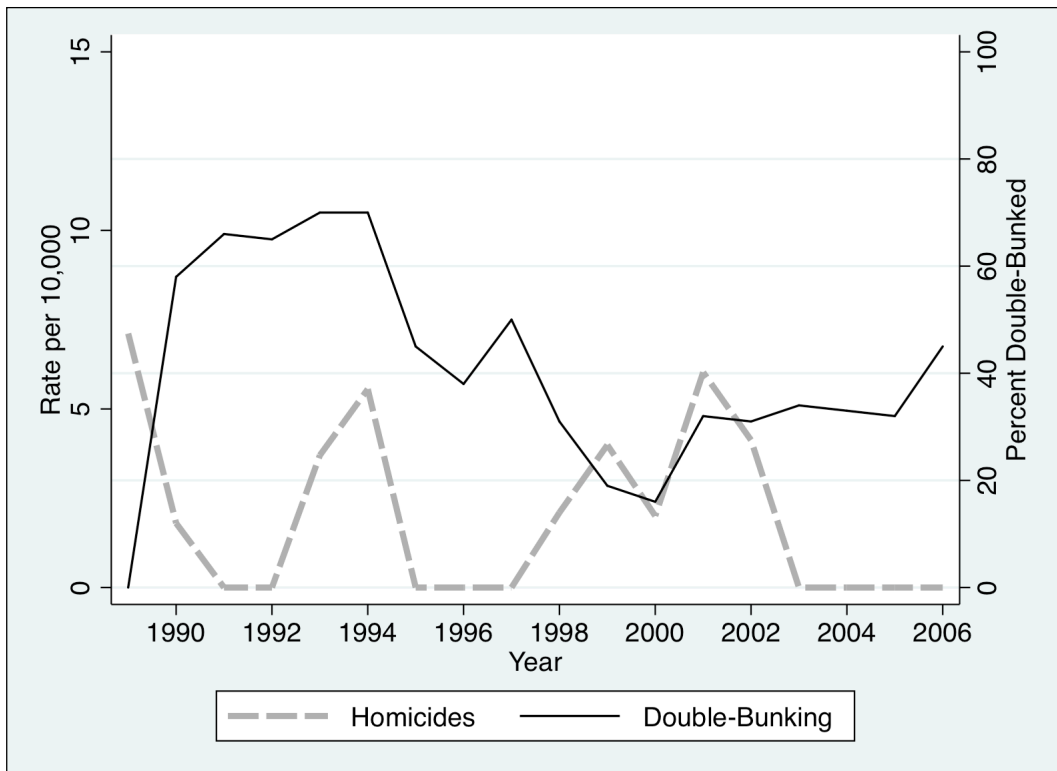


Figure 14: Rate of Violent Death Compared to Proportion of Prisoners Double-Bunked, Pelican Bay State Prison, 1989-2006

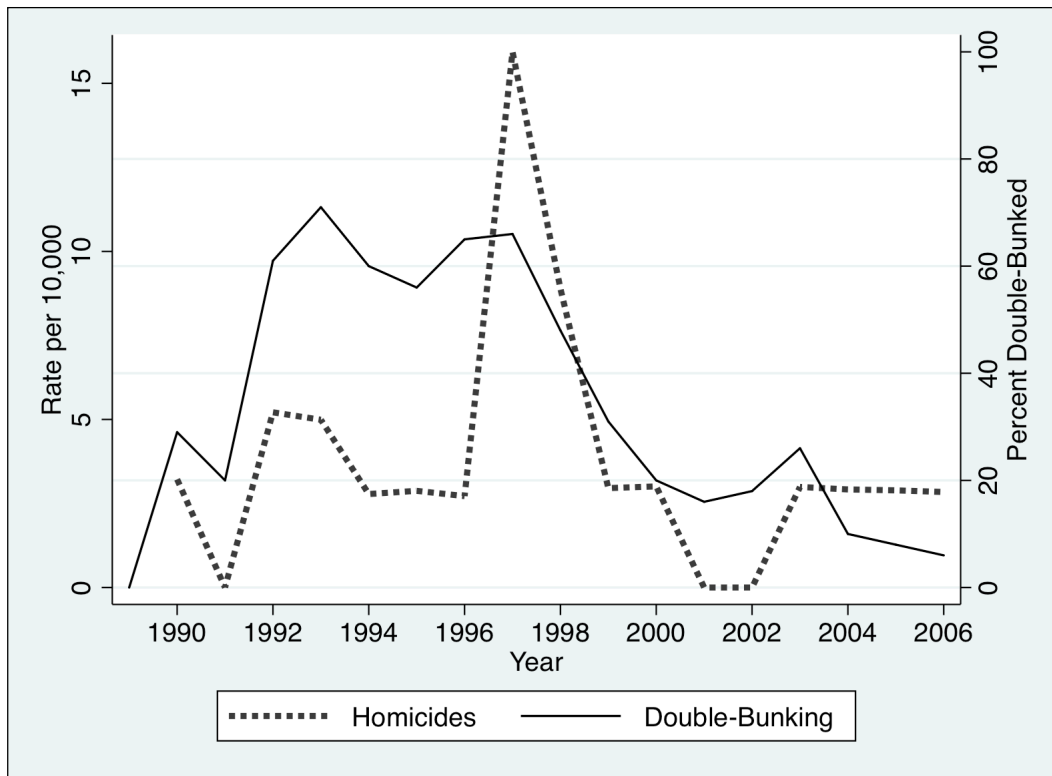


Figure 15: Rate of Suicides at Corcoran, Pelican Bay, and All Prisons, 1998-2006

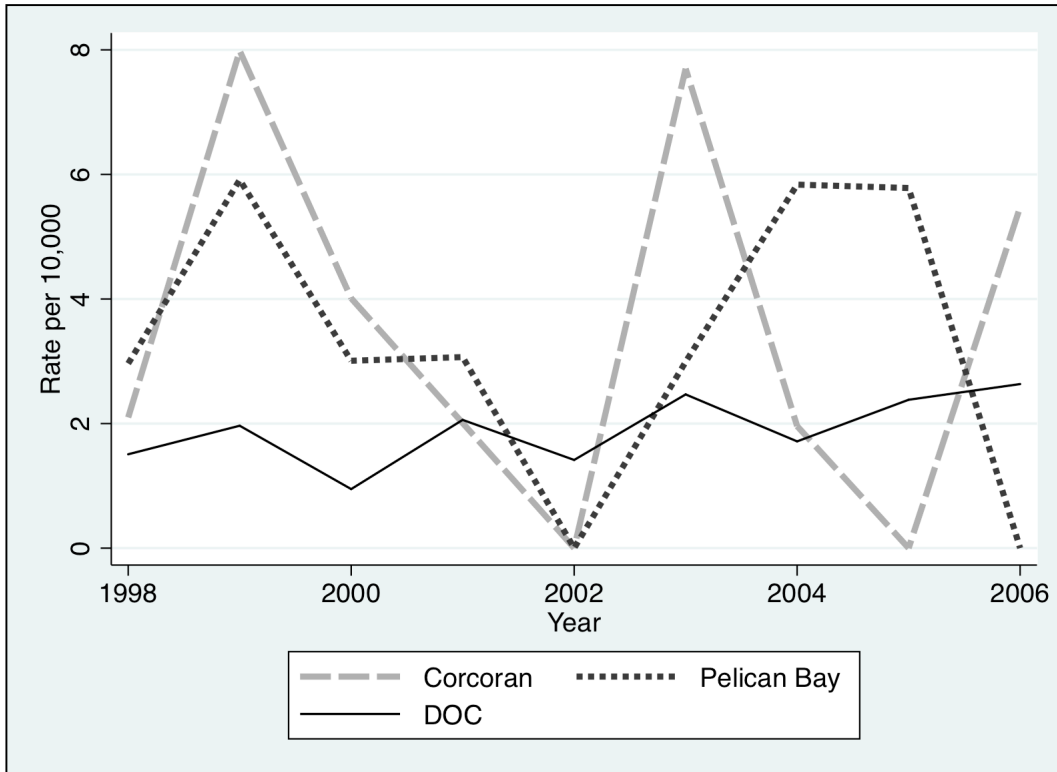


Figure 16: Rate of Suicides Compared to Proportion of Prisoners Double-Bunked, Corcoran State Prison, 1998-2006

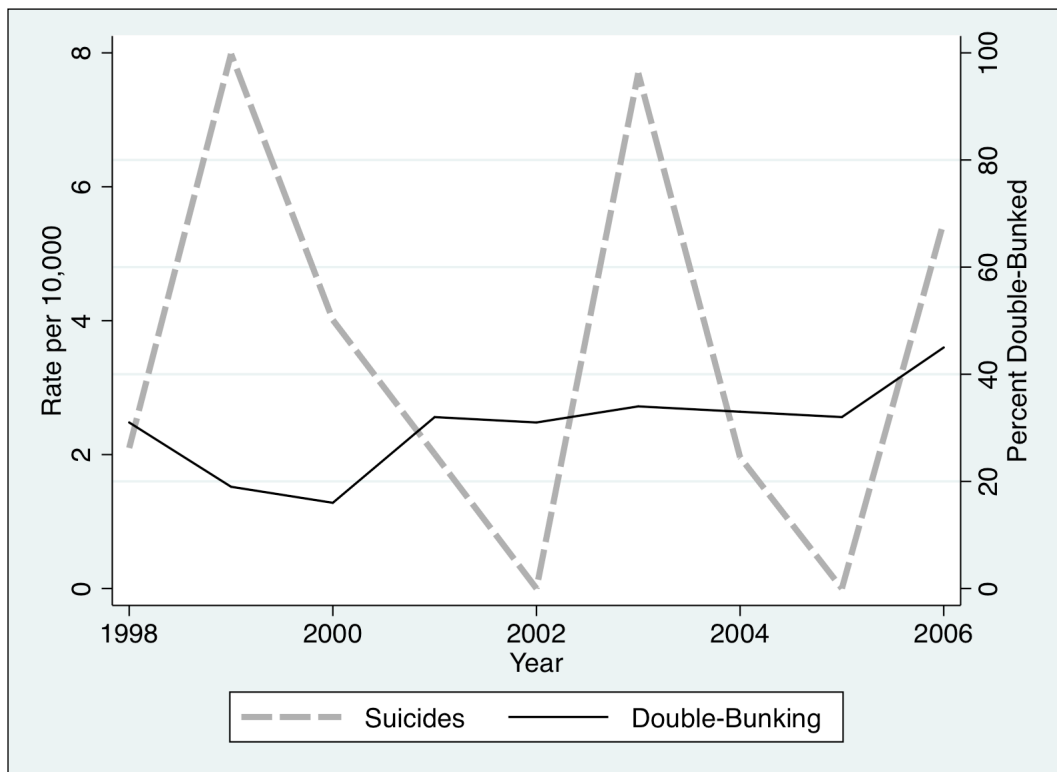


Figure 17: Rate of Suicides Compared to Proportion of Prisoners Double-Bunked, Pelican Bay State Prison, 1998-2006

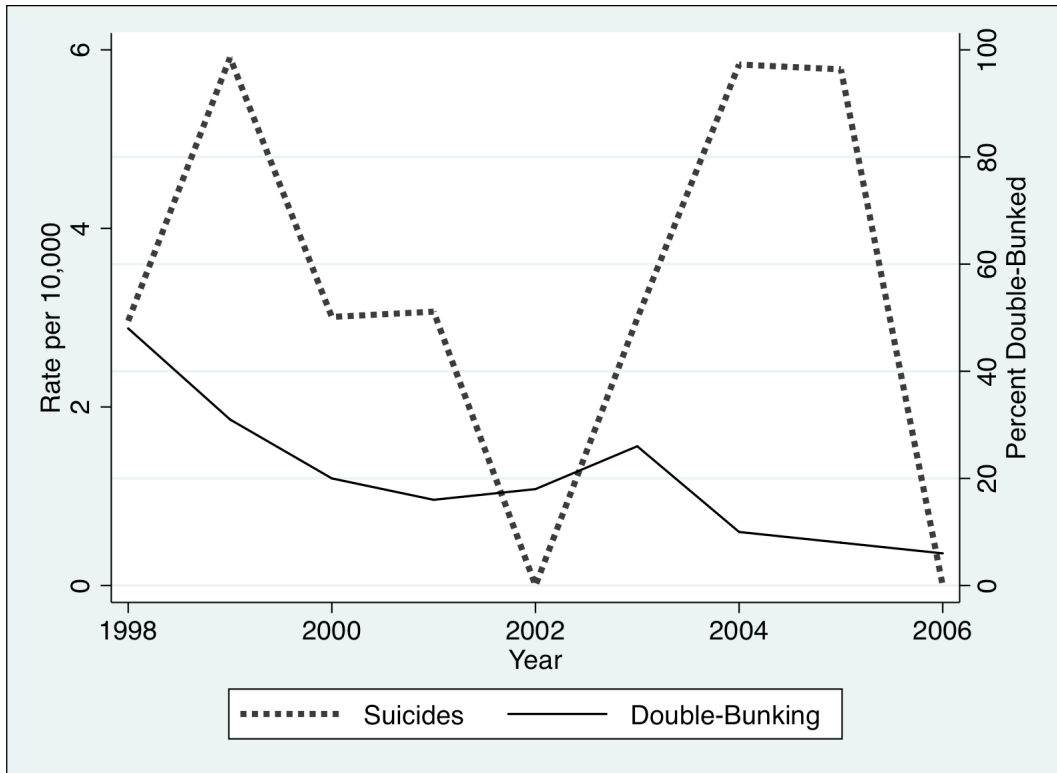


Figure 18: Rate of Attempted Suicides at Corcoran, Pelican Bay, and All Prisons, 1998-2006

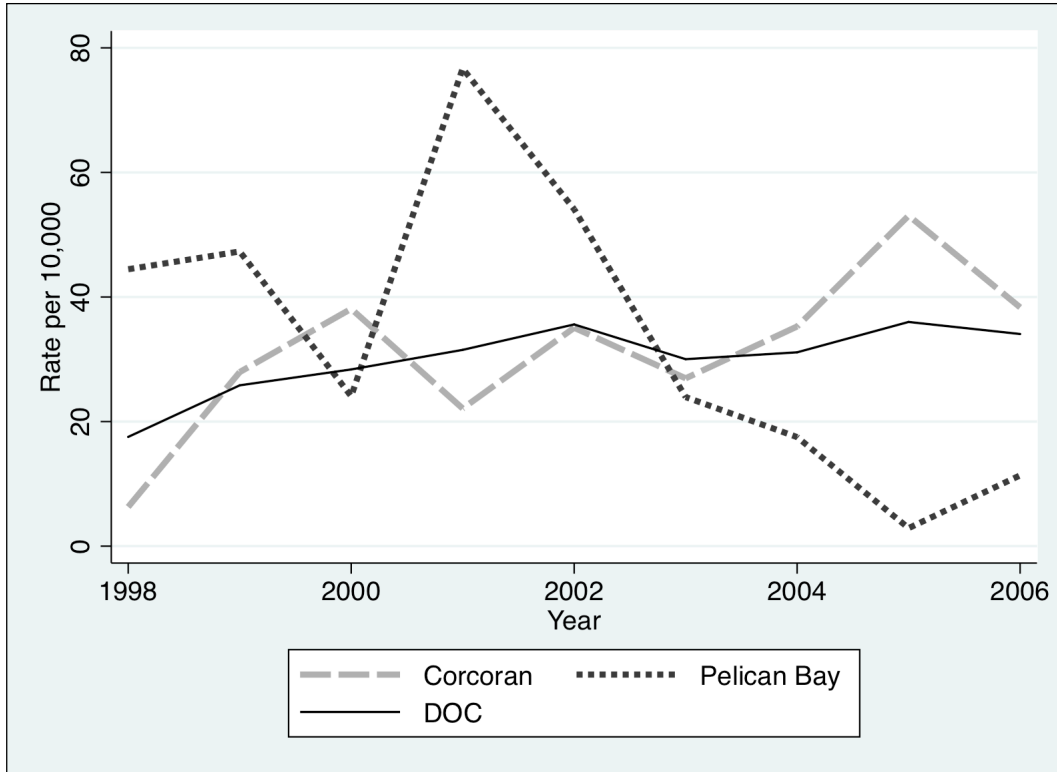


Figure 19: Rate of Attempted Suicide Compared to Proportion of Prisoners Double-Bunked, Corcoran State Prison, 1998-2006

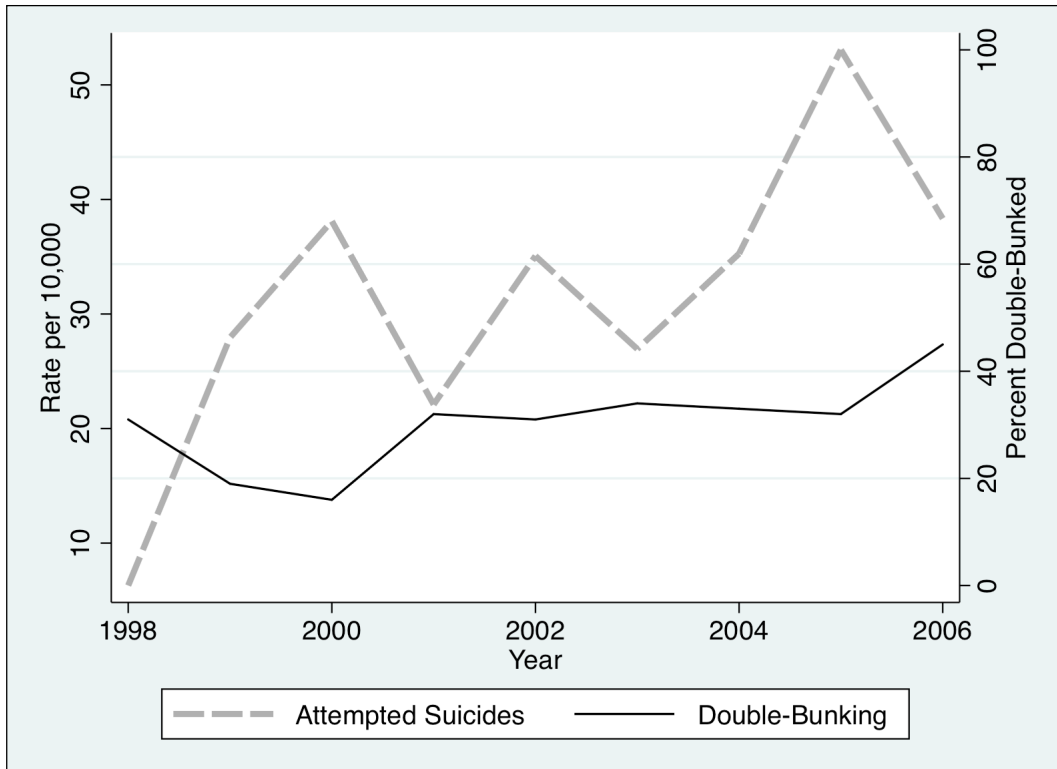


Figure 20: Rate of Attempted Suicide Compared to Proportion of Prisoners Double-Bunked, Pelican Bay State Prison, 1998-2006

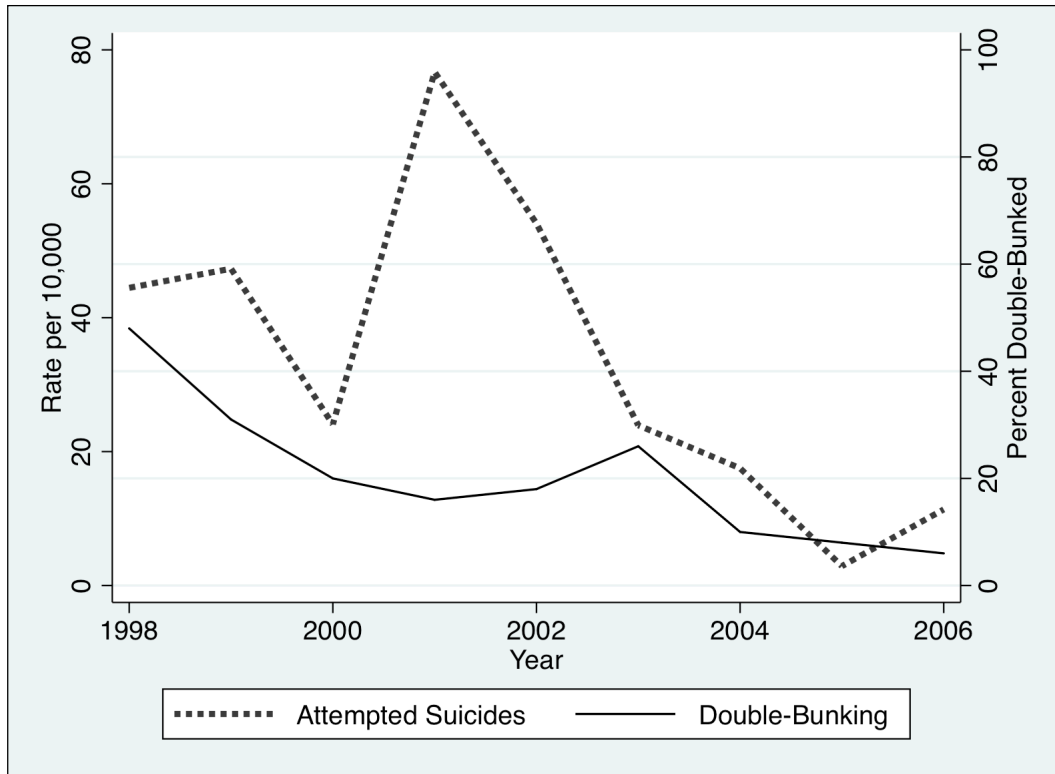


Figure 21: Rate of Prisoner-on-Guard Assaults at Corcoran, Pelican Bay, and all Prisons, 1989-2006

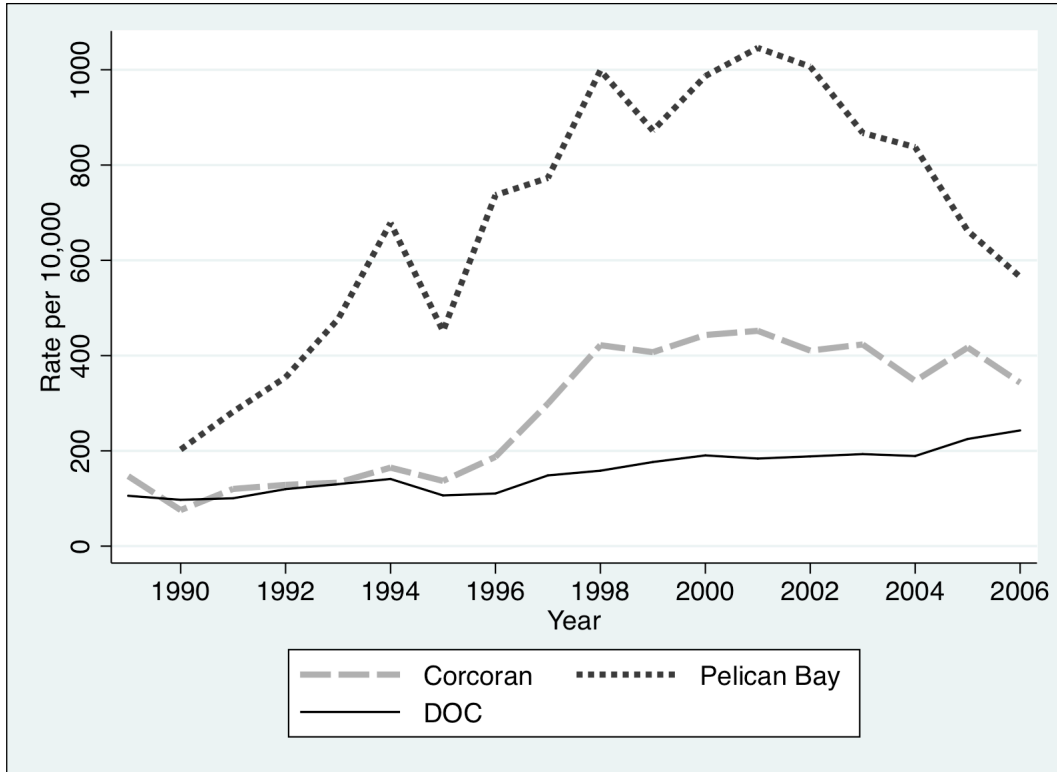


Figure 22: Rate of Prisoner-on-Guard Assaults Compared to Proportion of Double-Bunked Prisoners, Corcoran, 1989-2006

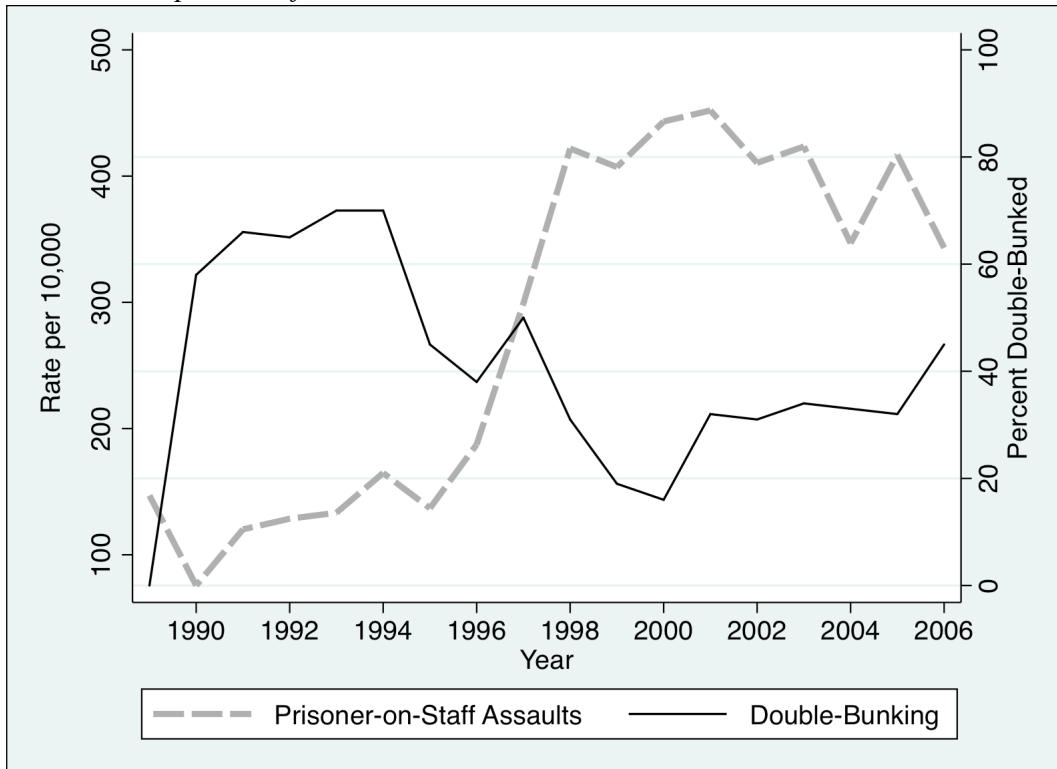


Figure 23: Rate of Prisoner-on-Guard Assaults Compared to Proportion of Double-Bunked Prisoners, Pelican Bay, 1989-2006

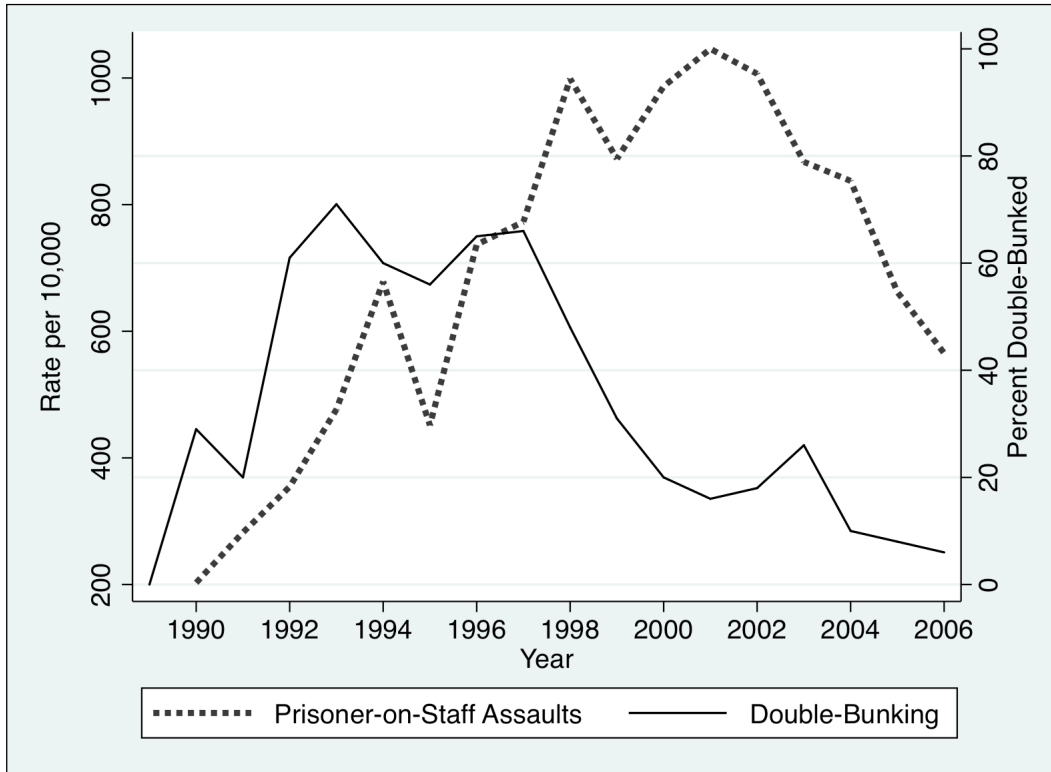


Figure 24: Rate of Prisoner-on-Prisoner Assaults at Corcoran, Pelican Bay, and all Prisons, 1989-2006

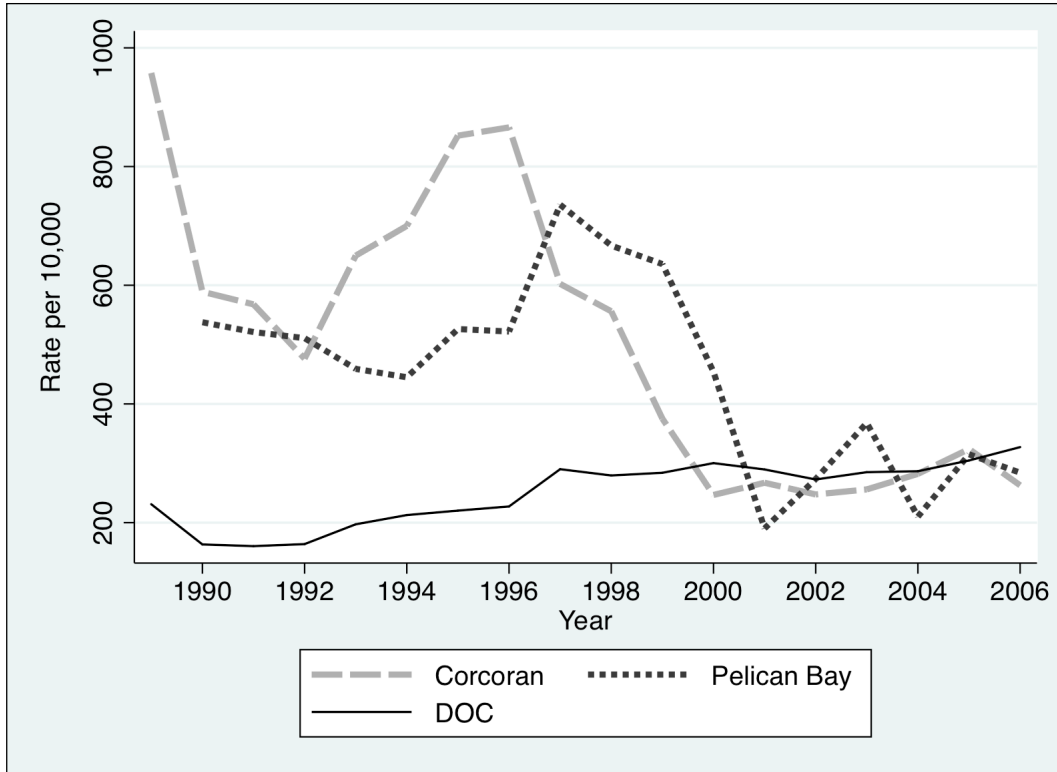


Figure 25: Rate of Prisoner-on-Prisoner Assaults, Compared to Proportion of Double-Bunked Prisoners, at Corcoran, 1989-2006

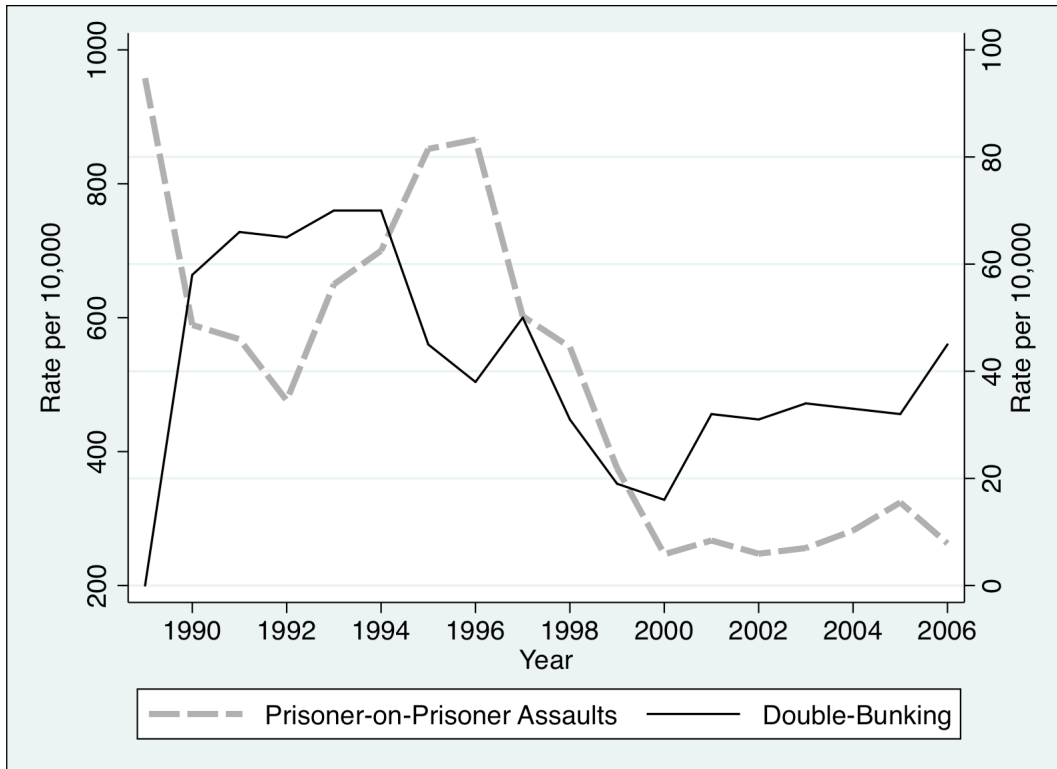


Figure 26: Rate of Prisoner-on-Prisoner Assaults, Compared to Proportion of Double-Bunked Prisoners, at Pelican Bay, 1989-2006

