
SOLITARY CONFINEMENT IN THE YOUNG REPUBLIC

David M. Shapiro

CONTENTS

INTRODUCTION	544
I. JOHN HOWARD AND THE INTELLECTUAL ORIGINS	
OF SOLITARY CONFINEMENT	548
A. <i>Durational Limits for Solitary Confinement</i>	549
B. <i>Prison Oversight</i>	550
C. <i>Prison Conditions</i>	551
II. THE NATION'S FIRST SOLITARY CONFINEMENT REGIME	551
A. <i>Public Discourse About Solitary Confinement in Philadelphia</i>	552
1. <i>The Rise of Incarceration and Prison Reform</i>	552
2. <i>Ideas to Restrain and Mitigate Solitary Confinement</i>	553
B. <i>Implementation of Solitary Confinement in Pennsylvania</i>	557
1. <i>Incarceration in Philadelphia Before Solitary Confinement Legislation</i>	559
2. <i>The 1790 Act</i>	561
3. <i>The 1794 Act</i>	563
4. <i>The 1795 Act</i>	565
5. <i>Walnut Street Jail Sentences to Solitary, 1795–1800</i>	566
6. <i>The Execution of Solitary Sentences</i>	567
C. <i>The Abandonment of Restraint in the Late 1820s</i>	568
1. <i>The Change</i>	569
2. <i>Challenging the Conventional Narrative</i>	570
3. <i>The Decline of Long-Term Isolation</i>	572
III. SOLITARY CONFINEMENT IN THE PRESENT.....	574
A. <i>As in the 1790s, Solitary Confinement Entails Sensory Deprivation and the Loss of Human Interaction</i>	576
1. <i>Conditions</i>	576
2. <i>Mental and Physical Effects</i>	580
B. <i>Some Contemporary Periods of Solitary Confinement Would Not Have Been Conceivable at the Walnut Street Jail</i>	581
C. <i>Solitary Confinement Functions as an Administrative Tool Rather than as Criminal Punishment</i>	583
1. <i>Prison Officials' Authority over Solitary Confinement</i>	583
2. <i>Solitary Confinement as a Prison Management Tool</i>	584
D. <i>Prison Officials Have Broad Discretion to Isolate Prisoners for Long Periods of Time</i>	584
1. <i>Criteria for Isolation</i>	585
2. <i>Limited Procedural Protections</i>	587
3. <i>Weak Proportionality Constraints</i>	591
4. <i>Impediments to Judicial Review</i>	592
5. <i>Nonjudicial Oversight Mechanisms</i>	593

2019]	<i>SOLITARY CONFINEMENT IN THE YOUNG REPUBLIC</i>	543
	CONCLUSION	594
	APPENDIX	596

SOLITARY CONFINEMENT IN THE YOUNG REPUBLIC

David M. Shapiro*

America's first system for punishing criminals with solitary confinement began at the Walnut Street Jail, an institution that stood right behind Independence Hall in Philadelphia. Historical and archival evidence from that facility demonstrates that the unchecked use of solitary confinement in today's correctional facilities contravenes norms that prevailed in the Constitution's founding era. In the 1790s, a robust array of checks and balances cabined the discretion of corrections officials to isolate prisoners. Judges, legislatures, and high public officials regulated human isolation at the jail, leaving prison administrators relatively little power over solitary confinement. Most importantly, long periods of seclusion could be imposed only by courts acting pursuant to criminal sentencing statutes. Jail officials had the power to impose solitary confinement for disciplinary violations, but only for a matter of days or weeks. Today, however, deference to prison officials has swallowed these constraints. In the present regime, some prisoners remain isolated for years and decades based on decisions by prison officials that courts hesitate to second-guess. The historical record casts doubt upon any originalist argument that the founding generation would have embraced the contemporary regime of judicial deference in matters of human isolation.

INTRODUCTION

In less than four years, three current and former Justices of the U.S. Supreme Court have written opinions calling for constitutional limits on long-term isolation. In 2015, then-Justice Kennedy reached out to discuss solitary confinement in a case that had almost nothing to do with the subject.¹ Concurring in the opinion of the Court in *Davis v. Ayala*,² he opined that in “a case that presented the issue” the judiciary should “determine whether workable alternative systems for long-term [solitary] confinement exist, and, if so, whether a correctional system should be required to adopt them.”³

That same year, Justice Breyer dissented from the denial of a stay in a capital case, arguing that isolating prisoners at length “create[s] [a]

* Clinical Associate Professor of Law, Northwestern Pritzker School of Law; Director, Supreme Court and Appellate Program, Roderick and Solange MacArthur Justice Center. The ideas in this Article benefited from feedback from: the Northwestern Faculty Workshop series, Andrew Koppelman, John McGinnis, Charlotte Crane, Leigh Bienen, Shari Diamond, Margo Schlanger, Judith Resnik, Maggie Filler, Daniel Greenfield, Arielle Tolman, and the editors of the *Harvard Law Review*. The Philadelphia City Archive, the Church of Jesus Christ of Latter-day Saints, and the Historical Society of Pennsylvania shared archival records regarding the Walnut Street Jail. Above all, I am grateful to Rosalind Dillon and Lisa Winkler. I could not have written this Article without their extraordinary dedication, research, and analysis.

¹ *Davis v. Ayala*, 135 S. Ct. 2187, 2193, 2210 (2015) (Kennedy, J., concurring).

² 135 S. Ct. 2187.

³ *Id.* at 2210.

special constitutional difficul[ty]” when coupled with the fear of awaiting execution.⁴ Most recently, Justice Sotomayor wrote a statement respecting the denial of certiorari in a solitary confinement case.⁵ While agreeing with the Court’s decision to decline review due to waiver concerns, Justice Sotomayor cautioned that in future cases, “[c]ourts and corrections officials must . . . remain alert to the clear constitutional problems raised by keeping prisoners . . . in ‘near-total isolation’ from the living world.”⁶ She then likened solitary confinement to a “penal tomb.”⁷

This Article demonstrates that legal checks and balances constituted a defining feature of America’s first regime of solitary confinement, implemented in the early years of the Republic. The original paradigm diffused the authority to isolate prisoners among the legislature, the courts, and high government officials. In this system, corrections staff had the power to impose days and weeks of isolation for disciplinary infractions, but months and years could be imposed only as a criminal sentence ordered by a court. This legal order mitigated the suffering of prisoners in solitary confinement by limiting the length of their seclusion.

Contemporary solitary confinement has drifted far away from this original model. Legal checks and balances temper the cruelty of human isolation with less force than they did in the early Republic, and prison officials enjoy broad authority over prolonged isolation. In civil cases challenging solitary confinement, the law instructs courts to defer to prison officials’ judgment. Nonjudicial oversight has ebbed as well, generally empowering staff and their supervisors to impose indefinite isolation without approval from anyone outside the prison system. This level of administrative discretion can translate into cruelty: some prisoners remain in isolation cells for years and decades. One inmate languished there for forty-three years.⁸ Prisoners in solitary confinement can descend into extreme psychosis; manifestations may include talking to oneself, hallucinations, self-harm, and shrinkage of the brain’s physical size.

This Article examines Philadelphia’s Walnut Street Jail. This institution, which stood behind Independence Hall,⁹ became the birthplace

⁴ *Glossip v. Gross*, 135 S. Ct. 2726, 2765 (2015) (Breyer, J., dissenting).

⁵ *Apodaca v. Raemisch*, 139 S. Ct. 5, 6 (2018) (Sotomayor, J., respecting the denial of certiorari).

⁶ *Id.* at 10 (quoting *Ayala*, 135 S. Ct. at 2210 (Kennedy, J., concurring)).

⁷ *Id.*

⁸ Josie Duffy Rice, *After 43 Years, the Longest-Serving Solitary Confinement Prisoner Has Been Released*, DAILY KOS (Feb. 22, 2016, 12:00 PM), <https://www.dailykos.com/story/2016/2/22/1489181/-After-43-years-the-longest-serving-solitary-confinement-prisoner-has-been-released> [https://perma.cc/9JJE7-RE3G].

⁹ JOHN HILLS, THIS PLAN OF THE CITY OF PHILADELPHIA AND IT’S [sic] ENVIRONS (SHEWING THE IMPROVED PARTS) (Philadelphia, John Hills 1797), <https://www.loc.gov/item/2007625050> [https://perma.cc/5WDC-FK8N] (map) (depicting the Walnut Street Jail as “45. Goal [sic] for Felons” and Independence Hall as “38. State House”).

of solitary confinement in America. In the 1780s and 1790s, prominent Philadelphia intellectuals, including Benjamin Rush and Pennsylvania Supreme Court Justice William Bradford, championed solitude as a sanction for crime. As the states debated ratification of the Bill of Rights, Philadelphians augmented the Walnut Street Jail with an unprecedented structure: a building designed to punish criminals by isolating them. Along with the physical edifice, Pennsylvania built America's first legal structure for secluding prisoners — a series of solitary confinement laws.

These laws constrained solitary confinement as surely as they established it. After all, the new system served a merciful end, at least in relative terms: seclusion supplanted the death penalty for a great number of crimes. Spared from the gallows, convicts would be left in solitude to redeem themselves through austere introspection and repentance. The prison reformers believed solitude could be powerful and transformative in moderation, but they also worried it could become cruel and destructive in excess.

Pennsylvania therefore tempered solitary confinement with strict controls on its use, developing a sophisticated system of checks and balances that limited the cruelty of isolation and the discretion of corrections officials. Periods of seclusion for months or years could be imposed only by a court acting pursuant to a criminal sentencing statute. To make the length of isolation proportional to the offense, the law required sentencing judges to calibrate the solitary component to the overall length of the prison sentence. Moreover, only serious crimes (ones previously punished by death) authorized a court to impose a solitary confinement sentence at all. These laws also allowed jail officials to punish disciplinary infractions with solitary confinement, but only for a matter of days.

I have three objectives in this Article. First, I examine the institution of solitary confinement in Philadelphia as a system of legal constraint. The story of solitary confinement at Walnut Street has been recounted before, but not as a story of checks and balances designed to cabin the discretion of prison officials and to mitigate isolation.¹⁰ Second, prior

¹⁰ Previous accounts of the use of solitary confinement at Walnut Street Jail include: HARRY ELMER BARNES, *THE EVOLUTION OF PENOLOGY IN PENNSYLVANIA: A STUDY IN AMERICAN SOCIAL HISTORY* 135–37 (1927); NEGLEY K. TEETERS, *THE CRADLE OF THE PENITENTIARY: THE WALNUT STREET JAIL AT PHILADELPHIA, 1773–1835* *passim* (1955); NEGLEY K. TEETERS & JOHN D. SHEARER, *THE PRISON AT PHILADELPHIA CHERRY HILL 1829–1913* *passim* (1957); RICHARD VAUX, *BRIEF SKETCH OF THE ORIGIN AND HISTORY OF THE STATE PENITENTIARY FOR THE EASTERN DISTRICT OF PENNSYLVANIA, AT PHILADELPHIA* 13–17 (Philadelphia, McLaughlin Brothers 1872); Harry Elmer Barnes, *The Historical Origin of the Prison System in America*, 12 *J. CRIM. L. & CRIMINOLOGY* 35, 48–49 (1921); LeRoy B. DePuy, *The Walnut Street Prison: Pennsylvania's First Penitentiary*, 18 *PA. HIST.* 130, 131–34 (1951); Melvin Gutterman, *Prison Objectives and Human Dignity: Reaching a Mutual*

scholarship has sometimes assumed that isolation sentences were equally severe in the 1790s and the Jacksonian Period. This Article challenges that view, showing that solitary confinement became harsher and longer in the 1820s.

Finally, I contrast solitary confinement past with solitary confinement present. The level of discretion enjoyed by some prison officials today and the periods of isolation they sometimes impose would have been unthinkable at the Walnut Street Jail. At least in solitary confinement cases, this Article's comparison between the two systems undermines the originalist argument for judicial deference to prison staff advanced by two Supreme Court Justices.¹¹ In *Hudson v. McMillian*,¹² a case about the use of force by a prison guard, Justice Thomas, joined by Justice Scalia, argued that early American courts did not intervene in penal administration: while opining that "[s]urely prison was not a more congenial place in the early years of the Republic," the Justices asserted that despite these harsh conditions, "the lower courts routinely rejected prisoner grievances by explaining that the courts had no role in regulating prison life."¹³ It may be true that courts did not superintend prison conditions generally, but this Article shows such a claim would be incorrect if applied to solitary confinement specifically.

I focus on Pennsylvania because it provides important evidence of early American solitary confinement practices. Pennsylvania was the intellectual epicenter of solitary confinement in America, and the richest discussion of the topic occurred there in the last two decades of the eighteenth century. While other states enacted solitary confinement legislation in the late 1790s and early 1800s,¹⁴ Pennsylvania acted in 1790, closer in time to the enactment of the Bill of Rights than any other state.

Accommodation, 1992 BYU L. REV. 857, 862–63; Leonard G. Levenson, *Constitutional Limits on the Power to Restrict Access to Prisons: An Historical Re-examination*, 18 HARV. C.R.-C.L. L. REV. 409, 415–17 (1983) (discussing the penitentiary system's emphasis on systematic inspections); Thorsten Sellin, *Philadelphia Prisons of the Eighteenth Century*, 43 TRANSACTIONS AM. PHIL. SOC'Y 326, 328–29 (1953); and Matthew W. Meskell, Note, *An American Revolution: The History of Prisons in the United States from 1777 to 1877*, 51 STAN. L. REV. 839, 846–49 (1999).

¹¹ See *Hudson v. McMillian*, 503 U.S. 1, 17–29 (1992) (Thomas, J., dissenting).

¹² 503 U.S. 1.

¹³ *Id.* at 19 (Thomas, J., dissenting).

¹⁴ See, e.g., Act of Dec. 15, 1796, ch. 2, *reprinted in* 2 THE STATUTES AT LARGE OF VIRGINIA 5 (Samuel Shepherd ed., Richmond, Samuel Shepherd 1835); Act of Mar. 30, 1798, ch. 56, 1798 N.Y. Laws 216; Act of Mar. 15, 1805, ch. 120, 1804 Mass. Acts 172; Act of Mar. 15, 1805, ch. 123, 1804 Mass. Acts 179; Act of Mar. 16, 1805, ch. 131, 1804 Mass. Acts 202; Act of Mar. 16, 1805, ch. 133, 1804 Mass. Acts 209; Act of Mar. 16, 1805, ch. 143, 1804 Mass. Acts 240; Act of Nov. 9, 1808, ch. XXIX, § 11, *reprinted in* 3 LAWS OF THE STATE OF VERMONT 65 (Rutland, Vermont, Fay, Davison & Burt 1817).

Moreover, other states looked to Pennsylvania as a model when implementing their systems.¹⁵ The Walnut Street Jail came to be recognized as a paradigm of solitary confinement in America.¹⁶

Part I sets the stage for Pennsylvania's system of solitary confinement by analyzing the writing of John Howard, an English sheriff and prolific author on the subject. The American prison reformers set out to implement Howard's ideas on prisoner isolation at the Walnut Street Jail. Part II discusses the implementation of solitary confinement in Philadelphia. This Part begins by examining the writings of Justice Bradford, Rush, and other advocates of solitary confinement in Pennsylvania in the 1780s and 1790s. Part II then considers the regime of seclusion created by statute in the early 1790s, demonstrating that jailers lacked the power to isolate prisoners for years or even months. Part II concludes by describing the weakening of checks and balances in the late 1820s and the more extreme form of isolation that took hold in Pennsylvania in the Jacksonian period, only to be rejected later as inhumane. Part III turns to contemporary solitary confinement, demonstrating that the practice has become unmoored from the legal structures that limited the discretion of prison staff at the Walnut Street Jail. Modern solitary confinement is therefore a distortion — not a realization — of the original American model.

I. JOHN HOWARD AND THE INTELLECTUAL ORIGINS OF SOLITARY CONFINEMENT

The Pennsylvania prison reformers of the 1790s viewed themselves as the intellectual heirs of John Howard, an English sheriff whose work profoundly affected the implementation of solitary confinement in Philadelphia.¹⁷ As the architect and preeminent champion of solitary confinement in the eighteenth century,¹⁸ Howard believed that solitude

¹⁵ See Report on Punishment & Prison Discipline [hereinafter Report on Punishment], reprinted in 1 THE REGISTER OF PENNSYLVANIA: DEVOTED TO THE PRESERVATION OF FACTS AND DOCUMENTS, AND EVERY OTHER KIND OF USEFUL INFORMATION RESPECTING THE STATE OF PENNSYLVANIA 206 (Samuel Hazard ed., Philadelphia, W.F. Geddes 1828) [hereinafter REGISTER OF PENNSYLVANIA] (noting that the Walnut Street Jail's regimen was "subsequently imitated at New York, Boston, Baltimore, and other places"); Meskill, *supra* note 10, at 848–49.

¹⁶ See, e.g., Donald W. Dowd, *The Pit and the Pendulum: Correctional Law Reform from the Sixties into the Eighties*, 29 VILL. L. REV. 1, 3 n.7 (1984) (citing HARRY E. ALLEN & CLIFFORD E. SIMONSEN, CORRECTIONS IN AMERICA 27 (3d ed. 1981)); Thom Gehring, *Characteristics of Correctional Instruction, 1789–1875*, 46 J. CORRECTIONAL EDUC. 52, 56 (1995); Thorsten Sellin, *The Origin of the "Pennsylvania System of Prison Discipline,"* 50 PRISON J. 13, 14 (1970); Rex A. Skidmore, *Penological Pioneering in the Walnut Street Jail, 1789–1799*, 39 J. CRIM. L. & CRIMINOLOGY 167, 180 (1948).

¹⁷ See BARNES, *supra* note 10, at 77–78.

¹⁸ See George Fisher, *The Birth of the Prison Retold*, 104 YALE L.J. 1235, 1236–37 (1995); Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. REV. L. & SOC. CHANGE 477, 563 n.433 (1997).

could redeem prisoners, even hardened ones.¹⁹ At the same time, Howard condemned *lengthy* solitary confinement, which he considered destructive and ineffective.²⁰

In 1777, Howard published the work that had the greatest impact on penal reform in his day in both England and America: *The State of the Prisons in England and Wales*.²¹ English prisons, Howard complained, were “riddled with abuses”;²² he bemoaned a litany of problems, including disease, disorder, lack of oversight and inspection, rampant gambling and drinking, and fees taken by jailers.²³ Howard abhorred “the indiscriminate mixing of inhabitants” in prisons.²⁴ His critiques led to reforms such as dividing prisoners into categories and separating “dangerous” prisoners from “endangered” ones (a process now called “classification”).²⁵ Howard’s efforts brought new attention to prison conditions and culminated in Parliament’s enactment of the Penitentiary Act of 1779.²⁶

A. *Durational Limits for Solitary Confinement*

Howard believed that solitude would “reclaim the most atrocious and daring criminals” by forcing them to engage in “hours of thoughtfulness and reflection,”²⁷ but he also decried prolonged isolation.²⁸ He argued that “solitude should be broken up by long periods of associated labor and communal exercise.”²⁹ Upon visiting a prison where inmates assigned to solitary cells also exercised alone, Howard “expressed vigorous disapproval of the practice” and attempted to persuade the local justices to “moderate their regimen with the addition of some communal exercise.”³⁰

Howard criticized periods of one year or more in solitary confinement, which he considered “a severe confinement, to be so long in solitude, unemployed, in nauseous cells, and without fire in winter.”³¹ In a footnote to this passage, Howard continued:

¹⁹ JOHN HOWARD, *An Account of the Principal Lazarettos in Europe*, in 2 THE WORKS OF JOHN HOWARD, ESQ. 1, 169 & n.* (2d ed. London 1791).

²⁰ See MICHAEL IGNATIEFF, A JUST MEASURE OF PAIN: THE PENITENTIARY IN THE INDUSTRIAL REVOLUTION, 1750–1850, at 102 (1978).

²¹ Randall McGowen, *The Well-Ordered Prison: England, 1780–1865*, in THE OXFORD HISTORY OF THE PRISON 71, 78–79 (Norval Morris & David J. Rothman eds., 1998).

²² *Id.* at 79.

²³ See *id.* at 79–80.

²⁴ *Id.* at 79.

²⁵ *Id.* at 83.

²⁶ 19 Geo. 3 c. 74 (Eng.); McGowen, *supra* note 21, at 80.

²⁷ HOWARD, *supra* note 19, at 169 n.*.

²⁸ IGNATIEFF, *supra* note 20, at 102.

²⁹ *Id.*

³⁰ *Id.*

³¹ HOWARD, *supra* note 19, at 169.

It should therefore be considered by those who are ready to commit, for a *long* term, petty offenders to *absolute* solitude, that such a state is more than human nature can bear, without the hazard of distraction or despair; . . . and that for want of some employment in the day (as in several houses of correction) health is injured, and a habit of idleness or inability to labour in future, is in danger of being acquired. The beneficial effects on the mind, of such a punishment, are speedy, proceeding from the horror of a vicious person left entirely to his own reflections. This may wear off by long continuance, and a sullen insensibility may succeed.³²

Thus, Howard suggested that long-term solitary confinement is cruel because it promotes a “sullen insensibility,” causes injury to health, and was “more than human nature can bear.”³³ Lengthy isolation, he contended, also fails to rehabilitate convicts.³⁴

Howard believed that jailers should use isolation sparingly to discipline recalcitrant inmates: “Gentle discipline is commonly more efficacious than severity; which should not be exercised but on such as will not be amended by lenity.”³⁵ When lenity failed, “solitary confinement on bread and water” should be imposed, but only “for a time proportioned to [a prisoner’s] fault.”³⁶ In a footnote to this discussion of proportionality, Howard discussed the importance of “humanity” in disciplining prisoners.³⁷ In fact, Howard appears to have thought four to five days sufficient to punish disobedience.³⁸ He wrote favorably of a prison chaplain who “took notice of the propriety of solitary confinement for those that were riotous and refractory at their first coming; for generally, he said, ‘in four or five days they would become very tractable and submissive.’”³⁹

B. Prison Oversight

Howard considered external oversight vital to a just system of incarceration and solitary confinement; he was not content to leave prison conditions in the hands of wardens alone.⁴⁰ “I think a proper *inspection* so *absolutely necessary* to the good government of Penitentiary houses,” he wrote, “that neither *expense*, nor a *few* other conveniences, ought to be set in competition with so *important* a circumstance.”⁴¹ Magistrates were “[t]o visit at proper periods —

³² *Id.* at 169 n.*.

³³ *Id.*

³⁴ *See id.* at 169 & n.*.

³⁵ JOHN HOWARD, *The State of the Prisons in England and Wales*, in 1 THE WORKS OF JOHN HOWARD, ESQ. 1, 39 (4th ed. London 1792).

³⁶ *Id.*

³⁷ *Id.* at 39 n.†.

³⁸ *See id.* at 138.

³⁹ *Id.*

⁴⁰ *See* HOWARD, *supra* note 19, at 228.

⁴¹ *Id.* at 224.

without previous notice — to see and examine all prisoners separately.”⁴² In addition, prison inspectors were to appear “at unexpected times — to view the whole prison, and hear prisoners’ complaints.”⁴³ In short, prison inspection was an indispensable component of Howard’s vision.

C. Prison Conditions

Throughout his work, Howard also commented on the proper conditions for solitary confinement. For example, he recoiled at the isolation cells at London’s Newgate Prison, where he believed “the prisoners . . . will be in great danger of the gaol-fever,”⁴⁴ and he noted that even hardened criminals “were struck with horror, and shed tears, when brought to these darksome solitary abodes.”⁴⁵

Howard seemed to take a skeptical tone when describing a practice that has become quite common today — allowing solitary confinement prisoners only one hour per day out of their cells: “Those committed to *hard labour* are locked up in solitary cells, and out only *one* hour in a day, which seems to be, in several places, the magistrates’ *mode* of curing the prisoners of their habits of idleness.”⁴⁶

Howard also believed that solitary confinement cells should be relatively commodious, “ten feet long, ten feet high, and eight feet wide.”⁴⁷ He advocated “for the cheering influence of *light*, as well as of *air*,” and he believed that prisoners in solitary confinement should have “that exposure to the salutary influence of the breezes, and that cheerfulness of aspect, which are so necessary to relieve the languor attending sickness and confinement.”⁴⁸ On the other hand, heating was optional, except for sick prisoners.⁴⁹

II. THE NATION’S FIRST SOLITARY CONFINEMENT REGIME

In the late eighteenth century, prison reformers in Pennsylvania embraced Howard’s vision for a solitary confinement regime founded on moderation. After a rich public discourse in the Philadelphia press, the reformers prevailed upon the legislature to establish America’s first system of solitary confinement at the Walnut Street Jail. Checks and balances pervaded the new isolation system, diffusing power among various government actors and limiting the discretion of jail officials. The three sections within this Part examine the system of restraint envisioned by the reformers, the implementation of their theories in the

⁴² *Id.* at 228.

⁴³ *Id.*

⁴⁴ HOWARD, *supra* note 35, at 213.

⁴⁵ *Id.* at 214.

⁴⁶ HOWARD, *supra* note 19, at 185.

⁴⁷ *Id.* at 202 n.†.

⁴⁸ *Id.* at 230.

⁴⁹ *Id.* at 202 n.†.

1790s at the Walnut Street Jail, and the demise of their original system of solitary confinement many years later.

A. *Public Discourse About Solitary Confinement in Philadelphia*

This section examines the public discussion of solitary confinement that flourished in Philadelphia in the 1780s. Intellectual and political leaders, including Rush and Justice Bradford, championed solitude as a way to reform criminals and curtail the death penalty. Just as importantly, they believed that punishment by isolation required strict limits to prevent cruelty and excess. In this section, I show that the Philadelphia reformers, drawing on Howard, envisioned a system of checks and balances that would curb the severity of isolation.

1. *The Rise of Incarceration and Prison Reform.* — Prior to the Revolutionary War, incarceration rarely served as a criminal punishment in America.⁵⁰ Local authorities “meted out a wide range of punishments. The most popular sanctions included fines, whippings, mechanisms of shame (the stock and public cage), banishment, and of course, the gallows. What was not on the list was imprisonment.”⁵¹ Convicts who were not hanged suffered corporal punishment or monetary fines.⁵² The authorities often used incarceration to prevent pretrial defendants from fleeing, but only rarely to punish convicts.⁵³

When the war ended in 1783, a group of civic leaders in Philadelphia spearheaded reforms to scale back capital punishment.⁵⁴ In the years that followed, a series of laws enacted by the Pennsylvania legislature dramatically reduced the number of offenses punished by death, largely replacing capital punishment with imprisonment.⁵⁵ As incarceration became the cornerstone of criminal punishment, the prison system demanded new attention.⁵⁶

In 1787, a group of prominent Philadelphians, many of the same men who had been advocating to reduce capital punishment, gathered at a building known as the German School House on Cherry Street and formed the Philadelphia Society for Alleviating the Miseries of Public Prisons, or the Pennsylvania Prison Society, as the organization came to be known.⁵⁷ Included in this group were Rush, Caleb Lownes, and Reverend William White.⁵⁸ Rush has been described as “the leading

⁵⁰ BARNES, *supra* note 10, at 72–73.

⁵¹ David J. Rothman, *Perfecting the Prison: United States, 1789–1865*, in THE OXFORD HISTORY OF THE PRISON, *supra* note 21, at 100, 101.

⁵² See TEETERS, *supra* note 10, at 7–9.

⁵³ See Barnes, *supra* note 10, at 36.

⁵⁴ BARNES, *supra* note 10, at 81.

⁵⁵ *Id.* at 73.

⁵⁶ See *id.* at 79.

⁵⁷ *Id.* at 81 n.17; VAUX, *supra* note 10, at 8–9.

⁵⁸ BARNES, *supra* note 10, at 82 n.18.

spirit behind the formation” of the Society.⁵⁹ Lownes later became a prison inspector.⁶⁰ White, the Bishop of the Philadelphia Episcopal Church, would go on to serve as the Society’s president for nearly fifty years.⁶¹

The Pennsylvania reformers viewed themselves as Howard’s intellectual heirs. “[E]ven in its origin,” the Pennsylvania Prison Society “was powerfully stimulated by Howard’s work.”⁶² Its members “were thoroughly conversant with the printed accounts of [Howard’s] travels in the inspection of prisons and with his recommendations of reform based upon these trips.”⁶³ White corresponded with Howard on behalf of the Society, commending Howard for proposing useful prison reforms and thanking him “for having rendered the miserable tenants of prisons the objects of more general attention and compassion.”⁶⁴

The Society’s constitution set forth principles of forgiveness, compassion, and redemption.⁶⁵ The preamble stated that “the precepts and example of the author of Christianity are not cancelled by the follies or crimes of our fellow creatures.”⁶⁶ Nonetheless, the preamble observed that prisoners suffered “penury, hunger, cold, unnecessary severity, unwholesome apartments and guilt.”⁶⁷ It was the Society’s moral ambition to spare prisoners from “undue and illegal sufferings” and to find the “degrees and modes of punishment” that would “restor[e] our fellow creatures to virtue and happiness.”⁶⁸

2. *Ideas to Restrain and Mitigate Solitary Confinement.* — In the 1780s and early 1790s, members of the Society published essays setting forth the precepts that later came to govern solitary confinement at the Walnut Street Jail.⁶⁹ The reformers believed: (1) the length of solitary confinement must reflect the severity of an inmate’s crime; (2) courts

⁵⁹ TEETERS & SHEARER, *supra* note 10, at 8; *see also id.* at 5 (“Certainly no one will quarrel with the thesis that the philosophy of the penitentiary was first implemented in Philadelphia through the efforts of the Philadelphia Society for Alleviating the Miseries of Public Prisons.”).

⁶⁰ DePuy, *supra* note 10, at 142.

⁶¹ *See* BARNES, *supra* note 10, at 84.

⁶² *Id.* at 78.

⁶³ *Id.*

⁶⁴ Letter from William White to John Howard (Jan. 14, 1788), *quoted in* BARNES, *supra* note 10, at 78.

⁶⁵ *See* VAUX, *supra* note 10, at 9.

⁶⁶ Constitution of the Philadelphia Society for Alleviating the Miseries of Public Prisons, *quoted in* VAUX, *supra* note 10, at 9.

⁶⁷ *Id.*

⁶⁸ *Id.* This focus on prison reform and solitary confinement also reflected Quaker thought. The idea to experiment with solitary confinement stemmed from the Quaker belief that prisoners isolated in cells with a Bible could use that time to reflect, repent, and eventually reform. Muriel Schmid, “The Eye of God”: *Religious Beliefs and Punishment in Early Nineteenth-Century Prison Reform*, 59 *THEOLOGY TODAY* 546, 548–51, 553–54 (2003). Solitude was intended to be a humane alternative to the corporal punishment that was common at the time. *Id.* at 551.

⁶⁹ *See* sources cited *infra* notes 70, 80, 98.

and the legislature should determine the duration of solitary confinement for particular offenses; (3) prison operations require external oversight and inspection; and (4) isolation becomes cruel and immoral when prolonged.

In 1787, Rush wrote *An Enquiry into the Effects of Public Punishments upon Criminals, and upon Society*,⁷⁰ which he read aloud in the home of Benjamin Franklin during a meeting of the Society for Promoting Political Inquiries.⁷¹ Rush contended that convicts should endure five forms of punishment — “Bodily Pain, Labour, Watchfulness, Solitude, and Silence.”⁷² These punishments were to be proportionate, meted out “according to the nature of the crimes, or according to the variations of the constitution and temper of the criminal.”⁷³ The various sanctions could be used “separately, or more or less combined.”⁷⁴ Rush noted that “the facts that are contained in Mr. Howard’s History of Prisons” supported his arguments.⁷⁵

Rush envisioned a regime in which the judiciary and the legislature — not prison staff — would control the various punishments, including solitude.⁷⁶ The legislature would establish maximum and minimum periods for these sanctions: “[T]here should exist *certain* portions of punishment, both in duration and degree, which should be placed by law beyond the power of the discretionary court before mentioned, to shorten or mitigate.”⁷⁷ Within the statutory constraints, courts would decide the length of solitude (and any other punishments imposed) when pronouncing a sentence: “The nature — degrees — and duration of the punishments, should all be determined beyond a certain degree, by a court properly constituted for that purpose”⁷⁸ Like Howard, Rush asserted that courts should keep a careful eye on conditions, making it their “business” to inspect prisons.⁷⁹

In 1790, the Pennsylvania Prison Society published a pamphlet entitled *Extracts and Remarks on the Subject of Punishment and Reformation of Criminals*.⁸⁰ Although it included brief passages

⁷⁰ BENJAMIN RUSH, AN ENQUIRY INTO THE EFFECTS OF PUBLIC PUNISHMENTS UPON CRIMINALS, AND UPON SOCIETY (Philadelphia 1787).

⁷¹ *Monthly Catalogue, for August, 1787*, 77 THE MONTHLY REVIEW; OR, LITERARY JOURNAL: FROM JULY TO DECEMBER, INCLUSIVE 153, 153 (1787).

⁷² RUSH, *supra* note 70, at 25 (emphasis omitted).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 26.

⁷⁶ *See id.* at 23, 30.

⁷⁷ *Id.* at 30.

⁷⁸ *Id.* at 23.

⁷⁹ *Id.*

⁸⁰ THE SOCIETY, ESTABLISHED IN PHILADELPHIA, FOR ALLEVIATING THE MISERIES OF PUBLIC PRISONS, EXTRACTS AND REMARKS ON THE SUBJECT OF PUNISHMENT AND

authored by a member of the Society, the pamphlet mainly consisted of three parts: accounts of Wymondham Prison in Norfolk, England, by Thomas Beevor; the regulations governing the Wymondham Prison and one other English prison; and extracts from Howard's work.⁸¹ The publication aimed to convince the Pennsylvania legislature to adopt reforms that had been implemented at the Wymondham Prison⁸² and argued that incarceration should replace corporal punishment and execution as the principal mode of punishment.⁸³

On the topic of solitary confinement, *Extracts and Remarks* stated:

It may very safely be assumed as a principle that the prospect of *long solitary confinement*, hard labour and very plain diet, would, to many minds, prove more terrible than even an execution; where this is the case, the operation of example would have its full effect, so far as it tended to deter others from the commission of crimes. With respect to the criminal, he will be prevented from a repetition of the crime, during the term of his confinement, which will be extended, according to its degree; and it may very reasonably be supposed, that length of time, and the severity of his punishment, will either really reform his disposition towards evil practices, or will restrain him through principles of fear⁸⁴

This excerpt shows that the Prison Society viewed solitary confinement as a punishment that must fit the “degree” of the offender’s crime.⁸⁵ The passage could also arguably be interpreted as an endorsement of long-term isolation in some cases, but that reading is likely incorrect for two reasons: the passage is not specific about duration, and it is not clear if the passage refers to genuine solitary confinement or merely single-celling.⁸⁶ First, while the passage refers to “long solitary confinement,”⁸⁷ it does not answer an important question — how long is long? Howard believed that just a few days in seclusion could reform disobedient prisoners and decried periods of one year or more.⁸⁸ Today, however, prisoners often face solitary confinement for years, and even decades on end.⁸⁹ Nothing in the pamphlet implies support for such prolonged solitude.⁹⁰ Second, considering this passage in the context of *Extracts and Remarks* as a whole, it appears that “solitary confinement” may refer to holding prisoners in individual cells

REFORMATION OF CRIMINALS (Philadelphia, Zachariah Poulson 1790) [hereinafter EXTRACTS AND REMARKS].

⁸¹ *Id.* at 1–23.

⁸² See TEETERS, *supra* note 10, at 31–32.

⁸³ EXTRACTS AND REMARKS, *supra* note 80, at 4.

⁸⁴ *Id.* (emphasis added).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ See *supra* pp. 549–50.

⁸⁹ See *infra* p. 582.

⁹⁰ See EXTRACTS AND REMARKS, *supra* note 80.

at night but permitting mingling during the day. At present, that practice is called “single-celling,” not “solitary confinement.” “Solitary” appears to have both meanings in *Extracts and Remarks*. For example, the pamphlet states that Howard supported “Solitary Cells.”⁹¹ Tracing this reference to its source (page 202 of Howard’s *Lazarettos*), one finds that Howard is discussing not true solitary confinement but “prisoners’ solitary *night-rooms*” (that is, single-celling).⁹²

Along similar lines, in describing the prison at Wynmondham in a letter quoted in *Extracts and Remarks*, Beevor writes, “there are separate cells for each prisoner, airy, neat, and healthy, in which they sleep, and, when necessary, work the whole day alone.”⁹³ This description confirms that prisoners slept alone but also suggests that prisoners generally did not labor in solitude.⁹⁴ Both sets of prison regulations quoted in *Extracts and Remarks* stated that prisoners were to be “kept entirely separate”⁹⁵ at night if enough rooms were available, but also provided that, while laboring, prisoners were to be kept only “as much separate as their employment will admit of.”⁹⁶ In short, while *Extracts and Remarks* appeared to advocate prolonged “solitary confinement,”⁹⁷ the varying use of the term makes it difficult to know with any degree of certainty whether the Society endorsed true long-term solitary confinement, or merely single-celling.

Other influential reformers also advocated for constraints on solitary confinement. In 1793, Justice Bradford of the Pennsylvania Supreme Court Pennsylvania (later Attorney General of the United States), published *An Enquiry How Far the Punishment of Death Is Necessary in Pennsylvania*,⁹⁸ a document both released as a pamphlet and printed in the Journal of the Pennsylvania Senate.⁹⁹ Justice Bradford argued that solitude and other punishments should completely replace capital punishment, except as a sanction for certain categories of treason and murder.¹⁰⁰ In 1794, the legislature essentially adopted Justice Bradford’s view, abolishing the death penalty for every crime except murder in the first degree.¹⁰¹

⁹¹ *Id.* at 19 (emphasis omitted) (quoting HOWARD, *supra* note 19, at 202).

⁹² HOWARD, *supra* note 19, at 202 n.7.

⁹³ EXTRACTS AND REMARKS, *supra* note 80, at 5.

⁹⁴ *See id.*

⁹⁵ *Id.* at 9, 18.

⁹⁶ *Id.*

⁹⁷ *Id.* at 4.

⁹⁸ WILLIAM BRADFORD, AN ENQUIRY HOW FAR THE PUNISHMENT OF DEATH IS NECESSARY IN PENNSYLVANIA (Philadelphia, T. Dobson 1793), *reprinted in* 12 AM. J. LEGAL HIST. 122 (1968).

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 132; *see* BARNES, *supra* note 10, at 109.

¹⁰¹ BARNES, *supra* note 10, at 109–10.

Justice Bradford argued that sentencing courts, not prison officials, should mete out solitary confinement.¹⁰² He advocated isolation only for serious offenders: “[T]he salutary rigor of *perfect solitude*,” he wrote, should be “*invariably* inflicted on the greater offenders.”¹⁰³ He also proposed dividing solitary confinement sentences into intervals “seldom longer than 20 or 30 days at a time.”¹⁰⁴ Justice Bradford supported this idea with a lengthy quotation in which Howard argued that solitary confinement “by a *long continuance*” is “*more than human nature can bear*.”¹⁰⁵

In sum, the leaders of what could be called the eighteenth century’s solitary confinement movement pushed to restrict prison isolation no less forcefully than they pushed to establish it. They demanded limits: inspection and oversight, judicial and legislative checks and balances, proportionality, and duration constraints. The following section shows that Pennsylvania adopted all of these principles.

B. Implementation of Solitary Confinement in Pennsylvania

In the early 1790s, a series of legislative enactments in Pennsylvania created the first system of solitary confinement in America. The Pennsylvania Prison Society conceived of the legislation, advocated for it, and participated in its drafting. With the establishment of a legal regime for solitary confinement, state law came to reflect the ideas of Howard and the Pennsylvania Prison Society. This section shows that the system of inmate isolation created in the 1790s featured a set of important checks and balances that curtailed the discretion of jailers to sequester prisoners.

To understand this system, it is important to distinguish between solitary confinement as a prison disciplinary measure and solitary confinement as criminal punishment. Jail officials had the power to impose solitary confinement to discipline prisoners, but only for days or weeks. More specifically, jailers could not subject rule violators to more than two days of solitary confinement without the consent of high-level government officials.¹⁰⁶ But even with that approval, the jailers had no power to impose solitary confinement for more than fifteen days for disciplinary infractions.¹⁰⁷

¹⁰² See BRADFORD, *supra* note 98, at 141.

¹⁰³ *Id.* at 154.

¹⁰⁴ *Id.* at 174.

¹⁰⁵ *Id.* (quoting HOWARD, *supra* note 19, at 169).

¹⁰⁶ See *infra* pp. 562–63.

¹⁰⁷ See Act of Apr. 18, 1795, ch. MDCCCL, § III [hereinafter 1795 Act], reprinted in 3 LAWS OF THE COMMONWEALTH OF PENNSYLVANIA 1700–1810, at 246, 247 (Philadelphia, John Bioren 1810).

Longer periods of solitude could be imposed only as criminal punishment by a court statutorily authorized to do so.¹⁰⁸ And the statutes bounded the authority of courts by (1) reserving solitary confinement for the most serious crimes and (2) establishing a range for any solitary confinement component of a sentence.¹⁰⁹ Judges showed leniency in their sentences, relatively speaking: the average solitary confinement sentence was closer to the bottom of the range than to the top.¹¹⁰

There is some evidence that prisoners in this system never experienced multiple years of continual solitude.¹¹¹ Once the court fixed a solitary sentence, the prisoner would serve it in intervals, not all at once: the solitary portions were interspersed with non-solitary portions.¹¹² It appears that as late as 1827, no one in Pennsylvania spent more than sixteen continuous months in solitary confinement.¹¹³

A very detailed summary of conditions in the solitary cells comes from a 1798 description published in the *Philadelphia Monthly Magazine*.¹¹⁴ That source reports that there was a small window to the outside that let in air and sunshine, but it was too high up for the prisoner to see anything out of it.¹¹⁵ The prisoner had “no convenience of bench, table, or even bed.”¹¹⁶ Each cell had a privy and was heated in the winter.¹¹⁷ “The situation of these cells is high and healthy, not subject to damp, as dungeons under ground generally are. They are finished with lime and plaster; white washed twice a year; and in every respect clean.”¹¹⁸ A jailer appeared only once a day and delivered food.¹¹⁹

Despite the restraints on its use, solitary confinement in the 1790s could inflict extreme suffering. Some prisoners reportedly “beg[ged], with the greatest earnestness, that they may be hanged out of their misery.”¹²⁰ A humanitarian impulse to reduce capital punishment spurred

¹⁰⁸ See *infra* pp. 563–65 (describing the statutory solitary confinement regime).

¹⁰⁹ See *infra* pp. 563–64.

¹¹⁰ See *infra* pp. 566–67.

¹¹¹ See *infra* pp. 565–68.

¹¹² See *infra* p. 565.

¹¹³ See *infra* p. 567.

¹¹⁴ Thomas Condie, *Plan, Construction and Etc. of the Jail and Penitentiary House of Philadelphia*, PHILA. MONTHLY MAG., Feb. 1798, at 97, reprinted in TEETERS, *supra* note 10, app. 1 at 129.

¹¹⁵ *Id.* at 131.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ See *id.*; see also FRANCOIS-ALEXANDRE-FREDERIC LA ROCHEFOUCAULD-LIANCOURT, ON THE PRISONS OF PHILADELPHIA BY A EUROPEAN 10 (1796) (indicating that the prisoner saw a guard only once a day, when the guard delivered a meal).

¹²⁰ LOUIS P. MASUR, RITES OF EXECUTION 83 (1989); see *id.* at 84 (“Advocates peddled solitude as both less and more horrifying than public executions A supple concept, solitude as punishment united theorists with dissimilar agendas and conflicting ideologies.”); see also MARK

the rise of solitary confinement,¹²¹ but benign motivations may have intermixed with darker ones, including an urge for dominance and control over others.¹²² The point is not that sensory deprivation at the jail was benevolent, utopian, or free of cruelty. Nonetheless, because the original system of solitary confinement included powerful checks and balances, it compares favorably to procedures in many contemporary American prisons.

This section consists of six subsections. Subsection II.B.1 describes the conditions of incarceration in Philadelphia prior to the passage of reform legislation. Subsections II.B.2, II.B.3, and II.B.4 examine the solitary confinement laws enacted in 1790, 1794, and 1795, respectively. Subsection II.B.5 presents my analysis of all Walnut Street Jail sentences from 1795 to 1800 that included a period of solitary confinement. These records reveal that judges tended to show leniency in meting out solitary confinement, often sentencing on the low end of the sentencing range established by the 1794 Act. Subsection II.B.6 suggests that the execution of solitary sentences may have introduced further leniency, as some prisoners spent less time in isolation than their sentence required.

I. Incarceration in Philadelphia Before Solitary Confinement Legislation. — In 1773, the Pennsylvania General Assembly enacted a law requiring the construction of a new jail in Philadelphia.¹²³ Walnut Street Jail, as the structure came to be known, stood at the intersection of Walnut and Sixth Street — right behind Independence Hall.¹²⁴ It first received prisoners in January of 1776, during the Revolutionary War.¹²⁵

E. KANN, PUNISHMENT, PRISONS, AND PATRIARCHY 141 (2005) (citing to a 1788 *Pennsylvania Mercury* article that “reported that a condemned man considered solitude ‘infinitely worse than the most agonizing death’”); LA ROCHEFOUCAULD-LIANCOURT, *supra* note 119, at 29–32 (describing death as less severe than “that most dreaded of all punishments, solitary confinement,” *id.* at 29); Craig Haney, *The Psychological Effects of Solitary Confinement: A Systematic Critique*, 47 CRIME & JUST. 365, 370 (2018) (noting Pennsylvania’s system as illustrative of the “damaging nature” of solitary confinement). Benjamin Rush even wrote that “a wheelbarrow, a whipping post, nay even a gibbet, are all light punishments compared with letting a man’s conscience loose upon him in solitude.” MASUR, *supra*, at 183 n.35 (quoting Letter from Benjamin Rush to Enos Hitchcock (Apr. 24, 1789)), in 1 LETTERS OF BENJAMIN RUSH 512 (Lyman H. Butterfield ed., 1951).

¹²¹ See *supra* section II.A, pp. 552–57.

¹²² See KANN, *supra* note 120, at 135 (describing the penal philosophy of reformers as tied to rehabilitation, which “required more than time; it also demanded institutional control of all aspects of inmates’ lives and environments”); *id.* at 143 (“[A] number of reformers identified [solitary confinement] as the seminal source of rehabilitation. . . . It forced the convict to contemplate his ‘forlorn condition,’ see ‘the wickedness and folly’ of his life, and open up to ‘future amendment.’” (quoting writing of Richard Vaux)). Benjamin Rush imposed solitary confinement on his own son for twenty-seven years because he appeared distressed and unkempt after a duel in which he killed his friend. LISA GUENTHER, SOLITARY CONFINEMENT 9 (2013).

¹²³ BARNES, *supra* note 10, at 134.

¹²⁴ *Id.*; HILLS, *supra* note 9; TEETERS, *supra* note 10, at 17.

¹²⁵ See TEETERS, *supra* note 10, at 19.

When originally opened, the jail consisted of large rooms, each of which housed twenty to fifty prisoners.¹²⁶ Various classes of prisoners — among them “criminals, debtors, accused and vagrants” — were all mixed together.¹²⁷ Even men and women were commingled until statutes enacted in 1789 and 1790 required separation.¹²⁸ Escapes were common,¹²⁹ the prisoners frequently were drunk (on alcohol sold to them by the keeper of the jail), and conditions were poor.¹³⁰ In one day alone, twenty gallons of alcohol entered the jail, and by some accounts prisoners would sell their own clothes for liquor.¹³¹

In 1786, the legislature enacted a statute requiring prisoners to perform “continued hard labor, publicly and disgracefully imposed.”¹³² In one famous example of such public labor, prisoners from the Walnut Street Jail carried Benjamin Franklin in a sedan chair to Independence Hall on the first day of the Constitutional Convention.¹³³

Public labor, however, quickly came under fire. By one account, prisoners sent out to work in the streets of Philadelphia were “in the practice of begging and insulting the inhabitants” while “heated with liquor.”¹³⁴ In 1788, the Prison Society recommended several changes to the Pennsylvania General Assembly: assigning “more private or even solitary labour” to prisoners, dividing male and female prisoners, and separating first-time and repeat offenders.¹³⁵ Most importantly, for present purposes, the Society announced its unanimous “opinion, that *solitary confinement to hard labor*, and a total abstinence from spirituous liquors, will prove the most effectual means of reforming these unhappy creatures.”¹³⁶

¹²⁶ BARNES, *supra* note 10, at 135.

¹²⁷ *Id.*; cf. VAUX, *supra* note 10, at 13 (noting that the Society objected to the mixture of debtors and criminals in the jail).

¹²⁸ See BARNES, *supra* note 10, at 135, 331; VAUX, *supra* note 10, at 13; see also PETER OKUN, CRIME AND THE NATION 99 (2002).

¹²⁹ TEETERS, *supra* note 10, at 28.

¹³⁰ See *id.* at 31–33.

¹³¹ VAUX, *supra* note 10, at 13.

¹³² Act of Sept. 15, 1786, ch. MCCXXI, in 12 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801, at 280, 280 (1906), quoted in BARNES, *supra* note 10, at 163–64.

¹³³ A.J. LANGGUTH, UNION 1812: THE AMERICANS WHO FOUGHT THE SECOND WAR OF INDEPENDENCE 20 (2006).

¹³⁴ CALEB LOWNES, AN ACCOUNT OF THE ALTERATION AND PRESENT STATE OF THE PENAL LAWS OF PENNSYLVANIA, CONTAINING, ALSO, AN ACCOUNT OF THE GAOL AND PENITENTIARY HOUSE OF PHILADELPHIA — AND THE INTERIOR MANAGEMENT THEREOF 6 (Boston, Young & Minns 1799).

¹³⁵ BARNES, *supra* note 10, at 86 (quoting SKETCH OF THE PRINCIPAL TRANSACTIONS OF THE “PHILADELPHIA SOCIETY FOR ALLEVIATING THE MISERIES OF PUBLIC PRISONS,” FROM ITS ORIGINS TO THE PRESENT TIME 6 (Philadelphia, Merrihew & Thompson 1859)).

¹³⁶ *Id.* at 90–91 (quoting Letter from William White et al. to The Representatives of the Freemen of the Commonwealth of Pennsylvania, in General Assembly Met (Dec. 15, 1788)).

2. *The 1790 Act.* — The state government ultimately invited the Prison Society to participate in drafting a statute to overhaul the prison system.¹³⁷ The Society's efforts culminated in a sweeping 1790 statute entitled An Act to Reform the Penal Laws of this State,¹³⁸ which marked the beginning of a system of solitary confinement in the United States.¹³⁹ The Act also turned the Walnut Street Jail into both a jail and a state prison — a facility for both holding pretrial detainees to prevent flight and punishing convicted prisoners with incarceration.¹⁴⁰

The 1790 Act required “a suitable number of cells to be constructed in the yard of the gaol”¹⁴¹ in order to “confin[e] therein the more hardened and atrocious offenders.”¹⁴² The law stipulated that the isolation cells must comprise a new structure, separate from the main jail building, and required the cells to be “six feet in width, eight feet in length, nine feet in heighth.”¹⁴³ Thirty-six solitary confinement cells were built.¹⁴⁴ The statute ordered the jailer to separate non-solitary inmates from each other “as much as the convenience of the building [would] admit.”¹⁴⁵

The Act also established mechanisms of oversight. During the colonial period and immediately after the Revolution, the sheriff of Philadelphia operated the jail.¹⁴⁶ A 1789 law transferred control to a group of government-appointed prison inspectors, and the 1790 Act superseded those provisions and stated that the mayor and aldermen of Philadelphia and two justices of the peace for the county of Philadelphia would select the prison inspectors.¹⁴⁷

Prisoners at the jail were “subject to the visitation and superintendence”¹⁴⁸ of the inspectors, two of whom would “attend at the . . . gaol at least once in each week, and . . . examine into and inspect the management of the . . . gaol, and the conduct of the . . . keeper and his deputies.”¹⁴⁹ By all accounts, “[t]he inspectors were unquestionably diligent

¹³⁷ *Id.* at 91.

¹³⁸ Act of Apr. 5, 1790, ch. MDV (1790) [hereinafter 1790 Act], reprinted in 2 LAWS OF THE COMMONWEALTH OF PENNSYLVANIA, 1700–1810, at 531 (Philadelphia, John Bioren 1810); see BARNES, *supra* note 10, at 91–93.

¹³⁹ BARNES, *supra* note 10, at 91–93.

¹⁴⁰ See TEETERS & SHEARER, *supra* note 10, at 15.

¹⁴¹ 1790 Act, *supra* note 138, § VIII, at 533.

¹⁴² *Id.* at 534.

¹⁴³ *Id.* at 533; see BARNES, *supra* note 10, at 136.

¹⁴⁴ Documents Accompanying the Commissioners' Report on Punishment & Prison Discipline: Answer of the Inspectors to Questions Proposed by the Commissioners (Apr. 19, 1828) [hereinafter Accompanying Documents], reprinted in REGISTER OF PENNSYLVANIA, *supra* note 15, at 241.

¹⁴⁵ 1790 Act, *supra* note 138, § X, at 534.

¹⁴⁶ BARNES, *supra* note 10, at 121.

¹⁴⁷ *Id.* at 122–23; 1790 Act, *supra* note 138, § XXIII, at 538.

¹⁴⁸ 1790 Act, *supra* note 138, § X, at 534.

¹⁴⁹ *Id.* § XXIV, at 539.

in their business.”¹⁵⁰ At least one of them visited the prison on a daily basis.¹⁵¹ In addition to the inspectors, the governor, state supreme court justices, mayor of Philadelphia, and all city and county judges visited the prison four times a year.¹⁵² In 1791, the inspectors were also given the power to make rules and regulations for the prison, so long as the rules were met with approval from the mayor, two aldermen, and two judges of the state supreme court or the court of common pleas.¹⁵³

For purposes of this Article’s central argument, the most important feature of the 1790 Act is that it did not authorize prison officials to punish disciplinary infractions with more than two days of solitary confinement. Under the Act, the jailer could punish prisoners who broke prison rules “by confining such offenders in the dark cells or dungeons of the said gaol, and by keeping them upon bread and water only, for any term not exceeding two days.”¹⁵⁴ The meaning of the terms “dark cells” and “dungeons” requires some explanation. The dungeons, located in the basement of the jail,¹⁵⁵ were turned into storage space after 1795.¹⁵⁶ The term “dark cells” referred to the solitary confinement cells.¹⁵⁷ Thus, under the 1790 Act, the jailer could discipline prisoners by limiting their diet and placing them in the solitary cells (or the dungeon while it existed) for no more than two days.

If the jailer thought two days insufficient “by reason of the enormity of the offence,” he needed approval from higher officials.¹⁵⁸ First, the jailer needed the official blessing of two inspectors.¹⁵⁹ Then it fell to the inspectors to “certify the nature and circumstances” of the disciplinary offense to the mayor of Philadelphia.¹⁶⁰ Even when armed with the mayor and inspectors’ approval, the jailer could not send a prisoner to

¹⁵⁰ TEETERS, *supra* note 10, at 52.

¹⁵¹ *Id.*

¹⁵² See LOWNES, *supra* note 134, at 11.

¹⁵³ Act of Sept. 23, 1791, ch. MDLXXII, § XVIII (1791) [hereinafter 1791 Act], reprinted in 4 LAWS OF THE COMMONWEALTH OF PENNSYLVANIA, 1700–1802, at 82 (Philadelphia, M. Carey & J. Bioren 1803); BARNES, *supra* note 10, at 123.

¹⁵⁴ 1790 Act, *supra* note 138, § XXI, at 537.

¹⁵⁵ Sellin, *supra* note 10, at 329.

¹⁵⁶ *Id.*; see also LOWNES, *supra* note 134, at 9 (stating that the ground floors of a portion of the prison “were formerly occupied as places of greater security, upon the general principle of dungeons, but have not been used for some time”); TEETERS, *supra* note 10, at 49.

¹⁵⁷ GEORGE F. COLE, CHRISTOPHER E. SMITH & CHRISTINA DEJONG, CRIMINAL JUSTICE IN AMERICA 351 (9th ed. 2018); see 2 ENCYCLOPEDIA OF PRISONS AND CORRECTIONAL FACILITIES 1026 (Mary Bosworth ed., 2005); see also TODD R. CLEAR, MICHAEL D. REISIG & GEORGE F. COLE, AMERICAN CORRECTIONS 46 (10th ed. 2013).

¹⁵⁸ 1790 Act, *supra* note 138, § XXI, at 537.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

the solitary cells for more than six days.¹⁶¹ In sum, the law restricted the discretion of prison officials by denying them authority to sanction prisoners with even a week of isolation. (As will be shown in Part III, today's prison officials have the power to impose solitary confinement for years on end for disciplinary and management reasons.)

3. *The 1794 Act.* — In 1794, the legislature enacted An Act for the Better Preventing of Crimes, and for Abolishing the Punishment of Death in Certain Cases.¹⁶² The Act abolished capital punishment for most offenses and established incarceration as the predominant criminal penalty.¹⁶³ “[P]unishment of death,” the preamble announced, “ought never to be inflicted, where it is not absolutely necessary to the public safety.”¹⁶⁴

Most importantly for purposes of this Article, the 1794 Act established solitary confinement for periods of months or years as the domain of criminal punishment controlled by courts and the legislature. This contrasted with solitary confinement for a matter of days, which, as we have seen, was the domain of prison discipline, in which jail officials enjoyed some discretion.

In the domain of criminal punishment, sentencing courts had substantial — but not unbounded — control over longer-term solitary confinement. The 1790 Act had reserved the isolation cells for “hardened and atrocious offenders” but did not specify who fit the bill.¹⁶⁵ The 1794 Act, in contrast, created a clearly defined solitary confinement sentencing regime based on proportionality.¹⁶⁶ Only those convicted of the most serious crimes (principally felonies punished by death until 1786) were eligible for solitary confinement.¹⁶⁷ Thus, consistent with the recommendations of Rush and Justice Bradford,¹⁶⁸ it was for the courts and the legislature to decide how long a prisoner would spend in solitude.¹⁶⁹

To define which crimes are punishable with solitary confinement, section XI of the 1794 Act cross-references the previous section of the statute, section X, which refers to “any crime (except murder of the first

¹⁶¹ *Id.*; see also ROBERT J. TURNBULL, A VISIT TO THE PHILADELPHIA PRISON 40–41 (Philadelphia 1797) (“As to the quantum of confinement necessary to reform a prisoner, it is determined at the discretion of the jailer who is notwithstanding obliged to inform the inspectors of it as soon as convenient. For a criminal who refuses to labour, it is generally forty-eight hours, and for other offences in a like proportion, according to the exigence of the case.”).

¹⁶² Act of Apr. 22, 1794, ch. MDCCLXVI (1794) [hereinafter 1794 Act], reprinted in 3 LAWS OF THE COMMONWEALTH OF PENNSYLVANIA 1700–1810, *supra* note 107, at 186.

¹⁶³ See *id.* at 186–91.

¹⁶⁴ *Id.*, pmb., at 186–87.

¹⁶⁵ 1790 Act, *supra* note 138, § VIII, at 533–34.

¹⁶⁶ See 1794 Act, *supra* note 162, §§ VII, XI, XIII, at 188–90.

¹⁶⁷ *Id.* §§ X, XI, at 189.

¹⁶⁸ See *supra* pp. 553, 557.

¹⁶⁹ 1794 Act, *supra* note 162, § XI, at 189.

degree,) which now is, or on the fifteenth day of September, one thousand seven hundred and eighty-six, was capital, or a felony of death, without benefit of clergy," in addition to a group of counterfeiting crimes.¹⁷⁰ The crimes punishable by death in 1786 included arson, burglary, murder, rape, and robbery.¹⁷¹ In essence, these provisions commanded that the most serious crimes (with the exception of first-degree murder, which remained capital) would now be punished with solitary confinement rather than death. Any crimes not encompassed within section XI's reference to section X — that is, less serious crimes — could not be punished with solitary confinement.¹⁷² The statute provided that a prisoner would remain secluded "for such part or portion of the term of his or her imprisonment, as the court in their sentence shall direct and appoint."¹⁷³

The 1794 Act not only defined which crimes merited solitary confinement but also established a solitary confinement sentencing range for those crimes.¹⁷⁴ For prisoners convicted of crimes that required isolation, a mathematical rule bound the court: the length of solitary confinement could not be less than one-twelfth, nor more than one-half, of the total sentence.¹⁷⁵ The rule is contained in section XI:

Sect. XI: *And be it further enacted by the authority aforesaid*, That every person convicted of any of the crimes last aforesaid, and who shall be confined in the gaol and penitentiary-house aforesaid, shall be placed and kept in the solitary cells thereof, on low and coarse diet, for such part or portion of the term of his or her imprisonment, as the court in their sentence shall direct and appoint: *Provided*, That it be not more than one half, nor less than one twelfth part thereof¹⁷⁶

That the statute was understood to include the limits described above — both the reservation of solitary confinement for prior capital offenses and a solitary confinement sentencing range for such crimes — is confirmed by the Duke of La Rochefoucauld, who visited Walnut Street in 1795.¹⁷⁷ He reported that for those "convicted of crimes of less importance, . . . [the] sentence does not include the above article of solitary confinement."¹⁷⁸ On the other hand, for "[t]hose condemned for crimes [that previously were punishable by] death," the "sentence always

¹⁷⁰ *Id.* §§ X, XI, at 189.

¹⁷¹ Lawrence Henry Gipson, *The Criminal Codes of Pennsylvania: The Laws of the Duke of York; The Laws of Chester (1682); The Code of 1701; The Law of 1718*, 6 J. AM. INST. CRIM. L. & CRIMINOLOGY 323, 335 tbl.II (1915).

¹⁷² See *White v. Commonwealth*, 1 Serg. & Rawle 139, 140–41 (Pa. 1814) (opinion of Tilghman, C.J.).

¹⁷³ 1794 Act, *supra* note 162, § XI, at 189.

¹⁷⁴ See *id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ IGNATIEFF, *supra* note 20, at 70.

¹⁷⁸ LA ROCHEFOUCAULD-LIANCOURT, *supra* note 119, at 9–10.

includes the article of solitary confinement, during a part of their detention, the duration of which is fixed at the pleasure of the judge, except that according to law, it must not exceed one half, nor be less than one twelfth of the whole period.”¹⁷⁹

Similarly, in an 1807 case dealing with the sufficiency of an indictment, *Commonwealth v. Boyer*,¹⁸⁰ Justice Thomas Smith of the Pennsylvania Supreme Court wrote in dicta that prisoners guilty of “offences formerly capital in *Pennsylvania*” were, under the 1794 Act, “subject only to imprisonment at hard labour, and a certain proportion of the time to confinement in the solitary cells.”¹⁸¹

The 1794 Act also contemplated that after the court fixed the total period of solitary confinement, the solitary portion of the prison sentence would be broken up into intervals, not served continuously.¹⁸² This division of the solitary sentence fell to the inspectors: the statute granted them “power to direct the infliction of the said solitary confinement at such intervals, and in such manner, as they shall judge best.”¹⁸³

The limitations established by the 1794 Act differed for two narrow categories of prisoners.¹⁸⁴ First, an inmate convicted twice of crimes that were punishable by death prior to 1786 faced life imprisonment and confinement “in the . . . solitary cells at such times, and in such manner, as the inspectors shall direct.”¹⁸⁵ A prisoner who escaped or received a pardon, and then committed another of the previously capital crimes, received a twenty-five-year sentence, with the inspectors deciding the length of solitary confinement.¹⁸⁶

4. *The 1795 Act.* — The legislature tinkered with these rules in 1795.¹⁸⁷ The 1795 Act extended the six-day provision of the 1790 statute to “any period not exceeding ten days for the first offence, nor fifteen

¹⁷⁹ *Id.* at 9.

¹⁸⁰ 1 Binn. 201 (Pa. 1807).

¹⁸¹ *Id.* at 206 (opinion of Smith, J.).

¹⁸² 1794 Act, *supra* note 162, § XI, at 189.

¹⁸³ *Id.*; see also LA ROCHEFOUCAULD-LIANCOURT, *supra* note 119, at 10–11 (“The inspectors of the prison have, however, the liberty of modifying the seasons of [the solitary] confinement, provided nevertheless, that the time mentioned in the sentence is strictly completed within the course of the detention.”); TURNBULL, *supra* note 161, at 41 (describing how those sentenced by judges to serve their sentences in solitary “are not made, however, to undergo the whole of their term of confinement at first, although the greatest proportion is generally required, before they are permitted to labour. The inspectors have the power to direct the infliction of [solitary confinement] at such intervals, and in the manner they shall judge best, provided the whole term is complied with, during the stay of the criminal in prison.”); cf. LA ROCHEFOUCAULD-LIANCOURT, *supra* note 119, at 11 (“In general, the prisoner is made to pass over a considerable part on his first arrival; because the execution of the most rigorous part of the sentence ought, in justice, to follow closely its publication, and be connected as nearly as possible, with the crime which called it forth . . .”).

¹⁸⁴ See 1794 Act, *supra* note 162, § XIII, at 190.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ See 1795 Act, *supra* note 107, § III, at 247.

days for any subsequent offence.”¹⁸⁸ The onerous procedure of obtaining the approval of the mayor and two inspectors remained in force, and the new maximums for disciplinary violations remained extremely short by today’s standards.¹⁸⁹

5. *Walnut Street Jail Sentences to Solitary, 1795–1800.* — The judges who pronounced solitary confinement sentences did so sparingly relative to the sentencing range established by the 1794 Act.¹⁹⁰ Professor Thorsten Sellin found that in 1795 and 1796, some of the convicts subject to a mandatory period of solitude under the 1794 Act “were spared that aggravation” because judges simply refused to apply the sentence.¹⁹¹

My research shows that the judges never ordered a longer period of solitary confinement than the 1795 Act allowed, and they tended to sentence at or close to the bottom of the permissible range (one-twelfth of the incarceration sentence). The Appendix to this Article collects and summarizes all of the Walnut Street Jail solitary confinement sentences between 1795 and 1800. This data comes from the Prison Sentence

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*; see *infra* p. 582. The primary sources suggest that the inspectors sometimes attempted to flout the ten-day and fifteen-day limits established by the 1795 statute. In a 1799 publication, Lownes wrote of a prisoner who refused to work. LOWNES, *supra* note 134, at 18. The inmate was sent to “the solitary cells, where he remained some weeks, without labour, bed, or furniture, of any kind, except a vessel to hold his drink, and another his mush, and a blanket.” *Id.* Confining the prisoner for “some weeks” in a solitary cell for refusing to work would seem to conflict with the statutory prohibition on sentences greater than ten or fifteen days for disciplinary offenses. See 1795 Act, *supra* note 107, § III, at 247. In any case, when “some weeks” had passed, the prisoner agreed to work, at which point “he was restored” to communal housing in the prison. LOWNES, *supra* note 134, at 18.

Lownes also wrote of “a woman, of an extreme bad character, an old offender, and very ungovernable, who had made an attempt to burn the prison.” *Id.* The inmate “stood the confinement for some weeks, with firmness,” *id.* at 18, but then relented and promised to behave, *id.* at 18–19. At that point, the jailers released her from isolation. *Id.* The punishment here — apparently a matter of weeks for attempted arson of a correctional facility — may have exceeded the legal maximum at the time, but the length of isolation is shockingly lenient by modern standards. See *infra* p. 582. In addition, a memoir of an individual confined at the jail while pending trial claims that he was held “six weeks under close confinement, and without a bed.” PATRICK LYON, THE NARRATIVE OF PATRICK LYON, WHO SUFFERED THREE MONTHS SEVERE IMPRISONMENT IN PHILADELPHIA GAOL; ON MERELY A VAGUE SUSPICION, OF BEING CONCERNED IN THE ROBBERY OF THE BANK OF PENNSYLVANIA 58 (Philadelphia, Francis & Robert Bailey 1799).

In 1796, the prison inspectors adopted a resolution that arguably conflicted with the 1794 statute. Board of Inspectors of the Prison, Inspectors of the Jail and Penitentiary House Minutes 30 (Jan. 12, 1796) (City of Philadelphia, Department of Records, City Archives, RG 38.1). The jail included a nail factory, and the inspectors resolved that inmates who failed to perform a “reasonable days [sic] work” in the nail factory three days in a row would be “seperated [sic] from the Society of their fellow Prisoners and confined in the Cells at the discretion of the Visiting Inspectors.” *Id.* The decision appears to violate the statutory requirement that the inspectors obtain the mayor’s approval for any period of solitary confinement exceeding two days. See 1790 Act, *supra* note 138, § XXI, at 537.

¹⁹⁰ See Sellin, *supra* note 10, at 329.

¹⁹¹ *Id.*

Docket, an ongoing ledger that lists the following information for each individual admitted to the jail: name, crime, date of birth, terms of the sentence, identity of the prosecutor, age of the prisoner, description of the prisoner (usually including race and place of birth), and when and how the prisoner was discharged.¹⁹² The Appendix shows a total of twenty-nine individuals sentenced to solitary confinement at the Walnut Street Jail from 1795 to 1800. During this period, a total of 748 people were committed to the jail.¹⁹³

Most prison sentences did not include solitary confinement and therefore are not included in the Appendix. In cases where the sentence did require solitary confinement, the ratio of the solitary period to the overall sentence can be readily calculated from the information in the Prison Sentence Docket. As the Appendix shows, judges usually sentenced closer to the minimum ratio of one-twelfth of the sentence than to the maximum ratio of one-half of the sentence.

6. *The Execution of Solitary Sentences.* — Even when the courts pronounced a sentence that included isolation, it may not have been meted out in full. The Appendix shows three lengthy outliers from the other sentences — two solitary confinement sentences of six years, and one of nine years. But some evidence suggests that as late as 1827, no one actually spent more than approximately sixteen months in solitary confinement in Pennsylvania.¹⁹⁴ In that year, the inspectors wrote: “We have known a convict to have been confined within a solitary cell upwards of sixteen months, and this is the longest time.”¹⁹⁵

In the same year, John Sergeant (who had represented Pennsylvania in the U.S. House of Representatives and would later be Henry Clay’s running mate in the 1832 presidential election¹⁹⁶) gave further support to the idea that no one had yet experienced multiple years of solitary confinement.¹⁹⁷ The hypothesis that “continued solitude for a considerable length of time”¹⁹⁸ might be “intolerable,” Sergeant wrote, had “never been fairly tested by experiment.”¹⁹⁹ Based on the inspectors’

¹⁹² Prison Sentence Docket (on file with author); see also Leslie C. Patrick-Stamp, *The Prison Sentence Docket for 1795: Inmates at the Nation’s First State Penitentiary*, 60 PA. HIST. 353, 354–55 (1993). Professor Patrick-Stamp notes some discrepancies between the Prison Sentence Docket and a separate document that refers to some of the same defendants, the Prisoners for Trial Docket. *Id.* at 356. The Prisoners for Trial Docket does not include sentences. See *id.* at 355.

¹⁹³ Accompanying Documents, *supra* note 144, at 246.

¹⁹⁴ *Id.* at 241.

¹⁹⁵ *Id.*

¹⁹⁶ *Sergeant, John, (1779–1852)*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONGRESS, 1774–PRESENT, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=S000246> [https://perma.cc/597A-P9TN].

¹⁹⁷ See Letter from Hon. John Sergeant (1827), quoted in VAUX, *supra* note 10, at 25–26.

¹⁹⁸ *Id.* at 26.

¹⁹⁹ *Id.* at 25.

report and Sergeant's letter, it appears likely that even convicts sentenced to prolonged solitary confinement did not suffer the full sanction.²⁰⁰

Assuming that the jailers did not always carry out solitary confinement sentences in full, it may not have been for the same reason that sentencing judges and the legislature limited solitary confinement. The statutes reflect the legislature's intent to restrict the duration of solitary confinement as both a disciplinary measure and a criminal sentence.²⁰¹ Judicial sentences also suggest a conscious attempt to shorten periods spent in solitary.²⁰² In contrast, the jail's incomplete execution of solitary sentences may have been an ad hoc response to resource constraints. As prisoners flooded to the jail, housing multiple prisoners in the same cell became unavoidable.²⁰³

C. *The Abandonment of Restraint in the Late 1820s*

This section shows that the checks and balances established in the 1790s were eroded in the Jacksonian period, when Pennsylvania rejected its previous philosophy of restraint and embraced an ideology of more prolonged isolation. Existing scholarship often assumes that Pennsylvania's practice of solitary confinement in the 1790s resembled the harsher isolation that took hold decades later. This section challenges that familiar narrative.

²⁰⁰ It should be noted that there is also countervailing evidence on this point. See Skidmore, *supra* note 16, at 172 (suggesting "frequent exceptions occurred . . . in which the prisoner, immediately on admission, was conducted to his cell, and remained in it until his discharge from prison" (omission in original) (quoting ROBERTS VAUX, REPLY TO TWO LETTERS OF WILLIAM ROSCOE, ESQUIRE, OF LIVERPOOL, ON THE PENITENTIARY SYSTEM OF PENNSYLVANIA 7 (Philadelphia, Jesper Harding 1827))); see also LA ROCHEFOUCAULD-LIANCOURT, *supra* note 119, at 10–11 ("The inspectors of the prison have, however, the liberty of modifying the seasons of this confinement, provided nevertheless, that the time mentioned in the sentence is strictly completed within the course of the detention.").

²⁰¹ See *supra* p. 563.

²⁰² See *supra* pp. 563–67.

²⁰³ See Skidmore, *supra* note 16, at 172 ("As a result of the crowded population, the prescribed system of solitary confinement was not given an extensive trial. Vaux mentions 'that not one-third of the criminals . . . could be accommodated at any one time in separate apartments. . . . Alternate seclusion and association were, therefore, indispensable, as a general rule . . .'" (first and second omissions in original) (quoting VAUX, *supra* note 200, at 7)). One cause for the shortened solitary sentences may be that some prisoners were pardoned altogether after serving only a portion of their sentence in order to alleviate overcrowding. Report on Punishment, *supra* note 15, at 208 ("The enormous increase in the number of convicts, and the insufficiency of the prison accommodations have, we understand, reduced the Inspectors to the necessity of applying, annually, for the pardon of a number of the convicts, to make room for others; and by this means it has happened, that the average term of imprisonment actually passed, has been far below the amount inflicted by the sentence of the courts.").

I. *The Change.* — The system of solitary confinement envisioned by legislators and penal reformers in the 1790s fell apart because the population of the Walnut Street Jail increased beyond its capacity, leaving no choice but to house multiple prisoners in one cell.²⁰⁴ Overcrowding derailed the orderly prison environment envisioned by the reformers.²⁰⁵ In 1795, seventy-two prisoners had been sentenced to confinement at Walnut Street; by 1815, the number had grown to 225.²⁰⁶ Riots and administrative dysfunction beset the jail.²⁰⁷ The attempt to implement solitary confinement became “a well-nigh complete failure.”²⁰⁸

In the first years of the nineteenth century, the Prison Society began to press for new facilities where limited capacity would not prevent solitary confinement.²⁰⁹ These efforts resulted in the opening of Arch Street Prison in 1817, Western State Penitentiary in 1827, and Eastern State Penitentiary in 1829.²¹⁰ In 1829, the legislature enacted a new regime of criminal laws.²¹¹ In stark contrast to the philosophy of limited solitary confinement that reigned in the 1790s, the new order prescribed solitary confinement for the entire period of incarceration.²¹²

²⁰⁴ BARNES, *supra* note 10, at 153; VAUX, *supra* note 200, at 7; Barnes, *supra* note 10, at 48; Gutterman, *supra* note 10, at 862.

²⁰⁵ BARNES, *supra* note 10, at 153; VAUX, *supra* note 200, at 7; Barnes, *supra* note 10, at 48; Gutterman, *supra* note 10, at 862.

²⁰⁶ BARNES, *supra* note 10, at 153–54.

²⁰⁷ *See id.* at 155.

²⁰⁸ Barnes, *supra* note 10, at 48.

²⁰⁹ *See* BARNES, *supra* note 10, at 155–56; TEETERS & SHEARER, *supra* note 10, at 16–17.

²¹⁰ BARNES, *supra* note 10, at 153, 157, 159.

²¹¹ Act of Apr. 23, 1829, no. 204, 1828–29 Pa. Laws 341, 341–42 [hereinafter 1829 Act]; BARNES, *supra* note 10, at 112–13.

²¹² 1829 Act, *supra* note 211, §§ 1–4, at 341–42; BARNES, *supra* note 10, at 112–13. The 1829 law shortened the period of incarceration for many crimes, including murder in the second degree, manslaughter, high treason, arson, rape, sodomy or buggery, burglary, forgery, passing counterfeit money, robbery, kidnapping, mayhem, horse stealing, and perjury. *See id.* But the Act also delivered longer periods of solitary confinement because it required the full sentence for these crimes to be spent in solitude. The following comparisons between the solitary confinement sentences imposed in the late 1790s (which are catalogued in the Appendix) and the sentences required for the same offenses under the 1829 law illustrate the point. For counterfeiting, the 1829 Act prescribed a sentencing range of one to seven years for a first offense. 1829 Act, *supra* note 211, § 4, at 343–44. The Appendix shows that of the counterfeiting sentences imposed between 1795 and 1800 that included a solitary confinement component, nine of the solitary sentences were below the 1829 minimum, nine were at the very bottom of the 1829 range (one year), and the remaining five were in the bottom half of the 1829 range. *See infra* Appendix: Walnut Street Jail Solitary Confinement Sentences, 1795–1800 [hereinafter Appendix]. None of the sentences exceeded three years or even approached the 1829 maximum of seven years. *See infra* Appendix. Other comparisons also show longer solitary sentences under the 1829 Act, as compared to the practices of the 1790s: a solitary sentence of six months imposed for arson in 1798 versus one to ten years for a first offense under the 1829 law; a solitary sentence of six months for manslaughter imposed in 1798 compared to two to six years for first offense under the 1829 law; solitary sentences of two years and six months for burglaries imposed in 1798 and 1800 respectively compared to two to ten years for a first offense under the 1829 law; solitary sentences of three years and two years for rapes imposed in 1796 and 1798 respectively compared to two to twelve years for a first offense under the 1829 law; a solitary

Beginning in the late 1820s, Eastern State and Western State Penitentiaries implemented a new and more radical form of isolation. Unlike the Walnut Street Jail, the new institutions had the space and the cells for full-scale solitary confinement.²¹³ At Eastern State, prisoners rarely left their cells.²¹⁴ Under what came to be called the Pennsylvania System, prisoners “worked, ate, and slept” in solitary cells for their entire sentence.²¹⁵ “[T]he foundation of the system,” Gustave de Beaumont and Alexis de Tocqueville wrote, was “absolute solitary confinement,” with convicts locked away day and night.²¹⁶

Eventually, sensory deprivation at Eastern State Penitentiary reached the point that guards would “plac[e] hoods over the heads of newcomers so that as they walked to their cells they would not see or be seen by anyone.”²¹⁷ One scholar described Western State as “probably the best example that has ever existed of the solitary system carried to the most vicious extreme.”²¹⁸

2. *Challenging the Conventional Narrative.* — There was a significant difference between solitary confinement in the early 1790s and in the late 1820s.²¹⁹ The strict limits on solitary confinement that reformers championed and legislators implemented in the 1790s gave way to continual solitary confinement for the totality of one’s incarceration.

sentence of five months for second-degree murder in 1796 compared to four to twelve years for a first offense under the 1829 law. See 1829 Act, *supra* note 211, § 4, at 341–46; BARNES, *supra* note 10, at 112–13; *infra* Appendix. One solitary sentence imposed in the late 1790s would have been on the high end of the range established in 1829: nine years for second-degree murder, compared to a four-to-twelve-year range for a first offense under the 1829 law. See *infra* Appendix; BARNES, *supra* note 10, at 112–13. The docket entries for 1795–1800 do not reveal which solitary sentences were imposed for first offenses, but even if all of them were for first offenses, on the whole these sentences were lenient by comparison to those of the 1829 Act.

²¹³ See BARNES, *supra* note 10, at 156–59.

²¹⁴ TEETERS & SHEARER, *supra* note 10, at 78. (Cherry Hill is another name for Eastern State.)

²¹⁵ Rothman, *supra* note 51, at 106. While solitude was complete, the cells were large by current standards (eight feet by twelve feet with ceilings that reached sixteen feet). VAUX, *supra* note 10, at 24 n.*. Each prisoner also had an individual outdoor yard measuring eight feet by twenty feet. *Id.*

²¹⁶ G. DE BEAUMONT & A. DE TOQUEVILLE, ON THE PENITENTIARY SYSTEM IN THE UNITED STATES, AND ITS APPLICATION IN FRANCE 5 (Francis Lieber ed. & trans., Philadelphia, Carey, Lea & Blanchard 1833).

²¹⁷ Rothman, *supra* note 51, at 106.

²¹⁸ BARNES, *supra* note 10, at 157.

²¹⁹ Scholars have offered different explanations for this change in penological thought and legislation. One theory is that Americans in the early years of the Republic viewed crime largely as a relic of the Old World, which democracy would eliminate. See Rothman, *supra* note 51, at 102–05. The persistence of widespread criminality well past the Founding, combined with fears of a fraying social order, frustrated those assumptions, and drove forward a more draconian system of incarceration. *Id.* Backlash against immigration and rapid population growth may also have been at play. See Samuel H. Pillsbury, *Understanding Penal Reform: The Dynamic of Change*, 80 J. CRIM. L. & CRIMINOLOGY 726, 735 (1989); Accompanying Documents, *supra* note 144, at 260 (“Europe then involved in wars, continued from time to time to pour in upon us a population to a considerable

The usual narrative of the evolution of solitary confinement in the United States neglects the contrast between the 1790s and 1820s. There is a vast body of literature regarding solitary confinement at Eastern and Western State Penitentiaries.²²⁰ Even Charles Dickens and Alexis de Tocqueville wrote about Eastern State.²²¹ However, the earlier form of solitary confinement practiced at the Walnut Street Jail has not been examined as carefully or as frequently.

Perhaps because solitary confinement at the Walnut Street Jail receives less attention than the regime that replaced it, the existing literature often assumes that the two systems of isolation were similar. Indeed, several accounts of the Walnut Street Jail's history gloss over the change that occurred in the practice of solitary confinement in the 1820s because they collapse many decades into a unified "Pennsylvania System" of total isolation.²²² Professors Negley Teeters and John Shearer, for example, acknowledge that "most of the original members of the Philadelphia Prison Society who worked to secure the system in 1790 were dead in 1829," but maintain nonetheless that "their true descendants . . . held firm in their insistence on separate confinement with labor in the prisoners' cells."²²³ Thus, we are led to believe that when the doors of Eastern State Penitentiary swung open in 1829,²²⁴ the new prison — where solitary confinement reigned in a more absolute form — instituted the "salient features" of "the Pennsylvania System of prison discipline."²²⁵ Another scholar asserts that "the 'Pennsylvania System' pioneered at Walnut Street [reached] maturity" in the 1820s.²²⁶ A recent law review article states, inaccurately, that prisoners at Walnut Street generally spent their entire sentence in solitude: "The first solitary confinement cells were constructed in 1790 at the Walnut Street prison

degree ignorant and vicious, thereby adding to the quantum of crime."). Another proposed explanation is that as prisons came to be plagued with "chaos and decay, reformers and legislatures turned to new ideas and grander penitentiaries." Meskell, *supra* note 10, at 851.

²²⁰ See, e.g., BARNES, *supra* note 10, at 156–63; TEETERS & SHEARER, *supra* note 10, at 32; VAUX, *supra* note 10, at 23–24; LeRoy B. DePuy, *The Triumph of the "Pennsylvania System" at the State's Penitentiaries*, 21 PA. HIST. 128 (1954); DePuy, *supra* note 10, at 132–33; Eugene E. Doll, *Trial and Error at Allegheny: The Western State Penitentiary, 1818–1838*, 81 PA. MAG. HIST. & BIOGRAPHY 3 (1957); Meskell, *supra* note 10, at 853–54; Schmid, *supra* note 68; Negley K. Teeters, *The Early Days of the Eastern State Penitentiary at Philadelphia*, 16 PA. HIST. 261 (1949); Jacqueline Thibaut, "To Pave the Way to Penitence": *Prisoners and Discipline at the Eastern State Penitentiary 1829–1835*, 106 PA. MAG. HIST. & BIOGRAPHY 187 (1982).

²²¹ See BEAUMONT & TOQUEVILLE, *supra* note 216, at 4–5; CHARLES DICKENS, *AMERICAN NOTES* 43–44 (New York, D. Appleton & Co. 1868) (1842).

²²² See *infra* pp. 571–72.

²²³ TEETERS & SHEARER, *supra* note 10, at 32.

²²⁴ TEETERS, *supra* note 10, at 123.

²²⁵ TEETERS & SHEARER, *supra* note 10, at 32. For other accounts that suggest a linear narrative from Walnut Street to the more intensive solitary confinement beginning in the late 1820s, see Gutterman, *supra* note 10, at 862–63; and Levenson, *supra* note 10, at 415–17.

²²⁶ DePuy, *supra* note 10, at 132–33.

in Philadelphia and featured sixteen eight-by-six-by-ten-foot cells designed to house the most serious and wicked offenders in complete isolation. *Prisoners were isolated for the entire duration of their sentences . . .*²²⁷

Substituting what ultimately came to be called “the Pennsylvania System” for the original practices at Walnut Street Jail risks overlooking the powerful checks and balances that restricted solitary confinement in the first decades of the new Republic.²²⁸ Viewed for what it was, and not for what it later became, the system of solitary confinement launched in the 1790s differed from what emerged in the late 1820s.

Challenging this common understanding of solitary confinement’s history has significant implications for the present. As I show in the following Part, a new form of long-term isolation swept the nation in the 1980s and persists to this day. At present, solitary confinement bears a greater resemblance to the regime that prevailed in Jacksonian America than to the more restrained rules that governed the Walnut Street Jail in the early years of the Republic. However, one who accepts the fallacy that long-term solitary confinement reigned in the 1790s will likely conclude that contemporary solitary confinement resembles the system in place immediately after ratification of the Bill of Rights. In truth, inmate isolation as practiced most closely in time to ratification was more limited and merciful than both the paradigm that took hold in the nineteenth century and the system that exists at present.

3. *The Decline of Long-Term Isolation.* — Many who witnessed the prolonged sensory deprivation that began in the late 1820s came away horrified.²²⁹ After Charles Dickens visited Eastern State Penitentiary in 1842, he wrote: “I hold this slow and daily tampering with the mysteries of the brain to be immeasurably worse than any torture of the body . . .”²³⁰ Deaths and madness multiplied among solitary confinement prisoners; by the middle of the century, hundreds of such cases had been catalogued.²³¹ And as the nineteenth century drew to a close, inmate isolation was regarded as a failed experiment and a “form[] of torture.”²³² By that time, solitary confinement was rare and used only on “extremely violent offenders” for short periods of time.²³³

²²⁷ Mariam Hinds & John Butler, *Solitary Confinement: Can the Courts Get Inmates Out of the Hole?*, 11 STAN. J. C.R. & C.L. 331, 334 (2015) (emphasis added) (footnote omitted).

²²⁸ See *supra* section II.B.3, pp. 563–65.

²²⁹ See, e.g., DICKENS, *supra* note 221, at 43–44; Keramet Ann Reiter, *The Most Restrictive Alternative: A Litigation History of Solitary Confinement in U.S. Prisons, 1960–2006*, 57 STUD. L. POL. & SOC’Y 71, 78 (2012).

²³⁰ DICKENS, *supra* note 221, at 44.

²³¹ Reiter, *supra* note 229, at 79.

²³² Stephen F. Eisenman, *The Resistable Rise and Predictable Fall of the U.S. Supermax*, MONTHLY REV., Nov. 2009, at 31, 35.

²³³ *Id.*

In 1890, the Supreme Court condemned solitary confinement in *In re Medley*,²³⁴ a case in which a prisoner convicted of murder sought a writ of habeas corpus on ex post facto grounds.²³⁵ At the time of Medley's offense, the relevant statute prescribed the death penalty but did not mandate solitary confinement leading up to the execution.²³⁶ Shortly afterward, the statute changed to require a convict to await his death in isolation.²³⁷ Medley was sentenced to death *and* solitary confinement.²³⁸ The Supreme Court agreed with Medley that his sentence under the new statute violated the Ex Post Facto Clause.²³⁹ In dicta, the Court described the proliferation of solitary confinement, which ended in disaster:

A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane, others, still, committed suicide, while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community.²⁴⁰

In the wake of *Medley*, solitary confinement continued its decline throughout the United States.²⁴¹ "Prolonged solitary confinement as a method of rehabilitation . . . was determined to be a profound failure."²⁴² Even at Eastern State Penitentiary, inmate seclusion was discontinued by 1913.²⁴³ In sum, from the end of the nineteenth century through the 1970s, solitary confinement teetered on the edge of extinction.²⁴⁴

²³⁴ 134 U.S. 160 (1890).

²³⁵ See *id.* at 161–62.

²³⁶ *Id.* at 167.

²³⁷ *Id.*

²³⁸ *Id.* at 164.

²³⁹ See *id.* at 174.

²⁴⁰ *Id.* at 168.

²⁴¹ See, e.g., TERRY ALLEN KUPERS, SOLITARY: THE INSIDE STORY OF SUPERMAX ISOLATION AND HOW WE CAN ABOLISH IT 21 (2017); Reiter, *supra* note 229, at 80.

²⁴² Thomas L. Hafemeister & Jeff George, *The Ninth Circle of Hell: An Eighth Amendment Analysis of Imposing Prolonged Supermax Solitary Confinement on Inmates with a Mental Illness*, 90 DENV. U. L. REV. 1, 12 (2012); see also *id.* at 11–12 ("[E]very state that tried the Pennsylvania model between 1830 and 1880 subsequently abandoned it within a few years, with the exception of Pennsylvania. By the 1880s, other than [Eastern State Penitentiary] itself, which continued to employ the 'silent model' until 1913, prisons based on the Pennsylvania model had completely disappeared. Prolonged solitary confinement as a method of rehabilitation, in other words, was determined to be a profound failure. The systematic use of prolonged solitary confinement in correctional systems in the United States remained largely dormant through most of the twentieth century. Likewise, even the selective use of extended solitary confinement as a means of imposing discipline within relatively traditional prisons began to lose favor. Authors of a study on prison psychiatry in 1939 declared, perhaps optimistically, that around-the-clock, prolonged solitary confinement was no longer practiced by any 'civilized nation.'" (footnotes omitted)).

²⁴³ See KUPERS, *supra* note 241, at 21; Hafemeister & George, *supra* note 242, at 12.

²⁴⁴ See KUPERS, *supra* note 241, at 21.

III. SOLITARY CONFINEMENT IN THE PRESENT

The 1980s and 1990s witnessed a resurgence of solitary confinement, as tough-on-crime policies ruled the day.²⁴⁵ The new era began after a stabbing of two officers at the federal prison in Marion, Illinois, in 1983.²⁴⁶ In response, prison officials confined inmates to their cells with very little human interaction; initially, this confinement was meant as a direct response to the stabbings, but it became permanent over the next twenty-three years.²⁴⁷ Other prison systems soon followed suit by expanding solitary confinement and constructing supermaxes, prisons designed solely for long-term isolation.²⁴⁸ At present, over forty states and the federal government operate supermax facilities.²⁴⁹

In contrast to the system of solitary confinement at the Walnut Street Jail, the present order was not brought about through legislative enactments or vigorous public discourse.²⁵⁰ Rather, the current system of solitary confinement took hold principally because “corrections officials embraced [isolation] as a sanction for misbehavior in prison.”²⁵¹

This Part demonstrates that the present regime of solitary confinement in many American prisons lacks the checks and balances that limited the discretion of prison officials — and helped curtail the length of inmate seclusion — in the 1790s. In contrast to the sophisticated constraints that operated in the early Republic, prison staff and administrators have much greater discretion over long-term isolation. This level of discretion results largely from current prison-conditions law, the linchpin of which is judicial deference to the administrative decisions of prison officials.²⁵² The Supreme Court has never decided

²⁴⁵ *Id.* at 25; David C. Fathi, *The Common Law of Supermax Litigation*, 24 PACE L. REV. 675, 675–76 (2004).

²⁴⁶ KUPERS, *supra* note 241, at 7, 25; *see also* KERAMET REITER, 23/7: PELICAN BAY PRISON AND THE RISE OF LONG-TERM SOLITARY CONFINEMENT (2016).

²⁴⁷ KUPERS, *supra* note 241, at 7.

²⁴⁸ *Id.* at 8, 25; Fathi, *supra* note 245, at 675.

²⁴⁹ KUPERS, *supra* note 241, at 25; *see also* Keramet Reiter, *Supermax Administration and the Eighth Amendment: Deference, Discretion, and Double Bunking, 1986–2010*, 5 U.C. IRVINE L. REV. 89, 91 (2015).

²⁵⁰ *See* Alexander A. Reinert, *Solitary Troubles*, 93 NOTRE DAME L. REV. 927, 940 (2018); *see also* REITER, *supra* note 246, at 99.

²⁵¹ Reinert, *supra* note 250, at 940; *see also* REITER, *supra* note 246, at 99 (stating that in the construction of California’s supermax, “[p]rison officials had successfully negotiated a prison-building process that minimized their accountability to legislators — or, for that matter, to anyone else”).

²⁵² As Charles Hogle and I have written previously, “[j]udicial deference to prison staff manifests in virtually every standard for constitutional claims arising from official misconduct in prisons and jails, and it often hinders the vindication of prisoners’ constitutional rights.” David M. Shapiro & Charles Hogle, *The Horror Chamber: Unqualified Impunity in Prison*, 93 NOTRE DAME L. REV. 2021, 2037 (2018); *see also* Andrea C. Armstrong, *Race, Prison Discipline, and the Law*, 5 U.C. IRVINE L. REV. 759, 759 (2015) (“Judicial oversight of prison administrative decisions is deferential in almost every respect.”).

whether solitary confinement can constitute cruel and unusual punishment; thus, as Professor Alexander Reinert observes, “the Constitution has failed to govern the use of solitary confinement in prisons and jails,”²⁵³ leaving corrections officials “free to dispense extreme isolation as punishment whenever they see fit.”²⁵⁴

The modern practice of solitary confinement contrasts with the more measured regime of the 1790s, both because constraints on administrative discretion have been dismantled, and because the corrections bureaucracy sometimes wields its new power by ordering periods of solitary confinement that would have been unthinkable in the 1790s. At the Walnut Street Jail, judicial and legislative control over solitary confinement prevented jailers from inflicting long-term isolation. In contemporary prisons, however, penal administrators enjoy substantial discretion to seclude inmates for many years and decades — far longer periods than any Walnut Street prisoner endured. This is not to suggest that most solitary confinement prisoners remain isolated for such periods — a shorter duration is far more common.²⁵⁵ But many prisoners do remain in solitary for much longer periods than what would have been conceivable in the 1790s.

Section III.A demonstrates that contemporary solitary confinement generally entails near-total isolation. In this respect, the practice has remained more or less intact since the 1790s. While solitary no longer means a diet of bread and water, and prisoners may occasionally be permitted to leave their cells to exercise or shower, the essential features remain the same: human isolation and sensory deprivation. Section III.B shows that some inmates today — in stark contrast to Walnut Street Jail prisoners — remain in solitary confinement for continuous, indeterminate periods of time. This prolonged solitude can induce and exacerbate mental illness, sometimes even causing prisoners to kill or otherwise harm themselves.²⁵⁶

In contrast to the legal order of the 1790s, long-term solitary confinement is rarely imposed as a criminal punishment. Instead, as shown in section III.C, the prison bureaucracy has absorbed long-term solitary confinement, using it as an administrative tool to control and manage inmates. Section III.D argues that this transformation of solitary confinement into an administrative function grants correctional staff very broad discretion. Unlike officials at the Walnut Street Jail, staff in some contemporary prisons order long periods of solitary confinement for

²⁵³ Reinert, *supra* note 250, at 933.

²⁵⁴ *Id.* at 929.

²⁵⁵ See THE ASS'N OF STATE CORR. ADM'RS & THE LIMAN CTR. FOR PUB. INTEREST LAW AT YALE LAW SCH., REFORMING RESTRICTIVE HOUSING: THE 2018 ASCA-LIMAN NATIONWIDE SURVEY OF TIME-IN-CELL 14 (2018) [hereinafter 2018 ASCA-LIMAN SURVEY], https://law.yale.edu/sites/default/files/documents/pdf/Liman/asca_liman_2018_restrictive_housing_revised_sept_25_2018_-_embargoed_unt.pdf [https://perma.cc/DQW3-QD7M].

²⁵⁶ See *infra* section III.A.2, pp. 580–81.

managerial and disciplinary purposes, while courts and high officials often fail to provide meaningful checks and balances against arbitrary isolation. Nor does proportionality play a muscular role in controlling the length of isolation. Largely freed from rigorous oversight, prison officials today enjoy substantial power to send prisoners to solitary confinement for indefinite periods of time.

In short, the prison reformers in the founding era who introduced isolation as criminal punishment in America would disapprove of solitary confinement's modern incarnation in many state prison systems. They understood that without strong checks and balances, forced seclusion could devolve into cruelty. Contemporary American prisons too often prove that point.

This analysis comes with a caveat: contemporary solitary confinement is neither uniform nor static. Many states have moved to curtail solitary confinement in the past several years through reforms that shorten isolation, improve oversight, and curb discretion.²⁵⁷ Therefore, the discussion that follows sets forth common — but not universal — features of contemporary solitary confinement.

*A. As in the 1790s, Solitary Confinement Entails
Sensory Deprivation and the Loss of Human Interaction*

1. *Conditions.* — Solitary confinement goes by many names; a partial list includes: supermax prisons, disciplinary segregation, Special Housing Units (SHUs), Special Management Units (SMUs), Special Control Units (SCUs), Administrative Segregation Units (ASUs or Ad-Seg), and Intensive Management Units.²⁵⁸ Supermaxes are defined as facilities that “house prisoners in virtual isolation and subject them to almost complete idleness for extremely long periods of time. Supermax prisoners rarely leave their cells. . . . They eat all of their meals alone in their cells, and typically no group or social activity of any kind is permitted.”²⁵⁹

Prison policies often allow prisoners out of their cells for an hour a day,²⁶⁰ but those can be violated in practice, leaving prisoners in continuous lockdown.²⁶¹ In some respects, conditions may vary from state to

²⁵⁷ See 2018 ASCA-LIMAN SURVEY, *supra* note 255, at 60–66.

²⁵⁸ GUENTHER, *supra* note 122, at 161.

²⁵⁹ Craig Haney, *Mental Health Issues in Long-Term Solitary and “Supermax” Confinement*, 49 CRIME & DELINQUENCY 124, 126 (2003).

²⁶⁰ *Id.*

²⁶¹ See Greg Rienzi, *Thousands of American Prisoners Spend 23 Hours a Day in Solitary Confinement*, JOHNS HOPKINS MAG. (Spring 2015), <https://hub.jhu.edu/magazine/2015/spring/is-solitary-confinement-ethical> [<https://perma.cc/YZ93-JB8X>] (“[I]f there’s a staffing shortage or unrest in another part of the prison that is demanding resources, then those prisoners [in solitary] are not going to be let out That happens too frequently, so inmates might go weeks without getting out.”); *Solitary Inmates Don’t Get Legally Required Amount of Exercise in NYC Jails*,

state and facility to facility — a prisoner in a SHU might have more out-of-cell exercise time than a prisoner in a SMU, or vice versa.²⁶² Nonetheless, solitary confinement is generally understood to refer to the practice of keeping inmates alone in a cell, in conditions designed to sharply curtail human interaction, for twenty-two to twenty-four hours a day on average.²⁶³

Prisoners in solitary confinement may not “even touch another person while in the units,” except when correctional officers apply or remove handcuffs.²⁶⁴ The moments of human interaction “are almost always conducted through the cell door or conducted by video, speaker, or telephone through a thick glass window.”²⁶⁵ Even cuffing and uncuffing occurs through a slot in the cell door.²⁶⁶ On the rare occasions when prisoners interact with others outside of a cell (for example, during appointments with prison medical staff), they may be secured “in multiple forms of physical restraints (e.g., ankle chains, belly or waist chains, handcuffs).”²⁶⁷ In some cases, appointments with medical and mental health providers occur by videoconference to further reduce human contact.²⁶⁸ Supermaxes may be designed so that prisoners do not even see guards when they leave their cells for a shower or exercise; instead, the guards open and close doors by pressing buttons in a control room.²⁶⁹ When officers pass by cell fronts to deliver meals, the officers do not interact with the prisoners; instead, they pass the meals through a slit in a solid metal door.²⁷⁰

HUFFPOST (Aug. 6, 2014), https://www.huffingtonpost.com/entry/solitary-inmates-exercise-nyc_n_5655953.html [<https://perma.cc/Y7PD-YU5A>]. An oversight board in New York City found that “access to recreation time . . . is elusive in large part because guards assigned to escorting inmates to and from recreation frequently fail to notify prisoners in the morning to sign up.” *Id.*

²⁶² See *Solitary Confinement Facts*, AM. FRIENDS SERV. COMM., <https://www.afsc.org/resource/solitary-confinement-facts> [<https://perma.cc/9XTY-SGY9>].

²⁶³ FAQ, SOLITARY WATCH, <http://solitarywatch.com/facts/faq> [<https://perma.cc/7HCJ-RU69>].

²⁶⁴ Angela A. Allen-Bell, *Perception Profiling & Prolonged Solitary Confinement Viewed Through the Lens of the Angola 3 Case: When Prison Officials Become Judges, Judges Become Visually Challenged, and Justice Becomes Legally Blind*, 39 HASTINGS CONST. L.Q. 763, 769 (2012) (quoting Laura Sullivan, *In U.S. Prisons, Thousands Spend Years in Isolation*, NPR (July 26, 2006, 5:36 PM), <https://www.npr.org/templates/story/story.php?storyId=5582144> [<https://perma.cc/MHN8-TPCM>]); accord GUENTHER, *supra* note 122, at 163.

²⁶⁵ ALISON SHAMES ET AL., VERA INST. OF JUSTICE, SOLITARY CONFINEMENT: COMMON MISCONCEPTIONS AND EMERGING SAFE ALTERNATIVES 10 (2015), https://storage.googleapis.com/vera-web-assets/downloads/Publications/solitary-confinement-common-misconceptions-and-emerging-safe-alternatives/legacy_downloads/solitary-confinement-misconceptions-safe-alternatives-report_1.pdf [<https://perma.cc/M375-R2MC>].

²⁶⁶ GUENTHER, *supra* note 122, at 163.

²⁶⁷ Haney, *supra* note 259, at 126.

²⁶⁸ GUENTHER, *supra* note 122, at 163.

²⁶⁹ *Id.*

²⁷⁰ SHAMES ET AL., *supra* note 265, at 10; Elizabeth Bennion, *Banning the Bing: Why Extreme Solitary Confinement Is Cruel and Far Too Usual Punishment*, 90 IND. L.J. 741, 742–43 (2015).

Solitary confinement commonly entails not only social isolation, but sensory deprivation as well.²⁷¹ “[I]t is not uncommon for prisoners to spend decades alone in windowless cement rooms with perimeters approximately the size of a parking space or a king-sized bed for twenty-three hours a day.”²⁷² The “furnishings” may consist of only a sink, a toilet, and a platform for a mattress, all made of metal.²⁷³ Solitary confinement prisoners may have little, if any, access to natural light. There may be a tiny window or no window at all.²⁷⁴ Fluorescent bulbs can illuminate the cells day and night.²⁷⁵ Isolation cells in Illinois’s Stateville Correctional Center exemplify solitary confinement quarters: small chambers with “gray walls, a solid steel door, no window, no clock, and a light kept on twenty-four hours a day.”²⁷⁶

If solitary prisoners are allowed to exercise at all,²⁷⁷ typically they must do so alone.²⁷⁸ Supermaxes commonly use “cages” (often called “dog pens” or “dog runs”²⁷⁹) for solitary inmates, not the more spacious outdoor yards in which general population prisoners exercise.²⁸⁰

Other conditions may worsen the experience of isolation. Some solitary confinement prisoners, perhaps in “desperation for external feedback,” have been known to hurl “feces, urine, and semen” at each other.²⁸¹ Solitary confinement prisoners typically eat their meals in their cells, and that can mean right by a toilet, in close quarters, amid poor sanitation.²⁸² The noise level in solitary confinement can also be a

²⁷¹ See Allen-Bell, *supra* note 264, at 769; Bennion, *supra* note 270, at 742–43.

²⁷² Bennion, *supra* note 270, at 742; accord Allen-Bell, *supra* note 264, at 769 (stating that solitary confinement prisoners “are often housed in small, windowless cells with hardly any natural light”).

²⁷³ SHAMES ET AL., *supra* note 265, at 8.

²⁷⁴ *Id.*

²⁷⁵ *Id.*; see also CAROLINE ISAACS & MATTHEW LOWEN, AM. FRIENDS SERV. COMM. — ARIZ., BURIED ALIVE: SOLITARY CONFINEMENT IN ARIZONA’S PRISONS AND JAILS 11 (2007) (“Prisoners often complain of the lights being left on 24 hours per day, causing them to lose track of time entirely.”).

²⁷⁶ Atul Gawande, *Hellhole*, NEW YORKER (Mar. 23, 2009), <https://www.newyorker.com/magazine/2009/03/30/hellhole> [<https://perma.cc/9Q2C-QP8P>].

²⁷⁷ See THE LIMAN PROGRAM, YALE LAW SCH. & ASS’N OF STATE CORR. ADM’RS, TIME-IN-CELL: THE ASCA-LIMAN 2014 NATIONAL SURVEY OF ADMINISTRATIVE SEGREGATION IN PRISON 42 (2015) [hereinafter 2014 ASCA-LIMAN SURVEY]; Rienzi, *supra* note 261; *Solitary Inmates Don’t Get Legally Required Amount of Exercise in NYC Jails*, *supra* note 261.

²⁷⁸ See Haney, *supra* note 259, at 126; Jeffrey L. Metzner & Jamie Fellner, *Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethics*, 38 J. AM. ACAD. PSYCHIATRY L. 104, 104 (2010). A national survey of administrative segregation conditions found that “[i]n the majority of jurisdictions, the time allotted per week ranged from 5 to 7 hours; in the 36 identifying a standard amount for all people in administrative segregation, the median amount of exercise permitted was 5 hours per week.” 2014 ASCA-LIMAN SURVEY, *supra* note 277, at 41.

²⁷⁹ GUENTHER, *supra* note 122, at 163.

²⁸⁰ See 2014 ASCA-LIMAN SURVEY, *supra* note 277, at 47.

²⁸¹ Hafemeister & George, *supra* note 242, at 37.

²⁸² See William Blake, *A Sentence Worse Than Death*, in HELL IS A VERY SMALL PLACE: VOICES FROM SOLITARY 25, 30 (Jean Casella, James Ridgeway & Sarah Shourd eds., 2016).

stressor.²⁸³ According to one prisoner, “you hear other inmates yelling all day long constantly, it never stops.”²⁸⁴

It has been argued that solitary confinement promotes prison security.²⁸⁵ Evaluating that argument is beyond the scope of this Article, but empirical support for the claim appears questionable and mixed. Limited studies in Texas, Arizona, and Ohio suggest a correlation between placing gang members in solitary and a decrease in prison violence, but the author of these studies notes that this evidence base is “far from conclusive.”²⁸⁶ On the other hand, there is some evidence that “[p]risons with higher rates of restrictive housing [have] higher levels of facility disorder.”²⁸⁷ When Maine dramatically decreased the use of solitary confinement, violence, prisoner misbehavior, and injuries to prison employees decreased.²⁸⁸ A longitudinal evaluation of the effect of solitary confinement in Ohio indicated no “significant effect on the prevalence or incidence of subsequent violent, nonviolent, or drug misconduct,” calling into question the use of solitary to improve institutional security.²⁸⁹

²⁸³ See KATIE ROSE QUANDT, THE ACLU OF NEV., SOLITARY WATCH & NEV. DISABILITY ADVOCACY & LAW CTR., UNLOCKING SOLITARY CONFINEMENT: ENDING EXTREME ISOLATION IN NEVADA STATE PRISONS 30 (2017).

²⁸⁴ *Id.*

²⁸⁵ See, e.g., Ana Ceballos, *Florida’s Prison System Is “Widely Overusing” Solitary Confinement to Punish Inmates, Lawsuit Says*, ORLANDO WEEKLY (May 8, 2019, 2:45 PM), <https://www.orlandoweekly.com/Blogs/archives/2019/05/08/floridas-prison-system-is-widely-overusing-solitary-confinement-to-punish-inmates-lawsuit-says> [<https://perma.cc/D5NF-25CR>] (quoting a Department of Corrections spokeswoman saying that solitary confinement is used for security reasons).

²⁸⁶ David C. Pyrooz, *Using Restrictive Housing to Manage Gangs in U.S. Prisons*, U.S. DEP’T OF JUSTICE (June 30, 2018), <https://www.nij.gov/topics/corrections/institutional/Pages/using-restrictive-housing-to-manage-gangs-in-us-prisons.aspx> [<https://perma.cc/A83A-S84B>].

²⁸⁷ ALLEN BECK, U.S. DEP’T OF JUSTICE, USE OF RESTRICTIVE HOUSING IN U.S. PRISONS AND JAILS, 2011–12, at 1 (2015).

²⁸⁸ *Why Reducing Solitary Confinement Helps Inmates, Makes Prisons Safer*, CORRECTIONS ONE (Feb. 5, 2016), <https://www.correctionsone.com/facility-design-and-operation/articles/72195187-why-reducing-solitary-confinement-helps-inmates-makes-prisons-safer> [<https://perma.cc/694S-EPG3>]; see also *Reassessing Solitary Confinement II: The Human Rights, Fiscal, and Public Safety Consequences: Hearing Before the Subcomm. on the Constitution, Civil Rights and Human Rights of the S. Comm. on the Judiciary*, 113th Cong. (2014) (testimony of Marc A. Levin, Esq., Director of the Center for Effective Justice at the Texas Public Policy Foundation) <https://www.judiciary.senate.gov/imo/media/doc/02-25-14LevinTestimony.pdf> [<https://perma.cc/6J4G-KAP8>].

²⁸⁹ Ryan M. Labrecque, *The Effect of Solitary Confinement on Institutional Misconduct: A Longitudinal Evaluation* 118 (July 2, 2015) (unpublished Ph.D. dissertation, University of Cincinnati), <https://www.ncjrs.gov/pdffiles1/nij/grants/249013.pdf> [<https://perma.cc/WQP5-JPV2>]; see also Benjamin Steiner & Calli M. Cain, *The Relationship Between Inmate Misconduct, Institutional Violence, and Administrative Segregation: A Systematic Review of the Evidence*, in RESTRICTIVE HOUSING IN THE U.S. 165, 179 (U.S. Dep’t of Justice ed., 2016) (“A greater use of segregation . . . is not associated with reductions in facility or systemwide misconduct and violence.”).

2. *Mental and Physical Effects.* — Solitary confinement can cause “an extremely broad range of harmful psychological reactions.”²⁹⁰ These include: “negative attitudes and affect, insomnia, anxiety, panic, withdrawal, hypersensitivity, ruminations, cognitive dysfunction, hallucinations, loss of control, irritability, aggression, and rage, paranoia, hopelessness, lethargy, depression, a sense of impending emotional breakdown, self-mutilation, and suicidal ideation and behavior.”²⁹¹ Solitary confinement can drive previously healthy inmates to mental illness, in addition to worsening preexisting psychiatric conditions.²⁹² Solitary confinement cells house two to eight percent of the American prison population, but account for almost half of all inmate suicides.²⁹³ Inmates in isolation may also cut or otherwise harm themselves.²⁹⁴

While no one has directly studied the neurological effects of solitary confinement on humans, current evidence suggests that isolation may

²⁹⁰ Haney, *supra* note 259, at 130.

²⁹¹ *Id.* at 130–31 (citations omitted); *see also* Haney, *supra* note 120, at 370 (noting “the broad consensus that solitary confinement has substantial negative psychological effects on prisoners”). One notable exception, often called the “Colorado Study,” found limited psychological harm — and even some improvement — associated with solitary confinement. MAUREEN L. O’KEEFE ET AL., ONE YEAR LONGITUDINAL STUDY OF THE PSYCHOLOGICAL EFFECTS OF ADMINISTRATIVE SEGREGATION, at ii (2010). That study, however, has been described as “riddled with serious methodological problems that limited its value and made the meaning of the results impossible to decipher.” Haney, *supra* note 120, at 369; *see also id.* at 378–98.

²⁹² Bennion, *supra* note 270, at 743. One expert on inmate mental health found that “for many of the inmates so housed, incarceration in solitary cause[s] either severe exacerbation or recurrence of preexisting illness, or the appearance of an acute mental illness in individuals who had previously been free of any such illness.” Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J.L. & POL’Y 325, 333 (2006).

²⁹³ Bennion, *supra* note 270, at 757. To commit suicide, one solitary confinement prisoner “stood on top of the cement bunk and dove headfirst into the toilet, over and over, until he crushed his skull in.” Nathaniel Penn, *Buried Alive: Stories from Inside Solitary Confinement*, GQ (Mar. 2, 2017), <https://www.gq.com/story/buried-alive-solitary-confinement> [<https://perma.cc/AQ3L-NAXQ>]. Another recounts witnessing “[a]n older man cut his wrists. He filled a Styrofoam cup with blood and flung it on the glass of the door and all over his room, then lay down and died. I watched all of this through the crack on the side of my cell door.” *Id.*

²⁹⁴ One inmate writes: “I’ve had these cell walls make me see delusions. I’ve tried to kill myself a few times. I’ve smeared my own blood on my cell walls and ceiling. I would cut myself just to see my own blood.” Penn, *supra* note 293. Another “insert[s] paper clips completely into his abdomen — to relieve his anxiety and to be removed from his cell for medical treatment.” SASHA ABRAMSKY & JAMIE FELLNER, HUMAN RIGHTS WATCH, ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS 145 (2003), *quoted in* Elizabeth Alexander, “*This Experiment, So Fatal*”: Some Initial Thoughts on Strategic Choices in the Campaign Against Solitary Confinement, 5 U.C. IRVINE L. REV. 1, 13 (2015). A former Illinois solitary confinement prisoner would “routinely mutilate[] himself, and at one point cut off one of his testicles and hung it from a string on his cell door.” Jean Casella & James Ridgeway, *Illinois Prisoner Says Years of Solitary Confinement Caused Mental Illness, Self-Mutilation*, SOLITARY WATCH (Sept. 2, 2011), <http://solitarywatch.com/2011/09/02/illinois-inmate-claims-years-of-solitary-confinement-have-led-to-mental-illness-and-self-mutilation/> [<https://perma.cc/4X2D-MN4B>].

injure the brain and cause it to shrink.²⁹⁵ First, “conditions of severe and sustained stress” like those experienced by solitary confinement prisoners harm the hippocampus, which “physically shrinks,”²⁹⁶ and “begins to fail in its functioning, with loss of emotional and stress control, loss of stress regulation, sometimes defects in memory, spatial orientation, and other cognitive processes, and in extreme cases, lasting changes in mood, including severe depression.”²⁹⁷ Second, isolation has been shown to affect the neurological structure of rodents, with their brains exhibiting “smaller neurons, with fewer branches in the hippocampus and cerebral cortex regions, which affect learning, memory, and executive brain functions.”²⁹⁸ This evidence could support an inference that “each of the key features of solitary confinement — lack of meaningful interaction with others and the natural world and lack of physical activity and visual stimulation — ‘is by itself sufficient to change the brain . . . dramatically depending on whether it lasts briefly or is extended.’”²⁹⁹

In addition to neurological harm, other physical effects of isolation include: severe headaches, heart palpitations, digestive problems, insomnia, and extreme weight loss.³⁰⁰ Studies also report oversensitivity to common stimuli, which can include an inability to stand ordinary noises, resulting in dramatic overreactions to sound.³⁰¹

*B. Some Contemporary Periods of Solitary Confinement
Would Not Have Been Conceivable at the Walnut Street Jail*

As section II.B has demonstrated, it does not appear that prisoners in the 1790s ever remained in solitary confinement for years on end. Howard recoiled at the practice of placing prisoners in solitary confinement for one year,³⁰² Justice Bradford favored a thirty-day maximum for most inmates,³⁰³ and there is evidence no one spent more than sixteen months in solitary confinement in Pennsylvania until at least the late 1820s.³⁰⁴

²⁹⁵ See Jules Lobel & Huda Ahil, *Law & Neuroscience: The Case of Solitary Confinement*, 147 DÆDALUS, Fall 2018, at 61, 68–70.

²⁹⁶ *Id.* at 69.

²⁹⁷ *Id.* at 69–70.

²⁹⁸ *Id.* at 70.

²⁹⁹ *Id.* (omission in original) (quoting Brief of Medical and Other Scientific and Health-Related Professionals as *Amici Curiae* in Support of Respondents and Affirmance at 24–25, *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017) (No. 15-1358)).

³⁰⁰ Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 CRIME & JUST. 441, 488–89 (2006); see also Haney, *supra* note 259, at 131–33.

³⁰¹ Scharff Smith, *supra* note 300, at 489.

³⁰² See HOWARD, *supra* note 19, at 169.

³⁰³ See BRADFORD, *supra* note 98, at 174.

³⁰⁴ See *supra* p. 567.

Solitary confinement in modern prisons can last only a few weeks for some prisoners,³⁰⁵ but others face terms that far exceed anything imaginable at the Walnut Street Jail. In New Mexico, as of 2013, the average supermax term approached three years.³⁰⁶ In Texas, as of 2015, the average administrative segregation term was almost four years, with over 100 prisoners remaining there for over twenty years.³⁰⁷ In California, as of 2011, over 500 prisoners at the supermax prison had lived in isolation for over ten years.³⁰⁸ At Red Onion State Prison in Virginia, solitary terms ranged from two weeks to almost seven years as of 2012.³⁰⁹ The fifty-two prisoners in the United States executed in 2009 spent an average of fourteen years in solitary confinement prior to death.³¹⁰ A 2018 study of forty-three prison systems found that nearly 2000 individuals remained in restrictive housing (where they were kept in their cells for twenty-two hours or more each day) for over six years.³¹¹ One prisoner at the federal supermax prison in Colorado lived in isolation for thirty-six years, until his death in 2019.³¹² Another inmate spent forty-three years in solitary.³¹³ A third remained in seclusion for forty-two years and died three days after release.³¹⁴

In the past several years, many state prison systems have made significant progress in curtailing the length and arbitrariness of solitary confinement.³¹⁵ Nonetheless, today's reality presents a stark contrast with seclusion in the early Republic. In 1827, Sergeant called the effects of long-term solitary confinement "conjectural"³¹⁶ and "never . . . fairly tested by experiment."³¹⁷ In 2019, the experiment is conducted on thousands of people each day.

³⁰⁵ 2018 ASCA-LIMAN SURVEY, *supra* note 255, at 14.

³⁰⁶ THE N.M. CTR. ON LAW & POVERTY & THE ACLU OF N.M., *INSIDE THE BOX: THE REAL COSTS OF SOLITARY CONFINEMENT IN NEW MEXICO'S PRISONS AND JAILS* 5 (2013).

³⁰⁷ ACLU OF TEX. & TEX. CIVIL RIGHTS PROJECT — HOUSTON, *A SOLITARY FAILURE: THE WASTE, COST AND HARM OF SOLITARY CONFINEMENT IN TEXAS* 2 (2015).

³⁰⁸ Reiter, *supra* note 249, at 119.

³⁰⁹ Anita Kumar, *Va. Prisons' Use of Solitary Confinement Is Scrutinized*, WASH. POST (Jan. 7, 2012), https://www.washingtonpost.com/local/dc-politics/va-prisons-use-of-solitary-confinement-is-scrutinized/2011/11/28/gIQAkKHuhP_story.html?noredirect=on&utm_term=.180bc8572303 [<https://perma.cc/WXV3-NPQ4>].

³¹⁰ Rachel Meeropol, *Death Row: America's Torture Chamber*, THE GUARDIAN (Oct. 10, 2011, 1:00 PM), <https://www.theguardian.com/commentisfree/cifamerica/2011/oct/10/death-row-torture-chamber> [<https://perma.cc/2B37-NTNX>].

³¹¹ 2018 ASCA-LIMAN SURVEY, *supra* note 255, at 4–5.

³¹² Sam Roberts, *Thomas Silverstein, Killer and Most Isolated Inmate, Dies at 67*, N.Y. TIMES (May 21, 2019), <https://nyti.ms/2WWME9X> [<https://perma.cc/JM26-AQJX>].

³¹³ Rice, *supra* note 8.

³¹⁴ Helen Vera, *After 42 Years in Solitary, Herman Wallace Dies a Free Man*, ACLU (Oct. 4, 2013, 1:29 PM), <https://www.aclu.org/blog/smart-justice/mass-incarceration/after-42-years-solitary-herman-wallace-dies-free-man> [<https://perma.cc/EB5B-ZKGF>].

³¹⁵ 2018 ASCA-LIMAN SURVEY, *supra* note 255, at 60–66.

³¹⁶ Letter from Hon. John Sergeant, *supra* note 197, at 26.

³¹⁷ *Id.* at 25.

*C. Solitary Confinement Functions as an
Administrative Tool Rather than as Criminal Punishment*

Once controlled by sentencing courts, long-term seclusion has become the province of officials in the corrections bureaucracy, who use isolation as a prison management tool. Guided by statutory limits, Pennsylvania judges fixed solitary confinement sentences, but contemporary sentencing judges have no such role.³¹⁸ Rather, courts pronounce a prison sentence and leave conditions, including solitude, almost entirely to prison staff.³¹⁹

This transfer of power from courts to administrators reflects a shift in the purpose of isolation. In the 1790s, solitary confinement functioned principally as criminal punishment, with the duration calibrated to the gravity of the offense.³²⁰ Breaking prison rules could trigger short bursts of solitary confinement, but the disciplinary role of solitary confinement was secondary to its operation as a criminal sanction imposed by courts acting pursuant to statutes.³²¹ In modern prisons, solitary confinement does not serve to punish crime at all — its purposes are to maintain order and to discipline offenders for violating rules.³²² In other words, solitary confinement has been bureaucratized, changing from a tool of criminal punishment to one of penal administration.

I. Prison Officials' Authority over Solitary Confinement. — Modern sentencing laws delegate virtually all decisions regarding conditions of confinement to the executive branches of federal and state governments, which operate prison systems. By statute, when a defendant in a federal case receives a sentence of incarceration, he or she is “committed to the custody of the Bureau of Prisons until the expiration of the term imposed.”³²³ The Bureau of Prisons “may designate any available penal or correctional facility that meets minimum standards of health and habitability.”³²⁴ The agency’s regulations also state that it will decide when to place prisoners in solitary confinement.³²⁵ State sentencing generally works the same way — the sentencing court has no role in deciding what portion of a sentence, if any, a prisoner spends in solitary confinement. The sentencing court commits a convicted defendant to

³¹⁸ Reiter, *supra* note 249, at 91.

³¹⁹ *Id.*

³²⁰ See *supra* section II.B.3, pp. 563–65.

³²¹ See *supra* section II.B.6, pp. 567–68.

³²² See Reiter, *supra* note 249, at 93.

³²³ 18 U.S.C. § 3621(a) (2012).

³²⁴ *Id.* § 3621(b).

³²⁵ See 28 C.F.R. §§ 541.20–.33 (2019).

the custody of the corrections department, which determines where and in what conditions the prisoner will live.³²⁶

2. *Solitary Confinement as a Prison Management Tool.* — Solitary confinement takes two forms — disciplinary segregation and administrative segregation — but both forms of segregation are used for management purposes, not for criminal punishment. Rule violations often lead to disciplinary segregation.³²⁷ Triggering infractions can extend well beyond “violent or dangerous” acts and include mere “disruptive behavior — such as talking back, being out of place, failure to obey an order, failing to report to work or school, or refusing to change housing units or cells.”³²⁸ Nuisance transgressors account for most of the disciplinary segregation population in some prisons.³²⁹

Even if they follow the rules, prisoners can face administrative segregation, a form of seclusion designed to separate inmates believed to pose a safety risk to officers or other prisoners.³³⁰ Often indeterminate in length, administrative segregation may continue for years on end,³³¹ if not for the entirety of a prisoner’s sentence.³³² In some states, corrections officials do not even inform prisoners why they have been placed in administrative segregation.³³³

D. *Prison Officials Have Broad Discretion to Isolate Prisoners for Long Periods of Time*

The transfer of authority from courts to prison officials described in the previous section results in administrative discretion over inmate seclusion. In the 1790s, the keeper of the jail needed high-level officials to approve solitary confinement for more than two days; even with that assent, the law capped solitary confinement at a few weeks unless a sentencing order commanded a greater term.³³⁴ In striking distinction from their early predecessors, correctional staff today wield enormous power to impose long periods of solitary confinement.

This section shows that present-day courts rarely perform their historical role as a bulwark against prolonged solitary confinement. Under

³²⁶ See, e.g., MONT. CODE ANN. § 46-19-101 (2019); OR. REV. STAT. § 137.124 (2018); N.Y. CRIM. PROC. LAW § 430.20 (McKinney 2011).

³²⁷ SHAMES ET AL., *supra* note 265, at 14.

³²⁸ *Id.*

³²⁹ *Id.*

³³⁰ Angela Browne et al., *Prisons Within Prisons: The Use of Segregation in the United States*, 24 FED. SENT’G REP. 46, 47 (2011).

³³¹ See *id.*

³³² Haney, *supra* note 259, at 127.

³³³ Browne et al., *supra* note 330, at 47; Haney, *supra* note 259, at 127 (“[M]any prisoners are placed in supermax not specifically for what they have done but rather on the basis of who someone in authority has judged them to be (e.g., ‘dangerous,’ ‘a threat,’ or a member of a ‘disruptive’ group).”).

³³⁴ See *supra* pp. 561–62.

current law, courts extend deference to prison staff in virtually every category of constitutional challenge to convict isolation, thereby granting administrators principal control over lengthy solitary confinement. This section also describes the often feeble state of nonjudicial oversight. In Pennsylvania, prison inspectors and high government officials outside the prison bureaucracy visited the Walnut Street Jail regularly and provided a check on jailers' discretion.³³⁵ In contrast, external oversight barely exists in many contemporary prisons, where low-level staff exercise substantial authority over human isolation.

Arbitrary results can follow from the lack of robust checks and balances. Disciplinary infractions that trigger extended solitary confinement may be vaguely defined or downright trivial (for example, having friends post updates on Facebook).³³⁶ Staff isolate African American inmates more often than other prisoners, and solitary punishments vary significantly for the same offense within the same prison.³³⁷

This state of affairs would have disturbed the creators of solitary confinement in America. Recognizing the potential cruelty of extended solitude, they created a regime to limit its use. Little remains of their system, and administrative discretion rules the day.

I. Criteria for Isolation. — Broad and vague criteria for placement in solitary confinement grant prison staff substantial discretion over whom they opt to isolate. According to a national study on administrative segregation that surveyed forty-seven prison systems, “[m]any jurisdictions provided very general reasons for moving a prisoner into segregation, such as that the prisoner posed ‘a threat’ or ‘a serious threat’ to ‘the life, property, security, or orderly operation of the institution.’”³³⁸

Prison officials also dispatch inmates to segregation for “insubordination” or “insolence,” which are amorphous categories of misconduct.³³⁹ One state defined “insubordination” to include “acting in a

³³⁵ See *supra* pp. 561–62.

³³⁶ See Dave Maass, *Hundreds of South Carolina Inmates Sent to Solitary Confinement over Facebook*, ELECTRONIC FRONTIER FOUND. (Feb. 12, 2015), <https://www.eff.org/deeplinks/2015/02/hundreds-south-carolina-inmates-sent-solitary-confinement-over-facebook> [https://perma.cc/YFC6-PEKR].

³³⁷ See GUENTHER, *supra* note 122, at 162–63; N.Y. CIVIL LIBERTIES UNION, *BOXED IN: THE TRUE COST OF EXTREME ISOLATION IN NEW YORK'S PRISONS* 20, 24 (2012); 2018 ASCA-LIMAN SURVEY, *supra* note 255, at 5 (“Black prisoners comprised a greater percentage of the restrictive housing population than they did the total custodial population.”). See generally Armstrong, *supra* note 252, at 761 (analyzing the argument that implicit racial bias may affect prison discipline); Eric D. Poole & Robert M. Regoli, *Race, Institutional Rule Breaking, and Disciplinary Response: A Study of Discretionary Decision Making in Prison*, 14 LAW & SOC'Y REV. 931, 934–40 (1980) (reporting racial disparities in the imposition of discipline on inmates).

³³⁸ 2014 ASCA-LIMAN SURVEY, *supra* note 277, at 8 (quoting HOPE METCALF ET AL., *ADMINISTRATIVE SEGREGATION, DEGREES OF ISOLATION, AND INCARCERATION* 5 (2013)).

³³⁹ Armstrong, *supra* note 252, at 771.

sullen, uncooperative, or disrespectful manner toward any employee.”³⁴⁰ Prison officials have disciplined prisoners for insolence or insubordination for such actions as writing to another prisoner to offer help with a legal case or sending a written complaint about prison conditions to an official.³⁴¹ Insolence can include “reckless eyeballing” or “body posture” deemed disrespectful.³⁴² Possession of contraband is a common disciplinary offense, and the charge may encompass everything “from weapons to spicy tortilla chips.”³⁴³ Even the generic term “violation of rules” can constitute a disciplinary charge.³⁴⁴

Rules like these “provide prison staff with unwarranted discretion in distinguishing permissible from punishable conduct.”³⁴⁵ Corrections officials “interpret the prison rules, deciding whether a given prisoner’s transgression merits supermax confinement.”³⁴⁶ Experts in prison management note that staff sometimes isolate inmates “based on what is colloquially known as being ‘mad’ at a prisoner, as contrasted with being ‘scared’ of that individual.”³⁴⁷

Prisoners can wind up in solitary confinement for trivial infractions. Low-level rule violations like having a small amount of cash, or underwear not issued by the prison, can result in disciplinary segregation.³⁴⁸ Disobeying an officer may result in seclusion for months; assault or possession of contraband may lead to years or decades in segregation.³⁴⁹ As

³⁴⁰ *Id.* at 772 (emphasis omitted) (internal quotation mark omitted) (quoting GA. DEP’T OF CORR., ORIENTATION HANDBOOK FOR OFFENDERS 27 (n.d.), http://www.dcor.state.ga.us/sites/all/files/pdf/GDC_Inmate_Handbook.pdf [<https://perma.cc/CZ3F-WJ5J>]).

³⁴¹ *Id.* at 771–72 (citing *Shaw v. Murphy*, 532 U.S. 223, 225–26 (2001); *Smith v. Mosley*, 532 F.3d 1270, 1272–74 (11th Cir. 2008)).

³⁴² Jim Thomas et al., *Exacting Control Through Disciplinary Hearings: “Making Do” with Prison Rules*, 8 JUST. Q. 37, 44 (1991).

³⁴³ GUENTHER, *supra* note 122, at 162.

³⁴⁴ Thomas et al., *supra* note 342, at 44.

³⁴⁵ James E. Robertson, “Catchall” *Prison Rules and the Courts: A Study of Judicial Review of Prison Justice*, 14 ST. LOUIS U. PUB. L. REV. 153, 153 (1994); see also 2014 ASCA-LIMAN SURVEY, *supra* note 277, at 8 (noting the wide disciplinary discretion prison staff possesses).

³⁴⁶ Reiter, *supra* note 249, at 117.

³⁴⁷ 2014 ASCA-LIMAN SURVEY, *supra* note 277, at 8. In one unusually flagrant case, a prisoner received a disciplinary charge for “disruptive conduct” while working in the kitchen. *Armstrong*, *supra* note 252, at 772 (citing Donald F. Tibbs, *Peeking Behind the Iron Curtain: How Law “Works” Behind Prison Walls*, 16 S. CAL. INTERDISC. L.J. 137, 160–61 (2006)). The prisoner asked the guard, “man what about my warning? Don’t I receive a warning?” *Id.* This resulted in a second disciplinary charge for “disrespect” because the officer believed the prisoner spoke to him too loudly and should not have addressed him as “man.” *Id.*

³⁴⁸ SHAMES ET AL., *supra* note 265, at 14.

³⁴⁹ See, e.g., *DuPont v. Wall*, 288 F. Supp. 3d 504, 506–08 (D.R.I. 2018) (prisoner sentenced to solitary confinement for one year for having advance knowledge of and thus involvement in an assault); *Johnson v. Wetzel*, 209 F. Supp. 3d 766, 770–72 (M.D. Pa. 2016) (prisoner held in solitary for thirty-six years for, among others infractions, staff assaults and attempted escapes); *Brown v. Caruso*, No. 10-cv-180, 2010 WL 3720184, at *1 (W.D. Mich. Sept. 17, 2010) (prisoner placed in solitary confinement for 940 days (two and a half years) for assaulting a staff member); *Browne et al.*, *supra* note 330, at 47.

one example, a New York prisoner spent three months in segregation for having “gambling chips and a list of prisoners who owed him chewing tobacco in his cell.”³⁵⁰ Prisoners commonly face indefinite administrative segregation because prison staff decide they belong to a gang, a procedure called “[g]ang validation.”³⁵¹ Guards may infer gang validation from indicia of varying reliability, such as correspondence with gang members or tattoos associated with a gang.³⁵²

“Judicial oversight of prison administrative decisions is deferential in almost every respect,”³⁵³ and courts rarely consider prison rules to be unacceptably vague.³⁵⁴ In a procedural due process challenge, the Ninth Circuit upheld rules against “insolence,” defined as “words . . . intended to harass or cause alarm in an employee.”³⁵⁵ The Fourth Circuit rejected a constitutional challenge to a regulation barring possession of “anything not specifically approved for the specific inmate who has possession of the item.”³⁵⁶ The Fifth Circuit upheld a muddled rule that banned “derogatory or degrading remarks” and “insults, unwarranted and uncalled for remarks” about prison employees.³⁵⁷

2. *Limited Procedural Protections.* — Just as courts rarely concern themselves with the substance of prison rules, so too do they hesitate to interfere with the procedures used to assign prisoners to solitary confinement.³⁵⁸ This form of deference further enhances the discretion of prison officials over prolonged inmate seclusion³⁵⁹ and contrasts with the safeguards that governed the jailers of the 1790s. In the young Republic, Pennsylvania jailers required approvals from higher-level officials, including the inspectors and mayor of Philadelphia, for short periods of solitary confinement.³⁶⁰ They had no discretion to impose long periods of solitary confinement.³⁶¹

³⁵⁰ N.Y. CIVIL LIBERTIES UNION, *supra* note 337, at 21.

³⁵¹ Reiter, *supra* note 249, at 117.

³⁵² *See id.*

³⁵³ Armstrong, *supra* note 252, at 759.

³⁵⁴ *See id.* at 778–79.

³⁵⁵ *Murphy v. Shaw*, 195 F.3d 1121, 1124, 1128 (9th Cir. 1999), *rev'd on other grounds*, 532 U.S. 223 (2001), *cited in* Armstrong, *supra* note 252, at 779.

³⁵⁶ *Gaston v. Taylor*, 946 F.2d 340, 342–43 (4th Cir. 1991) (en banc), *cited in* JOHN BOSTON & DANIEL E. MANVILLE, PRISONERS' SELF-HELP LITIGATION MANUAL 365 n.581 (4th ed. 2010).

³⁵⁷ *Gibbs v. King*, 779 F.2d 1040, 1045–46 (5th Cir. 1986), *cited in* BOSTON & MANVILLE, *supra* note 356, at 365 n.581.

³⁵⁸ *See* Allen-Bell, *supra* note 264, at 806.

³⁵⁹ *See* Reiter, *supra* note 249, at 120–21 (“[F]ederal court deference to prison officials exaggerates existing administrative discretion. Courts cede the power of independent review to prison officials when they do not carefully evaluate those officials’ claims about why certain restrictive conditions of confinement are necessary. And prisoners themselves become increasingly vulnerable to abuses, as an unreasonable burden of proof shifts onto their shoulders.”).

³⁶⁰ *See supra* pp. 562–63.

³⁶¹ *See supra* p. 563.

Current legal doctrine provides limited protection against arbitrary isolation. Courts consider most periods of solitary confinement up to and at times exceeding 100 days to be too short to trigger a liberty interest that warrants due process protection at all.³⁶² Even when a plaintiff does demonstrate a liberty interest, courts may require only minimal procedures. In *Sandin v. Conner*,³⁶³ a prisoner allegedly cursed at an officer during a strip search and rectal inspection.³⁶⁴ Officials charged the prisoner with a misconduct offense, denied his request to present witnesses at his disciplinary hearing, found him guilty of misconduct, and sentenced him to thirty days of disciplinary segregation.³⁶⁵ The prisoner brought suit, alleging that he had a liberty interest in avoiding the segregation sentence and therefore had a due process right to present evidence.³⁶⁶ The Supreme Court, however, rejected this contention, holding that thirty days of isolation did not trigger due process protection at all.³⁶⁷ That disciplinary punishment fell “within the range of confinement to be normally expected” by a prisoner serving a sentence of thirty years to life, as the respondent was.³⁶⁸

In *Wilkinson v. Austin*,³⁶⁹ however, the Supreme Court held that indefinite administrative segregation, combined with the loss of parole eligibility, triggered a due process liberty interest.³⁷⁰ The Court described conditions at the supermax as follows:

Inmates must remain in their cells, which measure 7 by 14 feet, for 23 hours per day. A light remains on in the cell at all times, though it is sometimes dimmed, and an inmate who attempts to shield the light to sleep is subject to further discipline. During the one hour per day that an inmate may leave his cell, access is limited to one of two indoor recreation cells.

Incarceration at [Ohio State Prison (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.³⁷¹

³⁶² See Reinert, *supra* note 250, at 929, 943; see also sources cited *infra* notes 375–386 (discussing the limited scope of procedural checks on disciplinary and administrative segregation).

³⁶³ 515 U.S. 472 (1995).

³⁶⁴ *Id.* at 475.

³⁶⁵ *Id.* at 475–76.

³⁶⁶ See *id.* at 476–77.

³⁶⁷ *Id.* at 486.

³⁶⁸ *Id.* at 487.

³⁶⁹ 545 U.S. 209 (2005).

³⁷⁰ *Id.* at 223–24.

³⁷¹ *Id.* at 214.

After finding a liberty interest in avoiding indefinite confinement in these conditions, the Court considered what procedures due process demanded.³⁷² Ohio's system satisfied due process requirements, the Court held, because prisoners were afforded a short statement of the reasons for supermax placement, a chance to rebut those reasons at a live administrative hearing, and the opportunity to submit objections to officials reviewing the outcome of the hearing.³⁷³ The Court also held that prisoners lacked a due process right to call witnesses.³⁷⁴

(a) *Protections Against Arbitrary Disciplinary Segregation.* — *Sandin* and *Wilkinson* generally have not been applied to ensure robust procedural rights for prisoners facing long-term isolation. In disciplinary segregation cases, lower courts interpreting *Sandin* and *Wilkinson* have held that even substantial periods of solitary confinement (nine months,³⁷⁵ twenty-one months,³⁷⁶ and even three years³⁷⁷) do not trigger due process protections in the first place. Other courts, however, have found that comparable or shorter periods of isolation do trigger a liberty interest.³⁷⁸

Even when the duration and conditions of disciplinary segregation create a liberty interest, relatively minimal process is required. The literature sometimes uses the word “meaningless” to describe these disciplinary review procedures.³⁷⁹ Professor Michael Mushlin observes: “[T]he protections that surround the inmate are slight. Notice can be as short as twenty-four hours; there is no guaranteed right to call witnesses; inmates do not have a right to a lawyer at any point; the rights of confrontation and cross examination are not provided.”³⁸⁰

³⁷² *Id.* at 224.

³⁷³ *See id.* at 225–26.

³⁷⁴ *Id.* at 228.

³⁷⁵ *Orr v. Larkins*, 610 F.3d 1032, 1033–34 (8th Cir. 2010) (per curiam), *cited in 2* MICHAEL B. MUSHLIN, *RIGHTS OF PRISONERS* § 10:17 (5th ed. 2017).

³⁷⁶ *Merchant v. Hawk-Sawyer*, 37 F. App'x 143, 146 (6th Cir. 2002), *cited in 2* MUSHLIN, *supra* note 375, § 10:16.

³⁷⁷ *Bonner v. Parke*, 918 F. Supp. 1264, 1266, 1271 (N.D. Ind. 1996), *cited in 2* MUSHLIN, *supra* note 375, § 10:16.

³⁷⁸ *See, e.g., Brown v. Or. Dep't of Corr.*, 751 F.3d 983, 985 (9th Cir. 2014) (27 months); *Fogle v. Pierson*, 435 F.3d 1252, 1259 (10th Cir. 2006) (3 years); *Magluta v. Samples*, 375 F.3d 1269, 1282 (11th Cir. 2004) (500 days); *Colon v. Howard*, 215 F.3d 227, 230–32 (2d Cir. 2000) (305 days).

³⁷⁹ *See, e.g., Jules Lobel, Prolonged Solitary Confinement and the Constitution*, 11 U. PA. J. CONST. L. 115, 125, 126 (2008); Elli Marcus, Comment, *Toward a Standard of Meaningful Review: Examining the Actual Protections Afforded to Prisoners in Long-Term Solitary Confinement*, 163 U. PA. L. REV. 1159, 1164, 1181, 1184 (2015); Alexa T. Steinbuch, *The Movement Away from Solitary Confinement in the United States*, 40 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 499, 516 (2014).

³⁸⁰ Michael B. Mushlin, “*I Am Opposed to this Procedure*”: *How Kafka's In the Penal Colony Illuminates the Current Debate About Solitary Confinement and Oversight of American Prisons*, 93 OR. L. REV. 571, 606–07 (2015) (footnotes omitted) (citing eleven cases in stating this description of segregated inmates' dearth of protections); *see also Estate of DiMarco v. Wyo. Dep't of Corr., Div. of Prisons*, 473 F.3d 1334, 1344–45 (10th Cir. 2007) (“While [a prisoner in administrative segregation]

Courts defer to the outcomes of disciplinary hearings. If a prisoner challenges the result of such a proceeding in a federal action, the court will not review the outcome *at all* unless the punishment rises to the deprivation of a liberty interest.³⁸¹ And when the prisoner can show a liberty interest, the court will apply a highly deferential standard — “some evidence” — to the hearing officer’s decision.³⁸²

(b) *Protections Against Arbitrary Administrative Segregation.* — The story is similar for procedural checks on administrative segregation. Following *Wilkinson*, some courts require prisons to hold periodic administrative reviews when imposing administrative segregation for years on end.³⁸³ But these reviews can afford very limited process and instead function as a rubber stamp.³⁸⁴

was not allowed to present witness testimony, nor were there other trappings of the adversarial process, these are not required to satisfy due process.”)

³⁸¹ See *Sandin v. Conner*, 515 U.S. 472, 487–88 (1995).

³⁸² *Superintendent v. Hill*, 472 U.S. 445, 455–56 (1985) (“Ascertaining whether [the ‘some evidence’] standard is satisfied does not require examination of the entire record, independent assessment of the credibility of witnesses, or weighing of the evidence. Instead, the relevant question is whether there is any evidence in the record that could support the conclusion reached by the disciplinary board.”); see also *Castro v. Terhune*, 712 F.3d 1304, 1315 (9th Cir. 2013) (describing the “some evidence” standard as a “low hurdle”); *Gaston v. Coughlin*, 249 F.3d 156, 163 (2d Cir. 2001) (finding a conversation with a confidential informant sufficient to meet the “some evidence” standard required to uphold the disciplinary board’s decision).

³⁸³ See, e.g., *Williams v. Sec’y Pa. Dep’t of Corr.*, 848 F.3d 549, 575–76 (3d Cir. 2017) (holding that prisoners whose capital sentences have been vacated “have a right to *regular and meaningful* review of their continued placement on death row,” including “the attendant right of a hearing,” *id.* at 576); *Proctor v. LeClaire*, 846 F.3d 597, 609 (2d Cir. 2017) (“Before confining an inmate in Ad Seg, prison officials must provide ‘some notice of the charges against him and an opportunity to present his views to the prison official charged with deciding whether to transfer him to [Ad Seg],’ although not necessarily a full hearing.” (alteration in original) (quoting *Hewitt v. Helms*, 459 U.S. 460, 476 (1983))); *Westefer v. Neal*, 682 F.3d 679, 685 (7th Cir. 2012) (finding that decisions regarding transfer to supermax prison must satisfy informal due process, which “requires only that the inmate be given an ‘opportunity to present his views’ — not necessarily a full-blown hearing” and suggesting that a written statement from the prisoner would suffice (quoting *Hewitt*, 459 U.S. at 476)); *LaChance v. Comm’r of Corr.*, 978 N.E.2d 1199, 1206–07 (Mass. 2012) (“We conclude that an inmate confined to administrative segregation on awaiting action status . . . is entitled, as a matter of due process, to notice of the basis on which he is so detained; a hearing at which he may contest the asserted rationale for his confinement; and a posthearing written notice explaining the reviewing authority’s classification decision.”).

³⁸⁴ See, e.g., *Isby v. Brown*, 856 F.3d 508, 525 (7th Cir. 2017) (holding that prisoners in administrative segregation are entitled to an “‘informal and nonadversary’ periodic review (the frequency of which is committed to the discretion of the prison officials) that keeps administrative segregation from becoming a pretext for indefinite confinement” (quoting *Westefer*, 682 F.3d at 686)); *Incumaa v. Stirling*, 791 F.3d 517, 534–35 (4th Cir. 2015) (declining to decide “whether prison review mechanisms must be as extensive as in *Wilkinson* in order to pass constitutional muster,” *id.* at 535, but finding “a triable question of whether the Department’s review process was adequate to protect Appellant’s right to procedural due process,” *id.*, where “the Department’s process apparently only requires the [Institutional Classification Committee (ICC)] to give a perfunctory explanation supporting its decision to continue to hold Appellant in solitary confinement,” *id.* at 534, and “the Department regulations do not grant Appellant the right to contest the factual bases for his detention before the ICC makes its decision — either with respect to his assigned behavior level or his

Professor Jules Lobel observes that “the trend in prolonged supermax confinement is for the federal or state government to simply designate certain prisoners for essentially lifetime or very long solitary confinement.”³⁸⁵ Periodic reviews may occur, but “the decision is predetermined, the review is a sham, and there is nothing the prisoner can do to get out of solitary confinement.”³⁸⁶

3. *Weak Proportionality Constraints.* — Courts rarely limit the length of solitary confinement based on Eighth Amendment proportionality. This additional type of judicial deference further enhances prison administrators’ authority to impose long periods of solitary confinement.

The abandonment of proportionality in modern jurisprudence marks another transfer of power and discretion from the courts and the legislature to corrections officials. The Pennsylvania courts of the 1790s calibrated the length of solitary confinement to the severity of the crime.³⁸⁷ But, because courts do not impose solitary confinement as criminal punishment anymore,³⁸⁸ they cannot graduate isolation to match a prisoner’s offense.

The Supreme Court has never considered whether the Eighth Amendment requires proportionality between the gravity of a disciplinary infraction and the duration of disciplinary segregation.³⁸⁹ Lower federal courts occasionally hold that a long period of disciplinary segregation for a small infraction violates the Eighth Amendment, but only where extreme disproportionality overcomes the strong presumption of judicial deference to prison officials.³⁹⁰ For the most part, federal courts

candidacy for release,” *id.* at 534–35); *Selby v. Caruso*, 734 F.3d 554, 559–60 (6th Cir. 2013) (finding that periodic administrative segregation reviews need only be meaningful and supported by “some evidence”); *Toevs v. Reid*, 685 F.3d 903, 913 (10th Cir. 2012) (“A meaningful review . . . does not require giving the inmate an opportunity to submit additional evidence.”).

³⁸⁵ Lobel, *supra* note 379, at 125.

³⁸⁶ *Id.* at 125–26; *see also* Allen-Bell, *supra* note 264, at 797–98 (“As a result of there being no exact standards governing periodic review hearings, review hearings are in many instances nothing more than ritualistic exercises in formality. Often, the proceedings are hollow in that they do not genuinely probe into the suitability of an inmate’s custody change, and they do not rule based on a measurable evidentiary standard. Many review hearings serve as veils for a predetermined decision to maintain an inmate in isolation on an indefinite or permanent basis. Further complicating the situation is the fact that judicial challenges to such proceedings may fall upon deaf ears because courts, concerned only with procedure and satisfied with the knowledge that a ‘process’ was afforded, feel their work is done.” (footnote omitted)); Marcus, *supra* note 379, at 1181 (“[T]he broad deference the Court has repeatedly afforded to administrative segregation decisions has rendered the procedures perfunctory and meaningless. They are a protection in name only.”).

³⁸⁷ *See supra* pp. 562–65.

³⁸⁸ *See supra* section III.C, pp. 383–84.

³⁸⁹ *See* *Wilkinson v. Austin*, 545 U.S. 209, 218 (2005) (“The extent to which the settlement resolved the practices that were the subject of the inmates’ Eighth Amendment claim is unclear but, in any event, that issue is not before us.”); *Austin v. Wilkinson*, 372 F.3d 346 (6th Cir. 2004), *cert. granted in part*, 543 U.S. 1032 (mem.).

³⁹⁰ *See, e.g.*, *Chapman v. Pickett*, 586 F.2d 22, 28 (7th Cir. 1978) (inmate refused to handle pork during a kitchen cleanup detail and was punished by segregation for an indeterminate term, which

take a noninterventionist approach to prison disciplinary punishments.³⁹¹ In one case, for example, the Fifth Circuit found no proportionality violation where an inmate was sentenced to segregation for an indefinite period of time because he complained that a medical condition prevented him from pulling sticker vines.³⁹²

Due to the lack of a strong proportionality constraint, prisoners can find themselves in solitary confinement for trifling infractions. Prisoners can wind up in solitary “for having in their cells ink pens with metal in the tip, possessing tobacco, talking back to officers, assisting fellow inmates with legal filings, serving as jailhouse lawyers, filing grievances, instituting legal proceedings against the penal facility, [or] using profane language.”³⁹³ Other reasons include “having charisma and leadership traits, serving as prison activists or whistleblowers, having militant and/or radical political beliefs, participating in or organizing hunger strikes in prison, and refusing to get out of the shower quickly enough.”³⁹⁴

4. *Impediments to Judicial Review.* — In addition to judicial deference, other barriers to inmate civil rights litigation contribute to the vast power of prison officials over solitary confinement. Other legal scholars and I have discussed these impediments at length in prior articles,³⁹⁵ and I mention below some of the principal obstacles that commonly prevent prisoners from bringing successful challenges to their conditions of incarceration, including solitary confinement.

Even when mistreatment is so egregious as to overcome deferential constitutional standards, qualified immunity insulates prison staff against monetary liability.³⁹⁶ In addition, the Prison Litigation Reform

ended up being seven months); *Peoples v. Fischer*, No. 11 Civ. 2694, 2012 WL 1575302, at *1–2 (S.D.N.Y. May 3, 2012) (inmate punished with a three-year solitary sentence for violating prison rule that stated he was not allowed to possess certain documents, including a copy of the Uniform Commercial Code).

³⁹¹ For a discussion of courts’ deference to the judgment of prison administrators, see Sharon Dolovich, *Forms of Deference in Prison Law*, 24 FED. SENT’G REP. 245 (2012).

³⁹² *Gibbs v. Lynn*, No. 93-3017, 1994 WL 397686, at *1, *3 (5th Cir. July 12, 1994); see also *Gambina v. Fed. Bureau of Prisons*, 529 F. App’x 900, 901, 903 (10th Cir. 2013) (affirming grant of summary judgment to prison officials who sentenced a prisoner to administrative segregation for sixty months for attempted escape); *Leslie v. Doyle*, 125 F.3d 1132, 1135 (7th Cir. 1997) (finding that prisoner sentenced to fifteen days disciplinary segregation, allegedly for no reason at all, did not state a claim because “[a] brief stay in disciplinary segregation is, figuratively, a kind of slap on the wrist that does not lead to a cognizable Eighth Amendment claim”).

³⁹³ *Allen-Bell*, *supra* note 264, at 772–73 (citations omitted).

³⁹⁴ *Id.* at 773 (citations omitted).

³⁹⁵ See, e.g., Shapiro & Hogle, *supra* note 252, at 2036–60; see also Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1606 (2003) (noting that Eighth Amendment doctrine requires prisoners to prove mental culpability on the part of prison officials, not simply poor prison conditions); Ken Strutin, *Litigating from the Prison of the Mind: A Cognitive Right to Post-conviction Counsel*, 14 CARDOZO PUB. L. POL’Y & ETHICS J. 343, 355 (2016).

³⁹⁶ Shapiro & Hogle, *supra* note 252, at 2058–59.

Act of 1995³⁹⁷ looms as one of the greatest barriers to prison litigation because the statute prevents prisoners from accessing the courts when they make minor procedural missteps in exhausting administrative remedies; bars recovery for most non-physical injuries; and reduces statutory fees in prison conditions cases, thereby diminishing lawyers' incentives to represent prisoners.³⁹⁸ Furthermore, a large number of prison conditions cases are unwinnable due to a combination of factors I have called "practical immunity."³⁹⁹ These impediments include dismal access to counsel, limited literacy and educational attainment among prisoners, the difficulty of obtaining evidence and researching the law while incarcerated, the complex and technical nature of prisoners' rights law, and the risk that prison officials will retaliate against prisoners who sue them.⁴⁰⁰

As Professor Margo Schlanger documents, in fiscal year 2012, the 2.2 million men and women incarcerated in American prisons and jails litigated their cases to successful damages judgments only fifty times.⁴⁰¹ Their *total* winnings barely exceeded \$1 million.⁴⁰² This sum reflects more than judicial deference to prison officials. It also reflects the reality that officers enjoy so much insulation from suits that defending against prisoner litigation can be like shooting fish in a barrel.⁴⁰³

5. *Nonjudicial Oversight Mechanisms.* — As already detailed, solitary confinement at the Walnut Street Jail was subject not only to judicial control but also to robust supervision by the prison inspectors and high-level government officials. It was for the inspectors — not the warden or his staff — to decide how to divide the period of solitary confinement imposed by the sentencing court into intervals. Likewise, holding a prisoner in solitary confinement for more than a few days for disciplinary reasons required the approval of the inspectors and the mayor of Philadelphia. When it came to formulating policies, officials at the highest levels of state and local government were involved. To make a rule, prison inspectors had first to obtain the endorsement of the mayor of Philadelphia, two aldermen, and two judges of the state supreme court or the court of common pleas.⁴⁰⁴

The difference between the vigorous supervision of the 1790s and the limited monitoring of the present is substantial. Today, prisons

³⁹⁷ Pub. L. No. 104-134, 110 Stat. 1321-66 (1996) (codified as amended in scattered sections of 11, 18, 28, and 42 U.S.C.).

³⁹⁸ Shapiro & Hogle, *supra* note 252, at 2042-47; see 42 U.S.C. § 1997e(a), (d)(2), (d)(3), (e) (2012).

³⁹⁹ *E.g.*, Shapiro & Hogle, *supra* note 252, *passim*; see *id.* at 2036-57.

⁴⁰⁰ *Id.* at 2048-57.

⁴⁰¹ Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 U.C. IRVINE L. REV. 153, 157 tbl.1, 168 tbl.7 (2015).

⁴⁰² *Id.* at 168 tbl.7.

⁴⁰³ See Shapiro & Hogle, *supra* note 252, at 2048.

⁴⁰⁴ 1791 Act, *supra* note 153, § XVIII, at 82.

operate as “closed institutions, with little transparency or oversight.”⁴⁰⁵ In the United States, “[i]n sharp contrast to many other democracies, non-judicial regulation and oversight of correctional facilities . . . is spotty and in many jurisdictions nonexistent.”⁴⁰⁶ The United States also lacks a governmental entity that functions as a prison conditions watchdog.⁴⁰⁷

In many prison systems, low-level correctional staff have substantial control over placement in solitary confinement. Line officers who observe or learn of a rule violation have discretion in deciding whether to write a disciplinary ticket, the first step in the disciplinary process.⁴⁰⁸ Officers may use tickets as a means of harassing prisoners whom they perceive as “troublemakers,”⁴⁰⁹ resulting in rules that are “enforced selectively at the discretion of the staff.”⁴¹⁰

Oversight of charges is often minimal, as “[p]rison administrators relinquish supervisory control to guards who deal with inmates intimately on a daily basis. As a result, subordinate custodial personnel . . . exercise independent and sometimes capricious discretion in meting out severe disciplinary sanctions.”⁴¹¹ There is little uniformity across prison systems: “Some systems [leave] decisions at the ground level, with unit personnel; some jurisdictions’ policies place[] authority in committees; and others require[] oversight by the warden or the central office.”⁴¹² The bottom line is that “[t]he imposition of long-term isolation . . . for months or years . . . is ultimately at the discretion of prison administrators.”⁴¹³ Suffice it to say that in contrast to the Walnut Street Jail, no one is checking with the mayor of any city before sending prisoners into solitary confinement.

CONCLUSION

The prison reformers of the 1790s would be dismayed by what solitary confinement has become. They restrained the cruelty of isolation with a system of checks and balances that limited administrative discretion, but little remains of that regime. The largely unrestricted power

⁴⁰⁵ Armstrong, *supra* note 252, at 759.

⁴⁰⁶ David C. Fathi, *The Challenge of Prison Oversight*, 47 AM. CRIM. L. REV. 1453, 1460 (2010).

⁴⁰⁷ *Id.* at 1454.

⁴⁰⁸ See, e.g., Thomas et al., *supra* note 342, at 41, 44 (discussing Illinois prisons).

⁴⁰⁹ *Id.* at 47.

⁴¹⁰ *Id.* at 44.

⁴¹¹ Gutterman, *supra* note 10, at 900; see also Sandra Simkins, Marty Beyer & Lisa M. Geis, *The Harmful Use of Isolation in Juvenile Facilities: The Need for Post-disposition Representation*, 38 WASH. U. J.L. & POL’Y 241, 263 (2012) (“Often, the decision to place a juvenile in isolation is done at the discretion of correctional officers for a reason that does not warrant such an intense level of corrective action.”).

⁴¹² 2014 ASCA-LIMAN SURVEY, *supra* note 277, at 8; see also Reinert, *supra* note 250, at 931–32 (“[T]he use of solitary confinement has been left in the hands of line officers and their supervisors.”).

⁴¹³ Allen-Bell, *supra* note 264, at 769 (alteration in original) (quoting Gawande, *supra* note 276).

of contemporary prison staff can result in prolonged solitude. With oversight and law weakened in the machinery of isolation, men and women have endured long periods of solitary confinement, sometimes with minimal protections against arbitrary suffering.

My central argument — that bureaucratic control of solitary confinement diverges from the nation’s early practices — has important implications for solitary confinement jurisprudence. Indeed, this Article has shown that the centerpiece of current solitary confinement law — judicial deference to the administrative discretion of prison staff — lacks grounding in the nation’s early history.

Some members of the Supreme Court have cited the relationship between courts and prisons in the early Republic *in support* of judicial restraint in penal affairs. As discussed in the Introduction, Justice Thomas, joined by Justice Scalia, has defended deference in contemporary prison conditions cases by arguing that judges took a hands-off approach in the young Republic. “Surely,” Justice Thomas wrote, “prison was not a more congenial place in the early years of the Republic than it is today; nor were our judges and commentators so naive as to be unaware of the often harsh conditions of prison life.”⁴¹⁴ Despite knowing about inhospitable conditions, judges “simply did not conceive of the Eighth Amendment as protecting inmates from harsh treatment. Thus, historically, the lower courts routinely rejected prisoner grievances by explaining that the courts had no role in regulating prison life.”⁴¹⁵

Whatever the merit of this argument for judicial deference in most aspects of prison operation, it is incorrect if applied to isolation. When solitary confinement was born in the 1790s, at a jail a stone’s throw from Independence Hall, the architects of the new system refused to leave seclusion to the jailers alone. Courts and the legislature controlled long-term solitary confinement, leaving prison staff without the power to impose it. For Pennsylvanians of the founding generation, deference to the prison bureaucracy in matters of human isolation was not a judicial duty — on the contrary, it would have been considered a judicial dereliction.

⁴¹⁴ *Hudson v. McMillian*, 503 U.S. 1, 19 (1992) (Thomas, J., dissenting).

⁴¹⁵ *Id.*

APPENDIX

Walnut Street Jail Solitary Confinement Sentences, 1795–1800

Date	Convict	Crime	Prison Sentence	Solitary Sentence	Ratio of Solitary Sentence to Prison Sentence
2/28/1795	Joseph Price	Counterfeiting	8 years	8 months	1/12
2/28/1795	Joseph Price	Counterfeiting	8 years	8 months	1/12
2/28/1795	Margaret Price	Counterfeiting	4 years	4 months	1/12
2/28/1795	Robert Hancock	Counterfeiting	5 years	5 months	1/12
2/28/1795	Robert Hancock	Counterfeiting	5 years	5 months	1/12
2/28/1795	Robert Hancock	Counterfeiting	5 years	5 months	1/12
2/28/1795	William Shaw	Counterfeiting	5 years	5 months	1/12
2/28/1795	William Shaw	Counterfeiting	5 years	5 months	1/12
2/28/1795	William Shaw	Counterfeiting	5 years	5 months	1/12
9/11/1795	Hugh Paxton	Arson	5 years	Unspecified*	
1/8/1796	Samuel Lewis, Nathan Lewis, Charles Hobbes, Isaac Hobbes & Isaac Braden	Murder of the Second Degree	5 years	5 months	1/12
11/25/1796	Neal Lafferty	Rape	12 years	3 years	1/4
12/9/1796	John Creighton	Counterfeiting	10 years	1 year	1/10

1/30/1797	Phebe Cromwell	Concealing the Birth and Death of a Bastard	5 years	2.5 years	1/2
8/31/1797	Robert Odlin	Counterfeiting	4 years	1 year	1/4
8/31/1797	Robert Odlin	Counterfeiting	4 years	1 year	1/4
8/31/1797	Robert Odlin	Counterfeiting	4 years	1 year	1/4
8/31/1797	Robert Odlin	Counterfeiting	4 years	1 year	1/4
8/31/1797	Alexander Crawford	Paying Counterfeit Dollars	4 years	1 year	1/4
8/31/1797	Alexander Crawford	Paying Counterfeit Dollars	4 years	1 year	1/4
8/31/1797	Alexander Crawford	Paying Counterfeit Dollars	4 years	1 year	1/4
9/15/1797	John Buskirk Allen	Paying Counterfeit Bank-Notes	15 years	3 years	1/5
9/15/1797	John Buskirk Allen	Paying Counterfeit Bank-Notes	10 years	3 years	3/10
9/15/1797	John Buskirk Allen	Paying Counterfeit Bank-Notes	10 years	3 years	3/10
3/14/1798	Cornelius Stegar	Paying Counterfeit Bank-Notes	15 years	3 years	1/5
6/19/1798	Jacob Hahn	Arson	6 years	6 months	1/12
6/20/1798	Jacob Bishop	Manslaughter	5 years	6 months	1/10
8/1798 (no day specified)	Joseph Disberry	Burglary	21 years	2 years	2/21
11/29/1798	Stephen Lyon	Rape	12 years	2 years	1/6
9/1799 (no day specified)	Thomas Armstrong	Forgery and Counterfeiting	10 years	1 year	1/10

8/29/1799	Elijah Crane Pardy	Counterfeiting	12 years	3 years	1/4
9/3/1799	James Scott	Second Degree Murder	18 years	6 years	1/3
11/21/1799	James Kain	Second Degree Murder	18 years	9 years	1/2
2/11/1800	Amos Merrion	Highway Robbery	5 years	1 year	1/5
2/12/1800	Richard Mills & John O'Brian	Burglary	3 years	6 months	1/6
2/18/1800	John Henderson	Burglary, Larceny, and Prison Break	10 years (burglary), 7 years (larceny), 10 years (prison break)	6 years (total)	2/9
2/20/1800	William Murray	Highway Robbery	7 years	1 year	1/7

*Prisoner was to be kept "at hard labour, or in [s]olitude."