Continuity in the Face of Penal Innovation: Revisiting the History of American Solitary Confinement

Ashley T. Rubin and Keramet Reiter

Solitary confinement has been a perennial tool of control in US prisons, despite its status as a repeatedly delegitimized practice. Although there have been significant changes in punishment over time, solitary confinement has remained, mostly at the margins and always as a response to past failures, part of an unending search for greater control over prisoners. This history raises the question of how a discredited penal technology can nevertheless persist. We locate the source of this persistence in prison administrators' unflagging belief in solitary confinement as a last-resort tool of control. To maintain this highly criticized practice, prison administrators strategically revise, but never abandon, discredited practices in response to antecedent legitimacy struggles. Using solitary confinement as a case study, we demonstrate how penal technologies that violate current sensibilities can survive, despite changing macro-level social factors that otherwise explain penal change and practice, provided those technologies serve prison officials' internal goals.

Solitary confinement, as a punishment for crime, has a very interesting history of its own, in almost all countries where imprisonment is one of the means of punishment.

In re Medley 1890, 168

INTRODUCTION

Justice Anthony Kennedy recently wrote of solitary confinement: "years on end of near total isolation exacts a terrible price." In an ironic concurrence to a decision upholding the constitutionality of a California prisoner's death sentence, Kennedy practically begged legal advocates to bring a case that would force the

Ashley T. Rubin is an assistant professor of sociology at the University of Toronto, Mississauga. Her research examines punishment from historical and sociological perspectives. She is currently completing a book manuscript, *The Deviant Prison: Eastern State Penitentiary and the Advantage of Difference, 1829–1913*, which examines Eastern's long-term retention of solitary confinement despite intense national and international criticism and local incursions. She may be contacted at ashley.rubin@utoronto.ca.

Keramet Reiter is an assistant professor in the Department of Criminology, Law & Society and School of Law at the University of California, Irvine. Her research focuses on prisons, prisoners' rights, and the impact of prison and punishment policy on individuals, communities, and legal systems. She is the author of *23/7: Pelican Bay Prison and the Rise of Long-Term Solitary Confinement* (Yale University Press 2016) and the coeditor of the anthology *Extreme Punishment: Comparative Studies in Detention, Incarceration, and Solitary Confinement* (Palgrave 2015).

Supreme Court to address solitary confinement's constitutionality head on: "In a case that presented the issue, the judiciary may be required … to determine whether workable alternative systems for long-term confinement exist, and … whether a correctional system should be required to adopt them" (*Davis v. Ayala* 2015, 36). Although prisoners' rights advocates welcomed Kennedy's invitation to litigate for reform, the history of solitary confinement suggests that the practice may not be so easy to dismiss in favor of "alternative systems." Throughout its "very interesting history," solitary confinement has always been the alternative system—a perpetual experiment, refined, polished, and repackaged, but never abandoned. It is a perennial practice of last resort for those seeking control within prison walls.

Solitary confinement, in one form or another, has remained in use at the deep end of punishment for more than two centuries. Importantly, solitary confinement has persisted despite significant changes over time in both the dominant penal technologies (from the birth of the prison to the rise of mass incarceration) and the dominant justifications for punishment (from reform and rehabilitation to incapacitation and warehousing), as well as extensive critiques from reformers, politicians, and others. Biological and social scientists alike have documented the detrimental effects of solitary confinement on prisoners, especially increasing rates of mental illness and suicide (Haney and Lynch 1997; Grassian 2006; Smith 2006; Reiter and Blair 2015). Prisoners themselves have responded with both small and large acts of friction and resistance (Reiter 2014a; Rubin 2015b, 2016, 2017b). Solitary confinement's persistence—despite criticism denouncing the practice as an immoral and inhumane punishment and forceful calls for reform—demands explanation. How does a penal technology that has been repeatedly, publicly discredited and delegitimized nevertheless persist?

We begin to answer this question by examining the history of solitary confinement in the United States. We foreground our discussion by asking: What constitutes solitary confinement? Paying attention to sociolegal theorizing about both the form and function of penal technologies, we introduce the ongoing historical contestation over how to define solitary confinement and we provide a working definition of the term for the analytical purposes of this article. We then proceed to describe the US history of solitary confinement in four key periods: the early (if limited) use in the decades after the Revolutionary War; the singular expansion of solitary cellular blocks at Eastern State Penitentiary in the early nineteenth century; solitary's retreat into obscurity over the twentieth century; and the final, modern form of iconic "supermax" facilities (like California's Pelican Bay State Prison Security Housing Unit, or SHU, and the federal Administrative Maximum facility, or ADX, in Florence, Colorado).

Throughout these periods, we explore how experimental penal forms that public and legal critics write off as failures and presume to be abandoned instead form the basis of new regimes. In describing these different uses and reuses of solitary confinement, we illustrate how the same penal technology has been deployed in different (whether innovative or reinvented) physical forms, justified by the same institutional goals, and simultaneously criticized for the same individually detrimental effects. These sometimes marginal practices reveal important dimensions of penal change, particularly the role of internal, administrative and external, historical factors.

Using the history of solitary confinement in the United States as a case study, we argue that solitary confinement's persistence can be traced, first, to prison administrators' perennial belief in the power of the practice to secure administrative control over prisoners. Administrators have strong incentives to retain penal technologies, like solitary confinement, which they perceive as useful, even in the face of public critique or changing social norms. In each historical era we examine, prison administrators reinvented solitary confinement, following critiques of the practice as a failed social experiment. This reinvention involves changing the name, the physical structure, or some procedural details of the same underlying practice (solitary confinement), which continues to serve the same institutional functions (controlling prisoners). Administrators' claims of reinvention, however, imply a kind of novelty aimed at legitimizing the use of solitary. Highlighting the bureaucratic politics behind these claims of innovation, we demonstrate, second, that prison administrators repeatedly leverage historical narratives—alternately distinguishing themselves from, and aligning themselves with, prior practices—to legitimize the continued use of harsh solitary conditions in the face of renewed critiques.

These findings are particularly important in the contemporary period, in which old debates have resurfaced both about how to define solitary confinement and about whether the practice is legitimate—often framed as whether solitary confinement is an effective tool of control or destructive to the human psyche (see, e.g., Haney 2017; O'Keefe 2017). The most modern iteration of solitary confinement, the supermax prison, has faced scrutiny from the likes of Justice Kennedy and Justice Breyer, the UN Special Rapporteur on Torture, and even neuroscientists (Stromberg 2014; *Ashker v. Governor* 2015, Méndez Expert Report; *Davis v. Ayala* 2015; *Ruiz v. Texas* 2017). Although scholars and critics are bringing new evidence to bear on old debates, our analysis reveals that solitary confinement is likely to persist as long as prison administrators remain committed to the practice as an ultimate tool of punitive control. In fact, the debates about what constitutes solitary confinement, whether it works, and whether it is ethical, have existed as long as the concept of the prison itself. Our analysis further reveals how prison administrators incorporate these debates into their justifications for the ongoing use of solitary confinement, pitting historical analyses against each other, justifying nominally "new" practices in relation to historical critiques.

Our focus on the centrality of administrative preference and historical legacies in the history of solitary confinement also reveals new sources of penal change distinct from the macro-level social factors typically examined in the literature. First, while macro-level social factors at the state or (inter)national level may have implications for penal policy (e.g., Foucault 1977; Garland 2001), we illustrate that prison administrators appear fairly consistent in both their goal of controlling prisoners and their preference for solitary confinement as an instrument to achieve that end. Internal administrative goals, then, can produce surprisingly consistent punishment decisions, even in the face of external, macro-level changes in social perspectives on crime and other penal policies. Second, changing sentiments about punishment do not, alone, drive legitimacy crises around solitary confinement; instead, specific events within prison walls usually bring the otherwise hidden

practice of solitary confinement into public view, thereby contributing to legitimacy crises. During these crises, prison administrators seek both to avoid critique and to reestablish legitimacy, all the while maintaining solitary confinement policies and practices. The past casts a shadow over this process, guiding prison administrators' future efforts. In sum, this study suggests that in emphasizing macro-level social factors in theories of penal change, punishment scholars overlook important internal, administrative and external, historical sources that shape penal policy and practice.

ATTENDING TO FORM: DEFINING SOLITARY CONFINEMENT

Throughout history and across jurisdictions, prison administrators have employed a variety of forms of solitary confinement. Even those administrators using the same technology or practice, however, have used disparate labels to characterize solitary confinement. The first challenge of analyzing the practice, then, is reaching consensus on what exactly constitutes solitary confinement.

In recent years, scholars seeking this consensus have catalogued a range of names and justifications for solitary confinement and proposed common definitions. For instance, defining (and constraining) uses of solitary confinement was a major focus of the revised UN Standard Minimum Rules on the Treatment of Prisoners (ratified as the "Mandela Rules" in May 2015). The rules laid out a seemingly simple definition of "solitary confinement" as "confinement of prisoners for 22 hours or more a day without meaningful human contact," and of "prolonged solitary confinement" as "solitary confinement for a time period in excess of 15 consecutive days" (Mandela Rules 2015, 14). Like many legal rules, however, "meaningful human contact" is subject to interpretation: for instance, would housing two prisoners in the same cell for twenty-two hours per day constitute meaningful contact?

Months later, in October 2015, the Bureau of Justice Statistics (BJS) released its first national report seeking to systematically quantify the use of solitary confinement in state and federal prisons across the United States. The report suggested the term "restrictive housing" to encompass the constellation of practices involving solitary confinement:

> Whether it is disciplinary segregation, administrative segregation (largely nonpunitive in nature), or solitary confinement (involving isolation and relatively little out-of-cell time), restrictive housing typically involves limited interaction with other inmates, limited programming opportunities, and reduced privileges. (Beck 2015, 2)

In jettisoning the label "solitary" confinement and adopting a fairly broad definition, the BJS recognized the diversity of restrictive and isolating practices (such as double-bunking prisoners together for twenty-two hours or more per day in the same cell) that can be technically or cosmetically different but substantively and experientially similar.

These attempts to reach consensus on terminology and definitions, however, remain limited. National and international bodies have differed in both the labels

they assign to solitary confinement and the conditions they describe as solitary confinement, as these examples illustrate. Some such bodies have also cobbled together labels and defining characteristics from multiple sources, potentially creating further confusion. For example, in 2016, the Arthur Liman Public Interest Program at Yale Law School and the Association of State Correctional Administrators (ASCA) issued a joint report on the status of solitary confinement use throughout the United States. The report adopted the twenty-two-hour and fifteen-day cutoffs from the Mandela Rules definition of solitary confinement, but it followed the BJS in focusing on "time in cell," instead of the Mandela "meaningful human contact," and used the BJS's label of "restrictive housing." Specifically, the Yale-ASCA report defined "restrictive housing" as holding individuals "in their cells for 22 hours or more each day, and for 15 continuous days or more at a time" (ASCA/Liman 2016, 1).

This ongoing confusion over both the labels and the defining characteristics of solitary confinement is far from novel: the history of solitary confinement in the United States is replete with such definitional disputes. As we will discuss below, deploying different names for substantially similar practices is itself a legitimizing technique of prison administrators, allowing them to appear to differentiate "new" practices from discredited "old" practices. This legitimizing tactic has the added benefit of obfuscation: identifying a practice as solitary confinement (and therefore potentially subject to a de-legitimizing critique) is notoriously difficult due to the wide variety of labels and definitions that have been deployed over time.

For the purposes of this article, we define solitary confinement broadly as *the intersection of two of the most restrictive conditions of incarceration—reducing prisoners' freedom of movement by maximizing "time in cell" and constraining human contact (both physical and social) so severely as not to be "meaningful."*[1] While most prison systems will have a set of "most restrictive" conditions of incarceration, many but not all of these conditions will fit our definition of solitary confinement. Both corporal punishment and extended bodily restraints would be restrictive punishments excluded from our definition of solitary confinement,[2] but a spectrum of isolating conditions from short term and temporary to long term and permanent would be included in our definition. Any given prison or prison system might employ more than one variety of such highly restrictive confinement; under this definition, each variation would qualify as solitary confinement. For instance, some subset of restrictive solitary confinement cells might be "dark" cells with no lights, "dry" cells without any running water, or "double-bunked" cells with two prisoners locked together for most of the day in a cell designed for one. In other words, we argue that the specific

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1. Usually, when fundamental personal liberties are curtailed by policy or legislation, courts require the "least restrictive means" for curtailing these liberties, evaluating alternatives that might achieve similar goals but be less restrictive. See, for example, *Procunier v. Martinez* (1974, 413–14). The concept of the "most restrictive alternative," then, highlights the legal opposite of this constitutional principle.

2. For instance, a prison system's most restrictive conditions of incarceration, such as the iron gag or straight jacket, might involve corporal punishment that reduced freedom of movement and constrained human contact, but not through time in cell (Meranze 1996, 311–18). Or, a prison system's most restrictive conditions of incarceration might involve restraining prisoners for eight to ten hours per day in a desk chair in a group classroom setting, rather than reduced freedom of movement (specifically through confinement in a cell) and constrained human contact (Sapien 2017).

design and actual operation of a prison cell—rather than its official label—defines solitary confinement.

Our focus on design and operation pays close attention to the "social forms of legal change," an analysis Liu (2015, 6) recently encouraged. In so doing, we identify surprising consistencies in form, even in the face of functional and structural change. We argue that historical legacies of past forms shape subsequent forms. Indeed, in her foundational anthropological study of Washington State supermax confinement, Lorna Rhodes highlighted the importance of the "historical echo" visible in the "encrusted layers of practice within institutions" (Rhodes 2004, 7). These layered prison practices, Rhodes noted, are "haunted" by a "history of disappearances" (15). By tracing the various forms of solitary confinement used over time in the United States, we hope to peel back these encrusted layers of practice and to uncover disappeared justifications and continuities in isolation practices, maintained in the face of repeated social critiques.

By examining how solitary confinement has been used, contested, and defined over time through multiple iterations, we illustrate that its illusory appeal as a tool of control has persisted despite its frequent failure to achieve such control objectives. In light of each episode of de-legitimation, prison administrators have sought to distinguish solitary confinement from what came before, and thereby to infuse new faith that the same old technology (often with a new name) will not fail this time.

STEPPING BACK FROM MACRO-LEVEL ACCOUNTS OF PENAL CHANGE: ADMINISTRATIVE CONTROL AND TECHNOLOGICAL CONTINUITY

The advent of new penal technologies has been central to sociohistorical examinations of punishment (Rubin 2015a). For instance, Foucault (1977) described the birth of the prison and its disciplining function as a new tool of punishment, or technology of power (see also Melossi and Pavarini 1981). Likewise, Simon (1993) described the use of parole and its welfare function as a new technology of power over the body. Garland (2012) described the ongoing use of the death penalty in the United States as a persistent technology of power. In a more recent article summarizing the sociohistorical literature on punishment, Simon (2014, 63) described three historical periods of technologies of punitive power: the birth of the penitentiary, the advent of penal welfarism, and the development of mass incarceration. In each case, the innovation of a particular penal technology—whether the prison itself, or the widespread social practices of penal welfarism or mass incarceration—underlies historical periodization.

Typically, changing penal technologies have correlated with changes in the articulated goals and purposes of punishment; for example, early versions of parole and probation correlated with rehabilitation, and the death penalty with retribution. Although politicians, prison officials, reformers, lobbyists, and other penal actors emphasize multiple purposes of punishment simultaneously (and contradictorily), the individual purposes themselves seem to undergo cycles of popularity and

unpopularity (Rothman 1980; Irwin 2005; Goodman, Page, and Phelps 2017). Declines in popularity can occur because, in practice, "punishment rarely works as planned" by reformers or policy advocates: when reforms fail to achieve their stated goals, decision makers' confidence in the technology wanes, paving the way for new penal technologies to replace the old (Simon 2014, 83; see also Rubin 2015a). Moreover, scholars frequently analyze the waxing and waning of penal technologies in light of macro-level cultural trends, like shared norms around appropriate responses to violence and racism (Garland 2012), or degrees of political support for social welfare policies (Simon 1993; Pratt 2008). Consequently, scholars have argued that penal technologies are an important unit of analysis in understanding the history of penal change (e.g., Simon 2014).

The correlation between changing technologies and purposes of punishment, or broader cultural contexts, however, obscures an important source of continuity in the operation of penal technologies: administrative control. Prison officials working within institutions consistently have had at least one common goal that spans and, arguably, eclipses all other purposes of punishment: maintaining basic control over everyday institutional operation (Hepburn 1985; Sparks, Bottoms, and Hay 1996, 2; Ibsen 2013; Goodman, Page, and Phelps 2015; Rubin forthcoming a). Discretion is key to maintaining this control, in both day-to-day interactions (Liebling 2000; Crewe 2011) and designing institutional policy (Reiter 2016). Moreover, as Rothman (1980) has argued, prison administrators exercise their discretion to accept reformers' proffered programs and technologies only when those programs or technologies also serve internal goals, regardless of reformers' goals. Conversely, however, penal technologies that are useful for administrative control purposes may fail to serve reformers' and politicians' purpose *à la mode*; thus, while it may appear that the field has moved away from supporting such technologies, administrators may continue to use them, albeit privately or quietly. As the history of solitary confinement reveals, prison administrators have powerful incentives to retain certain penal technologies, especially those technologies that offer administrators (perceived) control over prisoners, even in the face of public critique or changing social norms.

By locating penal change in shifting articulations of the purposes of punishment, or macro-level shifts in society, however, the extant punishment studies literature has frequently overlooked the role of factors internal to the penal system, such as administrative goals, in shaping punishment. A few recent fine-grained case studies have emphasized the important roles of local prison administrators in not only implementing, but also initiating, penal policy (e.g., Goodman 2008; Lynch 2010; Schoenfeld 2010; Campbell 2011, 2014; Rubin 2013, 2016; Reiter 2016). Rubin (2013, in prep) has illustrated the role of prison administrators in ensuring the persistence of the Pennsylvania System from 1829 to 1879, despite interference and criticism from both the state legislature and reform community. McLennan illustrated the role of early twentieth-century prison administrators in designing in-prison political organizations and "disciplinary activities as alternatives to labor" in the absence of legislative authorization (2008, 383). Schoenfeld (2010) described the decisive role Florida prison administrators played in translating court-ordered prison reforms into more prison beds in the 1970s and 1980s. Lynch (2010) demonstrated how Arizona prison administrators secured the passage of local and then

federal legislation to limit prisoners' rights to litigate the conditions of their confinement in the 1990s. Reiter (2016) documented how, in the same decade, California prison administrators orchestrated the creation of that state's first supermax. Such accounts indicate that, sometimes, factors internal to the penal system are influential. In fact, internal factors, especially administrative goals, can be at least as important as either macro-level social factors or external critique and resistance in shaping penal policy and practice.[3] We expand on this growing literature by examining how administrative goals, internal to the prison system, affect penal change.

Rather than focusing on administrators' acceptance of, rejection of, or reaction to external influences, we trace how both new and revised penal technologies emerge within the prison, and examine how prison officials justify and legitimize their own innovations. Because of their ability to serve internal goals, these technologies persist in the face of external critiques. We argue that the US history of solitary confinement, its various forms, and its many justifications together reveal how prison officials have consistently wielded solitary confinement as a technology of control over prisoners' bodies to achieve basic order maintenance: physically separating and restraining at least some prisoners facilitates institutional control and management goals. As prison administrators' penal technology of last resort, solitary confinement has always worked at least somewhat "as planned." The challenge for prison administrators who seek to retain these discredited, but useful, practices is to offer "accounts" that legitimize the practices (Scott and Lyman 1968).

SOLITARY CONFINEMENT OVER TIME

In recent years, the practice of solitary confinement has faced increasing social scrutiny in the United States. Between 2011 and 2013, tens of thousands of prisoners in California staged a series of weeks-long, nonviolent hunger strikes to protest the conditions of confinement specifically in the state's solitary confinement units (Reiter 2014a). The national and international press took notice and, in 2014, the UN Special Rapporteur on Torture visited California's main "supermax" facility, the 1,056-bed Security Housing Unit at Pelican Bay State Prison, and condemned conditions there (*Ashker v. Governor* 2015, Méndez Expert Report). Across the United States, from California to Texas to New York, states have implemented reforms to solitary confinement—limiting who can be sent to solitary confinement (no seriously mentally ill prisoners, no juveniles, no pregnant women), limiting the lengths of time prisoners can spend in solitary (to anywhere from fifteen days to

3. Of course, the nature of administrative power has changed as the US political system has developed. The administrative control Rubin (2013, in prep) describes in nineteenth-century penitentiaries faces little resistance or oversight from a small, prebureaucratic state. Later, the administrative control McLennan (2008) describes in the early twentieth century develops in response to and in conjunction with organized labor and political coordination. Finally, the administrative control Reiter (2016) describes in the late twentieth century emerges in spite of and in opposition to concerted legislative and judicial attempts to constrain administrative discretion. Throughout each of these periods, despite these differences in the nature of administrative control, these administrators relied, at least intermittently, on solitary confinement as a foundational tool of control.

five years), and working to mitigate the harshness of the conditions in solitary confinement (e.g., allowing prisoners a few more hours per day out of their cell or more access to natural light) (see, e.g., de Avila 2017). Some states, including Illinois and Washington, have even shut down isolation units (Illinois Department of Corrections 2012, 142; Martin 2013).

Other states and federal institutions, however, have resisted reform—often seeking to distinguish current practices from historical precedents. For instance, the Director of the Virginia Department of Corrections explicitly asserted that "solitary confinement ... went out the window a long time ago" and insisted instead on using the word "segregation" to describe isolation conditions in Virginia's supermax (Kumar 2012). Likewise, a military commander, describing the conditions of a military prisoner in segregation, "denied [the prisoner] was in solitary confinement ... saying that he could talk with guards and with prisoners in nearby cells, though he could not see them" (Shane 2011). Prison officials operating these institutions use ruptures with past practices and distinctions from stereotypical images of solitary confinement to legitimize supermaxes. However, such attempts to distinguish modern supermaxes from notorious examples of nineteenth-century solitary confinement in places like Eastern State Penitentiary reveal fairly limited historical knowledge. In fact, supermaxes represent a new form of an old technology of power functioning to control and isolate prisoners' bodies. Moreover, the legitimizing strategies themselves are by no means new. Since Eastern's prisoners had access to some activities, like work and gardening, and routinely communicated with staff, administrators also preferred the phrase "separate confinement," to avoid the critiques of and negative connotations associated with the term "solitary confinement."

Both the critiques of solitary confinement, and correctional officials' attempts to redefine the practice in relation to historical precedents, are part of a pattern of solitary confinement use over time in the United States that reveals the complex relationship between technologies of power, prison administrators, and historical antecedents. Below, we outline four key periods of solitary confinement use in the United States, each bounded by a moment of sharp critique, during which solitary confinement is denounced but does not disappear. Within each period, we examine solitary confinement as a "penal technology," focusing especially on the administrative ideologies driving the practice (institutional control and order maintenance) and its remarkably consistent effects (especially psychological harm) on the prisoners experiencing it, even as various details of the practice change, like how and when the solitarily confined interact with other humans. Finally, within each period, we demonstrate that prison officials leveraged both similarities and contradictions in solitary's historical legacy to legitimize the persistent practice.

Early Uses of Solitary Confinement (1790–1835)

Solitary confinement was first authorized in the United States in the 1790s, when states began building their first prisons. The most significant innovation of these early prisons was sentencing criminals to incarceration as punishment. Previously, during the colonial period, incarceration had not been penal, but

administrative, used for the accused awaiting trial, the condemned awaiting their (corporal or capital) punishment, or for those who had been punished but still owed court-imposed fines and jail fees. Penal incarceration was still quite similar to administrative confinement, at least in the sense that prisoners spent much of their time congregated together in large rooms. Distinct from colonial jails, however, these early prisons kept their convicted criminals separate from the untried, witnesses awaiting trial, debtors, vagrants, and others who also remained congregated together (Rubin forthcoming b).

Separation became a major organizing theme of these prisons, as prisoners of different genders and types (recidivist or novice, convicted criminal or unfree citizen) were separated from each other to prevent the spread of disease as well as the mutual moral contamination previously wrought by congregating prisoners in jails (Meranze 1996). Incarceration, combined with discipline-generating hard labor, was designed to create submissive citizens who would respect authority and abstain from crime. In this regime, reformers considered solitary confinement an indispensable tool for prisoner reformation, but not one intended for all prisoners—only for the worst offenders. Solitary offered the advantages of separation—in this case, preventing the worst offenders from influencing the less experienced offenders. However, it went further: as a terrifying experience, it also served as an additional threat to encourage following the prison's rules. Moreover, with no distractions, it would allow prisoners time for reflection and reformation (see, e.g., Lownes [1793] 1799; Turnbull 1797).

While solitary confinement was often discussed in the penal reform literature and was included in almost every statute authorizing the early prisons (Rubin 2016, in prep), the place of solitary confinement was more limited in practice. The country's model prison, Philadelphia's Walnut Street Prison, had only sixteen solitary cells—a disproportionately small number for the prison's hundred (and later, more) prisoners (Teeters 1955, 19). Likewise, judges tended to avoid sentencing convicted criminals to any period in solitary confinement (Sellin 1953, 329). For both these reasons, solitary confinement was only used for short periods to punish in-prison infractions; due to the scarcity of cells and the frequent rule violations, however, solitary was often "the last, not the first, resort of discipline," while punishment at the hands of the prison's administrators was the more common response (Meranze 1996, 196). Similar design flaws and limitations in practice followed in every prison that adopted the Walnut Street model. Ultimately, a flurry of fires, escapes, and riots at Walnut Street, as well as at the nation's other nascent prisons, unavoidably proved that the early experiment had failed to achieve either reformers' stated disciplinary goals or administrators' basic goals of order maintenance (Rubin in prep).

In the 1810s and 1820s, prison officials and reformers alike sought to refine the physical structures and legal rules governing prisons and turned to solitary confinement to achieve their goals better. Referring to past failures, penal reformers and legislators sought to improve their approach and to create a more ordered prison that relied more systematically on solitary confinement—not only for a minority of the most "hardened" prisoners, but for all prisoners. Some reformers, who were increasingly involved with prison administration, argued that solitary confinement would be perceived as more terrifying than the incarceration that (they

believed) was no longer a deterrent. Additionally, they believed that solitary confinement would prevent the chaos within the "schools of vice" that the early prisons had become; locked in solitary cells, prisoners would no longer be able to conspire or mutually to corrupt each other's morals. Ultimately, many reformers believed that solitary confinement would enable proper reflection and reformation (Meranze 1996; McLennan 2008; Rubin in prep).

Pennsylvania's reformers[4] were among solitary confinement's strongest supporters; they believed it was the ingredient missing from their first experiment with incarceration at Walnut Street. An 1818 statute authorized solitary confinement for all prisoners with no distractions (Pennsylvania 1818). When Pennsylvania's new prison, Western State Penitentiary, opened just outside of Pittsburgh in 1826, its architectural design proved problematic. The cells were too small and poorly ventilated for long-term solitary confinement; prisoners frequently had to be released from their cells to preserve their health (Barnes 1921; Doll 1957).

New York's reformers also expressed frustration with their first prison. Newgate, which was modeled on Walnut Street, had failed to achieve either its disciplinary or order maintenance goals. As in Pennsylvania, New York legislators sought to implement solitary confinement more systematically:

> The legislature passed an act, April 2d, 1821, directing the Inspectors to select a class of convicts to be composed of the oldest and most heinous offenders, and to confine them constantly in solitary cells. At this period, the legislature and public at large had become so dissatisfied and discouraged with the existing mode and effects of penitentiary punishments, that it was generally believed, that unless a severer system was adopted, the old sanguinary criminal code must be restored. In dread of such a result, the legislature ordered the experiment of exclusive solitude, without labor, and it is now believed, that in avoiding one extreme, another was fallen into. (Powers 1826, 32)

The experiment, begun on Christmas Day 1821 at the new Auburn State Prison, was a disaster. The cells were too small for prisoners to exercise, and their muscles atrophied. The intensive reliance on solitary confinement was even more devastating on prisoners' mental health. Auburn's Warden, Gershom Powers, reported that "one [prisoner] was so desperate that he sprang from his cell, when the door was opened, and threw himself from the gallery upon the pavement. . . . Another beat and mangled his head against the walls of his cell until he destroyed one of his eyes" (Powers 1826, 36). The surviving prisoners—whose "health and constitutions . . . had become alarmingly impaired"—received pardons, and the experiment was officially discontinued in 1823 (Powers 1826, 36). A similar disaster occurred at Maine State Prison several years later (Lewis 1922, 147–48; Rubin in prep).

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4. Until the mid-1820s, reformers in Pennsylvania were heavily involved with prison administration; indeed, many of Eastern's first generation of prison administrators were themselves penal reformers. After that state's two modern prisons opened, however, the two groups began to diverge. The situation was similar in New York, but the split occurred earlier, as its modern prison opened five years earlier than Pennsylvania's first modern prison.

These early episodes with total solitary confinement at Western State Penitentiary, Auburn State Prison, and Maine State Prison became the first set of "historical echoes" that would continue to haunt penal experimentation and innovation. These episodes inspired widespread social critique (an external response to internal failures of implementation in the early prison institutions) and de-legitimized solitary confinement. By the middle of the 1820s, penal reformers and prison administrators alike expressed intense opposition to total solitary confinement (e.g., BPDS [1826] 1827). Most centrally, they concluded that the practice was cruel and inhumane and dangerous to mental and physical health. Moreover, reformers and other commentators believed solitary confinement was too expensive: prisoner labor was increasingly understood to be a central ingredient for prisoner reformation and to offset the cost of prison maintenance, but labor seemed impossible in solitary.

Still, prison officials experimented with different variations on the solitary confinement theme—attempting to legitimize new practices by distinguishing them from old practices, while consistently seeking to maintain order and control. New York invented a new system of confinement in which prisoners silently performed factory-style labor and experienced solitary confinement only at night. Additionally, military discipline—including lockstep marching, ranks for prison staff, and whipping—helped to maintain order. Most states would copy New York's new Auburn System and continue to oppose solitary confinement for anything more than nighttime confinement (Rubin 2015a), but Pennsylvania moved in a different direction to pursue discipline and order maintenance.

Eastern State Penitentiary (1829–1913)

Eastern State Penitentiary opened outside of Philadelphia in late 1829, eight years after its initial statutory authorization. Eastern was Pennsylvania's latest attempt to resurrect the original goals behind its earlier Walnut Street Prison by instituting more order and security while ensuring prisoner reformation. In response to national sentiment, as well as the overt failure at Western State Penitentiary, Pennsylvania reformers and legislators sought to correct their past mistakes. With a different architectural design that included larger, better ventilated cells, provision for in-cell labor, and weekly visits from prison staff and penal reformers, they sought to mitigate the possibility of death, insanity, inefficacy, and impracticality already experienced. Eastern State Penitentiary was the result of these efforts.

The theory underlying Eastern State Penitentiary, articulated in a new statute (Pennsylvania 1829), was referred to as the Pennsylvania System. Under this system, at least theoretically, prisoners lived—worked, slept, ate, prayed—in their solitary cells. Each ground-floor cell was attached to a small, walled-in yard into which prisoners were released at various times. Prisoners would spend the vast majority of their sentence within their cells, passing most of their day (except the Sabbath) performing some form of craft (e.g., weaving, shoemaking, carpentry) or unskilled labor (e.g., oakum picking or bobbin winding).

A combination of prison personnel and official prison visitors would meet with the prisoners at least once a week to mentor, minister, or instruct them. Overseers

(guards trained in a craft) would instruct the prisoners in how to perform their assigned work task. A moral instructor (chaplain) would visit the prisoners and offer sermons on Sundays, while a physician would check their physical health weekly. Each week, two members of the prison's five-man Board of Inspectors (the prison's main governing body) and the prison's warden would separately visit the prisoners to mentor them and to inquire into any complaints. Finally, members of the local penal reform society, the Philadelphia Society for Alleviating the Miseries of Public Prisons, would visit the prisoners bimonthly or monthly. The moral instructor, inspectors, warden, and penal reformers would teach prisoners how to read and write, as well as try to convince prisoners to change their ways, while collecting information about what had led a prisoner to commit his (or her) crime in the first place. Apart from these officially authorized visitors, prisoners would never see another person (including family), let alone another prisoner.

This approach to solitary confinement under the Pennsylvania System was different from the kind of total solitary confinement attempted at Western and used briefly at Auburn and Maine in the early 1820s. However, that earlier approach did not disappear completely, as illustrated by administrators' response to refractory prisoners: Eastern's prisoners who refused to work, attempted to speak with other prisoners, attacked their guards, tried to escape, or broke other prison rules were removed to "punishment cells" or "dark cells." Dark cells were regular cells whose window and skylight were covered with cloth, blocking out the light; prisoners in the dark cells were sustained on a diet of bread and water and given no work or books to distract them from their solitude. A recalcitrant prisoner remained in the dark cell for a day or two (initially) or up to a week (or, occasionally, two), typically until he or she apologized for his or her wrongdoing and pledged good behavior in the future. Although reminiscent of Auburn's early experiment with total solitary confinement, this form of solitary was exceptional—of short duration and only used after administrators warned misbehaving prisoners to obey (Rubin 2017a, in prep).

Eastern's prison officials thus used two versions of solitary confinement for administrative control. The first, central to the Pennsylvania System, was justified primarily as a means of enabling prisoner reformation by allowing reflection and preventing mutual contamination across prisoners. This form of solitary confinement had emerged out of the need to prevent disorder, but was central to reformers' and reformers-turned-administrators' commitment to prisoner rehabilitation. The second form of solitary confinement, however, was more severe (a short-term version of the earlier efforts at total solitary) and punitive: it was a means of regaining control over and demanding deference from unruly prisoners. Moreover, both versions were distinct from the central mode of nightly solitary used elsewhere, under the Auburn System, indicating the variety of forms of solitary confinement used in this single historical period.

Throughout this period, Eastern remained a minority model in the United States. While nearly every state had built at least one prison by the Civil War, only Pennsylvania retained its Pennsylvania System by that time. (New Jersey and Rhode Island had both adopted the system, but quickly abandoned it.) Instead, most prisons followed New York's Auburn System, which restricted solitary

confinement to the nighttime and congregated prisoners during the day in large, factory-like rooms for silent labor. Penal reformers in Boston and New York promoted this Auburn System nationwide, arguing that it was more economical, but also that the Pennsylvania System was cruel and inhumane, dangerous to prisoners' mental and physical health, and ultimately ineffective (Rubin 2015a). Foreign visitors who toured America's prisons echoed these sentiments, emphasizing particularly their concern over the Pennsylvania System's severity and the dangerous effects of long-term isolation on individual prisoners (de Beaumont and de Tocqueville 1833; Dickens [1842] 2000).

Publicly, Eastern's administrators defended their use of solitary confinement, emphasizing its difference from the kind of fatal solitary used earlier at Auburn. Administrators called their Pennsylvania System the "separate system" and referred to their primary use of solitary confinement as "separate confinement." They reminded their critics that prisoners received approved visitors—the prison staff and the local penal reform society—so the claim that a prisoner at Eastern "never looks upon a human countenance, or hears a human voice" (Dickens [1842] 2000, 113) was untrue. Eastern's administrators further sought to discredit their opponents as profit-mongers who cruelly whipped their prisoners, while presenting themselves as "benevolent," "humanitarian" gentlemen concerned for their prisoners' welfare. The Pennsylvania System, they argued, was likewise more humane and beneficial for prisoners than the competitor Auburn System (Rubin 2013, in prep).

In practice, however, solitary confinement under the Pennsylvania System was never as severe as its critics—or its supporters—described. Prison administrators and prisoners often violated the Pennsylvania System. Prison officials removed between 10 and 25 percent of the prison population from their cells to perform work around the prison. Although prisoners were supposed to avoid contact with other prisoners and nonprison personnel (e.g., construction workers), records indicate multiple incidents of prisoners mingling; at least two prisoners even carried on an intense romance for two months (Rubin 2013, 2015b). Additionally, prisoners constructed numerous inventive ways of communicating with one another from within their cells, from tapping on pipes, to standing on looms to reach through a skylight and yell to other prisoners, to carving notes on the bobbins passed from winders to spinners (Rubin 2015b, 2017b). Prison administrators also occasionally double-celled prisoners, particularly when one seemed to become mentally ill from the isolation. For most prisoners, however, the Pennsylvania System remained mostly intact until the late 1870s (Rubin 2013, in prep).

Driven by a combination of overcrowding and administrative discretion, in the 1870s, Eastern's administrators quietly abandoned the Pennsylvania System. In its place, they instituted the "Individual Treatment System," which retained parts of the Pennsylvania System's ideology without its core focus on solitary confinement. For years, the administrators had claimed that, through solitary confinement, they could better observe a prisoner's reformation and customize treatment to the individual's needs. When overcrowding made solitary confinement impossible, the administrators continued to emphasize the customization of treatment but de-emphasized the earlier claim that solitary enabled the special opportunities for observation. During the decades to follow, prisoners were increasingly housed with cellmates, allowed to work in congregate workshops, and released together to

exercise in the prison's yards. The administrators maintained their emphasis on the importance of reformation, preventing prisoner communication (to the extent possible within the space constraints imposed by overcrowding), and mentorship, education, and religion. However, solitary confinement was no longer a core component of the formal regime (Rubin 2013, in prep).[5]

During the first century of experimentation with solitary confinement, then, cycles of critique, reform, and legitimizing retrenchment were visible. Prison administrators experienced the frustration of internal failures, including overcrowding, imperfect implementation of the "separate system," and mental health deterioration. Some of these failures were publicly critiqued by the likes of Charles Dickens; others were not. In response to failure and critique, prison administrators and reformers continued to experiment with and refine the practice of solitary confinement. In both New York and Pennsylvania, two of the country's then-most penologically innovative states, legislators and reformers in the early 1820s first sought to correct the incomplete implementation of solitary confinement in their earlier prisons by implementing new programs of total solitary confinement. In both cases, however, they ultimately sought a relaxation of rigid conditions in response to extreme failures like death and insanity. In sum, prison administrators at both Auburn and Eastern (and beyond) responded to critiques by repeatedly refining the quality and quantity of their isolation practices.

Prison administrators also sought to legitimize new solitary confinement practices by distinguishing them from older solitary confinement practices. For instance, in an attempt to distinguish new practices from old, Eastern administrators denied that prisoners were in solitary confinement, insisting first on the term "separate confinement" and later on the term "Individual Treatment System." They argued consistently for both the practical value (as a tool of control and order maintenance) and the ideological value (as a tool of rehabilitation) of solitary confinement, or "separation." Over time, solitary confinement continued its trajectory toward becoming a marginal practice in every prison, but it remained ever present, as a technology of control of last, if not first, resort.

Subaltern Models of Solitary Confinement (1867–1978)

Just as the Pennsylvania System was starting to fall apart at Eastern, the debate over solitary confinement cooled. Penal norms had settled: the only advocates of

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5. Notably, even after the Pennsylvania System disintegrated, the use of solitary confinement in the dark cell remained, but (again) with semantic differences. In 1881, Eastern's warden gleefully reported:

> It might be said that there have been no punishments; we have no dark cells, no appliances for administering correction, and no special apartments for refractory convicts. The violator of prison rules is kept in his own cell, fed on bread and water only, with no books but his Bible, and no intercourse whatever with any persons except his official care-takers. The period of his rigid isolation depends upon himself. He must be convinced of and acknowledge his error, before any steps are taken to restore to him his forfeited privileges. (*51st Annual Report* 1881, 45)

The "new" form of punishment was a dark cell in all but name.

long-term, round-the-clock solitary of the kind used in the Pennsylvania System were limited to Pennsylvania. Moreover, most commentators were content with the Auburn System's use of "isolation at night." Even so, some commentators who opposed long-term solitary confinement did acknowledge another, limited place for solitary confinement in prison regimes. In their 1867 survey of prisons, Auburn advocates Enoch C. Wines and Theodore W. Dwight argued that the "proper place" of the Pennsylvania System was in jails, for short-term confinement, and in the early portion of one's longer confinement under the Auburn System (1867, 55–56). Wines continued to hold and promote this view at national and international congresses on prisons in the coming decades (Rubin in prep).

In 1890, after his passing, Wines's son, Frederick, presented a paper at the national prison congress at Cincinnati affirming his father's earlier view: "We all, I think, have the separate system in mind as the ideal for short-term prisoners, especially for the accused, while waiting [sic] trial" (National Prison Association 1890, 97). This use of pretrial solitary confinement was widely deployed in Europe during the twentieth century, especially in Scandinavian countries, extending well into the twenty-first century (Smith 2009).

When it came to convicted criminals' long-term confinement, however, Frederick Wines endorsed a hybrid system that relied on "individual treatment," a concept that was increasingly in vogue beyond Pennsylvania (National Prison Association 1890, 97; see also Garland 1985). Long-term solitary confinement, in the late nineteenth and early twentieth centuries, remained an unacceptable practice, at least in the United States. Though it lost favor in the United States over the course of the nineteenth century, the Pennsylvania model remained popular in Europe—in Britain, France, Germany, Belgium, Holland, Norway, Sweden, and Denmark—and even in other parts of the world, including Chile and New Zealand (Smith 2009).

Meanwhile, in the United States, even the Auburn System of old was coming under fire, mainly for its reliance on contract-based labor systems (McLennan 2008). However, as southern penal reformers began to tout their own innovations as progressive, they used northern prisons as a foil (Lichtenstein 1996). An Alabama Inspector of Convicts, reporting on his state's convict-lease system, reported: "The convicts are allowed to talk to one another and to visitors. We have not yet reached that point in refined cruelty where the convict is kept in a solitary cell and not allowed to raise his eyes from his work or to speak to anyone but his keeper, until his mind, from constant communion with its own thoughts, is liable to become a wreck" (National Prison Association 1890, 116). More generally, however, solitary was such a minor practice that it was hardly mentioned outside of discussions of prisoners' punishment for in-prison misconduct.

Reflecting contemporary thought in 1890, the US Supreme Court dismissed solitary confinement as a barbaric and destructive practice no longer used in most of the United States. Recollecting the early experience with solitary confinement, the Court noted:

A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition. ... And others became violently

insane; others, still, committed suicide; while those who stood the ordeal
better were not generally reformed, and in most cases did not recover suf-
ficient mental activity to be of any subsequent service to the community.
(*In re Medley* 1890, 168)

The Court overturned James Medley's death sentence, finding that his preexecution
solitary confinement, under a policy Colorado implemented after Medley committed
his crime, constituted a new punishment so severe it violated the ex post facto clause
of the constitution (Reiter 2012, 79). Much as Justice Kennedy's concurrence in *Davis
v. Ayala* (2015) represented a judicial "bark" with little legal "bite," the *Medley*
Court's critique of solitary confinement appeared in dicta, not directly related to the
holding of the case, and therefore not legally binding. Still, the decision in *Medley*
represented the most marked legal rejection of solitary confinement in the nineteenth
century. Over a period of sixty years, solitary confinement had been theorized as an
ideal mode of confinement, implemented inconsistently, resisted by prisoners, refined
by prison administrators and legislators, criticized by reformers and yet other prison
administrators, and then, nominally, at least, abandoned.

   The very fact that Colorado initiated the practice of keeping at least some
prisoners in solitary confinement in the 1880s, however, reveals solitary's persis-
tence. In 1891, just one year after the *Medley* decision, the US Supreme Court
upheld the use of solitary confinement in a similar context: a New York facility
where prisoners were awaiting execution (*McElvaine v. Brush* 1891). Over the next
half-century, the US Supreme Court only mentioned solitary confinement two
more times; each time the Court presumed both the severity and the constitutional-
ity of the practice (*United States v. Moreland* 1922, 433, 449 [Brandeis, J., dissent-
ing]; *Chambers v. Florida* 1940, 227, 237–38; Haney and Lynch 1997, 540).
Meanwhile, Pennsylvania prison administrators systematically relaxed the use of sol-
itary confinement over the nineteenth century, as the Auburn model of congregate
labor gained popularity. Most of the burgeoning US prison population in the early
twentieth century continued to live and work in congregate settings, although a
few troublemakers were perpetually excluded in solitary confinement.

   Prison records from infamous facilities across the United States also confirm that
solitary confinement remained in use as punishment. For instance, records from Alca-
traz, a federal penitentiary operating from 1934 to 1963, describe the "Spanish dun-
geons" used to isolate troublesome prisoners (Odier 1982, 117). Of course, solitary
confinement had also been used in this way throughout the nineteenth century, such
as in Eastern's "dark cells" for refractory prisoners. Like those earlier dark cells, the
dungeons at Alcatraz functioned primarily as a tool of control and order maintenance.
Alcatraz's warden even attempted to impose an Auburn-style model of congregate, *but
silent* labor. This attempt at reviving the solitary-like conditions of early US prisons,
however, faced immediate and sharp criticism, much as Auburn and Eastern had faced
in the nineteenth century. In 1938, the *Saturday Evening Post* published an exposé
alleging that more than one dozen prisoners had gone insane under these restrictive,
silent conditions (Haney and Lynch 1997, 488).

   As the twentieth century wore on, prisons lost their experimental sheen and
became an integral part of US democracy. Solitary confinement, on the other

hand, continued to inspire criticism, and critics from the Supreme Court to the *Saturday Evening Post* continued to presume that the practice of solitary confinement, unlike incarceration, was far from integral to American democracy.

Still, prison administrators continued to use solitary confinement, whether in the form of a few dark cells and dungeons, or in the form of more systematic attempts to impose silence and other restrictions. These internal institutional practices continued to generate external critiques. In the late 1960s and early 1970s, in particular, prisoners began organizing for and asserting their rights to better conditions of confinement (see, e.g., Reiter 2016; Thompson 2016), while courts became increasingly receptive to prisoner litigation (Feeley and Rubin 2000).

Due to a series of legal changes granting individual plaintiffs broader rights to sue state officials, litigation over conditions of confinement in prisons flourished across the United States by the late 1960s (Reiter 2012). Horrifying prison conditions—including practices that resembled slavery and constituted torture—became a focal point of social critique. By the early 1970s, more than thirty state prison systems faced challenges to conditions of confinement in at least one facility, and sometimes the entire state system (Feeley and Rubin 2000). Every major case in this litigation movement for better prison conditions addressed the question of conditions in solitary confinement, or isolation. In one of the few of these cases to reach the US Supreme Court, *Hutto v. Finney* (1978), the Court noted that even short-term uses of solitary confinement in Arkansas prisons were "punitive" and "serve[] no rehabilitative purpose" (688). The *Hutto* Court, like many lower courts considering similar challenges to solitary confinement in state prisons across the United States, upheld caps of fifteen to thirty days on durations of solitary confinement, seeking to avoid lengthier stays (Reiter 2012).

Over the course of the twentieth century, then, experiments with solitary confinement continued, and these experiments continued to inspire critique. Although there were a few media exposés of solitary, like the *Saturday Evening Post* piece about the attempt at imposing a regime of silence at Alcatraz, the primary critics in the twentieth century were not public reformers or legislators or political theorists, but courts. The critics were new, but the responses were old.

First, prison officials defended themselves against these critiques, resisting court orders to reform conditions in solitary confinement and to cap the amount of time prisoners could spend there. In the *Hutto* case out of Arkansas, for instance, prison officials resisted over the course of thirteen years, appealing these orders all the way to the US Supreme Court. In particular, prison officials objected to any total ban on the use of solitary confinement and to any requirement that solitary confinement be "rehabilitative" (*Hutto* 1978, n8). In a way, this objection to the requirement of rehabilitation represented an implicit distinction between solitary confinement in Arkansas in the 1960s and solitary confinement in Pennsylvania in the 1830s: history had taught prison officials that solitary confinement was unlikely to be rehabilitative, so they resisted any requirement to make it so. Instead, they insisted that it was necessary to manage and control prisoners.[6]

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6. In *Executing Freedom*, Daniel LaChance (2016, 65–66) makes a similar point about shifts in justifications for the death penalty across the United States in the same era.

Second, in addition to defending solitary confinement, prison officials continued to impose the practice—despite the *Medley* Court's condemnation in 1890, the *Saturday Evening Post*'s condemnation in 1938, and even the *Hutto* Court's condemnation in 1978 (stemming from a case initiated in 1965). Prison administrators, like the warden at Alcatraz, and the guards in Arkansas whose solitary confinement policies were challenged in the case of *Hutto v. Finney*, experimented with old regimes of silence and isolation in dark cells, modifying in response to criticism, but often continuing, their experiments with technologies of power.

Experiments with Longer-Term Solitary Confinement and the Modern Supermax (1974–Present)

Even after the barrage of litigation in the 1970s and 1980s, the use of solitary confinement expanded, albeit in new "experimental" iterations. In the 1970s and 1980s, prison systems across the United States began testing out new technologies of longer-term, more systematic isolation. These experiments took three forms: behavior modification through sensory deprivation, semi-permanent "lockdowns," and supermaximum security prisons. As with earlier forms of solitary confinement use, prison officials faced critique, but they defended themselves against these critiques, often with reference to historical echoes of earlier regimes.

Behavior modification programs were common across US prisons in the 1970s (see, e.g., Cummins 1994), but the Control and Rehabilitation Effort in the federal system and Special Treatment and Rehabilitation Training (START) in Missouri particularly attracted attention—and critique. These programs experimented with techniques of brainwashing piloted in military training exercises: placing prisoners in extreme isolation, without reading materials or human contact, and then gradually relaxing the conditions of confinement as prisoners met behavioral benchmarks. In justifying the programs, prison officials focused on the dual goals of order maintenance and discipline (with at least an implication of the potential for rehabilitation). For example, prison officials defended Missouri's START program by claiming, "the primary objective ... was an attempt to work with these offenders to control their behavior so that they could participate in regular institution programs" (*Clonce v. Richardson* 1974, 340). And prison officials distinguished the new behavioral modification regimes as novel, using "new techniques" that differentiated them from earlier (discredited) forms of solitary confinement. Such justifications both internalized lessons from earlier critiques—solitary confinement with no end or alternative goal had been abandoned, for instance—and sought to distinguish modern penal technologies from earlier penal technologies, like silent regimes or dark cells.

Nonetheless, the inherent abusiveness of these regimes was documented both in a journalist's book-length exposé about cruel prison conditions (Mitford 1974, 134–35) and in federal litigation (*Adams v. Carlson* 1973, 621–22; *Clonce* 1974, 345). In two federal cases, *Adams* and *Clonce*, courts ordered modifications to the harsh behavioral management regimes, and insisted that prisoners be granted at

least minimal due process protections, such as notice of why they were being placed in the restrictive behavioral management programs, prior to being placed in them.

Still, experiments with isolation continued. Violent altercations between prisoners and staff, along with full-blown revolts in prisons across the United States in the 1970s—in California, New York, Illinois, and Massachusetts, to name just a few examples—precipitated long-term lockdowns following each riot (see Reiter 2016; Thompson 2016). During these lockdowns, prisoners were stuck in their cells all day every day for weeks, months, and then years at a time (*Toussaint v. McCarthy* 1984, 1397, 1410; Ward and Breed 1984; Cummins 1994, 232; Bissonnette et al. 2008). More prisoner litigation challenged these long-term lockdown conditions (Reiter 2012). And again, prison officials justified the lockdowns as critical for maintenance of institutional order, especially for managing "those portions of the prison population composed of prisoners who are dangerous and violent" (*Toussaint* 1984, 1367). This time, instead of seeking to distinguish long-term lockdowns from earlier uses of solitary confinement, prison officials sought to distinguish 1980s prison culture from earlier prison cultures, pointing to increasing problems with gang leaders and gang affiliates threatening to control the prison system (1375), to justify more extended uses of isolation. Courts resisted these arguments, again ordering administrators to relax the conditions of confinement—to provide more time out of cell, more opportunities to visit with nonprisoners, and more procedural protections to govern who was placed on lockdown.

But instead of designing alternatives to solitary confinement, prison administrators worked with architects to design the first "supermax" prisons—technologically advanced facilities that institutionalized lockdown practices. In 1986, Arizona opened Cell Block 6 (CB 6) at its Eyman Complex, the first supermax facility in the United States (Lynch 2010). A supermax, or supermaximum security prison, is a unit, or an entire prison, designated for prisoners' solitary confinement. Prisoners spend an average of twenty-two to twenty-three hours per day locked in their cells, in conditions that keep any kind of human contact at an absolute minimum. The first supermax units in Arizona, opened in 1986, were stark. Each cell, made of poured concrete, had one hard concrete ledge for a bed, and an angular cube-and-shelf combination for a desk. These "fixtures" were solid concrete, continuous with the cell walls. There were no windows.[7] The perforated steel doors were equipped with a small locking hatch at about waist level, allowing for both a food tray to slide in and for prisoners to reach out their hands for cuffing before being removed from the cell—a rare occurrence. Prison officers in a central, Panopticon-like control booth could look out over multiple blocks of cells at one time, and operate the doors through a computer system, requiring no face-to-face human contact to

7. The Arizona SMU remains in operation, with these conditions, as of this writing. Though many prison systems copied Arizona's model, including California's Pelican Bay Security Housing Unit, some subsequent iterations of the supermax included small, slit windows in the cells, likely in reaction to early litigation about the supermax conditions of confinement. In his 1995 decision in the case of *Madrid v. Gomez*, Judge Henderson assessed the constitutionality of the Pelican Bay supermax and noted the "windowless" nature of the cells no less than six times. The settlement in the case required prisoners with mental illnesses to be housed in cells with windows. The Illinois supermax at Tamms, modeled after Pelican Bay, but opened after the decision in *Madrid*, for instance, included slit windows in the cells.

release a prisoner from his cell for his daily one hour of exercise in a "yard"—usually another concrete enclosure with a skylight or some other access to natural light. In 1989, California opened the 1,056-bed Pelican Bay State Prison Security Housing Unit, explicitly modeled on the Arizona Security Management Unit. And in 1994, the federal prison system opened the Administrative Maximum, modeled on the Arizona SMU and the Pelican Bay SHU (Reiter 2016).

By the late 1990s, nearly every state had a supermax (Riveland 1999). In many ways, supermaxes are the archetypal punishment in the late-modern era. They emerged across the United States roughly simultaneously with the largest period of prison building (see Eason 2017, 6). They epitomize the "warehouse" style of these newer prisons: geometric concrete boxes with no landscaping, combined with layers of barbed wire fencing, located in isolated rural settings (Feeley and Simon 1992, 460; Irwin 2005). They are designed for the so-called worst of the worst, the problem prisoners who are too dangerous to interact with or live among prison personnel or other prisoners. Supermax prisoners fit the cultural-political imagination of prisoners as monstrous (Kennedy 2000) and are the physical embodiment of the metaphorical toxic waste that Feeley and Simon (1992) argue is targeted by modern incapacitation policies. Supermaxes thus represent the latest experiment with solitary confinement as a technology of power, deployed by prison administrators for labeling, threatening, and controlling prisoners' bodies.

Not only do supermaxes redeploy solitary confinement as a tool of institutional control, experimenting with new structures and procedures to achieve the same outcome, but supermaxes, like each of the preceding iterations of solitary confinement, have been the subject of both public and legal critique. As with every prior experiment with isolation in the United States, the new supermaxes in Arizona and California quickly inspired public critique, including a *60 Minutes* exposé of the conditions at California's Pelican Bay in 1993 (Reiter 2016). As with many critiques of experiments with solitary confinement, at least since prisoners gained the right to make legal challenges to the conditions of their confinement in the 1960s, litigation also ensued, most notably in the case of *Madrid v. Gomez.* Almost as soon as the Pelican Bay Security Housing Unit opened, prisoners there started complaining about the harsh conditions of confinement. The critiques began within the prison system, internally, but they soon inspired external oversight. A federal judge in northern California quickly certified a class of prisoners and ultimately held a three-month trial in 1993 evaluating the constitutionality of conditions in the Pelican Bay SHU.

As in earlier challenges to solitary confinement, prison officials quibbled over the labels applied to the facilities. The supermax at Pelican Bay was not called solitary confinement, or a separate system, or a dark cell, but instead a "Security Housing Unit" or "SHU." When critics said the SHU imposed harsh conditions of solitary confinement, prison administrators objected, saying "[i]t's not Draconian, it's Spartan" (Reiter 2016, 115) and pointed out that prisoners have modern privileges in isolation, like the ability to take correspondence courses and watch television (Dolan 2011). Such attempts to legitimize a new penal technology by distinguishing it from an old one, however, ignore the fact that prisoners at Eastern learned to read and write and had access to books—nineteenth-century equivalents of correspondence courses and television.

Nonetheless, prison officials' work to distinguish supermaxes from earlier, discredited forms of solitary confinement, legitimizing the supermax as new and different, were ultimately fairly successful. The final holding in the *Madrid* case: prisoners needed better mental and physical health care, and mentally ill prisoners should never have been sent to isolation in the first place, but the overall practice of keeping prisoners in solitary confinement indefinitely was constitutional (Reiter 2016). Solitary confinement, in its newest iteration, would persist. As with the Pennsylvania model, the Auburn model, and other early US experiments with solitary confinement, supermaxes would also have global appeal, appearing in countries as diverse as Ireland, Denmark, and Turkey, to name just a few examples (O'Hearn 2013; Ross 2013; Reiter 2014b).

The relationship between supermaxes and their many historical antecedents—whether the Eastern or Auburn penitentiaries, dark cells or silent dining halls, lockdowns or behavioral management programs—is contested, with scholars pointing to multiple sources and explanations for supermaxes. On the one hand, scholars explain supermaxes as a brand-new technology of power, a product of the penal politics and policies of this latest penal generation—the period after the 1970s that generated mass incarceration and the whole host of policies and practices that constitute the modern penal assemblage (Shalev 2009; Ross 2013; Simon 2014). On the other hand, scholars explain supermaxes as an old technology of power repackaged in a modern architectural form, but originating at Alcatraz in the early twentieth century, or even at Eastern State Penitentiary in the early nineteenth century (Mears and Reisig 2006, 34; Mears and Bales 2009, 1132; 2010, 545). Supermaxes, however, can be better understood as a product of these contested origin stories: a reinvention and reinterpretation of solitary confinement, with multiple eras of critique integrated into the institution, as encrusted layers of both justification and practice.

DISCUSSION: HISTORICAL LEGACIES AS A KEY ELEMENT OF PENAL CHANGE

This article has examined the persistent use of solitary confinement throughout US history in the face of repeated critiques from reformers and judges alike. Solitary confinement had great ideological appeal in the 1790s and 1800s, but was virtually absent from actual practice, leading to implementation of an extreme (and fatal) version in the early 1820s. Most states quickly implemented modifications to this initial, extreme system, severely limiting their use of solitary to nighttime confinement alone under the Auburn System, or providing labor, education, mentorship, and visits to alleviate the possible physical and mental health consequences of solitary confinement, under the Pennsylvania System at Eastern State Penitentiary. Yet the practice of implementing and modifying solitary confinement continued. From the mid-nineteenth century through the mid-twentieth century, solitary confinement was a largely discredited and hidden technology, relied on only as a punishment for prisoners who administrators identified as refractory. Then, in response to extensive violence and riots in prisons, reliance on solitary confinement expanded as administrators increasingly instituted lockdowns for radical or violent prisoners and then created

modern supermaxes, with regimes characterized by long-term solitary confinement in conditions of sensory deprivation. Although solitary confinement's use has varied throughout history, it has never disappeared. Even in the face of extensive criticism, it was revised and redefined, but not eliminated. Moreover, while some justifications for its use varied, its appeal to prison administrators as a technology of control was omnipresent. In fact, in each period examined, solitary confinement persisted at least in part because of its ability to satisfy administrative goals like institutional control.

Administrative Goals versus Social Change

One of the basic contributions of the punishment and society literature has been to illustrate the interconnectedness between punishment and society. Rather than a simple response to crime, punishment is a function of society—its religion, its economy, its politics, its culture, its cohesion, and, especially, its diversity. This lesson has been repeatedly illustrated by scholars for more than a century (Durkheim [1893] 1984; Rusche and Kirchheimer 1939), although it was most popularly propagated by Michel Foucault (1977) and David Garland (1985, 1990, 2001), and the many scholars in dialogue with them (Beckett 1997; Wacquant 2002; Zimring 2003; Simon 2007; Barker 2009). By emphasizing the important role society plays in shaping punishment, however, these macro-level, context-focused accounts downplay factors internal to the penal system that might also contribute to changes in penal policy.

This study, by contrast, has illustrated the importance of these internal factors. First, we have illustrated the way in which prison administrators, driven by their perception of internal needs like prisoner control, have offered a counterpoint to changing norms in the larger society. Administrators' continued use of solitary confinement has frequently proceeded even after the technology has been publicly discredited. Second, we have also highlighted the importance of historical legacies. We have demonstrated that pivotal events within penal institutions—such as Auburn's fatal experiment with solitary confinement in New York; prisoner-initiated complaints about harsh conditions of confinement as in the *Hutto* case out of Arkansas; or moments of significant unrest, including revolts in the 1970s California, New York, and Massachusetts—have significant consequences for the shape of punishment to come. These historical legacies, and prison administrators' reactions to them, in turn become part of the penal context, or field, in which prison administrators operate (see Bourdieu and Wacqant 1992; Page 2011, 10–14). They act as "feedback effects" (Schoenfeld 2010, 737) that structure the range of choices—scripts and actions—open to actors within the criminal justice system. Such important internal factors are overlooked in analyses that only focus on external or macro-level changes at the level of politics or economics.

Implications for Solitary Confinement and Other Extreme Punishments

By examining the persistence of a particular penal technology, solitary confinement, we not only illustrate an important influence on penal policy and practice, but also highlight one significant contradiction of contemporary penal rhetoric. Modern

penal officials insist that they are *not* using solitary confinement, seeking to differentiate themselves from widely condemned practices abandoned at Eastern, and dismissed as barbaric by the Supreme Court in *Medley* in 1890 (albeit in dicta). In other words, modern prison officials want to distance themselves from something that was perceived as inordinately harsh and to argue they are imposing something more civilized. In fact, what exists today is, in many ways, calculated to be significantly harsher: modern supermax prisoners do not have the private yards attached to their cells, the expectation of being provided with work, or the weekly visits from staff and volunteers, which Eastern State Penitentiary prisoners did have, for instance.

Better understanding the similarities and differences between these two innovations thus illustrates precisely what is and is not new about supermaxes and their use of solitary confinement. In turn, understanding the ways in which solitary confinement use has persisted over time reveals two mechanisms of this persistence: administrative control and legitimization in relation to historical legacies.

Recent calls for solitary confinement reform or abolition, especially those made by Supreme Court Justice Kennedy in the 2015 case of *Davis v. Ayala*, and echoed by his colleague Justice Breyer in the 2017 case of *Ruiz v. Texas*, tend to assume that litigation and critical attention might result in significant changes to solitary confinement practices. Such assumptions, however, reveal a lack of understanding of both the persistence of solitary confinement and the mechanisms of this persistence. The history of solitary confinement use in US prisons suggests that significant changes to the practice have been both initiated and coordinated internally, by prison administrators, rather than externally by critics.

In light of this history, the total abolition of solitary confinement, as imagined by Justices Kennedy or Breyer, as well as by other current reformers such as the national "Stop Solitary" campaign currently coordinated by the American Civil Liberties Union National Prison Project, seems unlikely, absent broader changes to the structure of incarceration, and especially the control that prison administrators wield. Indeed, Reiter (forthcoming) argues that a more global perspective on solitary confinement reveals that solitary confinement has been persistent and resistant to reform in Europe, as well as in the United States.

While our analysis has focused on solitary confinement, and the implications of historical practices for current reforms, this analysis also has broader application to other "extreme punishments" (Reiter and Koenig 2015, xi), as well as to other penal and legal technologies. Like long-term solitary confinement, extreme punishments such as capital punishment and deportation have undergone similar processes of superficial transformation while fundamentally persisting (Reiter and Coutin 2017). In each case, the penal or legal technology is always in the background, used at society's margins in ways that are useful to administrators or, more generally, people in power. The administrative and historical mechanisms through which such practices persist deserve more attention and exploration.

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