

IS SOLITARY CONFINEMENT A PUNISHMENT?

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Nulla poena sine lege—no punishment without law—is one of the oldest and most universally accepted principles of English and American law.¹ Today, thousands of American prisoners are placed in long-term solitary confinement² despite the fact that such placement is authorized neither by penal statute nor by judicial sentence.³ Is solitary confinement “punishment without law,” or is it a mere exercise of administrative discretion?

Imagine a prisoner is present during a violent altercation in the prison yard. The warden suspects that the prisoner was an instigator of the fight, and orders that the prisoner be publicly flogged to deter both this prisoner and others from engaging in future acts of violence. Is this flogging a punishment?

Now imagine a slightly different scenario. A federal judge sentences a gang member to the statutory maximum sentence of five years in prison and a \$250,000 dollar fine for illegally growing twenty-five marijuana plants. When the offender arrives at prison, the warden informs him that he will add one day to the prisoner’s sentence for every day the prisoner fails to identify the other gang members he knows in the prison. As a result, the offender spends an extra five years in prison. Is this additional prison time a punishment?

Now imagine a third scenario. Imagine that instead of a flogging or extra prison time, the warden transfers the prisoner to a higher security facility to minimize the risk of violence or gang activity. As a result, the prisoner suffers greater restrictions on his liberty and experiences more discomfort than he would in a lower security facility. Is this transfer a punishment?

Many of us would probably consider the first two scenarios to be clear examples of punishment, but we might not be so sure about the third. In all three cases, a government official inflicts additional pain or imposes additional restrictions on a prisoner’s liberty. In all three cases,

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¹ See, e.g., Jerome Hall, *Nulla Poena Sine Lege*, 47 YALE L.J. 165 (1937) (tracing the historical roots of the principle).

² See ASCA & LIMAN CTR. FOR PUB. INTEREST L., REFORMING RESTRICTIVE HOUSING: THE 2018 ASCA-LIMAN NATIONWIDE SURVEY OF TIME-IN-CELL 4, 14 (2018) [hereinafter REFORMING RESTRICTIVE HOUSING] (estimating that 60,000 prisoners are currently kept in solitary confinement, of whom approximately 11,500 have spent a year or more in solitary confinement and nearly 3,000 have spent 6 years or more in solitary confinement).

³ See Alexander A. Reinert, *Solitary Troubles*, 93 NOTRE DAME L. REV. 927, 959–60 (2018).

the official's actions are motivated by a desire to enhance prison security. The third scenario seems, on its face, less extreme than the other two—so we might think of it as a mere administrative measure rather than an additional punishment.⁴ But before deciding, we might want to know more about conditions at the new facility. If they are sufficiently harsh, the reassignment might also start to look like an additional punishment.

These examples illustrate two things: First, the most important factor in determining the line between punishments and non-punishments, at least intuitively, is penal effect. Flogging and extension of a prison sentence are new punishments because they inflict pain or restrict liberty well beyond what was authorized by the original sentence. The fact that the warden's purpose might be characterized as “regulatory” rather than “penal” is not enough to transform these punishments into mere administrative acts. Second, although prison officials need discretion to protect guards and inmates from prison violence, this discretion does not include the power to impose new punishments beyond what was authorized by the offender's sentence.⁵ Otherwise, prison officials would have the authority to do what legislatures, judges, and juries may not: Impose punishment without law.⁶

The government's authority to impose punishments is limited by several constitutional provisions. The Ex Post Facto clauses of Article I, sections 9 and 10 prohibit the government from increasing an offender's punishment after he commits a crime.⁷ The Fifth Amendment's⁸ Double Jeopardy Clause prohibits punishing an offender twice for the same offense, and its Compelled Self-Incrimination Clause prohibits the use of punishment as coercion to obtain incriminating information from an individual.⁹ The Sixth Amendment prohibits punishment for conduct that is

⁴ See *Meachum v. Fano*, 427 U.S. 215, 225 (1976) (“Confinement in any of the State's institutions is within the normal limits or range of custody which the conviction has authorized the State to impose”).

⁵ See *infra* Part I.

⁶ See *infra* Part II.

⁷ U.S. CONST. art. I, §§ 9, 10.

⁸ U.S. CONST. amend. V.

⁹ The Supreme Court has sometimes implied that government coercion can only be considered a “punishment” if it is inflicted as the result of a criminal conviction. See, e.g., *Ingraham v. Wright*, 430 U.S. 651, 664 (1977) (holding that paddling of schoolchildren did not come within scope of Eighth Amendment because “[a]n examination of the history of the Amendment and the decisions of this Court construing the proscription against cruel and unusual punishment confirms that it was designed to protect those convicted of crimes”). Early constitutional history suggests, however, that the term “punishment” was also thought to encompass practices such as pretrial torture, where pain was inflicted in order to obtain information. For example, during the Virginia ratification debate, George Mason, the principle drafter of the Virginia Declaration of Rights, asserted the following reasons for concluding that that document prohibited pretrial torture: “[F]or that one clause expressly provided that no man can give evidence against himself; and that the worthy gentleman must know that, in those countries where torture is used, evidence was extorted from the criminal himself. Another clause of the bill of rights provided that no cruel and unusual punishments shall be inflicted; therefore, torture was included in the prohibition.” 3 JONATHAN ELLIOT, *DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787*, at 452 (2d ed. 1836) [hereinafter 3 ELLIOT'S DEBATES]. Similarly, Blackstone described pretrial torture as a “punishment.” 4 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 325–27 (16th ed. 1825); see also Celia Rumann, *Tortured History: Finding Our Way Back to the Lost Origins of the Eighth Amendment*, 31 PEPP. L. REV. 661, 673 (2004) (discussing historical evidence that the Eighth Amendment was originally understood to prohibit torture).

not proven to a jury beyond a reasonable doubt.¹⁰ And of course, the Eighth Amendment prohibits cruel and unusual punishments.¹¹ If flogging, extending a prison sentence, or transferring a prisoner to a higher security facility constitutes punishment, then prison officials may not inflict it unless it was both authorized by the penal statute governing the offense of conviction at the time the prisoner committed the offense and imposed by the sentence actually given by a judge or jury. Moreover, the Fifth and Eighth Amendments may bar certain punishments altogether, either because they involve an effort to force the prisoner to provide incriminating evidence or because they are cruel and unusual.¹²

These limits apply to all three branches of government. Indeed, they arguably should apply with greatest force to the executive branch because it has strong incentives to order the infliction of punishments, but no independent constitutional authority to do so. Basic separation of powers principles dictate that only the legislature may authorize punishments and only the judge or the jury may impose them. Executive officials are supposed to implement the punishments authorized by the other branches of government. They do not have the authority to enhance punishments on their own.¹³ At the same time, executive officials interact with individuals more frequently and directly than representatives of the other branches of government, and have strong incentives to use punishment to exert control over them. Thus it is important to make sure that executive officials comply with the constitutional provisions summarized above.

The Supreme Court's modern prison conditions jurisprudence shows little awareness of the separation of powers principles prohibiting executive officials from imposing punishments on their own authority.¹⁴ Instead, the Court has focused on a different separation of powers problem: The need to prevent the judiciary from involving itself in the running of prisons. To decide constitutional cases without intruding upon the prerogatives of the other branches of government, courts need a judicially administrable standard of adjudication. As discussed in Part I below, the Supreme Court's modern punishment-related jurisprudence notably lacks such a standard. The tests the Court employs for distinguishing punishments from non-punishments are so vague and ambiguous that they provide little real guidance. Thus the Court must either substitute its own judgment for that of prison officials or defer to prison officials' constitutionally questionable

¹⁰ U.S. CONST. amend. VI. *See also, e.g.,* *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (“Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”).

¹¹ U.S. CONST. amend. VIII.

¹² Because prison conditions are part of the punishment the offender receives with his sentence, the Eighth Amendment applies to the conditions even if the decision to place a prisoner in a certain facility does not constitute a separate punishment above and beyond the prisoner's formal sentence. *See, e.g., Estelle v. Gamble*, 429 U.S. 97, 104–06 (1976) (applying the Cruel and Unusual Punishments Clause to prison conditions); *see also* John F. Stinneford, *The Original Meaning of “Cruel”*, 105 *GEO. L.J.* 441 (2017) [hereinafter Stinneford, *Original Meaning of “Cruel”*] (discussing the Supreme Court's prison conditions jurisprudence under the Eighth Amendment). Judith Resnik has recently identified a nascent “anti-ruination principle” tying together the various strands of the Supreme Court's Eighth Amendment jurisprudence over the past seventy years, including its prison conditions case law. *See* Judith Resnik, *(Un)Constitutional Punishments: Eighth Amendment Silos, Penological Purposes, and People's “Ruin”*, 129 *YALE L.J. FORUM* 365, 408 (2020).

¹³ *See supra nn. 7-12 and accompanying text.*

¹⁴ *See infra* Part I.

conduct. In other words, in the absence of a clear, workable standard of adjudication, the Court must either violate separation of powers by taking over the functions of the executive or tolerate the executive's violation of separation of powers by deferring to its decisions to inflict punishments on the basis of its own authority. Such toleration also permits prison officials to violate individuals rights by imposing punishments without law.

In recent decades, the Supreme Court has chosen to tolerate punishment by executive fiat. The Court has implied that once a prisoner is incarcerated, changes to prison conditions will not be considered punishments unless they are cruel and unusual under the Eighth Amendment—a situation that is only triggered, under current case law, by proof that the responsible prison official had a culpable state of mind.¹⁵ Even if conditions of confinement impose a “significant and atypical hardship” on the prisoner, they are not considered punishments and therefore trigger only minimal due process protection.¹⁶ The Court's deference to administrative discretion means that executive officials can easily evade constitutional restrictions on the infliction of punishment.

An examination of English and American constitutional history demonstrates three facts that are relevant to this situation: First, the need to limit the government's discretion over punishment has been a central theme of English and American constitutionalism from the Magna Carta through the adoption of the American Bill of Rights. Second, executive officials' exercise of undue discretion over punishment has been recognized for centuries as a central characteristic of arbitrary and tyrannical government. Third, the core standard for distinguishing between punishments and non-punishments is penal effect viewed in light of tradition. If a government action has traditionally been used as a punishment, or imposes pain or deprivation equivalent to a method traditionally used as a punishment, it is a punishment for constitutional purposes regardless of the label the government attaches to it.¹⁷

The Supreme Court's older case law reflects these principles. In 1890, the Court held, in the case of *In re Medley*,¹⁸ that transfer of a condemned offender from a county jail to solitary

¹⁵ *See id.*

¹⁶ *See, e.g.,* *Wilkinson v. Austin*, 545 U.S. 209, 223 (2005). *See also infra* Section I.b. Moving the analysis from the “punishment” question to the “due process” question has not solved the problem arising from the Court's lack of an administrable standard for differentiating punishments from non-punishments, for the Court also lacks an administrable standard for determining which inflictions of pain or deprivations of liberty within prison trigger due process protection. *See, e.g.,* *Wilkinson*, 545 U.S. at 223 (noting the courts lack a “baseline from which to measure what [deprivation] is atypical and significant in any particular prison system”).

¹⁷ This is not to say that the reasons for the imposition are unimportant. If the government imposes a deprivation that has traditionally been used for non-penal as well as penal reasons, the purpose of the deprivation may tell us whether or not the deprivation is punishment. For example, denial of the right to practice law has traditionally been imposed for non-penal reasons – failure to pass the bar exam, failure to meet character and fitness requirements, etc. But if the government imposes this deprivation in order to punish a person for prior conduct, it is a punishment for constitutional purposes. *See Ex parte Garland*, 71 U.S. 333, 377 (1867). The government's purpose is also important in determining whether a punishment is justified and proportionate to the offense. *See, e.g.,* Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: “Proportionality” Relative to What?*, 89 MINN. L. REV. 571 (2005); Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677 (2005); John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899 (2011) [hereinafter Stinneford, *Rethinking Proportionality*].

¹⁸ 134 U.S. 160 (1890).

confinement in a penitentiary prior to execution was a new punishment for constitutional purposes for two related reasons: it was historically used as a heightened form of punishment and it inflicted substantial suffering beyond what is normally imposed by a prison sentence.¹⁹ The fact that the government's purpose in imposing solitary confinement on Medley was regulatory rather than penal was irrelevant to the Court's analysis. *Medley* is still good law, and answers the question posed by this Essay. Solitary confinement is a punishment, not a mere exercise of administrative discretion, and is thus subject to the constitutional constraints listed above.

Part I of the Essay that follows describes the Supreme Court's existing case law governing prison officials' discretion to impose harsher conditions on inmates. Part II analyzes English and American constitutional history relating to the need to limit discretion over punishment, the danger of executive discretion in the infliction of punishment, and the distillation of a standard relevant to conditions of confinement. Finally, Part III checks the accuracy of the Supreme Court's conclusion in *Medley* that the harshness of solitary confinement makes it a new punishment by examining historical and modern empirical data relating to the effects of solitary confinement, and concludes that the *Medley* court was correct.

I. THE DOMINANCE OF DISCRETION: CURRENT APPROACHES TO PUNISHMENT AND DUE PROCESS

Current Supreme Court doctrine governing conditions of confinement focuses almost exclusively on the need to respect the discretionary decisions of prison officials and focuses little on the need to constrain this discretion by law. This deferential approach stems from the Court's failure to identify a workable, coherent definition of "punishment," which has led to an inability to develop a standard to differentiate permissible from impermissible exercises of discretion over conditions of confinement.

a. The Supreme Court's Failure to Define "Punishment"

The Supreme Court has not adopted a clear, consistent standard for determining whether conditions imposed by prison officials constitute an additional punishment beyond what has been authorized by penal statute and judicial sentence. Instead it has adopted at least two different standards, one of which is inconsistent with the plain meaning of the constitution's text, and the other of which is largely incoherent.

The Court's first definition of punishment, which it employs in Eighth Amendment cases, comes from its decision in *Wilson v. Seiter*.²⁰ In that case, a prisoner brought a lawsuit claiming that certain prison conditions—namely "overcrowding, excessive noise, insufficient locker storage space, inadequate heating and cooling, improper ventilation, unclean and inadequate restrooms, unsanitary dining facilities and food preparation, and housing with mentally and physically ill

¹⁹ *Id.* at 173.

²⁰ 501 U.S. 294 (1991).

inmates”²¹—constituted cruel and unusual punishment. The Supreme Court held that such conditions amount to a punishment only if the prison official responsible for them displayed a “wanton” or “culpable” state of mind.²² Such wantonness or culpability could be shown by establishing a prison official’s “deliberate indifference”²³ to a prisoner’s well-being, or that the official acted “maliciously and sadistically for the very purpose of causing harm.”²⁴

The requirement that responsible prison officials must be shown to have a culpable state of mind might make sense as a standard for determining which punishments are “cruel,”²⁵ but not as a means of distinguishing punishments from non-punishments. Indeed, this standard seems flatly inconsistent with the plain meaning of the word “punishment.” Webster’s 1828 Dictionary, for example, defines “punishment” as “[a]ny pain or suffering inflicted on a person for a crime or offense, by the authority to which the offender is subject, either by the constitution of God or of civil society.”²⁶ Similarly, Merriam-Webster’s online dictionary defines punishment, in relevant part, as “suffering, pain, or loss that serves as retribution . . . a penalty inflicted on an offender through judicial procedure; severe, rough, or disastrous treatment.”²⁷ As these older and newer dictionary definitions imply, punishment involves intent to inflict pain or suffering, but not necessarily culpable intent. Moreover, once we consider punishment outside the context of the Cruel and Unusual Punishments Clause, the culpability requirement loses even its surface appeal. What does a government official’s culpability have to do with the question of whether a prisoner is suffering an ex post facto punishment, or double jeopardy, or deprivation of the right to a jury trial?

The other test the Court sometimes uses to distinguish punishments from non-punishments was first articulated in *Kennedy v. Mendoza-Martinez*,²⁸ and was applied to prison conditions for pretrial detainees in *Bell v. Wolfish*²⁹ and *United States v. Salerno*.³⁰ The question in *Mendoza-Martinez* was whether a statute that stripped citizenship from certain draft dodgers imposed a punishment within the meaning of the Constitution.³¹ To answer this question, the Court set forth the following multi-factor test: (1) whether the sanction imposes “an affirmative disability or

²¹ *Id.* at 296.

²² *Id.* at 299, 302, 305 (italics omitted).

²³ *Id.* at 302 (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)).

²⁴ *Id.* (quoting *Whitley v. Albers*, 475 U.S. 312, 320–1 (1986)).

²⁵ As I have demonstrated elsewhere, however, this would be an incorrect standard as a matter of original meaning. See Stinneford, *Original Meaning of “Cruel”*, *supra* note 11. See also Samuel L. Bray, “Necessary and Proper” and “Cruel and Unusual”: *Hendiadys in the Constitution*, 102 VA. L. REV. 687, 717 (2016) (arguing that “cruel and unusual” is an hendiadys—that is, a multi-word phrase with a single, complex meaning—but agreeing that it does not refer to the mental state of the punisher).

²⁶ Noah Webster, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (New York, S. Converse 1828).

²⁷ *Punishment*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/punishment?utm_campaign=sd&utm_medium=serp&utm_source=jsonld [<https://perma.cc/DKQ9-579G>].

²⁸ 372 U.S. 144 (1963).

²⁹ 441 U.S. 520 (1979).

³⁰ 481 U.S. 739 (1987).

³¹ 372 U.S. at 165–166.

restraint;”³² (2) whether the sanction “has historically been regarded as a punishment;”³³ (3) whether the sanction “comes into play only on a finding of scienter;”³⁴ (4) whether the sanction “promote[s] the traditional aims of punishment—retribution and deterrence;”³⁵ (5) whether the sanction applies to behavior that is “already a crime;”³⁶ (6) whether the sanction is “rationally connected” to a possible “alternative purpose;”³⁷ and (7) whether the sanction “appears excessive in relation to the alternative purpose.”³⁸

This test is confusing and amorphous. The Court does not specify how the factors relate to each other, nor how they are supposed to reveal whether a government action is a punishment. Nonetheless, there is an implicit logical relationship between the test’s seven factors. The first two focus on the government action itself: Does it have a penal effect, and is it the sort of action that has historically been used as punishment? The remaining factors focus on the government’s purpose in taking the action: Is it directed only at culpable actors? (Factors 3 and 5.) Does the government label the action as penal or regulatory? (Factors 4 and 6.) If the government labels the action as regulatory, is this labeling plausible in light of the action’s effect? (Factors 6 and 7.)

When one examines the precedents underlying the *Mendoza-Martinez* factors, it becomes clear that a government-imposed sanction is a punishment if it has a clear penal effect, and that questions about the government’s purpose in imposing a sanction only arise when the sanction is also often used for non-penal purposes. Every case cited in support of the factors relating to government purpose (factors 3 through 7) involved a type of deprivation that has historically been imposed for regulatory purposes. Seven of the nine cases involved monetary deprivations labeled as taxes, customs duties, denial of social security benefits, or contractual liquidated damages provisions.³⁹ The two remaining cases involved “status” deprivations—disqualification from public office⁴⁰ and denationalization⁴¹—that are often imposed for regulatory purposes. States routinely impose regulatory requirements that must be met before a person can hold public office, and the exclusion of those who fail to meet these requirements is not generally regarded as a punishment. Similarly, as a plurality of the Supreme Court noted in *Trop*, the federal government generally denationalizes nationalized citizens who falsified their citizenship applications “not . . .

³² *Id.* at 168.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 168–169.

³⁸ *Id.* at 169.

³⁹ See *United States v. Constantine*, 296 U.S. 287 (1935) (excise tax on liquor); *United States v. La Franca*, 282 U.S. 568 (1931) (tax on retail liquor business); *Bailey v. Drexel Furniture Co. (Child Labor Tax Case)*, 259 U.S. 20 (1922) (child labor tax); *Lipke v. Lederer*, 259 U.S. 557 (1922) (“tax” on unlawful liquor sales); *Helwig v. United States*, 188 U.S. 605 (1903) (customs charge); *Flemming v. Nestor*, 363 U.S. 603 (1960) (termination of social security benefits); *Rex Trailer Co. v. United States*, 350 U.S. 148 (1956) (contractual liquidated damages provision).

⁴⁰ *Cummings v. Missouri*, 71 U.S. 277 (1867).

⁴¹ *Trop v. Dulles*, 356 U.S. 86 (1958).

to penalize the alien for having falsified his application for citizenship” but “in the exercise of the power to make rules for the naturalization of aliens.”⁴²

It is not a coincidence that the precedents supporting factors 3 through 7 involve deprivations that have historically been imposed for regulatory purposes. In order to determine whether such a deprivation is actually a punishment, the Court must consider evidence that the deprivation’s true purpose is not what it appears to be. Factors 3 through 7 identify the kinds of evidence relevant to this inquiry. But if the deprivation is of the sort that has historically been imposed as punishment, there is no need to look for evidence of purpose. The penal effect itself is sufficient to qualify the deprivation as punishment.⁴³ Thus a court examining whether a government-imposed deprivation is actually a punishment should engage in a two-step inquiry. First it should ask whether the action has traditionally been used as a punishment, or imposes pain or deprivation equivalent to a method traditionally used as a punishment. If the answer to this question is no, the court should use factors 3 through 7 to determine whether the action has been imposed for punitive purposes. If the answer is yes, there is no need to inquire into the government’s purpose.

The Supreme Court in recent decades has generally skipped the first step of this inquiry and focused solely on evidence relating to a given sanction’s purpose. The Court has also increasingly deferred to the label the government attaches to the sanction at the expense of other types of evidence. For example, in *Bell v. Wolfish*,⁴⁴ the Court considered whether prison conditions such as double bunking and restrictions on the receipt of books, food, and other packages counted as unconstitutional punishment of pretrial detainees. In answering this question, the Court focused almost exclusively on factor 6—whether there was a rational relationship between the challenged restrictions on liberty and the asserted non-punitive purpose of the restrictions.⁴⁵ The Court minimized the liberty interest at stake and emphasized the need to defer to the expertise of prison administrators. Because detainees were already in prison, and were thus already subject to intrusions on their privacy and restrictions on their liberty, these increases in the level of intrusion were not sufficient to raise constitutional concerns.⁴⁶ Moreover, respect for separation of powers dictated that the Court give deference to prison officials’ expertise concerning the measures necessary to preserve security.⁴⁷ The Supreme Court observed that courts should not be in the business of running prisons.⁴⁸ Thus, it concluded, the restrictions placed on pretrial

⁴² *Id.* at 98.

⁴³ *See, e.g.*, *In re Medley*, 134 U.S. 160 (1890) (imposition of solitary confinement); *Wong Wing v. United States*, 163 U.S. 228 (1896) (60 days imprisonment at hard labor). These cases are discussed in greater depth in Section II.C, *infra*.

⁴⁴ *Bell v. Wolfish*, 441 U.S. 520 (1979).

⁴⁵ *Id.* at 538–539.

⁴⁶ *Id.* at 546 (“A detainee simply does not possess the full range of freedoms of an unincarcerated individual.”).

⁴⁷ *Id.* at 547 (“Prison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.”).

⁴⁸ *See id.* at 548.

detainees did not constitute punishment because they were rationally related to the goal of protecting prison security.⁴⁹

In *United States v. Salerno*,⁵⁰ the Supreme Court made its deference to government labeling more explicit. It asserted that unless the government labels its action as a punishment, the action will be considered a non-penal regulation so long as it has a rational relationship to a non-penal purpose and is not excessive in relation to that purpose.⁵¹ Thus, it held that pretrial detention on grounds of dangerousness was not a punishment because Congress labeled this detention as non-penal and because such detention was rationally related to the goal of protecting the community.⁵² The Supreme Court later used similar reasoning to hold that indefinite detention of persons considered sexually dangerous was not a punishment and thus not subject to the various limits stated in the Constitution.⁵³

b. The Minimal Due Process Approach

As the cases discussed above demonstrate, outside the context of an Eighth Amendment claim, the Supreme Court strongly defers to the labeling the government attaches to a given deprivation or infliction. If the government labels a sanction as non-penal, the Court generally accepts the label. The cases discussed below demonstrate the Supreme Court will sometimes analyze these “non-punishments” under the due process clause—but only in extreme cases—and even then, it provides far less procedural and substantive protection than is required by the constitutional provisions that govern the infliction of punishment.

The Supreme Court’s reluctance to interfere with prison officials’ decisions concerning conditions of confinement is evident in three cases involving imposition of solitary confinement: *Hutto v. Finney*,⁵⁴ *Sandin v. Conner*,⁵⁵ and *Wilkinson v. Austin*.⁵⁶

In *Hutto v. Finney*,⁵⁷ the Supreme Court upheld a district court’s determination that the Arkansas prison system’s use of punitive isolation was a cruel and unusual punishment.⁵⁸ The conditions of isolation were particularly egregious—numerous prisoners were crowded into a single cell and subjected to malnourishment and exposure to infectious disease.⁵⁹ But even as the Court condemned these conditions, it implied that prison officials have implicit authority to impose long-term solitary confinement so long as they provide for the physical needs of the offender: “If new conditions of confinement are not materially different from those affecting other prisoners, a

⁴⁹ *See id.* at 555.

⁵⁰ *United States v. Salerno*, 481 U.S. 739 (1987).

⁵¹ *See id.* at 747.

⁵² *Id.*

⁵³ *See Kansas v. Hendricks*, 521 U.S. 346, 366 (1997).

⁵⁴ 437 U.S. 678 (1978).

⁵⁵ 515 U.S. 472 (1995).

⁵⁶ 545 U.S. 209 (2005).

⁵⁷ 437 U.S. 678 (1978).

⁵⁸ *Id.* at 680–81.

⁵⁹ *Id.* at 682–83 (citations omitted).

transfer [to punitive isolation] for the duration of a prisoner's sentence might be completely unobjectionable and well within the authority of the prison administrator."⁶⁰

The Supreme Court confirmed prison officials' discretion to send prisoners to solitary confinement in *Sandin v. Conner*.⁶¹ In that case, an inmate named Conner cursed at a prison guard during a highly intrusive strip search.⁶² As a result, the prison conducted a disciplinary hearing pursuant to prison regulations, but refused to allow Conner to present witnesses.⁶³ Conner was sentenced to thirty days of "disciplinary segregation" in solitary confinement.⁶⁴ During this period, Conner "had to spend his entire time alone in his cell (with the exception of 50 *minutes* each day on average for brief exercise and shower periods, during which he nonetheless remained isolated from other inmates and was constrained by leg irons and waist chains)."⁶⁵ By contrast, if he had not been placed in disciplinary segregation, Conner "would have left his cell and worked, taken classes, or mingled with others for eight *hours* each day."⁶⁶ Thus Conner argued that the denial of his request to present witnesses at his disciplinary hearing violated his right to due process.⁶⁷

The Supreme Court acknowledged that the government's purpose in sending Conner to solitary confinement was "punitive"⁶⁸ but held that the due process clause was not implicated because such confinement did not implicate any "liberty interest."⁶⁹ A liberty interest might be implicated if prison officials impose a constraint that "exceed[s] the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force"—for example, transfer to a mental hospital or coercive administration of a psychotropic drug.⁷⁰ Such interests might also be implicated if the state "create[s]" liberty interests by giving prisoners certain rights—such as the right to "good time" credits—and then takes them away from a particular prisoner without adequate procedures.⁷¹ But the latter situation only gives rise to due process concerns if the deprivation "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life."⁷² The Supreme Court held that the due process clause did not apply of its own force in this case because "[d]iscipline by prison officials in response to a wide range of misconduct falls within the expected parameters of the sentence imposed by a court of law."⁷³ Moreover, the Court held, Conner's sentence to solitary confinement "did not present the type of atypical, significant deprivation in which a State might conceivably create a liberty

⁶⁰ *Id.* at 686.

⁶¹ 515 U.S. 472 (1995).

⁶² *Id.* at 475.

⁶³ *Id.*

⁶⁴ *Id.* at 475–476.

⁶⁵ *Id.* at 494 (Breyer, J., dissenting).

⁶⁶ *Id.*

⁶⁷ *Id.* at 476.

⁶⁸ *Id.* at 485.

⁶⁹ *Id.* at 486.

⁷⁰ *See id.* at 484 (citing *Vitek v. Jones*, 445 U.S. 480, 493 (1980) (transfer to mental hospital); *Washington v. Harper*, 494 U.S. 210, 221–22 (1990) (coercive administration of a psychotropic drug)).

⁷¹ *Id.* at 477–478 (citing *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974)).

⁷² *Id.* at 484.

⁷³ *Id.* at 485.

interest.”⁷⁴ This was so because the conditions of disciplinary segregation “mirrored” those of “administrative segregation and protective custody” and because inmates in the general population were confined to their cells for twelve to sixteen hours per day.⁷⁵

The Supreme Court returned to this question ten years later in *Wilkinson v. Austin*.⁷⁶ That case concerned the procedures necessary to assign a prisoner to indefinite solitary confinement in a “supermax” facility known as the Ohio State Penitentiary (OSP).⁷⁷ As in *Conner*, prisoners were given notice and an opportunity to rebut the case against them before being assigned to solitary confinement but were not allowed to present their own witnesses.⁷⁸ Thus, they claimed that the procedure violated their right to due process.⁷⁹ The Court decided that the differences between the indefinite solitary confinement at issue in this case and the disciplinary segregation at issue in *Conner* were sufficient to create “an atypical and significant hardship,” thus implicating a liberty interest under the due process clause:

For an inmate placed in OSP, almost all human contact is prohibited, even to the point that conversation is not permitted from cell to cell; the light, though it may be dimmed, is on for 24 hours; exercise is for 1 hour per day, but only in a small indoor room. Save perhaps for the especially severe limitations on all human contact, these conditions likely would apply to most solitary confinement facilities, but here there are two added components. First is the duration. Unlike the 30-day placement in [*Conner*], placement at OSP is indefinite and, after an initial 30-day review, is reviewed just annually. Second is that placement disqualifies an otherwise eligible inmate for parole consideration.⁸⁰

Nonetheless, as in *Conner*, the *Austin* court upheld the decision to send the prisoner to indefinite solitary confinement.⁸¹ The Court held that prisoners had a reduced liberty interest because they were already incarcerated⁸² and that the state’s interest in security was “dominant” because of the threat posed by prison gangs.⁸³

The Supreme Court’s decisions in *Hutto*, *Conner*, and *Austin* show that the Court lacks a meaningful standard for determining whether the imposition of solitary confinement constitutes an additional punishment or even a mere deprivation of liberty. The *Hutto* and *Conner* decisions imply that every sentence of incarceration includes authorization to subject prisoners to solitary confinement. The *Austin* Court expresses some discomfort with this idea but ultimately affirms

⁷⁴ *Id.* at 486.

⁷⁵ *Id.* at 486 n.8.

⁷⁶ 545 U.S. 209 (2005).

⁷⁷ *Id.* at 213.

⁷⁸ *Id.* at 216.

⁷⁹ *Id.* at 218.

⁸⁰ *Id.* at 223–224.

⁸¹ *Id.* at 213.

⁸² *Id.* at 225.

⁸³ *Id.* at 227 (“Prison security, imperiled by the brutal reality of prison gangs, provides the backdrop of the State’s interest. Clandestine, organized, fueled by race-based hostility, and committed to fear and violence as a means of disciplining their own members and their rivals, gangs seek nothing less than to control prison life and to extend their power outside prison walls.”).

prison officials' broad authority to impose even indefinite solitary confinement on prisoners. These decisions show relatively little awareness of the extreme degree of additional suffering that solitary confinement inflicts on prisoners. This suffering will be discussed in Section III below.

II. HISTORICAL LIMITS ON PUNISHMENT DISCRETION

This Part provides a brief overview of three aspects of English and American constitutional history: First, the development of procedural and substantive doctrines to limit the government's discretion over the imposition of punishment and thus minimize the risk of punishment without law. Second, recognition of the dangers to liberty that arise from executive discretion over punishment. Third, the distillation in the nineteenth century of a standard for differentiating punishments from non-punishments, focusing on penal effect in light of tradition.

a. Constitutional Doctrines Limiting Punishment Discretion

Of all governmental powers, the power to punish may be the most susceptible to abuse. If one wishes to enhance one's power, eliminate one's enemies, or simply demonstrate that one is in control, the easiest and most straightforward way to accomplish these goals is often the whip, the prison, or the gallows. For this reason, much of English constitutional history may be seen as a struggle between a power holder (whether it be king, judge, or parliament) seeking to exercise unconstrained power to punish and others seeking to enforce common law limits on this power. These discretion-constraining common law doctrines were later adopted by the drafters of the United States Constitution and written into its original text or the Bill of Rights. Because I have limited space, I will provide only a brief overview of these principles and doctrines.

English common law doctrines enforcing the *nulla poena* principle were both substantive and procedural in nature. These included:

No punishment for conduct not prohibited by law at the time it occurred

In England, the *nulla poena* principle dates back at least to the Magna Carta. The thirteenth century conflicts between King John and his barons led to a settlement in which he agreed to abide by customary limits on royal power, including the famous promise: "No Free-man shall be taken, or imprisoned, or dispossessed, of his free tenement, or liberties, or free customs, or be outlawed, or exiled, or in any way destroyed; nor will we condemn him, nor will we commit him to prison, excepting by the legal judgment of his peers, or by the laws of the land."⁸⁴ This promise reflected

⁸⁴ *The Third Great Charter of King Henry the Third* c. 29 (1225), in *THE ROOTS OF LIBERTY: MAGNA CARTA, ANCIENT CONSTITUTION, AND THE ANGLO-AMERICAN TRADITION OF RULE OF LAW, APPENDIX: TEXT AND TRANSLATION OF MAGNA CARTA 347* (Ellis Sandoz ed., Liberty Fund, Inc. 2008). The full text of the provision in the original Latin is: "nullus liber homo decetero capiatur vel imprisonetur aut disseisiatur de aliquo libero tenemento suo vel libertatibus vel liberis consuetudinibus suis, aut utlagetur, aut exuletur aut aliquo alio modo destruat, nec super eum ibimus, nec super eum mittemus, nisi per legale iudicium parium suorum, vel per legem terre." See *id.* at 340; Claire Breay & Julian Harrison, *Magna Carta in Context*, BRITISH LIBRARY,

the idea that the king's power to punish was limited by law. By the seventeenth century, common law thinkers like Edward Coke identified this passage from Magna Carta as the source of the requirement that life, liberty, or property could not be taken without due process.⁸⁵

The idea that the government may not inflict punishment for conduct that does not violate preexisting law is reflected in the traditional common law prohibition of *ex post facto* punishments.⁸⁶ English rulers did not always honor this principle, of course, but when they violated it they were ultimately condemned as acting unconstitutionally. For example, English monarchs created prerogative courts, such as the Court of Star Chamber, in part to evade procedural and substantive limits to government power generally respected by common law courts.⁸⁷ The Court of Star Chamber's penchant for punishing those who had not violated preexisting law led parliament not only to abolish it, but to condemn it on the ground that it had "undertaken to punish where no law doth warrant, and to make decrees for things having no such authority, and to inflict heavier punishments than by any law is warranted . . . [Such judgment had proven] to be an intolerable burden to the subjects, and the means to introduce an arbitrary power and government."⁸⁸

Notice that in this statute, parliament criticizes the Court of Star Chamber not only for violating substantive rights, but also for ignoring structural limits to its own power. The Court of Star Chamber abused its power by inflicting punishments either unauthorized by law or heavier than authorized by law, and also by issuing decrees it had no authority to issue. This statute was later interpreted as condemning the Court's refusal to follow established common law procedures designed to protect the rights of defendants, and as requiring that any new courts of justice established by the king "must proceed according to the old established forms of the common law."⁸⁹ By insisting that the government can only inflict punishments in a manner that protects substantive rights, follows established procedures, and respects structural limitations of

<https://www.bl.uk/magna-carta/articles/magna-carta-in-context> [<https://perma.cc/7VHA-C6XJ>] (describing historical and legal issues that gave rise to the Magna Carta).

⁸⁵ See EDWARD COKE, *SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* 50 (6th ed. 1671).

⁸⁶ The prohibition of *ex post facto* punishments is reflected in a story recounted by Blackstone concerning the Russian ambassador to England during the reign of Queen Anne. The ambassador was apparently a profligate spender who ran up debts he could not pay back. Ultimately, one of his creditors had him arrested and imprisoned for debt. When the Czar learned of this, he angrily demanded that the creditor be executed for his effrontery. "But the queen (to the amazement of that despotic court) directed her secretary to inform him, 'that she could inflict no punishment upon any, the meanest, of her subjects, unless warranted by the law of the land: and, therefore, was persuaded that he would not insist upon impossibilities.'" See 1 WILLIAM BLACKSTONE & ST. GEORGE TUCKER, *BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA* 254–55 (1803) [hereinafter 1 TUCKER'S BLACKSTONE].

⁸⁷ See, e.g., Frederic William Maitland, *Selected Historical Essays of F.W. Maitland* 127–130 (Helen M. Cam ed., 1957).

⁸⁸ The Act for the Abolition of the Court of Star Chamber, (July 5, 1641) *Statutes of the Realm*, v. 110. 17 Car. I. cap. 10.

⁸⁹ 1 TUCKER'S BLACKSTONE, *supra* note 84, at 142.

government power, parliament sought to prevent future efforts “to introduce an arbitrary power and government”⁹⁰

No use of punishments that are harsher than the common law permits

As noted above, one of the grounds for condemning the Court of Star Chamber was that it inflicted punishments that were heavier than the law authorized by law. Even if the law permits punishment for a given offense, it also limits the punishments that may be inflicted for that offense. To the extent punishment exceeds legal limits, it is a punishment without law. This limitation on government power showed itself in two primary contexts under the English Constitution: The absolute prohibition of torture and the requirement that punishment be proportionate to the offense.

One of the ways prerogative courts differed from common law courts was that at least some of them used continental civil law practices such as torture to extract confessions from criminal defendants.⁹¹ From the time English monarchs first introduced this practice, common lawyers argued that it was illegal.⁹² Ultimately, the Court of King’s Bench declared in *Felton’s Case* (1628) that torture was prohibited because “no such punishment is known or allowed by our law.”⁹³

The requirement that punishment be proportionate to the offense may be seen in parliament’s condemnation of the Court of Star Chamber for inflicting heavier punishments than the law permits for a given offense. It may be seen even more clearly in the prohibition of excessive fines and cruel and unusual punishments in the English Bill of Rights. As I have shown elsewhere, the prohibition of cruel and unusual punishments was directed not only at inherently cruel methods of punishment such as torture, but also at punishments that are cruelly disproportionate to the offense in light of longstanding prior practice.⁹⁴

The proportionality requirement may also be seen in rules governing conditions of confinement while prisoners await trial. Blackstone wrote that because pretrial prisoners were held

⁹⁰ The Act for the Abolition of the Court of Star Chamber, (July 5, 1641) Statutes of the Realm, v. 110. 17 Car. I. cap. 10.

⁹¹ See, e.g., See, e.g., Anthony F. Granucci, “Nor Cruel and Unusual Punishments Inflicted”: The Original Meaning, 57 Cal. L. Rev. 839, 848-49 (1969) (describing the Court of High Commission’s use of torture); 3 Edward Coke, Institutes of the Lawes of England ch. 2 (1608), as reprinted in 2 The Selected Writings and Speeches of Sir Edward Coke 1025 (Steve Sheppard ed., 2003) (claiming that the first step toward introducing civil law judicial process into England was the placement of a torture device – the rack – in the Tower of London).

⁹² See, e.g., SIR JOHN FORTESCUE, DE LAUDIBUS LEGUM ANGLIAE, A TREATISE IN COMMENDATION OF THE LAWS OF ENGLAND 73 (Francis Gregor trans., Cincinnati, Robert Clarke & Co. 1874) (1470) (condemning torture: “[a] practice so inhuman deserves not indeed to be called a law, but the high road to hell”); EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING HIGH TREASON, AND OTHER PLEAS OF THE CROWN AND CRIMINAL CAUSES 35 (1797) (“[T]here is no law to warrant tortures in this land And there is no one opinion in our books, or judicial record (that we have seen and remember) for the maintenance of tortures or torments”).

⁹³ 3 T. B. HOWELL, *Proceedings against John Felton for the Murder of the Duke of Buckingham*, in HOWELL’S STATE TRIALS 369 (1628).

⁹⁴ Stinneford, *Rethinking Proportionality*, *supra* note 16, at 932–38.

“only for safe custody, and not for punishment,”⁹⁵ they “ought to be used with the utmost humanity; and neither be loaded with needless fetters, or subjected to other hardships than such as are absolutely requisite for the purpose of confinement only.”⁹⁶ He lamented, however, that conditions of confinement “must too often be left to the discretion of the gaolers; who are frequently a merciless race of men, and, by being conversant in scenes of misery, steeled against any tender sensation.”⁹⁷ To protect against abuse of this discretion, parliament enacted laws making gaolers liable to punishment for engaging in extortionate or abusive conduct,⁹⁸ and for neglecting the health and sanitation of the prisoners.⁹⁹ In short, if a restriction on liberty is not itself a punishment, the jailer must be careful not to inflict greater restrictions or pain than are necessary, for any additional pain or restriction would be a punishment without law.

Protection of Common Law Procedural Rights

Common law criminal procedures were also designed to prevent the imposition of wrongful punishment. These procedures included the right to indictment by grand jury, to jury trial in the vicinage of the offense, to confront witnesses, and to seek a writ of habeas corpus. Such procedures limited the power of the government to punish, either by requiring a finding by citizens that punishment was warranted, or by permitting the defendant to challenge the basis of the government’s case, or by providing that a judge may review the lawfulness of a person’s incarceration.

The nulla poena principle was also reflected in jurisdictional rules designed to limit judicial discretion at sentencing. For example, as Blackstone explains, courts of equity were prohibited from exercising jurisdiction in criminal cases because of the risk they would use their equitable powers to impose more punishment than was permissible by law: “For the freedom of our constitution will not permit, that in criminal cases a power should be lodged in any judge, to construe the law otherwise than according to the letter. . . . A man cannot suffer *more* punishment than the law assigns, but he may suffer *less*. The laws cannot be strained by partiality to inflict a penalty beyond what the letter will warrant; but, in cases where the letter induces any apparent hardship, the crown has the power to pardon.”¹⁰⁰

Strict Separation of Powers

The common law also required a strict separation of powers in the imposition and execution of punishments. According to Blackstone, for example, only a judge could order the execution of a man found guilty of murder, and he could only do so when acting upon the basis of a lawful

⁹⁵ 4 WILLIAM BLACKSTONE & ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA 299 (1803) [hereinafter 4 TUCKER’S BLACKSTONE].

⁹⁶ *Id.* at 300.

⁹⁷ *Id.*

⁹⁸ 32 Geo. 2 c. 28, § XI (1758).

⁹⁹ 14 Geo. 3 c. 59 (1774).

¹⁰⁰ 1 TUCKER’S BLACKSTONE, *supra* note 84, at 92.

commission.¹⁰¹ The execution order could only be carried out by the proper officer or his deputy.¹⁰² Finally—and most importantly for our purposes—the officer had no discretion to change the ordered method of execution (for example, from beheading to hanging, or vice versa): “[F]or he is merely ministerial, and therefore only justified when he acts under the authority and compulsion of the law”¹⁰³ If anyone violated any of these rules, he would himself be guilty of murder.¹⁰⁴ Even the king lacked the authority to substitute one method of execution for another, because this would be imposition of a new punishment—although he could remit part of the sentence.¹⁰⁵

American Adoption of English Common Law Limits on Punishment Discretion

Americans of the Founding Era were at least as concerned about constraining governmental punishment discretion as were English common law thinkers.¹⁰⁶ They were acutely aware of the historical struggles to constrain this discretion, and were determined not to permit the same abuses that had occurred in England.¹⁰⁷ For example, when England tried to give an Admiralty Court criminal jurisdiction over American colonists, Americans protested that the Admiralty Court used the same civil law procedures as the Court of Star Chamber. As John Adams wrote: “Can you recollect the complaints and clamors, which were sounded with such industry, and supported by such a profusion of learning in law and history, and such invincible reasoning . . . against the Star-Chamber and High Commission, and yet remain an advocate for the newly-formed courts of admiralty in America?”¹⁰⁸

Similarly, Anti-Federalists opposed ratification of the United States Constitution on the ground that it did not require Congress to provide traditional common law protections to criminal defendants.¹⁰⁹ Patrick Henry noted, for example, that although criminal courts of equity were forbidden in England, “[Congress] will tell you that there is such a necessity of strengthening the

¹⁰¹ See *id.* at 178–79.

¹⁰² See *id.*

¹⁰³ *Id.* at 179.

¹⁰⁴ See *id.* at 178–179.

¹⁰⁵ See *id.* at 179.

¹⁰⁶ For a detailed discussion of American efforts to constrain governmental power within common law limits during the revolutionary and founding periods, see John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment As A Bar to Cruel Innovation*, 102 NW. U.L. REV. 1739, 1792–1810 (2008) [hereinafter Stinneford, *The Original Meaning of "Unusual"*].

¹⁰⁷ See *id.* at 1798.

¹⁰⁸ John Adams, *The Earl of Clarendon to William Pym*, BOSTON GAZETTE (Supplement), Jan. 13, 1766, reprinted in 3 CHARLES FRANCIS ADAMS, THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES: WITH A LIFE OF THE AUTHOR, NOTES AND ILLUSTRATIONS 469–70 (Charles C. Little, & James Brown 1851).

¹⁰⁹ See, e.g., George Mason, *Objections to this Constitution of Government*, Sept. 15, 1787, reprinted in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 637 (Max Farrand ed., 1911) (“There is no Declaration of Rights, and the laws of the general government being paramount to the laws and constitution of the several States, the Declaration of Rights in the separate States are no security. Nor are the people secured even in the enjoyment of the benefit of the common law (which stands here upon no other foundation than its having been adopted by the respective acts forming the constitutions of the several States).”)

arm of government, that they must have a criminal equity, and extort confession by torture, in order to punish with still more relentless severity. We are then lost and undone.”¹¹⁰

Indeed, many of the rights listed in the original constitutional text and the Bill of Rights were specifically designed to limit the government’s discretionary power to punish.¹¹¹ These include the right to trial by jury in the state and vicinage of the offense;¹¹² habeas corpus;¹¹³ prohibitions of ex post facto laws and bills of attainder;¹¹⁴ the right to indictment by grand jury;¹¹⁵ the prohibition of double jeopardy;¹¹⁶ the prohibition of compelled self-incrimination;¹¹⁷ the right to due process of law;¹¹⁸ to be informed of the nature and cause of the accusation;¹¹⁹ to be confronted with the witnesses against him;¹²⁰ to have compulsory process for obtaining witnesses in his favor;¹²¹ to have the assistance of counsel;¹²² and the prohibition of excessive bail, excessive fines, and cruel and unusual punishments.¹²³

Like its English counterpart, American law required that even where a decision-maker has discretion as to the type or quantity of punishment, such discretion must have legal limits.¹²⁴ For example, the defendant in *Commonwealth v. Wyatt*¹²⁵ was convicted of operating an illegal gaming table¹²⁶ and appealed his conviction on the ground that the criminal statute authorized the judge to inflict a cruel and unusual punishment.¹²⁷ The statute provided that a defendant could be imprisoned for up to six months and “shall moreover be punished with stripes, at the discretion of the Court, to be inflicted at one time, or at different times during such confinement, as such Court may direct, provided the same do not exceed thirty-nine at any one time.”¹²⁸ Wyatt argued that “the Court, by virtue of this Law, might exercise its discretion to subserve vindictive passions, and so as to direct the party convicted to be subjected to thirty-nine stripes every day of the six months, which would inevitably terminate in death; a death produced by the most *cruel torture*.”¹²⁹ The

¹¹⁰ Patrick Henry, Speech to the Virginia Ratifying Convention for the United States Constitution (June 9, 1788), in 3 ELLIOT’S DEBATES, *supra* note 8 at 448.

¹¹¹ The Bill of Rights was added to the Constitution largely to answer the Antifederalist critique that the original constitutional text did not provide sufficient common law constraints on the power of the federal government. *See, e.g.*, Robert Allen Rutland, *The Birth of the Bill of Rights 171-175* (1991). Stinneford, *The Original Meaning of “Unusual”*, *supra* note 102, at 1800-1808.

¹¹² U.S. CONST. art. III, § 2; U.S. CONST. amend. VI.

¹¹³ U.S. CONST. art. I, § 9.

¹¹⁴ U.S. CONST. art. I, §§ 9–10.

¹¹⁵ U.S. CONST. amend. V.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ U.S. CONST. amend. VI.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ U.S. CONST. amend. VIII.

¹²⁴ *See* Stinneford, *The Original Meaning of “Unusual”*, *supra* note 102, at 1810–11.

¹²⁵ 27 Va. 694, 701 (Va. Gen. Ct. 1828).

¹²⁶ *Id.* at 695.

¹²⁷ *Id.* at 700.

¹²⁸ *Id.* at 698.

¹²⁹ *Id.* at 700.

General Court of Virginia rejected this argument, noting that the discretion authorized under this statute was “of the same character with the discretion always exercised by Common Law Courts to inflict fine and imprisonment, and subject to be restrained by the same considerations”¹³⁰ If the judge abused this discretion by inflicting excessive floggings, he could be “impeached” for abuse of office.¹³¹

b. The Particular Danger of Executive Discretion over Punishment

Executive officials have strong incentives to impose punishments without law. A king or a president may wish to use punishment to put a stop to civil disorder or to dispose of political enemies. Similarly, a prison warden may wish to inflict punishment to establish order in the prison or to put down prisoners who challenge or annoy him. Historically, the constitutional movement to limit punishment discretion has been driven by executive officials’ attempts to impose punishment without law. It was King John’s depredations that led to Magna Carta’s requirement that punishment be according to the “law of the land.”¹³² It was the unauthorized punishments imposed by the Court of Star Chamber—a prerogative court composed largely of the king’s ministers—that led to the emphasis on common law rights in England and America.

Both English and American thinkers recognized that executive discretion over punishment was dangerous because it could lead so easily to tyranny. For example, the tendency of English kings to impose arbitrary imprisonment led parliament to pass the Habeas Corpus Act of 1679.¹³³ This statute strengthened the ancient common law writ of habeas corpus, which provided for judicial review of the lawfulness of incarceration.¹³⁴ Blackstone described the Habeas Corpus Act of 1679 as an important structural limit to royal and executive power: “[I]f once it were left in the power of any, the highest, magistrate to imprison arbitrarily whomever he or his officers thought proper, (as in France it is daily practised by the crown) there would soon be an end of all other rights and immunities. . . . To bereave a man of life, or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom: but confinement of the person, by secretly

¹³⁰ *Id.* at 701.

¹³¹ *Id.* See also *Ex parte Hickey*, 12 Miss. (4 S. & M.) 751, 765–66 (Miss. Err. App. 1844) (holding that the trial court’s claim of inherent power to punish newspaper editor for contempt for running an article critical of the judge was invalid because it gave the judge unlimited power to punish). “It is a maxim of law that where a discretion is allowed courts in the punishment of defined offenses, that discretion must be regulated by law. But in this instance, the law, as claimed, sets to itself no bounds, and, under the influence of strong passions, punishment may be inflicted to a cruel, an unusual and excessive degree.” *Id.* at 778.

¹³² See, e.g., Breay & Harrison, *supra* n. __.

¹³³ See Habeas Corpus Act of 1679, (May 27, 1679) Statutes of the Realm, v. 935–38. 31 Car. II. c. 2, reprinted in MABEL HILL, LIBERTY DOCUMENTS 431 (Albert Bushnell Hart ed., 2d ed. 1907); see e.g., Amanda L. Tyler, *A “Second Magna Carta”: The English Habeas Corpus Act and the Statutory Origins of the Habeas Privilege*, 91 NOTRE DAME L. REV. 1949 (2016) (describing the origins and significance of the Habeas Corpus Act of 1679).

¹³⁴ See *id.*

hurrying him to gaol, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government.”¹³⁵

Similarly, Joseph Story wrote that although the President’s duty to “take care that the laws be faithfully executed” gives the President an important role in protecting the country’s well-being, it must not be construed to give him power to impose punishments: “[W]e are not to understand, that this clause confers on the President any new and substantial power to cause the laws to be faithfully executed, by any means, which he shall see fit to adopt, although not prescribed by the Constitution, or by the acts of Congress. That would be to clothe him with an absolute despotic power over the lives, the property, and the rights of the whole people. A tyrannical President might, under a pretence of this sort, punish for a crime, without any trial by jury, or usurp the functions of other departments of the government.”¹³⁶

c. Penal Effect and the Line between Punishment and Regulation

The question of how to draw the line between punishments and non-penal regulations has arisen repeatedly from the very beginning of the republic. In *Calder v. Bull*,¹³⁷ for example, the Supreme Court held that a Connecticut statute enacted to overturn a judge’s decision disapproving a will was not an ex post facto law, even though it retroactively changed legal rules in a way that deprived the plaintiff of property, because the law did not impose a punishment.¹³⁸ In support of this decision, Justice Chase wrote that an ex post facto law is:

1st. Every law that makes an action, done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2nd. Every law that aggravates a crime, or makes it greater than it was, when committed. 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.¹³⁹

The *Calder* court held that the Connecticut law did not violate the ex post facto clause because it did not impose a punishment—although in making this decision, the Court did not define “punishment” so as to make the distinction between penal and non-penal laws and practices clear.

¹³⁵ 1 TUCKER’S BLACKSTONE, *supra* note 84, at 135–36.

¹³⁶ See Joseph Story, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES: CONTAINING A BRIEF COMMENTARY ON EVERY CLAUSE, EXPLAINING THE TRUE NATURE, REASONS, AND OBJECTS THEREOF, DESIGNED FOR THE USE OF SCHOOL LIBRARIES AND GENERAL READERS, WITH AN APPENDIX CONTAINING IMPORTANT PUBLIC DOCUMENTS, ILLUSTRATIVE OF THE CONSTITUTION 177-78 (1840) (*italics omitted*).

¹³⁷ 3 U.S. 386 (1798).

¹³⁸ See *id.* at 387, 390. There has been sustained controversy from the time *Calder* was decided to today as to the correctness of its decision that the ex post facto clause only applies to criminal and not civil statutes. See, e.g., John Mikhail, *James Wilson, Early American Land Companies, and the Original Meaning of “Ex Post Facto Law”*, 17 GEO. J.L. & PUB. POL’Y 79 (2019). This controversy is beyond the scope of the present essay.

¹³⁹ *Calder*, 3 U.S. at 390.

The distinction between punishment and regulation repeatedly arose in the nineteenth century in relation to the power to deport non-citizens. The issue was first debated after passage of the Alien and Sedition Acts in 1798.¹⁴⁰ These statutes were enacted during a period of heightened tensions between the United States and France, and gave the President the authority to arrest and deport such non-citizens “as he shall judge dangerous to the peace and safety of the United States, or shall have reasonable grounds to suspect are concerned in any treasonable or secret machinations against the government thereof,”¹⁴¹ or who are male, fourteen years old or older, and “natives, citizens, denizens, or subjects of [a] hostile nation or government” during a time of actual conflict.¹⁴²

The Alien and Sedition Acts generated numerous constitutional objections. Most notable for our purposes was the Virginia legislature’s complaint that the deportation provisions gave the President the power to impose punishments without trial, and therefore “subvert[ed] the general principles of free government” by “uniting legislative and judicial powers to those of executive.”¹⁴³ In response, Congress rejected the argument that the Alien Acts gave the President the authority to punish without trial, arguing that deportation was not a punishment “but . . . merely the removal from motives of general safety, of an indulgence which there is danger of their abusing, and which we are in no manner bound to grant or continue.”¹⁴⁴ James Madison replied on behalf of the Virginia legislature that deportation is the same thing as banishment, and that it is therefore a punishment regardless of whether Congress’s motives were “preventive” or “penal.” Because deportation has the effect of removing a person from a country where he may have made a permanent home, acquired property, and established friends and family ties and exposing him to the dangers of travel at sea during a time of possible conflict, Madison argued that it must be classified as a punishment: “[I]f a banishment of this sort be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied.”¹⁴⁶

This debate did not definitively resolve the constitutionality of the Alien Acts’ deportation provisions. Nonetheless, it is illuminating because both sides of the debate focused primarily on the question of whether deportation has a penal effect. The congressional committee argued that the Acts were not a punishment but “merely the removal, from motives of general safety, of an

¹⁴⁰ See The Alien Friends Act, 1798 Laws, ch. 58, 1 Stat. 570 (1798); The Alien Enemies Act, 1798 Laws ch. 66, 1 Stat. 577 (1798); The Sedition Act, 1798 Laws, ch. 74, 1 Stat. 596 (1798).

¹⁴¹ Alien Friends Act, *supra* note 140.

¹⁴² Alien Enemies Act, *supra* note 140.

¹⁴³ JAMES MADISON, VIRGINIA RESOLUTIONS OF 1798, PRONOUNCING THE ALIEN AND SEDITION LAWS TO BE UNCONSTITUTIONAL, AND DEFINING THE RIGHTS OF THE STATES (1798), *reprinted in* 4 JONATHAN ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 528 (2d ed. 1836) [hereinafter 4 Elliot’s Debates].

¹⁴⁴ Report of Select Committee on the Petitions Praying for a Repeal of the Alien and Sedition Laws (February 25, 1799), *in* ANNALS OF THE CONGRESS OF THE UNITED STATES, FIFTH CONGRESS 2987 (1851) [hereinafter Select Committee Report]

¹⁴⁶ JAMES MADISON, REPORT OF THE COMMITTEE TO WHOM WERE REFERRED THE COMMUNICATIONS OF VARIOUS STATES, RELATIVE TO THE RESOLUTIONS OF THE LAST GENERAL ASSEMBLY OF THIS STATE, CONCERNING THE ALIEN AND SEDITION LAWS, H.D. 1799–1800 Sess. (Va. 1800) [hereinafter MADISON, REPORT], *reprinted in* 4 Elliott’s Debates, *supra* note 138, at 554–55.

indulgence”¹⁴⁷ Madison, on the other hand, asserted that deportation of those who may have lived here for years, formed relationships, acquired property, and sought citizenship is “banishment,” a traditional method of punishment.¹⁴⁸ He argued that Congress may not use a punishment to achieve a regulatory purpose unless it complies with the Constitution’s procedural restrictions on the government’s power to punish. He further argued that the executive should not possess independent authority to inflict punishment.¹⁴⁹

The issues raised by the Alien Acts arose once again nearly a century later in *Wong Wing v. United States*.¹⁵⁰ The defendants in this case were Chinese citizens convicted under a law providing that any Chinese person found to be illegally present in the United States should be sentenced to up to a year of imprisonment at hard labor followed by deportation.¹⁵¹ The defendants were convicted in a summary hearing before a commissioner¹⁵² and sentenced to 60 days at hard labor in a house of correction before deportation.¹⁵³ They argued that imprisonment at hard labor is an infamous punishment within the meaning of the Constitution, and that therefore they had been unconstitutionally denied their rights to indictment by grand jury and to a jury trial.¹⁵⁴ The Supreme Court agreed, noting that “for more than a century[,] imprisonment at hard labor in the state prison or penitentiary or other similar institution has been considered an infamous punishment in England and America”¹⁵⁵ The fact that Congress’s purposes were regulatory did not prevent the statute from being subject to the constitutional limits on punishment: “[W]hen Congress sees fit to further promote such a policy by subjecting the persons of such aliens to infamous punishment at hard labor, or by confiscating their property, we think such legislation, to be valid, must provide for a judicial trial to establish the guilt of the accused.”¹⁵⁶

The question of the line between punishment and non-penal regulation also arose in the context of the late-nineteenth century trend (which persists to this day)¹⁵⁷ toward housing condemned offenders awaiting execution in solitary confinement in the state penitentiary.¹⁵⁸ This

¹⁴⁷ Select Committee Report, *supra* note 144.

¹⁴⁸ See MADISON, REPORT, *supra* note 146; see also, e.g., 4 TUCKER’S BLACKSTONE, *supra* note 91, at 112, 121, 138, 187, 245, 376–77 (providing various examples, ancient and modern, in which banishment is prescribed as a punishment).

¹⁴⁹ See Madison, REPORT, *supra* note 146. Nearly a century later, the Supreme Court concluded that deportation is not the equivalent of banishment because traditionally banishment was only a punishment for citizens, not aliens. See *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893) (“The order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment.”).

¹⁵⁰ 163 U.S. 228 (1896).

¹⁵¹ *Id.* at 233–34.

¹⁵² *Id.* at 229.

¹⁵³ *Id.* at 234.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 237.

¹⁵⁶ *Id.*

¹⁵⁷ See Marah Stith McLeod, *Does the Death Penalty Require Death Row? The Harm of Legislative Silence*, 77 OHIO ST. L.J. 525, 527 (2016).

¹⁵⁸ See, e.g., DAVID GARLAND, PECULIAR INSTITUTION: AMERICA’S DEATH PENALTY IN AN AGE OF ABOLITION 52, 116 (2010) (describing the historical trend toward moving executions out of the public square and into the private confines of the prison).

trend seems not to have been intended to further any penal purpose; rather, it appears to have been motivated by the desire to hide executions from public view.¹⁵⁹ For most of the nineteenth century – indeed, for nearly all of history – executions were conducted in the public square.¹⁶⁰ Toward the end of the nineteenth century, a number of states moved executions out of the public square and behind prison walls.¹⁶¹ This move was supported by some people who believed that public executions coarsened public sensibility by turning death into a spectacle.¹⁶² But there is evidence that states were actually motivated by a desire to undercut the death penalty abolition movement by removing executions from public view and thus minimizing the emotional force of the abolitionist argument.¹⁶³

The Colorado statute considered by the Supreme Court in the case *In re Medley* is a good example of these new death penalty statutes.¹⁶⁴ In 1889, Colorado adopted a new law governing executions in the state. The old law had provided that prisoners awaiting execution should be kept in a county jail for fifteen to twenty-five days before execution by hanging.¹⁶⁵ Both the jail term and the execution were supervised by the county sheriff.¹⁶⁶ The new law, by contrast, required that a prisoner sentenced to death be kept in solitary confinement in the state penitentiary for two to four weeks prior to execution.¹⁶⁷ The execution should be “enclosed from public view within the walls of the penitentiary”¹⁶⁸ The warden had the power to set the time and date of the execution, but was required to keep this information “secret” from everyone except those people invited to witness the execution.¹⁶⁹ These witnesses were also required to keep the time and date of the execution secret.¹⁷⁰ All witnesses were also prohibited from divulging the details of what happened at the execution “beyond the statement of the fact that such convict was on the day in question duly executed according to law at the state penitentiary”¹⁷¹ Thus under the new

¹⁵⁹ See, e.g., STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 148 (2002) (noting that in nineteenth century America, many criticized public executions on the ground that they generated public sympathy for offenders); GARLAND, *supra* note 158, at 135 (stating that moving executions out of public view “is best viewed as the ongoing effort of government officials to exert ever-tighter control over a fraught undertaking and to manage the meanings that it put into circulation”); LOUIS MASUR, *rites of execution: capital punishment and the transformation of American culture, 1776–1865*, at 96 (1989) (describing the perception among some nineteenth century elites that public executions undermined public order); Michael Madow, *Forbidden Spectacle: Executions, the Public and the Press in Nineteenth Century New York*, 43 *BUFF. L. REV.* 461, 493–497 (1995) (describing debate among historians concerning the reasons executions were moved out of the public square).

¹⁶⁰ See, e.g., Garland, *supra* note 154, at 52, 116; JOHN D. BESSLER, *DEATH IN THE DARK: MIDNIGHT EXECUTIONS IN AMERICA* 25 (1997) (noting that executions in early America were designed to encourage public visibility).

¹⁶¹ See, e.g., Garland, *supra* note 154, at 116.

¹⁶² See BANNER, *supra* note 154, at 146, 153; LAWRENCE FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 76 (1993); MASUR, *supra* note 155, at 97.

¹⁶³ See, e.g., BANNER, *supra* note 155, at 148; GARLAND, *supra* note 154, at 135; MASUR, *supra* note 155, at 97; Madow, *supra* note 155, at 491, 557.

¹⁶⁴ 134 U.S. 160 (1890).

¹⁶⁵ *Id.* at 167.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 163–64.

¹⁶⁸ *Id.* at 163.

¹⁶⁹ *Id.* at 164.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

Colorado statute, the offender was kept in solitary confinement in a location likely to be remote from the place of crime and conviction; neither the offender nor the public was to be informed of the execution's time and place; the execution took place behind prison walls; and the details of the execution—including, for example, the suffering undergone by the offender—were to be kept secret as well.¹⁷² The whole focus of the statute was on isolation and secrecy.

An offender named James Medley challenged the constitutionality of this statute. Medley committed a murder in May of 1889, two months before Colorado adopted its new execution law.¹⁷³ Medley was tried and convicted after adoption of the new execution law, and was sentenced under its provisions.¹⁷⁴ He challenged his conviction on the ground that the new law imposed an ex post facto punishment in violation of Article I section 10 of the United States Constitution.¹⁷⁵ He argued that the imposition of solitary confinement in a state penitentiary—albeit only for a period of two to four weeks—substantially added to the pain and suffering of his execution.¹⁷⁶ Because the new statute imposed additional punishment, and because it was adopted after Medley committed his crime, it violated the constitutional prohibition of ex post facto punishments.¹⁷⁷

The Supreme Court agreed.¹⁷⁸ It held that placing the prisoner in solitary confinement prior to execution added so much suffering to the execution that it had to be considered an additional punishment for constitutional purposes.¹⁷⁹ Thus the new statute could not be applied to a prisoner whose crime occurred before the statute took effect without violating the prohibition of ex post facto punishments.¹⁸⁰ In reaching this decision, the Court took note of both England's and America's prior experience with solitary confinement. During the reign of George II, the English parliament authorized solitary confinement prior to execution in order to add “further terror and [a] peculiar mark of infamy” to the sentence.¹⁸¹ But parliament repealed this law during the reign of William IV because “[i]n Great Britain, as in other countries, public sentiment revolted against this severity. . . .”¹⁸² Similarly, the Court noted, America had experimented with solitary confinement earlier in the nineteenth century and found it unduly harsh:

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

¹⁷² See *id.* at 161-64.

¹⁷³ *Id.* at 161-62.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 162.

¹⁷⁶ *Id.* at 170, 172.

¹⁷⁷ *Id.* at 172-73.

¹⁷⁸ *Id.* at 173.

¹⁷⁹ *Id.* at 171.

¹⁸⁰ *Id.* at 173.

¹⁸¹ *Id.* at 170.

¹⁸² *Id.*

or forty years ago the whole subject attracted the general public attention, and its main feature of solitary confinement was found to be too severe.¹⁸³

Given the fact that solitary confinement was historically used as a heightened form of punishment, and given its extremely harsh effects, the Supreme Court held that it could not be considered a mere administrative measure. Rather, it was “an additional punishment of the most important and painful character”¹⁸⁴ Thus Medley’s punishment violated the ex post facto clause, and Medley’s conviction had to be overturned—even though this meant that Medley would escape punishment for murder altogether.¹⁸⁵

In sum, the United States Constitution is designed to limit the discretion of government officials—including executive officials—to impose punishments. Under the Constitution, the line between punishments and non-penal regulations is determined primarily by examining the penal effect of the government’s action. If the government employs a method that has traditionally been considered a punishment—such as banishment or imprisonment in a penitentiary—it is to be classified as a punishment even if the government’s asserted purpose is regulatory rather than penal. Similarly, if the government imposes conditions that increase the harshness of the offender’s suffering beyond what could reasonably be considered part of an offender’s sentence, it is a new punishment, as the *Medley* Court concluded in the context of solitary confinement.

III. HISTORY AND EFFECTS OF SOLITARY CONFINEMENT

As the above discussion demonstrates, the Supreme Court’s current treatment of the decision to place an offender in solitary confinement as an administrative matter rather than a punishment conflicts directly with its previous holding that solitary confinement is a punishment for constitutional purposes.¹⁸⁶ Astonishingly, up to now, the Court has not shown any awareness of the conflict.

Resolving this conflict is important because most states today impose solitary confinement without statutory authorization. According to Professor Alexander Reinert, only four states (Delaware, Washington, South Carolina, and Pennsylvania) have statutes authorizing the use of solitary confinement outside the context of death row, and three states (Idaho, Pennsylvania, and Wyoming) have statutes authorizing it for those under a sentence of death.¹⁸⁷ This means that the vast majority of prisoners subjected to solitary confinement are sent there by prison officials

¹⁸³ *Id.* at 168.

¹⁸⁴ *Id.* at 171.

¹⁸⁵ *Id.* at 173–74.

¹⁸⁶ *Compare, e.g.,* Wilkinson v. Austin, 545 U.S. 209, 213 (2005) with In re Medley, 134 U.S. 160, 171 (1890). Interestingly, several courts have held that judges lack the authority to impose solitary confinement as part of an offender’s sentence where it is not explicitly authorized by penal statute. *See, e.g.,* Fludd v. Goldberg, 854 N.Y.S.2d 362, 367 (2008) (invalidating sentence of four days per year in solitary confinement due to lack of statutory authorization); State v. McHenry, 525 N.W.2d 620, 627 (Neb. 1995) (same); State v. Snitzky, Nos. 74706, 74811, 1998 WL 827611, at *2 (Ohio Ct. App. 1998) (same). These cases appear to recognize the same truth the *Medley* court did—solitary confinement is an additional punishment above and beyond a mere prison sentence.

¹⁸⁷ *See* Alexander A. Reinert, *Solitary Troubles*, 93 NOTRE DAME L. REV. 927, 959–60 (2018).

without statutory authorization, based solely on their authority to administer prisons. If solitary confinement is a punishment, this conduct is unconstitutional.

Before reaching a final conclusion concerning how to resolve this conflict, this essay will look briefly at the history and effects of solitary confinement to determine whether the *Medley* Court's findings concerning its extreme harshness are correct.

a. Solitary Confinement in Nineteenth Century America

Solitary confinement has a long and troubled history in the United States. It was introduced by eighteenth and nineteenth century reformers who wished to reduce use of the death penalty, corporal punishments, and shaming punishments. The reformers argued that imprisonment and solitary confinement would operate as more effective and humane engines of rehabilitation.¹⁸⁸ Some reformers believed that solitary confinement could transform offenders into peaceful and productive members of society by segregating them from harmful outside influences and providing time for reflection and prayer.¹⁸⁹ Others believed that the “terror” induced by solitary confinement would deter crime.¹⁹⁰ Led by Pennsylvania and New York, a number of states created penitentiaries in the nineteenth century and amended their penal statutes to provide for imprisonment and solitary confinement.¹⁹¹

Although solitary confinement enjoyed a period of popularity over several decades in the nineteenth century, it came into disrepute as its effects became known.¹⁹² Experience showed that solitary confinement did not serve to rehabilitate prisoners; rather, it destroyed them.¹⁹³ Numerous cases of hallucination, insanity, despair, suicide, illness, and death were reported by prison administrators and outside observers.¹⁹⁴ Writers such as Alexis de Tocqueville, Gustave Beaumont, and Charles Dickens, who observed prisoners subject to solitary confinement,

¹⁸⁸ See, e.g., Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. REV. L. & SOC. CHANGE 477, 482 (1997) (describing reformers' arguments for the institution of solitary confinement); ADAM JAY HIRSCH, *THE RISE OF THE PENITENTIARY* 19 (1992) (same); see generally David M. Shapiro, *Solitary Confinement in the Young Republic*, 133 HARV. L. REV. 542 (2019) (describing the early history of solitary confinement in America).

¹⁸⁹ See Haney & Lynch, *supra* note 188.

¹⁹⁰ See, e.g., WILLIAM PALEY, *THE PRINCIPLES OF MORAL AND POLITICAL PHILOSOPHY* 436 (London, J. Davis ed., 7th ed. 1790) (discussing the potential deterrent effect of the “terror” induced by solitary confinement).

¹⁹¹ Ashley T. Rubin & Keramet Reiter, *Continuity in the Face of Penal Innovation: Revisiting the History of American Solitary Confinement*, 43 LAW & SOC. INQUIRY 1604, 1612–15 (2018) (describing the nineteenth century trend toward adopting solitary confinement as a method of punishment); David M. Shapiro, *Solitary Confinement in the Young Republic*, 133 Harv. L. Rev. 542 (2019) (providing a detailed historical account of early experiments with solitary confinement, focusing particularly on Pennsylvania).

¹⁹² See e.g., *id.* at 1617–18 (highlighting critiques of the original models of solitary confinement).

¹⁹³ See, e.g., John F. Stinneford, *Experimental Punishments*, 95 NOTRE DAME L. REV. 39, 60–64 (2019) (describing the history of solitary confinement in the nineteenth century).

¹⁹⁴ See Haney & Lynch, *supra* note 188, at 483–84 (describing nineteenth century reports of the extremely harsh effects of solitary confinement); Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 CRIME & JUST. 441, 459 (2006) (same).

described its effects as “fatal”¹⁹⁵ and “worse than any torture.”¹⁹⁶ Thus solitary confinement fell out of favor as a method of punishment by the 1860s and largely disappeared from the United States by the 1870s and 1880s.¹⁹⁷

b. Late Twentieth Century Resurgence of Solitary Confinement

Long-term solitary confinement experienced a resurgence starting in the 1960s and 1970s before drastically accelerating with the rise of “Supermax” prisons in the 1980s and 1990s.¹⁹⁸ By 2004, forty-four states and the District of Columbia had joined the federal government in opening supermax facilities.¹⁹⁹ According to recent estimates by the Liman Center at Yale Law School, more than 60,000 offenders are currently housed in solitary confinement.²⁰⁰ Of these, approximately 11,500 have spent a year or more in solitary, and nearly 3,000 have spent six years or more in solitary.²⁰¹

The conditions of solitary confinement vary from facility to facility, but the supermax unit at the Pelican Bay penitentiary in California, as described by the court in *Madrid v. Gomez*, is fairly representative.²⁰² At the time *Madrid* was decided, most prisoners in the secure housing unit (SHU) at Pelican Bay were kept in total isolation, twenty-four hours per day, seven days per

¹⁹⁵ G. DE BEAUMONT & A. DE TOQUEVILLE, ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION IN FRANCE 5 (Francis Lieber, trans., 1833) (“This trial, from which so happy a result had been anticipated, was fatal to the greater part of the convicts: in order to reform them, they had been submitted to complete isolation; but this absolute solitude, if nothing interrupt[s] it, is beyond the strength of man; it destroys the criminal without intermission and without pity; it does not reform, it kills. The unfortunates, on whom this experiment was made, fell into a state of depression, so manifest, that their keepers were struck with it; their lives seemed in danger, if they remained longer in this situation; five of them, had already succumbed during a single year; their moral state was not less alarming; one of them had become insane; another, in a fit of despair, had embraced the opportunity when the keeper brought him something, to precipitate himself from his cell, running the almost certain chance of a mortal fall.”)

¹⁹⁶ CHARLES DICKENS, AMERICAN NOTES FOR GENERAL CIRCULATION 123-24 (Paris, A. & W. Galignani & Co. 1842) (“I hold this slow and daily tampering with the mysteries of the brain, to be immeasurably worse than any torture of the body . . .”). Hans Christian Andersen similarly described solitary confinement he witnessed in a Swedish prison as “a well-built machine—a nightmare for the spirit.” PICTURES OF SWEDEN 56 (Richard Bentley, ed., 2d ed. 1852).

¹⁹⁷ See, e.g., Rubin & Reiter, *supra* note 191, at 1617; Shapiro, *supra* note 188, at 572. Shorter term solitary confinement continued to exist at the margins of penal practice to discipline unruly prisoners, and there is evidence that some prison officials subjected some prisoners to extended periods in solitary confinement. See, e.g., Stinneford, *Experimental Punishments*, *supra* note 193, at 65–68.

¹⁹⁸ Stinneford, *Experimental Punishments*, *supra* note 193, at 69–75.

¹⁹⁹ See DANIEL P. MEARS, EVALUATING THE EFFECTIVENESS OF SUPERMAX PRISONS 40 (2006).

²⁰⁰ REFORMING RESTRICTIVE HOUSING, *supra* n. 2, at 4. A recent study indicates that the rapid increase in the number of prisoners subjected to solitary confinement has been caused largely by increases in the length of time individual prisoners are subjected to it. See Ryan T. Sakoda & Jessica T. Simes, *Solitary Confinement and the U.S. Prison Boom*, CRIM. JUST. POL’Y REV. 18–19 (2019).

²⁰¹ See REFORMING RESTRICTIVE HOUSING, *supra* note 2, at 14. These numbers are merely estimates because not all states reported the duration of current inmates’ time in solitary confinement. Those that did report this data indicated that just under 19% of inmates currently in solitary confinement had spent a year or more there, and just under 5% had spent six years or more there. *Id.*

²⁰² 889 F. Supp. 1146, 1228–30 (N.D. Cal. 1995).

week.²⁰³ Each prisoner spent about twenty three hours per day in a cell approximately the size of a parking spot.²⁰⁴ For about an hour each day, the prisoner would be let into a caged exercise area, resembling a dog run, where he was permitted to exercise alone.²⁰⁵ Meals were served through a slot in the door.²⁰⁶ Prisoners were shackled during all interactions with guards.²⁰⁷ Any meetings with visitors were conducted through thick glass windows—but such visits were rare because of the prison’s isolated location.²⁰⁸ In sum, as the former warden testified, imprisonment in the SHU amounted to “virtual total deprivation, including, insofar as possible, deprivation of human contact.”²⁰⁹ Numerous supermax facilities share the characteristics described above.²¹⁰

c. Current Evidence Concerning the Effects of Solitary Confinement

For purposes of determining whether solitary confinement is a punishment or a mere administrative action, the key question is this: How harsh are the effects of solitary confinement in comparison to the effects of imprisonment generally? Numerous studies of the effects of solitary confinement have been performed over the past forty years.²¹¹ They show that solitary confinement has extraordinarily harmful effects on prisoners subjected to it.²¹² More importantly for our purposes, they show that the harmful effects of solitary confinement are extreme, not just as an absolute matter, but also in comparison to the effects of imprisonment generally.

Suffering in prison seems to follow a curve. Studies have shown that prisoners at the beginning of their sentence tend to experience very high levels of depression and anxiety.²¹³ But these symptoms tend to recede as time goes on, so that several years into a term of incarceration, prisoners’ happiness levels generally settle somewhere near their pre-incarceration baseline.²¹⁴ This curve corresponds to the theory of “hedonic adaptation,” which refers to the general human tendency to revert back to a baseline level of happiness after a significantly positive or negative experience.²¹⁵

²⁰³ *Id.* at 1228–29.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 1229.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 1230.

²¹⁰ See generally Judith Resnik, Sarah Baumgartel & Johanna Kalb, *Time-in-Cell: Isolation and Incarceration*, 125 YALE L.J. F. 212 (2016) (describing the characteristics of American supermax facilities).

²¹¹ See *infra* notes 211–20.

²¹² See *id.*

²¹³ See John Bronsteen et al., *Happiness and Punishment*, 76 U. CHI. L. REV. 1037, 1047–48 (2009). Some groups of prisoners, such as the mentally ill, may not be able to adapt to prison as well as others. See, e.g., E. Lea Johnston, *Vulnerability and Just Desert: A Theory of Sentencing and Mental Illness*, 103 J. CRIM. L. & CRIMINOLOGY 147, 159–60 (2013) (“Prison is a toxic environment for individuals with serious mental health problems”).

²¹⁴ See Bronsteen *supra* note 209, at 1047.

²¹⁵ See *id.* at 1040.

Suffering in solitary confinement follows a very different trajectory. Studies show that inmate well-being is significantly harmed by solitary confinement, and harms get worse over time.²¹⁶ Effects include “extreme forms of psychopathology,”²¹⁷ and include suicidal thoughts, hallucinations, perceptual distortions, violent fantasies, talking to one’s self, overall deterioration, mood swings, emotional flatness, chronic depression, social withdrawal, confused thought processes, oversensitivity to stimuli, irrational anger, and ruminations.²¹⁸

Compared to the symptoms displayed by prisoners subjected to incarceration generally, the effects of solitary are extraordinarily grave. For example, a recent study compared the psychological well-being of prisoners who had been held in the Secure Housing Unit (SHU) of the Pelican Bay state prison in California for ten years or more to prisoners held in the general population of the same prison for a comparable period of time.²¹⁹ The study excluded prisoners listed on the prison’s mental health caseload,²²⁰ and prisoners from both groups were randomly selected.²²¹ It found that extreme long-term SHU prisoners reported nearly twice the number of stress-related trauma and isolation-related pathology symptoms as prisoners in the general population,²²² and much greater intensity of stress, trauma, and isolation-related pathology symptoms.²²³ Finally, the study found that “the prisoners in long-term solitary confinement were

²¹⁶ Numerous studies demonstrate the harmful effects of solitary confinement on prisoner well-being. As discussed above, these effects were well-known in the nineteenth century. Modern studies in America and Europe have replicated these findings. Many such studies are summarized in the following literature reviews: See Elizabeth Bennion, *Banning the Bing: Why Extreme Solitary Confinement Is Cruel and Far Too Usual Punishment*, 90 IND. L.J. 741, 753–63 (2015); Haney & Lynch, *supra* note 183; Craig Haney, *Mental Health Issues in Long-Term Solitary and “Supermax” Confinement*, 49 CRIME & DELINQ. 124, 132 (2003); Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J.L. & POL’Y 325 (2006); Smith, *supra* note 189; Bruce Arrigo & Jennifer Bullock, *The Psychological Effects of Solitary Confinement on Prisoners in Supermax Units: Reviewing What We Know and Recommending What Should Change*, 52 INT’L. J. OFFENDER THERAPY AND COMP. CRIMINOLOGY 622 (2008). A group of researchers published a study in 2010, known as the “Colorado study,” claiming that prolonged solitary confinement has few negative effects and may actually be good for mentally ill prisoners. See MAUREEN O’KEEFE ET AL., ONE YEAR LONGITUDINAL STUDY OF THE PSYCHOLOGICAL EFFECTS OF ADMINISTRATIVE SEGREGATION 1 (2010). In 2016, a meta-analysis based largely on the Colorado study reached a similar conclusion. See Robert Morgan et al., *Quantitative Synthesis of the Effects of Administrative Segregation on Inmates’ Well-Being*, 22 PSYCHOL., PUB. POL’Y, AND L., Aug. 8, 2016, at 18. These studies have been shown to be so deeply flawed as to be meaningless. See, e.g., Craig Haney, *The Psychological Effects of Solitary Confinement: A Systematic Critique*, 47 CRIME & JUST. 365, 369–70 (2018) (flaws include contamination of treatment and comparison groups, poorly constructed sampling and group composition, uncontrolled differences in conditions of “general population” and “administrative segregation” imprisonment, failure to control or record treatment dose, and a number of problems undermining the reliability of data collection); Stuart Grassian & Terry A. Kupers, *The Colorado Study vs. The Reality of Supermax Confinement*, 13 CORRECTIONAL MENTAL HEALTH REP. 1, 7–8 (2011) (noting that, among other problems, the study ignored key data including the fact that the prisons recorded almost 7 times as many psychiatric emergencies per inmate in solitary confinement than among those in the general population).

²¹⁷ See Haney, *supra* note 212, at 134.

²¹⁸ See *id.*

²¹⁹ See Craig Haney, *Restricting the Use of Solitary Confinement*, 1 ANN. REV. OF CRIMINOLOGY 285, 292–293 (2018).

²²⁰ See *id.* at 292 n. 2.

²²¹ See *id.* at 291.

²²² See *id.* at 292–293.

²²³ See *id.* at 293.

not only significantly more lonely than the long-term GP prisoners . . . , but also reported extremely high levels of loneliness rarely found anywhere in the literature.”²²⁴ Similar results have been found by other comparative studies.²²⁵ There is broad consensus that placing a prisoner in solitary has a psychological and physical impact well above any that a prisoner would experience in general population.”

In sum, historical and modern empirical evidence concerning the effects of solitary confinement strongly supports the Supreme Court’s conclusion in *In re Medley* that solitary confinement is an additional punishment within the meaning of the United States Constitution. It causes suffering and harm well beyond that caused by a general sentence of imprisonment. Moreover, unlike the suffering caused by imprisonment generally, the suffering continues to intensify over time. Because solitary confinement is an additional punishment, its imposition does not fall within the legitimate discretion of prison officials seeking to promote prison security. Rather, before it may be imposed, it must be authorized by the penal statute governing the offense of conviction in effect at the time the prisoner committed his crime, and must be imposed as part of the offender’s sentence.

CONCLUSION

Solitary confinement is a punishment. The Supreme Court was correct when it reached this conclusion in 1890, and more recent cases ignoring this conclusion are incorrect. When a prison official inflicts solitary confinement on a prisoner without prior statutory and sentencing authorization, that official imposes a “punishment without law.” Basic principles of separation of powers and individual rights dictate that this practice must stop.

²²⁴ *See id.*

²²⁵ *See, e.g.,* Smith, *supra* note 189 at 477-480 (describing comparative studies concerning the effects of solitary confinement on Norwegian and Danish remand prisoners).