

Supermax Administration and the Eighth Amendment: Deference, Discretion, and Double Bunking, 1986–2010

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This Article explores the constitutionality of supermax prisons, focusing on one of the earliest and largest supermaxes in the United States, California's Pelican Bay State Prison, and one of the first court cases to consider supermax constitutionality, Madrid v. Gomez. Although international human rights bodies have condemned indeterminate periods of solitary confinement in the harsh conditions of American supermax prisons as torture, no American court has found that the harsh conditions or long durations of confinement in these institutions violate the Eighth Amendment prohibition against cruel and unusual punishment. This Article examines why. Part I suggests the simplest answer: courts evaluating supermax confinement have simply deferred to prison administrators' assertions that the institutions are constitutional. Introducing the cases that have examined supermax prison conditions, with a specific focus on Madrid, this part analyzes the role of judicial deference in Madrid and other, similar decisions. Parts II and III present evidence of two key, overlooked mechanisms of this judicial deference. Part II analyzes historical evidence from archives and oral history interviews to demonstrate how prison administrators in California and Arizona worked to design supermax institutions maximally free of public oversight, demonstrating that deference to prison officials is not only initiated by courts, but also actively cultivated by supermax designers and administrators. A second mechanism of judicial deference to supermax administrators is a presumption that no empirical evidence exists with which to evaluate prison administrators' claims. But this presumption is unwarranted. Part III provides an example of the kinds of empirical

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evaluations of supermax administrators' claims that are possible, even in the context of limited evidence and broad administrative discretion. Part IV suggests two judicial and two nonjudicial avenues to check the broad discretion in the design and operation of supermax prisons; this discretion has produced a lack of public, and especially judicial, oversight of potentially egregious constitutional violations. Supermaxes represent the most extreme end of mass incarceration in the United States. Looking closely at the motivations behind supermaxes, their ungovernability, and their potential for reform therefore has implications for mass incarceration more broadly. If we could grapple with limiting the supermax, perhaps this would give us clues as to how we might grapple with limiting other aspects of the supersized American criminal justice system.

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INTRODUCTION

“Supermax” prisoners in the United States live for months (and often years) at a time in windowless, poured-concrete boxes. Each “box,” or cell, includes roughly eighty square feet of space—about the size of a handicap bathroom stall, or a parking space. Prisoners spend at least twenty-two hours of every day in these cells, under fluorescent lights that never turn off. They only leave their cells four or five times per week, for showers or for brief, solitary exercise periods in “dog runs”—concrete pens with roofs at least partially open to natural light. A guard in a central booth controls each prisoner’s automated, steel cell door. Phone calls are not permitted, unless a prisoner is to be notified of a death in his immediate family. The rare human interaction—with a doctor, a lawyer, or an in-person family visit—

takes place from within a cage on wheels or behind bulletproof glass. Usually, prisoners live in total solitary confinement in these cells. Sometimes, however, prison systems have more supermax prisoners than supermax prison cells. In these cases, prisoners in supermax cells are double banded, spending twenty-two or more hours of every day in that eighty-square-foot cell with a cellmate.

Correctional administrators, not judges, assign prisoners to supermaxes, based on in-prison behavioral assessments. These are prisons within prisons, where the deprivation conditions are extreme. Supermaxes are a modern phenomenon, growing out of and expanding with America's turn toward harsher sentencing policies and mass incarceration in the 1980s.¹ Arizona opened the first supermax in 1986, and California quickly copied the Arizona prototype, opening two more supermaxes in 1988 and 1989.² The federal prison system opened the United States Penitentiary, Administrative Maximum (nicknamed AdMax, or ADX) in Florence, Colorado, in 1994.³ (The ADX designers had looked to other state supermax facilities as a model for ADX, and designed an institution structurally similar to the California and Arizona supermaxes.)⁴ By the late 1990s, nearly every state had a supermax prison.⁵ Each facility costs between \$8 and \$230 million to build.⁶ Today, scholars estimate that between twenty thousand and eighty thousand prisoners across the United States are held in supermax prisons, under conditions of long-term solitary confinement (or sometimes conditions of long-term segregation, with one other cellmate, as the case may be).⁷

This massive investment in building the infrastructure to maintain thousands of prisoners in long-term isolation is surprising in light of both U.S. prison history and U.S. prison law prior to the 1980s. The earliest U.S. prisons, which opened in Pennsylvania and New York between 1790 and 1829, maintained prisoners in

1. See, e.g., Franklin E. Zimring, *The Scale of Imprisonment in the United States: Twentieth Century Patterns and Twenty-First Century Prospects*, 100 J. CRIM. L. & CRIMINOLOGY 1225, 1230–33 (2010).

2. MONA LYNCH, SUNBELT JUSTICE: ARIZONA AND THE TRANSFORMATION OF AMERICAN PUNISHMENT 5, 135–38 (2010); Keramet A. Reiter, *Parole, Snitch, or Die: California's Supermax Prisons and Prisoners, 1997–2007*, 14 PUNISHMENT & SOC'Y 530, 532, 535 (2012).

3. Ed Pilkington, *ADX Florence Supermax Prison: The Alcatraz of the Rockies*, GUARDIAN (Apr. 10, 2012, 2:00 PM), <http://www.theguardian.com/world/2012/apr/10/abu-hamza-isolation-supermax-prison>.

4. Interview with Anonymous, Architect, Fed. Bureau of Prisons (Feb. 2, 2011) (on file with author).

5. NAT'L INST. OF CORR., U.S. DEP'T OF JUSTICE, SUPERMAX HOUSING: A SURVEY OF CURRENT PRACTICE 4–6 (1997), available at <http://static.nicic.gov/Library/013722.pdf>; Alexandra Naday et al., *The Elusive Data on Supermax Confinement*, 88 PRISON J. 69, 75 (2008).

6. DEL NORTE CNTY. BD. OF SUPERVISORS, COMPREHENSIVE ECONOMIC DEVELOPMENT STRATEGY: DEL NORTE COUNTY, CALIFORNIA 2006–2008, at 10 (2006), available at <http://www.jirwinconsulting.com/CEDS050506.pdf>; Mark Roberts, *Butner Supermax: Prison 'Locks Down' Inmates*, WRAL.COM (Dec. 1, 1998), <http://www.wral.com/news/local/story/131674/>; *The "Supermax" Prison in Butner Will House the Worst of the Worst*, WRAL.COM (May 13, 1998), <http://www.wral.com/news/local/story/131663/>.

7. Naday et al., *supra* note 5 at 77; Jean Casella & James Ridgeway, *How Many Prisoners Are in Solitary Confinement in the United States?*, SOLITARYWATCH (Feb. 1, 2012), <http://solitarywatch.com/2012/02/01/how-many-prisoners-are-in-solitary-confinement-in-the-united-states/>.

solitary confinement.⁸ Within eighteen months of opening in 1821, New York's Auburn State Prison abandoned the practice of solitary confinement because so many prisoners lost their minds.⁹ Pennsylvania was slower to abandon the solitary confinement system. In 1842, novelist and social critic Charles Dickens condemned the ongoing use of solitary confinement in Pennsylvania's Eastern State Penitentiary as "worse than any torture of the body."¹⁰ And by the mid-nineteenth century, hundreds of deaths and cases of insanity had been documented and attributed to the use of long-term solitary confinement in New York and Pennsylvania.¹¹ In light of this evidence, many jurisdictions took steps to limit the duration of solitary confinement, or to eliminate the practice entirely.¹² At the turn of the twentieth century, the Supreme Court conclusively condemned the practice, albeit in dicta. In 1890, in *In re Medley*, the Supreme Court devoted more than a page (of a short, fifteen-page opinion) to describing in no uncertain terms the severity and futility of solitary confinement as a punishment: "A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition . . . and others became violently insane; others still, committed suicide."¹³ *In re Medley* marked the end of a century of on-again-off-again uses of extended solitary confinement in the early United States penitentiaries, until the 1980s.

Even in its modern form (well-lit, technologically advanced, hyperhygienic), long-term isolation in supermax prisons like California's Pelican Bay and the Federal Bureau of Prisons' ADX, has been correlated with hallucinations and symptoms of post-traumatic stress disorder, increased suicide risk, exacerbations of existing mental health problems, and higher recidivism rates.¹⁴ And international human

8. See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 219–20 (3d ed. 2005); ADAM JAY HIRSCH, *THE RISE OF THE PENITENTIARY: PRISONS AND PUNISHMENT IN EARLY AMERICA* 59–60 (1992); MICHAEL IGNATIEFF, *A JUST MEASURE OF PAIN: THE PENITENTIARY IN THE INDUSTRIAL REVOLUTION, 1750–1850*, at 194–97 (1978); ORLANDO F. LEWIS, *THE DEVELOPMENT OF AMERICAN PRISONS AND PRISON CUSTOMS, 1776–1845*, at 118–19 (Patterson Smith 1967) (1922); DAVID J. ROTHMAN, *THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC* 82–83, 94–96 (1971).

9. Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 *CRIME & JUST.* 441, 457 (2006); see also REBECCA M. MCLENNAN, *THE CRISIS OF IMPRISONMENT: PROTEST, POLITICS, AND THE MAKING OF THE AMERICAN PENAL STATE, 1776–1941*, at 57 (2008).

10. CHARLES DICKENS, *Philadelphia and Its Solitary Prison*, in *AMERICAN NOTES AND PICTURES FROM ITALY* 97, 99 (Oxford Univ. Press 1957) (1842), available at <http://www.online-literature.com/dickens/americanotes/8/>.

11. 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, 484 (1997).

12. *Id.* at 484–86.

13. *In re Medley*, 134 U.S. 160, 168 (1890) (holding that Colorado's new policy of keeping death-sentenced prisoners in solitary confinement constituted a significant additional punishment beyond the sentence of death; holding that the solitary confinement policy violated the *ex post facto* clause as to Medley, who had committed his crime before the solitary confinement policy became law; and overturning Medley's death sentence on this basis).

14. See, e.g., Haney & Lynch, *supra* note 11, at 506, 509, 521, 524, 530; Reiter, *supra* note 2, at 533, 552–56; Kevin Johnson, *Inmate Suicides Linked to Solitary*, USA TODAY (Dec. 27, 2006, 10:59 PM), http://usatoday30.usatoday.com/news/nation/2006-12-27-inmate-suicides_x.htm; Mary Beth

rights bodies have condemned modern supermaxes as places of torture that violate international human rights laws.¹⁵ Yet no U.S. court has held that supermax prison conditions, like those at Pelican Bay, violate the Eighth Amendment prohibition against cruel and unusual punishment. This Article examines why not.

Specifically, this Article addresses two questions about the legality of supermaxes. First, why have U.S. courts repeatedly upheld the constitutionality of supermaxes? Second, should the constitutionality of supermaxes be reconsidered, and if so, how?

California's Pelican Bay State Prison is the focal point of the analysis in this Article. California's prison system is second in scale only to Texas's.¹⁶ Pelican Bay was one of the first and largest supermaxes built in the United States.¹⁷ And Pelican Bay was the site of one of the first challenges to the constitutionality of supermaximum security confinement, in the federal lawsuit *Madrid v. Gomez*.¹⁸ Many courts have followed Judge Thelton Henderson's reasoning in the *Madrid* case in subsequent challenges to supermaxes located in other districts.¹⁹

Part I introduces the cases that have examined supermax prison conditions, focusing especially on *Madrid v. Gomez*, which assessed the constitutionality of the conditions at California's Pelican Bay State Prison. In *Madrid* and other similar cases, U.S. federal courts have held that supermaxes are necessary tools of safety and security, based on the assertions of prison administrators that this is the case. In fact, prison-law scholars have clearly established (and criticized) a broader pattern of federal court deference to prison administrators' claims, as discussed in Part I. Generally, courts justify this deference because (1) prison administrators need discretion to manage the difficult populations of people in prison, and (2) prison administrators have expertise in their own management needs.

However, the supermax phenomenon reveals two key, overlooked mechanisms of this deference. First, the deference is not only initiated by courts, but also actively cultivated by supermax designers and administrators. The correctional administrators who designed and ran the first supermaxes sought to

Pfeiffer, *Prison Suicide Rates Rise; Solitary Confinement Adds to Risk*, POUGHKEEPSIE J. (Apr. 11, 2011), <http://www.poughkeepsiejournal.com/article/20101017/NEWS01/112030002/SPECIAL-REPORT-Prison-suicide-rates-rise-solitary-confinement-adds-risk>; Peter Schworm, *Before Suicide, Inmate Pleaded for End to Isolation*, BOS. GLOBE (Mar. 13, 2012), <http://www.bostonglobe.com/metro/2012/03/12/suspect-double-murder-takes-his-own-life-after-being-held-isolation/7osEIHfBDQp0VcFetpw0JI/story.html>.

15. See, e.g., AMNESTY INT'L, USA: THE EDGE OF ENDURANCE: PRISON CONDITIONS IN CALIFORNIA'S SECURITY HOUSING UNITS 9–10, 28, 52 (2012), available at <http://www.amnestyusa.org/sites/default/files/edgeofendurancecaliforniareport.pdf>; *Solitary Confinement Should Be Banned in Most Cases, UN Expert Says*, UN NEWS CENTRE (Oct. 18, 2011), <https://www.un.org/apps/news/story.asp?NewsID=40097>.

16. E. ANN CARSON & WILLIAM J. SABOL, U.S. DEP'T OF JUSTICE, NCJ 239808, PRISONERS IN 2011, at 3 (2012).

17. See Reiter, *supra* note 2, at 531.

18. See *Madrid v. Gomez*, 889 F. Supp. 1146, 1155 (N.D. Cal. 1995).

19. See, e.g., *Wilkinson v. Austin*, 545 U.S. 209, 213 (2005) (discussed *infra*); *Comer v. Stewart*, 230 F. Supp. 2d 1016, 1023, 1033–34, 1071 (D. Ariz. 2002).

avoid all forms of public oversight—from legislators, media, and courts—of the facilities. Continued judicial deference to supermax administrators further exaggerates this institutionalized lack of oversight. Part II analyzes historical evidence from archives and oral history interviews to demonstrate how prison administrators in California and Arizona worked to design supermax institutions maximally free of public oversight, and, over the next twenty-five years, continued to operate supermaxes largely free of public oversight.

A second mechanism of judicial deference to supermax administrators is a presumption that no empirical evidence exists with which to evaluate prison administrators' claims. But this presumption is unwarranted. In fact, prison administrators' claims about what management tools they require and how these tools operate in practice are empirically testable. Part III provides an example of the kinds of empirical evaluations of supermax administrators' claims that are possible, even in the context of limited evidence and broad administrative discretion. By analyzing empirical data about supermax operation over the last twenty years, this part seeks to demonstrate the importance of empirical data to any legal analysis of the constitutionality of an institution of punishment.

Part IV suggests two judicial and two nonjudicial avenues to check the broad discretion in the design and operation of supermax prisons, which has produced a lack of public, and especially judicial, oversight of potentially egregious constitutional violations. The judicial avenues seek to limit the degree of deference given to correctional administrators imposing the most extreme possible in-prison punishments, by expanding categorical restrictions excluding certain groups from supermax prisons, and also by expanding the procedural protections preceding supermax assignment. The nonjudicial avenues include increasing the visibility of supermaxes by requiring more regular and more detailed production of data and by facilitating regular, independent monitoring of supermaxes.

I. MADRID AND THE CONSTITUTIONALITY OF SUPERMAX PRISONS

The technologically advanced, extremely harsh conditions of the first supermax prisons in Arizona and California quickly attracted judicial scrutiny. A federal court in California led the inquiry. Judge Henderson, Chief Judge of the Northern District Court of California from 1990 through 1997, remembered when he and a few other judges on the court first heard about the conditions at Pelican Bay: “[W]e were looking and our mouths were open, and we said [the judges to each other]: ‘You can’t do that. That’s unconstitutional.’”²⁰ Within three years of Pelican Bay’s opening, Judge Henderson was overseeing a three-month long trial to evaluate the constitutionality of the conditions at the prison. In January of 1995, he issued a 137-page opinion in the case of *Madrid v. Gomez*.²¹ For the next fifteen years, he

20. Interview with Thelton Henderson, Chief Judge, Dist. Court for the N. Dist. of Cal., in S.F., Cal. (May 24, 2011) (on file with author).

21. *Madrid*, 899 F. Supp. 1146.

would oversee day-to-day policies and practices at the institution, reading regular monitoring reports from prisoners' rights attorneys who visited the institution at least annually.²²

Judge Henderson has a reputation as one of the most liberal federal district court judges in the United States. He was one of the first African American lawyers to work for the Civil Rights Division in the U.S. Department of Justice, where he investigated the 1963 white supremacist bombing of the 16th Street Baptist Church in Montgomery, Alabama.²³ Since his early days as a civil rights attorney, Henderson has presided over a number of controversial cases, including a case upholding environmental protections for dolphins; a case overturning a murder conviction of an alleged Black Panther member; a case in which he attempted to block enforcement of California's Proposition 209, which prohibited public entities from engaging in affirmative action; and, most recently, a class action prison conditions case in California in which he issued a population reduction order affecting more than thirty thousand state prisoners.²⁴ If any judge was predisposed to find the conditions of confinement in a supermax like Pelican Bay unconstitutional, it was Judge Henderson.

However, Judge Henderson never found that Pelican Bay's harsh conditions of confinement, or the practice of imposing indeterminately long solitary confinement on some prisoners, were per se unconstitutional. In March of 2011, Judge Henderson closed the *Madrid* case.²⁵ That summer, dozens of Pelican Bay prisoners coordinated a three-week-long, statewide prisoner hunger strike, protesting their indefinite solitary confinement.²⁶ At that point, more than five hundred prisoners at Pelican Bay had been in solitary confinement for more than ten years.²⁷ And, with the *Madrid* case closed, they had little hope that the courts would provide any potential avenue for reform. The international human rights community, however, was paying closer attention in 2011 than it had been in the

22. See Interview with Thelton Henderson, *supra* note 20.

23. SOUL OF JUSTICE: THELTON HENDERSON'S AMERICAN JOURNEY (Ginzberg Video Productions 2006).

24. *Id.*; see, e.g., Order to Reduce Prison Population, *Coleman/Plata v. Brown*, Nos. S-90-0520 LKK JFM P, C01-1351 TEH (E.D. & N.D. Cal. 2010) (Three-Judge Court); *Earth Island Inst. v. Evans*, No. C03-0007TEH, 2004 WL 1774221 (N.D. Cal. Aug. 9, 2004) (redefining what constitutes dolphin-safe tuna); *Coal. for Econ. Equity v. Wilson*, 946 F. Supp. 1480 (N.D. Cal. 1996) (issuing a preliminary injunction against enforcement of Proposition 209), *vacated*, 122 F.3d 692 (9th Cir. 1997); *Spain v. Rushen*, 543 F. Supp. 757 (N.D. Cal. 1982) (issuing a writ of habeas corpus, functionally overturning Johnny Spain's in-prison murder conviction), *aff'd*, 701 F.2d 186 (9th Cir. 1983), *vacated*, 464 U.S. 114 (1983).

25. *Judge Closes Prison Abuse Case After 20 Years*, KQED NEWS (Mar. 22, 2011), <http://blogs.kqed.org/newsfix/2011/03/22/judge-closes-prison-abuse-case-after-20-years/>.

26. Sal Rodriguez, *One Year Anniversary of Pelican Bay Hunger Strike Against Solitary Confinement*, SOLITARY WATCH (July 3, 2012), <http://solitarywatch.com/2012/07/03/one-year-anniversary-of-pelican-bay-hunger-strike-against-solitary-confinement/>; see also Keramet Reiter, *The Pelican Bay Hunger Strike: Resistance within the Structural Constraints of a U.S. Supermax Prison*, 113 S. ATLANTIC Q., 579 (2014).

27. Julie Small, *Under Scrutiny, Pelican Bay Prison Officials Say They Target Only Gang Leaders* (KPCC Southern California Public Radio, Aug. 23, 2011).

late 1980s and early 1990s; Juan Mendez, the UN Special Rapporteur on Torture said in August of 2011 that more than fifteen days in solitary confinement, in a prison like Pelican Bay, could constitute torture in violation of international human rights covenants.²⁸

UN officials' recent assertions that the conditions at Pelican Bay might constitute torture, Judge Henderson's initial instinct about California's supermax ("that's unconstitutional"), and the 1890 Supreme Court decision dismissing solitary confinement as futile, all inspire a central question about the *Madrid* decision and others like it: by what rationale have U.S. courts repeatedly upheld the constitutionality of supermaxes? This section first examines the rationale applied in *Madrid*, then examines the rationales applied in subsequent, similar cases, and finally contextualizes the supermax cases in the framework of a pattern of deference in U.S. prisoners' rights cases decided in the late twentieth and early twenty-first centuries.

A. *Madrid v. Gomez*

In 1995, Judge Henderson released a substantial opinion evaluating the constitutionality of multiple aspects of the conditions of confinement and the operational policies at Pelican Bay State Prison. The *Madrid* decision documented a number of constitutional violations at Pelican Bay State Prison, including the practice of placing mentally ill prisoners in long-term solitary confinement with minimal access to psychiatric treatment, and a correctional "code of silence" that worked to systematically conceal allegations of excessive uses of force.²⁹ The *Madrid* court ordered the California Department of Corrections to work with plaintiffs' lawyers to design a remedial plan to bring the institution into compliance with basic constitutional norms prohibiting cruel and unusual punishment. The court also appointed a special master to regularly monitor the institution's progress.³⁰ However, the court did not find that the basic conditions of confinement in the Pelican Bay Security Housing Unit (SHU) were, in and of themselves, unconstitutional. Specifically, the court considered (and found constitutional) two common aspects of confinement in the Pelican Bay SHU, which will be discussed in detail here: (1) the constitutionality of the basic, restrictive conditions of confinement; and (2) the constitutionality of double bunking some prisoners under these conditions.

For both of these challenges to the constitutionality of the conditions within the Pelican Bay SHU, the *Madrid* court applied a then newly minted Supreme Court rule articulated in *Farmer v. Brennan*,³¹ a 1994 prisoners' rights case. In *Farmer*, the

28. Special Rapporteur of the Human Rights Council, *Interim Report of the Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Doc. A/66/268 (Aug. 5, 2011).

29. *Madrid v. Gomez*, 889 F. Supp. 1156, 1259–60 (N.D. Cal. 1995).

30. *Id.* at 1282–83.

31. *Farmer v. Brennan*, 511 U.S. 825 (1994).

Supreme Court established a two-prong rule for evaluating the constitutionality of a condition or conditions of confinement: (1) the prisoner must claim a serious actual deprivation, or a serious risk of harm, a claim that requires an objective evaluation of seriousness; and (2) the prison officials inflicting the deprivation or imposing the risk of harm must have done so unnecessarily and wantonly (i.e., the official must have known of the risk of harm), a claim that requires a subjective evaluation of the state of mind of prison officials.³² A prisoner's initial burden of proof under the *Farmer* test is high: he must both establish the existence of a significant harm and also prove that the harm was intended, or at least that the prison official knew of the likelihood of the harm.³³ I discuss the *Madrid* court's application of *Farmer* to each aspect of confinement.

32. *Id.* at 834.

33. *Id.* at 837, 842 (defining deliberate indifference and describing the plaintiff's burden of proof). Interestingly, two of the concurrences in *Farmer* revolved around the issue of the reasonableness of this second prong, and questioned the requirement that a prison official's subjective state of mind be established. *Id.* at 852 (Blackmun, J., concurring); *id.* at 858 (Stevens, J., concurring). Prisoners face a particularly high burden in attempting to establish that a prison condition violates the Constitution. Many of them are representing themselves; ninety-three percent of prisoner petitions are filed pro se or without legal representation. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2011 ANNUAL REPORT OF THE DIRECTOR 189 tbl.C-13, available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/JudicialBusiness2011.pdf>. General population prisoners are in legally vulnerable positions stripped of many of the rights of citizenship. They are also likely to be uneducated and to have limited access to a lawyer or legal advice. In all but two states, prisoners are not allowed to vote. In most other states, even people who have been released from prison are disenfranchised for some period of time, and sometimes permanently. See *Criminal Disenfranchisement Laws Across the United States*, BRENNAN CENTER, <https://www.brennancenter.org/sites/default/files/analysis/RTV%20Map%2010%2016%2013.pdf>. According to the Prison Policy Initiative, nineteen percent of the U.S. prison population is completely illiterate, and forty percent are "functionally illiterate," which means someone would be "unable to write a letter explaining a billing error." Peter Wagner, *Section I: Crime & Punishment in the U.S.*, PRISON POL'Y INITIATIVE, <http://www.prisonpolicy.org/prisonindex/rootsofcrime.html> (last visited Oct. 18, 2014). Moreover, prisoners seeking to bring lawsuits challenging the conditions of their confinement face not just the social barrier of low literacy but legal barriers as well. For example, the Prison Litigation Reform Act is national legislation passed in 1996 that limits the ability of prisoners to bring civil rights claims. See *Prison Litigation Reform Act (PLRA): Myths and Facts*, SAVE COALITION, <http://www.savecoalition.org/myths.html> (last visited Oct. 18, 2014) (noting that between 1981 and 1995, the rate of prisoner filings of civil rights cases decreased from 29 per 1000 prisoners to 25 per 1000 prisoners, while the prison population itself doubled); see also Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550, 566 (2006). A supermax prisoner's vulnerability is further exaggerated by his placement in extreme isolation. Supermax prisoners usually only have the ability to request legal research materials if they have a pending court deadline. Under *Lewis v. Casey*, 518 U.S. 343, 351 (1996), the prisoner has the burden of proving that he was not able to pursue a legal claim because of inadequate library access, so most prisons prioritize access for prisoners who may be facing court filing deadlines. See also CTR. FOR CONSTITUTIONAL RIGHTS & NAT'L LAWYERS GUILD, *JAILHOUSE LAWYER'S HANDBOOK* 43–47 (Rachel Meeropol & Ian Head eds., 5th ed. 2010). Since supermax prisoners have no contact with other prisoners, they usually cannot seek out advice or help from so-called jailhouse lawyers. They are also not permitted to make phone calls, absent an emergency. See Reiter, *supra* note 2, at 531; Reiter, *supra* note 26, at 580, 585.

1. *Assessing the Constitutionality of Supermax Isolation*

The *Madrid* court applied the *Farmer* analysis to prisoners' claims that the conditions in the Pelican Bay SHU constituted cruel and unusual punishment. First, the court established facts about the conditions in the supermax units. Second, it evaluated whether there was a serious risk of harm to prisoners in these units based on these conditions (the objective prong of *Farmer*). Ultimately, the court found that there was no serious risk of harm to prisoners (the objective prong of *Farmer*), so this obviated the need to evaluate the "state of mind" of the prison officials who designed and operated these units (the subjective prong of *Farmer*). At each point of analysis—factual description, evaluating risk of harm, and considering whether to evaluate state of mind—the court incorporated a deferential consideration of whether prison officials had articulated a legitimate penological justification for the potentially unconstitutional restrictive conditions at issue.

First, the *Madrid* court described the conditions in the SHU in stark terms: "[T]he conditions . . . may press the outer bounds of what most humans can psychologically tolerate . . ." ³⁴ The court described these "outer bounds" of human tolerance in vivid detail: "The overall effect of the [supermax] is one of stark sterility and unremitting monotony. Inmates can spend years without ever seeing any aspect of the outside world except for a small patch of sky."³⁵ But even within these kinds of descriptions, the court did not describe the conditions as decisively unreasonable: "[T]he totality of the SHU conditions *may be* harsher than necessary to accommodate the needs of the institution with respect to these populations."³⁶ In describing the institution, the court weighed its harsh characteristics against what is necessary for institutional safety and security. The court described the SHU as not just a potentially intolerable place of stark and sterile conditions, but also as a place that housed "some of the most anti-social and violence-prone prisoners in the system."³⁷ Prison administrators, the court noted, have "the paramount responsibility" and "remarkably difficult undertaking" of managing these prisoners.³⁸ The court, then, connected the description of the conditions in the SHU to the necessity for these conditions as tools "to maintain the safety and security of both staff and inmates."³⁹

This initial description of the Pelican Bay SHU, highlighting the violent nature of the prisoners there and the importance of maintaining institutional safety and security, did not incorporate the perspectives of prisoners and their lawyers (who argued that some prisoners in the SHU were not dangerous, but mentally ill, and that other prisoners did not deserve to be there), nor the first-hand observations of Judge Henderson (who visited the Pelican Bay SHU numerous times over the

34. *Madrid*, 899 F. Supp. at 1267.

35. *Id.* at 1229, 1267.

36. *Id.* at 1263 (emphasis added).

37. *Id.* at 1160.

38. *Id.* at 1159.

39. *Id.* at 1159–60 (citations omitted).

course of the *Madrid* litigation⁴⁰). Rather, the initial description precisely reflected the claims of correctional administrators about who was housed in the Pelican Bay SHU and why.

Interviews I conducted with the California prison administrators who designed the Pelican Bay SHU reveal the close alignment between how the *Madrid* court described the institution and how correctional administrators described it. For instance, Carl Larson, a prison administrator who oversaw the design and construction of the Pelican Bay SHU in the 1980s, explained that revolutionary groups in the prisons, like the Black Panthers and the Black Guerilla Family, incited violence, which necessitated institutionalizing a long-term lock-up unit: “We needed a SHU unit . . . we were having a hell of a time . . . we had eleven staff members murdered in 1971.”⁴¹ Other administrators asserted that the SHU had indeed accomplished its safety-and-security goals. Craig Brown, the director of California’s Youth and Adult Correctional Authority (YACA), the agency that approved the building of Pelican Bay, argued: “We had a severe violence problem, and it got a lot better [after Pelican Bay opened] . . . less officers are killed at the hands of inmates than in the ‘70s . . . I think the SHU did what it was supposed to do . . . I actually think gangs got better.”⁴² The *Madrid* court’s descriptions of the SHU—as harsh but perhaps necessary—reflected exactly these correctional explanations and justifications for the SHU.⁴³ And, as I will show in the next part, the same administrators who articulated these justifications for the SHU in the 1990s and 2000s had designed the institution in the 1980s.⁴⁴

Once the *Madrid* court established descriptive facts about the Pelican Bay SHU—a stark place of restrictive confinement, but one necessary for isolating dangerous prisoners in order to maintain institutional safety and security—the court then evaluated the constitutionality of supermax conditions.⁴⁵ The court acknowledged in vivid terms the severity of the conditions in the Pelican Bay SHU, but found that the risk of harm to most prisoners housed in these conditions did not rise to the level of a truly serious deprivation or risk.⁴⁶

In analyzing the question of the seriousness of the harm to prisoners housed in SHU conditions (i.e., the objective prong of the *Farmer* analysis), the *Madrid* court deferred again to prison administrators’ claims about the necessity of the SHU for maintaining safety and security: “The severe restrictions on social interaction further defendants’ legitimate interest in precluding opportunities for disruptive or gang

40. See Interview with Thelton Henderson, *supra* note 20.

41. Interview with Carl Larson, former Dir. of Fin., Cal. Dep’t of Corr., in Sacramento, Cal. (Feb. 22, 2010) (on file with author).

42. Interview with Craig Brown, former Undersec’y, Youth & Adult Corr. Auth., Cal., in Sacramento, Cal. (Jan. 22, 2010) (on file with author).

43. *Madrid v. Gomez*, 889 F. Supp. 1146, 1263 (N.D. Cal. 1995).

44. See Interview with Craig Brown, *supra* note 42.

45. See *Madrid*, 899 F. Supp. at 1263–64.

46. *Id.* at 1267.

related activity and assaults on other inmates or staff.”⁴⁷ As the *Madrid* court explained, an established penological interest in certain conditions of confinement must be considered, along with the relative harm of that condition of confinement, in a careful weighing of the purpose of the restriction against the potential harm of the restriction.⁴⁸ The *Madrid* court’s final conclusion about whether the restrictive SHU conditions rose to the level of a constitutional violation (satisfying the first prong of the *Farmer* analysis) was that prison officials had adequately justified these conditions, given “the wide-ranging deference they are owed . . . [d]efendants are thus entitled to design and operate the SHU consistent with the penal philosophy of their choosing, absent constitutional violations.”⁴⁹ The court added the phrase “absent constitutional violations,” but in evaluating the SHU conditions, the court found no violations precisely *because* the defendants had defended an adequate “penal philosophy.”⁵⁰ In sum, the court weighed the severity of the conditions against the justifications for the conditions, and found that the justifications adequately rationalized the severity.

Because the court found that the need for the SHU conditions justified their seriously restrictive nature, the court did not reach the second prong of the *Farmer* analysis—the subjective question of whether the prison officials operating the SHUs knew the conditions might be generally harmful. Rather than incorporating the principle of deference to prison officials into the second, subjective prong of the *Farmer* test, which was explicitly designed to be deferential to what prison officials knew or should have known, the *Madrid* court incorporated the principle of deference to prison officials into its findings of fact, as well as into the objective prong of the *Farmer* test.⁵¹ In this way, the court expanded the *Farmer* principle of judicial deference.

The *Madrid* court essentially found that few, if any, conditions of confinement (short of sedating prisoners against their will⁵²) would actually be so severe as to outweigh prison officials’ justifications for supermax conditions, as tools of safety and security required to control the most dangerous prisoners.⁵³ This expanded prison officials’ discretion to define nearly any harsh condition of confinement as necessary for safety and security and, therefore, virtually exempt from constitutional review.

This also added an additional burden of proof for prisoner plaintiffs. In addition to being required to establish a conditions-based harm, and to establish that prison officials knew or should have known about the harm, post-*Madrid* prisoner plaintiffs now also have to establish that the conditions-based harm is *not*

47. *Id.* at 1263.

48. *Id.* at 1262.

49. *Id.* at 1262–63.

50. *See id.*

51. *See id.* at 1260–61.

52. *Id.* at 1263.

53. *See id.*

justifiable as a tool of safety and security.⁵⁴ In sum, by deferring to prison officials' claims not just in the second, subjective prong of the *Farmer* analysis, but also in the first, objective prong of the *Farmer* analysis, the *Madrid* court altered the power allocation between courts, prisoners, and prison officials, thereby expanding prison administrators' discretionary control over supermax confinement.

2. *Assessing the Constitutionality of Supermax Double Bunking*

In addition to deferring to prison officials' claims about the need to house some prisoners in the restrictive conditions of the Pelican Bay SHU, the *Madrid* court also deferred to prison officials on another safety and security point: the permissibility of double bunking some prisoners, two to a cell, in the same restrictive supermax conditions. As with the prisoners' claims challenging the harshness of the conditions of supermax confinement, the *Madrid* court first outlined the facts about double bunking in the SHU, and then applied the objective and subjective prongs of the *Farmer* analysis to assess the prisoners' claims about the unconstitutionality of the conditions.⁵⁵ Again, at each step of the analysis, the *Madrid* court weighed descriptive facts about prison conditions and prisoners' claims of constitutional violations against prison officials' justifications for the necessity of the conditions at issue.⁵⁶

First, the *Madrid* court described the practice of double bunking.⁵⁷ The court explicitly noted that as many as two-thirds of the Pelican Bay SHU prisoners had been double bunked in the prison's first few years of operation.⁵⁸ The court explained that all SHU prisoners were segregated from the general prison population, but "[t]he degree of segregation and restrictions may vary . . . depending on a variety of factors, including penal philosophy and the underlying reason for the inmate's segregation."⁵⁹ As in the factual analysis about the general conditions in the SHU, in the factual analysis of the condition of double bunking, the *Madrid* court addressed the "penal philosophy" justifying those conditions, weighing harsh conditions against institutional necessity.⁶⁰ Prison administrators' justifications—specifically the penal philosophies they promoted, and the reasons they provided for segregation—were integral to the factual description of the condition being evaluated.

Next, the *Madrid* court evaluated the seriousness of the injuries that had resulted from double bunking. The court tallied the hundreds of cell fights that had taken place between 1989 and 1993 at Pelican Bay and noted that "[m]any of these cell fights have resulted in serious injuries to the victimized inmate," including

54. *See id.*

55. *See id.* at 1269.

56. *See id.* at 1238, 1269.

57. *See id.* at 1237–38.

58. *Id.* at 1227.

59. *Id.* at 1228.

60. *Id.* at 1237.

fractured ribs, paralysis, and brain damage.⁶¹ But, as with the question of whether the restrictive conditions of supermax isolation were sufficiently serious to establish a constitutional violation, the court weighed the serious injuries resulting from double bunking against the claims of prison officials, who explained that cell fights are unavoidable.⁶² The court noted: “[C]ell fights are an inevitable fact of prison life, particularly in maximum security prisons and security housing units where inmates are more likely to have violent histories or tendencies.”⁶³ In alleging that the practice of double bunking in the Pelican Bay SHU violated the Constitution, the prisoners and their lawyers argued that cell fights could be prevented, with better housing decisions and less double bunking.⁶⁴ In assessing this claim, the court cited the number and frequency of cell fights over three years, and the testimony of prison officials about cell fights as “frequent” but “not as frequent as one might expect,” and concluded that cell fights were “inevitable.”⁶⁵ Rather than assessing the merits of the plaintiffs’ claim about the potential to prevent cell fights, the court accepted the prison administrators’ assertions that cell fights could not be prevented, which was, in turn, based on a second assertion that prisoners indeed had violent histories and tendencies. In the end, given the “inevitability” of fights between prisoners with “violent histories or tendencies,” the court found that the objective prong of the *Farmer* analysis—the seriousness of the alleged constitutional violation—was not satisfied.⁶⁶ Again, a penological claim made by prison administrators, in this case about the inevitability of the harm prisoners claimed to experience, essentially mitigated the court’s assessment of the seriousness of a condition of confinement (double bunking).

In the double-bunking analysis, the court did not stop with the first, objective prong of the *Farmer* test, but also considered the second, subjective prong. The *Madrid* court found that there could be no Eighth Amendment liability for prison administrators without proof that these officials actually knew they were housing repetitively assaultive prisoners with bunkmates.⁶⁷ If the prison officials did not have actual knowledge of how dangerous some of the double-bunked prisoners were, then the subjective, state-of-mind prong of the *Farmer* analysis was not satisfied.

This finding, that the practice of double bunking in the Pelican Bay SHU failed the subjective prong of the *Farmer* test, indirectly contradicts the court’s earlier analysis that the isolation conditions in the Pelican Bay SHU failed the objective prong of the *Farmer* test. In that analysis, the court deferentially accepted prison officials’ claims that the most dangerous prisoners from throughout the California department of corrections were housed in the SHU, without proof of how and why

61. *Id.* at 1239.

62. *Id.* at 1269.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

each individual prisoner was dangerous.⁶⁸ The court simply acknowledged that (1) some prisoners were “unsuited for intermingling” with others, and (2) correctional administrators had an “unenviable task” in managing these prisoners.⁶⁹ At the same time, the court declined to hold these same prison officials liable for Eighth Amendment violations stemming from housing these same dangerous prisoners together, two to a cell, because there was no proof that these administrators knew *exactly* how dangerous these prisoners were.⁷⁰ How could prison administrators have inherent knowledge of dangerousness, without any knowledge of degree of dangerousness? The court does not reconcile the inconsistency.

In analyzing the constitutionality of both the conditions of confinement in the Pelican Bay SHU and the practice of double bunking some prisoners there, the *Madrid* court demonstrated great deference to the claims of prison officials about the necessity for the supermax institution. By incorporating deference to correctional administrators into each step of analysis, the *Madrid* court expanded correctional administrators’ discretion over supermaxes, allowing them to define and influence the constitutional analysis applied to supermaxes, thereby shifting the balance of power away from courts and prisoner plaintiffs and toward prison officials.

Importantly, the analysis in the *Madrid* case is representative of (1) how courts have analyzed prison conditions generally in the late twentieth and early twenty-first century, and (2) how courts have analyzed the constitutionality of supermax confinement specifically since 1995. I will address each of these trends in turn.

B. Deference in Prison Conditions Cases Generally

In the early 1990s, Judge Henderson, who oversaw the *Madrid* case for almost twenty years, seemed especially predisposed to find that the basic conditions at the Pelican Bay SHU *did* violate the Constitution. His first instinct was that the conditions violated the Constitution, and he actually initiated the lawsuit against the prison by encouraging lawyers to visit Pelican Bay and document potential constitutional violations there.⁷¹ So why, in the end, was he so deferential to the prison officials’ claims about the justifications for the institution?

The simplest answer is that the *Madrid* decision was part of a much larger trend in federal court litigation across the United States: persistent judicial deference to the claims and assertions of prison administrators in the context of prison conditions challenges in and out of supermaxes.⁷² Prison law scholar Sharon

68. *Id.* at 1223.

69. *Id.* at 1259, 1262.

70. *Id.* at 1237–39.

71. See Interview with Thelton Henderson, *supra* note 20.

72. See Sharon Dolovich, *Cruelty, Prison Conditions and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 961 n.306 (2009) [hereinafter Dolovich, *Eighth Amendment*]; Sharon Dolovich, *Forms of Deference in Prison Law*, 24 FED. SENT’G. REP. 245 (2012) [hereinafter Dolovich, *Forms of Deference*]; Richard H. Fallon, *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274 (2006); Judith Resnik, *Detention, the War on Terror, and the Federal Courts*, 110 COLUM. L. REV. 579 (2010); Giovanna

Dolovich has described a typology of three forms of deference in prisoners' rights cases: (1) "doctrine-constructing," (2) procedural rule revising, and (3) "situation-reframing."⁷³ Each form is present in the *Madrid* case.

First, the *Madrid* court applied *Farmer*, a judicially constructed doctrine that incorporates deference to prison officials through the subjective prong of analysis, which requires a prisoner plaintiff to prove not just that he or she was harmed, but that the prison official intended the harm.⁷⁴ On its face, the deferential *Farmer* test is reasonable. It gives prison officials the benefit of the doubt, implicitly acknowledging the challenges prison officials face in managing prisoners, and it seeks to hold officials accountable only for things they can actually control.⁷⁵ Moreover, the deference toward prison officials codified in the *Farmer* test maintains a delicate balance of power between the legal experts in federal courts and the security experts who run state prison systems.⁷⁶ However, the *Farmer* test has been applied in a manner and context that has exaggerated deference toward prison officials. As I suggested in my analysis of *Madrid* above, and as Dolovich argues in categorizing forms of deference, the doctrine-constructing deference of *Farmer* has been expanded through procedural rule revising and situational reframing.

Second, the *Madrid* court "presume[d] the correctness" of the assertions of prison officials, when these officials claimed prisoners were dangerous, restrictive conditions were necessary, or cell fights were inevitable.⁷⁷ This is what Dolovich calls procedural rule revising, through which the trier of fact weighs evidence with deference to one particular party over another (as opposed to weighing evidence objectively).⁷⁸ In *Jones v. North Carolina Prisoners' Labor Union*, the Supreme Court mandated exactly this kind of deference.⁷⁹ In *Jones*, the Supreme Court upheld limitations on speech and association imposed by the North Carolina prison system on members of a prison-based labor union. The Court rejected the prisoners' argument that the union had never actually "interfered with the prison's operations," finding that the prisoners had failed to prove, with "substantial

Shay, *Ad Law Incarcerated*, 14 BERKELEY J. CRIM. L. 329, 339–44 (2010) (describing the institutionalization of deference to prison officials in federal court cases through the 1980s and 1990s); see also MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS (Alfred Blumstein & David Farrington eds., 1999) (discussing generally the history of prisoners' rights litigation in the United States); Raja Raghunath, *A Promise the Nation Cannot Keep: What Prevents the Application of the Thirteenth Amendment in Prison?*, 18 WM. & MARY BILL RTS. J. 395 (2009) (describing patterns of judicial deference to prison officials); Mikel-Meredith Weidman, Comment, *The Culture of Judicial Deference and the Problem of Supermax Prisons*, 51 UCLA L. REV. 1505 (2004) (discussing how courts navigate deference principles with narrow holdings, restricting the placement of mentally ill prisoners in supermaxes).

73. Dolovich, *Forms of Deference*, *supra* note 72, at 246.

74. *Id.*

75. *Farmer v. Brennan*, 511 U.S. 825, 837–38 (1994).

76. See *Turner v. Safley*, 482 U.S. 78, 84–85 (1987) (explaining judicial deference in the prison context in an earlier prison conditions case).

77. Dolovich, *Forms of Deference*, *supra* note 72, at 247.

78. *Id.*

79. *Id.* at 246 (citing *Jones v. N.C. Prisoners' Labor Union, Inc.*, 433 U.S. 119, 121 (1977)).

evidence” that the prison officials’ response was “exaggerated.”⁸⁰ Unless prisoner plaintiffs satisfied this high standard of proof, the Court presumed the reasonableness of the prison officials’ policy.⁸¹

Third, situation reframing occurs in the way the *Madrid* court presented the facts about supermax isolation conditions and supermax double-bunking conditions, incorporating the claims of prison officials about why certain conditions are necessary into the factual descriptions of the conditions. Dolovich describes this as “recast[ing] relevant facts in ways that deny or disregard the lived experiences of prisoners,” as the *Madrid* court did when it described the conditions in the SHU as stark and sterile, but only potentially at the outer bounds of psychological tolerability, in spite of evidence that many prisoners had actually found the conditions psychologically intolerable.⁸²

Other scholars have argued that judicial deference to institutional officials and administrators is endemic not just to prison law but also to the law of detention generally, including pretrial custody, immigrant, and terrorist detentions contexts.⁸³ But the existence of widespread federal judicial deference to prison officials, as evidenced in *Madrid* and discussed by scholars like Dolovich and Judith Resnik, cannot alone explain the outcome in *Madrid*, upholding the basic constitutionality of the Pelican Bay SHU. After all, the *Madrid* court found some aspects of the policies and practices governing SHU confinement unconstitutional.⁸⁴ The court found that excessive use of force in the prison, as well as the practice of placing mentally ill prisoners in long-term isolation, were blatantly unconstitutional and required immediate remedy; as to these conditions, the *Madrid* court was not at all deferential to prison officials.⁸⁵

In other words, acknowledging the persistence of federal judicial deference to prison officials is just the first step in understanding why the *Madrid* court deferred to officials’ claims about some but not other conditions of confinement in the Pelican Bay SHU. The next step is examining which factors facilitate deference in the prisoners’ rights context. Resnik has argued that concerns with the limits of federalism, concerns with the dangerousness of detainees, and considerations for

80. *Id.* (citing *Jones*, 433 U.S. at 127–28).

81. *Id.*

82. *Id.* at 248.

83. See Resnik, *supra* note 72, at 589. Judith Resnik argues that this deference is so pervasive among federal courts and legislators that other mechanisms of civil rights enforcement must be explored and implemented—perhaps through elevating the enforcement roles that might be played by state court judges and nonjudicial decision makers (including “intelligence officials, police officers, immigration authorities, lawyers, and decision makers operating at the lowest tiers of the system that apprehend and confine such persons”). *Id.* at 685. Parts III and IV of this Article will argue that, in the prison context, nonjudicial decision makers have had the significant “independent decisional authority” Resnik advocates, but they have failed to treat disputants equally, and they have not been “protected and monitored through public observation,” critical characteristics of nonjudicial decision makers, according to Resnik. See *infra* Parts III, IV; see also Resnik, *supra* note 72, at 685.

84. *Madrid v. Gomez*, 889 F. Supp. 1146, 1280 (N.D. Cal. 1995).

85. *Id.* at 1279–80.

the expertise of detaining officials have all encouraged deference.⁸⁶ On the other hand, Dolovich has argued that sometimes there is a limit to the amount of deference courts are willing to engage where “multiple forms of deference” have already been applied in lower court rulings.⁸⁷ The *Madrid* case suggests another factor that affects judicial deference: whether the conditions at issue are immediately and obviously life-threatening.⁸⁸

Specifically, where the *Madrid* court identified egregious prisoner abuses, with actual or potentially life-threatening consequences, the court also held that those conditions and practices violated the Eighth Amendment.⁸⁹ In other words, the more obviously life-threatening the abuse, the less the court deferred to prison officials. The *Madrid* court identified multiple instances in which excessive force was used, such as the incident in which a prisoner’s skin burned off after officers forced him to take a scalding bath, or the cuffing of prisoners into fetal positions for as long as twenty-four hours, or the breaking of a prisoner’s jaw and a subsequent refusal of medical treatment for seven days.⁹⁰ In these instances, the *Madrid* court applied the deferential *Farmer* test to analyze the fact patterns, but the court found that prison officials had the requisite subjective intent to harm prisoners.⁹¹ Similarly, in these same instances, the *Madrid* court refrained from applying any of the other forms of deference Dolovich identified and which were discussed in the previous subsections on supermax isolation conditions and supermax double-bunking conditions. For example, the court did not engage in procedural rule revising or presuming the correctness of prison officials’ assertions, nor did it reframe the fact patterns to disregard the lived experiences of prisoners.⁹²

This pattern of judicial avoidance of deference in the context of especially abusive, physically life-threatening situations extends back to the earliest prisoners’ rights cases brought in the 1960s and 1970s.⁹³ In these early cases, when abusive, physically life-threatening situations were consistently present, courts found prison conditions to be unconstitutional.⁹⁴ For instance, in one of the earliest class action prison conditions cases, *Hutto v. Finney*, the Arkansas district court, and later the Supreme Court, noted that prisoners in Arkansas prisons were crowded into small, dark isolation cells where infectious diseases were rampant and food provisions inadequate; other prisoners received electrical shocks to sensitive areas of their bodies as punishment.⁹⁵ Likewise, in the rare federal cases subsequent to *Madrid* in

86. Resnik, *supra* note 72, at 652, 663.

87. Dolovich, *Forms of Deference*, *supra* note 72, at 257 n.127.

88. *Madrid*, 899 F. Supp. at 1257–58.

89. *Id.* at 1146–1283.

90. *Id.* at 1163, 1167–70.

91. *Id.* at 1248–52.

92. *Id.* at 1146–1283.

93. See generally FEELEY & RUBIN, *supra* note 72 (discussing early prisoners’ rights litigation in the United States and the kinds of physical abuses documented in those cases).

94. *Id.*

95. *Hutto v. Finney*, 437 U.S. 678, 683 n.5 (1978).

which courts have withheld deference to prison officials, abusive and physically life-threatening situations have also been present.⁹⁶ For instance, in *Brown v. Plata*, the district court found “on average, an inmate in one of California’s prisons needlessly dies every six to seven days due to constitutional deficiencies in the . . . medical delivery system.”⁹⁷ In this case, deference played a minimal role in the lower court’s conclusion that the conditions were unconstitutional and violated the Eighth Amendment, and the Supreme Court upheld the finding of unconstitutionality.⁹⁸ Dolovich argues that perhaps *Plata* represents “an implicit upper limit to how much deference to defendant prison officials the Court is willing to allow,”⁹⁹ but I am suggesting that this upper limit is only reached in the context of physically life-threatening conditions, as existed in *Hutto*, *Plata*, and at least to a certain extent, *Madrid*.

This analysis is not based on a comprehensive sample of every prison conditions case that has been litigated in the United States between the 1960s and 2014. Indeed, such a study could provide an important test of the theory suggested here. Rather, I am suggesting that the factors contributing to deference in prison conditions cases need to be better understood, and that one possible explanation turns on the severity (and physicality) of the conditions at issue. Because the prisoners challenged such a wide array of conditions in *Madrid*, the case provides a particularly useful starting point for analyzing when, why, and how courts defer to prison administrators in assessing the constitutionality of prison conditions. But understanding the legal context of prison conditions cases provides only preliminary insights about the factors shaping judicial deference. As I will discuss in subsequent sections, the historical and empirical contexts of *Madrid* provide further insights into two additional mechanisms of judicial deference: how the Pelican Bay SHU was initially designed, and how it has operated over the last twenty-five years (as discussed in Parts II and III of this Article).

In sum, this subsection has argued that *Madrid* is representative of how courts have analyzed prison conditions in the late twentieth and early twenty-first centuries—generally concluding that prison conditions are constitutional, based on deference to the claims of prison officials, unless there is evidence of egregious and physically endangering abuse. The next subsection will argue that *Madrid* is also representative of how courts have analyzed the constitutionality of supermax confinement since 1995.

96. See, e.g., *Brown v. Plata*, 131 S. Ct. 1910, 1927 (2011).

97. *Id.* (internal quotation marks omitted).

98. See *id.* at 1928–29 (discussing the role that deference should play in the determination of constitutionality of prison conditions).

99. Dolovich, *Forms of Deference*, *supra* note 72, at 252 n.127.

C. *Deference in Supermax Cases After Madrid v. Gomez*

Perhaps not surprisingly, given the extremity of the conditions in supermaxes, prisoners and their legal advocates have challenged the institutions in most states in which they have been built. Prisoners allege that administrative assignment to supermaxes violates their constitutional right to due process under the Fourteenth Amendment to the U.S. Constitution, and that continued detention in extreme isolation violates their constitutional right to be free from cruel and unusual punishment under the Eighth Amendment.¹⁰⁰ Courts have considered these challenges carefully, often ordering modifications to specific policies and procedures governing supermax confinement, such as the procedures by which prisoners may be assigned to supermaxes,¹⁰¹ including prohibiting the assignment of mentally ill prisoners to supermaxes, and requiring additional training for correctional officers working in supermaxes.¹⁰² However, no U.S. court has declared the imposition of long-term solitary confinement in supermax institutions to be unconstitutional as a violation of the Eighth Amendment prohibition against cruel and unusual punishment.

Instead, courts have followed the pattern *Madrid* established. Two representative federal court cases serve as examples of replications of the *Madrid* analysis. First, I discuss the only case in Arizona in which a federal court specifically addressed the conditions of confinement in that state's supermax and explicitly provided legal justifications for the extremity of the supermax conditions. Arizona is an important case study because its supermax was the first modern supermax in the United States, and the one on which Pelican Bay was modeled.¹⁰³ In *Comer v.*

100. Prisoners and their legal advocates have brought legal challenges questioning both the ability of correctional administrators to accurately and fairly identify the most dangerous prisoners in the prison system, and the overall methods by which correctional administrators assign prisoners to supermaxes, alleging due process violations under the Fifth Amendment to the U.S. Constitution (as incorporated through the Fourteenth Amendment). *See, e.g.,* *Wilkinson v. Austin*, 545 U.S. 209, 225 (2005) (finding that inmates have a protected liberty interest in avoiding assignment to supermax prison facilities); *Lira v. Herrera*, 427 F.3d 1164 (9th Cir. 2005), *reconsidered by* *Lira v. Cate*, No. C 00-0905 SI, 2009 U.S. Dist. LEXIS 91292, at *7-8 (N.D. Cal. Sept. 30, 2009) (upholding prisoner challenge to rules governing placement in California's SHUs); Charles F.A. Carbone, *California Changes Policies for Prison Gangs and Security Housing Units*, PRISON LEGAL NEWS, Sept. 2004, at 33 (describing Settlement Agreement, *Castillo v. Alameida*, No. C-94-2847-MJJ-JCS (N.D. Cal. Sept. 21, 2004)). Prisoners have also challenged supermaxes as violations of their right to be free from cruel and unusual punishment. Specifically, prisoners have alleged that their duration of confinement in supermaxes constitutes cruel and unusual punishment, *Silverstein v. Fed. Bureau of Prisons*, 704 F. Supp. 2d 1077 (D. Colo. 2010), that the conditions of total solitary confinement constitute cruel and unusual punishment, *Madrid v. Gomez*, 889 F. Supp 1146 (N.D. Cal. 1995), and that the operation of the institutions constitutes cruel and unusual punishment, *id.*

101. *See, e.g., Lira*, 2009 U.S. Dist. LEXIS 91292, at *7-8 (finding that *Lira* was improperly "validated" as a gang member and unjustly spent eight years in the SHU at Pelican Bay).

102. *See, e.g., Madrid*, 889 F. Supp. at 1202 (finding that correctional officers mistreated prisoners due to a lack of adequate medical training and supervision).

103. *See* Keramet Reiter, *The Most Restrictive Alternative: The Origins, Functions, Control, and Ethical Implications of the Supermax Prison, 1976-2010*, at 55-81 (Spring 2012) (unpublished Ph.D. dissertation, University of California, Berkeley) (on file with author).

Stewart, an Arizona district court assessed the constitutionality of the conditions in Arizona's Security Management Unit (a supermax) in the context of evaluating a death-sentenced prisoner's competency to decide to relinquish his appeals.¹⁰⁴ Second, I discuss the one Supreme Court case that has considered the constitutionality of long-term solitary confinement: *Wilkinson v. Austin*.¹⁰⁵ The Eighth Amendment questions are secondary in *Wilkinson*, as in *Comer*. In the context of evaluating the due process required before a prisoner can be assigned legally to a supermax institution, the *Wilkinson* Court analyzed legal justifications for the supermax conditions at issue in the case.¹⁰⁶

1. *Comer v. Stewart*

When a federal district court considered the constitutionality of long-term solitary confinement in Arizona's supermax, the Security Management Unit (SMU), the court held that the interests of prison administrators in protecting staff from prisoners and prisoners from each other outweighed any interest prisoners had in less restrictive conditions of confinement.¹⁰⁷ In *Comer v. Stewart*, Arizona prisoner Robert Comer sought to waive his right to appeal his death sentence.¹⁰⁸ But Comer's lawyers argued that the conditions in SMU I, the Arizona supermax where Comer was being held, were so extremely harsh that the conditions had caused Comer to withdraw his appeals and seek to facilitate his own execution.¹⁰⁹ The *Comer* court held that these claims about the coercive impacts of the SMU conditions were unfounded and ultimately permitted Comer to waive his right to appeal his death sentence.¹¹⁰

Throughout the *Comer* opinion, the Arizona district court detailed how restrictive Comer's conditions of confinement were in the SMU, and how these restrictive conditions responded directly to how extremely dangerous Comer was.¹¹¹ The court detailed the harsh reduction in privileges Comer experienced in the SMU, including the modification of his cell "to remove the desk and stool and to reinforce the bunk to make it more difficult for Mr. Comer to fashion weapons."¹¹² The court further elaborated on the necessity of these conditions, explaining just how dangerous Comer was, citing his history of disciplinary infractions, "including making weapons and assaulting other inmates and staff," and even referencing media comparisons between Comer and the fictional horror movie character

104. See *Comer v. Stewart*, 230 F. Supp. 2d 1016 (D. Ariz. 2002).

105. See *Wilkinson v. Austin*, 545 U.S. 209 (2005).

106. *Id.*

107. See *Comer*, 230 F. Supp. 2d at 1021–22, 1034–35 (describing and accepting justifications for restrictive conditions of confinement).

108. *Id.* at 1018.

109. *Id.* at 1026–27.

110. *Id.* at 1071–72.

111. See *id.* at 1021–22, 1034–35.

112. *Id.* at 1023, 1033–34, 1071.

Hannibal Lecter.¹¹³ As in the *Madrid* case, the *Comer* court deferred to the correctional administrators' assertions about the extreme dangerousness of certain prisoners, and accepted this dangerousness as a justification for total isolation in long-term solitary confinement, under conditions the Ninth Circuit had already held to be constitutionally questionable.¹¹⁴

However, in contrast to the *Madrid* case, which involved a class of prisoners and referenced categories of dangerous prisoners without specifically evaluating many correctional administrators' individual assessments of dangerousness, the *Comer* case specifically assessed one individual prisoner's dangerousness.¹¹⁵ And the assessment was convincing; Comer was accused of multiple well-documented assaults of staff and other prisoners.¹¹⁶ The restrictions in Comer's housing conditions were explicitly tied to the kinds of risks he posed as an individual.¹¹⁷

The *Comer* case is important not just for the individual assessment it provides, though. First, the *Comer* case might be used to justify the restrictive conditions of supermax confinement more generally for any Arizona prisoner who might challenge the constitutionality of the restrictive conditions. Once the safety-and-security conditions have been upheld in one archetypal case, like that of *Madrid* or Richard Comer, one archetypally dangerous individual is implicitly allowed to stand for hundreds of other prisoners who have not received a similarly individualized assessment of dangerousness. Second, the *Comer* case reinforced yet again the power of the rhetorical justifications articulated by the original supermax designers to explain the institutions they built. Indeed, the comparison the *Comer* court made between Robert Comer and the popular trope of the dangerous Hannibal Lecter echoed the descriptions of dangerous prisoners articulated by the correctional administrators and architects who designed the first supermaxes in Arizona and California in the 1980s. As one architect who worked closely with correctional administrators on the Pelican Bay design project said, "The facility was designed to house the worst of the worst, the Hannibal Lecters of the world. And in the state of California, you find more Hannibal Lecters."¹¹⁸ In the *Comer* case, as in the *Madrid* case, correctional administrators and prison designers shaped the court's interpretations of the constitutionality of conditions with their virtually unchallenged descriptions of the necessity of the supermax.

113. *Id.* at 1022, 1033–34.

114. *Comer v. Stewart*, 215 F.3d 910, 916 (9th Cir. 2000) (describing similar conditions to Comer's that had previously been held unconstitutional), *remanded to* 230 F. Supp. 2d 1016 (D. Ariz. 2002).

115. *Compare Comer*, 230 F. Supp. 2d at 1020, *with Madrid v. Gomez*, 889 F. Supp. 1146 (N.D. Cal. 1995).

116. *See Comer*, 230 F. Supp. 2d at 1020, 1033–34 (referencing Comer's assaults on staff and other inmates).

117. *Id.* at 1034 (noting that Comer's cell was modified "to make it more difficult for Mr. Comer to fashion weapons").

118. Telephone Interview with Anonymous, Pelican Bay Justice Architect (Aug. 4, 2010) (on file with author).

2. *Wilkinson v. Austin*

While many federal district courts, in addition to those in Arizona and California, have considered the constitutionality of individual state supermaxes, only one case has reached the Supreme Court.¹¹⁹ In 2005, the U.S. Supreme Court considered the constitutionality of a modern state supermax for the first (and only) time in *Wilkinson v. Austin*.¹²⁰ As the *Madrid* court had done ten years earlier, the *Wilkinson* Court described in great detail the “severe” and “harsh” conditions in the Ohio State Penitentiary (OSP), a supermax:

Incarceration at OSP is synonymous with extreme isolation. . . . OSP cells have solid metal doors with metal strips along their sides and bottoms which prevent conversation or communication with other inmates. All meals are taken alone in the inmate’s cell instead of in a common eating area. Opportunities for visitation are rare and in all events are conducted through glass walls. It is fair to say OSP inmates are deprived of almost any environmental or sensory stimuli and of almost all human contact.¹²¹

However, the Court also noted that the “severity of the conditions” in the Ohio supermax was justified by the existence of prisoners so dangerous that they required total isolation from all other prisoners and correctional staff.¹²² Specifically, the *Wilkinson* Court stated: “OSP’s harsh conditions may well be necessary and appropriate in light of the danger that high-risk inmates pose both to prison officials and to other prisoners.”¹²³ In other words, the Court accepted an explanation underlying the necessity of the supermax much like the justifications articulated in both *Comer* and *Madrid*: the Court agreed with prison officials’ assertions that the institutions were necessary (a) to completely isolate high-risk prisoners from staff and from each other¹²⁴ and (b) to manage risk or to maintain institutional safety and security.¹²⁵

Ultimately, the *Wilkinson* Court reviewed the procedures by which a prisoner could be assigned to OSP and upheld the requirements for minimal procedural due

119. See *Wilkinson v. Austin*, 545 U.S. 209 (2005).

120. *Id.*

121. *Id.* at 214.

122. *Id.*

123. *Id.* at 224. In *Wilkinson*, the Court focused on the procedural policies necessary to meet minimum constitutional due process requirements in assigning individual prisoners to the Ohio State Penitentiary (OSP). The discussion of the harsh conditions at OSP and their justification as necessary safety and security measures constituted the extent of the (implicit) Eighth Amendment analysis in the *Wilkinson* case. I have argued elsewhere that, in the Eighth Amendment context, legal analyses of procedural rights have largely replaced legal analyses of whether a punishment is actually cruel and unusual, in both the context of the death penalty and the context of the supermax. Keramet Ann Reiter, *The Most Restrictive Alternative: A Litigation History of Solitary Confinement in U.S. Prisons, 1960–2006*, 57 STUD. L. POL. & SOC’Y 71, 117–18 (2012).

124. See *Wilkinson*, 545 U.S. at 229 (finding that “[p]rolonged confinement in Supermax may be the State’s only option for the control of some inmates”).

125. See *id.* at 227 (establishing the role that “the brutal reality of prison gangs” plays in the State’s interest).

process imposed by lower courts.¹²⁶ The *Wilkinson* Court, however, did not evaluate whether OSP conditions violated the Eighth Amendment prohibition against cruel and unusual punishment. The question at the heart of the case was whether OSP prisoners have a liberty interest in avoiding placement in supermaxes (according to the Court, they do), not whether the OSP supermax conditions violate the Eighth Amendment prohibition on cruel and unusual punishment.¹²⁷ In fact, by the time the Court heard arguments in *Wilkinson*, numerous lower federal courts, including the *Madrid* court, had already decided that supermax conditions did not violate the Eighth Amendment.¹²⁸

In both *Comer* and *Wilkinson*, courts evaluated some aspect of the constitutionality of long-term solitary confinement in modern supermax institutions.¹²⁹ And in each case, the courts deferred to prison administrators as experts who needed discretion to manage difficult prison populations. When prison administrators said that some prisoners were dangerous and would injure other prisoners or correctional staff if they were allowed to live in a general prison population, courts accepted these assertions. As discussed throughout this part, this deference to prison officials' claims follows a long tradition of deference in prison conditions cases, especially absent evidence of egregious, physically endangering abuse.

But the question remains as to exactly how this deference operates—do prison officials facilitate deference, and do judicial decision makers resist deference? The next two parts will address two critical mechanisms that have both facilitated and exaggerated judicial deference to prison officials, especially in the California supermax context. Part II documents how prison officials have actively avoided judicial (and legislative and public) oversight, and Part III documents how courts have avoided demanding and analyzing empirical evidence in the supermax context.

II. DEFERENCE BY OVERSIGHT AVOIDANCE

Part I discussed how deference to prison officials is pervasive in both general prison conditions litigation and in supermax conditions litigation. However, the supermax phenomenon reveals two key, overlooked mechanisms of this deference. This part discusses the first mechanism: judicial deference is not simply initiated by courts, it is also actively cultivated by supermax designers and administrators. This part first analyzes historical evidence from archives and oral history interviews to document how prison officials (rather than legislators or voters or judges) in Arizona and California designed the first supermax institutions to avoid legislative,

126. *Id.* at 224–29.

127. *See id.* at 229 (“[C]laims alleging violation of the Eighth Amendment’s prohibition of cruel and unusual punishments were resolved, or withdrawn, by settlement in an early phase of this case.”).

128. *See, e.g.,* *Madrid v. Gomez*, 889 F. Supp. 1146, 1280 (N.D. Cal. 1995).

129. *Wilkinson*, 545 U.S. at 224–28 (evaluating the constitutionality of processes used to identify and place inmates into supermax units); *Comer v. Stewart*, 230 F. Supp. 2d 1016, 1021–22, 1034–35 (D. Ariz. 2002).

public, and judicial oversight. This part next analyzes supermax operational policies, especially in California, to document how prison officials maintain broad discretion in the day-to-day operation of the supermaxes they designed in the 1980s. Continued judicial deference to supermax administrators, then, further exaggerates the institutionalized lack of oversight and broad discretion prison officials have had in designing and operating supermaxes.

A. Discretion in Design

Correctional administrators, in collaboration with architects, designed the first supermaxes in Arizona and California.¹³⁰ In both states, there was little public or legislative oversight of the design process.¹³¹ Arizona opened its first supermax, the SMU, in 1987.¹³² Lynch describes how “there was . . . no mention in any department materials, government papers, or press accounts that this unit was anything more than a maximum-security prison.”¹³³ After the SMU opened, however, correctional administrators and correctional architects alike quickly took notice of “its avant-garde nature,”¹³⁴ flocking to Arizona to see the newly efficient and newly harsh creation.

Similarly, in California, few people were aware of Pelican Bay State Prison’s unusual design and harsh conditions of confinement until after it opened.¹³⁵ Judge Henderson recalled first learning of the 1056-bed SHU at Pelican Bay when he started receiving letters from prisoners complaining about the harsh conditions there.¹³⁶ Steve Fama, one of the plaintiffs’ lawyers in the *Madrid* case, said he first learned of the Pelican Bay SHU when Judge Henderson asked him to go visit the prison to evaluate the constitutionality of the conditions there.¹³⁷

California prison officials involved in the initial legislative approval process for the Pelican Bay SHU explained that they had virtually total control over the siting, building, and design of the institution.¹³⁸ Craig Brown, who was the Undersecretary of the Youth and Adult Correctional Authority (YACA), the executive agency that oversaw the California Department of Corrections in the 1980s, described the state legislature’s role in prison construction projects in that decade: “You’re not going to find much in the record; it was all negotiated [off the record], and we [YACA] pretty much had our way with the legislature.”¹³⁹ California legislators, in fact, paid

130. See Reiter, *supra* note 103, at 84–105.

131. See Keramet Reiter, *The Origins of and Need to Control Supermax Prisons*, 5 CAL. J. POL. & POL’Y, 146, 149–50 (2013).

132. LYNCH, *supra* note 2, at 138.

133. *Id.* at 136.

134. *Id.* at 137.

135. Reiter, *supra* note 123, at 108.

136. *Id.* at 166.

137. Interview with Steve Fama, Att’y & Co-Counsel in *Madrid v. Gomez*, Prison Law Office, in Berkeley, Cal. (Oct. 13, 2010) (on file with author); Interview with Thelton Henderson, *supra* note 20.

138. Reiter, *supra* note 131, at 149–50.

139. Interview with Craig Brown, *supra* note 42.

minimal attention to what kind of prison was built in California's Del Norte County, the site chosen for Pelican Bay.¹⁴⁰ Correctional administrators recalled telling legislators that the "Spartan" but "not Draconian" facility was necessary and receiving few queries in response.¹⁴¹ Ruth Wilson Gilmore also described how, throughout the 1980s, the California legislature increasingly ceded authority over prison siting, designing, and financing to the California Department of Corrections.¹⁴²

In Arizona, the legislature also ceded authority to the state department of corrections. The Arizona legislature passed a law in 1985 exempting correctional administrators from the usual administrative agency requirements for public hearings and legislative reporting preceding any significant rule and policy changes (under the Administrative Procedure Act).¹⁴³ This effectively expanded correctional administrators' control over penal policies by exempting them from the kind of legislative and public oversight to which most other state agencies were subject.¹⁴⁴ Given the discretion correctional administrators had in designing the Arizona SMU and the Pelican Bay SHU, the initial public invisibility of these institutions, as described by Judge Henderson and attorney Fama is, perhaps, not surprising.

But the invisibility of these institutions was not accident or serendipity. Rather, correctional administrators designed supermaxes like California's Pelican Bay SHU explicitly to avoid attracting attention, especially judicial attention.¹⁴⁵ Correspondence between California's Undersecretary of Corrections, Rodney Blonien, and state senator and chair of the Joint Legislative Committee on Prison Construction and Operations, Robert Presley, reveals one motivation behind the building of Pelican Bay: avoiding further litigation over conditions of confinement in existing maximum security prison in the state.¹⁴⁶ Specifically, in a May 1986 letter to Presley, Blonien requested a \$250 million legislative allocation to build a new maximum security prison in California; he argued that building a new prison was the only way to appease the judges in both the *Toussaint* and *Wilson* cases, which had condemned the decrepit, deteriorating conditions at the state's existing maximum security prison, San Quentin, and had ordered the state to make improvements.¹⁴⁷ That same year, the legislature authorized a new high-security prison in Del Norte County, which would become Pelican Bay.¹⁴⁸

140. Reiter, *supra* note 131, at 149–50.

141. Second Interview with Carl Larson, former Dir. of Fin., Cal. Dep't of Corr., in Sacramento, Cal. (Apr. 14, 2010) (on file with author).

142. RUTH WILSON GILMORE, *GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA* 93–94 (Earl Lewis et al. eds., 2007).

143. LYNCH, *supra* note 2, at 140.

144. *Id.* at 140; *see also* Shay, *supra* note 72, at 344–61 (describing the systematic exemption of state correctional systems from state administrative procedures acts).

145. Letter from Rodney J. Blonien, Undersec'y, Cal. Youth & Adult Corr. Agency, to Robert Presley, Chairman, Joint Comm. on Prison Constr. & Operations (May 30, 1986) (on file with author).

146. *Id.*

147. *See id.*

148. Reiter, *supra* note 131, at 149–50.

The *Toussaint* case explicitly challenged the conditions in long-term lock-down units at San Quentin, where prisoners were in semipermanent segregation.¹⁴⁹ Attorney Steve Fama, who represented the plaintiffs in the *Toussaint* case (and who would later represent plaintiffs in the *Madrid* case), explained that in the 1980s, the California Department of Corrections figured out how to avoid litigation over unconstitutional prison conditions by simply building new prisons.¹⁵⁰ Specifically, Fama said that he thought a Ninth Circuit opinion issued in the *Toussaint* case might have helped to pave the way for the idea of the supermax at Pelican Bay.¹⁵¹ Fama said: “At a particular point there, the Department opened New Folsom [later renamed California State Prison-Sacramento], and the Ninth Circuit held that the [*Toussaint*] order did not apply, and this gave the Department the idea of a way out of the consent decree.”¹⁵² Not only was the Pelican Bay SHU designed, in part, to avoid litigation over long-term lockdown conditions in older, more decrepit facilities, but it was designed to itself resist litigation, carefully built to meet minimum standards for space, clean air, light, and daily exercise that had been established in *Toussaint* and other similar cases.¹⁵³

Arizona correctional administrators took a much more confrontational stance against prison litigation than California administrators. The Arizona SMU’s predecessor, CB-6, came under judicial scrutiny in the early 1980s. The Arizona Department of Corrections Director, Sam Lewis, resisted the litigation and the settlement, going so far as to ban ACLU lawyers from visiting their clients in CB-6.¹⁵⁴ Over the next decade, Arizona correctional officials and legislators collaborated to institutionalize their resistance to prisoners’ rights litigation, drafting and successfully advocating for the passage of a federal law limiting prisoner litigation nationwide (the Prison Litigation Reform Act, passed in 1996).¹⁵⁵ Arizona’s SMU supermax opened in 1986, in the midst of this institutionalization of a general correctional culture of resistance to judicial oversight of the prisons.¹⁵⁶ Across the United States, high-security and isolation-style prisons attracted judicial scrutiny in the 1970s and 1980s.¹⁵⁷ And, as in Arizona and California, many of these states built new supermaxes designed specifically to comply with those minimum standards

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

150. Interview with Steve Fama, *supra* note 137.

151. *Id.*

152. *Id.* (referring to *Rowland v. U.S. Dist. Court for N. Dist. of Cal.*, 849 F.2d 380 (9th Cir. 1988)).

153. See Reiter, *supra* note 123, at 106–10 (discussing the relationship between prison conditions litigation in the 1970s and 1980s and the physical structure of prisons that were built during the late-twentieth century prison-building boom across the United States).

154. LYNCH, *supra* note 2 at 180–82 (discussing *Black v. Ricketts*, a settled matter in which the ACLU challenged the confinement conditions of Arizona’s high security prison units).

155. *Id.* at 190–91.

156. *Id.* at 135–38.

157. Reiter, *supra* note 123, at 104.

courts had described in earlier orders, consent decrees, and settlements designed to remedy unconstitutional prison conditions.¹⁵⁸

The initial invisibility—to state legislators, to the general public, and to courts—of the first supermaxes in Arizona and California is one indication of the administrative discretion inherent in the design of the facilities. The fact that many supermaxes were built to the precise minimum standards of confinement described in earlier court cases, with the explicit purpose of avoiding further prison conditions litigation, provides evidence of the broad administrative discretion underlying the design of supermax facilities.¹⁵⁹

This administrative discretion in the design of the first supermax facilities, in turn, has two important implications for understanding the mechanisms of judicial deference to prison administrators. First, the earliest supermax designers in Arizona and California actively cultivated the judicial deference they later received. Prison officials built new prison facilities in order to avoid the persistent judicial scrutiny that had plagued older facilities, and they built the facilities to the precise specifications of preexisting minimum standards for constitutionally acceptable conditions of confinement, designed to satisfy subsequent judicial scrutiny.¹⁶⁰

Second, when supermaxes like the Pelican Bay SHU did face judicial scrutiny, prisoner plaintiffs lacked any evidence with which to counter the claims of prison officials about the necessity and usefulness of the SHU.¹⁶¹ There was no legislative record about different possible intents or justifications for the Pelican Bay SHU, no public debate over whether the institution was necessary, no already-collected evidence about long-term rates of violence in the prisons and the short-term impact of the SHU.¹⁶² Because of this absence of a public record about how and why the SHU was designed, there was practically no evidence at the disposal of the *Madrid* court or the prisoners' lawyers to use to establish alternative justifications for the Pelican Bay SHU, or to develop counterarguments to levy against prison officials' claims of safety and security necessity. Instead, there was a court record, in cases like *Toussaint*, establishing unconstitutional conditions of confinement in overcrowded, deteriorating nineteenth-century California prisons.¹⁶³ The hyper-hygienic, well-lit Pelican Bay SHU cells, made of easy-to-clean poured concrete, seemed, exactly as prison officials had intended, to largely remedy the concerns earlier courts had with unconstitutional conditions in prisons like San Quentin. Even when some Pelican Bay SHU prisoners were housed two to a cell,¹⁶⁴ the slightly crowded SHU conditions still seemed better than much more overcrowded conditions in much older cells at prisons like San Quentin in the early 1980s.

158. *Id.* at 104–06.

159. *Id.* at 106–10.

160. *Id.*

161. *Id.* at 110–12.

162. *Id.* at 94–97.

163. *Id.* at 167.

164. *Id.* at 170.

The day-to-day operation of supermaxes provides yet another example of the continued role of administrative discretion in shaping supermax policies and procedures over the last twenty years, and the way this discretion, in turn, facilitates judicial deference. Specifically, correctional administrators determine how, when, and for how long prisoners are assigned to supermaxes, again with little oversight from legislators, the public, or courts.¹⁶⁵

B. Discretion in Operation

The administrative rules governing California's supermax units, or SHUs, provide myriad examples of the day-to-day operational discretion correctional administrators have in overseeing supermaxes. First, correctional administrators, not judges or juries, assign prisoners to supermaxes based on in-prison behavioral assessments. Second, these administrators interpret the prison rules, deciding whether a given prisoner's transgression merits supermax confinement.¹⁶⁶ For instance, officers have many options in responding to prisoners who violate rules—they can ignore the prisoner, or choose a range of charges to levy against the prisoner from an informal prison rule violation to a formal felony charge.¹⁶⁷ Third, correctional administrators define and categorize evidence that indicates gang membership.¹⁶⁸ In California, three pieces of evidence—such as tattoos of symbols associated with gangs, documentation of associations with other gang members based on a prisoners' correspondence or on observations of in-prison conversations, or literature associated with gangs—are required for gang "validation."¹⁶⁹ Gang validation, in turn, *may*, at the discretion of correctional administrators, result in indefinite placement in a California SHU.¹⁷⁰ Prisoners who have been validated as gang members and assigned to indeterminate SHU terms say the only way to complete an indeterminate SHU term is to "parole, snitch, or die."¹⁷¹ "Parole" refers to the fact that prisoners might be released directly from the SHU upon the expiration of their criminal sentences.¹⁷² Because assignment to the SHU is an administrative process, it does not affect the prisoner's maximum criminal sentence.¹⁷³ "Snitch" refers to the prisoner's option to prove he is no longer active in a gang by agreeing to identify gang members and describe gang activity to the

165. *Id.* at 167.

166. Reiter, *supra* note 2, at 541–43 (discussing discretionary supermax policies); Reiter, *supra* note 131, at 152.

167. *See, e.g.*, CAL. CODE REGS., tit. 15, § 3341.5(c)(9) (West, Westlaw through Reg. 2014, No. 44, Oct. 31, 2014); *see also* Reiter, *supra* note 2, at 542–43 (discussing discretionary supermax policies); Reiter, *supra* note 131, at 152.

168. Reiter, *supra* note 2, at 542.

169. *Id.*

170. CAL. CODE REGS., tit. 15, §§ 3000, 3341.5, 3378(c)(4). For further discussion of administrative discretion in the supermax context, *see also* Reiter, *supra* note 2, at 543.

171. Reiter, *supra* note 2, at 536.

172. *Id.* (stating that most prison sentences in California include mandatory three-year parole terms, so "release" is synonymous with "parole").

173. *Id.* at 531.

prison system's internal gang investigation unit.¹⁷⁴ Beyond the obvious, "die" suggests the hopelessness and helplessness an indeterminate SHU term can inspire.

Across the United States, administrative decisions to discipline prisoners with SHU terms, or to validate prisoners as gang members and assign them to the SHU, include few procedural protections for prisoners. In *Wilkinson*, the Supreme Court held that prisoners must be told why they are being assigned to a supermax and must have some opportunity to rebut the evidence against them.¹⁷⁵ But they are not guaranteed a hearing, a lawyer, the right to call witnesses, or any other traditional criminal procedural protections.¹⁷⁶ And in California, as in Arizona, administrative rules applying to only a single prison, like Pelican Bay State Prison, are not subject to the basic procedural protections of the state's Administrative Procedure Act, which usually requires, for instance, public notice and comment periods for new administrative rules.¹⁷⁷

This administrative discretion over who gets sent to supermaxes and why facilitates judicial deference in much the way administrative discretion over the initial design of supermaxes facilitated judicial deference. Just as prison officials designed the first supermaxes, they also designed the policies governing the facilities.¹⁷⁸ And just as with the administrative process underwriting the first supermaxes, administrative discretion over day-to-day operational policies contributes to a lack of evidence with which to counter prison officials' claims.

The *Madrid* case provides a perfect example of the challenge a judge faces in evaluating prison officials' claims when those claims are asserted in the context of policies over which prison officials exercise significant discretion. As discussed in Part I, the *Madrid* court deferred to prison officials' claims that the Pelican Bay SHU housed "some of the most anti-social and violence-prone prisoners in the system," and this deference to prison officials' claims is unsurprising in light of the pattern of judicial deference in prison conditions.¹⁷⁹ But a better understanding of the discretion prison officials exercise over the determinations of antisociality and violent predispositions suggests that the *Madrid* court's judicial deference was not a legal decision but a practical necessity. Because little evidence is collected through the cursory disciplinary and gang validation processes underlying SHU confinement, and even less of this evidence is made available to prisoners, the prisoner plaintiffs in *Madrid* had nothing to work with in attempting to counter prison officials' claims about their inherent dangerousness.¹⁸⁰ Importantly, where the prisoner plaintiffs in *Madrid* were able to counter claims about inherent dangerousness with evidence that they had been brutally subdued by prison officials

174. *Id.* at 542.

175. *Wilkinson v. Austin*, 545 U.S. 209, 229 (2005).

176. *Id.* at 228.

177. Shay, *supra* note 72, at 377–78.

178. Reiter, *supra* note 123, at 96–97.

179. *Madrid v. Gomez*, 889 F. Supp 1146, 1160 (N.D. Cal. 1995).

180. *Id.*

(e.g., skin scalded off or jaw broken and wired shut), they overcame the presumption of judicial deference and proved that some of the conditions of their confinement were, in fact, unconstitutional.¹⁸¹ Where there was no evidence of this kind of egregious physical abuse—as in the placement of the vast majority of prisoners in isolation conditions, or in double-bunked isolation conditions—the *Madrid* court had minimal evidence with which to evaluate (or counter) the underlying claims of prison administrators that the prisoners were dangerous.¹⁸²

Over the last twenty-five years of Pelican Bay's operation, prisoner plaintiffs have sought to collect better evidence about the SHU assignment and gang validation process in California, and have brought multiple individual lawsuits to limit the discretion inherent in the process.¹⁸³ Between 2011 and 2013, prisoners in the Pelican Bay SHU organized three prison-wide hunger strikes to protest their conditions of confinement, especially the gang validation and indeterminate SHU term policies.¹⁸⁴ In total, thirty thousand prisoners participated in the third hunger strike, which lasted more than three weeks.¹⁸⁵ Following the first hunger strike, in 2011, in response to media requests about durations of confinement in the Pelican Bay SHU, the California Department of Corrections and Rehabilitation (CDCR) released data indicating that there were more than 500 prisoners who had been in isolation in the Pelican Bay SHU for more than ten years.¹⁸⁶ Less than one year later, the Center for Constitutional Rights filed a lawsuit, *Ashker v. Brown*, on behalf of these prisoners, alleging that being in solitary confinement for more than ten years violates the Eighth Amendment prohibition against cruel and unusual punishment.¹⁸⁷ In June of 2014, the federal district court in Northern California certified a class of ten prisoners, each of whom had been in isolation for ten years or more, in a case challenging these long durations of confinement.¹⁸⁸

These recent events demonstrate the value of basic empirical data to prisoner plaintiffs seeking to challenge their conditions of confinement and overcome the presumption of judicial deference to the claims of prison officials. Whereas the *Madrid* prisoner plaintiffs failed to win their argument that conditions in the Pelican Bay SHU were unconstitutional, the certification of a new class of prisoners in the *Ashker* suit has reopened the question, in light of the information that has been gathered over the last twenty-five years about who has been assigned to the SHU,

181. *Id.*

182. *Id.*

183. *See, e.g.,* *Lira v. Cate*, No. C-00-0905 SI, 2009 U.S. Dist. LEXIS 91292, at *48 (N.D. Cal., Sept. 30, 2009) (successfully challenging the evidence on which a gang validation was based); Carbone, *supra* note 100.

184. *See* Reiter, *supra* note 26, at 579–81.

185. *Id.* at 581.

186. Small, *supra* note 27.

187. *Ashker v. Brown: Synopsis*, CENTER FOR CONST. RTS., <http://ccrjustice.org/pelican-bay> (last visited Oct. 18, 2014).

188. Order Granting in Part Motion for Class Certification; Denying Motion to Intervene at 21, *Ashker v. Gov. of Cal.*, No. C-09-5796-CW (N.D. Cal. June 2, 2014), available at <http://ccrjustice.org/files/6.2.14%20Order%20Granting%20Class%20Cert.pdf>.

on what basis, and for how long.¹⁸⁹ Much of this information has been obtained piecemeal, through individual litigation and journalist and researcher requests for data.¹⁹⁰ Each lawsuit and each request for more information constrains the discretion prison officials have over the SHU assignment process—requiring the officials to specify more precisely how the process works and to track more accurately who is subject to SHU conditions. For instance, in October of 2013, the CDCR released details of a revised policy for identifying gang members and placing them in the SHU based on a narrower range of evidence than had previously been authorized (“[u]nsubstantiated confidential information from a single source” is no longer considered acceptable evidence of gang membership).¹⁹¹ CDCR also began systematically reviewing all of the case files of validated gang members in the SHU; as of October 2013, it had completed 528 reviews and found that 343 prisoners were eligible for less restrictive conditions of confinement.¹⁹² This new evidence, gathered and published by CDCR for the first time, calls into question whether every prisoner in the SHU is as dangerous as previously alleged—and whether the discretion and associated judicial deference accorded to prison officials is justified.¹⁹³

In this part, I have described how the same prison officials who defined the SHU for the *Madrid* court also first designed and then operated the SHU with little public or legislative oversight. Evidence of the litigation-avoidant intentions of the Pelican Bay designers suggests that prison officials institutionalized resistance to judicial oversight in the supermax design. And evidence about the discretionary procedures by which prison officials assign prisoners to supermaxes suggests that these officials facilitated ongoing deference by failing to collect or produce evidence to defend their assertions.

In sum, existing research about the discretion inherent in the design and operation of supermax prisons—from the initial invisibility of the institutions, to the intentions of their designers to avoid legislative and judicial scrutiny, to the vague rules governing the day-to-day operation of the institutions—provides critical background to understanding the *Madrid* court’s finding that the basic conditions of confinement at the Pelican Bay SHU were constitutional. Judicial deference in prison conditions must be understood not just as a common legal presumption, but in the context of the wide-ranging discretion prison officials have to design and impose punishment, absent judicial review. Within this institutional context of administrative discretion, federal court deference to prison officials exaggerates existing administrative discretion. Courts cede the power of independent review to

189. Compare *id.*, with *Madrid v. Gomez*, 889 F. Supp. 1146, 1283 (N.D. Cal. 1995).

190. See, e.g., *id.* (using plaintiff depositions as evidence of current SHU practices).

191. CAL. DEP’T OF CORR. & REHAB., FACT SHEET: SECURITY THREAT GROUP PREVENTION, IDENTIFICATION AND MANAGEMENT STRATEGY (2013), available at <http://www.cdcr.ca.gov/stg/docs/Fact-Sheet-STG-reforms.pdf>.

192. *Id.*

193. See *id.* at 2 (stating that a case-by-case examination is taking place and more than half of the inmates reviewed have been released to general population).

prison officials when they do not carefully evaluate those officials' claims about why certain restrictive conditions of confinement are necessary. And prisoners themselves become increasingly vulnerable to abuses, as an unreasonable burden of proof shifts onto their shoulders.

However, as discussed in this subsection, evaluating prison officials' claims about the necessity of supermax confinement is difficult in light of policies and procedures that discourage collecting basic evidence about why and how prisoners are assigned to supermaxes. But even where such evidence has not been collected and published, as with supermaxes in California, the presumption that the evidence does not exist, or could not be collected, is unwarranted. In fact, the recent increase in evidence available about the Pelican Bay SHU following the hunger strikes and the *Asbeker* lawsuit suggests that the evidence is there, it just needs to be sought out and evaluated. In the next section, I discuss exactly what kind of evidence is available regarding the need for supermax confinement and how this evidence might be assessed. While this section has focused on discretion in design and operation as one mechanism underlying and facilitating judicial deference, the next section focuses on the presumption that no empirical evidence exists with which to evaluate prison administrators' claims as a second mechanism of judicial deference.

III. DEFERENCE BY EMPIRICAL ASSUMPTION

This part examines the kinds of data the CDCR has collected about its supermax institutions, and evaluates whether evidence supports the legal claims correctional administrators make about the safety and security purpose and violence-prevention outcomes of the supermax. This part highlights the absence of data, in correctional records and in response to information queries, about the operation and effectiveness of supermax prisons, especially in California. Just as supermaxes have continued to be arenas of broad correctional discretion, in spite of many legal challenges to their constitutionality, so have they also continued to be largely invisible. Indeed, invisibility and discretion go hand-in-hand in ways that this part will explore. And, as discussed in the prior part, invisibility and discretion are critical mechanisms that facilitate and underwrite the presumption of judicial deference in prison conditions cases.

This part is divided into three sections. The first presents and analyzes data about double bunking in the California supermaxes between 1989 and 2010, and the second two sections present and analyze qualitative data about incidents and quantitative data about rates of violence in the California supermaxes. Both the double bunking and violence data contradict the articulated purposes of the supermax as institutions that maintain safety and security and reduce high levels of institution and department-wide violence by controlling extremely dangerous prisoners. These contradictions, in turn, reveal the perverse incentives—to build additional, harsher, and less visible supermax cells—inherent in the multifaceted discretion of supermax incarceration. In the context of the widespread judicial deference to prison officials discussed in Part I, this evidence is all the more

important. Judicial deference to prison officials designing and operating facilities at the outer boundaries of constitutionally acceptable conditions potentially blurs those very boundaries. Where courts presume that evidence with which to evaluate prison officials' claims is not available, they not only exaggerate existing official discretion, they also facilitate the continued invisibility and excessive harshness of supermax incarceration.

A. *Double Bunking*

The *Madrid* court described the central purpose of the Pelican Bay SHU as containment of “the worst of the worst” prisoners—the gang affiliates and the “Hannibal Lecters”—in the state system.¹⁹⁴ The court also noted that California regulations “provide that housing ‘shall be in single cells (when possible) in security housing.’”¹⁹⁵ However, as noted by the *Madrid* court, some prisoners, in spite of their dangerousness and the single-cell function of the SHU, were double bunked in the SHU in the first years it was open.¹⁹⁶ This section follows up on this factoid from the *Madrid* case, examining the practice of double bunking in California SHUs over time, and suggesting how the ongoing practice of double bunking might be interpreted. This section argues that the practice of double bunking, which seems to contradict the underlying supermax theory of safety and security achieved through total isolation, provides critical insights into how supermaxes have developed and operated. Examining the practice of double bunking reveals the underlying incentives, rooted in the context of mass incarceration, driving supermax growth and sustaining the practice of long-term isolation, even in the face of myriad legal challenges and growing public condemnation. In the context of mass incarceration, the practice of double bunking in the Pelican Bay SHU appears to be not a practical or theoretical contradiction, but a natural corollary of the same incentives that produced supermaxes in the first place.

Table 1 and Figure 1 in Appendix A examine double-bunking practices over the last twenty years in California's two main supermaxes: the Pelican Bay SHU and the Corcoran SHU, both opened in the late 1980s.¹⁹⁷ The Pelican Bay SHU has a “design capacity” for 1056 single-occupancy cells, and the Corcoran SHU has a design capacity of 1024 single-occupancy cells.¹⁹⁸ However, both SHUs have consistently housed significantly more prisoners than their “design capacity” would indicate. On February 17, 2010, 1118 prisoners were housed in the Pelican Bay SHU (eleven percent of prisoners had a cellmate), and 1439 prisoners were housed in the Corcoran SHU (fifty-eight percent of prisoners had a cellmate).¹⁹⁹ Table 1 and

194. *Madrid v. Gomez*, 899 F. Supp. 1146, 1155 (N.D. Cal. 1995).

195. *Id.* at 1237.

196. *Id.*

197. Reiter, *supra* note 2, at 530.

198. *Id.* at 524.

199. E-mail from James S. Derby, Assoc. Dir., Div. of Planning, Acquisition & Design, Cal. Dep't of Corr. & Rehab., to author (July 22, 2011, 5:12 PM PDT) (on file with author). I calculated the percentage of prisoners who are double bunked by subtracting the design capacity of the Corcoran

Figure 1, in fact, demonstrate that double bunking happens often in California's SHUs. In any given year, at least one-quarter and often as many as two-thirds of the prisoners in the Pelican Bay and Corcoran SHUs have been double bunked.²⁰⁰ Rates of double bunking, in fact, have varied drastically over time. In some years, like 1993 and 1994, as many as two-thirds of all supermax prisoners were double bunked.²⁰¹ In other years, like 2000 and 2001, only one-quarter of all supermax prisoners were double bunked.²⁰²

While rates of double bunking have varied greatly, the proportion of supermax prisoners relative to the overall prison population has remained relatively constant, at between 1.6% and 2.3% of the overall prison population.²⁰³ See the final column of Table 1, in Appendix A, for these numbers. In fact, the raw number of supermax prisoners has increased steadily, with the increases in the raw numbers of the overall prison population.²⁰⁴ This explains how the rate of supermax use has remained relatively constant.

In addition to double bunking supermax prisoners to keep up with increasing populations, the CDCR has also opened additional supermax units, or SHUs.²⁰⁵ In 1995, the CDCR opened a second SHU at Corcoran.²⁰⁶ And in 2000, the CDCR opened an overflow SHU at the Central California Institute at Tehachapi.²⁰⁷ The fact that double-bunking rates in California SHUs have fluctuated in the California prison system, while the overall proportion of prisoners confined in SHUs has remained relatively constant, suggests that prison population increases generally, and overcrowding in particular, are important factors affecting rates of supermax double bunking.

In other words, patterns of supermax housing and double bunking are closely intertwined with patterns of mass incarceration in the United States. Indeed, supermaxes have been built as part of expansions in state prison populations and state prisons, and they have become overcrowded right along with state prisons. Both Arizona and California built their supermaxes as part of statewide investments in prisons; California built twenty-three prisons between 1984 and the early 2000s, and Arizona spent hundreds of millions of dollars on prison infrastructure over the

SHU (1024) from the total population (1439). This number (415) represents the "extra" prisoners being housed in the SHU; every "extra" prisoner is necessarily housed in a cell with one other prisoner, so the number of double bunked prisoners is twice the number of "extra" prisoners (830). The percentage of prisoners double celled is therefore 830 divided by the total SHU population (1439): 0.576, or fifty-eight percent.

200. Note that these two figures first appeared in Reiter, *supra* note 2, at 544, 546.

201. *Id.* at 546.

202. *Id.*

203. *Id.*

204. *Id.* at 245.

205. *Id.*

206. *Id.*

207. Reiter, *supra* note 2, at 543–45; E-mail from Carl Larson, former Dir. of Fin., Cal. Dep't of Corr. & Rehab., to author (July 20, 2011) (on file with author).

same years.²⁰⁸ Carl Larson, who was instrumental in designing and building the SHU at Pelican Bay, explained that “temporary overcrowding” of SHUs was a problem before the first SHUs even opened at Pelican Bay and Corcoran:

[Although] the Corcoran SHU and all of the other new prisons designed and constructed since 1982 were designed for one inmate per cell . . . based on our inmate population projections at the time, which proved to be accurate, to accommodate “temporary overcrowding” we added a second bunk and a second locker to each cell and increased the utility infrastructure.²⁰⁹

Other states copied the California model; between 1990 and the early 2000s, nearly every state built a new, freestanding supermax facility or retrofitted an existing prison unit to impose supermax conditions, and many states double-bunk prisoners in these facilities. In addition to California, Colorado, Connecticut, Massachusetts, New Jersey, North Carolina, and Pennsylvania double bunk some supermax prisoners.²¹⁰

Although the *Madrid* court acknowledged the “ever-increasing population pressures” facing prison officials administering supermaxes, the court did not acknowledge how these pressures created perverse incentives to expand supermax use, make supermax confinement maximally uncomfortable, and maintain the invisibility of the institutions. First, with an ever-increasing prison population, prison officials needed more and better methods of control, including an ever-increasing number of supermax cells.²¹¹ Second, confinement in these supermax cells, as the *Madrid* court acknowledged in discussing the frequent cell fights in crowded cells, prioritized institution-wide safety and staff safety over the safety of individual prisoners. For instance, that court noted, and accepted as “inevitable,” that there were at least 683 cell fights in the Pelican Bay SHU between its opening in December of 1989 and the production of assault data pursuant to the *Madrid* litigation in January of 1993.²¹² Prison officials operating supermaxes—especially in a state where hundreds of extremely dangerous cell fights annually are deemed constitutionally acceptable—have as much of an incentive to make supermax conditions maximally uncomfortable as minimally safe. After all, the more uncomfortable a supermax cell is, the more potential it has to function as a tool of control, deterring bad behavior by individual prisoners who want to earn their way out of the supermax, and deterring bad behavior by all other prisoners who fear earning their way into the supermax. Or so the theory goes. If the supermax is simply a tool for control, the more uncomfortable the better, and double bunking some supermax prisoners operates as just another form of discomfort. (The

208. GILMORE, *supra* note 142, at 93–94; LYNCH, *supra* note 2.

209. E-mail from Carl Larson, *supra* note 207.

210. Various postings to stopsolitary@mail.lawhelp.org (Aug. 9, 2012) (on file with author) (responses by lawyers and activists to Taylor Pendergrass’s query whether a state double cells).

211. *See Madrid v. Gomez*, 889 F. Supp. 1146, 1237 (1995).

212. *Id.* at 1238 & n.180.

evidence about violence in supermaxes in the subsequent sections reinforces this point about the incentives to create, rather than eliminate, discomforts.)

Finally, double bunking facilitates a third perverse incentive to keep supermaxes invisible. As discussed in the second part, California's supermax designers explicitly built the institutions to avoid the attention of courts, and as the *Madrid* case reiterated, the less judicial attention the better, at least from the perspective of prison officials struggling to manage challenging prison populations.²¹³ Double bunking, then, is a means to facilitate the continued invisibility of supermaxes; double bunking blurs the line between maximum security prisons and supermaxes, creating a literal grey area. The practice of double bunking within supermaxes makes the institutions appear to be a kind of imprisonment on the same spectrum with other harsh conditions of confinement—a series of extended thirty-day periods in isolation, for instance, or a different degree of decreased access to privileges, like out-of-cell time, communal meals, access to books, radios, and televisions. As long as supermaxes appear to be simply a different degree of imprisonment, and one that is clean, well lit, and leaves few physical scars, they are more difficult to define as a new or unprecedentedly hard form of punishment. In other words, specific unconstitutional practices are harder to identify, describe, and challenge legally when supermaxes appear to be just a new (and variable) combination of existing tools of control.

B. *Initial Indicators of Violence*

Much as the goal of total isolation in the California supermaxes was compromised from the first day the institutions opened, complete with the extra bunk bed added at the last minute, so was the goal of total safety and security. The myriad safety and security compromises at the Pelican Bay SHU, from dangerous prisoners being double bunked together, to prison officials using excessive force to abuse prisoners, were discussed in the preceding sections. Like double bunking, violence initiated by prison officials is not unique to the Pelican Bay SHU; similar incidences took place at the Corcoran SHU, California's other main supermax, in the early years of its operation. And many supermaxes across the United States experienced similar incidents of excessive use of force and extreme violence initiated by prison officials, especially in the first few months and years after a state supermax opened, as documented in anecdotes, journalistic accounts, and litigation.²¹⁴ These incidents provide another indicator of the second perverse incentive of supermaxes: impose the harshest possible conditions.

213. *Id.* at 1263.

214. *See, e.g.*, *United States v. LaVallee*, 439 F.3d 670 (10th Cir. 2006); *Jones-El v. Berge*, 374 F.3d 541 (7th Cir. 2004) (describing guards beating up prisoners when Wisconsin's supermax first opened); *United States v. Verbickas*, 75 F. App'x 705 (10th Cir. 2003) (detailing gruesome abuses of prisoners by correctional officers at the federal supermax, for which officers were sentenced to three-plus years in prison); Affidavit of Chase Riveland ¶15, *Osterback v. Moore*, No. 97-2806-CIV-HUCK (S.D. Fla. 1997) (describing excessive use of pepper spray in Florida's supermaxes); JAMIE FELLNER & JOANNE MARINER, HUMAN RIGHTS WATCH, COLD STORAGE: SUPER-MAXIMUM SECURITY

Local news reports and court records from the early 1990s document that between 1989 and 1994, five prisoners in the Corcoran SHU were killed, allegedly as a result of the actions of prison guards.²¹⁵ Guards injured an additional forty prisoners from the Corcoran SHU in these years.²¹⁶ Most of these injuries, and all five deaths, stemmed from “gladiator fights,” staged by prison officers.²¹⁷ Officers would choose two prisoners at a time, who were known to be from enemy gangs, to release into small, outdoor exercise yards attached to the Corcoran SHU.²¹⁸ The rival gang members would fight each other and when the fights got heated, prison officers shot at the fighting prisoners.²¹⁹ On five different occasions between 1989 and 1994, prison officers shot and killed a prisoner during these gladiator fights.²²⁰ Prosecutors charged eight correctional officers with civil rights violations for staging the gladiator fights and facilitating the five prisoner deaths.²²¹ Although all eight officers were ultimately acquitted, surveillance cameras documented the causes of each of the five prisoner deaths—a shot fired by an officer during a fight between rival gang members.²²²

Then, in 1998, twelve more Corcoran correctional officers were indicted in two separate cases and charged with civil rights violations for setting up and inciting fights and rapes in the Corcoran SHU.²²³ The charges were widely reported in local, national, and even international papers.²²⁴ The correctional officers’ union supported their indicted members, both financially, by paying the legal costs of the members’ defense, and publicly, through a media campaign to educate the public about Corcoran, described as the place “Where Hell Begins.”²²⁵ In its public relations campaign, the union argued that guards at Corcoran “maintain a thin blue line” against thousands of the “state’s most violent criminals.”²²⁶ The comments of

CONFINEMENT IN INDIANA 28, 50 (1997), available at <http://www.hrw.org/reports/1997/usind/> (discussing how supervisors encouraged guards to use unnecessary force against prisoners when Indiana’s supermax first opened, and discussing how guards kept supermax temperatures at forty degrees Fahrenheit for extended periods); Andy Davis, *State Settles Pepper-Spray Suits: Ex-inmate at Varner Supermax Unit to get \$4,000 for ‘05 Cases*, ARK. DEMOCRAT-GAZETTE, Feb. 17, 2011, at 1B (describing instances of abusive uses of pepper spray following the opening of the Arkansas supermax); Press Release, American Civil Liberties Union, ACLU Sues CT Corrections Chief Over Abuse of Prisoners Housed at Notorious Virginia “Supermax” (Feb. 7, 2001), available at www.clearinghouse.net/chDocs/public/PC-CT-0001-0002.pdf (last visited Oct. 18, 2014) (describing the violent deaths of two Connecticut prisoners housed under contract in Virginia’s supermax).

215. Matthew Heller, *Prison of the Damned*, INDEPENDENT, Jan. 28, 2001, at 10.

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.* at 13–14.

220. *Id.*

221. *Id.*

222. *Id.* at 13.

223. *Id.* at 15.

224. See, e.g., Robert B. Gunnison, *8 Prison Guards at Corcoran Indicted: Civil Rights Charges in Slaying of Inmate*, S.F. CHRONICLE, Feb. 27, 1998, at A1; Heller, *supra* note 215.

225. Heller, *supra* note 215, at 15.

226. *Id.*

the union in defense of their members reiterated the second perverse incentive of supermax incarceration—toward maximally harsh conditions. Not only do maximally harsh conditions serve as a potential deterrent, they are also self-reinforcing. The harsher the conditions, the worse the prisoners experiencing those conditions will be perceived to be. The prison guards who orchestrated the Corcoran gladiator fights and were charged with civil rights violations based on incontrovertible evidence turned the viciousness of the fights back against the prisoners, alleging that anyone acting the way the prisoners had been induced to act was inherently violent.²²⁷

C. *In Search of a Relationship Between Supermaxes, Overcrowding, and Violence*

Because correctional administrators have claimed—both in interviews explaining the need for the first supermaxes, and in court cases challenging the conditions in these prisons—that supermaxes are necessary for safety and security, a natural corollary question to the one about whether supermaxes have been used for total isolation is: have supermaxes had a positive impact on institutional safety and security? And, has double bunking in supermaxes compromised any positive impact supermaxes might have had? This section evaluates the available data collected by the CDCR over the last twenty years about various rates of violence. Because California correctional officials do not collect sufficient data to answer these questions, this section will also outline what data would be needed in order to conclusively answer these questions.

Based on the claims of correctional administrators about the safety and security value of total isolation incarceration, two hypotheses about the structure and value of supermax incarceration should be considered: (1) The use of supermax incarceration decreases violence throughout a state prison system by isolating the most dangerous, violence-prone prisoners. (2) Double bunking the most dangerous prisoners in conditions designed for total isolation increases rates of violence. This section will evaluate the available data about supermax housing practices and incarceration based on twenty years of supermax incarceration in California. The short story: the available data can neither confirm nor reject the hypotheses suggested above. This section will conclude by suggesting what data might be collected in an effort to evaluate these hypotheses.

First, why is there no reliable statistical data with which to conclusively evaluate the two hypotheses proposed above? There are two problems with violence data collected and published by the CDCR. The biggest problem is a collection problem: the CDCR collects and releases data about violent incidents—including homicides, suicides, suicide attempts, prisoner-on-staff assaults, and prisoner-on-prisoner assaults—at the institutional rather than unit level.²²⁸ Therefore, violent

227. See Keramet Reiter, *The Supermax Prison: A Blunt Means of Control, or a Subtle Form of Violence?*, 17 *RADICAL PHIL. REV.* 457, 461 (2014), for a further discussion of the ways in which supermaxes encourage and produce violence.

228. See, e.g., COMPSTAT DAI STATISTICAL REPORT – 13 MONTH (Sep. 12, 2014), available at

incident data from Corcoran and Pelican Bay includes violent incidents that took place throughout the institution, both within the SHUs (these are the supermax units, which make up roughly one-quarter to one-third of the total population at each), and within the general population units.²²⁹ Prisoners in the general population units spend many more hours per day out of their cells (congregating with each other and participating in group activities) than prisoners in the SHUs, who spend only an hour or two out of their cells every few days in a solitary exercise yard.²³⁰ The second problem with violent incident data is an interpretive problem. Either (a) very small numbers of incidents are involved, as in the case of homicides and suicides; or (b) incident reporting is subject to correctional administrators' discretion about how to characterize and whether to report nonfatal incidents of violence.

In spite of these two serious problems with the California violent incident data, this subsection presents two different analyses of the data. First, the data is charted descriptively, over time, in order to investigate whether there are any obvious or consistent trends in the data. Second, a differences-in-differences regression model is presented in order to explore whether there are any consistent trends in the data. California's two supermaxes have now been open for just over twenty years.²³¹ The fact that there are two institutions' worth of statistics to compare and two decades' worth of multiple violence measures provides some hope that some trends over time might be visible, such as long-term increases or decreases in multiple measures of violence. If there were consistent trends, these might compensate for the two main flaws in the data as collected. Unfortunately, no such trends are visible. Each method of analysis will be discussed in turn below.

The results of the descriptive graphs appear in Appendix B (Figures 2 through 16); the graphs are labeled and grouped together based on the kind of violence measure each describes. Five measures of violence are included: homicides, suicides, suicide attempts, prisoner-on-prisoner assaults, and prisoner-on-staff assaults. For each measure of violence, there are three graphs: (1) comparing the rate of a given kind of violence at Corcoran, Pelican Bay, and throughout the California prison system (labeled as DOC, for department of corrections, on the graphs); (2) comparing the rates of double bunking in the SHU at Corcoran to the rates of violence throughout that institution; (3) comparing the rates of double bunking in the SHU at Pelican Bay to the rates of violence throughout that institution.

Correctional administrators' claims about the safety and security value of supermaxes would be supported by either (1) a consistent decrease in overall rates of violence, over the last twenty years, in institutions with supermaxes, and throughout the California prison system; or (2) evidence of a consistent relationship

http://www.cdcr.ca.gov/COMPSTAT/docs/DAI/2014_07/2014_07_DAI%20High%20Security.pdf.
Note that violent incidents are reported by institution, not by units, within the institution.

229. *Id.*

230. Heller, *supra* note 215.

231. LYNCH, *supra* note 2, at 2.

between fluctuating rates of double bunking in the supermaxes and fluctuating rates of violence throughout the department of corrections. Unfortunately, the descriptive trends in the graphs in Appendix B fail to tell one obvious story about either overall rates of violence in the California prisons, or about the relationship between rates of violence and double bunking in California.

In looking at Figures 2, 5, 8, 11, and 14, which each compare a single measure of violence (homicides, suicides, suicide attempts, prisoner-on-prisoner assaults, and prisoner-on-correctional officer assaults) at Corcoran, Pelican Bay, and throughout the department of corrections since 1989, when the first SHUs opened at Corcoran and Pelican Bay, one fact does stand out.²³² Rates of violence at Corcoran and Pelican Bay, whatever the particular measure, are consistently higher than the rates of violence throughout the prison system.²³³ But again, the violence data do not reveal whether these violent incidents occurred in the supermax units at these prisons, in the general population units, or in both. Moreover, there is no way to tell based on these data whether the violence rates at Corcoran and Pelican Bay would have been higher or lower if these prisons had not had supermax units. The data allows for no conclusions about whether supermaxes have either exacerbated or reduced violence in the California prison system.

Figures 3, 4, 6, 7, 9, 10, 12, 13, 15, and 16 each compare rates of double bunking in the supermax units at Corcoran and Pelican Bay, respectively, to rates of violence in each unit. Again, the story is one of absences. For some measures of violence in some institutions, violence seems to increase as double-bunking rates increase. For instance, Figures 14 and 26 show this kind of pattern. In *Figure 4: Rate of Violent Death Compared to Proportion of Prisoners Double-Bunked, Pelican Bay State Prison, 1989–2006*, between 1994 and 1998, the peak years of double bunking in the Pelican Bay SHU, homicide rates at the institution also peaked. Similarly, in *Figure 16: Rate of Prisoner-on-Prisoner Assaults, Compared to Proportion of Double-Bunked Prisoners, at Pelican Bay, 1989–2006*, in those same years of SHU double bunking at Pelican Bay, prisoner-on-prisoner assaults also peaked. But for other measures of violence, violence actually seems to decrease as double-bunking rates increase. See *Figure 12: Rate of Prisoner-on-Staff Assaults Compared to Proportion of Double-Bunked Prisoners, Corcoran, 1989–2006* for an example of this; as rates of double bunking in the Corcoran SHU increased, rates of prisoner-on-staff assaults actually decreased.

However, even the apparently contradictory trends seen in these graphs could be capturing changes in violence rates due to violent incidents that took place outside of the supermax units, elsewhere in the prison institutions. Modeling these apparent relationships with a bivariate regression, for instance, is futile, because there is no way to directly evaluate the relationship between double bunking in the supermax units and rates of violence in the supermax units, since the only data available here actually consists of institution-wide violence rates.

232. See *infra* Appendix B, Figure 2; Appendix B, Figure 5; Appendix B, Figure 8; Appendix B, Figure 11; Appendix B, Figure 14; see also LYNCH, *supra*, note 2, at 2.

233. See *infra* Appendix B, Figure 2.

One possibly creative statistical model through which the relationship between supermax housing practices and violent incidents might be teased out is a differences-in-differences estimation. This model allows a comparison between variables across panels of data, if the panels of data are drawn from the same broader context. Differences-in-differences estimations, then, might be used to compare employment outcomes in different firms operating within the same broader state policy context.²³⁴ In the instant case, violence outcomes in different prisons operating in the same broader policy context of one state corrections department are compared using a differences-in-differences model. Between Corcoran and Pelican Bay, a differences-in-differences model estimates the relationship between the independent variable of supermax housing and the dependent variable of violence outcomes. In theory, such a panel-based, differences-in-differences model might isolate the effect of *changes* in (1) rates of prisoners housed in supermaxes, and in (2) rates of double bunking among these prisoners on institutional violence rates. Indeed, this model provides a creative way to explore whether there is a clear relationship between supermax housing practices and rates of violence in California. However, even with the two panels of data drawn from Corcoran and Pelican Bay, there are a limited number of observations; for some measures, as few as nine years of data are available, and no more than seventeen years of data are available for any measure. (Unfortunately, the data are reported annually, not monthly.) Moreover, for many measures, like homicides and suicides, there are very few instances of violence in any given year.²³⁵ Given these data limitations, the inconclusive results reported in Table 2 are unsurprising.

Specifically, the model presented in *Table 2: SHUs, Double Bunking, and Violence in California Prisons – Correlation Models & Results*, in Appendix B, estimates the effect of (1) the *differences* in the proportion of all prisoners housed in the SHU between each institution (Model A), and (2) the *differences* in the double-bunking rates between each institution (Model B) on the *differences* in violence rates between each institution, over a decade. Model A tests the first hypothesis presented in this section: that the use of supermax housing, isolating some prisoners, will produce overall reductions in violence throughout institutions. Model B tests the second hypothesis presented in this section: that double bunking dangerous supermax prisoners will produce increases in violence in these institutions.

These tables show that the directions of the relationships between supermax housing practices and violence rates are inconsistent; sometimes the coefficient in the regression is positive and sometimes it is negative, suggesting that sometimes violence rates increase with increased rates of supermax housing use or with

234. See generally Stephen G. Donald & Kevin Lang, *Inference with Difference-in-Differences and Other Panel Data*, 89 REV. ECON. & STAT. 221 (2007) (discussing differences-in-the-differences modeling).

235. See *infra* Appendix B, Figure 9. Note that the regression results presented in Figure 9 are based on the natural logs of the housing rates and violence rates. In some years, however, there were no suicides or no homicides at a particular institution; in this case, rather than dropping the variable (because there is no natural log of 0), a zero was used.

increased rates of double bunking, but sometimes violence rates decrease with changes in housing practices. Moreover, very few of these relationships are significant: the standard errors are large, so the apparent relationships could well be due to chance and may not predict future relationships with much accuracy.

Model A evaluates the hypothesis that increased use of supermax housing might lead to decreases in institutional levels of violence. The results reported in Table 2 suggest that this hypothesized relationship might be true for three of the five measures of violence: homicides, attempted suicides, and prisoner-on-prisoner assaults. For all three of these measures, the regression coefficient is negative; as supermax housing rates increase, homicide rates decrease, attempted suicide rates decrease, and prisoner-on-prisoner assault rates also decrease. The regression coefficient remains negative even when a year variable is included in the regression model (columns labeled (2)), to control for the effects of time (and, by extension, other variables that might be closely correlated with time). However, none of these results are significant; the standard errors are relatively large, so the possibility that the apparent relationships are due to chance cannot be ruled out.

Moreover, the results for two other measures of violence—suicides and prisoner-on-staff assaults—further complicate the findings. For each of these two measures of violence, the apparent relationship reverses when the control variable for the year is included in the model. So, suicides appear to be negatively related to supermax housing for the basic differences-in-differences regression estimation (as supermax housing use increases, suicides go down), but positively related when a year variable is included in the model (as supermax housing use increases, suicides increase).²³⁶ The exact reverse is true for prisoner-on-staff assaults. However, the relationship between prisoner-on-staff assaults and supermax housing in the basic differences-in-differences regression estimation, without a control variable for the year included, is the only significant relationship in Model A. Thus, the positive relationship between increased supermax housing and increased prisoner-on-staff assaults is one of the more robust relationships in this model. This relationship, however, contradicts the first hypothesis presented in this section, suggesting that an increased use of supermax housing might actually exacerbate rates of violence in the prison. However, the significant relationship disappears (and the apparent relationship also reverses, becoming negative) when the control variable for year is included in the model. The fact that controlling for more variables in the model reverses the apparent relationships is another indication that the potential positive

236. In fact, of all the measures of violence, completed suicides might be the one that could be expected to increase with increased uses of isolation; mental health professionals have argued that isolation is a risk factor for suicide. Don Thompson, *Record California Inmate Suicides Are Double National Rate*, FREE REPUBLIC (Jan. 2, 2006, 3:38 PM), <http://www.freerepublic.com/focus/f-news/1550815/posts> (noting that seventy percent of the forty-four prisoners who committed suicide in California in 2005 were in solitary confinement); *Fact Sheet: Psychological Effects of Solitary Confinement*, SOLITARY WATCH, <http://solitarywatch.files.wordpress.com/2011/06/fact-sheet-psychological-effects-final.pdf> (last visited Feb. 3, 2012).

relationship between supermax housing and prisoner-on-staff violence is weak and not likely predictive.

In sum, for three measures of violence, Model A suggests that increased rates of supermax housing use are associated with decreased homicide rates, suicide attempts, and prisoner-on-prisoner assaults, but the standard errors for these associations are large, so the significance of these findings is limited. Moreover, for two measures of violence, suicides and prisoner-on-guard assaults, the relationships between increases in rates of supermax housing are more ambiguous.

Model B evaluates the hypothesis that increased rates of double bunking in supermaxes might lead to increased rates of institutional violence. In fact, this model reveals that, for three measures of violence, increased rates of double bunking are negatively correlated with rates of homicide, prisoner-on-staff assault, and prisoner-on-prisoner assault (i.e., as double-bunking rates increase, those three violence rates decrease). For the assault statistics, these relationships have low standard errors; they are significant and unlikely to be due to chance. For suicides and attempted suicides, which admittedly constitute a different kind of violence, increased rates of double bunking are correlated with increased rates of self-inflicted violence. The standard errors are relatively large; only the relationship between double bunking and suicides, without controlling for year, produces a significant p-value.

In sum, for three measures of violence, Model B suggests a possible negative relationship between double bunking and violence. As double-bunking rates increase, violence rates decrease. This finding might suggest that either (a) the prisoners in the supermaxes are not so dangerous as alleged because double bunking them does not produce aggravations in rates of violence, or (b) the right prisoners are being double bunked together, so possible violent altercations are being avoided by safely bunking known friends together. Either way, there is an absence of evidence to support the claim that total isolation of certain individually dangerous prisoners is strongly associated with reductions in institutional levels of violence across a variety of measures of violence.

The statistical data in California is conclusively inconclusive as to the effectiveness of supermaxes in general or of double bunking in particular. As with the descriptive graphs discussed above, the differences-in-differences estimation fails to reveal a clear relationship between supermax housing practices and violence rates at Corcoran and Pelican Bay. However, the statistics are useful for what they do not show. They fail to either confirm or reject the claims of correctional administrators about the relationship between the restrictive conditions of supermax prisons and the safety and security of prison systems with supermaxes. Correctional administrators, then, have produced little-to-no evidence of whether the supermax institution has succeeded or failed at its stated safety and security purposes, for more than twenty years now.

Indeed, very few analyses of the relationship between supermaxes and violence, in any state, exist. The few studies that do exist suggest that perhaps

supermaxes actually exacerbate violence between prisoners and staff.²³⁷ For example, Peter Kratcoski found some evidence that higher security prisons often have higher levels of violence, documenting that seventy-one percent of assaults on staff occurred in a maximum-security unit that housed less than ten percent of the facility's prisoners.²³⁸ And Chad Briggs, Jody Sundt, and Thomas Castellano found some evidence of a correlation between supermaxes and prisoner-on-staff assaults.²³⁹

Correctional administrators have collected virtually no data with which to examine the justification for supermaxes: violence control and reduction. These data (or the absence thereof, as the case may be) reiterate the third perverse incentive of the supermax—the incentive to maximum invisibility. Given the discretion correctional administrators had both in designing and operating supermaxes and the deference courts have shown to correctional administrators' claims about the need for and purposes of supermaxes, correctional administrators have no incentives to produce more or better data about supermax operation. Indeed, they have incentives to produce less data so that their claims can remain straightforward and simple.

When courts defer to prison officials' claims about prison conditions, the deference implicitly assumes that data with which to evaluate these claims is not available, is impossible to collect, or is too complicated to analyze. But even working with extremely limited existing data, this part has documented many findings relevant to understanding whether supermaxes are constitutional, including: the relationship between prison populations and supermax double bunking, which suggests that overcrowding, as much as security concerns, drives double-bunking decisions; the qualitative evidence of violence in supermaxes; and the absence of evidence that supermaxes curb violence. Deference to prison officials often depends on an assumption of the absence of empirical data; this section has sought to demonstrate that that assumption is unwarranted.

IV. LESS DEFERENCE, MORE VISIBILITY, BETTER INCENTIVES

The previous parts documented how courts have repeatedly deferred to correctional administrators' claims about the necessity for supermax prisons as tools of institutional safety and security. Empirical evidence, however, demonstrates that supermaxes were built and operated in direct contradiction to these correctional administrators' claims. For instance, although correctional administrators described supermaxes as institutions of total isolation, designed to protect staff and prisoners alike from “the worst of the worst,” or the “most dangerous” prisoners in the

237. See generally Chad S. Briggs et al., *The Effect of Supermaximum Security Prisons on Aggregate Levels of Institutional Violence*, 41 CRIMINOLOGY 1341 (2003); Peter C. Kratcoski, *The Implications of Research Explaining Prison Violence and Disruption*, 52 FED. PROBATION 27 (1988).

238. Kratcoski, *supra* note 237, at 28.

239. Briggs et al., *supra* note 237, at 1365.

system, supermaxes have regularly housed two prisoners to a cell.²⁴⁰ In fact, correctional administrators failed to clearly articulate the many purposes a supermax would serve, consistently operated the institutions in contradiction to the purposes they have articulated, and failed to collect and analyze evidence that supports their claims to expertise and to being skilled promoters of institutional safety and security. These failures suggest the perverse incentives underlying supermax incarceration— incentives to maximize the number of supermax cells in operation and to maximize the harshness of the conditions there while also minimizing the visibility of these institutions. The pattern of deference federal courts have shown to correctional administrators in evaluating the constitutionality of supermaxes has only exaggerated these perverse incentives. Judicial deference, along with administrative discretion and the relative invisibility of supermaxes, has essentially left supermax prisoners at the mercy of inconsistently disorganized and inexperienced (at least in terms of analyzing and applying empirical evidence) administrators. This section will consider two ways that prison visibility might be increased, while simultaneously limiting judicial deference to prison administrators and two ways that the degree of judicial deference deployed in *Madrid* and similar cases might be directly limited or discouraged.

First, better data about our prisons, and especially about supermaxes, could be collected; paying empirical attention to American imprisonment is something that criminal law practitioners and scholars should (in fact, must) do in order to make determinations about how the law does and should work. Better data collection can be facilitated at the state and federal legislative level through legislation requiring systematic collection of information about who is housed at what level of prison security, for how long, and with what prevalence of violence, for instance. And better data collection can be facilitated in courts if both lawyers and judges demand and evaluate empirical evidence to back up the expert claims of prison officials about things like the purpose and effectiveness of supermaxes.

The example of California's supermaxes is instructive. Evidence of the practice of double bunking in California supermaxes potentially contradicts the stated rationale of supermaxes as necessary for safety and security. Specifically, California's use of supermax double bunking suggests that perhaps California supermaxes have been used not just as a tool of safety and security, but as a tool for managing overcrowding. When the *Madrid* court deferred to correctional administrators' penological justifications for both (1) the restrictive conditions of supermax confinement, and (2) the differently restrictive conditions of double bunking in supermax confinement, the court did not consider that the actual justification for the conditions could have been overcrowding pressures rather than safety-and-security concerns.²⁴¹ If rates of overall prison overcrowding are, in fact, determining the degree of restrictive conditions of supermax prisons, then this

240. See *infra* Appendix A, Table 1; Figure 1.

241. See *Madrid v. Gomez*, 889 F. Supp. 1146, 1282 (N.D. Cal. 1995).

might present a constitutional problem. After all, the Supreme Court recently held in *Plata* that overcrowded prison conditions were no excuse for the perpetuation of Eighth Amendment constitutional violations and therefore had to be remedied, even if the remedy would require the release of thousands of prisoners.²⁴²

The statistics about double-bunking rates over time in the California supermaxes suggest that there is indeed overcrowding in California's supermaxes.²⁴³ The decision in *Plata*, in turn, suggests that if the conditions of supermax confinement are being determined not by safety concerns but by institutional overcrowding concerns, the supermax may deserve renewed constitutional scrutiny.²⁴⁴ By analogy to *Plata*, if overcrowded prison conditions are forcing prison officials to either (a) assign prisoners who otherwise would be housed in less restrictive conditions to the "stark sterility and unremitting monotony" of supermax conditions of confinement,²⁴⁵ or (b) assign prisoners who otherwise would be housed in total isolation for the safety of other prisoners or staff to have cellmates, then there may be a constitutional problem.²⁴⁶ The *Madrid* court held that imposing these conditions to isolate dangerous prisoners in order to promote institution-wide safety and security was justified; the court did not hold that imposing these conditions to relieve problems with overcrowding was justified.²⁴⁷

The California case puts in stark relief the enormous difference between the theories of criminal law as taught in the academy and applied by judges, and the creation and administration of imprisonment as a criminal punishment. In fact, this Article documents how the creation and administration of imprisonment happens outside of, or in the shadow of, the law. Empirical evidence—not only statistical, but also historical—is absolutely vital both to better understanding this process of creating and administering imprisonment and to accurately applying legal frameworks to analyses of punishment practices. Advocates should present evidence of supermax practices, and courts should demand it before assuming that deference to the expertise of correctional administrators is warranted. And the evidence should be weighed against correctional administrators' claims about the purposes of and necessity for certain prison practices, like supermaxes.

Another way that judicial deference to prison administrators might be limited is through the application of categorical restrictions, excluding certain prisoners from supermaximum confinement. Some courts, including the *Madrid* court, have

242. See *Brown v. Plata*, 131 S. Ct. 1910, 1947 (2011).

243. See *infra* Appendix A, Table 1; Figure 1.

244. See *Plata*, 131 S. Ct. at 1910.

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

246. *Cf. id.* at 1947. I do not mean to equate violations of standards of decency with the viability of the safety-and-security justification for supermaxes. Under *Plata*, a finding that supermaxes do not promote safety and security would be insufficient to conclude the institutions were unconstitutional. A court would also need to find that supermaxes violated standards of decency. See *id.* I am simply suggesting here that the lack of a clear purpose behind the restrictive conditions of confinement in supermaxes might be the first step to considering whether the institutions do, in fact, violate standards of decency.

247. See *Madrid*, 889 F. Supp. at 1272.

categorically excluded prisoners with preexisting mental illnesses from supermax confinement.²⁴⁸ Prisoner plaintiffs could raise and courts could consider expanding these kinds of categorical restrictions on supermax confinement. For instance, these restrictions might be extended to exclude juveniles from supermax confinement, much as the Supreme Court has recently determined that the death penalty and even certain sentences of life without the possibility of parole exclude juveniles.²⁴⁹ Certain offenses might also be categorically excluded from supermax confinement. Just as the court held in *Kennedy v. Louisiana* that the death penalty cannot be applied to nonhomicide offenders, and in *Graham v. Florida* that the sentence of life without parole cannot be applied to nonhomicide juvenile offenders,²⁵⁰ federal courts addressing challenges to supermax confinement might exclude certain kinds of in-prison offenses from eligibility for long-term or indeterminate supermax confinement. For instance, in California, more than five hundred prisoners have spent more than ten years in supermax confinement serving indeterminate solitary terms because of their status as gang members instead of for specific actions they took while in prison.²⁵¹ Courts could limit supermax confinement to those prisoners who have committed a specific action that endangered prisoner safety.

In response to a spate of highly publicized critiques of supermax prisons between 2011 and 2014,²⁵² a number of state legislatures have proposed laws imposing categorical restrictions on placements in supermax confinement, including restrictions on placing juveniles, pregnant women, and the mentally ill in supermaxes.²⁵³ These kinds of categorical restrictions have been criticized, though, as distractions from the restrictive conditions of supermax confinement, which some argue should be unconstitutional for anyone, vulnerable or not.²⁵⁴

Judicial expansions of categorical restrictions excluding certain prisoners from supermax confinement might require a different interpretation of the purposes

248. *See id.* at 1267; *see also, e.g.*, Settlement Agreement at 6, Disability Law Ctr., Inc. v. Mass. Dep't of Corr., 960 F. Supp. 2d 271 (D. Mass. Apr. 12, 2012) (No. 07-10463-MLW).

249. *See* Miller v. Alabama, 132 S. Ct. 2455 (2012) (excluding all juvenile offenders from the mandatory punishment of life without the possibility of parole); *Graham v. Florida*, 130 S. Ct. 2011 (2010) (categorically excluding all juvenile, nonhomicide offenders from the punishment of life without the possibility of parole); *Roper v. Simmons*, 543 U.S. 551 (2005) (categorically excluding all juveniles from the punishment of death); *see also* IAN KYSEL, GROWING UP LOCKED DOWN: YOUTH IN SOLITARY CONFINEMENT IN JAILS AND PRISONS ACROSS THE UNITED STATES (Alison Parker et al. eds., 2012) (documenting juvenile placement in solitary and supermax confinement and arguing that it violates international human rights standards and should be forbidden).

250. *Graham*, 130 S. Ct. 2011; *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (categorically excluding child rapists from receiving the death penalty).

251. Small, *supra* note 27, at 6.

252. *See, e.g.*, AMNESTY INT'L, *supra* note 15; George F. Will, *The Torture of Solitude*, WASH. POST, Feb. 21, 2013, at A17; UN NEWS CENTRE, *supra* note 15.

253. *See* Ivan Moreno, *Lawmakers Are Trying to Restrict Solitary Confinement*, HUFFINGTON POST (Apr. 22, 2014, 5:45 PM EDT), http://www.huffingtonpost.com/2014/04/22/solitary-confinement_n_5194072.html (discussing efforts in a number of states to impose categorical restrictions on uses of solitary confinement).

254. *See, e.g.*, Weidman, *supra* note 72 (arguing that categorical restrictions might “inadvertently narrow the scope of first amendment protections”).

behind supermax confinement. Whereas the *Madrid* court treated supermax confinement as a condition of confinement and so evaluated its constitutionality using the *Farmer* standard, courts might consider treating supermax confinement as more akin to a harsh prison sentence, like the death penalty or life without parole, which would trigger specific protections for certain categories of people.²⁵⁵ At a procedural level, supermaxes seem more like a condition of confinement than like a sentence to prison; correctional administrators, not judges, assign prisoners to supermax confinement.²⁵⁶ But at a practical level, when prisoners spend years at a time in segregated conditions harsh enough to trigger a liberty interest in avoiding them,²⁵⁷ questions arise as to whether the supermax experience is practically, if not also purposefully, punitive.

Third, the degree of deference deployed in *Madrid* might be limited by more individualized considerations of specific prisoners' placements in supermax confinement. In *Wilkinson v. Austin*, the one Supreme Court case that has considered the constitutionality of any aspect of solitary confinement, the Court mandated certain minimum procedural protections, like written notice and regular review of supermax placement, for prisoners facing supermax confinement.²⁵⁸ The limited procedural protections prisoners have before being placed in a supermax are somewhat less than the limited procedural protections undocumented immigrants have prior to being deported, or the limited procedural protections a citizen has prior to being preventively detained. But these protections are also somewhat greater than the limited procedural protections a person has prior to being required to register as a sex offender or prior to being placed on a no-fly list.²⁵⁹ Jennifer Daskal, for instance, outlines a series of increased procedural protections that should be considered for persons in the latter category. These protections, including increased procedural requirements, and especially a robust mechanism that allows "targets [to] rebut a presumption of continuing dangerousness,"²⁶⁰ could well be applied to increase the protections available to supermax prisoners prior to placement in supermaxes.

Because court-initiated protections are likely to face public and political scrutiny,²⁶¹ additional avenues for achieving increased visibility and decreased

255. See *Madrid v. Gomez*, 889 F. Supp. 1146, 1245 (N.D. Cal. 1995).

256. AMNESTY INT'L, *supra* note 15, at 2.

257. See *Wilkinson v. Austin*, 545 U.S. 209, 220 (2005).

258. *Id.* at 224–30.

259. See Jennifer C. Daskal, *Pre-Crime Restraints: The Explosion of Targeted, Non-Custodial Prevention*, 99 CORNELL L. REV. 327 (2014).

260. *Id.* at 379.

261. For instance, following the Supreme Court's decision in *Plata*, a three-judge panel in California ordered the release of thousands of prisoners from the state's overcrowded prison system. *Plata/Coleman v. Brown*, Case Nos. C01-1351 TEH (N.D. Cal. 2010) and 2:90-cv-0520 LKK JFM P (E.D. Cal. 2010), "Three-Judge Plata/Coleman v. Brown Court Order to Reduce Prison Population," available at <http://www.cand.uscourts.gov/tehplatacase>; see also *Brown v. Plata*, 131 S. Ct. 1910 (2011). Governor Brown has repeatedly sought to close the case, arguing that government oversight is no

discretion vis-à-vis prisons, and especially supermaxes, should be considered. One additional nonjudicial avenue toward these goals is indirectly facilitating prison and supermax visibility by making the institutions more accessible to journalists, the media, and oversight agencies. Most prisons limit journalist access to guided tours of facilities and interviews with prisoners selected by prison officials.²⁶² And there are few independent or government agencies charged with monitoring prisons at either the state or the federal level.²⁶³ Even American law students studying criminal law rarely either visit prisons or study prison law.²⁶⁴ Encouraging visibility through legislation that guarantees journalists broader access to prisons, or that facilitates independent citizen or nonprofit monitoring of prisons, is another means to increase the visibility and limit the often unchecked discretion in prison, and especially supermax operation. Law schools can also facilitate prison oversight by teaching prison law, as Dolovich has argued,²⁶⁵ and by facilitating legal scholar tours and monitoring of prisons.

CONCLUSION

Supermaxes represent the outer boundaries of our criminal justice system, the extreme end of permissible punishment. As prisons within prisons, they are literally hidden from sight. As arenas of near total administrative discretion, they are practically hidden from the law. At a microlevel, multiple levels of administrative discretion have reinforced the day-to-day ungovernability of supermaxes, fortifying the perverse incentives for expanded discretion at the genesis of the facilities. Judicial deference to prison officials' claims, in turn, has further expanded and exaggerated the administrative discretion at the heart of supermax facilities. This Article has sought to explore the mechanisms of that deference by documenting the ways supermax designers avoided oversight in the design and operation of prison facilities, and identifying the testable empirical assumptions underlying supermax incarceration.

At a macrolevel, supermaxes resulted from the perverse incentives of mass incarceration: a rapidly expanding prison system requires flexible and flexibly harsh tools of control. Looking closely at the motivations behind supermaxes, their ungovernability and their potential for reform, therefore, has implications for mass incarceration more broadly. If we could grapple with limiting the supermax, perhaps

longer necessary, even though the three-judge panel has found that unconstitutional conditions continue to exist in California's prisons.

262. James Ridgeway, *Fortresses of Solitude: Even More Rare: Journalist Access to Prison Isolation Units*, COLUMBIA JOURNALISM REV., Mar.–Apr. 2013, at 31, 32.

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

264. Sharon Dolovich, *Teaching Prison Law*, 62 J. LEGAL EDUC. 218, 218, (2012).

265. *Id.* at 222–24.

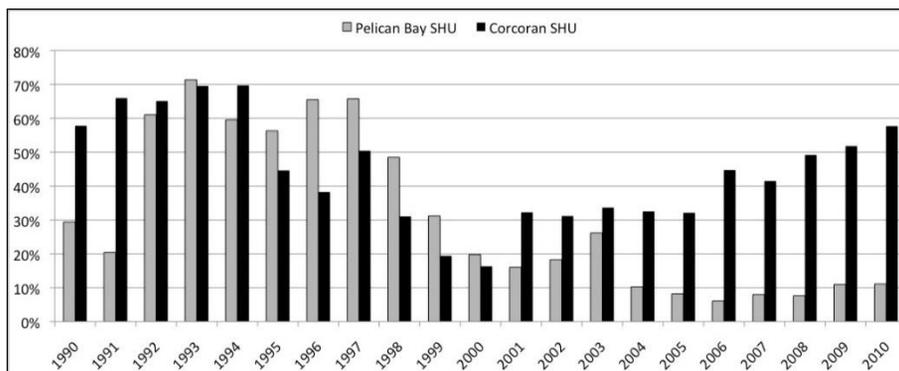
this would give us clues as to how we might grapple with limiting other aspects of the supersized American criminal justice system.

APPENDIX A

Table 1: Rates of Double Bunking and of SHU Use, 1989–2010

Year	Corcoran		Pelican Bay		DOC
	SHU Population	Percent Double Bunked	SHU Population	Percent Double Bunked	SHU Population as a Percent of Total Prison Population
1989	0	0%	0	0%	0.0%
1990	720	58%	1238	29%	2.2%
1991	764	66%	1176	20%	2.1%
1992	759	65%	1520	61%	2.3%
1993	785	70%	1642	71%	2.2%
1994	786	70%	1504	60%	2.0%
1995	1318*	45%	1470	56%	2.3%
1996	1266	38%	1570	65%	2.1%
1997	1369	50%	1573	66%	2.1%
1998	1212	31%	1394	48%	1.8%
1999	1134	19%	1251	31%	1.6%
2000	1115	16%	1172	20%	1.7%
2001	1221	32%	1148	16%	2.0%
2002	1213	31%	1162	18%	1.9%
2003	1231	34%	1215	26%	1.9%
2004	1223	33%	1113	10%	1.9%
2005	1220	32%	1101	8%	1.9%
2006	1319	45%	1089	6%	1.9%
2007	1292	41%	1100	8%	1.8%
2008	1358	49%	1098	8%	1.9%
2009	1382	52%	1117	11%	2.0%
2010	1439	58%	1118	11%	2.0%

* In May of 1995, the California Department of Corrections opened a second Security Housing Unit at Corcoran State Prison. This housing unit had been planned as a SHU since the prison was built, but was not operated as one until 1995. E-mail from Carl Larson, *supra* note 207. So, prior to 1995, the design capacity of the Corcoran SHU used for calculating overcrowding in this chart was 512 single-occupancy cells. In 1995 and thereafter, the design capacity of the Corcoran SHU used for calculating overcrowding in this chart was 1024 single-occupancy cells. The calculation for the percentage of double-bunked SHU prisoners is as follows: (1) Subtract the SHU Design Capacity from the SHU population to determine how many prisoners are housed in the SHU in excess of the design capacity. (2) Multiply the difference between the design capacity and the population by two, because every prisoner in excess of the design capacity is, by definition, double bunked with a second prisoner. (3) Divide the total number of double-bunked prisoners by the total population to obtain the percentage double bunked.

Figure 1: Percentage of Double-Bunked Prisoners, 1990–2010

APPENDIX B

Figure 2: Rate of Violent Deaths at Corcoran, Pelican Bay, and All Prisons, 1989–2006

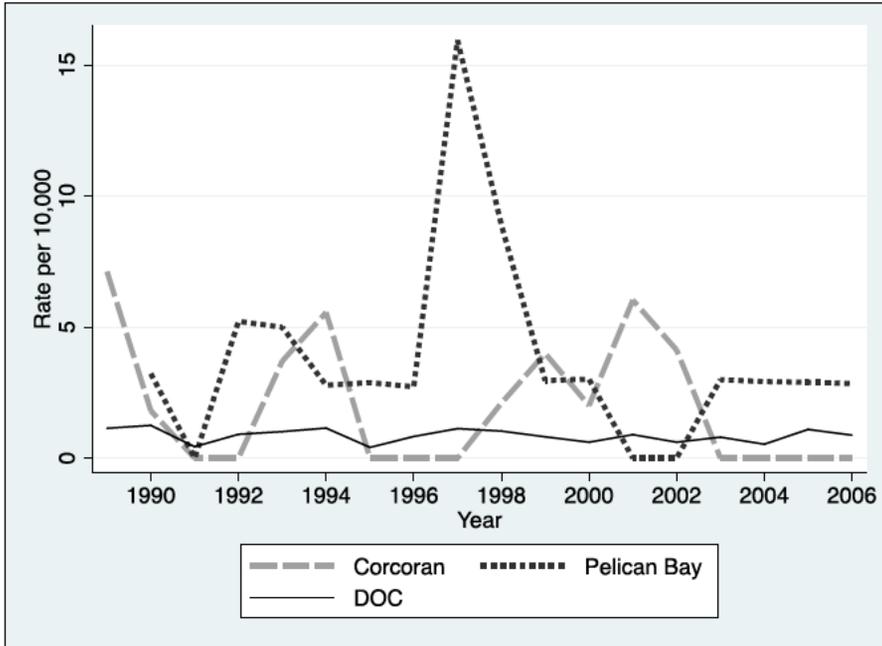


Figure 3: Rate of Violent Death Compared to Proportion of Prisoners Double Bunked, Corcoran State Prison, 1989–2006

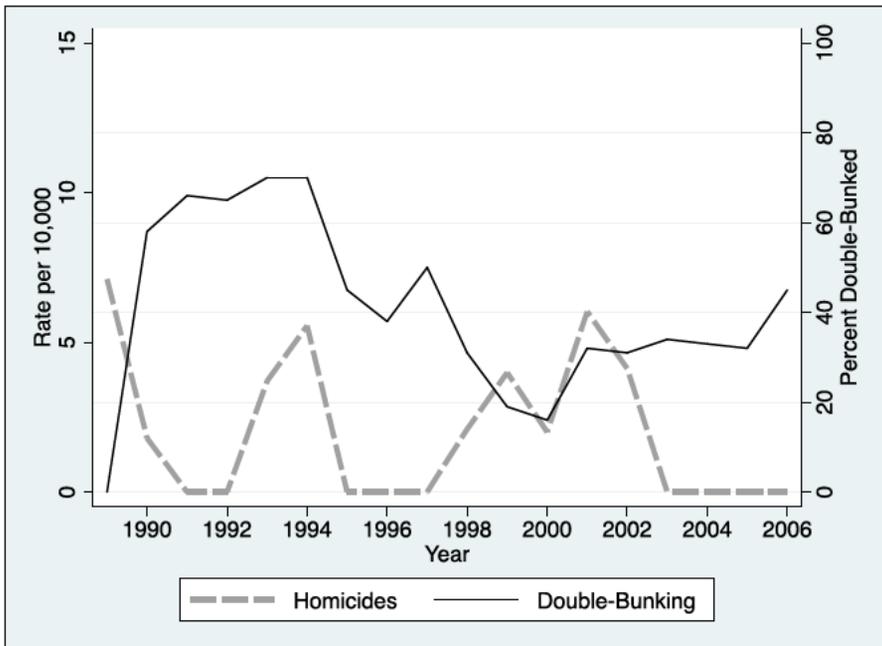


Figure 4: Rate of Violent Death Compared to Proportion of Prisoners Double Bunked, Pelican Bay State Prison, 1989–2006

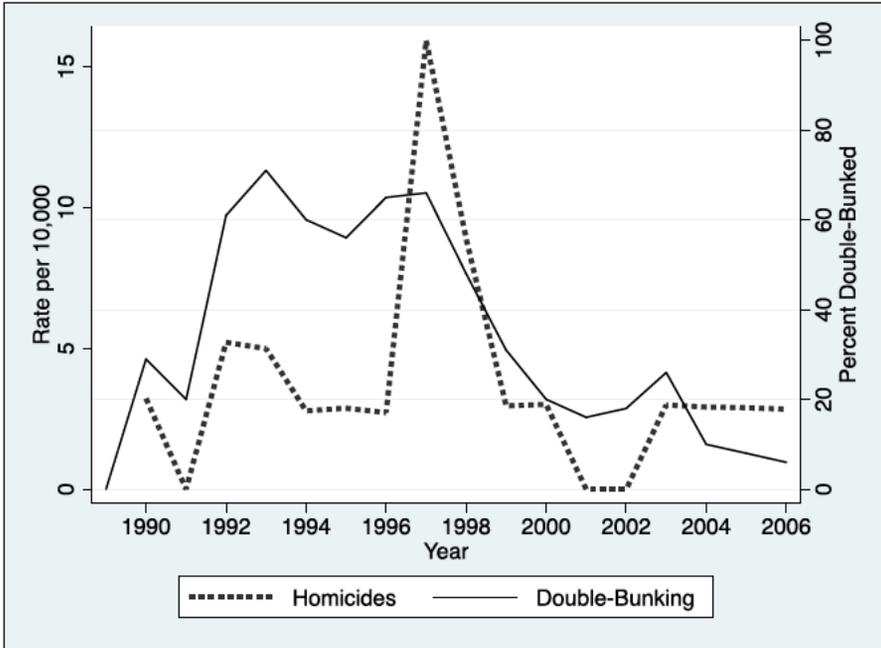


Figure 5: Rate of Suicides at Corcoran, Pelican Bay, and All Prisons, 1998–2006

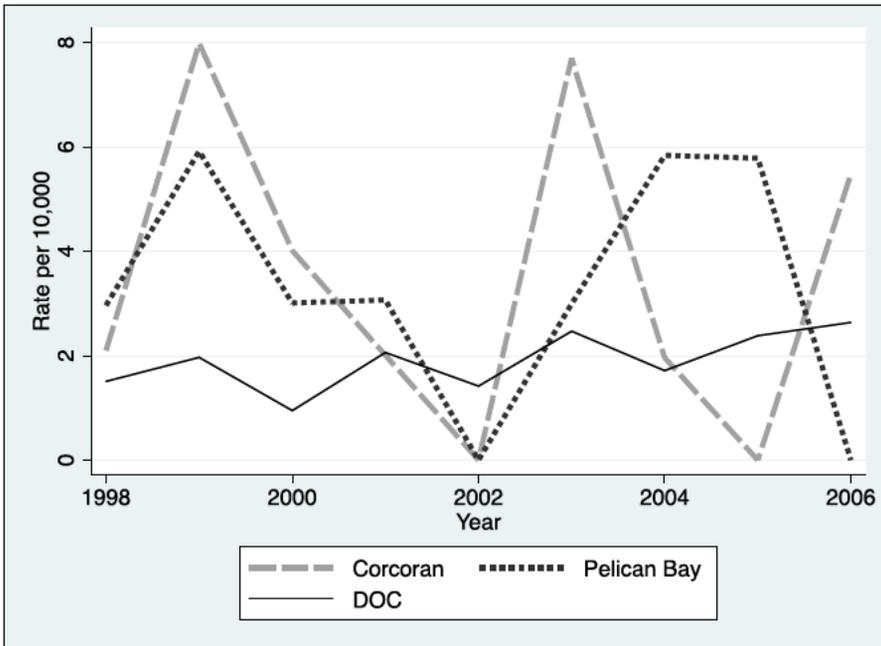


Figure 6: Rate of Suicides Compared to Proportion of Prisoners Double Bunked, Corcoran State Prison, 1998–2006

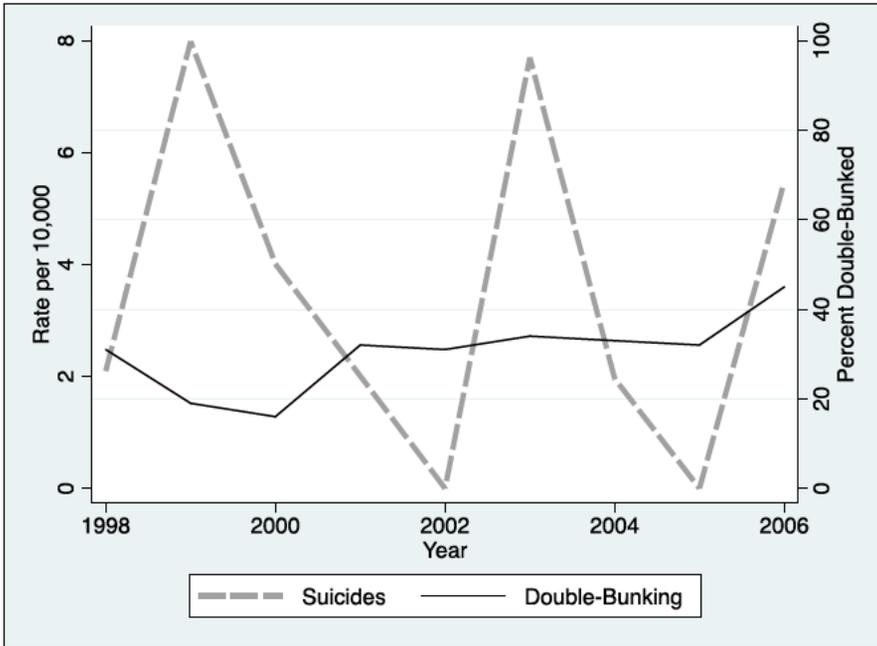


Figure 7: Rate of Suicides Compared to Proportion of Prisoners Double Bunked, Pelican Bay State Prison, 1998–2006

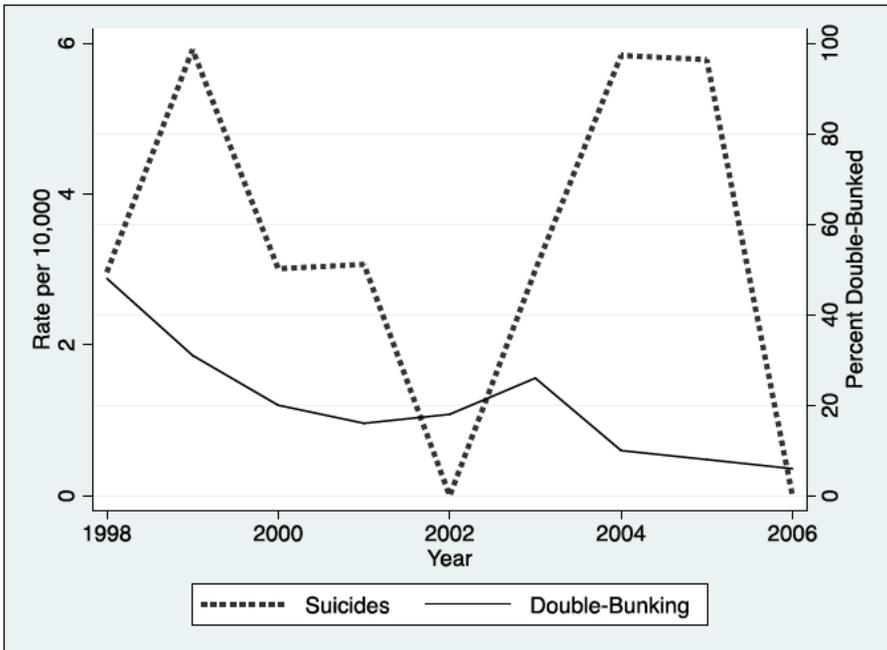


Figure 8: Rate of Attempted Suicides at Corcoran, Pelican Bay, and All Prisons, 1998–2006

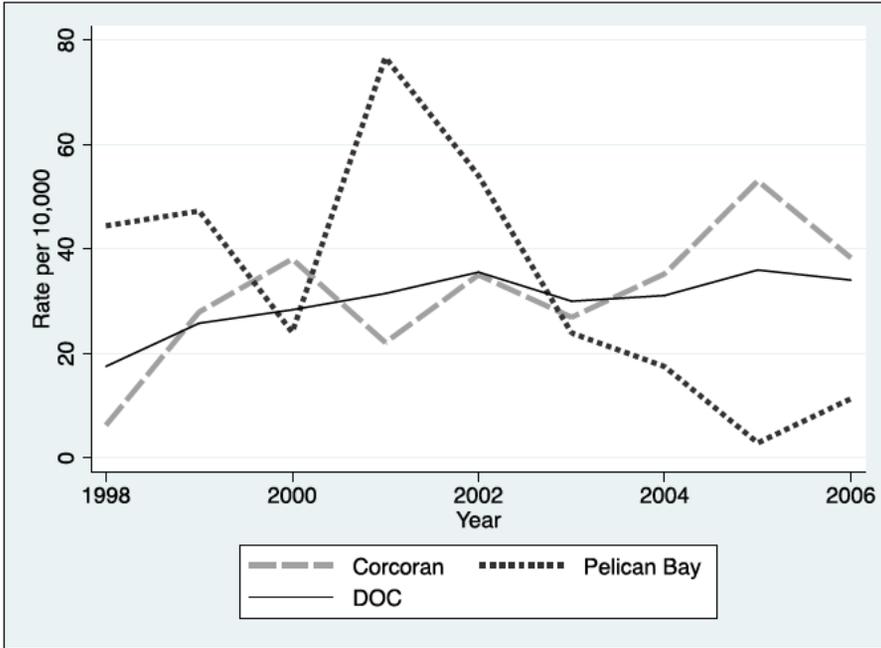


Figure 9: Rate of Attempted Suicide Compared to Proportion of Prisoners Double Bunked, Corcoran State Prison, 1998–2006

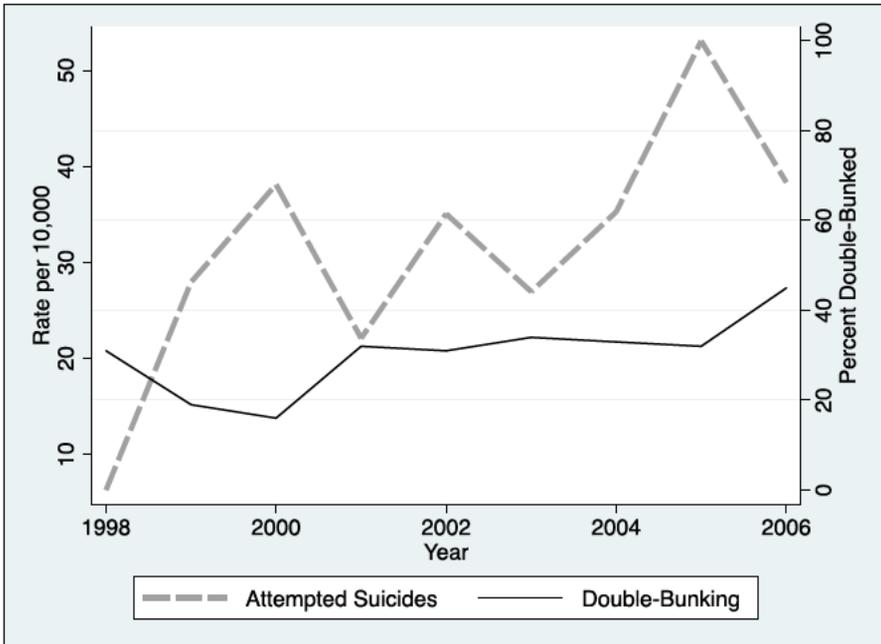


Figure 10: Rate of Attempted Suicide Compared to Proportion of Prisoners Double Bunked, Pelican Bay State Prison, 1998–2006

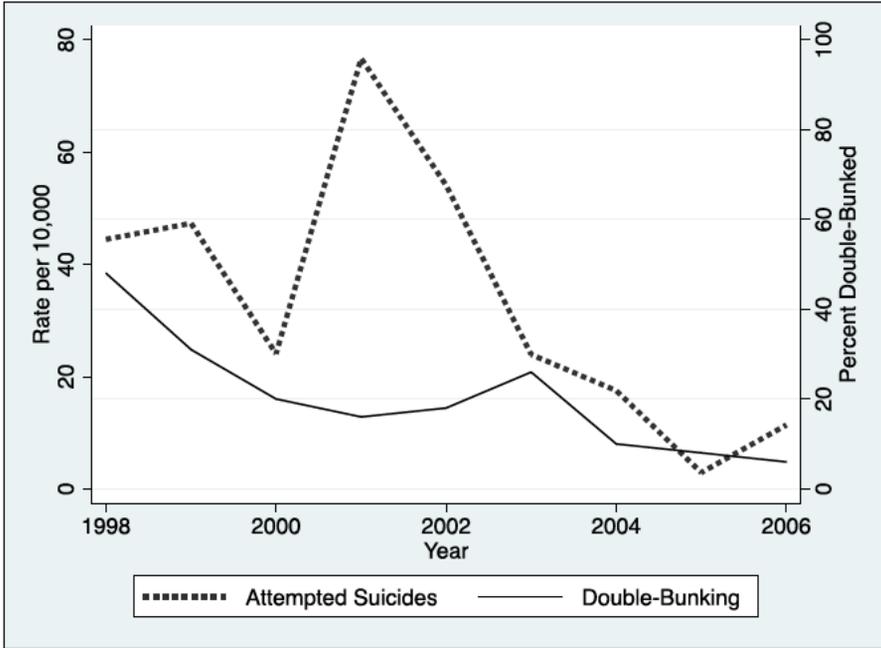


Figure 11: Rate of Prisoner-on-Staff Assaults at Corcoran, Pelican Bay, and all Prisons, 1989–2006

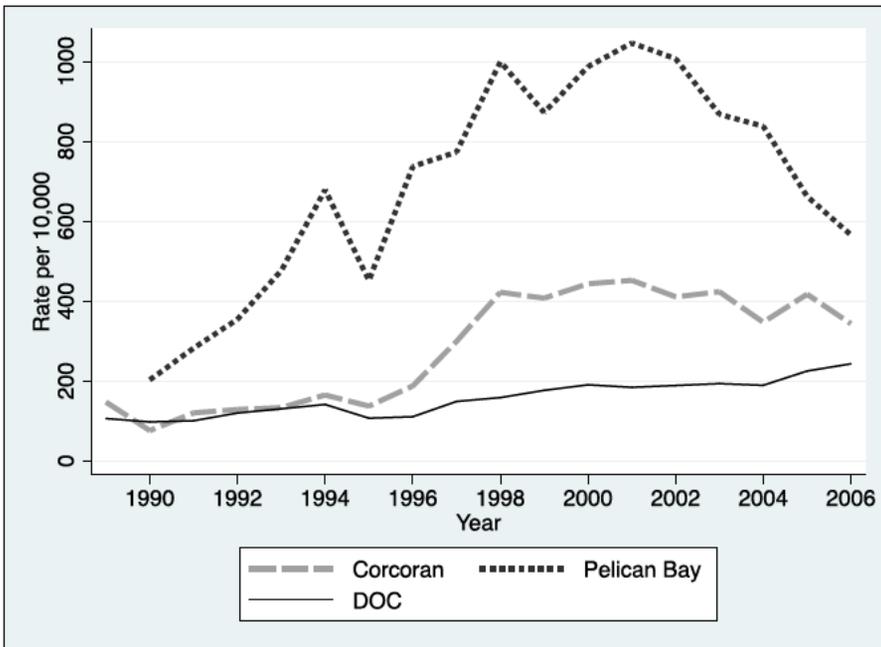


Figure 12: Rate of Prisoner-on-Staff Assaults Compared to Proportion of Double-Bunked Prisoners, Corcoran, 1989–2006

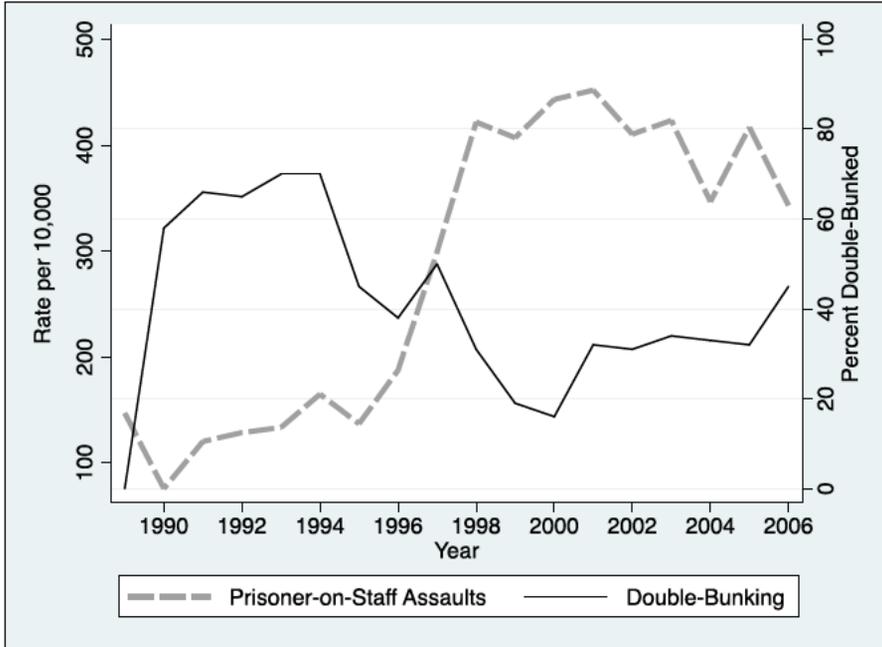


Figure 13: Rate of Prisoner-on-Staff Assaults Compared to Proportion of Double-Bunked Prisoners, Pelican Bay, 1989–2006

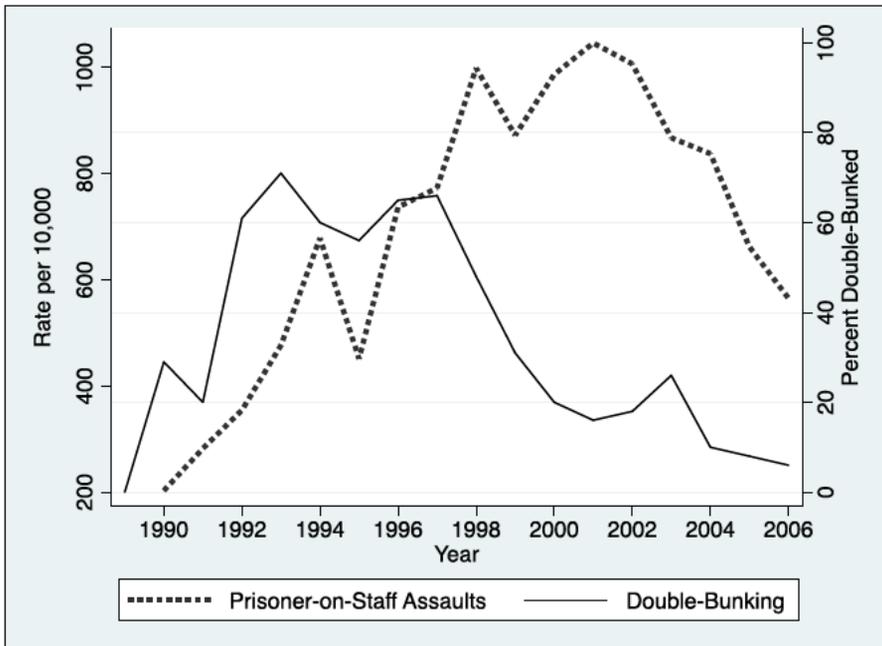


Figure 14: Rate of Prisoner-on-Prisoner Assaults at Corcoran, Pelican Bay, and All Prisons, 1989–2006

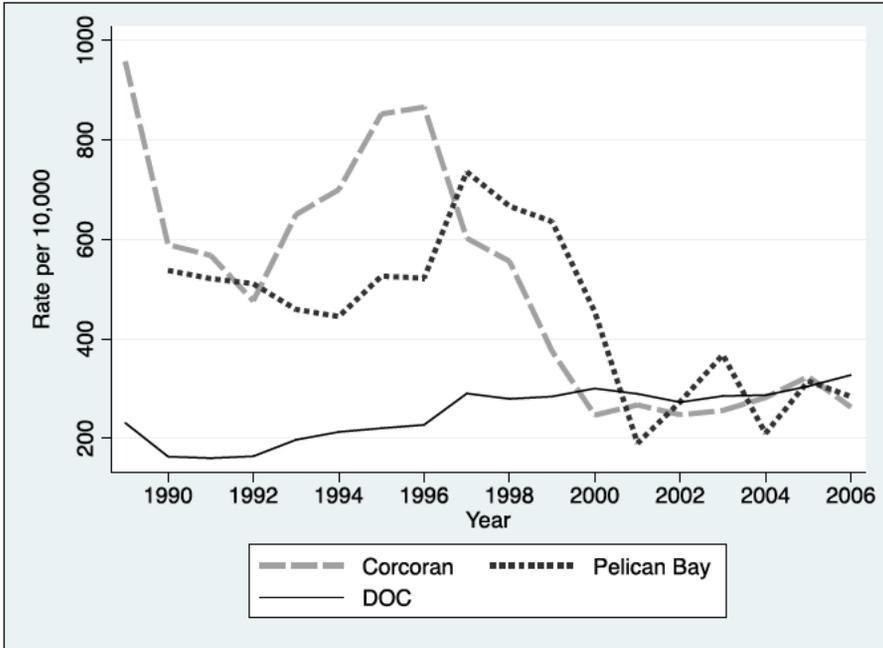


Figure 15: Rate of Prisoner-on-Prisoner Assaults, Compared to Proportion of Double-Bunked Prisoners, at Corcoran, 1989–2006

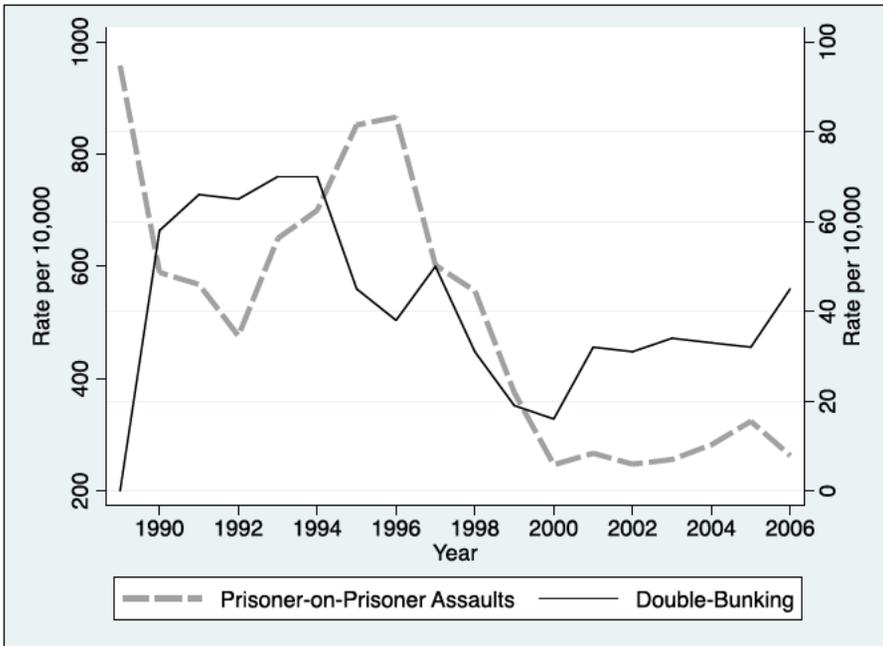


Figure 16: Rate of Prisoner-on-Prisoner Assaults, Compared to Proportion of Double-Bunked Prisoners, at Pelican Bay, 1989–2006

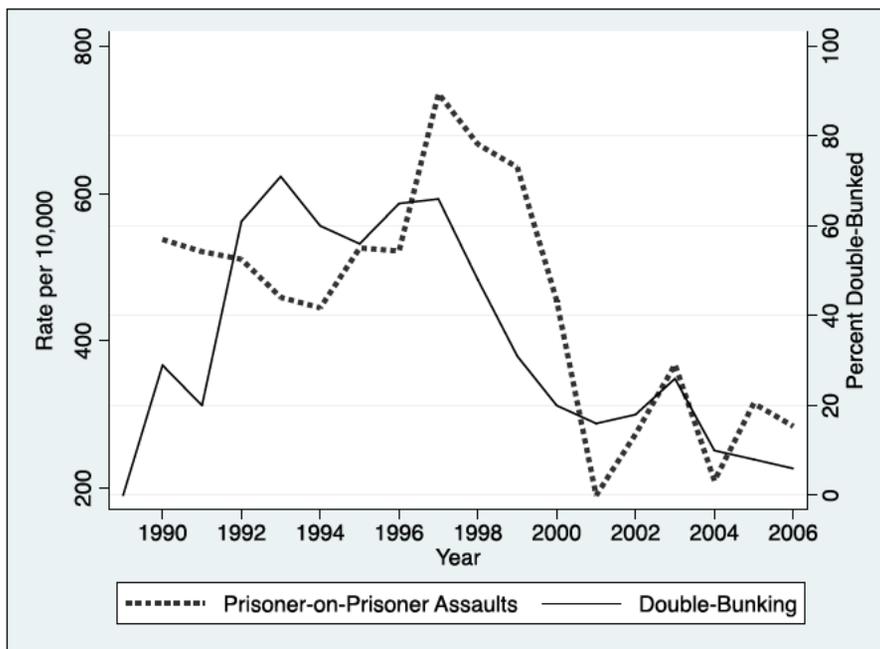


Table 2: SHUs, Double Bunking, and Violence in California Prisons—Correlation Models & Results²⁶⁶

<i>(Observations)</i>	Homicide			
	<i>(17)</i>			
A. Overall Effect of SHU Population on Violence	(1)	(2)		
<i>Coefficient</i>	-0.755	-1.145		
<i>(Standard Error)</i>	(0.532)	(1.073)		
<i>P-Value</i>	0.176	0.304		
<i>R-Squared</i>	0.119	0.13		
B. Overall Effect of Double Bunking on Violence				
<i>Coefficient</i>	-0.134	-0.391		
<i>(Standard Error)</i>	(0.316)	(0.357)		
<i>P-Value</i>	0.678	0.293		
<i>R-Squared</i>	0.012	0.133		

<i>(Observations)</i>	Suicide		Attempted Suicide	
	<i>(9)</i>		<i>(9)</i>	
A. Overall Effect of SHU Population on Violence	(1)	(2)	(1)	(2)
<i>Coefficient</i>	-4.773	3.9	-4.773	3.9
<i>(Standard Error)</i>	(2.154)	(3.181)	(2.154)	(3.181)
<i>P-Value</i>	0.062	0.266	0.062	0.266
<i>R-Squared</i>	0.412	0.771	0.412	0.771
B. Overall Effect of Double Bunking on Violence				
<i>Coefficient</i>	0.882	0.443	0.882	0.443
<i>(Standard Error)</i>	(0.229)	(0.343)	(0.229)	(0.343)
<i>P-Value</i>	0.006	0.244	0.006	0.244
<i>R-Squared</i>	0.68	0.776	0.68	0.776

266. Standard Errors in Parentheses; grey shading indicates significant p-values; Model (1) is a simple regression relating the natural log of the independent variable (SHU population or double bunking) to the natural log of the dependent variable (violence rate); Model (2) includes the year in the regression to control for the possible effects of time. Models (A) and (B) both use differences-in-differences estimations, comparing the panel of Corcoran data to the panel of Pelican Bay data, and evaluating the relationships, if any, between the differences in these two panels, i.e., does a comparative change in double-bunking rates between two institutions relate to an overall change in violence rates between two institutions?

	Prisoner-on-Staff Assaults		Prisoner-on-Prisoner Assaults	
	(17)		(17)	
<i>(Observations)</i>				
A. Overall Effect of SHU Population on Violence	(1)	(2)	(1)	(2)
<i>Coefficient</i>	0.484	-0.109	0.484	-0.109
<i>(Standard Error)</i>	(0.189)	(0.336)	(0.189)	(0.336)
<i>P-Value</i>	0.022	0.749	0.022	0.749
<i>R-Squared</i>	0.305	0.466	0.305	0.466
B. Overall Effect of Double Bunking on Violence				
<i>Coefficient</i>	-0.318	-0.199	-0.318	-0.199
<i>(Standard Error)</i>	(0.097)	(0.099)	(0.097)	(0.099)
<i>P-Value</i>	0.005	0.065	0.005	0.065
<i>R-Squared</i>	0.417	0.581	0.417	0.581

