The Prison Jurisprudence of Justice Thurgood Marshall

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I. Introduction

In these times of increasingly violent behavior, convicted felons are a friendless group, whose plight engenders little political support.\(^1\) Ever since the Supreme Court began to actively examine daily prison life, Justice Thurgood Marshall labored to make his colleagues aware of the Court's obligation to provide decent living conditions to those citizens whom the state seeks to punish by incarceration. As the first African American on the Court,\(^2\) his special voice advanced the debate. A review of Justice Marshall's prison jurisprudence demonstrates his belief that all persons, even disfavored minorities, are entitled to the Court's protection of their basic rights. He had a sense, perhaps more than most of his colleagues, that there are real people living in the overcrowded facilities and that they matter.\(^3\)

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3. In 1929 Thurgood Marshall was denied admission to the all white University of Maryland School of Law. See id. at V. On October 9, 1980, the law school named its law library in honor of Justice Marshall. Justice Marshall did not attend the dedication.

In 1967 President Lyndon B. Johnson appointed Marshall to the Supreme Court of the United States, see Resolutions, supra, at IX, a position he held for 24 years until his retirement in 1991. See id. at III. Justice Marshall died in Bethesda, Maryland on January 24, 1993. See id.

In 1929 Thurgood Marshall was denied admission to the all white University of Maryland School of Law. See id. at V. On October 9, 1980, the law school named its law library in honor of Justice Marshall. Justice Marshall did not attend the dedication.

3. See, e.g., Rhodes, 452 U.S. at 369-77 (Marshall, J., dissenting). Justice Marshall was the sole dissenter in Rhodes, arguing that the facility described by the majority was not the one in which the prisoners actually lived. Id. at 969-70. He agreed with the district court
was opposed to those prison practices and conditions that kept human beings from living a decent existence. He was not against incarceration, or even harsh punishment; he was simply in favor of applying constitutional rights and protections as much as possible in the prison setting.  

Justice Marshall understood that "the needs for identity and self-respect are more compelling in the dehumanizing prison environment." From the beginning of his tenure on the Court, he tried to protect those precious personal freedoms by which the inmate may capture the human spirit. He sought to educate the public that:

When the prison gates slam behind an inmate, he does not lose his human quality; his mind does not become closed to ideas; his intellect does not cease to feed on a free and open interchange of opinions; his yearning for self-respect does not end; nor is his quest for self-realization concluded.

Justice Marshall recognized that by moving the Constitution into the correctional facility, he could redefine the relationship between the imprisoned and his jailor and help mold the society in which they and we live. He applauded the activist role of the federal bench and vigorously opposed the Court's deference approach. He confronted the bleakness of daily prison existence, trying to bring prison life into contact with the outside world.

Marshall's experience as a young lawyer representing black defendants surely accounted for his passion for prison reform. He,

that the permanent practice of "double ceiling" at the Southern Ohio Correctional Facility (SOCF) constituted cruel and unusual punishment. Id. at 375. For a discussion of Rhodes, see infra notes 55-104 and accompanying text.

4. See, e.g., id. at 377 ("A society must punish those who transgress its rules. When the offense is severe, the punishment should be of proportionate severity. But the punishment must always be administered within the limitations set down by the Constitution.").


6. Id.

7. See, e.g., Rhodes, 452 U.S. at 375 (Marshall, J., dissenting) (warning that "the majority's admonitions might eviscerate the federal courts' traditional role of preventing a State from imposing cruel and unusual punishment through its conditions of confinement").

8. See, e.g., Martinez, 416 U.S. at 422-28 (Marshall, J., concurring) (noting that a prisoner's mail provides an essential tie to the outside world and should be afforded a degree of privacy).

9. See Tracey Maclin, Justice Thurgood Marshall: Taking the Fourth Amendment Seriously, 77 CORNELL L. REV. 723, 726-27 (1992) ("Marshall's experiences as a young lawyer confronting police officials and representing black defendants probably account for some of his views on the death penalty, the relevance of the Fifth Amendment privilege against self-incrimination to police interrogation practices, and the importance of the Sixth Amendment's guarantee of effective counsel in criminal cases.") (footnotes omitted).
more than any of his colleagues, understood the impact of the prison system on the African-American community. Perhaps, like his successor, Justice Clarence Thomas, he thought he could walk in the shoes of the prisoners who are affected by what the Court does.

Despite his many years on the bench, at a time when the Court was actively developing its prison jurisprudence, a good portion of Justice Marshall's philosophy is expressed in dissenting opinions. In these opinions, he called the public's attention to the degrading circumstances of prison life. Justice Marshall's rulings continually challenged his colleagues to make the Constitution fulfill its promise to all minorities. He left the bench with an enviable record of prison reform opinions. The objective of this Article is to explore Justice Marshall's prison jurisprudence, confident that his message will resonate in the future work of the Court.


You know, on my current court, I have occasion to look out the window that faces C Street, and there are converted buses that bring in the criminal defendants to our criminal justice system, busload after busload. And you look out, and you say to yourself, and I say to myself almost every day, But for the grace of God there go I.

So you feel that you have the same fate, or could have, as those individuals. So I can walk in their shoes, and I can bring something different to the Court. And I think it is a tremendous responsibility, and it is a humbling responsibility; and it is one that, if confirmed, I will carry out to the best of my ability.

Id.


13. See supra note 12.

14. The ethic of Justice Marshall's prison jurisprudence is reflected in several recent decisions of the Court. See, e.g., Farmer v. Brennan, 114 S. Ct. 1970, 1979 (1994) (holding that a prison official may be held liable under the Eighth Amendment if he knows of and disregards a substantial risk of serious harm to an inmate); Helling v. McKinney, 509 U.S. 25, 35 (1993) (holding that a prisoner's involuntary exposure to cigarette smoke can form the basis of a claim for relief under the Eighth Amendment); see also infra notes 354-370 and accompanying text.
II. OPENING A PATHWAY INTO THE PENITENTIARY

In the early years of the Republic, courts simply did not conceive of the Constitution as protecting prisoners from harsh treatment.\textsuperscript{15} The criminal offender was regarded as a “slave of the State.”\textsuperscript{16} More recently, the judicial attitude supported a policy of noninterference in prison affairs. This policy, generally referred to as the “hands-off” doctrine, made it virtually impossible for prisoners to get judicial relief from harsh living conditions and needlessly cruel punishment.\textsuperscript{17} There were numerous occasions when courts absolutely refused to consider the severe and demeaning conditions of prison life.\textsuperscript{18} The judiciary explained that it had no role in regulating prisons.

In the late 1960s and early 1970s, federal judges began to learn about the barbaric conditions in state penitentiaries.\textsuperscript{19} Their exposure to the horrors committed in prisons resulted in a general shift in prisoners’ rights jurisprudence away from the traditional hands-off doctrine.\textsuperscript{20} The most striking development in prison law was the federal bench’s recognition that state prisoners were entitled to minimum constitutional standards during confinement.\textsuperscript{21} A minor revolution occurred, and the principal means used to secure decent prison conditions resulted from interpretation of the Cruel and Unusual Punishments Clause of the Eighth Amendment.\textsuperscript{22} Going beyond

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\item[\textsuperscript{15}] See Hudson v. McMillian, 503 U.S. 1, 18-20 (1992) (Thomas, J., dissenting).
\item[\textsuperscript{16}] Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 796 (1871).
\item[\textsuperscript{17}] For a historical review of the “hands-off” doctrine, see Note, Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts, 72 Yale L.J. 506 (1963).
\item[\textsuperscript{18}] See, e.g., Banning v. Looney, 213 F.2d 771, 771 (10th Cir. 1954) (per curiam) (“Courts are without power to supervise prison administration or to interfere with the ordinary prison rules or regulations.”).
\item[\textsuperscript{20}] See, e.g., Hutto v. Finney, 437 U.S. 678, 681 (1978) (approving the lower court’s comprehensive order demanding changes in the prison system); Estelle v. Gamble, 429 U.S. 97, 105 (1976) (concluding that “deliberate indifference to a prisoner’s serious illness or injury states a cause of action under [42 U.S.C.] § 1983”); Battle v. Anderson, 564 F.2d 388, 409 (10th Cir. 1977) (recognizing the need for federal intervention where “there is displayed a clear failure by the State to take cognizance of an inmate’s valid federal constitutional rights”); Gates v. Collier, 501 F.2d 1291, 1212-22 (5th Cir. 1974) (holding that inhumane prison conditions and practices amounted to “gross constitutional violations” and justified the court’s equitable remedies).
\item[\textsuperscript{21}] For a general discussion of the rise of the American penitentiary system and the development of prisoners’ rights, see Melvin Gutterman, Prison Objectives and Human Dignity: Reaching a Mutual Accommodation, 1992 BYU L. Rev. 857 (1992).
\item[\textsuperscript{22}] The Eighth Amendment provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. Const. amend. VIII. For a comprehensive analysis of Eighth Amendment prison jurisprudence, see Mel-
their traditional role, federal judges examined prisons in great detail, fashioning remedies that touched on nearly every aspect of prison life and ordering comprehensive reform.28

Justice Marshall certainly was aware of Chief Judge Henley's discovery regarding the archaic prison system in Arkansas, where "confine[ment] in the Penitentiary involve[d] living under degrading and disgusting conditions."24 Prisoners were tortured by electrical shocks and beaten with leather straps.25 Faced with the threat of death, they were forced to work ten hours a day, six days a week, sometimes in inclement weather and without adequate clothing.26 “Trusty guards” had control over the life and death of the inmate.27 It was within their power to murder an inmate with impunity.28 Trying to escape forcible sexual violence and stabbing, the inmates in the barracks would “cling to the bars all night.”29 A sentence in the Arkansas penitentiary amounted to “banishment from civilized society to a dark and evil world completely alien to the free world.”30

Surely, Justice Marshall also read Chief Judge Frank Johnson's opinion detailing the severely overcrowded conditions of Alabama's


25. See id. at 372.

26. See id. at 370.

27. A “trusty guard” is an inmate with administrative responsibilities. See id. at 373-76.

28. See id. at 374. Prisoners at Parchman, a Mississippi state penitentiary, experienced similar destructive conditions. See Gates v. Collier, 349 F. Supp. 881, 887-92 (N.D. Miss. 1972), aff’d, 501 F.2d 1291 (5th Cir. 1974). The danger of prisoner mistreatment by armed trusty guards and other inmates forced a federal judge to find the housing at Parchman "unfit for human habitation under any modern concept of decency. The facilities at all camps for the disposal of human and other waste are shockingly inadequate and present an immediate health hazard." Id. at 887. Regarding the competency of the trusty guards, the court stated:

Penitentiary records indicate that many of the armed trusties have been convicted of violent crimes, and that of the armed trusties serving as of April 1, 1971, 35% had not been psychologically tested, 40% of those tested were found to be retarded, and 71% of those tested were found to have personality disorders.

Id. at 889.


30. Id. at 381. Even today, remnants of the brutal power exercised by trusties and condoned by prison officials survive. See Aric Press, Inside America's Toughest Prison, Newsweek, Oct. 6, 1986, at 46 (telling the gripping story of brutal treatment of Texas penitentiary inmates).
penitentiaries—a penal system in which inmates were required to sleep on mattresses placed on the floors in hallways and next to urinals. Food was often infested with insects and served without adequate utensils. In Alabama jails, inmates were raped and assaulted on a daily basis.

Penal institutions had lost their rehabilitative purpose; nevertheless, they continued to serve their purely custodial function as a warehouse for the convicted. Lower federal court judges had seen and had tried to deal with the complicated and intractable problems in state penitentiaries. By the time the Supreme Court agreed to consider the principles relevant to prison confinement claims, Justice Marshall knew that conditions within many American prisons made the system a national disgrace. He learned that entire prison systems in at least twenty-four states had been declared unconstitutional. As the Court was slowly being pulled into the arena, Justice Marshall was fully aware of the need to reform the prisons.

In one of his first prisoners' rights opinions, *Bounds v. Smith*, Justice Marshall strove to ensure that unschooled, indigent inmates

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**Notes:**
32. *See id.* at 323.
33. *See id.*
36. *See Rhodes v. Chapman*, 452 U.S. 337, 353-54 n.1 (1981) (Brennan, J., concurring) (listing the states in which prisons or prison systems had been placed under court order because of Eighth and Fourteenth Amendment challenges).
37. Prison conditions opinions, such as the following, abounded with dismay and moral outrage:

This memorandum opinion has, at some length, cited and summarized the evidence indicating the existence of these constitutional violations. But it is impossible for a written opinion to convey the pernicious conditions and the pain and degradation which ordinary inmates suffer within TDC prison walls—the gruesome experiences of youthful first offenders forcibly raped; the cruel and justifiable fears of inmates, wondering when they will be called upon to defend the next violent assault; the sheer misery, the discomfort, the wholesale loss of privacy for prisoners housed with one, two, or three others in a forty-five-foot cell or suffocatingly packed together in a crowded dormitory; the physical suffering and wretched psychological stress which must be endured by those sick or injured who cannot obtain adequate medical care . . .

have meaningful access to the courts. He sought to place before the courts, and ultimately the public, these inmates' claims of abuse of power and unconstitutional conditions of confinement. Justice Marshall believed an informed citizenry would improve our prisons. To promote the inmates' cause, he imposed an affirmative duty on prison officials "to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." He believed that a pro se inmate needs essential research tools as much as any lawyer. To the lament that it was too expensive, Marshall's reply was straightforward: "[T]he cost of protecting a constitutional right cannot justify its total denial." Bounds opened the federal dockets to prisoners with complaints of mistreatment and deprivation of constitutional rights. Most important, Bounds proclaimed that prisoners had a "fundamental constitutional right of access to the courts."

III. PRISON OVERCROWDING: DETERIORATION OF THE INMATES' MENTAL AND PHYSICAL HEALTH

Although the State has the power to punish, the Eighth Amendment stands to ensure that this power is exercised within the limits of civilized standards. The Supreme Court has stated: "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man." Marshall's close colleague, Justice Brennan, concluded that in death penalty cases the State "must treat its mem-

39. See id. at 821-32.
40. See id.
41. See, e.g., Gregg v. Georgia, 428 U.S. 153, 232 (1976) (Marshall, J., dissenting) (stating that a public "fully informed as to the purposes of the death penalty and its liabilities, would . . . reject it as morally unacceptable").
42. Bounds, 430 U.S. at 828.
43. Id. at 825-26.
44. Id. at 825.
45. See id. at 825, 827.
46. Id. at 828. In his dissenting opinion, Justice Rehnquist criticized the Court's announcement in Bounds as being "created virtually out of whole cloth with little or no reference to the Constitution from which it is supposed to be derived." Id. at 840 (Rehnquist, J., dissenting).

The Court shed light on Bounds in Lewis v. Casey, 116 S. Ct. 2174 (1996), holding that to establish a Bounds violation, an inmate must demonstrate an "actual injury." Casey, 116 S. Ct. at 2180. "Insofar as the right indicated by Bounds is concerned, 'meaningful access to the courts is the touchstone' and the inmate therefore must go one step further and demonstrate that the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim." Id. (citation omitted) (quoting Bounds, 430 U.S. at 829).
47. See generally Gutterman, supra note 22.
bers with respect for their intrinsic worth as human beings. A punishment [such as the death penalty] is ‘cruel and unusual,’ therefore, if it does not comport with human dignity.\textsuperscript{49}

These concepts underlie not only Eighth Amendment death penalty issues; Justice Marshall considered them to be a suitable test to measure those values retained in the prison setting.\textsuperscript{50} Marshall was always mindful of the State’s obligation to treat its prisoners with decency and humanity.\textsuperscript{51} He realized that demeaning and demoralizing prisoners is the worst way to prepare them for the outside world. It was evident to him that prison practices affect more than the integrity of the body; they influence the soul of the prisoner—his status as a person deserving some quantum of respect.\textsuperscript{52}

In the Supreme Court’s first full-fledged opportunity to review prison conditions,\textsuperscript{53} the Justices split on the role the federal judiciary should play in state corrections.\textsuperscript{54} \textit{Rhodes v. Chapman}\textsuperscript{55} presented an easy target for the Court majority bent on controlling the activist role of the federal bench. The Southern Ohio Correctional Facility (SOCF), the only maximum security prison in Ohio, was described by the district court, “from a brick and mortar viewpoint,” as “unques-

\textsuperscript{49}. Furman v. Georgia, 408 U.S. 238, 270 (1972) (Brennan, J., concurring).
\textsuperscript{51}. See id. at 372.
\textsuperscript{53}. Although the Court, in \textit{Estelle v. Gamble}, 429 U.S. 97 (1976), established that prison officials had an obligation to provide medical care to inmates and that “deliberate indifference to serious medical needs of prisoners constitutes the ‘unnecessary and wanton infliction of pain’ proscribed by the Eighth Amendment,” the decision advanced a relatively narrow principle. \textit{Id.} at 104 (citation omitted) (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976) (plurality opinion)). The Court in \textit{Rhodes} believed it had a fresh slate on which to consider prison conditions in the context of the Eighth Amendment. \textit{Rhodes}, 452 U.S. at 344-45.
\textsuperscript{54}. Prior to \textit{Rhodes}, \textit{Bell v. Wolfish}, 441 U.S. 520 (1979), was the Court’s most important prison conditions case. In \textit{Wolfish}, the Court considered a number of corrections practices, including double celling at the Metropolitan Correction Center (MCC) in New York. \textit{Id.} at 530. This federal, short-term, custodial facility “was intended to include the most advanced and innovative features of modern design of detention facilities.” \textit{Id.} at 525. The facility had “no barred cells, dank, colorless corridors, or clanging steel gates.” \textit{Id.} Justice Rehnquist, writing for the majority, held that double celling at MCC was not unconstitutional, thereby rejecting the notion that “there is some sort of ‘one man, one cell’ principle lurking in the Due Process Clause of the Fifth Amendment.” \textit{Id.} at 542. Noting the size of the cells (seventy-five square feet), the short-term confinement period for most of the inmates, and the amount of time the inmates could spend outside of their cells, the Court held that double celling did not violate constitutional norms. \textit{Id.} at 543. For a discussion of the specific constitutional challenges involved in \textit{Wolfish}, see \textit{infra} notes 234-304 and accompanying text.
tionably a top-flight, first-class facility. It was built in the early 1970s and had a superior law library, as well as school facilities, workshops, a forty-bed hospital, and outdoor recreational and visitation areas. Its cells were approximately sixty-three square feet in size, containing a bed, or bunkbed if double celled, in addition to a cabinet-type nightstand, a wall cabinet, a lavatory with hot and cold running water, a commode flushed from inside the cell, a radio, and a ventilation duct. Each cell block contained a day room “designed to furnish that type of recreation or occupation which an ordinary citizen would seek in his living room or den.” In short, SOCF was atypical of the sort of institutions with which federal courts had traditionally been involved. Its major failing was the practice of “double celling” prisoners because of overcrowding. By 1977, 1400 of the prison’s 2300 inmates were sharing cells. The congestion had not overwhelmed SOCF’s facilities or staff. It had not significantly reduced the availability of space for visitation or for stays in the day rooms, nor had it rendered the library resources inadequate, although inmate job opportunities had decreased. There was no indifference to medical or dental needs by the staff, although there were isolated instances of neglect. In spite of these “generally favorable findings,” the district court found double celling at SOCF to be cruel and unusual punishment.

The Supreme Court majority disagreed, finding no constitutional mandate for “comfortable prisons.” The majority emphasized that prison conditions must be extreme to constitute cruel and unusual punishment. Harsh prison conditions may be the penalty the inmate must pay for his crime. Double celling at SOCF did not increase violence among inmates, nor did it “lead to deprivations of essential food, medical care, or sanitation.” The Court noted that

57. See id. at 1010-11.
58. Rhodes, 452 U.S. at 341.
60. Id.
61. Id.
62. Id. at 342-43.
63. Id.
64. Id.
65. Id. at 343.
66. Id. at 349.
67. Id. at 348-49.
68. Id. at 347.
69. Id. at 348.
prison conditions must be judged by "'evolving standards of decency'"70 and that whatever discomfort double celling might have caused, it fell far short of violating the Constitution.71 Moreover, Eighth Amendment judgments are not simply based on the subjective values of judges, and although "aspiration[s] toward an ideal environment" may be appropriate, these considerations are more properly weighed by the legislature and correctional authorities than by the Court.72 The Court determined that virtually all of the district court's findings tended to refute, rather than support, the prisoners' claims of cruel punishment.73 Finding no constitutional violations at SOCF, the majority concluded that federal courts had no authority to decide whether double celling was the best solution to the state's growing prison population.74 To control the activist federal bench, the Rhodes majority counseled caution and the need for deference to prison administrators and state legislatures.75

Although eight Justices were in general agreement as to the result in Rhodes, Justice Marshall clearly was not.76 From his perspective, SOCF was not merely overpopulated; it was unhealthy and dangerous.77 As the sole dissenter in Rhodes, he fervently disagreed that the facility described by the majority was the one in which the prisoners actually lived out their daily existence.78 He believed it significant that the prison was so severely overcrowded that it was operating at thirty-eight percent above its design capacity.79 Moreover, double celling was not a temporary solution at SOCF, but would continue for the foreseeable future, with many of the facility's inmates spending most of their time in their cells.80 Marshall saw this as more than just a case concerning the constitutionality of double bunking.81

Frustrated with the majority's reading of the record, Justice Marshall stated that it was "simply not true," as the majority claimed, that there was no evidence that the prisoners had suffered "unnecessary or wanton pain."82 Marshall was more impressed by "[t]he conclusion of
every expert who testified at trial and of every serious study . . . that a long-term inmate must have to himself, at the very least, 50 square feet of floor space . . . in order to avoid serious mental, emotional, and physical deterioration."  

He agreed with the experts' testimony that these "'close quarters'" would likely increase the incidents of mental disorders and that double ceiling had increased tension and "'aggressive and anti-social characteristics.'" Two courts had already concluded that overcrowding and double ceiling at SOCF were severe enough to cause a deterioration of the prisoners' physical and mental health. Marshall agreed with these courts that the permanent practice of double ceiling at SOCF was cruel and unusual punishment. He knew that prisoners had the capacity to progress or degenerate in response to their environment. Marshall intended for the Eighth Amendment to protect the inmate from an environment where existing conditions made deterioration probable and progress toward rehabilitation unlikely.

Rhodes was significant in that it revealed the Justices' respective positions in the battle over the federal judicial role in assessing state prison conditions. The Court's jurisprudence was crystal clear. The principles of federalism required a proper respect for a state's control over its prisons—the federal courts may intervene in state correctional matters, but only grudgingly, even in the face of extremely harsh prison conditions. Rhodes effectively undermined the federal court

83. Id. at 371.
84. Id. at 374 n.7 (quoting Chapman v. Rhodes, 434 F. Supp. 1007, 1017 (S.D. Ohio 1977), aff'd mem., 624 F.2d 1099 (6th Cir. 1980), rev'd, 452 U.S. 337 (1981)).
85. Id. at 375 (referring to the district court's decision in Chapman v. Rhodes, 434 F. Supp. 1007 (S.D. Ohio 1977) and to the Court of Appeals for the Sixth Circuit's affirmance of that opinion in Chapman v. Rhodes, 624 F.2d 1099 (6th Cir. 1980) (mem.)).
86. Id.
87. Id.
88. See Battle v. Anderson, 564 F.2d 388, 393 (10th Cir. 1977). Drawing on Marshall's opinion in Estelle v. Gamble, 429 U.S. 97 (1976), the Court of Appeals for the Tenth Circuit asserted that the Eighth Amendment is "intended to protect and safeguard a prison inmate from an environment where degeneration is probable and self-improvement unlikely because of the conditions existing which inflict needless suffering, whether physical or mental." Battle, 564 F.2d at 393.
89. By its rhetoric and tone, Rhodes was meant to discourage activism by the lower federal courts. See Rhodes, 452 U.S. at 351-52. However, several Justices were apprehensive that the wrong message was being sent. See id. at 352-68 (Brennan, J., concurring), 368-69 (Blackmun, J., concurring), 369-77 (Marshall, J., dissenting). Justice Brennan emphasized that Rhodes should not be considered a retreat from the lower federal courts' careful scrutiny of prison conditions. Id. at 353 (Brennan, J., concurring).
90. See Gutterman, supra note 21, at 901-05.
leadership that had pressed for physical improvements in state prisons across the nation.91

The Rhodes majority added to the Eighth Amendment formula an additional ingredient that clearly frightened Justice Marshall—the requirement of deference.92 Marshall was terribly concerned with Rhodes's limited concept of federal responsibility for protecting state inmates' Eighth Amendment rights.93 He feared that the majority theory would "eviscerate" the federal judicial role in actively reviewing state prison conditions.94 His experience had shown that deference to governmental decisions leads to minimization of constitutional rights.95 He believed that the majority had taken "far too sanguine a view of the motivations of state legislators and prison officials."96 Justice Marshall tried to open the Court's eyes to the political realities.97 He reminded the majority that in the climate of the day—one of lock them up and throw away the keys98—it was "unrealistic to expect legislators to care whether the prisons are overcrowded or harmful to inmate health."99 He observed that "[t]oo often, state governments truly are 'insensitive to the requirements of the Eighth Amendment,' as is evidenced by the repeated need for federal intervention to protect the rights of inmates."100 Although the Rhodes majority took steps

91. See id.
92. See id. at 898-905.
94. Id. at 375. In Block v. Rutherford, 468 U.S. 576 (1984), Justice Blackmun also articulated his concern that the Court had embarked on a process of "substitut[ing] the rhetoric of judicial deference for meaningful scrutiny of constitutional claims in the prison setting." Id. at 593 (Blackmun, J., concurring). Acknowledging that there may sometimes be a danger of excessive court activism, Justice Blackmun encapsulated his view of the Court's current direction by concluding that "careless invocations of 'deference' run the risk of returning us to the passivity of several decades ago, when the then-prevailing barbarism and squalor of many prisons were met with a judicial blind eye and a 'hands off' approach." Id. at 594.
95. See Maclin, supra note 9, at 724 ("General trust in governmental power or deference to governmental decisions may lead one to minimize constitutional liberties or view them as tools for efficient law enforcement.").
97. See id. at 377.
98. See supra note 1 and accompanying text.
99. Rhodes, 452 U.S. at 377 (Marshall, J., dissenting). Several southern states have revived a shameful relic of the past—the shackling of inmates on work details. See Senate Must Cool Chain-Gang Steam, ATLANTA J. & CONST., Feb. 20, 1996, at A8, available in 1996 WL 8190580. Spurred by the public's fear of crime, states have resurrected chain gangs, not as a measure to control crime, but strictly for public show. See id. In the states where the prison population is overwhelmingly black, the comparison to slavery and the impact on the African-American community is evident. See id.
100. Rhodes, 452 U.S. at 376 (Marshall, J., dissenting) (citing to the majority opinion in Rhodes, 452 U.S. at 352, wherein the Court stated that in fulfilling their obligation to pro-
toward abandoning state prisoners, Justice Marshall clearly would not. He alone on the Court was willing to consider the long-term effects of double celling on inmates, staff, and facilities. Prophetically, when the Supreme Court overturned the lower court's depopulation order, the inmate population grew dramatically. The new warden despondently remarked: "We won, but I lost." The warden fully appreciated that sometimes nothing fails like success.

IV. FOURTEENTH AMENDMENT LIBERTY INTERESTS

In the highly restrictive prison environment, liberties that may be taken for granted in a free society assume heightened importance. The freedom to pursue religious beliefs, the right to read a book, the ability to write and receive letters from friends, and the opportunity to see and embrace family members all provide "a vital link between the inmate and the outside world." These simple freedoms help to cultivate the inmate's mind, providing a respite from "the blankness and bleakness of his environment," and help to facilitate rehabilitation.

In Wolff v. McDonnell, an opinion that studied a state prison's disciplinary practices, the Court asserted that there was to be "no iron curtain drawn between the Constitution and the prisons of this country." The prisoner, the Court firmly declared, is not totally stripped of constitutional protections and liberties when he is imprisoned. The Wolff majority proclaimed that, although confinement may diminish specific constitutional guarantees, including Fourteenth Amendment freedoms, a "mutual accommodation between institutional needs and objectives and the provisions of the Constitution" must be struck. The Wolff Court evaluated the prisoner's claim to maintain the "good-time credit" he had accrued and rejected the
state’s assertion that the prisoner’s stake in disciplinary procedures is not a liberty interest protected by the Due Process Clause of the Fourteenth Amendment. Moreover, the Court found that the protected liberty interest had its origins in state law; therefore, the prisoner’s investment in his good-time credit “had real substance and [was] sufficiently embraced within Fourteenth Amendment ‘liberty.’” The Wolff Court recognized that minimum procedures were required by the Due Process Clause “to insure that the state-created right [was] not arbitrarily abrogated.”

The Court in Wolff identified two sources of constitutional liberty interests protected by due process rights: those derived directly from the Fourteenth Amendment and those the state creates through its laws and regulations. Specifically, the Wolff Court held that although the Fourteenth Amendment Due Process Clause does not contain a liberty right to maintain credit for good behavior, the state statute mandating reduced sentences for good behavior did. Once the state awards these rights, they may not be taken away without heeding the requirements of due process.

The Court’s moderate theory of retained liberty rights derived directly from the Fourteenth Amendment proved short-lived. For example, two years after Wolff, in Meachum v. Fano, the key issue was whether a state prisoner could be transferred to a substantially more restrictive prison absent a fact-finding hearing on alleged misconduct. The Court rejected the concept that “any grievous loss visited upon a [state prisoner] by the State is sufficient to invoke the proce-

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112. Id. at 556-57. The Due Process Clause of the Fourteenth Amendment provides that a state may not “deprive any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV, § 1.

113. Wolff, 418 U.S. at 557. The state itself created the right to good-time credit toward early release from prison and recognized that its deprivation could only be sanctioned by major misconduct. Id. The prisoner’s interest, therefore, had real substance that sufficiently placed him within the pale of Fourteenth Amendment “liberty” and entitled him to minimum procedural due process. Id.

114. Id.

115. Id. at 556-57.

116. Id.

117. Id.


119. Id. at 216. The transfers occurred after a period of unrest at the Massachusetts Correctional Institution at Norfolk when several fires erupted, which officials suspected had been set by the inmates. Id. at 216-17. The corrections authorities, after reviewing the classification board’s recommendations, transferred six inmates to the Walpole and Bridgewater facilities, where living conditions were “substantially more adverse” than at Norfolk. Fano v. Meachum, 387 F. Supp. 664, 666-67 (D. Mass. 1975), aff’d, 520 F.2d 374 (1st Cir. 1975) (2-1 decision), rev’d, Meachum v. Fano, 427 U.S. 215 (1976).
dural protections of the Due Process Clause."\textsuperscript{120} The prisoner's conviction, the Court held, "sufficiently extinguished" his liberty, permitting the state to confine him in any of its prisons.\textsuperscript{121} The state law conferred no right on the inmate to remain in the prison to which he was initially confined, and whatever expectation he may have had was "too ephemeral and insubstantial to trigger procedural due process protections."\textsuperscript{122} In short, Wolff's limited liberty theory did not apply to prison transfers, even those sparked by alleged misconduct.\textsuperscript{123} Therefore, prison officials retained unfettered discretion to transfer prisoners for any reason or, more draconian, for no reason at all.\textsuperscript{124}

Several years later, in \textit{Hewitt v. Helms},\textsuperscript{125} the Court once again commented on its highly restrictive liberty theory. The state inmate, Helms, was believed to have participated in a riot and was consequently confined to a segregation unit pending investigation into his role in the uprising.\textsuperscript{126} In evaluating his claim to remain in a general population cell, the Court rejected the theory that this was a right protected by the Due Process Clause.\textsuperscript{127} The Court characterized Helms's transfer from the general population cell to the more restrictive administrative segregation quarters as the sort of confinement inmates should reasonably anticipate receiving at some point in their incarceration.\textsuperscript{128}

The Court has continually declined to delineate the hierarchy of significant liberty interests protected by the Fourteenth Amendment Due Process Clause, consistently refusing to recognize anything more than the most basic liberty interests.\textsuperscript{129} In \textit{Vitek v. Jones},\textsuperscript{130} the Court recognized one such interest, concluding that a state prisoner possesses a significant Fourteenth Amendment liberty interest in avoiding involuntary transfer to a state mental institution for treatment of a

\begin{itemize}
  \item \textsuperscript{121} \textit{Meachum}, 427 U.S. at 224.
  \item \textsuperscript{122} \textit{Id.} at 228.
  \item \textsuperscript{123} \textit{Id.} at 225-26.
  \item \textsuperscript{124} \textit{Id.} at 228. The Court distinguished \textit{Wolff} in that "[t]he liberty interest protected in \textit{Wolff} had its roots in state law," and the minimum procedures required there were to protect a state-created right. \textit{Id.} at 226. In \textit{Meachum}, "[t]he predicate for invoking the protection of the Fourteenth Amendment as construed and applied in \textit{Wolff} v. McDonnell is totally nonexistent." \textit{Id.} at 227.
  \item \textsuperscript{125} 459 U.S. 460 (1983).
  \item \textsuperscript{126} \textit{Id.} at 463-64.
  \item \textsuperscript{127} \textit{Id.} at 467.
  \item \textsuperscript{128} \textit{Id.} at 468.
  \item \textsuperscript{129} See \textit{id.} at 467.
  \item \textsuperscript{130} 445 U.S. 480 (1980).
\end{itemize}
mental disease. The stigma associated with involuntary transfer to a mental hospital, coupled with "mandatory behavior modification as a treatment for mental illness," was meaningfully different from the punishment characteristically suffered by a person convicted of a crime. Likewise, in Washington v. Harper, the Court concluded that, independent of any regulation, an inmate had a significant liberty interest in being protected from the unwanted administration of psychotropic drugs. The Court's treatment of mentally disturbed state prisoners is unique, however, because in virtually all other circumstances, the states' interests in unhindered control of their prisons has invariably prevailed.

The Court's methodology was now clear: except for the most basic of liberty interests, a prisoner would not gain any substantive protection from the Fourteenth Amendment Due Process Clause. Regarding state regulations, the Court ceased to examine the nature of the liberty lost, wrestling only with the language of the relevant statutes to determine if there was a state-created substantive liberty interest. The Court found that a state may create enforceable liberty interests in the prison setting by using "'explicitly mandatory [statutory] language'" limiting correctional officials' discretion. The Court's continued focus on the "mechanical dichotomy" between state regulations that were mandatory and those that were merely discretionary encouraged prisoners to scrutinize state regulations in search of mandatory language on which to base their entitlement

131. Id. at 488.
132. Id. at 494.
134. Id. at 221-22. However, the Court held that, "given the requirements of the prison environment, the Due Process Clause permits the State to treat a prison inmate who has a serious mental illness with antipsychotic drugs against his will, if the inmate is dangerous to himself or others and the treatment is in the inmate's medical interest." Id. at 227. Furthermore, the Special Offender Center's policy was "neither arbitrary nor erroneous" and satisfied the procedural protections required by the Due Process Clause. Id. at 228. This was so even though the decision to medicate an inmate against his will was made at a hearing by medical professionals, rather than by a judge. Id. at 228-95.
135. See, e.g., Sandin v. Conner, 115 S. Ct. 2293, 2299 (1995) ("[F]ederal courts ought to afford appropriate deference and flexibility to state officials trying to manage a volatile environment.") (citations omitted); Hewitt v. Helms, 459 U.S. 460, 470 (1983) (stating that prison operations have "traditionally been entrusted to the expertise of prison officials") (citation omitted); Meachum v. Fano, 427 U.S. 215, 225 (1976) (finding that subjecting all deprivations to judicial review would invade the "business of prison administrators").
136. In Kentucky Department of Corrections v. Thompson, 490 U.S. 454, 459-63 (1989), Justice Blackmun summarized the Court's history of prisoners' liberties protected by the Due Process Clause. For a discussion of Thompson, see infra notes 162-178 and accompanying text.
137. Thompson, 490 U.S. at 463 (quoting Hewitt, 459 U.S. at 472).
claims. For states interested in more uniform treatment, this created a disincentive to codify their prison management procedures. The net effect was to inject federal courts into the micro-management of prisons, thereby upsetting the balance between appropriate deference to the expertise of prison administrators and the effectiveness of judicial oversight.

Weary of the number of trivial claims this perfunctory approach encouraged and showing a lack of sympathy for the prisoners' plight, the Court abandoned its language-based analysis in *Sandin v. Conner,* thereby increasing the burden upon prisoners challenging prison administration actions. Although the Court continued to acknowledge that due process protection for liberty interests may spring from two sources, it narrowed the category of state-created interests:

> These interests will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.

Because the prisoners' disciplinary segregations in *Conner* were, with "insignificant exceptions," the same as those imposed on inmates placed in discretionary confinement for administrative or protective reasons, they were not unusual, significant deprivations that would satisfy the standard for any state-created liberty interest.

As expected, Justice Marshall's view of protected liberty was very different from that of the Court majorities. Although he did not write in the early prison liberty interest case of *Meachum,* he joined Justice Stevens's dissent. For Stevens and Marshall, it was self-evident that the source of liberty protected by the Constitution was natural law: "[A]ll men were endowed by their Creator with liberty as one of the cardinal unalienable rights. It is that basic freedom which the Due Process Clause protects, rather than the particular rights or privi-

139. See id. at 2299.
141. Id. at 2300.
142. Id. (citations omitted) (emphasis added).
143. Id. at 2301.
leges conferred by specific laws or regulations.” For the dissenting Justices, it “demean[ed] the concept of liberty itself—to ascribe to [it] nothing more than a protection of an interest that the State has created through its own [laws or] prison regulations.” To them, it was clear that “the inmate retains an unalienable interest in liberty—at the very minimum the right to be treated with dignity—which the Constitution may never ignore.” Trying to identify the residuum of liberty an inmate retains in the prison environment was understandably a difficult task. The dissenters were convinced, however, that at a minimum a prisoner “has a protected right to pursue his limited rehabilitative goals” and “to maintain whatever attributes of dignity” he can as an inmate in a “tightly controlled society.” Certainly, Justice Stevens also reflected Justice Marshall’s view when he explained that if an inmate’s liberty was “no greater than the State chooses to allow, he is really little more than the slave described in the 19th century cases.”

More direct insight into Justice Marshall’s concept of prisoners’ liberty rights can be found in his dissent in Olim v. Wakinekona. Applying the principles developed in Meachum, a majority of the Court decided that the transfer of a prisoner from a state prison in Hawaii to one in California implicated no Fourteenth Amendment liberty interest. Justice Marshall did not agree with the majority that the inmate’s liberty interest was merely a function of the state’s beneficence. In his calculus, it was the Fourteenth Amendment liberty right itself, not the language of Hawaii’s regulations, that was the source of the protection due Wakinekona. In Marshall’s estimation, to determine if a change in conditions of imprisonment implicates an inmate’s liberty interest, “the relevant question is whether the change constitutes a sufficiently ‘grievous loss’ to trigger the protec-

146. Id. at 230.
147. Id. at 233.
148. Id.
149. Id. at 234.
150. Id. at 233.
152. See supra notes 118-124 and accompanying text.
154. Id. at 251 (Marshall, J., dissenting).
tion of due process.\textsuperscript{156} The answer depends in part on a comparison of 'the treatment of the particular prisoner with the customary, habitual treatment of the population of the prison as a whole.'\textsuperscript{157} Justice Marshall would not "agree that a State may transfer its prisoners at will, to any place, for any reason, without ever implicating any interest in liberty protected by the Due Process Clause."\textsuperscript{158}

One might ask why these rights, with their concomitant procedural safeguards, were so important to Justice Marshall. Plainly, he could once again imagine what a person feels under the circumstances.\textsuperscript{159} He chronicled the range of possible detrimental effects on the transferred prisoner:

For an indeterminate period of time, possibly the rest of his life, nearly 2,500 miles of ocean will separate him from his family and friends. As a practical matter, Wakinekona may be entirely cut off from his only contacts with the outside world, just as if he had been imprisoned in an institution which prohibited visits by outsiders. Surely the isolation imposed on him by the transfer is far more drastic than that which normally accompanies imprisonment.\textsuperscript{160}

Marshall was keenly aware that the inmate, Wakinekona, had "in effect been banished from his home, a punishment historically considered to be 'among the severest.'"\textsuperscript{161}

Justice Marshall revisited the issue of prisoners' liberty rights in \textit{Kentucky Department of Corrections v. Thompson},\textsuperscript{162} a decision that again highlighted the Court's diverse perspectives on the liberty protected by the Fourteenth Amendment.\textsuperscript{163} The majority's analysis began by asserting that it could not seriously be contended that an inmate has unfettered visitation privileges guaranteed by the Constitution; therefore, "[t]he denial of prison access to a particular visitor 'is well within the terms of confinement ordinarily contemplated by a prison sen-

\begin{itemize}
\item \textsuperscript{156} \textit{Olim}, 461 U.S. at 252 (Marshall, J., dissenting) (citation omitted) (quoting \textit{Vitek v. Jones}, 445 U.S. 480, 488 (1980)).
\item \textsuperscript{157} \textit{Id.} (quoting \textit{Hewitt v. Helms}, 459 U.S. 460, 486 (1988) (Stevens, J., dissenting)).
\item \textsuperscript{158} \textit{Id.} at 254. Justice Marshall also could not agree with the majority's conclusion that Hawaii's prison regulation did not create a liberty interest. \textit{Id.} at 254-59. He concluded that Hawaii's prison classification regulations were cast in mandatory language taking away prison officials' unfettered discretion to transfer inmates. \textit{Id.} at 255-56.
\item \textsuperscript{159} See \textit{id.} at 252-53.
\item \textsuperscript{160} \textit{Id.}
\item \textsuperscript{161} \textit{Id.} at 252 (footnote omitted) (quoting JONATHAN ELIOT, 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 555 (1836) (statement of James Madison)).
\item \textsuperscript{162} 490 U.S. 454 (1989).
\item \textsuperscript{163} See generally \textit{id.}.
\end{itemize}
Furthermore, the Court found that the state regulation at issue lacked the "relevant mandatory language" necessary to establish a state-created liberty interest entitled to due process protections. The regulation provided that "[v]isitors may be excluded if they fall within one of the described categories, but they need not be. Nor need visitors fall within one of the described categories in order to be excluded." Stated more precisely, "the regulations are not worded in such a way that an inmate could reasonably expect to enforce them against the prison officials."

Thompson raised fundamental issues relevant to general prison administration. Justice Marshall was alarmed, not merely by the result, but also by the majority's reasoning in Thompson, which exhibited the Court's willingness to accede to correctional authority, as well as its dispassion for inmates' basic human needs. Thompson demonstrated the Court's intention to subordinate prisoners' interests to the warden's unsupervised power to control his jail. For Justice Marshall, the majority's callous acquiescence to the warden's uncontrolled power to deny visitation belied the Court's continuous proclamation that "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution."

In his Thompson dissent, Justice Marshall reiterated his theory that when prison officials change the conditions of a prisoner's confinement, the courts must inquire into whether the prisoner has suffered "a sufficiently "grievous loss" to trigger the protection of due process." For him, the answer required not only an assessment of the gravity of the change, but also a determination of whether the prisoner had been arbitrarily singled out for disparate treatment. It was no surprise that Justice Marshall agreed with those authorities proclaiming that visitation is so important to the reintegration of the inmate into society that its denial is a grievous loss implicating a

164. Id. at 461 (citation omitted) (quoting Hewitt v. Helms, 459 U.S. 460, 468 (1983)).
165. Id. at 464.
166. Id. (citation omitted).
167. Id. at 465 (footnote omitted).
168. Id. at 466 (Marshall, J., dissenting).
169. Id. at 467 ("In theory [a prisoner] retains some minimal interest in liberty protected by the Due Process Clause, but in practice this interest crystallizes only on those infrequent occasions when a majority of the Court happens to say so.") (footnote omitted).
172. Id.
prisoner's retained liberty interest.\(^{173}\) Without family visits, an inmate "may be entirely cut off from his only contacts with the outside world."\(^{174}\)

Thompson is significant because it gave the warden unbridled discretion over the prisoner's basic human need to see his family and friends.\(^ {175}\) For Justice Marshall, that was devastating; he could not accept such a "parsimonious reading of the Due Process Clause."\(^ {176}\) It was not unfettered visitation that he sought to protect, but rather the recognition that visitation is important enough to warrant basic procedural protections from arbitrary action.\(^ {177}\) With the voice of reason, Justice Marshall reminded the Court: "One need hardly be cynical about prison administrators to recognize that the distinct possibility of [retaliation] calls for a modicum of procedural protections to guard against such behavior."\(^ {178}\)

V. DISTRUST OF PRISON AUTHORITIES' EXERCISE OF POWER: PROTECTING PROCEDURAL FAIRNESS

Prior to the Supreme Court's involvement in prison conditions, state corrections officials were able to take away good-time credits after "serious misconduct" was shown in a nonadversarial hearing.\(^ {179}\) After examining a state prison disciplinary proceeding that took place in a "closed, tightly controlled environment,"\(^ {180}\) the Court in Wolff v. McDonnell\(^ {81}\) sought to design a structure that would accord procedural fairness to inmates.\(^ {182}\) The Wolff Court determined that before state prisoners could lose good-time credits, minimum procedural safeguards required that they receive advance written notice of the alleged violations, together with a written statement by the fact finders as to their findings, including reasons for the disciplinary action

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173. Id. at 468 n.4.
175. Thompson, 490 U.S. at 466 (Marshall, J., dissenting).
176. Id. at 476.
177. Id. at 475. Cf. Pell v. Procunier, 417 U.S. 817 (1974). The Director of the California Department of Corrections determined that personal visits "aid in the rehabilitation of the inmate while not compromising the other legitimate objectives of the corrections system." Id. at 825.
180. Wolff, 418 U.S. at 561.
182. Id. at 563-72.
Furthermore, prisoners were to be permitted to call witnesses and to present documentary evidence in their defense when not unduly hazardous to institutional safety.\textsuperscript{184} Wolff's "mutual accommodation" model did not, however, embrace the rights to confrontation, cross-examination, or the appointment of counsel.\textsuperscript{185} These procedural rights were viewed as presenting a potential danger to institutional goals and were not perceived as requiring constitutional protection in the prison setting.\textsuperscript{186} The Court agreed with the State that it would not be propitious to encase "disciplinary procedures in an inflexible constitutional strait-jacket" resembling proceedings typical of a criminal trial.\textsuperscript{187} Compelling corrections officials to provide these procedures, the Court reasoned, would most likely "raise the level of confrontation between staff and inmate," thereby undermining the "utilization of the disciplinary process as a tool to advance the rehabilitative goals of the institution."\textsuperscript{188} The Court remarked that as correctional goals evolve, the balance of interests may be altered.\textsuperscript{189} However, because security dangers were involved, and "prison practices are diverse and somewhat experimental," the better practice was to leave these matters to the sound discretion of the state corrections officials.\textsuperscript{190}

Justice Marshall adamantly disagreed with the majority in Wolff, seeing no justification for its refusal to accord prisoners the basic procedural safeguards found to be among the minimum requirements of due process.\textsuperscript{191} At the least, he would extend to prisoners those minimum requirements of due process that the Court required in parole revocation hearings.\textsuperscript{192} This would include the right to call witnesses and present documentary evidence, as well as the right to confront

\textsuperscript{183} Id. at 563.
\textsuperscript{184} Id. at 566.
\textsuperscript{185} Id. at 567, 570.
\textsuperscript{186} Id. at 567-68, 570.
\textsuperscript{187} Id. at 563.
\textsuperscript{188} Id.
\textsuperscript{189} Id. at 568.
\textsuperscript{190} Id. at 569.
\textsuperscript{191} Id. at 580-81 (Marshall, J., dissenting).
\textsuperscript{192} Id. at 594-98. The prisoners in Wolff argued for the same protections required in parole and probation revocation hearings included in Morrissey v. Brewer, 408 U.S. 471 (1972), and Gagnon v. Scarpelli, 411 U.S. 778 (1973). Wolff, 418 U.S. at 559-61. In Morrissey, the Court required that procedural safeguards for parole revocation include:

(a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body
and cross-examine adverse witnesses. He reminded the majority that without these basic protections, an inmate facing disciplinary proceedings was "afforded no means to challenge the word of his accusers." Justice Marshall fervently disagreed with the majority that these rights were not important, especially when measured against "the seriousness of the deprivation involved." For him, these procedures were necessary "to reveal mistakes of identity, faulty perceptions, or cloudy memories, [and to prevent] abuse of the disciplinary process by 'persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy.' Moreover, providing for basic procedural requirements would enhance the rehabilitative process by avoiding reactions of arbitrariness and the feeling among inmates that they were being treated unfairly.

The Wolff Court had taken a tentative step in the direction of prison reform, acknowledging that future events may "require further consideration and reflection." Nevertheless, the decision sent conflicting messages. By refusing to accept established prison procedures, the Court discarded the hands-off doctrine, but resolved that when security dangers are involved, respect for the sound discretion of state officials was to play a decisive role.

The Wolff opinion did not evaluate the best way to accommodate the inmate's right to call witnesses. The deference accorded prison officials left the inmate with no remedy against a prison board intent on arresting rights in the name of "'institutional safety.'" The right to call witnesses and present documentary evidence appeared unenforceable when left to the unchecked discretion of prison officials. A requirement by the Court that a disciplinary board provide, on the record, a contemporaneous, written explanation of its reasons for excluding an inmate's witness would go far toward guaranteeing that the...
board's exclusion of a witness was based on permissible factors. When this option was presented in *Ponte v. Real*, however, the majority once again chose *Wolff*'s ambiguous correctional goal of "swift discipline." The *Real* Court did not compel prison officials to state as part of the administrative record their reason for excluding an inmate's witness, but gave prison officials the choice to do so later by testimony in court.

In his *Real* dissent, Justice Marshall reminded the majority that, as even the Court acknowledged, the combination of sealed files and *in camera* review would adequately protect its primary concern for institutional safety. The Justice speculated that the Court would also acknowledge, if pushed, that because *Wolff* already required a written statement by the fact finders as to the evidence relied on and reasons for the disciplinary actions, the "twinkling of an eye that it would take for a board to [also] offer brief, contemporaneous reasons for refusing to hear witnesses would hardly interfere with any valid correctional goals." Marshall knew that by permitting postponement of a reasonable explanation, *Real* left the inmates' constitutional right to present witnesses "dangling in the wind."

For the majority in *Real*, the primary business of corrections is supervision of inmates—a responsibility the Justices were not interested in overseeing. Whereas the majority had shown little interest in compromising, Justice Marshall was able to see the disciplinary hearings from the inmate's point of view: to the inmate they were pretend trials—proving guilt was make-believe.

205. *Id.* at 495.
206. *Id.* at 497.
207. *Id.* at 513 (Marshall, J., dissenting).
208. *Id.* at 517.
209. *Id.* at 522.
211. The majority did, however, recognize the importance of certain procedural safeguards:

> The requirement that contemporaneous reasons for denying witnesses and evidence be given admitted has some appeal, and it may commend itself to prison officials as a matter of choice: recollections of the event will be fresher at the moment, and it seems a more lawyerlike way to do things. But the primary business of prisons is the supervision of inmates, and it may well be that those charged with this responsibility feel that the additional administrative burdens which would be occasioned by such a requirement detract from the ability to perform the principal mission of the institution.

*Id.* at 497-98 (footnote omitted).
212. See KATHRYN W. BURKHART, WOMEN IN PRISON 147 (1973).
[I]f I were to describe how [the disciplinary hearings] seem to a stranger, I would call them "pretend trials"—with the concept of "proving" guilt only make-believe.
Justice Marshall's generous reading of the Due Process Clause of the Fourteenth Amendment stands in sharp contrast to his colleagues' sparse, restrictive reading. To him, constitutional liberties embody values that far transcend concerns for correctional efficiency. He advocated fair treatment for the vulnerable, believing that this is what makes our country great. Justice Marshall's view of procedural fairness epitomizes what the Constitution and the Supreme Court could potentially mean to politically weak members of society.

VI. JUSTICE MARSHALL'S PIVOTAL ROLE IN THE PRISON REFORM MOVEMENT: PROTECTING THE HUMAN SPIRIT

There is little question that the government and a majority of the Court have adopted a retributivist philosophy of punishment. The Supreme Court has found no constitutional mandate for "comfortable prisons," imploring the lower federal courts to avoid becoming ensnared in the perplexing, sociological problem of how best to run prisons. As poetically advocated by Justice Rehnquist, "nobody promised them a rose garden."

Although there is a basic intuitive appeal for harsh prison treatment, for Justice Marshall it made absolutely no sense to confine a person under conditions that may increase the likelihood of recidivism. Throughout his career, he advocated a society that highly valued human dignity. For the twenty-four years he sat on the Court, he served as its conscience on prison reform. In the prison setting, Justice Marshall set his goal: to provide for the human qualities of inmates. The Justice's strong moral sensitivity was repulsed by a democratic society that maintains a prison system which cages inmates like animals, stacks them like chattel in a warehouse, and then expects...
that they emerge as decent, law-abiding citizens.\textsuperscript{219} Marshall believed that a convicted person's loss of liberty was the sole punishment permitted; any additional restraints or deprivations in the normal structure of prison life should be subject to judicial scrutiny.\textsuperscript{220}

Justice Marshall strove to develop a prison jurisprudence that preserved the idealistic concepts of dignity, humanity, and decency.\textsuperscript{221} He viewed the Constitution as protecting indispensable human values from government interference, even in the face of the special need for efficient prison administration.\textsuperscript{222} He especially could not condone blind deference to governmental authority.\textsuperscript{223} This was the philosophy he embraced. It certainly was not "anti-correctives";\textsuperscript{224} it is what he understood the Constitution to mean.

Justice Marshall emphasized that "the crucial task is not so much to define our rights and liberties, but to establish institutions which can make the principles embodied in our Constitution meaningful in the lives of ordinary citizens."\textsuperscript{225} He sought to apply this jurisprudence to prisoners confined to penitentiaries. Through his opinions, he strove to provide prisoners with a safe and sanitary environment, free from conditions that may unnecessarily cause pain or the risk of physical or mental deterioration.\textsuperscript{226}

\textbf{A. Securing the Right to Medical Treatment}

Marshall recognized that total control of prisoners denies them any opportunity to care for themselves, thereby obligating the government to provide them with their basic necessities. On the unique occasion of \textit{Estelle v. Gamble},\textsuperscript{227} when he was assigned to write a majority

\begin{itemize}
\item 219. See Pillsbury, \textit{supra} note 213, at 1128 n.191 (citing Costello v. Wainwright, 397 F. Supp. 20, 38 (M.D. Fla. 1975), aff'd, 525 F.2d 1239 (5th Cir. 1976), rev'd, 430 U.S. 325 (1977)).
\item 220. See Bell v. Wolfish, 441 U.S. 520, 568 (1979) (Marshall, J., dissenting) (allowing deference to jail officials on what regulations constitute punishment usurps a traditional judicial function).
\item 221. See id. at 576-77 (stating that strip searches violate "personal dignity and common decency").
\item 222. See id. at 579 ("Such unthinking deference to administrative convenience cannot be justified where the interests at stake are those of presumptively innocent individuals, many of whose only proven offense is the inability to afford bail.").
\item 223. See id.
\item 224. See \textit{supra} note 4 and accompanying text.
\item 227. 429 U.S. 97 (1976).
\end{itemize}
prison conditions opinion, Marshall seized the opportunity, acknowledging for the first time that the Eighth Amendment applies to serious deprivations of liberty that may occur in prison.\footnote{228} In Estelle, Justice Marshall validated the elementary principle that the government has an “obligation to provide medical care for those whom it is punishing by incarceration. An inmate must rely on prison authorities to treat his medical needs,” if these needs are to be met.\footnote{229}

Justice Marshall emphasized, however, that medical decisions such as treatment choices are beyond the scope of the Constitution, making it clear that the Eighth Amendment was not to be transformed into a tort remedy; it was not medical malpractice that was to be contained.\footnote{230} The Eighth Amendment would not protect prisoners against accidental or unintentional mistreatment, but would protect them from inadequate responses to their serious medical needs.\footnote{231} Failure to do so, Marshall recognized, could result in physical torture, death, or at a minimum, pain and suffering without penological purpose.\footnote{232} Marshall strove to capture the constitutional standard by holding that the Eighth Amendment bans treatment that shows “deliberate indifference” to prisoners’ severe medical needs.\footnote{233}  

\footnote{228. Id. at 101-06.}
\footnote{229. Id. at 103.}
\footnote{230. Id. at 104-06.}
\footnote{231. Id.}
\footnote{232. Id. at 103.}
\footnote{233. Id. at 104. In Wilson v. Seiter, 501 U.S. 294 (1991), a sharply divided Court, led by Justice Scalia writing for the five-member majority, seized on the “deliberate indifference” wording and noted that “‘[t]he infliction of punishment is a deliberate act intended to chastise or deter.’” \textit{Id.} at 300 (quoting Duckworth v. Franzen, 780 F.2d 645, 652 (7th Cir. 1985)). Justice Scalia reasoned that if the pain inflicted by the prison conditions was “not formally meted out as punishment by the statute or the sentencing judge,” then some mental element must be attributed to the prison officials responsible for the care of the inmate in order for it to be prohibited by the Eighth Amendment. \textit{Id.} (emphasis added).}

Reviewing past Eighth Amendment challenges to prison deprivations, Justice Scalia divined both an “objective component . . . (Was the deprivation sufficiently serious?)” and a “subjective component (Did the officials act with a sufficiently culpable state of mind?).” Id. at 298. Specifically, inmates challenging serious constitutional deprivations in confinement must show that prison officials behaved in a wanton manner, for it is only then that “deliberate indifference” to the challenged conditions can amount to a constitutional violation. Id. at 303.

Justice Scalia also placed an additional obstacle in the path of prison reform. He clearly recognized that the “totality of conditions” approach advocated by the Court in Rhodes v. Chapman, 452 U.S. 337 (1981), made possible very intrusive remedies. Wilson, 501 U.S. at 298. He wanted to ensure that the Cruel and Unusual Punishments Clause not be used as an easy tool for prison reform. Id. What Rhodes meant, wrote Scalia, was that: “Some conditions of confinement may establish an Eighth Amendment violation ‘in combination when each would not do so alone, but only when they have a mutually enforcing effect . . . for example, a low cell temperature at night combined with a failure to issue blankets.” Id. at 304. “Nothing so amorphous as ‘overall conditions’ can rise to the level of
B. Impact of Prison Regulations on Pretrial Detainees: Practices That Are an Affront to Dignity

The problems of operating a correctional facility are enormous, and the Court believed it must give prison administrators a wide berth to adopt and execute policies needed to preserve internal order. In Bell v. Wolfish, the Court analyzed the “special status” of pretrial detainees, identifying a special Fourteenth Amendment right not to be punished prior to being adjudged guilty. The Court noted, however, that not every restriction imposed during this period of pretrial detention “amounts to ‘punishment’ in the constitutional sense.” In ascertaining whether it was punishment, the Wolfish Court found the subjective intent of prison officials to be decisive. Absent a showing of an express intent to punish on the part of the detention officials, the determination of whether the particular restriction amounts to punishment turns on whether it is reasonably related to a legitimate governmental objective and not excessive in relation to that purpose.

Although detainees are entitled to at least those constitutional rights retained by convicted persons, all restrictions, even those that impinge upon a specific constitutional guarantee, must be evaluated...
in light of the central objective of prison administration—safeguarding institutional security. With this principle firmly established, the Court concluded that pretrial detainees pose similar security risks as convicted inmates. While prior decisions focused on sentenced prisoners, the "principle of deference" was not dependent on this fact. The Court concluded that the "publishers-only" rule, prohibiting receipt of hardback books not mailed directly from the publisher, did not violate the First Amendment because it reduced the chances that contraband would enter the prison. This limited restriction was "a rational response by prison officials to an obvious security problem." Limitations on receipt of packages from outside the facility containing food or personal property were held not to violate due process because of the administrative inconvenience of storing food and the serious security problems that arise from the introduction of such packages into the institution. The unannounced "shakedown" searches of inmates' living areas in their absence did not violate the Fourth Amendment and were permitted as facilitating "the safe and effective performance of the search." Finally, the practice that troubled the Court most, visual body cavity searches after contact visits, was upheld as reason-

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239. Id. at 545-47.
240. Id. at 546.
241. Id. at 546 n.28.
242. Id. at 547 n.29.

243. The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.

244. Wolfish, 441 U.S. at 550-51.
245. Id. at 550.
246. Id. at 553.

247. The Fourth Amendment provides: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. U.S. Const. amend. IV.

248. Wolfish, 441 U.S. at 557. The Court assumed, arguendo, that a pretrial detainee retained a diminished expectation of privacy after commitment to a custodial facility. Id. Subsequently, in Hudson v. Palmer, 468 U.S. 517 (1984), the Supreme Court held that a prisoner has no expectation of privacy in his prison cell entitling him to the protection of the Fourth Amendment. Hudson, 468 U.S. at 525-26.

249. See infra notes 278-304 and accompanying text.
able to deter the smuggling of weapons, drugs, and other contraband into the institution.\(^{250}\)

Notwithstanding the impression created by the majority, Justice Marshall was acutely aware that the detainees had not been convicted of a crime and that their detention served only the more limited regulatory purpose of assuring their presence at trial.\(^{251}\) The prison regulations, however, were not limited to convicted individuals or even to pretrial detainees shown to be particularly dangerous; rather, they applied indiscriminately to all persons housed at the detention facility.\(^{252}\)

The enforcement of these rules, Justice Marshall concluded, was a clear affront to the detainees' dignity as human beings.\(^{253}\) The rights involved were among those specifically protected by the Constitution, underscoring their societal importance.\(^{254}\) Prohibiting a detainee from receiving books and packages from his family and friends conveys to him that he is untrustworthy.\(^{255}\) Searching, in his absence, his private possessions offends not merely his privacy interests, but also his interest in "minimal dignity."\(^{256}\) Because the detainees are "presumptively innocent and many are confined solely because they cannot afford bail,"\(^{257}\) the punishment model cut too close to the core of their due process guarantees.\(^{258}\) The Court's punishment test, Justice Marshall argued, was adverse to a closer scrutiny of the deprivations imposed; it avoided examining less restrictive practices adopted by other detention facilities, as well as the recommendations of professional organizations.\(^{259}\) He preferred to have the impact of confinement regulations, not the intent behind them, as the focal point of

\(^{250}\) *Wolfish*, 441 U.S. at 558-59.

\(^{251}\) See id. at 569 (Marshall, J., dissenting).

\(^{252}\) Id. at 568 ("Reasoning that security considerations in jails are little different than in prisons, the Court concludes that cases requiring substantial deference to prison administrators' determinations on security-related issues are equally applicable in the present context.") (citation omitted). As to the convicted criminals housed at MCC, their detention may serve a legitimate punitive goal; Justice Marshall concluded the same was not true of the detainees whose rights were addressed in *Wolfish*. *Id.*

\(^{253}\) Id. at 569 (stating that pretrial detention "is essentially indistinguishable from punishment") (footnote omitted).

\(^{254}\) Id. at 571-79.

\(^{255}\) Id. at 593 (Stevens, J., dissenting).


\(^{257}\) *Wolfish*, 441 U.S. at 563 (Marshall, J., dissenting).

\(^{258}\) Id. at 568.

\(^{259}\) Id. at 565.
constitutional analyses. By seeking “merely to sanitize official motives and prohibit irrational behavior,” the Court’s reformulated punishment test lacked any real content. Justice Marshall was not an adherent in the Court’s decision to designate the detention officials’ intent as the critical factor in determining the constitutionality of the regulations. He accused the majority of being “unrealistic in the extreme,” by adopting a “toothless standard.” Almost any restriction can be shown to have some rational relationship to institutional security or to the all-embracing “effective management of the detention facility.” Because the Court apparently was not willing to look behind any justification that was based on security, the burden on detainees to establish punitive intent will almost always be insurmountable.

Justice Marshall would have rather had the majority consider the loss to the detainee: he is involuntarily confined and deprived of his freedom to be with his family, told when to eat and sleep, and divested of all the other benefits of normal life. When his interests are placed next to the corrections staff’s concern for administrative convenience, the latter pales in comparison. Justice Marshall’s response to the Wolfish regulations was straightforward: to impose additional deprivations merits a balancing test requiring jail administrators to carry a heavier burden of justification the greater the intrusion on the detainee. The government must endure a more rigorous test than the rational basis standard mandates. Where the regulation implicates fundamentally important interests, corrections personnel must demonstrate that the rule “serves a compelling necessity of jail administration.”

Applying this standard, Justice Marshall found the limitation on the receipt of hardback books to be unwarranted. The institution offered no reasons why it could not limit the number of hardback books received or use electronic devices and fluoroscopes to detect

260. Id. at 569-64. “By its terms, the Due Process Clause focuses on the nature of the deprivations, not on the persons inflicting them.” Id. at 567.
261. Id. at 565.
262. Id. at 565-67.
263. Id. at 565, 567.
264. Id. at 567 (construing the majority opinion in Wolfish, 441 U.S. at 540).
265. Wolfish, 441 U.S. at 540.
266. Id. at 569 (Marshall, J., dissenting) (citing Morrissey v. Brewer, 408 U.S. 471, 482 (1972)).
267. Id. at 569-70.
268. Id. at 570.
269. Id.
270. Id. at 574.
contraband instead of requiring inmates to buy directly from publishers or stores.\textsuperscript{271} Additionally, the record did not establish that searches of detainees' cells, in their absence, were substantially necessary to jail administration.\textsuperscript{272} Because they may invite disrespect for the detainees' few possessions, as well as generate fear that the guards may steal personal property or plant contraband, the inmates' interests were significant enough to warrant permitting them to observe searches of their cells.\textsuperscript{273} Justice Marshall also agreed with the lower courts that the correctional center's restriction against the receipt of packages from outside the facility "swept too broadly."\textsuperscript{274} He would order detention facilities to formulate a more suitable alternative.\textsuperscript{275}

C. Prohibiting Practices That Demoralize and Degrade the Inmate

Although prison officials sometimes deliberately use prison regulations and practices to punish misbehavior, for the most part they evince an indifference toward the prisoner's plight. Their primary interest is in maintaining exclusive authority to operate their prisons as they see fit.\textsuperscript{276} Justice Marshall knew that the Constitution required the Court, not the warden, to balance the preservation of human dignity against correctional needs.\textsuperscript{277}

Nowhere are dignity concerns more acutely implicated than in the area of bodily integrity. Intrusive body searches generate feelings of "degradation" and "terror."\textsuperscript{278} Visual body cavity examinations engender fear in inmates of physical and sexual abuse by prison

\textsuperscript{271} Id. As Marshall noted, the Court of Appeals for the Second Circuit found that "other institutions have not recorded untoward experiences with far less restrictive rules." Id. (citing Wolfish v. Levi, 573 F.2d 118, 150 (2d Cir. 1978), rev'd sub nom. Bell v. Wolfish, 441 U.S. 520 (1979)).

\textsuperscript{272} Id. at 575.

\textsuperscript{273} Id. at 576.

\textsuperscript{274} Id.


\textsuperscript{276} Cf. Thornburgh v. Abbott, 490 U.S. 401, 428 (1989) (Stevens, J., dissenting) (arguing that the warden's policy of using "impermissibly ambiguous" standards to deny prisoners' reading of certain publications actually gives the warden "virtually free rein to censor incoming publications").

\textsuperscript{277} See Wolfish, 441 U.S. at 563 (Marshall, J., dissenting) (arguing that the "impact that restrictions may have on inmates" should be part of the Court's analysis in balancing against the "detention officials' justifications").

\textsuperscript{278} Wolfish, 439 F. Supp. at 147.
guards.\textsuperscript{279} Even though governmental security interests are strongest with respect to preventing dangerous weapons and contraband from entering the prison, the Court rightfully paused in \textit{Wolfish}, when inmates at all Bureau of Prison facilities were routinely required "to expose their body cavities for visual inspection as a part of a strip search conducted after every contact visit with a person from outside the institution."\textsuperscript{280} There was testimony that the procedures may leave permanent psychological scars.\textsuperscript{281} The practice was so "unpleasant, embarrassing, and humiliating," and placed inmates in such a degrading position, that it caused some of them to forego visits with friends and family altogether.\textsuperscript{282} The Court hesitantly continued to permit these searches, despite the potential for abuse and the invasion of the inmates' personal privacy.\textsuperscript{283} The majority's balancing test\textsuperscript{284} to determine reasonableness under the Fourth Amendment gave way to one critical factor: "A detention facility is a unique place fraught with serious security dangers."\textsuperscript{285} The Court regarded the discovery of one incident of contraband smuggling in body cavities as a testament to the searches' effectiveness, rather than as an argument against its reasonableness.\textsuperscript{286}

Undoubtedly, this practice perpetuated the degradation and dehumanization of the inmates.\textsuperscript{287} Justice Marshall employed pragmatism and common sense in trying to influence those of his colleagues who apparently favored giving absolute deference to the warden upon

\begin{itemize}
  \item \textsuperscript{279} \textit{Wolfish}, 441 U.S. at 577 (Marshall, J., dissenting).
  \item \textsuperscript{280} \textit{Id.} at 558. "If the inmate is a male, he must lift his genitals and bend over to spread his buttocks for visual inspection. The vaginal and anal cavities of female inmates also are visually inspected. The inmate is not touched by security personnel at any time during the visual search procedure." \textit{Id.} at 558 n.39 (citing \textit{Wolfish} v. Levi, 573 F.2d 118, 131 (2d Cir. 1978), rev'd sub nom. \textit{Bell} v. \textit{Wolfish}, 441 U.S. 520 (1979)).
  \item \textsuperscript{281} \textit{Wolfish}, 439 F. Supp. at 147.
  \item \textsuperscript{282} \textit{Id.} at 146-47.
  \item \textsuperscript{283} \textit{Wolfish}, 441 U.S. at 560. Although recognizing the potential invasion of an inmate's personal privacy, the Court concluded that visual body cavity inspections can "be conducted on less than probable cause." \textit{Id.}
  \item \textsuperscript{284} \textit{Id.} at 559.
  \item In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.
  \item \textit{Id.}
  \item \textsuperscript{285} \textit{Id.}
  \item \textsuperscript{286} \textit{Id.}
  \item \textsuperscript{287} \textit{Id.} at 577 (Marshall, J., dissenting) (citing psychiatric and other testimony which suggests that strip searching places inmates in a degrading position and breeds fear of sexual assault).
\end{itemize}
his merely raising the specter of security. Marshall highlighted the “bankruptcy” of the prison administration’s position, finding indiscriminate searches “so unnecessarily degrading that it ‘shocks the conscience.’” With his usual candor, he examined the record and found far less need for routine body cavity searches.

The facts showed that before entering the visiting room, all visitors had their packages searched by hand, metal detectors, and a fluoroscope. For an inmate to conceal any contraband not detected by searching the visitor, an inmate would have had to remove half of his one-piece, front-zippered jumpsuit while in plain view of guards who continuously monitored the glass-enclosed visiting room. Moreover, expert medical testimony suggested that inserting an object into the rectum required time and opportunity not available in the visiting room and that it would be painful. Of equal importance, once an object was inserted, visual body cavity inspection probably would not detect it. Furthermore, the lower court found that less restrictive alternatives were available to ensure that contraband was not transferred during visits. Metal detectors could be used to discover weapons. Prisoners could be strip searched, their clothing examined, and they could be required to present open hands and arms to reveal the absence of concealed objects. Justice Marshall agreed with the district court that these alternative procedures amply satisfied the demands of security.

288. See id. at 579 (arguing that “unthinking deference” should not be given to “administrative convenience”).
289. Id. at 578-79 (quoting Rochin v. California, 342 U.S. 165, 172 (1952)).
290. Id. at 577-78.
291. Id. at 578.
292. Id. To further security, the locked lavatories were forbidden to the inmates, and the visitors could only use them with permission. Id. at 578 n.18 (citing Wolfish v. Levi, 573 F.2d 118, 125 (2d Cir. 1978), rev’d sub nom. Bell v. Wolfish, 441 U.S. 520 (1979)). The lavatories also contained a built-in window for inspection. Id.
293. Id. at 578.
294. Id.
296. Id. at 147.
297. Id.
298. Wolfish, 441 U.S. at 576-79 (Marshall, J., dissenting); see Wolfish, 439 F. Supp. at 148; see also Wolfish, 441 U.S. at 595 (Stevens, J., dissenting) (agreeing that the alternative procedures identified by the district court satisfy security demands). Justice Powell joined the majority except with respect to body cavity searches. Wolfish, 441 U.S. at 563. He stated that the serious intrusion on one’s privacy occasioned by anal and genital searches required “at least some level of cause, such as a reasonable suspicion.” Id.
Justice Marshall was sensitive to the human aspect involved. He focused on the practical consequences to the prisoner, condemning the searches as blithely contributing to the prisoner's virtual degradation, either by design or neglect.\textsuperscript{299} It was difficult to believe that the visual body cavity search was conducted solely for security reasons and not also to purposefully demoralize and humiliate the inmate.\textsuperscript{300} Humiliation, he was aware, had been an objective of the failed early systems.\textsuperscript{301}

The \textit{Wolfish} majority permitted a prison practice that allowed not only degradation of the prisoner, but also deprivation of the very elements necessary for reform.\textsuperscript{302} The hands-off doctrine had failed the prisoners by abdicating jurisdiction,\textsuperscript{303} and now the deferential model, Justice Marshall believed, likewise failed by abandoning the Court's responsibility.\textsuperscript{304}

\section*{D. Cultivating Communication with Prisoners}

\subsection*{1. By Correspondence: Maintaining Contacts with Family and Friends.}—The Court initially addressed First Amendment rights in the prison context in \textit{Procunier v. Martinez},\textsuperscript{305} in which the California Department of Corrections's mail censorship regulations proscribed inmate correspondence that unduly complained; magnified grievances;
expressed inflammatory political, racial, religious, or other views or beliefs; or contained matter deemed defamatory or otherwise inappropriate. 306 Prison employees screened both incoming and outgoing personal mail for violation of these regulations. 307 The majority candidly recognized that the tension between the traditional policy of judicial restraint and the need to protect constitutional rights led courts to adopt a variety of widely inconsistent solutions. 308 In the case of direct personal correspondence, the majority counseled that mail censorship implicates more than just the rights of the inmate. 309 Focusing not on the rights of the prisoners, but on the inextricably meshed interest in communication of the nonprisoner (friend or family member), the Court emphasized that an undemanding standard of review could not be harmonized with the fact that constitutional liberties of free citizens are implicated by the censorship of prisoners' mail. 310 The majority permitted censorship whenever it “further[ed] an important or substantial governmental interest unrelated to the suppression of expression” and “the limitation of First Amendment freedoms [was] no greater than [was] necessary or essential to the protection of the particular governmental interest involved.” 311 The Court stressed that censorship may not be used to simply eliminate unflattering opinions or inaccurate statements. 312 Restraints on inmate correspondence were permitted if used to preserve internal order and discipline, “the maintenance of institutional security against escape or unauthorized entry, and the rehabilitation of the prisoners.” 313

Justice Marshall strove to breathe life into the constitutional protections for inmates. The common theme of the Justice’s prison opinions was the reality that, in the dehumanizing prison environment, prisoners’ yearnings for identity and self-respect are most compelling. His Martinez opinion exemplified this theme, stating that prison authorities do not have a general right to read inmates’ mail as a matter of course. 314 A prisoner does not shed such basic First Amendment rights at the prison gate. 315 Marshall accorded prisoners this medium of expression as a constitutionally guaranteed right, not as a privilege

306. Id. at 423 (Marshall, J., concurring).
307. Martinez, 416 U.S. at 400.
308. Id. at 406.
309. Id. at 408.
310. Id. at 408-09.
311. Id. at 413.
312. Id.
313. Id. at 412.
314. Id. at 422-28 (Marshall, J., concurring).
315. Id.
handed out by the warden.\textsuperscript{316} Especially in the jail setting, "[t]o suppress expression is to reject the basic human desire for recognition and affront the individual's worth and dignity."\textsuperscript{317} Justice Marshall spurned any policy that chilled the communication necessary for prisoners to inform the community about their existence and plight, finding it at odds with "the most basic tenets of the guarantee of freedom of speech."\textsuperscript{318}

Possessing an instinct for the critical facts and a consummate sense of the practical, Justice Marshall decimated the State's justifications for a general right to read all prisoners' correspondence.\textsuperscript{319} To the State's assertion that contraband may be smuggled into prison via the mail, he countered that this certainly provided no justification for reading outgoing mail.\textsuperscript{320} As for incoming mail, it could be subjected to physical tests such as fluoroscopying, and if a physical test were inadequate, merely opening and inspecting the mail would clearly suffice.\textsuperscript{321}

To the suggestion that reading all prison mail was necessary to detect escape plans, he countered that inmates engaged in unmonitored personal interviews during which any number of surreptitious plans might be discussed undetected.\textsuperscript{322} Finally, he chaffed at the argument that reading prisoners' mail is a useful rehabilitative tool, responding that the weight of professional opinion is that an inmate's freedom to correspond with outsiders advances, rather than retards, the goal of rehabilitation.\textsuperscript{323} Justice Marshall concluded that the chilling effect on free expression served no valid rehabilitative purpose.\textsuperscript{324}

Marshall knew that letter writing keeps the inmate in touch with the outside world, helping him to eliminate the hopelessness and isolation incurred in prison.\textsuperscript{325} It stimulates natural human tendencies

\textsuperscript{316} Id. at 423. Rule 2401 of the Department of Corrections had as its basic premise that "'the sending and receiving of mail is a privilege, not a right.'" Martinez, 416 U.S. at 399 & n.1.

\textsuperscript{317} Id. at 427 (Marshall, J., concurring).

\textsuperscript{318} Id.

\textsuperscript{319} Id. at 422-28 (listing the reasons why the State's justifications for reading all correspondence were not adequate).

\textsuperscript{320} Id. at 424.

\textsuperscript{321} Id. at 424-25.

\textsuperscript{322} Id. at 425.

\textsuperscript{323} Id. at 425-26. "Constructive, wholesome contact with the community is a valuable therapeutic tool in the overall correctional process." Martinez, 416 U.S. at 412 n.13 (quoting Policy Statement 7300.1A, Federal Bureau of Prisons).

\textsuperscript{324} Id. at 425-26 (Marshall, J., concurring).

\textsuperscript{325} Id. at 426 (citing Palmigiano v. Travisono, 317 F. Supp. 776, 791 (D.R.I. 1970)).
and helps contribute to the better mental attitude and reformation of the inmate.\textsuperscript{326} Justice Marshall sent a straightforward message in Martinez: The role of the Court is to protect these precious personal rights by which the prisoner satisfies the "basic yearnings of the human spirit."\textsuperscript{327}

\textsuperscript{326} Id.

\textsuperscript{327} Id. at 428. Although the Wolfish majority admonished the judiciary to display great deference to the judgment of prison administrators, there was still much disagreement as to the appropriate standard to apply when prison regulations impinged on fundamental constitutional rights. See Block v. Rutherford, 468 U.S. 576, 597-98 (1984) (Marshall, J., dissenting) (arguing that the Wolfish doctrine rests on a finding that no "fundamental liberty interests" are implicated, and in a case where these interests are involved, the Wolfish doctrine should not apply). The inmates in Turner v. Safely, 482 U.S. 78 (1987), challenged a prison regulation that permitted correspondence between immediate family members who are inmates at other correctional institutions and between inmates concerning legal matters, but did not allow other inmate-to-inmate correspondence unless each inmate's "classification/treatment team" approved. Id. at 82. In practice, the effect of the regulation was to completely prohibit correspondence between nonrelated inmates. Id. (citation omitted).

The Court acknowledged that its task was "to formulate a standard of review for prisoners' constitutional claims that is responsive both to the 'policy of judicial restraint regarding prisoner complaints and [to] the need to protect constitutional rights.'" Id. at 85 (quoting Martinez, 416 U.S. at 406). Justice O'Connor, writing for the majority, after reviewing some of the Court's more recent prisoners' rights decisions, found in them the makings of a general standard. Id. at 84-91. In none of these cases had the Court applied a standard of "heightened scrutiny, but instead inquired whether a prison regulation that burdens fundamental rights is 'reasonably related' to legitimate penological objectives, or whether it represented an 'exaggerated response' to those concerns." Id. at 87. Justice O'Connor concluded that the prohibition on correspondence was reasonably related to valid corrections goals (institutional security) and not an exaggerated response to this concern, and therefore, it did not unconstitutionally abridge the prisoner's First Amendment rights. Id. at 93.

Justice Marshall joined in Justice Stevens's dissent characterizing the Turner standard as virtually meaningless. Id. at 100 (Stevens, J., dissenting). "Application of the standard would seem to permit disregard for inmates' constitutional rights whenever the imagination of the warden produces a plausible security concern and a deferential trial court is able to discern a logical connection between that concern and the challenged regulation." Id. at 100-01. While Justice Marshall had challenged the Court to find ways to best protect those few precious rights the prisoner retained, the Turner Court refused to break the mold: deference was the\textit{plate du jure}.

See also Thornburgh v. Abbott, 490 U.S. 401 (1989), where prison regulations provided that incoming publications may be rejected if prison officials found that the contents were "detrimental to . . . security, good order, or discipline," or "might facilitate criminal activity." Abbott, 490 U.S. at 404. The regulations authorized rejection of the entire publication, even if just one page of a book presented an intolerable security risk. Id. at 414-19. The primary justification advanced for the rule was administrative convenience, because a contrary rule would require laboriously going over each article in each publication and defacing the material. Id. The Court, despite the apparent vagueness of the terms used in the regulations, declared that the regulations were facially valid under Turner in order to give prison authorities appropriate needed broad discretion. Id. at 419.
2. By Family Contact Visitation.—Justice Marshall often characterized the Constitution's core value as the prevention of abuse of state power. Among the relationships he tried to shield from state interference were family bonds.\footnote{328} Prison visits had long been recognized as critically important,\footnote{329} and Marshall instinctively understood the importance of public knowledge and access to prisons for both the inmate, his family, and society.\footnote{330} In \textit{Kentucky Department of Corrections v. Thompson},\footnote{331} the issue for him had been simple: "[T]he basic need to see family members and friends strikes at the heart of the liberty protected by the Due Process Clause of the Fourteenth Amendment."\footnote{332}

Justice Marshall had a vision of prison reform that he kept in mind as individual cases came before the Court. The ability of an inmate to embrace his wife and children is exceptionally meaningful,\footnote{333} and denial of contact visitation in prison has very dramatic consequences.\footnote{334} Therefore, when the Los Angeles County Central Jail prohibited pretrial detainees contact visits with their families and friends, Justice Marshall recognized that the jail policy risked a significant injury to familial relations.\footnote{335} In \textit{Block v. Rutherford},\footnote{336} he was afforded the opportunity to examine prison practices and how they interfaced with the emotional and physical well-being of the prisoner.\footnote{337} He found substantial evidence to support the findings that contact visitation was crucial to maintaining family bonds and that its

\footnote{328. See \textit{Rutherford}, 468 U.S. at 599 (Marshall, J., dissenting) (stating that the risk of injury posed to family relations by the jail's policy requires that the Court employ a more constraining standard than the doctrine applied in \textit{Wolfish}).}

\footnote{329. See Leonard G. Leverson, \textit{Constitutional Limits on the Power to Restrict Access to Prisons: An Historical Re-examination}, 18 HARV. C.R.-C.L. L. REV. 409, 413 & n.20 (1983) (discussing the ease of access to English prisons in the seventeenth century and the importance of easy access to obtaining habeas corpus relief).}

\footnote{330. See \textit{Rutherford}, 468 U.S. at 598-99 (Marshall, J., dissenting) (noting the importance of access to prisons for the inmate, his family, and society).}

\footnote{331. 490 U.S. 454 (1989). For a discussion of \textit{Thompson}, see \textit{supra} notes 162-178 and accompanying text.}

\footnote{332. \textit{Id.} at 466 (Marshall, J., dissenting).}

\footnote{333. See \textit{Rutherford}, 468 U.S. at 598 (Marshall, J., dissenting) (citation omitted).}

\footnote{334. See \textit{id}.}

\footnote{335. See \textit{id}. (arguing that the denial of visitation between inmates and relatives can contribute to the deterioration of family relationships).}

\footnote{336. 468 U.S. 576 (1983).}

\footnote{337. \textit{Id.} at 598-99 (Marshall, J., dissenting) (detailing how the prison's policy may affect the emotional well-being of the prisoner).}
denial contributed to the break-up of inmate marriages, grievously threatening an inmate's mental health.\textsuperscript{338}

Justice Marshall had been in the pit; he knew how to read a record and its implications. Looking at the evidence, he challenged the majority's conclusion that the Central Jail's blanket prohibition on contact visits was a reasonable nonpunitive response to a legitimate security concern.\textsuperscript{339} He saw no reason why security procedures effectively used at other institutions could not be implemented at the County Jail.\textsuperscript{340} Specifically, prisoners could be dressed in special clothes for visitation, and searches could be conducted both before and after the visit.\textsuperscript{341} Visitors could be required to pass through metal detectors and fluoroscopes, and guards could continuously observe the visiting area.\textsuperscript{342} Furthermore, parcels could be excluded from the visitation area, and visitors who did not comply with the rules could be ejected.\textsuperscript{343} Marshall agreed with the experts who testified that these procedures would "'prevent everything except the most extreme methods of introducing drugs into the institution.'"\textsuperscript{344}

Justice Marshall's theory jeopardized the majority's central thesis: absolute deference to the reasonable judgment of prison officials.\textsuperscript{345} The Rutherford opinion, written by Chief Justice Burger, again emphasized the passive role the courts should play in the administration of detention facilities.\textsuperscript{346} The Chief Justice maintained that when specific restrictions are "reasonably related" to security interests, the Wolfish principle controls, and wide-ranging deference to prison administration policies must be accorded.\textsuperscript{347} The Chief Justice virtually ignored the importance of alternatives to accomplish the jail's security concerns; in his judgment, any further balance would merely substitute the Court's view of proper jail administration for that of the facility's experienced administrators.\textsuperscript{348}

The Chief Justice's reasoning was precisely what Justice Marshall had feared would be the outcome of Wolfish. For Marshall, unthink-
ing deference to administrative justifications precluded any meaningful consideration of the most significant factor: the impact the restriction may have on inmates. Justice Marshall did not discount prison security concerns, but in his view the significant injury to family relations wrought by denying contact visitation required a standard more constraining than Wolfish. Marshall unsuccessfully tried to persuade his colleagues that jail security could be accomplished without a total ban on contact visitation. He viewed the Court’s primary objective not as ensuring appropriate deference to prison officials, but rather as guaranteeing a justification for infringing inmates’ rights. Against this standard, Marshall determined the jail policy fell short.

He concluded the prison officials demonstrated their inability to ad-

349. Wolfish, 441 U.S. at 563 (Marshall, J., dissenting). Turner v. Safley, 482 U.S. 78 (1987), framed the standard of review, delineating the boundaries within which the debate must take place. Id. at 89-91. See supra note 327 for a discussion of Turner.

One week after deciding Turner, the Court applied its “reasonableness” standard to state correctional policies that impinged on the prisoners’ interest in freely exercising their religious rights. See O’Lone v. Estate of Shabazz, 482 U.S. 342, 349 (1987). Because unacceptable security risks and administrative burdens resulted from the return of outside work details during the day, a new policy memorandum prohibited inmates assigned to outside work details from returning to the prison during the day except in the case of an emergency. See id. at 346-47. In Shabazz, Muslim inmates challenged the prison policies that had the incidental effect of preventing them from attending Jumu‘ah, the primary congregational service of their faith held on Fridays. Id. at 347. Chief Justice Rehnquist determined that the Court of Appeals was clearly wrong when it required the state to show that it had made a bona fide inquiry into whether reasonable methods exist by which the prisoners’ religious rights can be accommodated without creating security problems. Id. at 350. The Court of Appeals believed that:

Where it is found that reasonable methods of accommodation can be adopted without sacrificing either the state’s interest in security or the prisoners’ interest in freely exercising their religious rights, the state’s refusal to allow the observance of a central religious practice cannot be justified and violates the prisoners’ first amendment rights.

Shabazz v. O’Lone, 782 F.2d 416, 420 (3d Cir. 1986) (en banc), rev’d sub nom. O’Lone v. Estate of Shabazz, 482 U.S. 342 (1987). However, the Chief Justice firmly declared that this approach had failed “to reflect the respect and deference that the United States Constitution allows for the judgment of prison administrators.” Shabazz, 482 U.S. at 350. Although mutual accommodation is relevant to the reasonableness inquiry, prison administrators, Justice Rehnquist reasoned, do not “have to set up and then shoot down every conceivable alternative method of accommodating the claimant’s constitutional complaint.” Id. (quoting Turner, 482 U.S. at 90-91).

Applying the new Turner standard, Justice Rehnquist found that the new policy was related to legitimate security concerns. Id. at 351. Furthermore, the Muslim inmates’ ability to participate in other religious observance of their faith gave added credence to the determination that the restrictions were reasonable. Id. For a fuller discussion of Shabazz, see Gutterman, supra note 21, at 895-98.


351. Id. at 602 (identifying a list of precautions used at other institutions that do not resort to total bans on contact visitation).

352. Id. at 607-08.
vance a substantial security interest when they refused to adopt the specific reforms ordered by the lower courts.\textsuperscript{353}

VII. THE NEW VOICES IN PRISON REFORM

Justice Marshall’s pivotal role as a prison reform advocate provides the central theme for many of the Court’s new voices. The merits of his prison jurisprudence have found their mark, as some hesitant allies on the present Court have begun to echo his views.\textsuperscript{354} A good example is \textit{Helling v. McKinney},\textsuperscript{355} in which the Court revisited medical issues—this time the health hazard posed by involuntary exposure of a nonsmoking prison inmate to the environmental tobacco smoke (ETS) of his five-packs-a-day smoking cellmate.\textsuperscript{356} The Court, presented with an opportunity to adopt an expansive reading of the Eighth Amendment in the prison context, knew what really was at stake in \textit{Helling}: the right of a prisoner to look toward the future.\textsuperscript{357}

Justice White, writing for a seven-member majority,\textsuperscript{358} considered prospective physical harm as part of the constitutional calculus.\textsuperscript{359} White rejected the government’s central thesis that only “deliberate indifference” to an inmate’s current, serious health problems is encompassed within the protection of the Eighth Amendment.\textsuperscript{360} For Justice White, it was not an unusual proposition that the Eighth Amendment protects inmates from future harm. He believed that unsafe, life-threatening conditions need not await a tragic event to require a remedy.\textsuperscript{361}

\textsuperscript{353} \textit{Id.} at 601.

\textsuperscript{354} \textit{See}, e.g., \textit{Sandin v. Conner}, 115 S. Ct. 2293, 2303 (1995) (Ginsburg, J., dissenting) (arguing that the Due Process Clause itself, not the state’s prison code, is the wellspring of the protection due a prisoner in remaining free of disciplinary segregation). “Deriving protected liberty interests from mandatory language in local prison codes would make of the fundamental right something more in certain States, something less in others.” \textit{Id.}; \textit{see supra} notes 140-143 and accompanying text.

Note also the view of Justice Breyer, with whom Justice Souter joined, that it is fairly clear that solitary disciplinary segregation for 30 days was prison punishment which deprived the inmate of constitutionally protected “liberty.” \textit{See Conner}, 115 S. Ct. at 2905 (Breyer, J., dissenting).

\textsuperscript{355} 509 U.S. 25 (1993).

\textsuperscript{356} \textit{Id.} at 28.

\textsuperscript{357} “That the Eighth Amendment protects against future harm to inmates is not a novel proposition.” \textit{Id.} at 33.

\textsuperscript{358} Justice White was joined in his opinion by Chief Justice Rehnquist and by Justices Blackmun, Stevens, O’Connor, Kennedy, and Souter. \textit{Id.} at 26.

\textsuperscript{359} \textit{Id.} at 33 (arguing that the “Eighth Amendment protects against future harm”).

\textsuperscript{360} \textit{Id.} at 33-34.

\textsuperscript{361} \textit{Id.} at 33 (noting that “[i]t would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition . . . on the ground that nothing yet had happened to them”).
The *Helling* decision manifested a sharp alteration in the Court's attitude, moving it toward Justice Marshall's theory of prisons. As the majority in *Helling* made clear, the Eighth Amendment prohibits prison conditions that pose a grave and imminent threat to prisoners' future health. The Court ruled that scientific and statistical evidence alone was insufficient proof; also required was an assessment that the risk of harm was so grave that it violated contemporary standards of decency. Two terms later, in *Farmer v. Brennan*, Justice Souter, building upon *Helling*, acknowledged that prison rape is not constitutionally tolerable and that "[b]eing violently assaulted in prison is simply not 'part of the penalty that criminal offenders pay for their offenses against society.'" Although not specifying the point at which the risk of inmate assault becomes sufficiently intolerable for Eighth Amendment purposes, *Farmer* required prison officials to protect prisoners from the violence of other prisoners. *Farmer* sent a clear message to corrections officials that they now had an affirmative duty to provide a safe environment for their inmates—a duty that the Court would not take lightly.

362. Id. at 35. In *Farmer v. Brennan*, 114 S. Ct. 1970 (1994), the Court reconfirmed that a prisoner may obtain preventive relief. Id. at 1974. The subjective awareness factor in the deliberate indifference test does not require prisoners to suffer physical injury before obtaining court-ordered correctional relief for inhumane prison conditions. Id. at 1983-84.


364. Id. "[T]he prisoner must show that the risk of which he complains is not one that today's society chooses to tolerate." Id. The requirement of a smoke-free environment has gained support in this country. See, e.g., 49 U.S.C. § 41706 (1994) (prohibiting smoking on domestic airline flights).


366. Id. at 1977 (quoting Rhodes v. Chapman, 452 U.S. 337, 347 (1981)).

367. Id. at 1976. Justice Souter, in *Farmer*, regarded as incompatible with *Wilson* a reading of the Eighth Amendment that would allow liability to be imposed on prison officials solely because of the presence of objectively inhuman prison conditions and required instead that responsibility be based on a consciousness of risk. Id. at 1979-80. Determining that "deliberate indifference" lies somewhere between the poles of "negligence" at one end and "purpose or knowledge" at the other end, Justice Souter adopted the "familiar" criminal law standard of subjective recklessness as consistent with the Cruel and Unusual Punishments Clause. Id. "[T]he official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." Id. at 1979. Whether the prison official had the subjective awareness is a question of fact. Reasonable prison officials will recognize risks that are obvious, but the inference cannot be conclusive, "for we know that people are not always conscious of what reasonable people would be conscious of." Id. at 1981 (quoting 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 3.7, at 335 (1986)).

Except for Justice Marshall's successor, Justice Thomas, all members of the Court joined in Justice Souter's opinion. Id. at 1974.

368. Id. at 1986 (Blackmun, J., concurring). Justice Blackmun issued a stern warning that corrections officials face a "serious risk" of civil liability if they fail to prevent inmates from being physically assaulted and raped. Id. at 1989.
Helling and Farmer are less than consistent with the Court’s philosophy of judicial restraint. Justice Marshall had advocated that prison officials’ actions be subject to closer judicial scrutiny. Today, after Helling and Farmer, prison officials may no longer have broad, unchecked power over prisoners’ lives. As Justice Marshall hoped, prisoners may now envision a future.

Furthermore, the Eighth Amendment was not limited to protecting against physical mistreatment. Prison conditions affect more than inmates’ bodies. Prisons also pose a serious risk of psychological

Justice Thomas adhered to his belief that “judges or juries—but not jailers—impose "punishment."” Id. at 1990 (Thomas, J., concurring) (quoting Helling, 509 U.S. at 40 (Thomas, J., dissenting)). Therefore, the sexual attack that Farmer incurred was not part of his sentence, and it did not constitute “punishment” under the Eighth Amendment. Id. Justice Thomas was concerned that by allowing an inmate to recover damages from correctional officials absent a showing of serious injury, the Court was turning the Eighth Amendment into a “National Code of Prison Regulation.” Id. at 28 (Thomas, J., dissenting).

Employing similar reasoning, Justice Thomas in his dissent in Helling argued that the Eighth Amendment’s Cruel and Unusual Punishments Clause applied only to penalties imposed by statute or sentence and not to those punishments that prison authorities may inflict on inmates. Helling, 509 U.S. at 38-41 (Thomas, J., dissenting). The Justice contended that neither historical evidence nor 185 years of precedent prior to Estelle v. Gamble, 429 U.S. 97 (1976), suggested that harsh penalties may constitute cruel and unusual punishment. Helling, 509 U.S. at 40. Justice Thomas hinted that given the right circumstances he would vote to overrule Estelle. Id. at 42.

Justice Thomas repeated this theme in Farmer, discerning that prisons are necessarily dangerous places housing antisocial and violent people, and regrettable “[s]ome level of brutality and sexual aggression among [prisoners] is inevitable,” whatever actions correctional officials may take. Farmer, 114 S. Ct. at 1990 (Thomas, J., concurring) (quoting McGill v. Duckworth, 99 F.2d 334, 348 (7th Cir. 1911)). He accused the Court of trying to rectify these unfortunate conditions by refining the “‘National Code of Prison Regulation,’ otherwise known as the Cruel and Unusual Punishments Clause.” Id. (citing Hudson, 503 U.S. at 28). Justice Thomas criticized the majority for its continued reliance on Estelle, the Court’s first prison conditions case, which was guided “not by the text of the Constitution, but rather by ‘evolving standards of decency that mark the progress of a maturing society.’” Id. (quoting Estelle, 429 U.S. at 102). The logical result of continuing along this path, Justice Thomas was convinced, “is to transform federal judges into superintendents of prisons nationwide.” Id. at 1990-91.

See Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion). The Supreme Court concluded that termination of citizenship destroyed the individual’s status in society and was “more primitive than torture.” See id. Many federal courts have equated the deterioration of a prisoner’s mental and emotional well-being with punishment. See, e.g., Palmigiano v. Garrachy, 443 F. Supp. 956, 979 (D.R.I. 1977) (arguing that inmates have basic constitutional rights to be free from conditions that cause their physical and mental deterioration); Laaman v. Helgemoe, 437 F. Supp. 269, 307 (D.N.H. 1977) (stating that the Eighth Amendment protections extend beyond punishment of the physical body and include the whole person as a human being).
damage without any corresponding physical injury. Justice Blackmun clearly recognized this, and to ensure that psychological harm is included in the Eighth Amendment calculus, he emphasized that such harm can be clinically diagnosed and quantified through well-established means. Because the Court in Helling did not hesitate to include future physical harm within the Eighth Amendment's orbit, its theory might also encompass potential psychological damage. Medically, potential physiological and psychological risks are intertwined, one nourishing the other.

On the periphery, as Justice Marshall envisioned, is the need for rehabilitative treatment. Prison conditions affect more than just the inmate's body; they may also affect the inmate's ability to make moral choices—to become self-determining. A lack of rehabilitative programs obviates the possibility of choice. Inadequate opportunities for rehabilitation contribute to physical and mental deterioration. Tension and anxiety caused by fear of physical and

372. See Block v. Rutherford, 468 U.S. 576, 598 (1984) (Marshall, J., dissenting) (citing testimony from a psychiatrist, arguing that denial of visitation to prisoners "generally threatens their mental health") (citation omitted); see also supra notes 278-304 and accompanying text.

373. See Hudson, 503 U.S. at 16-17 (Blackmun, J., concurring) ("'Pain' in its ordinary meaning surely includes a notion of psychological harm.").


375. See Procunier v. Martinez, 416 U.S. 396, 425-26 (1974) (Marshall, J., concurring) (arguing that freedom from censorship of prisoners' mail advances the goal of rehabilitation). Justice Brennan also seemingly considers rehabilitation as part of the constitutional equation. See Rhodes v. Chapman, 452 U.S. 337, 364 (1982) (Brennan, J., concurring) (arguing that if prison conditions combine to defeat rehabilitation by creating a probability of recidivism they violate the Constitution). He would find prison conditions unconstitutional when "'the cumulative impact of the conditions of incarceration threatens the physical, mental, and emotional health and well-being of the inmates and/or creates a probability of recidivism and future incarceration.'" See id. (quoting Laaman, 437 F. Supp. at 323).

Note, however, the court's comment in Holt v. Sarver:

This Court knows that a sociological theory or idea may ripen into constitutional law; many such theories and ideas have done so. But, this Court is not prepared to say that such a ripening has occurred as yet as far as rehabilitation of convicts is concerned. Given an otherwise unexceptional penal institution, the Court is not willing to hold that confinement in it is unconstitutional simply because the institution does not operate a school, or provide vocational training, or other rehabilitative facilities and services which many institutions now offer.


377. See id. at 326.
sexual attacks and callousness among correctional staff lead to the degeneration of the inmate’s attitude and emotional stability.\textsuperscript{378}

The lower federal courts identified not merely deterrence and retribution, but also rehabilitation as legitimate policies and goals of the corrections system.\textsuperscript{379} Justice Marshall understood that in most penal institutions rehabilitative programs are more an ideal than a reality.\textsuperscript{380} Although the therapeutic model of corrections has come under increasing criticism, for Marshall, prison practices that inhibit reformation just would not do. For example, in \textit{Martinez}, when correctional authorities asserted that reading prisoners’ mail was a useful rehabilitative tool, Justice Marshall summarily rejected the penological justification.\textsuperscript{381} He recognized that “[t]he mails provide one of the few ties inmates retain to their communities or families—ties essential to the success of their later return to the outside world.”\textsuperscript{382} Justice Marshall found Judge Kaufman’s observations particularly apropos: letter writing stimulates the inmate’s natural human impulses and contributes to his better mental attitude and reformation.\textsuperscript{383} Marshall likewise believed that “[t]he harm censorship [of letters] does to rehabilitation . . . cannot be gainsaid.”\textsuperscript{384}

Recent decisions such as \textit{Helling} and \textit{Farmer} mark a significant step toward vesting prisoners with constitutional rights, not merely to safe and healthy living conditions, but to protection from future harm to their psyche. The Eighth Amendment necessitates that prison officials provide inmates with food, shelter, and warmth,\textsuperscript{385} but it may also require more: an opportunity for redemption consistent with current societal standards.\textsuperscript{386} The balancing of punishment principles deter-

\textsuperscript{378} See \textit{id}. at 325-26 (noting that the “rampant violence and jungle atmosphere” can lead to more violence, as well as to “physical and mental degeneration”).


\textsuperscript{381} \textit{id}. at 426.

\textsuperscript{382} \textit{id}. (citing \textit{Comparative Analysis of Standards and Goals of the National Advisory Commission on Criminal Justice Standards and Goals with Standards for Criminal Justice of the ABA}, 1973 A.B.A. Sec. Criminal Justice 67-68).

\textsuperscript{383} \textit{id}. (citing \textit{Sostre v. McGinnis}, 442 F.2d 178, 199 (2d Cir. 1971) (en banc)).

\textsuperscript{384} \textit{id}. at 426 & n.11 (quoting \textit{Sostre}, 442 F.2d at 199 (quoting Richard G. Singer, \textit{Censorship of Prisoners’ Mail and the Constitution}, 56 A.B.A. J. 1051, 1054 (1970))).

\textsuperscript{385} See \textit{supra} note 233.

\textsuperscript{386} See \textit{Rhodes v. Chapman}, 452 U.S. 337, 364 (1980) (Brennan, J., concurring) (stating that opportunity for educational and rehabilitative programming is to be considered in determining whether prison conditions violate the Constitution).
mines the choice of constitutional restraints. The courts sentence citizens to jail. When the conditions in prison bear no relationship to the sentencing function, the sentence is pointless. If rehabilitation is truly a goal of confinement, courts are responsible for carrying out this purpose and should intervene when prison practices make it impossible.

The public is generally apathetic about prisons. However, studies have shown that most people are horrified when they learn of the savage living conditions that exist in some of the worst jails. Justice Marshall believed that the Eighth Amendment's evolving standards of decency emerge from an informed citizenry, and that by educating the public about prison conditions, their opinions could be altered. Through his opinions, he tried to enlighten the American public regarding the horrendous practices in prison. He was all too aware that corrections officials exercise extensive, largely invisible, power over inmates; not subject to public scrutiny, there is a tremendous potential for abuse by those officials. He recognized the enormous institutional responsibility that inheres in the administration of government-sanctioned punishment and the Court's integral part in the process. His primary goal was confinement with dignity. In case after case, Justice Marshall emphasized that it is the judiciary's obligation to enforce the rights of the politically powerless; for as far as he was concerned, this is the heart of the American system.

387. See Bruce R. Jacob, Prison Discipline and Inmate Rights, 5 Harv. C.R.-C.L. L. Rev. 227, 272 (1970) (arguing that the role of the courts in determining constitutional treatment varies with the objective of confinement).

388. See id. (stating that when rehabilitation is the objective of confinement, the judiciary should accept at least partial responsibility for implementing that objective).

389. See Feldberg, supra note 23, at 380.

390. See id. at 380-81 (citing Resource Center for Correctional Law & Legal Services, Comm. on Correctional Facilities & Services, ABA, After Decision: Implementation of Judicial Decrees in Correctional Settings 7-9 (1976)).


392. See Bell v. Wolfish, 441 U.S. 520, 565-66 (noting that the motivation for policy decisions by prison officials that affect the treatment of prisoners "will frequently not be a matter of public record").