The Majority Opinion as the Social Construction of Reality: The Supreme Court and Prison Rules

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THE MAJORITY OPINION AS THE SOCIAL CONSTRUCTION OF REALITY: THE SUPREME COURT AND PRISON RULES

JAMES E. ROBERTSON*

[All knowledge is knowledge from some point of view.]1

[I]nstitutions make realities within the relativistic boundaries of time and place.2

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I. Introduction

According to the "rule of law tradition," the Supreme Court discovers the meaning of the Constitution and its Amendments through a closed system of "general, impartial and fixed rules." This reified concept of constitutional interpretation masks the dynamics of judicial decision making: Supreme Court rulings are more than interpretations of the Constitution; they are authoritative constructions of social reality. In Supreme Court decision making, the line between what "is" and what "ought to be," between "reflection" and "creation," is illusive because each Justice does not "find" the law but instead employs interconnected assumptions and shared meanings about the issues before the Court. Given the

3. Craig Ducat, Modes of Constitutional Interpretation 45 (1978). Ducat wrote:

"It [the rule of law tradition] is customarily contrasted with the Rule of Men, generally with pejorative effect to the latter: While the Rule of Law mandates the decision of controversies objectively according to general, impartial, and fixed rules which do not acknowledge the individual identity of or personal consequences for particular litigants before the court, the Rule of Men implies that judgments in individual cases are otherwise politically motivated . . ."

Id. at 44.

Professor Ronald Dworkin described two models of the rule of law. The first is the "rule-book" model, in which government and individual must abide by legal rules regardless of their content. Ronald Dworkin, A Matter of Principle 11 (1986). The second model, the "rights' conception," posits that "the rules in the rule book [must] capture and enforce moral rights." Id. at 12.

The rule of law tradition arises from English common law. By the eighteenth century, common law judges posited that their judgments arose from common societal norms rather than their own predilections. See William Chamblis & Robert Sedman, Law, Order, and Power 58 (2d ed. 1982).

Juxtaposed to the rule of law tradition is legal realism, which posits that judicial decisions are grounded on emotions, intuition, and prejudice, making it impossible to predict what judges will do. See Jerome Frank, Are Judges Human?, 80 U. Pa. L. Rev. 17, 33-41 (1931). Frank argued that this uncertainty was concealed by the rule of law tradition to the disservice of democracy, "[f]or, in a democracy, the courts belong not to the judges and the lawyers, but to the citizens." Jerome Frank, Courts on Trial 429 (1949).

4. "The very idea of a government of laws, rather than men, rests on the wrongheaded premise that social structures have an objective existence that enables them to exert power over individuals. Ultra-theorists condemn the premise as an instance of the mistake of reification." Andrew Altman, Critical Legal Studies: A Liberal Critique 168 (1998). Reification is "the apprehension of the products of human activity as if they were something else than human products — such as the facts of nature, results of cosmic laws or manifestations of divine will." Peter L. Berger & Thomas Luckmann, The Social Construction of Reality 89 (1967).

5. Sociologists Peter Berger and Hansfried Kellner contended that "human phenomena does not speak for themselves; they must be interpreted." Peter Berger & Hansfried Kellner, Sociology Reinterpreted 10 (1981). In other words, social life is a subjective experience, i.e., an act of interpretation. Each person, then, constructs his or her own social reality. In making such interpretations of social reality, one cannot suspend value judgments. Because the rule of law tradition fails to acknowledge this, it cannot clarify the inherent moral choices that must be made in judicial decision making. Human meaning thus becomes constructed even though the participants may be ignorant of the moral choices behind their interpretation. See id. at 56-90 (discussing the relativity of social knowledge); see also Carter, supra note 2, at 65 ("A legal scholar who said he discovered the intent of the framers would more honestly have to say that he created a version of their intent from the symbolic material that has meaning to him.").
authoritative nature of judicial pronouncements, these assumptions and shared meanings can be determinative of what is perceived as social reality.

This Article argues that the Supreme Court has constructed as social reality a set of assumptions about imprisonment that renders inmates unworthy of meaningful constitutional safeguards. The Court has isolated inmates from the body politic by positing that the "[reasonableness] standard of review . . . applies in all circumstanc-
es in which the needs of prison administration implicate constitutional rights." Rather than subjecting prison rules to a skepticism worthy of a theory of rights, the Supreme Court imposes a presumption of their constitutionality — even when they significantly curtail fundamental rights. Consequently, the judiciary leaves inmates with scant protection from the excesses and abuses of their keepers.

The Article proceeds as follows. Part II describes the evolution of the prison from a largely autonomous, feudal-like entity into a bureaucratic organization. The


posner wrote:

Judicial authority is essentially political: decisions are authoritative because they emanate from a politically authorized source rather than because they are agreed to be correct by persons in whom the community reposes . . . trust. The political connotations of the word "authoritative" are apt; the work evokes power and submission, not truth and conviction.

Id.


8. In their constitutional context, not all rights are equal. Some have preferred status, which courts have deemed "fundamental," that is, "implicit in the concept of ordered liberty." Palko v. Connecticut, 301 U.S. 319, 325 (1937). Courts have incorporated fundamental rights into the Due Process Cause of the Fourteenth Amendment and thus have made them applicable to the states. See, e.g., Buckley v. Valeo, 424 U.S. 1, 23 (1976) (ruling that free speech constitutes a fundamental right); Shapiro v. Thompson, 394 U.S. 618, 638 (1969) (ruling that travel constitutes a fundamental right); Loving v. Virginia, 388 U.S. 1, 12 (1967) (ruling that marriage constitutes a fundamental right); Harper v. Virginia State Bd. of Educ., 383 U.S. 663, 670 (1966) (ruling that the right to vote constitutes a fundamental right); Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (ruling that privacy constitutes a fundamental right); Shearet v. Verner, 374 U.S. 408-09 (1963) (ruling that religion constitutes a fundamental right); Griffin v. Illinois, 351 U.S. 12, 18-20 (1956) (ruling that appeal of a criminal conviction constitutes a fundamental right) (Black & Frankfurter, J., concurring); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (ruling that recreation constitutes a fundamental right); see also LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 772-74 (2d ed. 1988) (discussing the process of selective incorporation). The Due Process Clause of the Fourteenth Amendment prohibits states from "depriv[ing] any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV.

9. A bureaucratic organization is characterized by the following components:

1. Rulification and routinization. Organizations stress continuity. Rules save effort by eliminating the need to derive a new solution for every situation. They also facilitate standard and equal treatment of similar situations.

2. Division of Labor. Labor division involves marking off performance functions as part of a systematic division of labor and providing the necessary authority to perform those functions.

3. Hierarchy of authority. The organization of offices follows the principle of hierarchy; each office is under the control and supervision of a higher one.

4. Expertise. Specialized training is necessary. . . . [N]ormally [then] only a person who has demonstrated an adequate technical training is qualified to be a member of the administrative staff.
prison begins the new millennium as a rule-bound, but nonetheless authoritarian, institution.

Part III chronicles the Supreme Court's review of prison rules via the rational-basis test. Once "beyond the ken of the courts," the prison has emerged from a tumultuous century with a powerful ally — the Supreme Court of the United States.

Part IV argues that the application of the rational-basis test to inmates rests on a distorted view of the bureaucratic prison. In holding that their fundamental rights merit minimal scrutiny, the Court has advanced a skewed portrait of the keepers and the kept.

In light of the conclusions drawn thus far in the Article, Part V asserts that the bureaucratic prison and its constitutional edifice — the rational-basis test — arose from a legitimation crisis threatening the prison during the 1960s. Thereafter, the courts constitutionally imprisoned and thereby re-legitimated its control of the underclass, the social junk of advanced capitalism.

Part VI posits three operational principles that should guide the courts in reviewing prison rules. This component of the Article contends that imprisonment ought to represent the punishment of last resort; and when incarceration occurs, it ought to be of the least restrictive form. Moreover, a new penal philosophy — one based on restorative justice — should redefine the role of the prison.

II. The Etiology of Prison Rules

Until the 1960s, legislatures and courts allowed wardens to run largely autonomous prisons. Consequently, wardens promulgated rules for inmates as they saw fit. Bureaucratic authority eventually dominated the governance of prisons, but it did not alter the pains of imprisonment. Prisons continued to function as authoritarian, repressive "total institutions."12

5. Written rules. Administrative acts, decisions, and rules are formulated and recorded in writing.

KENNETH J. PEAK, JUSTICE ADMINISTRATION 23 (2d ed. 1998) (footnote omitted).

10. See Notes and Comments, Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts, 72 YALE L.J. 506, 507 (1963) (concluding that courts followed the "hands-off" doctrine, leaving prisoners "without enforceable rights").

11. Roberto Unger juxtaposed three concepts of lawful authority. One is customary law, which consists of "characteristically inarticulate" yet narrowly applied standards of conduct. ROBERTO MANGABEIRA UNGER, LAW IN MODERN SOCIETY 50 (1975). Unger indicated that customary law is "spontaneously produced by society." Id. at 51. Bureaucratic (or regulatory) law is the second type. It arises from the state and is composed of "explicit prescriptions, prohibitions, or permissions, addressed to more or less general categories of persons and acts." Id. The third type of law is "the legal order or legal system." Id. at 52. Its rules are general and applied by autonomous bodies that are staffed by specialized groups. See id. at 53.

12. ERVING GOFFMAN, ASYLUMS 6 (1961). Goffman wrote:

The central feature of total institutions can be described as a breakdown of the barriers ordinarily separating these three spheres of life. First, all aspects of life are conducted in the same place and under the same single authority. Second, each phase of the member's daily activity is carried on in the immediate company of a large batch of others, all of whom are treated alike and required to do the same thing together. Third, all phases of
A. The Rise of the Bureaucratic Prison

Well into the twentieth century, state governments delegated extensive authority to prison wardens and asked for little accountability in return. Wardens seized this opportunity:

Historically, the management of prison business has been centered around the personal goals and powers of the warden and a deputy warden or principle keeper who served as chief disciplinarian and top security officer. Literature describing early prison wardens presents the image of autocratic, sometimes charismatic figures who commanded the obedience and loyal of rank and file custodians. Until the courts abandoned their hands-off policy, wardens and their deputies held nearly unlimited authority to administer their own system of punishments and rewards.

Nevertheless, these early prisons did not necessarily lack rules. Some wardens chose to promulgate few rules; others imposed a plethora. Both extremes functioned to give vast authority to the staff with one overriding purpose — control of the inmate population.

the day's activities are tightly scheduled. . . . Finally, the various enforced activities are brought together into a single rational plan purportedly designed to fulfill the official aims of the institution.

Id.


16. See, e.g., Bruce R. Jacob, Prison Discipline and Inmate Rights, 5 HARV. C.R.-C.L. L. REV. 227, 237 (1970) (observing that a Tennessee prison had over 300 rules and warned that "[t]his list is not comprehensive").

17. See Richard McCleery, Communication Patterns as a Bases of Systems of Authority, in THEORETICAL STUDIES IN THE SOCIAL ORGANIZATION OF THE PRISON 49, 52 (Richard A. Cloward et al. eds., 1960) ("Control, rather than 'justice' in the familiar sense, was the object. Hence, there was no place for a body of principles or 'constitutional' rights to restrain disciplinary procedure."); cf. RESOURCE CTR. ON CORRECTIONAL LAW & LEGAL SERVS., ABA COMM'N ON CORRECTIONAL FACILITIES & SERVS., SURVEY OF PRISON DISCIPLINARY PRACTICES AND PROCEDURES 21 (1974) (characterizing the prison rules of 41 states as often "so vague and indefinite that it is difficult to differentiate between what might
James Jacobs' classic social history of Illinois' Stateville Prison illustrates the use of prison rules.\(^{18}\) Jacobs observed that Stateville, during the wardenship of Joseph Regan (1936-61), imposed so many prison rules that inmates could not hope to obey them all.\(^{19}\) This led staff to make "innumerable [unofficial] exceptions" in exchange for inmate cooperation.\(^{20}\) While to some outsiders Stateville epitomized good order, Jacobs found a corrupted order: "The captains' [inmate]-clerks couldn't be 'busted' and there were other 'untouchables' throughout the prison whose inviolability was based upon stooping, indispensability, or personal relationships with the staff. This led to an arbitrary system of justice, whereby overlooking infractions was a reciprocity for certain inmate compliance . . . ."\(^{21}\)

Regan did not have to fear that courts, legislatures, or other governmental agencies would oversee his prison. They had embraced a hands-off approach to prison practices.\(^{22}\) Stateville's Regan, as well as other wardens across the nation, thus had a free hand to suppress any dissent coming from within the prison.\(^{23}\)

Regan's successors could not maintain the autonomy he had established. The barriers separating society from prisons collapsed during the 1960s.\(^{24}\) Judicial and legislative oversight entered prison walls for the first time and not far behind came bureaucratic methods of management.\(^{25}\) By the 1970s, the state legislature installed a state department of corrections, leading to centralized authority over the state's once largely autonomous prisons.\(^{26}\) In turn, university-educated, professional elites secured high-ranking administrative positions in Stateville and the department of corrections.\(^{27}\)

B. Contemporary Prison Rules

Like the Stateville of old, the contemporary prison envelops its inhabitants in a myriad of rules.\(^{28}\) As John Irwin and James Austin observed:

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18. See generally JAMES B. JACOBS, STATEVILLE (1977) [hereinafter JACOBS, STATEVILLE].
19. See id. at 42.
20. Id. at 43.
21. Id. at 42-43.
22. See id. at 31-37; see also infra notes 88-95 and accompanying text (discussing the hands-off doctrine).
24. See infra notes 88-95 and accompanying text (discussing the demise of the hands-off doctrine).
25. See JACOBS, STATEVILLE, supra note 18, at 54-70.
26. See id. at 73-104.
27. See id.
28. See, e.g., COLORADO DEPT OF CORRECTIONS, CODE OF PRISON DISCIPLINE 9-20 (Sept. 1, 1999) [hereinafter COLO. CODE OF PRISON DISCIPLINE] (listing 56 prohibited acts); MICHIGAN DEPT OF CORRECTIONS, PRISONER GUIDEBOOK 7-15 (1999) [hereinafter MICH. PRISONER GUIDEBOOK] (listing over 30 prohibited acts); MISSISSIPPI DEPT OF CORRECTIONS, INMATE HANDBOOK 47-50 (Aug. 1999) [hereinafter MISS. INMATE HANDBOOK] (listing 36 prohibited acts); MONTANA DEPT OF CORRECTIONS,
The lines of authority, as well as the procedures, prescriptions, or guidelines for all practices, are formalized in the written rules and regulations appearing in elaborate manuals. An extensive and professionalized training program is needed to keep abreast of the most recent changes in an increasingly complex array of administrative regulations imposed by the central office.  

1. The Scope of Prison Rules

Prison rules are wide-ranging in scope. Their subject matter includes: (1) access to legal materials and the media; (2) grievance procedures; (3) mail and publication policy; (4) visiting; (5) cell furnishings; (6) prisoner funds; (7) property control; (8) program classification; (9) work assignments and wages; (10) good time; (11) disciplinary and grievance procedures; (12) drug testing; (13) prisoner organizations; (14) housekeeping responsibilities; and (15) smoking policy.

The most important category of prison rules addresses discipline. Disciplinary rules address a broad range of prohibited conduct, including institutional security; property; contraband; movement; safety and health; and miscellaneous matters, e.g., refusal to work or attend school.

Disciplinary rules are proscriptive and punitive and thus resemble the criminal law. Many mirror malum in se criminal offenses, such as rape and murder.
the great bulk of prohibitions lack a counterpart in the criminal law and are peculiar to life in "total institutions,"33 whose inhabitants experience round-the-clock scrutiny by their keepers.34

Correctional officers retain extensive discretion in the enforcement of disciplinary rules, choosing to overlook many violations.35 The type of infraction,36 the alleged rule violator's race,37 and his or her prior disciplinary record38 bear significantly on the officers' selective enforcement of these rules.

A Bureau of Justice Statistics study found recorded rule violations commonplace, with each inmate committing on average 1.5 violations in 1986.39 Prison disciplinary tribunals convicted about half of all male state prisoners and 43% of female state prisoners of one or more rule violations during their imprisonment.40

Prison staff can utilize a variety of sanctions upon rule violators.41 The most

and battery, sexual assault, bribery, and theft); MONT. POLICY NO.: DOC 3.4.2, supra note 28 (listing, e.g., homicide, threats, assault, extortion, and blackmail); NEB. RULES & REGULATIONS, supra note 28, at 17-23 (listing, e.g., murder, bribery, and assault); TENN. RULES & REGULATIONS, supra note 28, at 5-10 (listing, e.g., arson, assault, burglary, possession or selling of drugs, extortion, indecent exposure, and arson).

33. See supra note 12 and accompanying text (defining "total institutions").

34. See, e.g., COLO. CODE OF PRISON DISCIPLINE, supra note 28, at 9-20 (listing, e.g., abuse of medication, interference with a search, and failure to work); KY. POLICY No. 15.2, supra note 31, at 2-10 (listing, e.g., refusing to obey an order, failure to pass bed inspection, and lying to staff); MICH. PRISONER GUIDEBOOK, supra note 28, at 7-15 (listing, e.g., failure to disperse, interference with the administration of rules, insolence, failure to maintain employment, possession of money, unauthorized occupation of a cell or room, horseplay, and lying to an employee); MONT. POLICY No.: DOC 3.4.2, supra note 28, at 17-23 (listing, e.g., tattoo activities, flare of tempers, and violation of signed program agreement); N.H. MANUAL FOR INMATES, supra note 28, at 16-20 (listing, e.g., engaging in any sexual contact, insubordination to a staff member, possession of any material to construct a mask, wig or disguise, and tattooing); TENN. RULES & REGULATIONS, supra note 28, at 5-10 (listing, e.g., abuse of telephone privileges, disrespect, dress code violations, failure to report, horseplay, and receiving two food trays).


36. See id.


38. See id. at 944.


40. See id.

41. The Supreme Court, in Wolff v. McDonnell, 418 U.S. 539 (1974), held that due process requires that inmates accused of a disciplinary violation and threatened with deprivation of significant liberty receive: (1) notification of the charges no later than twenty-four hours before their adjudication; (2) assistance by a staff member, inmate, or some other "counsel substitute" for illiterate defendants or for those persons facing complex accusations; (3) production of witnesses for the accused unless their presence would be "unduly hazardous to institutional safety or correctional goals;" and (4) an explanation of a guilty verdict. Id. at 563-64, 592. Ninety percent of the adjudications result in convictions. See Stephan, supra note 39, at 1.
frequent sanction that adjudicators impose is solitary confinement. Inmates most fear the loss of good time because it extends their time served. Other sanctions include denial of entertainment/recreational activities and loss of commissary privileges.

2. The Reach of Prison Rules

Inmates encounter rules that constrict every fundamental right. It is ironic that prison rules ostensibly promote good order, while placing significant limitations on rights said to be "implicit in the concept of ordered liberty." Nonetheless, among the initial "abasements, degradations, humiliations, and profanations of self" that a new inmate (a "fish") experiences is the near total loss of privacy. As one "fish" recounted:

My escort guard ordered me to "get naked" and surrender my personal effects to an inmate dressed in brown prison garb. I was still wearing my nice prison suit and tie from the Courthouse. As I stripped down I handed the silent inmate the last vestiges of my social identity . . . . After the guard conducted another "bend-over-and-stretch-'em" search, I was given delousing shampoo and ordered to shower.

Various prison rules continue the loss of privacy. One's appearance may be subject to regulation. Outgoing and incoming nonprivileged mail can be read.

42. See Stephan, supra note 39, at 6-7 (finding that adjudicators imposed segregation on 31% of rule violators).
43. Good time is "the amount of time deducted from time to be served in prison . . . contingent upon good behavior . . . ." U.S. DEPT OF JUSTICE, DICTIONARY OF CRIMINAL JUSTICE DATA TERMINOLOGY 98 (2d ed. 1981).
44. See id. at 6-7 (finding that adjudicators imposed loss of good time on 25% of rule violators).
45. See id. (finding that adjudicators imposed denial of entertainment/recreational activities and loss of commissary privileges on 15% and 13%, respectively, of rule violators).
47. See generally, e.g., Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (ruling that the right of privacy is fundamental).
53. Privileged mail generally includes correspondence to and from attorneys, selected representatives, and court personnel. See Wolff v. McDonnell, 418 U.S. 539, 57-77 (1974) (holding that attorney mail could be opened only in the presence of its inmate-recipient and could not be read).
and inspected for contraband, and drug testing may be mandated. Some institutions warn inmates that they can be searched at any time and for any reason.

As he is escorted from intake, the "fish" quickly learns that freedom of travel, a fundamental right entitling "all citizens . . . to travel throughout the length and breadth of our land," is another casualty of confinement. Walls bound the inmate's world; movement from one destination to another is closely monitored. Accordingly, being in an unauthorized area invariably constitutes a disciplinary violation.

Reading the institution's inmate handbook, the "fish" observes that freedom of speech — that guarantor of the "free trade of ideas" also falls victim to imprisonment. Prison rules restrict the content of outgoing general mail. Newspapers, magazines, and books must come directly from the publisher. Prison staff can censor them.

In turn, imprisonment dramatically curtails freedom of association — a right "deeply embedded" in the concept of ordered liberty. Visitors, including the media, must be preapproved. Intraprison inmate organizations, such as chapters

54. See, e.g., CAL. RULES & REGULATIONS, supra note 30, § 3130, at 54; GA. PRISONER HANDBOOK, supra note 52, at 4; MISS. INMATE HANDBOOK, supra note 28, at 37; N.H. MANUAL FOR INMATES, supra note 28, at 24; S.D. INMATE GUIDE, supra note 30, at 5; UTAH INMATE HANDBOOK, supra note 28, at 35-36.

55. See, e.g., MICH. PRISONER GUIDEBOOK, supra note 28, at 19; MISS. INMATE HANDBOOK, supra note 28, at 9-12; UTAH INMATE HANDBOOK, supra note 28, at 49.

56. See, e.g., S.D. INMATE GUIDE, supra note 30, at 3; UTAH INMATE HANDBOOK, supra note 28, at 46.

57. See generally, e.g., Shapiro v. Thompson, 394 U.S. 618, 629 (1969) (ruling that the right to travel is fundamental).

58. See, e.g., CAL. RULES & REGULATIONS, supra note 30, § 3015, at 14; GA. PRISONER HANDBOOK, supra note 52, at 2; MISS. INMATE HANDBOOK, supra note 28, at 49; PA. INMATE HANDBOOK, supra note 52, at 3; TENN. RULES & REGULATIONS, supra note 28, at 9.

59. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); see, e.g., Consolidated Edison Co. v. Public Serv. Comm'n of New York, 447 U.S. 530, 544 (1980) (ruling that the right to free speech, including mail, is fundamental).

60. See, e.g., CAL. RULES & REGULATIONS, supra note 30, § 3138, at 55; GA. PRISONER HANDBOOK, supra note 52, at 4-5; MISS. INMATE HANDBOOK, supra note 28, at 37; N.H. MANUAL FOR INMATES, supra note 28, at 24; PA. INMATE HANDBOOK, supra note 52, at 803-1; UTAH INMATE HANDBOOK, supra note 28, at 35-36. See generally Turner v. Safley, 482 U.S. 78, 89 (1987) (ruling that restrictions on inmate correspondence that are reasonably related to correctional goals do not violate the First Amendment).

61. See, e.g., CAL. RULES & REGULATIONS, supra note 30, § 3138, at 55; GA. PRISONER HANDBOOK, supra note 52, at 5; see also Bell v. Wolfish, 441 U.S. 520, 548-52 (1979) (ruling that requiring publications to come directly from their publishers is reasonably related to correctional goals and thus does not violate the First Amendment).

62. See, e.g., GA. PRISONER HANDBOOK, supra note 52, at 25; MAINE STATE PRISON, HANDBOOK 5-6 (May 1995) (thereinafter Me. PRISON HANDBOOK); MONT. STATE PRISON, POLICY NO.: MSP 5.4.1 (Nov. 14, 1997); N.H. MANUAL FOR INMATES, supra note 28, at 24; PA. INMATE HANDBOOK, supra note 52, at 814-1; S.D. INMATE GUIDE, supra note 30, at 4.


64. See, e.g., CAL. RULES & REGULATIONS, supra note 30, § 3170, at 60-61; Me. PRISON
of Alcoholics Anonymous and Narcotics Anonymous, exist at the pleasure of prison staff.\textsuperscript{66}

Lastly, prison rules curtail religious activities by regulating when, where, and how inmates worship.\textsuperscript{66} In so doing, these rules tread on a fundamental right\textsuperscript{67} that "will little bear the gentliest touch of the governmental hand."\textsuperscript{68}

\textbf{III. The Emergence of the Rational-Basis Test}

Despite the intrusive nature of prison rules, courts refused to review their constitutionality until the late 1960s. They took a hands-off approach.\textsuperscript{69} Judges claimed that they lacked sufficient knowledge about prison administration.\textsuperscript{70}


\textsuperscript{69} See generally, e.g., Torcaso v. Watkins, 367 U.S. 488 (1961) (ruling that the right to worship is fundamental).


\textsuperscript{66} See, e.g., Bethel v. Crouse, 417 F.2d 504, 505-06 (10th Cir. 1969) ("We have consistently adhered to the so-called 'hands-off' policy . . . ."); Douglas v. Sigler, 386 F.2d 684, 688 (8th Cir. 1967) ("[C]ourts will not interfere with the conduct, management, and disciplinary control of this type of institution except in extreme cases."); Sutton v. Settle, 302 F.2d 286, 288 (8th Cir. 1962) ("[C]ourts have no power to supervise the management and disciplinary rules of such institutions"); Garcia v. Steele, 193 F.2d 276, 278 (8th Cir. 1951) ("[C]ourts have no supervisory jurisdiction over the conduct of the various institutions . . . ."); Powell v. Hunter, 172 F.2d 330, 331 (10th Cir. 1949) ("The prison system is under the administration of the Attorney General . . . and not of the district courts."); Sarshik v. Sanford, 142 F.2d 676, 676 (10th Cir. 1944) ("The courts have no function to superintend the treatment of prisoners in the penitentiary, but only to deliver from prison those who are illegally detained there."); United States ex rel. Yaris v. Shaghnessy, 112 F. Supp. 143, 144 (S.D.N.Y. 1953) ("[I]t is unthinkable that the judiciary should take over the operation of . . . prisons."); see also Scott Christianson, With Liberty for Some 252 (1998) (stating that prior to the late 1960s "[A]mericans' constitutional rights effectively stopped at the prison gate"); Eugene N. Barkin, The Emergence of Correctional Law and the Awareness of the Rights of the Convicted, 45 Neb. L. Rev. 669, 669 (1966) (observing that the constitutional status of prisoners is "the most neglected area" of correctional law); Note, Constitutional Rights of Prisoners: The Developing Law, 110 U. Pa. L. Rev. 985, 985-87 (1962) ("[C]ourts have been so influenced by the dogma of the independence of prison authorities that judicial intervention has been limited to the extreme situation.").

\textsuperscript{70} See e.g., Garcia, 193 F.2d at 278; National Advisory Comm’n on Criminal Justice
They feared that judicial review would invite frivolous litigation as well as weaken already tenuous staff control over inmates. Some argued that prison complaints addressed privileges, not rights. Moreover, federal judges often invoked federalism as a basis for abstaining from disputes involving state prisoners and their keepers.

A newly admitted inmate encountered a prison that bore little relationship to the idealistic justifications for the hands-off doctrine. Corrupted trusties effectively ran many prisons. Rape and assault, while below today's levels, plagued many institutions. Despite the rhetoric of rehabilitation, reform usually gave way to custodial concerns. Inmates could expect substandard medical care at best. In Southern prisons, segregation prevailed.

STANDARDS & GOALS, CORRECTIONS 18 (1973) ("Judges felt that correctional administration was a technical matter to be left to experts rather than to courts . . .").

71. See e.g., Stroud v. Swope, 187 F.2d 850, 852 (9th Cir. 1951).


73. See e.g., Douglas v. Sigler, 386 F.2d 684, 687 (8th Cir. 1967); Parks v. Ciccone, 281 F. Supp. 805, 809-10 (W.D. Mo. 1968).

74. See e.g., United States ex rel. Lawrence v. Ragen, 323 F.2d 410, 412 (7th Cir. 1963); Eaton v. Bibb, 217 F.2d 446, 448 (7th Cir. 1954).

75. See e.g., Holt v. Sarver, 309 F. Supp. 362, 374-75 (E.D. Ark. 1970), aff'd, 442 F.2d 304 (8th Cir. 1971). In Holt, the court stated:

A trusty is not expected to take any steps to protect an inmate from violence at the hands of another inmate, and trusties do not do so . . . They can and do sell favors, easy jobs, and coveted positions; they can and do extort money from inmates on any and all pretexts. They operate rackets within the prison, involving among other things the forcing of inmates to buy from them things like coffee at exorbitant prices.

Id.; see also Charles B. Fields, Trustees, in ENCYCLOPEDIA OF AMERICAN PRISONS 461, 462 (Marilyn D. McShane & Frank P. Williams III eds., 1997) (stating that trusties were a common feature of Southern prisons at one time and arose from a "castlelike social structure" found in the region and a rewards system designed to secure inmate cooperation).

76. See, e.g., Alan J. Davis, Sexual Assaults in the Philadelphia Prison System and Sheriff's Vans, 6 TRANS-ACTION 8, 9 (1968) (observing that in Philadelphia's jails "virtually every slightly-built young man committed by the courts is sexually approached within a day or two after his admission to prison").

77. See, e.g., AMERICAN FRIENDS SERV. COMM., STRUGGLE FOR JUSTICE 86 (1971) (observing that prison staff embraced rehabilitation as a means of gaining greater control over inmates); JESSICA MITFORD, KIND AND USUAL PUNISHMENT 106 (1973) (observing that "in many states there is not even the pretense of making 'therapy' available to the adult offender").

78. See, e.g., Gates v. Collier, 501 F.2d 1291, 1300 (5th Cir. 1974) (finding an absence of "prompt and efficient" medical care in Mississippi prisons); Newman v. Alabama, 349 F. Supp. 278, 281 (M.D. Ala. 1972) (finding that the one hospital for Alabama's inmates employed no full-time physicians); BRADLEY STEWART CHILTON, PRISONS UNDER THE GAVEL 42 (1991) (stating that medical facilities at the Georgia State Prison were "wholly inadequate and understaffed"); LARRY W. YACKLE, REFORM AND REGRET 30-39 (1989) (summarizing expert testimony about Alabama's understaffed and outdated medical facilities for inmates).

79. See DAVID M. OSHINSKY, "WORSE THAN SLAVERY" 162 (1996) (describing racial segregation in Mississippi's Parchman prison); WELCH, supra note 23, at 369 box 13-2 (1996) (observing that until the 1960s institutional racism prevailed in prison; that segregation by race was a feature of imprisonment; and that living conditions for whites were better than those of blacks); see also JOHN IRWIN, PRISONS
A. The Demise of the Hands-off Doctrine

The Supreme Court's 1961 decision in Monroe v. Pape[80] laid the foundation for a new, bureaucratic prison. The Monroe Court held that section 1983 of the recodified Civil Rights Act of 1871[81] remedied civil rights violations committed by government agents.[82] Three years later, in Cooper v. Pate,[83] the Supreme Court refused to block an inmate's civil rights action.[84] In 1966, the first year in which a tally was kept, federal courts entertained 218 prison-related lawsuits brought under section 1983.[85] By 1971, inmate-plaintiffs initiated 2915 section 1983 actions.[86] Thereafter, that number grew exponentially and exceeded 39,000 by 1996.[87]

Much earlier, in 1838 in Barron v. Baltimore,[88] the Court had held that the Bill of Rights applied only to the federal government and thus placed no constraints on state prisons.[89] Later, in the Slaughter-House Cases,[90] the Court ruled that the Privileges and Immunities Clause of the Fourteenth Amendment left this bifurcated arrangement in tact.[91] State inmates would have to await the Warren Court for effective remedy of their federal civil rights.

Over the course of two decades, the Warren Court made the Due Process Clause of the Fourteenth Amendment a repository for individual rights that transcended state borders and city police stations.[92] By the late 1960s, the Fourteenth Amendment

IN TURMOIL 9 (1980) (observing that blacks and whites resided in separate sections of the "Big House" prison-type).

81. The Act's current codification is 42 U.S.C § 1983 (Supp. IV 1998). It reads:
   Every person who, under color of any statute, ordinance, regulation, custom, or usage, of
   any State or Territory, or the District of Columbia, subjects, or causes to be subjected, any
   citizen of the United States or other person within the jurisdiction thereof to the
deprivation of any rights, immunities, or privileges secured by the Constitution and laws,
   shall be liable to the party injured in an action in law, suit in equity, or other proper
   proceedings for redress . . . . For the purposes of this section, any Act of Congress
   applicable exclusively to the District of Columbia shall be considered to be a statute of
   the District of Columbia.

Id.

82. Section 1983 was originally codified in the Act of Apr. 20, 1871, ch. 22, 17 Stat. 13 (1871).
See Monroe, 365 U.S. at 191.
83. 378 U.S. 546 (1964) (per curiam).
84. See id. at 546.
85. See JIM THOMAS, PRISONER LITIGATION 58 tbl. 3c (1988).
86. See id.
87. See BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS — 1997,
at 442 tbl. 5.80 (1998) [hereinafter SOURCEBOOK].
88. 32 U.S. (7 Pet.) 242 (1833).
89. See id. at 247.
90. 83 U.S. (16 Wall.) 36 (1872).
91. See id. at 74. See generally U.S. CONST. amend. XIV, § 1 (stating in relevant part that "[n]o
   state shall make or enforce any law which shall abridge the privileges and immunities of citizens of
   the United States"); Eugene Gressman, The Unhappy History of Civil Rights Legislation, 50 MICH. L.
   REV. 1323 (1952) (discussing the Act's early history).
92. See, e.g., FRED P. GRAHAM, THE DUE PROCESS REVOLUTION (1970) (describing the Court's
reached into the nation's prisons. In Mempa v. Rhay, the Court held that revocation of probation implicated one's liberty interest under the Due Process Clause and therefore must be preceded by procedural safeguards. In a brief per curiam opinion in Lee v. Washington, the Court struck down de jure racial segregation of inmates. Lastly, in Johnson v. Avery, the Justices ruled that inmates' right of access to the courts included consultation with "jailhouse lawyers."

Lower federal courts soon took the lead in bringing inmates into the constitutional mainstream. Their decisions ranged over virtually every aspect of an inmate's life, including: classification, discipline, inmate-on-inmate violence, racial discrimination, medical care, access to the courts, religious freedom.

piecemeal extension of the Bill of Rights to the criminal justice systems of the states.

93. Earlier, the Court had federalized the civil rights of criminal suspects. See, e.g., Benton v. Maryland, 395 U.S. 784, 787 (1969) (ruling that the Fifth Amendment right against double jeopardy applies to the states); Duncan v. Louisiana, 391 U.S. 145, 160-62 (1968) (ruling that the Sixth Amendment right to trial by jury applies to the states); Pointer v. Texas, 380 U.S. 400, 406 (1965) (ruling that the Sixth Amendment right of confrontation applies to the states); Malloy v. Hogan, 378 U.S. 1, 3 (1964) (ruling that the Fifth Amendment right against compelled self-incrimination applies to the states); Gideon v. Wainwright, 372 U.S. 335, 343-45 (1963) (ruling that the Sixth Amendment right to counsel applies to the states).

95. See id. at 133-37.
96. 390 U.S. 333 (1968) (per curiam).
97. See id. at 333-34.
99. A jailhouse lawyer is an "inmate of a penal institution who spends his time reading the law and giving legal assistance and advice to inmates, especially to those who are illiterate." BLACK'S LAW DICTIONARY 834 (6th ed. 1990).
101. See, e.g., Kelly v. Brewer, 525 F.2d 394, 400-02 (8th Cir. 1975).
102. See, e.g., Knell v. Bansinger, 489 F.2d 1014, 1018 (7th Cir. 1973).
105. See, e.g., Fitzke v. Shappell, 468 F.2d 1072, 1076 (6th Cir. 1972).
106. See, e.g., Corby v. Conboy, 457 F.2d 251, 253 (2d Cir. 1972).
solitary confinement;\textsuperscript{108} fire hazards;\textsuperscript{109} overcrowding;\textsuperscript{110} exercise;\textsuperscript{111} prison rules;\textsuperscript{112} treatment of pretrial detainees;\textsuperscript{113} speech;\textsuperscript{114} search and seizure;\textsuperscript{115} food, shelter, clothing, and sanitation;\textsuperscript{116} and totality of living conditions.\textsuperscript{117}

In several instances, lower federal courts assumed control of entire state prisons systems.\textsuperscript{118} As Professors Feeley and Hanson observed, "The extent of this involvement by the federal judiciary in overseeing major changes [in] the nation's jails and prisons is perhaps second in breadth and detail only to the courts' earlier role in dismantling segregation in the nation's public schools."\textsuperscript{119}

B. From Wolff v. McDonnell to Bell v. Wolfish

For the prisoners' rights movement, the high water mark came in Wolff v. McDonnell.\textsuperscript{120} "[T]here is no iron curtain drawn between the Constitution and the prisons of this country," declared the Wolff Court in 1974.\textsuperscript{121} The Court spoke of a policy of "mutual accommodation" between inmate rights and penal objectives.\textsuperscript{122}

\textsuperscript{108} See, e.g., Wright v. McMann, 387 F.2d 519, 526-27 (2d Cir. 1967).
\textsuperscript{114} See, e.g., Sostre v. McGinnis, 442 F.2d 178, 204 (2d Cir. 1971).
\textsuperscript{115} See, e.g., Bonner v. Coughlin, 517 F.2d 1311, 1317 (7th Cir. 1975).
\textsuperscript{119} Feeley & Hanson, supra note 100, at 13.
\textsuperscript{120} 418 U.S. 539 (1974); see JAMES B. JACOBS, NEW PERSPECTIVES ON PRISONS AND IMPRISONMENT 42 (1983) [hereinafter JACOBS, NEW PERSPECTIVES] (commenting that the Court's ruling in Wolff "provided the kind of clarion statement that could serve as a rallying call for prisoners' rights advocates").
\textsuperscript{121} Wolff, 418 U.S. at 555-56.
\textsuperscript{122} Id. at 556.
Accordingly, the Court in Wolff held that inmates could contact their attorneys without censorship and must receive procedural safeguards when threatened with punishment for prison rule violations.

As illustrated by the First Amendment cases, the Court's subsequent decisions during the 1970s fell short of mutual accommodation. The first case to be decided, Procunier v. Martinez, refused to answer whether inmates enjoyed First Amendment safeguards and instead held that free speech rights of outside correspondents merited protection. The majority opinion invoked a deferential approach to inmate complaints similar to the hands-off doctrine:

Suffice it to say that the problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. For all of those reasons, courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform. . . . Moreover, where state penal institutions are involved, federal courts have a further reason for deference to the appropriate prison authorities.

The companion cases of Pell v. Procunier and Saxbe v. Washington Post addressed the media's asserted right to face-to-face access to particular inmates. Once again, the Court prefaced its decision on deference: "Such considerations [about visitation] are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters." The Court upheld the ban as a reasonable security measure. Speaking for the dissenters, Justice Powell discounted the Court's security concerns and argued that face-to-face interviews with designated inmates were crucial for accurate reporting.

In Jones v. North Carolina Prisoners' Labor Union, Inc., the Justices reviewed prison regulations that permitted inmates to join unions but banned various union activities, such as rank-and-file meetings. Speaking for the majority, Justice

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123. See id. at 574-77.
124. See id. at 563.
126. See U.S. CONST. amend. I (reading in relevant part that "Congress shall make no law . . . abridging the freedom of speech, or of the press").
127. Martinez, 416 U.S. at 409.
128. Id. at 404-05.
131. Pell, 417 U.S. at 827.
132. See id. at 823, 833.
135. See id. at 126.
Rehnquist evoked a policy of "wide-ranging deference to . . . the decisions of prison administrators." \(^{136}\) Unlike the Court's earlier rulings, Justice Rehnquist made it clear that the burden of proof lay not with the state, but with the plaintiffs; moreover, prison officials' speculative security concerns must be "conclusively shown to be wrong . . . ." \(^{137}\) He found that the plaintiffs had failed in this regard. \(^{138}\) Justice Marshall's dissent accused the Court of taking "a giant step backwards" toward the hands-off doctrine. \(^{139}\)

In the last major case of the 1970s, \textit{Bell v. Wolfish}, \(^{140}\) the Court reversed the rulings of the district and circuit courts, which had found unconstitutional various restraints imposed on pretrial detainees. \textit{Bell} resurrected a portion of the "iron curtain" that the \textit{Wolff} Court had purportedly brought down. \(^{141}\) \textit{Bell} posited that institutional restrictions would pass constitutional muster as long as they "are reasonably related to the government's interest in maintaining security and order and operating the institution in a manageable fashion." \(^{142}\) Furthermore, this test of reasonableness required courts to defer to prison staff:

[C]ourts must heed our warning that "[s]uch considerations are peculiarly within the province and professional expertise of correctional officials, and in the absence of substantial evidence in the record to indicate that officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters." \(^{143}\)

While \textit{Pell} and \textit{Jones} foretold the Court's decision in \textit{Bell}, it nonetheless marked a turning point. After \textit{Bell}, the Court revisited several issues — First Amendment concerns, \(^{144}\) cruel and unusual punishment, \(^{145}\) and due process \(^{146}\) — and, in each

\begin{footnotesize}
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\item \textit{Id.}
\item \textit{Id.} at 132.
\item \textit{See id.} at 132-33.
\item \textit{Id.} at 139 (Marshall, J., dissenting).
\item 441 U.S. 520, 562-63 (1979).
\item Wolff v. McDonnell, 418 U.S. 539, 555-56 (1974) ("[T]here is no iron curtain drawn between the Constitution and the prisons of this country.").
\item \textit{Bell}, 441 U.S. at 540 n.23.
\item \textit{Id.} at 547-48 (quoting Pell v. Procunier, 417 U.S. 817, 827 (1974)).
\item \textit{Compare} Thornburgh v. Abbott, 490 U.S. 401, 419 (1989) (ruling that institutional regulations restricting the exercise of association should be upheld if they are reasonably related to institutional goals), and O'Lone v. Estate of Shabazz, 482 U.S. 342, 350-51 (1987) (ruling that institutional regulations restricting the exercise of speech should be upheld if they are reasonably related to institutional goals), and Turner v. Safley, 482 U.S. 78, 91 (1987) (ruling that institutional regulations restricting the exercise of religion should be upheld if they are reasonably related to institutional goals), with Procunier v. Martinez, 416 U.S. 396, 413-14 (1974) (ruling that institutional regulations restricting correspondence with persons outside prison must advance important and substantial governmental interests in the least restrictive manner).
\item \textit{Compare} Farmer v. Brennan, 511 U.S. 825, 837-44 (1994) (ruling that prison conditions inflict cruel and unusual punishment when (1) defendants evidence deliberate indifference, that is, actual knowledge of a high risk of injury; and (2) fail to respond in a reasonable manner in light of that risk), with Rhodes v. Chapman, 452 U.S. 337, 347 (1981) (ruling that prison conditions, when considered in their totality, must be intolerable if they are to inflict cruel and unusual punishment; and implying that the
\end{itemize}
\end{footnotesize}
instance, rolled back inmates' rights.\textsuperscript{146} Therefore, some commentators have argued that the Court after \textit{Bell} re-embraced the hands-off doctrine.\textsuperscript{146} Others have more properly called the post-\textit{Bell} era the "one-hand-on and one-hand-off" in that the Court will articulate standards of review, but in their formulation and operationalization the Court will define them in such a way as to place all but the most abusive practices outside judicial remedies.\textsuperscript{149}

\textbf{C. Turner v. Safley and the Bifurcation of Rights}

In the eight years that separated \textit{Bell} v. \textit{Wolfish} from \textit{Turner v. Safley}, the prison population rapidly expanded,\textsuperscript{150} the states repudiated the "rehabilitative ideal,"\textsuperscript{151} and

\begin{itemize}
  \item \textbf{146.} Compare Sandin v. Conner, 515 U.S. 472, 483-84 (1995) (ruling that state-created liberty interests are deprived by atypical, significant hardships \textit{with} Hewitt v. Helms, 459 U.S. 460, 470-72 (1983) (ruling that state-created liberty interests are deprived when prison officials engage in actions that are regulated by state law via substantive predicates and other mandatory language).
  
  \item \textbf{147.} In its post-\textit{Bell} rulings, the Court continued to emphasize that security concerns greatly curtail inmates' retained rights and that considerable deference should be accorded prison staff in this regard. \textit{See, e.g.}, Turner v. Safley, 482 U.S. 78, 89 (1987) (embracing a deferential attitude toward the actions of prison staff because "such a standard is necessary if prison administrators . . . , and not the courts, [are] to make the difficult judgments concerning institutional operations") (citation omitted) (quoting Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 128 (1977)); Block v. Rutherford, 468 U.S. 576, 589 (1984) (chastising the trial court for substituting its notions of proper jail administration for that of "experienced administrators").
  
  
  \item \textbf{149.} \textit{See} WILLIAM C. COLLINS, CORRECTIONAL LAW FOR THE CORRECTIONAL OFFICER 11 (1990) (using the "one-hand-on, one-hand-off" phrase as a chapter subtitle); MARGARET FISHER ET AL., PRACTICAL LAW FOR JAIL AND PRISON PERSONNEL 17 (2d ed. 1987) ("Dubbed by some the 'one-hand-on, one-hand-off' approach, it encouraged federal judges to identify the existence of constitutional rights [sic] violations but to defer to the expertise of jail and prison officials in the administration of the institution."). Others have characterized the Court's approach as one of deference to prison administrators. \textit{See, e.g.}, TODD R. CLEAR \\& GEORGE F. COLE, AMERICAN CORRECTIONS 404 (4th ed. 1997) (asserting that "[a] return to a strict hands-off policy seems highly unlikely, but greater deference is being given to prison administrators"); PEAK, supra note 9, at 219 ("This [due deference] doctrine has not been developed sufficiently, however, to determine when the courts should or should not intervene. Frequently, the result has been, as in Bell, that courts accept jurisdiction over prisoners' claims but fail to provide a remedy to them.") (footnote omitted). Professors Krantz and Branham stated that "[t]he reasons given for this deference are many of the same reasons which underlay the 'hands-off doctrine' — separation of powers, federalism, judges' lack of expertise in correctional matters, and a concern that judicial intervention will undermine institutional security and the purposes of incarceration." SHELDON KRANTZ \\& LYNN S. BRANHAM, THE LAW OF SENTENCING, CORRECTIONS, AND PRISONERS' RIGHTS 140-42 (5th ed. 1998).
  
  \item \textbf{150.} \textit{See} SOURCEBOOK, supra note 87, at 490 tbl.6.35 (301,470 sentenced federal and state inmates in 1979 versus 560,812 in 1987).
  
  \item \textbf{151.} Francis A. Allen, Criminal Justice, Legal Values and the Rehabilitative Ideal, 50 J. CRIM. L. CRIMINOLOGY \\& POLICE SCI. 226, 226-27 (1959). Allen stated:
\end{itemize}
the Court decided a host of prison cases. One addressed the constitutionality of institutional rules. In *Block v. Rutherford*, the Court reviewed regulations that barred contact visits for detainees, including those classified as low risk. In applying the rational-basis test, the Court quoted at length the *Bell* Court's call for deference to the judgments of prison staff and proceeded to chastise the trial court for substituting its notions of proper jail administration for that of "experienced administrators." Four Justices vigorously took issue with the Court's deployment

The rehabilitative ideal is itself a complex of ideas. It is assumed, first, that human behavior is the product of antecedent causes. These causes can be identified as part of the physical universe, and it is the obligation of the scientist to discover and describe them with all possible exactitude. Knowledge of the antecedents of human behavior makes possible an approach to the scientific control of human behavior. Finally, it is assumed that measures employed to treat the convicted offender should serve a therapeutic function, that such measures should be designed to effect changes in the behavior of the convicted person in the interests of his own happiness, health, and satisfactions and in the interest of social defense.


152. Aside from *Block v. Rutherford*, see infra notes 153-58 and accompanying text, the Court decided five major conditions of confinement cases. In the most important, *Rhodes v. Chapman*, 452 U.S. 337 (1981), the Court ruled that double-celling of inmates did not in itself impose cruel and unusual punishment in violation of the Eighth Amendment. *See id.* at 348. Here too the Court urged deference: "This Court must proceed cautiously; courts cannot assume that state legislatures and prison officials are insensitive to the requirements of the Constitution or to the perplexing sociological problems of how best to achieve the goals of the penal function in the criminal justice system . . . ." *Id.* at 351-52. Turning to the issue of due process, the Court in *Hewitt v. Helms*, 459 U.S. 460 (1983), ruled that prison regulations controlling the use of administrative segregation could give rise to protected liberty interests and accompanying procedural safeguards. *See id.* at 470-72. Later, in *Hudson v. Palmer*, 468 U.S. 517 (1984), the Court held that inmates possessed no Fourth Amendment protection in cell searches because they lacked a reasonable expectation of privacy in a prison cell. *See id.* at 529-30. The following year, in *Superintendent v. Hill*, 472 U.S. 445 (1985), the Court again demonstrated its commitment to minimal judicial review by ruling that the evidentiary standard for disciplinary verdicts on appeal is merely "a modicum of evidence." *Id.* at 455. Finally, in *Whiteley v. Albers*, 475 U.S. 312 (1986), the Court effectively deferred to prison staff in ruling that the use of force to quell a riot is constitutionally acceptable if they acted in "good faith." *Id.* at 320.


154. *See id.* at 588. A contact visit is one in which inmate and visitor are permitted some physical contact, such as a kiss or embrace. *See id.* at 579.

155. *See id.* at 585 ("[P]rison administrators [are to be] accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." (quoting *Bell v. Wolfish*, 441 U.S. 520, 547 (1979))).

156. *Id.* at 589 (quoting *Bell*, 441 U.S. at 554).

The court's further "balancing" resulted in an impermissible substitution of its view on the proper administration of Central Jail for that of the experienced administrators of that facility. Here, as in *Wolfish*, "[i]t is plain from [the] opinions that the lower courts simply disagreed with the judgment of [the] jail officials about the extent of the security interests
of due deference. Justice Blackmun's concurring opinion warned that "careless invocation of 'deference'" would bring a return to the hands-off doctrine. Justice Marshall's dissent spoke of the Court's "unwarranted confidence in the good faith and 'expertise' of prison administrators" and its willingness "to sanction any prison condition for which they can image a colorable rationale, no matter how oppressive or ill-justified that condition is in fact."\(^{158}\)

In its landmark ruling in *Turner v. Safley*, the Court reviewed the constitutionality of two regulations of the Missouri Division of Corrections. The first had the practical effect of prohibiting correspondence between unrelated inmates.\(^{159}\) The second barred female inmates from marrying without the permission of the warden.\(^{160}\) After examining several of the Court's prior prison cases, Justice O'Connor's majority opinion declared that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."\(^{162}\) Justice O'Connor concluded that the correspondence rules passed this test but not those restricting marriage.\(^{163}\)

The *Turner* Court cobbled together several factors for determining the reasonableness of a prison regulation. First, the regulation cannot be arbitrary or irrational in that one must find "a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it."\(^{164}\) The second factor "is whether there are alternative means of exercising the right that remains open to prison inmates."\(^{165}\) Even if an alternative exists, judges "should be particularly conscious of the . . . 'deference owed to corrections officials . . . in gauging the validity of the regulation.'"\(^{166}\) Thirdly, courts should consider the likely impact that accommodating the asserted right will have on staff, inmates, and the allocation of resources.\(^{167}\) The final inquiry addresses whether the challenged regulation represents "an exaggerated response," which is gauged by the availability of "obvious, easy" alternatives to the regulation in question that would allow both the institution to achieve its objectives and the inmate to exercise the asserted right.\(^{168}\)

The Court's subsequent applications of the *Turner* rational-basis test upheld prison regulations restraining religious practices,\(^{169}\) prohibiting the receipt of publications

\(^{157}\) *Id.* at 593 (Blackmun, J., concurring).

\(^{158}\) *Id.* at 596 (Marshall, J., dissenting).

\(^{159}\) 482 U.S. 78 (1987).

\(^{160}\) *See id.* at 82.

\(^{161}\) *See id.* at 82-83.

\(^{162}\) *Id.* at 89.

\(^{163}\) *Id.* at 94-99.

\(^{164}\) *Id.* at 89 (quoting Block v. Rutherford, 468 U.S. 576, 586 (1984)).

\(^{165}\) *See id.* at 90.

\(^{166}\) *Id.* (quoting Pell v. Procunier, 417 U.S. 817, 827 (1974)) (emphasis added).

\(^{167}\) *See id.*

\(^{168}\) *Id.* at 90.

inconsistent with "good order,"\textsuperscript{170} and authorizing the forced administration of antipsychotic drugs to a mentally competent inmate.\textsuperscript{171} These rulings rejected calls for a more rigorous standard when prison regulations "effectively prohibit rather than simply limit" exercise of a right;\textsuperscript{172} implicate "fundamental" rather than nonfundamental rights;\textsuperscript{173} or regulate activities that are not "presumptively dangerous."\textsuperscript{174}

\textbf{IV. Deconstructing the Rational-Basis Test}

Footnote four of United States \textit{v. Carolene Products}\textsuperscript{175} outlined the Court's special role as guardian of fundamental rights and "discrete and insular minorities."\textsuperscript{176} It posited that the normal presumption of constitutionality would no longer be present when government action (1) interfered with the normal operation of democratic process; (2) discriminated against discrete and insular groups; or (3) threatened individual rights.\textsuperscript{177} Regarding the latter, footnote four stated:

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth [Amendment].\textsuperscript{178}

Since Carolene Products, the Court has decreed that classifications burdening fundamental rights — excepting those of prisoners — trigger strict scrutiny.\textsuperscript{179} To satisfy strict scrutiny, the government must demonstrate that the impediment advances a compelling state interest\textsuperscript{180} in a narrowly tailored manner.\textsuperscript{181} The rational-basis test, on the other hand, presumes the constitutionality of government

\textsuperscript{172} \textit{O'Lon}, 482 U.S. at 349 n.2.
\textsuperscript{173} Id. at 349.
\textsuperscript{174} Id. at 349 n.2.
\textsuperscript{175} 304 U.S. 144 (1938).
\textsuperscript{176} Id. at 152-53 n.4; see also BRUCE ACKERMAN, \textit{WE THE PEOPLE} 369 (1998) (observing that footnote 4 sought to "fill[] the gap created by the Court's repudiation of a constitutional system grounded on "state's rights, property and contract").
\textsuperscript{177} See Carolene Products, 304 U.S. at 152-53 n.4; see also Pamela S. Karlan, \textit{Discriminatory Purpose and Mens Rea: The Tortured Argument of Invidious Intent}, 93 YALE L.J. 111, 115 n.25 (1983) (observing that "footnote four first suggested that the normal presumption of constitutionality may not operate in cases involving certain distinctions").
\textsuperscript{178} Carolene Products, 304 U.S. at 152-53 n.4.
\textsuperscript{179} See supra note 8 (listing cases).
\textsuperscript{180} See NAACP \textit{v. Alabama}, 357 U.S. 449, 463 (1958) (using the phrase "compelling interest" for the first time).
action\textsuperscript{182} and requires the advancement of a legitimate government interest.\textsuperscript{183} Plaintiffs rarely overcome this presumption.\textsuperscript{184}

Why, then, are inmates exempted from strict scrutiny when imprisonment threatens their fundamental rights? This part of the Article argues that the Supreme Court has cast prison worker and inmate in reified terms that devalues inmates' rights.

A. The Prison Worker as Humane Bureaucrat

The Supreme Court has attached great significance to the rise of the bureaucratic prison. According to the Court, correctional staff invariably exercise "considered" judgment\textsuperscript{185} and their backgrounds ensure that they are "trained" in prison administration.\textsuperscript{186} Implicit in these characterizations is the assertion that we can suspend the Constitution's distrust of governmental power when the conduct of prison workers is at issue.

As we have seen, the contemporary prison has indeed experienced significant bureaucratization.\textsuperscript{187} However, these developments should not be equated with humane confinement:

[W]hen contemporary researchers attempt to relate prison management practices to the quality of life behind bars, the results are generally quite negative: Prisons that are managed in a tight, authoritarian fashion are plagued with disorder and inadequate programs, and those that are

\textsuperscript{182} See, e.g., FCC v. Beach Communications, 508 U.S. 307, 314 (1993) ("On rational-basis review, a classification in a statute . . . comes to us bearing a strong presumption of validity."). (citation omitted); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985) ([L]egislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.); McGowan v. Maryland, 366 U.S. 420, 425-26 (1961) ("State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequity."); cf. Heller v. Doe, 509 U.S. 312, 320 (1993) (challenging the constitutionality of a statute requires negation of "every conceivable basis which might support" it) (quoting Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973)).


\textsuperscript{185} O'Lone v. Estate of Shabazz, 482 U.S. 342, 349 (1987).

\textsuperscript{186} Bell v. Wolfish, 441 U.S. 520, 562 (1979).

\textsuperscript{187} See supra notes 26-28 and accompanying text (discussing the bureaucratization of Stateville and other prisons).
managed in a loose, participative fashion are equally troubled; these that are a mixture of these two styles are not any better. 188

As illustrated by the trial court's findings in Madrid v. Gomez, 189 prisons remain predisposed to coercion and brutality. 190 The court found that staff at California's super-max prison at Pelican Bay had repeatedly used excessive, unnecessary, and at times gratuitous force against certain inmates. 191 One troublesome mentally ill inmate received severe burns when bathed in scalding waters in the prison's hospital. 192 An officer remarked that this African-American inmate would look like "a white boy before this is through." 193 Staff on a routine basis employed taser and gas guns, both capable of inflicting severe pain and injury, on unarmed inmates in cell extractions. 194 Staff also placed naked inmates into outdoor holding cages the size of telephone booths, some of which could be seen from the main administrative offices. 195

Although the California Administrative Code devoted dozens of pages of regulations to the operation of its prisons, 196 the court found written policies on the use of force "often lacked the necessary clarity and consistency to provide meaningful guidance." 197 "It is also clear," wrote the court, "that the absence of authoritative written guidelines allows policy to shift according to the predilections of individual mid-level staff." 198

Indeed, daily life for many inmates in the bureaucratic prison is sometimes worse than they experienced under the authoritarian prison. A noted criminologist observed:

If I had to do time and could choose which [penal era] . . . to do it in, I certainly would not select the contemporary prison. In all prison settings guards are supposed to function as police officers, among other

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188. Peak, supra note 9, at 234.
190. See, e.g., Hickey v. Reeder, 12 F.3d 754, 756 (8th Cir. 1993) (finding that a staff member had used a stun gun on an inmate who refused to clean his cell); Weeks v. Chaboudy, 984 F.2d 185, 187 (6th Cir. 1993) (finding that staff had denied a paraplegic inmate the use of a wheelchair); McCord v. Maggio, 927 F.2d 844, 846 (5th Cir. 1991) (finding that staff had confined an inmate to a vermin infested, unlit cell for two years); Fruit v. Norris, 905 F.2d 1147, 1150 (8th Cir. 1990) (finding that staff had forced inmates to work in the prison's sewers without protective clothing); Women Prisoners v. District of Columbia, 877 F. Supp. 634, 639-40 (D.D.C. 1994) (finding that staff sexually assaulted female inmates); LeMaire v. Maas, 745 F. Supp. 623, 645 (D. Or. 1990) (finding that staff had denied outdoor recreation to an inmate for a five year period); see also infra notes 233-34 and accompanying text (positing several factors that breed inhumane treatment of inmates).
191. See Madrid, 889 F. Supp. at 1159-68.
192. See id. at 1166-67.
193. Id. at 1167.
194. See id. at 1172-76.
195. See id. at 1171.
196. See California Dept of Corrections, Rules & Regulations of the Director of Corrections (July 31, 1997).
198. Id.
things. But in contemporary institutions, they have withdrawn to the walls, leaving inmates to intimidate, rape, maim, and kill each other with alarming frequency.\textsuperscript{199}

In this tense, violence-laden environment, guards find that "going by the book" often is ineffective. Inmates do not acknowledge the legitimacy of prison rules.\textsuperscript{200} Moreover, "the punishments which the officials can inflict . . . do not represent a profound difference from the prisoner's usual status."\textsuperscript{201} In response, staff often pursue two courses of action. The first is to make unofficial accommodations for inmates. In exchange for inmate cooperation, guards will lessen the hardships of confinement.\textsuperscript{202} The second course of action involves illegal intimidation and application of force, regardless of court rulings to the contrary. While the degree of unauthorized violence is hard to gauge, it can reach significant levels. One study found it "highly structured and deeply entrenched in the guard subculture."\textsuperscript{203}

Another study, upon interviewing guards, reported that a majority had either engaged in or observed illegal beatings.\textsuperscript{204}

\textbf{B. Judicial Scrutiny Threatens Penal Order}

The Supreme Court has argued that it must defer to prison officials because maintaining order in prison is "at best an extraordinarily difficult undertaking" that cannot readily tolerate judicial intervention.\textsuperscript{205} Not surprisingly, the Court sees inmates as "antisocial . . . and often violent."\textsuperscript{206} Controlling them is fraught with "[h]erculean obstacles."\textsuperscript{207} Courts, furthermore, are "ill equipped" to deal with them.\textsuperscript{208}

Even if one concedes that controlling inmates is as challenging as the Court claims, it does not necessarily follow that judicial intervention weakens the staff's already tenuous authority. As Feeley and Hanson observed: "Ongoing studies . . . on the impact of jail and prison conditions orders report that interviews with

\begin{itemize}
  \item \textsuperscript{199} Donald R. Cressey, \textit{Foreword to JOHN IRWIN, PRISONS IN TURMOIL} vii-viii (1980) (emphasis added).
  \item \textsuperscript{200} \textit{See GRESHAM M. SYKES, THE SOCIETY OF CAPTIVES} 48 (1958) (describing "the lack of an inner moral compulsion to obey on the part of inmates").
  \item \textsuperscript{201} \textit{Id. at 50}.
  \item \textsuperscript{202} \textit{See Richard A. Cloward, Social Control in the Prison, in THEORETICAL STUDIES IN THE SOCIAL ORGANIZATION OF THE PRISON} 20, 35-41 (Richard A. Cloward et al. eds., 1960) (identifying three informal patterns of social accommodation: over goods and services, information, and status).
  \item \textsuperscript{203} James W. Marquart, \textit{Prison Guards and the Use of Physical Coercion as a Mechanism of Prisoner Control}, 24 CRIMINOLOGY 347, 347 (1986).
  \item \textsuperscript{204} \textit{See KELSEY KAUFFMAN, PRISON OFFICERS AND THEIR WORLD} 130 (1988).
  \item \textsuperscript{206} \textit{Hudson}, 468 U.S. at 526.
  \item \textsuperscript{207} Thornburgh v. Abbott, 490 U.S. 401, 428 (1989).
  \item \textsuperscript{208} Procurier v. Martinez, 416 U.S. 396, 405 (1974).
\end{itemize}
defendant officials, attorneys, and guards reveal no widespread belief that court
decrees have exacerbated continuing problems of inmate violence.209 Judicial intervention on balance has been beneficial. While judicial intervention
may have diminished staff authority,210 the nexus between court-ordered reforms
and inmate violence appears weak.211 On the other hand, the benefits of judicial
intervention have been several and significant, including the abolition of horrific
conditions of confinement,212 as well as increased funding of correctional
institutions213 and enhanced professionalism among prison staff.214 Even the
conservative criminologist John DiIulio, Jr. rates judicial intervention a "qualified
success":

For proponents of judicial restraint, there is no use denying that in most
cases levels of order, amenity, and service in prisons and jails have
improved as a result of judicial intervention. And in most cases it is
equally futile to assert that such improvements would have been made,
or made as quickly, in the absence of judicial intervention.215

209. Feeley & Hanson, supra note 100, at 25.
210. See Kathleen Engel & Stanley Rothman, The Paradox of Prison Reform: Rehabilitation,
intervention has weakened staff via fear of lawsuits, procedural rights accorded inmates, diminished
legitimacy in the eyes of inmates, and charges of racism).
211. See Feeley & Hanson, supra note 100, at 18-19 (faulting Engel and Rothman's case studies and
hypothesizing that various social changes, not judicial intervention, led to increased inmate violence).
212. See, e.g., Jackson v. Bishop, 404 F.2d 571, 579-80 (8th Cir. 1968) (banning the whipping of
inmates); Feliciano v. Barcelo, 497 F. Supp. 14, 18-32 (D.P.R. 1979) (ordering an end to "cruel and
brutalizing conditions and treatment" endured by inmates and detainees); Palmigiano v. Garraty, 443 F.
Supp. 956, 979, 986-90 (D.R.I. 1977) (ordering the end to conditions "unfit for human habitation"),
remanded, 599 F.2d 17 (1st Cir. 1979), aff'd, 616 F.2d 598 (1st Cir. 1980); Gates v. Collier, 349 F. Supp.
881, 902 (N.D. Miss. 1972) (requiring the classification of inmates so as to protect inmates from
assaultive inmates); Holt v. Sarver, 309 F. Supp. 362, 374-75 (E.D. Ark. 1970) (banning the use of
trustees having supervisory powers), aff'd, 442 F.2d 304 (8th Cir. 1971); Hamilton v. Shiro, 338 F. Supp.
1016, 1019 (E.D. La. 1970) (requiring the remedy of conditions that "shock the conscience as a matter
segregation in prison), aff'd. 390 U.S. 333 (1968) (per curiam); see also CLEAR & COLE, supra note 149,
at 410 (concluding that judicial intervention has "diminished" the "more brutalizing features" of prison
life).
213. See Feeley & Hanson, supra note 100, at 30-32 (observing that Southern prisons foremost
benefitted from increased funding born of judicial intervention).
214. See JACOBS, NEW PERSPECTIVES, supra note 120, at 54-55 (1983) (concluding that court orders
resulted in a "new administrative elite, which is better educated and more bureaucratically minded");
Feeley & Hanson, supra note 100, at 27 (observing that judicial intervention spurred professionalism
among correctional staff).
215. John J. Dilulio, Jr., Conclusion: What Judges Can Do to Improve Prisons and Jails, in
COURTS, CORRECTIONS, AND THE CONSTITUTION, 287, 291 (John J. Dilulio, Jr. ed., 1990); see also LEO
CARROLL, LAWFUL ORDER 8 (1998) (observing that "overall intervention has been a qualified success");
Susan P. Sturm, The Legacy and Future of Corrections Litigation, 142 U. PA. L. REV. 639, 705-06 n.316
(1993) (finding that judicial intervention has remedied various abuses). As Jacobs observed, defining
"success" is not so simple:
Prison and mental health bureaucracies are large and complicated. They are frequently
racked by conflicting goals and competing staff factions. Needless to say, prisons rarely
Indeed, one can question whether prisons can be governed humanely in the absence of judicial intervention. The history of the prison, dating back to the founding of the Walnut Street Jail in 1789, has been one of deterioration, overcrowding, and neglect. The contemporary prison has not escaped the historic malignancy that eventually consumes even the best intentions of prison staff:

It would be an error to assume that most of these late-twentieth-century mutations of the prison tend toward leniency and comfort. The most common prisons are the overcrowded prisons proximate to the big cities of America; they have become places of deadening routine punctuated by bursts of fear and violence.

Courts throughout the 1990s encountered flagrant abuses of inmates. These included: cross-gender strip searches in non-emergency situations; hiring staff previously convicted of unlawfully beating inmates; withholding medication from an inmate known to be HIV-positive; confining an inmate in a strip cell for approximately twenty days, where he wrapped himself in toilet paper to keep...
warm, and crowding of up to 190 inmates in a facility designed for fifty-one persons. And while judicial intervention has remedied many abuses, the end of judicial oversight often results in backsliding.

Several factors contribute to the malignancy that grows seemingly unchecked within the prison when unattended by the courts. First, prisons are "closed institutions," hidden from public scrutiny. Oversight of prisons by a public body is thus unlikely. In the absence of judicial scrutiny, the keepers of inmates possess extensive discretion and authority and are as corrupted by power as other government agents.

Second, the "pains of imprisonment" primarily assault an inmate's sense of competence and worth, leaving him or her adrift in a prison community that prizes toughness, violence, and exploitation. As I observed in a previous article:

The loss of liberty, aside from its constraint on physical movement, cuts a deep psychological wound because it "represents a deliberate, moral rejection of the criminal by the free community." Severe restrictions on goods and services constitute an attack on "an individual's self-image" in that poverty symbolizes "personal inadequacy." Deprivation of heterosexual relationships brings into question one's "ego image" given the cultural nexus between sexual prowess and manliness. The many prison rules that deny individual autonomy symbolize a return to "the weak, helpless, dependent status of childhood." Finally, the danger of assault by predatory inmates represents an ongoing challenge to one's manhood because the inmate society equates "toughness" with masculinity.

Finally, because inmates are demonized, impoverished, disenfran-
chised,\textsuperscript{232} and largely drawn from the underclass,\textsuperscript{233} their suffering is unlikely to arouse external protest.\textsuperscript{234} Indeed, "inmates may be the least sympathetic group of 'outsiders' in our constitutional jurisprudence."\textsuperscript{235}

\textbf{V. Revisiting Stateville}

Jacobs has argued that the bureaucratization of the American prison and the expansion of inmates' rights share a common etiology — the extension of the "mass society."\textsuperscript{236} Derived from the writings of Edward Shils, the "mass society" thesis asserted that groups historically at the margins of society have been integrated into "society's central institutional and value systems."\textsuperscript{237} This has come about by virtue of a "heightened sensitivity on the part of the elite to the dignity and humanity of the masses."\textsuperscript{238} "Fundamental to the realization of a mass society," wrote Jacobs, "is the extension of the rights of citizenship to heretofore marginal groups like racial minorities, the poor, and the incarcerated."\textsuperscript{239}

Consistent with the "mass society" thesis, some fifty years ago the Sixth Circuit in \textit{Coffin v. Reichard}\textsuperscript{240} first posited that "a prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law."\textsuperscript{241} Nonetheless, lower federal courts would not repudiate the hands-off doctrine until the late 1960s. Inmates' rights then rapidly expanded until the Supreme Court's ruling in \textit{Bell v. Wolfish}\textsuperscript{242} in 1979. Ironically, the \textit{Wolfish} Court halted the growth of inmates' rights through the caveat in \textit{Coffin} — those so-called "necessary" restrictions, which the Court has found embedded in its social construction of the prison.\textsuperscript{243}

This Article contends that Jacobs got it wrong. The bureaucratic prison's origins do not lie in an emergent, inclusive "mass society," but in a legitimation crisis.

\textsuperscript{232} With the exception of Maine, Massachusetts, New Hampshire, and Vermont, all states bar imprisoned felons from voting. See Fletcher, supra note 230, at 1898.

\textsuperscript{233} See \textit{Race, Ethnicity, and the Social Order of the Prison}, in \textit{The Pains of Imprisonment} 181, 182 (Robert Johnson & Hans Toch eds., 1988) (identifying "most" minority inmates as former "residents of ghettos").

\textsuperscript{234} See \textit{Transcript: The Goldwater Institute and the Federalist Society: Federalism and Judicial Mandates}, 28 \textit{ARIZ. ST. L.J.} 17, 30-31 (1996) (describing inmates as one of the "other discrete and insular minorities" in that "prisoners... will get no protection from the political process").

\textsuperscript{235} Pamela S. Karlan, \textit{Bringing Compassion Into the Province of Judging: Justice Blackmun and the Outsiders}, 71 N.D. L. REV. 173, 176 (1995); see also \textit{Irwin & Austin}, supra note 29, at 80 (describing inmates as "among society's leading pariahs" and describing inmates as "the least sympathetic group of 'outsiders' in our constitutional jurisprudence").

\textsuperscript{236} See \textit{Jacobs, Stateville}, supra note 18, at 5-6, 203-07.

\textsuperscript{237} Id. at 6.

\textsuperscript{238} Id.

\textsuperscript{239} Id.

\textsuperscript{240} 143 F.2d 443 (6th Cir. 1944).

\textsuperscript{241} Id. at 445.

\textsuperscript{242} See supra notes 149-57 and accompanying text (discussing the impact of the \textit{Bell} decision).

\textsuperscript{243} \textit{Coffin}, 143 F.2d at 445.
Having embraced the rehabilitative ideal, correctional authorities could not reconcile often deplorable penal conditions with its ideological rhetoric. Whereas a similar penal crisis a hundred years earlier was mitigated by a commitment to a new, professional penology and to the reformatory movement, this one was resolved by "rights talk."

Feeley and Simon in their seminal study of prison reform by judicial decree conceptualized rights talk as a three-stage process of dissonance, integration, and coordination. Dissonance, or crisis, arose because of the gap between the rehabilitative ideal and the actual conditions of confinement, particularly those in the South, where prison conditions resembled those of the slave plantation. In the integration stage, judges expressed their disapproval of prison conditions through the Eighth Amendment prohibition of cruel and unusual punishment. The final stage, coordination, involved the institutional commitment of judges to creating a "legally justifiable prison."

The prisoners' rights movement soon encountered the Burger Court. Its enunciation of the rational-basis test introduced a value-passive constitutional rhetoric. Unlike the stinging rebuke of prison life found in landmark lower court decisions such as Holt v. Sarver, the Burger Court advanced a deferential analysis that recast the parties: prison staff were no longer ill-trained brutes, but seasoned professionals; inmates, on the other hand, became conniving, violent outlaws. By 1980, rights talk became a two-edged sword. On the one hand, it would legitimate judicial intervention as a means of ameliorating the worst of penal abuses; on the other hand, it would legitimate the prison as a lawful institution, in which humane, seasoned professionals faced dangerous offenders.

As evidenced by the dramatic growth of the prison population for the past two decades, the Court's toothless rational-basis scrutiny has restored the legitimacy of the prison. In 1980, prisons held 315,974 persons; by 1998 the total number of sentenced prisoners exceeded 1,300,000.

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244. See Allen, supra note 151, at 226-27 (defining rehabilitative ideal).
245. See supra notes 83-86 (discussing prison conditions during the hands-off doctrine).
246. See MICHAEL SHERMAN & GORDON HAWKINS, IMPRISONMENT IN AMERICA 67 (1981) ("Faced with 'glaring institutional abuse' the Americans simply 'came up with a new design' in the form of a new theory of the Reformatory and a successful effort to find money to build it.") (footnote omitted); LARRY E. SULLIVAN, THE PRISON REFORM MOVEMENT 16-17 (1990) (chronicling the advent of the professional penologist).
248. See id. at 150-58.
249. See id. at 206.
250. See id. at 239.
251. 309 F. Supp. 362, 381 (E.D. Ark. 1970) ("For the ordinary convict a sentence to the Arkansas Penitentiary amounts to banishment from civilized society to a dark and evil world completely alien to the free world.") (emphasis added), aff'd, 442 F.2d 304 (8th Cir. 1971).
252. See SOURCEBOOK, supra note 87, at 490 tbl.6.35.
This growth, however, cannot be attributed to a renewed faith in rehabilitation. Policy makers have embraced a "new" penology, which the courts have allowed to function free of significant constitutional constraints. Unlike the old, traditional penology, "the [new penology] does not speak of impaired individuals in need of treatment or of morally irresponsible persons who need to be held accountable for their actions. Rather . . . it pursues systemic rationality and efficiency."  

Beneath the sanitized exterior of the new penology lies a correctional system that manages the underclass — the social junk of advanced capitalism. The criminal justice system has long targeted this lumpenproletariat occupying the inner city by virtue of their criminality, deviance, race, and perhaps mostly their class. In the past, however, the rehabilitative ideal deflected criticism of a class-oriented crime control policy. Presently, the bureaucratized prison and its constitutional edifice — the rational-basis test — perform the same defensive function once born by the rehabilitative ideal. Their success made possible a new type of prison, the warehouse prison.

The warehouse prison confines offenders in a manner not unlike the housing of livestock:

Warehouse prisons, with or without occasional creature comforts, are empty enterprises. Mostly, they squander human potential . . . . Warehouse prisons offer an existence, not a life. Their inhabitants survive rather than live. Warehouse prisons are our modern day houses of the dead, to draw on Dostoyevsky, not because of brutality but because of inertia. They provide some comforts but they are not comfortable. They don't instruct or correct. They merely contain.

Stripped of even the pretense of rehabilitation, warehouse prisons operate as storage facilities. They provide inmates with the bare necessities of life and thus satisfy the

255. See, e.g., id. at 455 ("The term underclass is used today to characterize a segment of society that is viewed as permanently excluded from social mobility and economic integration. The term is used to refer to a largely black and Hispanic population living in concentrated zones of poverty in central cities, separated physically and institutionally from the suburban locus of mainstream social and economic life in America."); Hans Toch, Studying and Reducing Stress, in THE PAINS OF IMPRISONMENT 25, 41 (Robert Johnson & Hans Toch eds., 1988); see also Morris, supra note 217, at 2.
256. See, e.g., REIMAN, supra note 231, at 134 (contending that "the criminal justice system works systematically not to punish and confine the dangerous and the criminal but to punish and confine the poor who are dangerous and criminal"); JONATHAN SIMON, POOR DISCIPLINE 254 (1993) (arguing that the introduction of probation and parole at the turn of the last century arose from a desire to control the "dangerous classes"); WELCH, supra note 23, at 35 (discussing the interrelationship between race and class and observing that together they "determine the form and degree of punishment").
257. JOHNSON, supra note 216, at 7-8; see also Robertson, supra note 216, at 1026-36 (delineating the origins and symbolic functions of warehousing inmates).
Supreme Court's minimalist notion of civilized confinement, but they do little else. Inmates are abandoned to "do time" without constructive activities.

VI. Reconstructing Prisoners' Rights

A theory of rights applicable to prison should be built around three operational principles. First, the criminal justice system should not resort to imprisonment as the normative sanction for a serious crime. Second, when imprisonment does become necessary, it ought to entail the fewest restrictions compatible with institutional safety. Finally, and perhaps most importantly, we should embrace a new penal philosophy — one based on restorative justice.

A. A Reputable Presumption Against Incarceration

A majority of inmates do not pose a sufficient threat to the community to justify the loss of liberty born from incarceration. Jerome Miller observed that in 68% of violent crimes the victim sustains no injury and just over 1% result in one or more days of victim hospitalization. Moreover, John Irwin and James Austin placed 52.6% of the crimes leading to imprisonment in the "petty categories," in which there is no significant loss of money and/or injury.

As former judge Lois Forer explained in recommending non-incarceral sentences for nonviolent offenders, "Fines, restitution, reparations, loss of licenses, and penalties other than prison are satisfactory in most cases [of criminality]. They compensate victims; they uphold the law; sometimes they act as a deterrent." Moreover, depopulating prisons may enhance public safety because prison officials will no longer prematurely release violent offenders to relieve prison overcrowding.

Previous law review commentary has advanced two constitutional grounds for a presumption against imprisonment. Richard G. Singer argued that the Eighth Amendment ban on sentences grossly disproportionate to the crime rendered imprisonment for nonviolent offenders constitutionally suspect. Recently, Sherry

258. Compare Rhodes v. Chapman, 452 U.S. 337, 348 (1981) (indicating that prison staff must provide "essential food, medical care, and sanitation" but need not go so far as to rehabilitate offenders), with HANS TOCH, LIVING IN PRISON 21-22 (1992) (setting forth his Prison Preference Inventory, which consists of privacy, safety, structure, support, emotional feedback, social stimulation, activity, and freedom).

259. Overcrowding provides a gauge of warehousing. Thirty-two states operated prison above 100% of their capacity. The federal prison system operated at 127% of its capacity. See BECK & MUMOLA, supra note 253, at 8 tbl.9. Inmate unemployment constitutes another measure of warehousing. Prisons employ under 10% of the inmate population. Gregory A. Clark, Work Programs, in ENCYCLOPEDIA OF AMERICAN PRISONS 508, 509 (Marilyn D. McShane & Frank P. Williams III eds., 1996).


261. See BECK & MUMOLA, supra note 253, at 11 (finding that of sentenced state prisoners; 47% were confined for violent offenses; 22% for property offenses; 21% for drug offenses; and 10% for public order offenses)

262. LOUIS G. FORER, A RAGE TO PUNISH 95 (1994).


264. See Singer, supra note 100, at 3-12. See generally Weems v. United States, 217 U.S. 349, 381
F. Colb contended that the Supreme Court in *Meyer v. Nebraska* (1910) (holding that punishments grossly disproportionate to the crime inflict cruel and unusual punishment).

265. 262 U.S. 390, 399 (1923).


267. *See id.* at 820-48. Commentators in other forums have embraced this stance. *See FORER, supra* note 262, at 95 (1994) (recommending alternative sanctions for nonviolent offenders); *IRWIN & AUSTIN, supra* note 29, at 70 (arguing that large-scale incarceration wastes resources); *JOHNSON, supra* note 216, at 293 (asserting that community settings can better achieve correctional goals for most offenders than incarceration); *Mark A.R. Kleiman, Community Corrections as the Front Line in Crime Control, 46 UCLA L. Rev. 1909 passim* (1999) (criticizing the overuse of prison and the underfunding of community corrections). *See generally M. Kay Harris, Reducing Prison Crowding and Nonprison Penalties, 478 ANNALS AM. ACAD. POL. & SOC. Sci. 150, 159 (1985) (lamenting that alternatives to incarceration are approached in a "laissez-faire, laundry-list" style, when their use should be part of a "significant rethinking" of penal policy).


269. *See Sykes, supra* note 200, at 65-78 (delineating the "pains of imprisonment").

sentence restricting freedom of movement should follow a prisoner into prison."

Many prison rules currently fail this test:

[PR]ison disciplinary codes often transcend the criminal law, regulating every aspect of the lives of inmates. They punish trivial, innocuous conduct. Therefore, prisoners perceive the prison disciplinary process as unfair. Overregulating or overcriminalizing within prison is counterproductive, encouraging selective enforcement of the rules. This allows guards to maintain control through favoritism. The rules themselves become inducements to violations, for their literal enforcement would reduce prisoners to automatons . . . .

We should make far greater use of open-prisons. They seek to limit the gulf separating imprisonment from the free world by maximizing inmate freedoms and responsibilities. Consequently, daily life in an open-prison is not a radical departure from life outside prison: inmates in open-prisons enjoy extensive contact with the outside world; they participate in the governance of the prison; and their incarceration rarely extends beyond one year.

C. A New Paradigm

The vulnerability of inmates to state-sanctioned harm arises from the dominant carceral paradigm. In this paradigm, the state — not the victim nor the community for that matter — claims the authority and right to inflict harm on offenders. The resulting power imbalance has left inmates at the mercy of state


274. See, e.g., Lawrence M. Friedman, Crime and Punishment in American History 77 (1993) ("[L]ocking people up is the primary tool for punishing serious offenders. . . . Ultimately, the prison became the centerpiece of correctional theory."); Robert Johnson, Preface to The Pains of Imprisonment 1, 11 (Robert Johnson & Hans Toch eds., 1988) (observing that "prisons have come to be synonymous with punishment in the modern mind"); Dan M. Kahan, What Do Alternative Sanctions Mean?, 63 U. CHI. L. REV. 591, 591 (1996) ([F]or those who commit serious criminal offenses, the law strongly prefers one form of suffering — the deprivation of liberty — to the near exclusion of all others").
power. Inmates have looked to the courts as a counterweight. Toward this end, the judiciary has achieved favorable but qualified results.

Advocates of the humane treatment of inmates must look beyond litigation and advance alternative models of penalty. They should weigh the merits of proffered paradigms by the following criterion: is offender autonomy maximized without diminishing the accountability of offenders to their victims and immediate communities?

Recently, several commentators have advanced the restorative justice philosophy. Its appeal to inmates lies in several of its unorthodox tenets. First, crime is no longer defined solely as an injury to the state but also as an act of harm directed toward the victim, community, government, and offender. The offender is deemed responsible for his crime within a framework of antecedent causes, which precludes his criminality from becoming his master status.

Second, the restorative justice ideal posits a new goal of punishment — the offender's direct accountability to both victim and community. This is to be

275. Professor Todd R. Clear remarks, "We should be suspicious about the uses of punishment, because allowing government to intentionally damage the well-being of some of its citizens is inherently questionable." Todd R. CLEAR, HARM IN AMERICAN PENOLOGY 171 (1994).

276. See WAYNE N. WELSH, COUNTIES IN COURT 15 (1995) ("Because inmates lack political power, litigation may be the only way to create and implement basic prisoner rights.").

277. See supra note 119 and accompanying text (discussing the impact of judicial intervention).

278. See, e.g., HOWARD ZEHR, CHANGING LENSES 177-214 (1995) (advancing restorative justice as a new way of viewing criminal justice); Gordon Bazemore & Dennis Maloney, Rehabilitating Community Service: Toward Restorative Service Sanctions in a Balanced System, in CORRECTIONAL CONTEXTS 401, 402 (James W. Marquart & Jonathan R. Sorensen eds., 1997) (arguing that the restorative justice paradigm "as a sanctioning focus" will bring new vitality to community service sentences); Myron Steele & Thomas R. Quinn, Restorative Justice, in THE DILEMMAS OF CORRECTIONS 524, 526-32 (Kenneth C. Haas & Geoffrey P. Alpert eds., 3d ed. 1995) (discussing the emergence of the restorative justice paradigm and arguing that sanctions based on this paradigm will be effective). See generally FRANK SCHMALLEGGER, CRIMINAL JUSTICE TODAY 410 tbl. 10-3 (annotated instructor's 5th ed. 1999) (comparing restorative and retributive justice). Criticism of the restorative justice paradigm include: (1) that it rests on a consensus notion of law-making in contradistinction to the role of conflict; and (2) that it functions as a means of "coercive social control" much like the extant justice system. Kevin I. Minor & I.T. Morrison, A Theoretical Study and Critique of Restorative Justice, in RESTORATIVE JUSTICE: INTERNATIONAL PERSPECTIVES 117, 129-30 (Burt Galaway & Joe Hudson eds., 1996).

279. Howard Zehr, arguably the foremost advocate of restorative justice, contended:

Crime represents an injury to the victim but it may also involve injury to the offender.

Much crime grows out of injury. Many offenders have experienced abuse as children.

Many lack the skills and training that make meaningful jobs and lives possible. For many, crime is a way of crying for help in part because of the harm done to them.

ZEHR, supra note 278, at 182; see also Daniel W. Van Ness, Restorative Justice and International Human Rights, in RESTORATIVE JUSTICE: INTERNATIONAL PERSPECTIVES 21, 23-24 (Burt Galaway & Joe Hudson eds., 1996) (arguing that alongside the injuries suffered by the victim and community, offenders experience injuries "that existed prior to the crime and that in some way may have prompted the criminal conduct of the offender").


281. See, e.g., ZEHR, supra note 278, at 200-03 (discussing the several dimensions of accountability in the restorative justice paradigm); Paul McCold, Restorative Justice and the Role of the Community,
achieved via the offender's reparation to the victim, service to the community, and appreciation of the reasons for his criminality.282 Thus, restorative justice seeks to make victims whole again.

Finally and most importantly for inmates, restorative justice seeks to reconcile offender autonomy with offender accountability by subjecting adjudicated persons to the least restrictive sanction that is consistent with community safety.283 Toward this end, proponents of restorative justice favor "intermediate," community-based sanctions.284

VII. Conclusion

Because inmates are both powerless and demonized,285 their welfare rests largely on the formulation, legitimatization, and implementation of a theory of inmate rights. Only then can they cope with the deleterious nature of the contemporary prison. One branch of government — the judiciary — has shown itself willing and capable of formulating and legitimating a theory of inmate rights. The majoritarian branches, in contrast, have demonstrated historic indifference to the welfare of inmates unless prodded by the judicial branch. As one commentator observed:

Only after it became clear that no relief would be voluntarily forthcoming were the federal courts dragged into prison reform. Judicial activism was directly attributable to legislative and executive inaction. The problem arose, of course, because these branches of state government were unwilling, or unable, to devote scarce resources to the improvement of correctional facilities.286

Unfortunately, federal courts no longer take prisoners' rights seriously. Blame rests squarely on the Supreme Court: it has advanced a lax, deferential standard in propounding that the "[reasonableness] standard of review . . . applies in all

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282. See, e.g., McCold, supra note 281, at 86-97 (describing the roles of the various parties in the restorative justice paradigm); Mark Carey, Restorative Justice in Community Corrections, CORRECTIONS TODAY, Aug. 1996, at 152, 152 (delineating the participants in the restorative justice paradigm); Bazemore & Maloney, supra note 278, at 406-11 (discussing the relationship of the parties in the restorative justice paradigm).

283. See Wesley Cragg, The Practice of Punishment: Towards a Theory of Restorative Justice 185-90 (1992) (arguing that sentencing should be guided by "the minimum force principle" because persuasion rather than coercion should be central to sentencing).

284. See, e.g., Zehr, supra note 278, at 93 (describing the restorative justice paradigm as one seeking alternatives to imprisonment); Mark S. Umbreit, Crime Victims Seeking Fairness, Not Revenge: Toward Restorative Justice, FED. PROBATION, Sept. 1989, at 52, 52 (stating that "[r]ather than the imposition of severe punishment, restorative justice emphasizes restitution as a means of restoring both parties").

285. See supra notes 237-42 and accompanying text (describing various attributes of the inmate population, which leave it powerless and demonized).

circumstances in which the needs of prison administration implicate constitutional rights.\footnote{287}

This Article has argued that new criteria ought to govern judicial review of prison rules. The alleged "reality" of life behind bars has become a self-fulfilling reality, where the rule of the cruel thrives on a penal policy wedded to a failed and unjust rationale for punishment.