

THE PUZZLES OF PRISONERS AND
RIGHTS: AN ESSAY IN HONOR OF FRANK
JOHNSON

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Resnik*

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THE PUZZLES OF PRISONERS AND RIGHTS: AN ESSAY IN HONOR OF FRANK JOHNSON

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Frank Johnson's landmark opinions in the 1970s recognized prisoners as rights-holders who were entitled to safety, sanitary conditions, health care, activities, and fair decision-making. In 2020, we take these propositions for granted, just as we also take for granted the power of prisoners to seek—and sometimes to win—judicial help in stopping the state from imposing certain forms of punishment on people convicted of crimes.

A first purpose of this Essay is to remind readers how radical and recent are the ideas of prisoners as rights-holders and of courts as protectors of those rights. Efforts to reform prisons are hundreds of years old. Yet the many ambitious individuals who sought to ameliorate conditions did not see prisoners as people whom law protected. Judge Johnson's contributions were to explain and to ensconce the judicial power to override prison officials' decisions about conditions of confinement. And as miserable as prisons are, those rulings have helped to alter some aspects of prisoners' daily lives.

* Arthur Liman Professor of Law, Yale Law School. All rights reserved, Judith Resnik ©, 2020. This work is supported by an Andrew Carnegie Fellowship; the research and views expressed are mine. The analysis here overlaps with and builds on my essay *(Un)Constitutional Punishments: Eighth Amendment Silos, Penological Purposes, and People's "Ruin,"* 129 YALE L.J.F. 365 (2020); the article *In-Prison Punishment: Constituting the "Normal" and the "Atypical" in Solitary and Other Forms of Confinement* (coauthored with Hirsu Amin, Sophie Angelis, Megan Hauptman, Aseem Mehta, Laura Kokotailo, Madeline Silva, Tor Tarantola, and Meredith Wheeler; forthcoming in *Northwestern University Law Review*, 2020); and my book, tentatively entitled *Impermissible Punishments*.

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Second, I bring to the fore more of the people who built that new law of prisons. Doing so entails mapping interactions among federal judges, lawyers, and dozens of prisoners whose names are not (yet) familiar but who deserve pride of place in the annals of the philosophy of punishment and of the law of prisons. Unrepresented, they provided insightful accounts into why the pain of their confinement was unconstitutional.

Third, I illuminate both the utility of law and the impact of the retreat from the doctrines that Judge Johnson elaborated. In the 1970s, the U.S. Supreme Court endorsed the precept that the Constitution does not stop at prisons' gates. But in later decades, the Court limited the application of the Eighth and the Fourteenth Amendments to prisoners. The Court refused to constrain prison overcrowding despite arguments that the intense density was cruel and unusual punishment. Further, the Court crafted a line of Fourteenth Amendment due process doctrine that distinguished between "typical" conditions in prisons, left largely to the unfettered discretion of

prison officials, and “atypical” conditions, for which some protection against arbitrary decisions was required.

Looking back at prison litigation in the 1960s and 1970s demonstrates the importance of rejecting the “typical” as a normative baseline from which to assess the legally permissible. Prisoners and judges such as Frank Johnson understood that the U.S. Constitution requires more than subsistence warehousing of people convicted of crimes. Amidst the squalor of conditions in the 1960s and 1970s, they saw that states could not use their punishment powers to ruin people and therefore had affirmative obligations to prevent debilitation. Whether a constitutional right to rehabilitation exists is distinct from the proposition that in constitutional democracies, governments cannot set out to cause deterioration as a purpose of their punishment.

I. REFUSING AND RECOGNIZING RIGHTS: FROM “CIVIL DEATH” TO *BROWN V. BOARD OF EDUCATION* AND PRISON LITIGATION IN THE 1960S AND 1970S

To think about Judge Johnson’s decisions on prisons requires knowing some of the history that made incarceration a central mode of punishment in the United States while leaving prisoners until the 1960s with very little access to courts. Given current awareness of the harms to the massive numbers of incarcerated persons, it is worth remembering that building penitentiaries was once heralded as a great reform. In the seventeenth and eighteenth centuries, advocates for incarceration argued that prisons would be an enlightened advance over the punishments then commonplace which were execution, branding, and transportation to empires’ colonies.

Yet with the “birth” of the penitentiary in the eighteenth century came calls for its reform. Local societies in England and the United States pioneered efforts that resulted in national and international organizations documenting miserable conditions in prisons. They sought ameliorative responses through the new social sciences of penology and criminology and through the profession of corrections. These reformers did not, however, recognize that prisoners were entitled as a *right* to safety, sanitation, and fair treatment.

Given the centrality of constitutionalism in the United States, one might have thought that this country would have taken a different approach. The 1789 U.S. Constitution addressed criminal law in a few arenas—by imposing rules

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for the trial of treason,¹ prohibiting ex post facto crimes,² and authorizing Congress to “define and punish” piracies and felonies on the high seas and crimes “against the Law of Nations.”³ The Constitution also prohibited Congress from “suspending” the writ of habeas corpus.⁴ But the U.S. Constitution did not direct the forms that punishment could take.

When the 1791 Bill of Rights amended that document, it addressed punishment in the Eighth Amendment through prohibitions on “excessive fines” and “cruel and unusual punishments.”⁵ Yet degrading prisoners was commonplace, rather than unusual. Moreover, the Eighth Amendment was not read until the later part of the twentieth century to apply to the states, where most of the country’s prisoners were (and are) confined.⁶

The post-Civil War Amendments also excluded prisoners from much of their protection. The Thirteenth Amendment, ratified in 1865, abolished slavery and involuntary servitude, “except as a punishment for crime whereof the party shall have been duly convicted.”⁷ The Fourteenth Amendment, ratified in 1868, protected the right of “male inhabitants” to vote in federal elections, except if they had participated “in rebellion, or other crime.”⁸

Carving out convicted prisoners from the new guarantees reflected English common law traditions that were followed in many states and that treated prisoners as “civilly dead”—unable to enter into or enforce contracts, buy property, or use the legal system at all. As the Supreme Court of Virginia explained four years after the Fourteenth Amendment was ratified, the “bill of rights is a declaration of general principles to govern a society of freemen, and not of convicted felons and men civilly dead.”⁹ Indeed, almost 100 years later,

in 1966, when the American Correctional Association put out a 600-page manual on

1. U.S. CONST. art. III, § 3. 2. *Id.* art. I, § 9, cl. 3. 3. *Id.* art. I, § 8, cl. 10. The Constitution also prohibits punishment for “Corruption of Blood,” which means that children are not to be sanctioned for the crimes of their parents. *Id.* art. III, § 3, cl. 2.

4. *Id.* art. I, § 9, cl. 2. 5. *Id.* amend. VIII. 6. For a discussion of the incorporation of the Cruel and Unusual Punishments Clause in the 1960s and the Excessive Fines Clause in 2019, see Judith Resnik, *(Un)Constitutional Punishments: Eighth Amendment Silos, Penological Purposes, and People’s “Ruin,”* 129 YALE L.J.F. 365, 370–71 (2020) [hereinafter Resnik, *(Un)Constitutional Punishments*],

https://www.yalelawjournal.org/pdf/Resnik_UnconstitutionalPunishments_gchaukm_hr.pdf. 7.

U.S. CONST. amend. XIII, § 1.

8. *Id.* amend. XIV, § 2; *Richardson v. Ramirez*, 418 U.S. 24, 25 (1974); *Hunter v. Underwood*, 471 U.S. 222, 233 (1985).
9. *Ruffin v. Commonwealth*, 62 Va. 790, 796 (1871). Some civil disabilities were mandated by statute and their impact varied by state. See Note, *Civil Death Statutes—Medieval Fiction in a Modern World*, 50 HARV. L. REV. 968, 969 (1937). In 1956, the National Conference on Parole called for abolition of laws limiting civil and political rights, and by the 1980s, most states had repealed them. See Margaret Colgate Love, *Starting Over with a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 FORDHAM URB. L.J. 1705, 1708, 1715 (2003).

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how to run prisons, it devoted a scant fourteen pages to law and barely men- tioned the U.S. Constitution.¹⁰

That manual’s skimpy overview got the doctrine “right” as it was at that time. Law was, of course, the engine that put people into prison. Further, the U.S. Supreme Court had read the Constitution’s mandate that Congress could not suspend the writ of habeas corpus¹¹ to mean that imprisoned individuals could attack their convictions in court and that prison officials were not sup- posed to impede such efforts.¹² But until the 1960s, courts generally refused challenges to the rules of and the conditions in prisons.

One example makes the point painfully clear. In the late 1940s, three Illinois prisoners—Harry Siegel, Maurice Meyer, and Robert Harp—sought federal-court protection from the terrorizing conditions of their incarceration.¹³ Harry Siegel said that, after he filed a lawsuit protesting the rampant violence and corruption, he was sent to months in solitary confinement where he had “no light . . . no bed . . . no modern toilet facilities . . . no visitors, no talking.”¹⁴ Maurice Meyer reported that in solitary confinement, he sat in filthy conditions, shared a “rusty tin cup” for drinking with other prisoners, and was forced to sleep on “the cold, damp, concrete floor.”¹⁵ Robert Harp alleged that the warden told him, “I will kill you before you get out of here.”¹⁶

These prisoners, assisted by a lawyer who brought the combined action,¹⁷ invoked the civil rights legislation that Congress had enacted after the Civil War to protect freed slaves by authorizing federal lawsuits if a person, acting “under color” of state law, deprived others of their constitutional rights.¹⁸ Siegel, Harp, and Meyer argued that this statute gave them access to federal judges because their treatment in Illinois’s prisons violated their Eighth and Fourteenth Amendment rights.

10. AM. CORR. ASS’N, MANUAL OF CORRECTIONAL STANDARDS 266–79 (3d ed. 1966). 11. U.S. CONST. art. I, § 9, cl. 2. 12. *Ex parte* Hull, 312 U.S. 546, 549 (1941). The Habeas Corpus Act of 1867, enacted right after the Civil War, provided for the first time that state as well as federal prisoners could file petitions in federal court. See Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385, presently codified in 28 U.S.C. § 2241 (2018). In practice, however, many prison systems imposed obstacles to prisoners seeking to file habeas petitions.

13. Complaint at 9, para. XVII(c), Siegel, Harp, and Meyer v. Ragen, No. 49 C 47 (N.D. Ill. 1949) (on file with author).

14. *Id.* at 10, para. XVIII(A)(a). 15. *Id.* at 11, paras. XVIII(A)(e), (g). 16. *Id.* at 13, para. XIX(c).

17. Their attorney was Luis Kutner, who, in 1961, cofounded Amnesty International. Kutner also argued for an international court to have authority to review claims from imprisoned persons. See Wolfgang Saxon, *Lawyer Who Fought for Human Rights Is Dead at 84*, N.Y. TIMES, Mar. 4, 1993, at B9. See generally Vicki C. Jackson, *World Habeas Corpus*, 91 CORNELL L. REV. 303 (2006). Warden Joseph E. Ragen, defending, told the press that the lawsuit was a “scheme” by Kutner, who wanted to represent “all prisoners in legal matters” and get fees from prisoners’ funds. See *3 Convicts Sue Warden Ragen for \$300,000*, CHI. TRIB., Jan. 11, 1949, at 18, <https://www.newspapers.com/clip/40200808/1949-3-prisoners-sue-warden-ragen/>.

18. That statute is currently codified at 42 U.S.C. § 1983 (2018).

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They lost at the trial and appellate levels.¹⁹ The federal district judge responded that, while he would “protect State prisoners from death or serious bodily harm,” he was “not prepared to establish [himself] as a ‘co-administrator’ of State prisons” and deal with matters he characterized as “internal administration and discipline.”²⁰ The Court of Appeals for the Seventh Circuit stated that even if “every fact which they have charged” were to be established, the complaint was not sufficient to support federal court involvement.²¹ To underscore the rights-less-ness of prisoners, the Seventh Circuit quoted a 1910 Illinois Supreme Court decision calling a prisoner “an alien in his own country.”²² The view that prison administration was the exclusive domain of the states was reiterated by many judges and came to be known as the “hands-off” doctrine.²³ As a result, the system of incarceration was immune from federal judicial oversight. That insulation eroded in the wake of *Brown v. Board of Education*. In 1954, the U.S. Supreme Court unanimously rejected arguments that schools run by states and localities were beyond constitutional review and concluded that racial segregation was unconstitutional.²⁴ The link between incarceration and race was vivid, as members of racial minorities then (as now) were disproportionately apprehended, charged, prosecuted, convicted, and sentenced to prison. Prisoners’ arguments for legal status gained currency with the growth of aspirations to accord equal treatment to men and women of all colors. When lower federal courts were put to work overseeing the desegregation of schools, judges began to see that constitutional guarantees had application to a host of state-based activities, prisons included.

Key decisions rendered by the U.S. Supreme Court between 1962 and 1964

directed lower court judges to take up claims by criminal defendants and by prisoners. In 1962, the Court in *Robinson v. California* concluded that the prohibition against “cruel and unusual punishments” bound states as well as the federal government.²⁵ The following year, the Court recognized rights to counsel

19. *Siegel v. Ragen*, 88 F. Supp. 996 (N.D. Ill. 1949), *aff'd*, 180 F.2d 785 (7th Cir. 1950). 20. *Siegel*, 88 F. Supp. at 999. 21. *Siegel*, 180 F.2d at 787, 789. 22. *Id.* at 788 (quoting *People v. Russell*, 245 Ill. 268, 272 (1910)). *Russell* also said that prisoners were worse off than aliens because while aliens could obtain a right to citizenship, any restoration of rights for prisoners was a “matter of grace.” *Russell*, 245 Ill. at 272.

23. *See, e.g., Siegel*, 180 F.2d at 789. 24. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). 25. 370 U.S. 660 (1962). In 1971, the Court assumed that the Eighth Amendment’s Excessive Bail Clause applied to the states. *See Schilb v. Kuebel*, 404 U.S. 357, 365 (1971). Decades later, the Court again assumed that the Excessive Bail Clause was incorporated against the states. *See McDonald v. City of Chicago*, 561 U.S. 742, 764 n.12 (2010). In 2019, the Court held that the Excessive Fines Clause also applied to the states. *Timbs v. Indiana*, 139 S. Ct. 682, 691 (2019). The Court relied on the Due Process Clause of the Fourteenth Amendment, while Justice Thomas specified the Privileges or Immunities Clause as the source of incorporation. *See id.* at 686–87, 691–92 (Thomas, J., concurring). Justice Gorsuch did not take a position

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for indigent felony defendants in *Gideon v. Wainwright*²⁶ and authorized post-conviction review in *Fay v. Noia*.²⁷ In 1964, in *Cooper v. Pate*, the Court ruled that § 1983 civil rights claims could be brought against state prison officials.²⁸

These precedents were artifacts of the political mobilizations of the twentieth century. Many scholars have chronicled the work of local and national organizations as they joined communities in marches, political action, and litigation—all aiming to curb the many forms of subordination that were then commonplace. As these social movements propelled the Court to recognize rights outside and inside prisons, judges such as Frank Johnson saw that com-

mitments to ending racial oppression did not stop at the gates to Alabama's prisons.²⁹

II. PRISONERS RETHEORIZING PUNISHMENT

This brief account reflects that from the 1700s until the 1960s, incarcerated people were the subject of condemnation as well as of concern. Through eloquence and sometimes with communal protests and uprisings, incarcerated individuals reached out for help. They were not, however, in a position to stop the punishments they endured in prison.

About sixty years ago, prisoners' relationship to law changed. To understand how and why, we need to consider not only remarkable judges such as Frank Johnson but also the remarkable prisoners who imagined that they were rights-holders when the world told them that they were not.³⁰ Ordinary people, often with little or no education and no money, took extraordinary leaps of faith. They built the law that is often assumed always to have been there.

on whether the basis for incorporation was the Privileges or Immunities Clause or the Due Process Clause of the Fourteenth Amendment. *Id.* at 691 (Gorsuch, J., concurring).

26. 372 U.S. 335, 345 (1963). That obligation has, in practice, been unevenly and insufficiently implemented. See Symposium, *The Gideon Effect: Rights, Justice, and Lawyers*, 122 YALE L. J. 2106 (2013); Stephen B. Bright & Sia M. Sanneth, *Fifty Years of Defiance and Resistance After Gideon v. Wainwright*, 122 YALE L.J. 2150 (2013).
27. 372 U.S. 391 (1963). In 1991, the Court abandoned *Fay*. See *Coleman v. Thompson*, 501 U.S. 722, 724 (1991).
28. 378 U.S. 546 (1964). That decision built on *Monroe v. Pape*, holding that litigants did not need to exhaust state courts' remedies. 365 U.S. 167 (1961). *Monroe's* reading of § 1983 that its reference to "any person" did not include municipalities was later revised. See *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978).
29. One analysis of the impact of courts comes from MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE* 30–34 (1998). Another analysis underscored the need to enlarge the focus to consider the role of social movements and lawyers in shaping these cases. See Margo Schlanger, *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 MICH. L. REV. 1994 (1999).
30. Two key decisions were *Pugh v. Locke*, 406 F. Supp. 318 (M.D. Ala. 1976), and *Wyatt v. Stickney*, 325 F. Supp. 781 (M.D. Ala. 1971). The ambitions and impact of Judge Johnson's decisions are chronicled in Larry Yackle's 1989 book that provides a moving account of the prison litigation and its aftermath. See LARRY W. YACKLE, *REFORM AND REGRET: THE STORY OF FEDERAL JUDICIAL INVOLVEMENT IN THE ALABAMA PRISON SYSTEM* (1989).

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Two such individuals, Jerry Lee Pugh and Worley James, filed lawsuits in 1974 that prompted Judge Johnson to appoint lawyers, hold hearings, and eventually issue decrees (today called structural injunctions)³¹ requiring redress in Alabama prisons. Figure 1 reproduces the front page of Pugh's typed complaint, which is provided in full as an appendix at this Essay's end, along with that of Worley James.

Figure 1. *The Opening Page of the Complaint in Pugh v. Sullivan,*

Civil Action No. 74-51-N, M.D. Ala.
1974

Filing in February of 1974, Pugh explained that, “at all times mentioned herein,
[he was a] Prisoner of The State of Alabama, in the custody of The

31. See Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV.
1, 49 (1979).

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Alabama Board of Corrections,” and housed at a prison in Elmore.³² Pugh was then twenty-seven years old and had, a year earlier, been sent to prison for violating conditions of probation.³³

Pugh alleged that he had been placed in a dormitory with more than 200 prisoners, of whom twenty-seven were white.³⁴ Describing the “[t]ension between the Whites and Black Inmates” as high, Pugh reported that he had asked to be transferred to a place with more White prisoners.³⁵ He alleged that the staff refused and that on August 8, 1973, he was one of fourteen prisoners “beaten so badly” that he was left “for dead.”³⁶ Pugh said he had a “fractured skull” and other injuries; after a high-risk surgery and a long hospitalization, he alleged that the prison denied him needed follow-up surgery.³⁷

Pugh argued that Alabama had violated his rights under the Eighth and Fourteenth Amendments because state officials (the commissioner of the Alabama Board of Corrections and the warden of the prison) had failed to keep him safe from assaults.³⁸ Pugh requested both an injunction and \$2 million in damages.³⁹ As Professor Larry Yackle explained in his analysis of the Alabama prison litigation, Judge Johnson responded by asking Robert Segall, who had been one of his law clerks, to represent Pugh.⁴⁰

In June of 1974, Worley James filed his handwritten complaint. He too was “in Custody of the Alabama Board of Correction[s],” housed in a facility at Atmore.⁴¹ As Professor Yackle detailed, James, “the son of a black sharecropper,” had spent decades inside prisons for a “string of felonies” dating back to 1925.⁴² That complaint named Governor George Wallace as well as prison officials as defendants and argued that the physical conditions constituted “punishments in violation of the Fifth, Eighth, [and] Fourteenth Amendments of the U.S. Constitution.”⁴³ Seeking relief “from this unjust punishment,” James described

32. See Complaint at 1, para. 2, Pugh v. Sullivan, No. 74-57-N, filed in the U.S. District Court in Montgomery, Ala. on Feb. 26, 1974 [hereinafter Pugh Complaint]. By the time Judge Johnson rendered his decision in 1976, L.B. Sullivan had been replaced by Judson C. Locke as the commissioner. See Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976). A copy of the complaint is reproduced in full in the Appendix, *infra*.

33. YACKLE, *supra* note 30, at 54. 34. Pugh Complaint, *supra* note 32, at 2, para. 6. 35. *Id.* 36. *Id.* Additional materials on the case are available on the Civil Rights Litigation Clearinghouse web-site. Univ. of Mich. Law Sch., *Case Profile: Pugh v. Locke*, C.R. LITIG. CLEARINGHOUSE, <https://www.clearinghouse.net/detail.php?id=537> (last visited Jan. 25, 2020).

37. Pugh Complaint, *supra* note 32, at 2–3, paras. 6–7. 38. *Id.* at 2–3, paras. 6–8. 39. *Id.* at 4, paras. 9–10. 40. YACKLE, *supra* note 30, at 51. 41. Complaint at 2, para. 2, James v. Wallace, No. 74-203-N, filed in the U.S. District Court in Montgomery, Ala. on June 21, 1974

[hereinafter James Complaint]. A copy of the complaint is reproduced in full in the Appendix, *infra*.

42. YACKLE, *supra* note 30, at 54. 43. James Complaint, *supra* note 41, at 2, para. 6.

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the prison's refusal to provide needed medical care, rehabilitation, recreation, and adequate food.⁴⁴

Figure 2 reproduces the last page of his complaint, styled a "Memorandum of Law" and listing the names of thirteen federal cases that had been brought by other prisoners during the decade before his filing.⁴⁵

Figure 2. *Worley James's "Memorandum of Law"*
Concluding His

Complaint in James v. Wallace,
Civil Action No. 74-203 N, M.D. Ala.
1974

This Memorandum of Law does not look like what lawyers produce. Yet
Worley James (and whoever assisted him) did a terrific job of
assembling the

44. *Id.* at 2–3, para.
6. 45. *Id.* at 4.

relevant precedents.⁴⁶ Even before Judge Johnson appointed law professor George Taylor to represent James, the filing was impressive.⁴⁷

James pointed to the efforts of people held in Alabama, Arkansas, California, Florida, Illinois, Texas, and Virginia who obtained decisions from courts in the years from 1966 to 1972. Recounting their claims shows how much their experiences sound like what the Illinois prisoners tried, unsuccessfully, in 1949 to get federal judges to recognize as worthy of court attention. In contrast, in these thirteen cases, judges agreed with prisoners that they had rights to be *in* court and agreed they had rights to be free from some forms of punishment *in* prisons.⁴⁸

Plunging into the details of lawsuits filed decades ago is necessary because the repetitive fact patterns make clear that, across the United States, prisoners were bogged down in repetitively similar and terrifying detention. Reading about the morass of misconduct, one can glimpse why some judges were worried about becoming involved, just as these decisions also make plain the contributions of Judge Johnson (and several other federal judges) who devoted sustained attention to dozens of same-sounding and disturbing complaints.

I have reorganized James's list to put the cases in chronological order. The earliest ruling came from Judge Johnson, writing *Washington v. Lee* in 1966 on behalf of a three-judge court. The decision not only was the first to hold unconstitutional the organized racial segregation of prisons⁴⁹ but also resulted in

46. Yackle reported that another prisoner who helped James "was never publicly disclosed." YACKLE, *supra* note 30, at 54.

47. *Id.* at 54–55. Taylor had joined with other lawyers in filing the "first great reapportionment case," *Reynolds v. Sims*, in 1963. *Id.* Taylor had then worked on *Gates v. Collier*, the litigation in Mississippi challenging that prison system, before returning to The University of Alabama to become an assistant dean. *Id.* at 55. Yackle recounted that after Taylor met James, who was by then old and "sickly," Taylor worked to reconfigure the case as not an individual claim about health care but as a class action focused on a right to rehabilitation. *Id.* at 55–56. Taylor hoped to draw on the right to treatment in Judge Johnson's decision in *Wyatt v. Stickney*. *Id.* at 56–58. Given the limits of the Court's interpretation of the Due Process Clause, Taylor thought it better to pursue rights to services such as education and recreation as part of an affirmative right to rehabilitation predicated on the Eighth Amendment. *Id.* at 58–59. A right to living conditions in

which rehabilitation was possible became part of the theory. *Id.* at 76–77.

Taylor filed an amended class action complaint on behalf of six prisoners housed at the Holman Maximum Security Unit in Atmore, Alabama, and all prisoners in all units of Alabama's prison system held "as a result of felony convictions." *James v. Wallace*, 382 F. Supp. 1177, 1178 & n.1 (M.D. Ala. 1974). Judge Johnson denied Alabama's motion to dismiss for failure to state a claim but distinguished between an absolute right to rehabilitation (which he held was not demanded, given that "free citizens" did not have such right to treatment) and the right not to be held in conditions making it "impossible" to have rehabilitation. *Id.* at 1180. See *infra* notes 126, 248.

48. For discussion of other prisoner litigation in this time period, see the National Prison Project's fifteenth-anniversary journal volume. 13 J. NAT'L PRISON PROJECT, Fall 1987, at 1.

49. See *Washington v. Lee*, 263 F. Supp. 327, 331 (M.D. Ala. 1966) (three-judge court), *aff'd sub nom. Lee v. Washington*, 390 U.S. 333 (1968). Also on the three-judge court were Circuit Judge Richard Rives and District Judge Seybourn Harris Lynne of the Northern District of Alabama. When statutes or regulations that applied statewide were at issue, federal law then required the convening of a three-judge court. See David P. Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. CHI. L. REV. 1, 30–37 (1964).

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the first U.S. Supreme Court decision (the affirmance in 1968) to address a class action challenging prison conditions.⁵⁰

This lawsuit brings into focus that, in addition to prisoners and judges, the other building blocks of prisoners' rights were social movements, streams of funding for lawyers to build records, and procedural innovations. The battles over segregation mobilized many sectors, including the American Civil Liberties Union (ACLU) and the Legal Defense and Educational Fund, Inc. (LDF), which by then had separated from the NAACP and which committed resources to litigate discrimination claims including those on behalf of criminal defendants and prisoners.⁵¹ But new tools were needed to make possible long-term implementation of the legal rights announced.

The problem of enforcement of federal court orders became vivid in the context of school desegregation mandates, which were often met by hostile, violent responses. Given recalcitrant defendants, judges involved in such cases sometimes found that named plaintiffs had graduated and that no one had the legal authority to enforce the

relief that had been won. In the early 1960s, drafters of federal procedural rules proposed major revisions, including novel forms of class actions to enable people who fell within class definitions (such as all children in a particular school district) to continue as plaintiffs and enforce court orders. In 1966, the Supreme Court promulgated a new class action rule, which permitted judges to authorize class actions for groups seeking injunctive relief and to craft long-term remedies.⁵²

Washington v. Lee was one of the first cases to use the 1966 class action rule.⁵³ The ACLU and LDF represented Caliph Washington, Hosea L. Williams, Julia

50. As I have elsewhere argued, understanding the law of prison conditions requires bringing together cases that often sit in separate doctrinal silos, such as those that focus on equal protection challenges as contrasted with those that focus on violence or other kinds of conditions in prisons. See Resnik, *(Un)Constitutional Punishments*, *supra* note 6, at 365–70.
51. The Legal Defense and Education Fund (LDF) launched its work against the death penalty in 1961. See Eric L. Muller, *The Legal Defense Fund's Capital Punishment Campaign: The Distorting Influence of Death*, 4 YALE L. & POL'Y REV. 158, 158 (1985). The ACLU's National Prison Project (NPP) began in 1972. See JOHN A FLITER, PRISONERS' RIGHTS: THE SUPREME COURT AND EVOLVING STANDARDS OF DECENCY 38–40 (2001); Samuel Walker, *Sixties Civil Rights Gave Momentum to Prisoners' Rights*, 13 J. NAT'L PRISON PROJECT, Fall 1987, at 2, 3.
52. See Judith Resnik, *From "Cases" to "Litigation,"* 54 LAW & CONTEMP. PROBS., Summer 1991, at 5, 8–9, 25–26, 40–43, 42 n.181 (1991); Judith Resnik, *"Vital" State Interests: From Representative Actions for Fair Labor Standards to Pooled Trusts, Class Actions, and MDLs in the Federal Courts*, 165 U. PA. L. REV. 1765, 1766–68 (2017); Judith Resnik, *Reorienting the Process Due: Using Jurisdiction to Forge Post-Settlement Relationships Among Litigants, Courts, and the Public in Class and Other Aggregate Litigation*, 92 N.Y.U. L. REV. 1017, 1020 (2017); David Marcus, *The History of the Modern Class Action, Part I: Sturm und Drang, 1953–1980*, 90 WASH. U. L. REV. 587, 588 (2017).
53. The decision to use Washington's name as the lead plaintiff evoked the growing national commitment to combat discrimination, and the happenstance that Alabama's prison head shared Robert E. Lee's last name underscored that point. The State argued against application of the then-new Rule 23 of the Federal Rules of Civil Procedure, and it lost before the three-judge court and again at the U.S. Supreme Court. The Court concluded that the "State's contentions that Rule 23 of the Federal Rules of Civil Procedure, which

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Allen (for her minor, incarcerated son, Willie), Agnes Beavers (for her minor son, Cecil McCargo), Johnnie Coleman, and Thomas E. Houck. This group of “one white and five Negro citizens” brought the lawsuit on behalf of all Alabama prisoners against the state’s Commissioner of Corrections Frank Lee and many others.⁵⁴ State statutes made it unlawful for “white and colored convicts to be chained together or to be allowed to sleep together.”⁵⁵ The Alabama prisoners sought a declaration that under the Eighth and Fourteenth Amendments, “Negro citizens, male and female” had the right “not to be segregated . . . or otherwise subjected to racial distinctions” when confined in the state prisons and county jails of Alabama.⁵⁶

Judge Johnson’s opinion for a three-judge court rejected the claim that racial segregation violated the Eighth Amendment.⁵⁷ Johnson explained that segregation was not “inhuman, barbarous or torturous punishment.”⁵⁸ In contrast, the court held that organizing prisons by race violated the Fourteenth Amendment guarantee of equal treatment, even if “some isolated instances” could exist when prison security and discipline required “segregation of the races for a limited period.”⁵⁹ The court ordered immediate desegregation in the “honor

relates to class actions, was violated in this case and that the challenged statutes are not unconstitutional are without merit.” *Lee v. Washington*, 390 U.S. 333, 333 (1968).

Many of the records of this case are available at the University of Michigan Law School’s Civil Rights Litigation Clearinghouse website. Univ. of Mich. Law Sch., *Case Profile: Washington v. Lee*, C.R. LITIG. CLEARINGHOUSE, <https://www.clearinghouse.net/detail.php?id=547> (last visited Jan. 25, 2020). In addition, I have drawn on materials from the collections of the papers of Chief Justice Earl Warren (MSS52258, Box 650, Opinions—Per Curiam) [hereinafter “Chief Justice Warren Papers”] and of Justice Byron White (MSS77264, Part I, Box 120, File 67-75) [hereinafter “Justice White Papers”] from the Library of Congress and on the papers of Justice Abe Fortas (MS 858, Box 60, File 1218) [hereinafter “Justice Fortas Papers”] and of Justice Potter Stewart (MS 1367, Box 228, File 2524) [hereinafter “Justice Stewart Papers”] housed at the Sterling Memorial Library, Manuscripts and Archives, Yale University.

54. *Washington v. Lee*, 263 F. Supp. at 328. 55. ALA. CODE tit. 45, § 52 (1958) (repealed 1975).

56. *Washington v. Lee*, 263 F. Supp. at 328. 57. *Id.* at 332. As noted, the Court had held in *Robinson v. California*, 370 U.S. 660 (1962), that the Eighth Amendment applied to the states. Judge Johnson cited the decision in *Washington v. Lee*, 263 F. Supp. at 332.

58. *Washington v. Lee*, 263 F. Supp. at 332. 59. *Id.* at 331. In its jurisdictional statement seeking Supreme Court review, Alabama informed the Court that its prison population then was “1546 white and 2510 Negro.” Appellate Petition, Motion and Filing, *Lee v. Washington*, 390 U.S. 333 (1968) (No. 75), 1967 WL 129475, at *7. According to 1960 census data, at that time,

Alabama's population (totaling 3,266,740) was 70% white. See Campbell Gibson & Kay Jung, *Historical Census Statistics on Population Totals by Race, 1790 to 1990, and by Hispanic Origin, 1970 to 1990, for Large Cities and Other Urban Places in the United States* (U.S. Census Bureau, Working Paper No. 76, 2005), <https://www.census.gov/population/www/documentation/twps0076/twps0076.html>. The state reported to the Court that one of the plaintiffs was a "Negro" from Georgia and that another was a "white citizen . . . of Florida." Appellate Petition, *supra*, at *6–7.

At the oral argument in the Supreme Court, Justice Black asked if the State conceded that its segregation statute was unconstitutional. The attorney for Alabama said he was "not in a position to concede" but spent no time defending de jure segregation. Transcript of Oral Argument at 1, *Lee v. Washington*, 390 U.S. 333 (1968) (No. 75), <https://www.oyez.org/cases/1967/75>. The State's focus and much of the argument centered instead on the authority of the plaintiffs to represent people in both jails and prisons and on the remedy.

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farms," youth centers, and prison hospitals and gave Alabama more time to desegregate higher security facilities.⁶⁰

The next case chronologically in James's Memorandum of Law was *Gilmore v. Lynch*, a May 28, 1970, decision from a three-judge court in the Northern District of California.⁶¹ Two San Quentin prisoners, Robert O. Gilmore Jr. and

Alabama insisted on the distinctive situations presented by local jails and on the need for prison officials to have "reasonable discretion" to separate prisoners when security required it. *Id.* at 2–4, 5–6. Justice Marshall elicited the answer that the State planned to abolish segregation by 1969, and Chief Justice Warren obtained the answer that nothing barred the state from seeking more time, if needed, from the district court. *Id.* at 20–21. Charles Morgan, for the prisoners, told the Court that the remedy had been shaped through the lens of the State's needs. *Id.* at 24–25.

The Supreme Court affirmed; the memoranda in the archives of the papers of Chief Justice Warren and of Justices Fortas, Stewart, and White reflect some of the Justices' qualms about desegregation in the prison context. Justice White offered a "longer version" of a per curiam that included a comment that the Court did not believe that the lower court "intended to prevent Alabama officials from separating prisoners according to their race temporarily, or from segregating particularly troublesome individuals, when required by considerations of security and discipline," and therefore, the order was "unexceptionable." Memorandum of November 14, 1967, signed B.R.W. at 2, Justice Fortas Papers, *supra* note 53.

Justice Marshall objected and said he could not “settle” for anything other than the initial short draft, as the “only thing struck down” was the statute and all other prison rules remained in effect. Memorandum of November 14, 1967, Justice Stewart Papers, *supra* note 53. On November 16, 1967, Justice Marshall added that there was no motion in the record to clarify or modify the district court order and included excerpts of the testimony of Commissioner Lee about the state’s desegregation plans then underway. Memorandum to the Conference from T.M., November 16, 1967, at 1, 2–5, and 6, Chief Justice Warren Papers, *supra* note 53. Justice Marshall stated that whatever problems could arise should be brought to the district court. *Id.* at 6. Justice Harlan responded that he remained of the view that “the judgment below should not be affirmed simpliciter,” which was why the case had been set for argument. Memorandum of November 17, 1967, from J.M.H. re No. 75 - Lee v. Washington, February 5, 1968, Justice Fortas Papers, *supra* note 53.

The result was both a brief per curiam and a concurrence that differed from the one Justice White had suggested in November. The Court’s opinion stated in part:

This appeal challenges a decree of a three-judge District Court declaring that certain Alabama statutes violate the Fourteenth Amendment to the extent that they require segregation of the races in prisons and jails, and establishing a schedule for desegregation of these institutions. . . . The remaining contention of the State is that the specific orders directing desegregation of prisons and jails make no allowance for the necessities of prison security and discipline, but we do not so read the “Order, Judgment and Decree” of the District Court, which when read as a whole we find unexceptionable. *Lee v. Washington*, 390 U.S. at 333–34. Justice Black, joined by Justices Harlan and Stewart, wrote in the concurrence that they wanted to make explicit something that is left to be gathered only by implication from the Court’s opinion. This is that prison authorities have the right, acting in good faith and in particularized circumstances, to take into account racial tensions in maintaining security, discipline, and good order in prisons and jails. We are unwilling to assume that state or local prison authorities might mistakenly regard such an explicit pronouncement as evincing any dilution of this Court’s firm commitment to the Fourteenth Amendment’s prohibition of racial discrimination. *Id.* at 334.

60. *Washington v. Lee*, 263 F. Supp. at 333. Specifically, Judge Johnson ordered the commissioner to take “necessary and appropriate steps to effect complete desegregation” within six months for minimum- and medium-security prisons and within a year for maximum-security institutions. *Id.*; see also YACKLE, *supra* note 30, at 30.
61. *Gilmore v. Lynch*, 319 F. Supp. 105, 109 (N.D. Calif. 1970) (three-judge court), *summarily aff’d*, 404 U.S. 15 (1971). The three judges were Circuit Judge Ben Duniway and District Judges Alfonso Zirpoli and Albert Wollenberg. Judge Wollenberg first denied the plaintiffs’ motion to convene a three-judge court, but the Ninth Circuit reversed. See *Gilmore v. Lynch*, 400 F.2d 228 (9th Cir. 1968).

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John Van Geldern, sought class-wide relief from California’s rules

limiting legal materials available to prisoners. The judges described “[r]easonable access to the courts” as a “constitutional imperative which has been held to prevail against a variety of state interests.”⁶² That court held that California’s regulations were unconstitutional and that, despite additional costs, more materials had to be provided.⁶³

February 18, 1970, is the date of the next decision—*Holt v. Sarver*,⁶⁴ a class action involving Arkansas’s prisons—that Worley James cited. To understand *Holt* requires learning about the filings that preceded and produced it. In 1965, three white prisoners, Winston Talley, William Hash, and Vernon Sloan, filed handwritten petitions in the Eastern District of Arkansas at the Pine Bluff Division, which was the closest federal court to Cummins Farm, where they and nearly 2,000 other men were incarcerated.⁶⁵

Like Siegel, Harp, and Meyer in Illinois in the 1940s and the *Gilmore* plaintiffs in California in the 1960s, these young men told the court that prison officials had violated their constitutional rights by blocking their access to courts.⁶⁶ But unlike those other cases, the handwritten petitions from the prisoners in Arkansas also alleged that the state routinely used whipping (with a five-foot leather strap) as its mode of discipline.⁶⁷

Chief Judge J. Smith Henley responded by appointing lawyers to represent the three. In a path-breaking ruling, he recognized their right to challenge the discipline imposed. But he wrote that federal judges were to give prison officials “wide latitude and discretion” in deciding prison discipline.⁶⁸ Chief Judge Henley did not hold that whipping was unconstitutional but did conclude that if whipping was to take place, it had to be regulated.⁶⁹ His 1965 ruling resulted in what Arkansas officials called the “*Talley Rules*”—condoning the use of the whip as long as written rules organized the process, prohibited its summary

62. *Gilmore*, 319 F. Supp. at 109. The Supreme Court held the year before the *Gilmore* ruling that prisons could not prevent prisoners from helping each other unless the prisons provided reasonable legal assistance directly to prisoners. See *Johnson v. Avery*, 393 U.S. 483, 490 (1969). While *Bounds v. Smith*, 430 U.S. 817 (1977), built on that proposition by requiring prison officials to provide adequate law libraries or persons trained to use legal materials, the 1996 decision in *Lewis v. Casey*, 518 U.S. 343 (1996), required that, as a predicate matter, prisoners bringing such claims had to show actual injuries from the lack of such legal help, *id.* at 349.

63. *Gilmore*, 319 F. Supp. at 111–12 (referencing *Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968), discussed *infra* note 134 and accompanying text).

64. 309 F. Supp. 362 (E.D. Ark. 1970). 65. See Doug Smith, *Stephens Relates How Prison System Boon for Everyone*, ARKANSAS GAZETTE, Jan. 3, 1965, at 15A; *Jackson v. Bishop*, 404 F. 2d 571, 573 (8th Cir 1968).

66. See *Talley v. Stephens*, 247 F. Supp. 683, 690 (E.D. Ark. 1965). 67. *Id.* at 687. 68. *Id.* at 686. 69. *Id.* at 689.

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imposition, and directed that “the blows administered for a single offense shall not exceed ten.”⁷⁰

Within short order, three more prisoners, William King Jackson, Lyle Edward Ernst, and Grady W. Mask, all in their early twenties and also at Cummins Farm, filed another set of handwritten petitions. Like the *Talley* plaintiffs, they too were white and in prison for low-level crimes. Alleging that they were whipped for “reasons” such as leaving okra in the fields and that the *Talley* Rules were not being followed, they again argued that whipping was unconstitutional.⁷¹

Two other federal judges, Oren Harris and Gordon E. Young, sitting together in the consolidated cases, appointed lawyers. After a trial, the judges reiterated that whipping was not itself unconstitutional but ordered more procedural protections.⁷² Prisoners had to be able to contest the charges and receive “an objectively reasoned, dispassionate decision” about whether the punishment was warranted.⁷³

The reversal by the Eighth Circuit in *Jackson v. Bishop* (written by Harry Blackmun, who soon thereafter joined the U.S. Supreme Court) concluded that the “use of the strap in the penitentiaries of Arkansas is punishment which, in this last third of the 20th century, runs afoul of the Eighth Amendment.”⁷⁴ Then-Judge Blackmun explained that regardless of what “precautionary conditions” were imposed, whipping offended “contemporary concepts of decency and human dignity and precepts of civilization which we profess to possess; and . . . it also violates . . . standards of good conscience and

fundamental fairness.”⁷⁵

In 1969, more Arkansas prisoners filed claims arguing the unconstitutionality of prison conditions. Chief Judge Henley again appointed lawyers, and Lawrence Holt became the lead plaintiff in a class action asserting that confinement at Cummins Farm and at the Tucker Intermediate Reformatory violated Eighth, Thirteenth, and Fourteenth Amendment rights, in part because it provided no “meaningful rehabilitative opportunities.”⁷⁶ Henley rejected the involuntary servitude claim,⁷⁷ but he concluded that the conditions and practices of

70. *Id.* at 688. 71. *Jackson v. Bishop*, 268 F. Supp. 804, 806 (E.D. Ark. 1967), *vacated*, 404 F.2d 571 (8th Cir. 1968). 72. *Id.* at 815–16. 73. *Id.* 74. *Jackson*, 404 F.2d at 579. 75. *Id.* 76. *Holt v. Sarver*, 309 F. Supp. 362, 364 (E.D. Ark. 1970). This decision is often referenced as *Holt II*, as it came after a more limited decision, *Holt v. Sarver*, 300 F. Supp. 825 (E.D. Ark. 1969). The U.S. Supreme Court reviewed both the remedy and the award of attorneys’ fees in the Arkansas prison litigation in *Hutto v. Finney*, 437 U.S. 678 (1978).

77. James Gray Pope has argued that the Thirteenth Amendment aimed to prohibit all involuntary servitude unless that work was specifically imposed as a punishment. See James Gray Pope, *Mass Incarceration, Convict Leasing, and the Thirteenth Amendment: A Revisionist Account*, 94 N.Y.U. L. REV. 1465 (2019).

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Arkansas’s penitentiary system “amount[ed] to a cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments.”⁷⁸ Chief Judge Henley also held the racial segregation imposed was unconstitutional.⁷⁹

The February 1970 *Holt v. Sarver* ruling was the first (as the opinion explained) in history to find an entire prison system unconstitutional. As Chief Judge Henley explained, the prior whipping cases had “involved specific practices and abuses alleged to have been practiced upon Arkansas convicts,” but *Holt* was “an attack on the System itself. As far as the Court is aware, this is the first time that

convicts have attacked an entire penitentiary system in any court, either State or federal.”⁸⁰

Worley James’s Memorandum cited another 1970 ruling, *Sinclair v. Henderson*, issued in November by the Fifth Circuit and addressing conditions on death row in Angola, Louisiana.⁸¹ Billy Wayne Sinclair alleged that the men held there had to “drink water . . . loaded with rust,” and were “fed from a food cart that [was] usually filthy and [that] numerous times insects, roaches, or human hair” were found.⁸² Sinclair reported that he was permitted only fifteen minutes per day outside his cell for bathing, washing clothes, and “what little physical exercise” he could have; he said that he never saw sunshine.⁸³

The Fifth Circuit vacated the trial court’s rejection of the “petition in the nature of a civil rights action” and remanded for consideration “on the merits.”⁸⁴ The appellate court reminded the trial judge that a civil rights plaintiff was not obliged to exhaust state judicial remedies.⁸⁵ Citing the Arkansas cases, the Fifth Circuit described the “allegations” as going far “beyond matters . . . of prison discipline and administration” and called for a decision on the merits about the “extreme maltreatment.”⁸⁶

The 1971 decision James cited was *Landman v. Royster*, issued by Judge Robert Merhige in the Eastern District of Virginia and ruling on behalf of a class headed by Robert Landman.⁸⁷ The judge detailed how Landman’s “troubles” began when he wrote a letter to the local newspaper objecting to twenty days

78. *Holt*, 309 F. Supp. at 365. 79. *Id.* at 381. 80. *Id.* at 365. 81. *Sinclair v. Henderson*, 435 F.2d 125 (5th Cir. 1970). 82. *Id.* at 126. 83. *Id.* 84. *Id.* at 125–26. 85. *Id.* at 126. 86. *Id.* 87. *Landman v. Royster*, 333 F. Supp. 621 (E.D. Va. 1971). During the same year, prisoners in upstate New York sought first to obtain relief through writing prison officials about the utterly oppressive conditions and then briefly took over the correctional facility in Attica, New York. Because the standoff resulted in the death of forty-three people, prisoners made vivid that the tragedies of American prisons were not a story of the South alone. As the 1972 report on Attica put it, Attica was not much worse or better than other prisons. Rather, “Attica [was] every prison; and every prison [was] Attica.” ATTICA: THE OFFICIAL REPORT OF THE NEW YORK STATE SPECIAL COMMISSION xii (1972).

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in solitary confinement,⁸⁸ which meant “a reduced diet, rationalized on the basis that the inmate is not working,” as well as “no outdoor exercise.”⁸⁹

Yet more severe was confinement “in meditation,” where prisoners could not “file suit” and could be put on bread-and-water rations⁹⁰ and chained.⁹¹ Landman had spent “266 days in solitary confinement and 743 days on pad- lock,” which meant he could not get out of his cell when other cells were opened.⁹² Judge Merhige held that Landman was punished because he had filed lawsuits and helped others in doing so.⁹³

Judge Merhige also detailed the degradation of seventeen other prisoners subjected to Virginia’s disciplinary system.⁹⁴ Merhige, noting that the practices in Virginia were “prohibited by the American Correctional Association,” de- scribed what Virginia did to people in its prisons: “handcuffing to cell doors or posts, shackling so as to enforce cramped position or to cut off circulation, . . . deprivation of sufficient light, ventilation, food or exercise to maintain physical and mental health, forcing a prisoner to remain awake until he is mentally exhausted, etc.”⁹⁵ The judge concluded that the state violated the Eighth and Fourteenth Amendments by depriving prisoners of good time and by placing them in horrid conditions in solitary confinement.⁹⁶ Like several other judges, Merhige cited Judge Blackmun’s decision in *Jackson v. Bishop* for the proposition that “[t]he extent of the constitutional guaranty is not fixed by the administra- tors’ budget or imagination.”⁹⁷

Two 1972 U.S. Supreme Court per curiam decisions, *Haines v. Kerner* and *Cruz v. Beto*, were on James’s list. The pair of decisions established that unrep- resented prisoners’ filings, as well as those of other lawyer-less litigants, were to be read liberally. Frances Haines, a prisoner in the Illinois State Penitentiary in Menard, likewise was authorized to proceed. On January 13, 1972, the Court held that, “however inartfully pleaded,” Haines had stated a claim with his de-

88. *Landman*, 333 F. Supp. at 633. Landman had helped some 2,000 prisoners and filed many lawsuits himself. *Id.* Michael Millemann, who worked on the case as a student, described the Virginia State Penitentiary as totally locked down and the prisoners as “confined in 120° cells for weeks.” Michael Millemann, *VA Prisoners Find Advocates in Early Prison Reformers*, 13 J. NAT’L PRISON PROJECT, Fall 1987, at 3, 4.
89. *Landman*, 333 F. Supp. at 628. The judge reported that Landman had been “technically eligible for parole for six years” during which he was held in abysmal conditions. *Id.* at 633.
90. *Id.* at 630. 91. *Id.* at 631. 92. *Id.* at 633. 93. *Id.* at 634. 94. *Id.* at 634–43. 95. *Id.* at 648 (omission in original) (quoting AM. CORR. ASS’N, *supra* note 10, at 417). 96. *Id.* at 647, 653–54. 97. *Id.* at 648 (citing *Jackson v. Bishop*, 404 F.2d 571, 580 (8th Cir. 1968)).

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scription of an alleged assault that he had “suffered while in disciplinary confinement and [the] denial of due process” before being placed there.⁹⁸ That description glossed over both the allegations before the Court (which detailed placement of the sixty-six-year-old, disabled prisoner in a dark cell for fifteen days⁹⁹) and the extensive arguments presented about the constitutionality under the Eighth and Fourteenth Amendments of such in-prison punishment.¹⁰⁰

On March 20, 1972, the Supreme Court reversed the dismissals of the federal district court in Texas and of the Fifth Circuit in the case filed by Fred A. Cruz, who had argued that Texas did not permit him, a Buddhist, to practice his religion; moreover, prison officials put him on a “diet of bread and water for two weeks” in solitary confinement because he had shared materials about his religion with others.¹⁰¹ While some members of the Court had planned to

98. Haines v. Kerner, 404 U.S. 519, 520–21 (1972) (per curiam). The Court had appointed Stanley Bass at the LDF to represent Francis Haines. Bass argued the case, in which he invoked Justice Blackmun’s opinion in *Jackson v. Bishop* more than once. Transcript of Oral Argument at 4–5, 7, Haines v. Kerner, 404 U.S. 519 (1972) (No. 70-5025), <https://www.oyez.org/cases/1971/70-5025>.
99. Haines’s brief explained that he was “66 years old and 30% permanently disabled,” had been incarcerated since 1939, and was serving a “life sentence for burglary.” Brief for Petitioner, Haines v. Kerner, 404 U.S. 519 (1972) (No. 70-5025), 1971 WL 133427 (July 15, 1972), at *3. The brief described the “hole” in which he was confined as “dark,” that he had no soap or other necessary hygiene items, and that food was limited to one meal a day plus bread morning and night. *Id.* at *4–5.
100. Both Haines’s brief and Illinois’s brief provided lengthy accounts of corrections practices and the case law on the Eighth Amendment, Due Process, and in-prison discipline. Haines cited the U.S. Bureau of Prisons’s Policy Statement 7400.5 (1966) calling for “quarters used for segregation [to] be well ventilated, adequately lighted, appropriately heated and maintained in a sanitary condition at all times.” *Id.* at *16, n. 22. Further, the brief referenced an ongoing survey of correctional facilities; his reply brief reported that of twenty-four responding states, all had lighted cells and mattresses. Reply Brief of Petitioner, Haines v. Kerner, 404 U.S. 519 (1972) (No. 70-5025), 1971 WL 133428 (Nov. 30, 1971) at *3. Illinois’s brief was likewise comprehensive in discussing the merits, as the State reviewed the history of the Eighth Amendment, surveyed the law of “punitive segregation” in the federal courts, and defended the treatment of Haines. Brief for the Respondents at 9–39, 41, 48–51, Haines v. Kerner, 404 U.S. 519 (1972) (No. 70-5025), 1971 WL 133738 (Sept. 4, 1971) at *9–39, 41, 48–51.
- In a memorandum to the conference, Justice Blackmun described the two decisions on prison discipline he had written as an appellate judge (including *Jackson v. Bishop*) and stated that Haines’s allegations did not “impress [him] as being outrageous” because the confinement was fifteen days and he had “a full meal at noon.” Memorandum from Harry Blackmun, Assoc. Justice, U.S. Supreme Court 1–2 (Nov. 22, 1971) (on file with the Harry A. Blackmun Papers, Library of Congress, MSSS4430, Box 143, File 70-5025). Justice Blackmun said he would not hold “solitary confinement, per se, ... a violation of the Eighth Amendment.” *Id.* at 3. He described himself as reluctant to “interfere with matters of prison administration and discipline” but also worried about opening “the door to abuse.” *Id.* at 2 (“I dislike here the deprivation of hygienic facilities . . . I dislike having the cells dark.”). He reported that he was “inclined to affirm,” even though there were some “fringe matters” of concern. *Id.* at 3.
- Chief Justice Warren Burger circulated a “draft” of what became the per curiam decision; he said it was “essentially” what he had “read . . . at the Conference but with more of the evidence recited to show the need for hearing and the inappropriateness for summary disposition.” Memorandum to the Conference, Jan. 3, 1972, Justice Stewart Papers, *supra* note 53, Box 258, File 3035. Issued on January 13, 1972, the opinion stated that the “only issue” before the Court was the sufficiency of the pleadings, concluded the complaint ought not to have been dismissed, and “intimate[d] no view whatever on the merits.” *Haines*, 404 U.S. at 520–21. Justices Powell and Rehnquist did not participate in the case. *Id.* at 521.
101. Cruz v. Beto, 405 U.S. 319, 319 (1972) (per curiam). Information about the debate within the Court comes from the papers of Justices Douglas, Stewart, and Powell. In an undated circulation, Justice

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deny certiorari, Justice Douglas's draft dissent, with modifications as requested by Justice Powell, became the Court's per curiam reversal of the lower courts and returned the case for a hearing.¹⁰²

The five other cases in James's Memorandum of Law all came from within the Fifth Circuit. *Williams v. Wainwright*, decided in June of 1972 and brought by Johnnie Williams and three other Florida prisoners, was about conditions in Florida. Vacating the trial court's dismissal and remanding,¹⁰³ the circuit cited *Haines v. Kerner*, *Cruz v. Beto*, and its own rulings. The appellate court reminded the lower courts that prisoners' pleadings were to be read liberally, as the court ruled that these prisoners had a right to a "hearing" or another "sort of factual investigation" into whether the challenged practices fell outside of "the scope of the broad official discretion permitted in connection with the operation and administration of State prison systems."¹⁰⁴

In July of 1972, the Fifth Circuit issued three more rulings, all of which told lower courts that they had wrongly dismissed prisoners' lawsuits. John Bowman, held in Alabama, alleged that he had not been given proper medical care and that the prison had confiscated his legal materials.¹⁰⁵ Troy C. Burroughs, confined in Florida, argued "a multitude of alleged abuses involving inadequate food and improper medical and dental treatment laced with overtones of racial discrimination."¹⁰⁶ Another Florida prisoner, Frank James Dennon, challenged confinement in administrative segregation; the circuit again instructed a district judge that the summary dismissal of the complaint was wrong.¹⁰⁷

Douglas stated he would have granted certiorari and “summarily reverse[d] for findings of fact.” See *Cruz v. Beto*, Mr. Justice Douglas, dissenting, at 1, William O. Douglas Papers, Box 1566, File 71-5552, Library of Congress. That draft, with as-noted modifications requested by Justice Powell, garnered enough of the Justices to become the Court’s opinion. See Memorandum from Justice Powell to Justice Douglas of March 1, 1972, with a handwritten note, “Thank you for making the changes I suggested,” in Justice Douglas Papers. See also Lewis F. Powell Jr. Papers, Box 374, Folder 2, Washington & Lee School of Law, Scholarly Commons, Supreme Court Case Files; Justice Stewart Papers, *supra* note 53, Box 256, File 3002.

The per curiam insisted that “persons in prison, like other individuals, have the right to petition the Government for redress,” and the complaint stated a valid claim for religious discrimination. *Cruz*, 405 U.S. at 321–22. The Supreme Court precedents, affirming prisoners’ access to federal courts for such claims, included *United States v. Muniz*, 374 U.S. 150 (1963), and *Cooper v. Pate*, 378 U.S. 546 (1964).

102. *Cruz*, 405 U.S. at 322–23. Justice Rehnquist dissented because “the fact that the Texas prison system offers no Buddhist services at this particular prison does not . . . demonstrate that his religious freedom [was] impaired.” *Id.* at 324 (Rehnquist, J., dissenting). Further, Justice Rehnquist chided Fred Cruz for having filed other complaints and stated that the complaint could have been dismissed as “frivolous.” *Id.* at 328.

103. *Williams v. Wainwright*, 461 F.2d 1080, 1081 (5th Cir. 1970) (per curiam). 104. *Id.* at 1080. 105. *Bowman v. Hale*, 464 F.2d 1032, 1032–33 (5th Cir. 1972) (per curiam). 106. *Burroughs v. Wainwright*, 464 F.2d 1027, 1028 (5th Cir. 1972) (per curiam). 107. *Dennson v. Tomkins*, 464 F.2d 1033 (5th Cir. 1972) (per curiam).

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The thirteenth case in James’s Memorandum of Law was *Newman v. Alabama*, which brings us back to Alabama and to Judge Johnson.¹⁰⁸ (The *Pugh* and *James* cases were later consolidated with the *Newman* litigation.)¹⁰⁹ N.H. Newman “and others” had alleged inadequate medical care.¹¹⁰ In 1972, Judge Johnson ruled that the “failure of the Board of Corrections to provide sufficient medical facilities and staff to afford inmates basic elements of adequate

medical care constitutes a willful and intentional violation of the rights of prisoners guaranteed under the Eighth and Fourteenth Amendments.”¹¹¹ Four years later, in 1976 when the U.S. Supreme Court reached the question of prison health care, its opinion echoed the views of Judge Johnson. In *Estelle v. Gamble*, the Court held that “deliberate indifference to serious medical needs” violated the Eighth Amendment.¹¹²

This genealogy of the six years when prisoners’ rights law emerged makes plain the reasons to celebrate the work of Judge Johnson. The first decision in the set was Johnson’s 1966 prison desegregation decision, and the last was his 1972 health care ruling. Judge Johnson is rightfully recognized as one of the great jurists to understand the imperative of prison reform.

What this account also reflects is that prisoners need to be brought into the pantheon of criminal justice innovators. Caliph Washington, Winston Talley, William King Bishop, Robert Landman, Billy Wayne Sinclair, Lawrence Holt, Worley James, Jerry Lee Pugh, and many others were theorists of the law of

108. *Newman v. Alabama*, 349 F. Supp. 278 (M.D. Ala. 1972). The Circuit reviewed aspects of this and the related Alabama prison litigation in a series of decisions. See *Newman v. Alabama*, 522 F.2d 71 (5th Cir. 1975); *Newman v. Alabama*, 559 F.2d 283, 292 (5th Cir. 1977), *cert. denied*, 438 U.S. 915 (1978); see also *Newman v. Alabama*, 683 F.2d 1312 (11th Cir. 1982). For discussion of the case’s evolution, see *infra* notes 109, 255.

109. See *Newman v. Alabama*, 683 F.2d 1312 (11th Cir. 1982). Judge Gerald Bard Tjoflat’s 1982 decision for the Circuit provided a brief account of what was then the “eleven year history” of the litigation. *Id.* at 1315. As he explained, Judge Johnson decided *Newman* first in 1972 and decided *Pugh v. Locke* and *James v. Wallace* in 1976. *Id.* The rulings that conditions in Alabama violated prisoners’ constitutional rights were affirmed “with modifications” in a consolidated appeal. See *Newman*, 559 F.2d at 292.

Thereafter, prisoners alleged that the consent decree was being violated and that the overcrowding remained unabated. Judge Johnson agreed and concluded that release of some prisoners was required. The Fifth Circuit rejected his remedy as “overreaching” and held that a less intrusive remedy setting caps on county jail populations was proper, rather than “entangling the district court in the administration of the prison and parole systems.” *Newman*, 683 F.2d at 1320. As Yackle recounted, by then Judge Johnson had moved to the Fifth Circuit and Judge Varner was presiding at the trial level on the Alabama prison litigation. YACKLE, *supra* note 30, at 184–85. In the interim, the U.S. Supreme Court had decided *Rhodes v. Chapman*, 452 U.S. 337 (1981), and concluded that double celling was not unconstitutional and cautioned lower courts to defer to prison officials again. See *infra* notes 152, 176, 264 and accompanying text. Yackle detailed the argument in *Newman*, see *supra* note 30, at 215–19, and the aftermath of the judgment, resulting in what Yackle termed “paralysis” and the retreat of the federal court. *Id.* at 222–55.

110. *Newman*, 349 F. Supp. at 280. 111. *Id.* at 285–86. 112. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976).

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punishment and analysts of prison practices. They put into motion new arguments about what the state cannot do to people who (to borrow a phrase from the Thirteenth Amendment) have been “duly convicted.”

This cohort of regular prisoners, who sat inside awful facilities and were subjected to unspeakable mistreatment, believed in law and courts and in constraints on sovereign power. They brought their experiences and their insights to judges who often linked them to lawyers who joined them in insisting that law had to be deployed to stop egregious treatment of incarcerated individuals. The lawyers, in turn, drew on popular mobilizations that supported organizations such as the LDF and the ACLU. As Judge Johnson’s appointments demonstrate, law schools and law firms played important roles.

Further, Congress made key contributions, including when, in 1976, it opened up funding streams through a statute permitting civil rights claimants, if successful, to recoup fees from defendants.¹¹³

Indeed, that statute’s first analysis in the Supreme Court came in 1978 in the context of the *Holt* litigation; the Court affirmed that the State of Arkansas could be liable for fees and approved Chief Judge Henley’s remedy of a thirty-day cap on solitary confinement.¹¹⁴ In 1980, Congress added more legal horsepower by authorizing the U.S. Department of Justice to represent “institutionalized persons” held in unlawful conditions.¹¹⁵

The impact of the system-wide decisions by Judge Henley, Judge Johnson, and others can be seen from a list compiled in the late 1980s by the ACLU’s National Prison Project of some three dozen jurisdictions in litigation to address overcrowded conditions.¹¹⁶ Those cases reflect that litigants, lawyers, and judges were rereading the U.S. Constitution to recognize its application to prisons, which

reoriented the work of federal judges.¹¹⁷ Because of their insistence and persistence, law no longer permits prisoners to be whipped, starved, or denied all medical care.

Amidst the tragic conditions in today's United States prisons, one could miss what was accomplished. Before the 1960s, prison administrators had unbridled power that was, at times, exercised in gruesome ways that left people in filth and violence. And law was silent. Today, albeit unevenly and insufficiently implemented, law requires prisons to provide safety, sanitation, and some health care. Indeed, in the United States, prisons are one of the few government-mandated services still standing.

113. See Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (codified at 42 U.S.C. § 1988 (2018)).

114. *Hutto v. Finney*, 437 U.S. 678, 680–81 (1978), discussed *infra* note 262 and accompanying text. 115. Civil Rights of Institutionalized Persons Act of 1980, Pub. L. No. 96-247, 94 Stat. 349. 116. See *Status Report: State Prisons and the Courts*, 13 J. NAT'L PRISON PROJECT, Fall 1987, at 24, 24; see also Alexander A. Reinert, *Eighth Amendment Gaps: Can Conditions of Confinement Litigation Benefit from Proportionality Theory?*, 36 FORDHAM URB. L.J. 53, 71–73 (2009).

117. See, e.g., Theodore Eisenberg & Stephen C. Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

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III. RECOGNIZING PRISONERS' CLAIMS THROUGH REREADING THE EIGHTH AND FOURTEENTH AMENDMENTS

In the 1960s and 1970s, prisoners, lawyers, and judges succeeded in identifying practices that had been seen as “normal” and named them “unconstitutional.” That shift occurred not only in prisons but also in many arenas of government action. School desegregation was an exemplar that made plain the need for sustained federal action to

interrupt—as it tried to reform—systemic discrimination.

But more needs to be explained about *how* American constitutional law moved inside prisons. The Eighth Amendment prohibits “cruel and unusual punishments.”¹¹⁸ What Jerry Pugh, Worley James, and other prisoners recounted was indeed cruel, but their lawsuits also showed that their experiences were neither unusual nor a departure from longstanding practices. Beatings, isolation, starvation, neglect, and limited or no medical care were commonplace experiences in American prisons in the 1960s and 1970s and had been during the century before.

Indeed, the litigating structure of many cases as class actions made that point. The lawyers whom Judge Johnson enlisted to help James and Pugh shifted the focus from individual claims to problems of all Alabama prisoners.¹¹⁹ To convince judges to certify class actions requires demonstrating that individuals share enough in common so that named plaintiffs adequately represent others, similarly situated. What prisoners in Alabama had in common, as Judge Johnson detailed in his 1976 decision, were “horrendously over-

118. U.S. CONST. amend. VIII. A large body of commentary addresses the history and disagrees about the implications of this clause, drawn from the English Bill of Rights of 1689. Questions include the sources to interpret the meaning of “cruel” and of “unusual,” the interaction of these words, the baselines by which to assess either, the relevance of judicial innovation in punishment as contrasted with legislative authorization, and the application of these precepts to prison officials. See, e.g., Margo Schlanger, *The Constitutional Law of Incarceration, Reconfigured*, 103 CORNELL L. REV. 357 (2018); Alexander A. Reinert, *Reconceptualizing the Eighth Amendment: Slaves, Prisoners, and “Cruel and Unusual” Punishment*, 94 N.C. L. REV. 817 (2016); AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* 133 (2012); Meghan J. Ryan, *Does the Eighth Amendment Punishments Clause Prohibit Only Punishments That Are Both Cruel and Unusual?*, 87 WASH. U. L. REV. 567 (2010); John F. Stinneford, *The Original Meaning of “Unusual”: The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1749–51, 1778–817 (2008); Anthony F. Granucci, *“Nor Cruel and Unusual Punishments Inflicted:” The Original Meaning*, 57 CALIF. L. REV. 839, 839–42 (1969).

119. In 1975, Judge Johnson consolidated the *Pugh* and *James* cases and tried them together, during a week-long trial. *Pugh v. Locke*, 406 F. Supp. 318, 321 n.1 (M.D. Ala. 1976) (decided with *James v. Wallace*, 406 F. Supp. 318 (M.D. Ala. 1976) (No. 74-203-N)); see also YACKLE, *supra* note 30, at 58.

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crowded,” “filthy,” understaffed, and unsafe conditions, in which “rampant violence” was “widespread.”¹²⁰ One area where more than 200 men were housed had only “one functioning toilet.”¹²¹

Reading what Judge Johnson found as facts brings this point uncomfortably home. He wrote that in Alabama’s prisons, the windows were

broken and unscreened, creating a serious problem with mosquitoes and flies. Old and filthy cotton mattresses lead to the spread of contagious diseases and body lice. Nearly all inmates’ living quarters are inadequately heated and ventilated. The electrical systems are totally inadequate, exposed wiring poses a constant danger to the inmates, and insufficient lighting results in eye strain and fatigue.¹²²

In addition, violence was widespread, as sadly illustrated by Judge Johnson’s description of the testimony provided by a twenty-year-old prisoner. That man had been “raped by a group of inmates on the first night he spent in an Alabama prison. On the second night he was almost strangled by two other inmates who decided instead that they could use him to make a profit, selling his body to other inmates.”¹²³

By 1976, when Judge Johnson issued his decision, it was not only prisoners and some judges who thought such conditions violated the Eighth Amendment. The defendants in Alabama—under the leadership of a recently elected Attorney General—agreed.¹²⁴ As Judge Johnson recounted, the defendants’

120. *Pugh*, 406 F. Supp. at 323–26. Painfully graphic detail came from Matthew Meyers, who worked on *James* for the ACLU. He described going to Draper Correctional Center and finding “dozens upon dozens of old, helpless men, many in wheelchairs, incontinent or bedridden, unable to

care for themselves and jammed into squalid, dilapidated living quarters which could only be described as a human death trap.” Matthew L. Myers, *12 Years After James v. Wallace*, 13 J. NAT’L PRISON PROJECT, Fall 1987, at 8, 8. He then found “the doghouse,”

a concrete building with no windows and a solid front door with eight cells, each about the size of a small door. This windowless concrete building and the cells in it had no lights, no ventilation, no toilets, no furniture, no beds, no running water, and no sinks or showers. *Id.* at 8–9. No guards were in the building, and cells had five to six prisoners, put there for violating minor rules like “talking back” to a guard. *Id.* at 9. 121. *Pugh*, 406 F. Supp. at 323. 122. *Id.* 123. *Id.* at 325; see also YACKLE, *supra* note 30, at 81–83 (providing this prisoner’s courtroom testimony). 124. William J. (“Bill”) Baxley II was Alabama’s attorney general from 1971 to 1979,

during the time when *Pugh v. Locke* was litigated and decided. Decades later, when he was asked to identify the problem that had “convinced him that the state’s prisons could not be defended,” former Attorney General Baxley responded, “It wasn’t a problem. It was everything The conditions there were shocking.” Rick Harmon, *Prisons in Peril: Alabama Trial Had Huge Impact on U.S. Prisons*, MONTGOMERY ADVERTISER, Sept. 15, 2013, at 9A. Baxley stated, “It was clear we were defending an indefensible practice After we saw the enormity of the problem, we just conceded.” *Id.* However, Baxley identified a “root problem,” which, he explained, “was the state not putting any money into the system [T]he state simply refused to provide adequate public funding for prisons.” *Id.* For commentary on Baxley’s work in relationship to that of Judge Johnson, see Kenneth M. Rosen & Hon. W. Keith Watkins, *Justice Delayed, Justice Delivered: The Birmingham Sixteenth Street Baptist Church Bombing and the Legacy of Judge Frank Minis Johnson, Jr.*, 71 ALA. L. REV. 560 (2020).

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lead lawyer made “the admission . . . in open court, that the evidence conclusively established aggravated and existing violations of” prisoners’ Eighth Amendment rights.¹²⁵

For that proposition to have become the law required freeing the Eighth Amendment from its text. As Judge Johnson explained in both his 1974 decision in *James v. Wallace* and his 1976 ruling in *Pugh v. Locke*, the “content of the Eighth Amendment” was not “static but ‘must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.’”¹²⁶ Those words come from *Trop v. Dulles*, a 1958 decision of the U.S. Supreme Court, which held unconstitutional a federal statute imposing the punishment of denationalization for a “native-born

American” who had escaped for less than a day from an Army stockade during the war; charged with desertion, he was convicted in a military court martial.¹²⁷ Chief Justice Warren, writing for a plurality, concluded that the Eighth Amendment’s “basic concept” was “nothing less than the dignity of man.”¹²⁸ This punishment was barred because it entailed the “total destruction of the individual’s status in organized society. . . . [T]he expatriate has lost the right to have rights.”¹²⁹

Yet there are important distinctions between whipping, denationalization, and what had happened to prisoners like Jerry Pugh, Worley James, and Lawrence Holt. In 1968, when the Eighth Circuit ruled whipping unconstitutional, Arkansas was an outlier. Almost all states had abandoned the official use of corporal punishment in prisons, and the 1966 *Manual of Correctional Standards*, the official publication of the American Correctional Association, had likewise rejected its use.¹³⁰ As for denationalization, Chief Justice Warren explained in *Trop* that the “civilized nations of the world” were in “virtual unanimity that statelessness” was not a punishment to be imposed for a crime.¹³¹ In contrast,

125. *Pugh*, 406 F. Supp. at 322. 126. *James v. Wallace*, 382 F. Supp. 1177, 1180 (M.D. Ala. 1974); *Pugh*, 406 F. Supp. at 328. Both opinions quoted *Trop v. Dulles*, 356 U.S. 86, 101 (1958). These were the terms that Judge Blackmun also used in holding whipping unconstitutional in *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968).

127. 356 U.S. at 87. Chief Justice Warren described Albert Trop as having walked away from a stockade in Casablanca, where he had been confined for violating military rules. He escaped but was picked up and returned by an Army truck, so that the “desertion” was less than a day. *Id.* at 87–88.

128. *Id.* at 100. Warren referenced *Weems v. United States*, 217 U.S. 349 (1910), a decision that had held punishment “of 12 years in irons at hard and painful labor imposed for the crime of falsifying public records” to be excessive and “unusual in its character.” *Trop*, 356 U.S. at 100.

129. *Trop*, 356 U.S. at 101–02. The decision did not cite Hannah Arendt’s book, *The Origins of the Totalitarian State*, published in 1951, but the words echo the discussion of the harms of fascism under Hitler and Stalin. An important resource for this decision was a note written by Stephen Pollak while he was a student at Yale Law School. See Stephen Pollak, Note, *The Expatriation Act of 1954*, 64 YALE L.J. 1164 (1955). 130. James Bennett, who had directed the Federal Bureau of Prisons, termed whipping “barbaric.” See *Jackson*, 404 F.2d at 575. The court also noted that other corrections officials had abandoned corporal punishment. *Id.* at 580. See also AM. CORR. ASS’N, *supra* note 10, at 559.

131. *Trop*, 356 U.S. at 102. For the history of its use and a concern that denationalization is returning as a punishment, see generally PATRICK WEIL, *THE SOVEREIGN CITIZEN: DENATURALIZATION AND THE*

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beatings, terrible food, violence, and no medical care—the complaints in *Newman*, *James*, and *Pugh*, as well as in *Holt v. Sarver* and dozens of other cases—were commonplace.

In short, as Chief Judge Henley had noted in 1970 in *Holt*, the issue was “the System,” which he found to “amount to a cruel and unusual punishment” because it was “characterized by conditions and practices so bad as to be shocking to the conscience of reasonably civilized people.”¹³² That holding, like the rulings of Judge Johnson, required rereading the Eighth Amendment to authorize prisoners to enforce limits on the sovereign power to determine the metes and bounds of confinement. Doing so entailed a rejection of the “usual” as the metric for what was unconstitutional punishment.¹³³

Moreover, the Eighth Amendment was not the only part of the Constitution reinterpreted to do work inside prisons. First Amendment principles securing rights to “petition for redress” served as the springboard (subject to security concerns) for access to courts, legal correspondence, and books.¹³⁴ The Free Exercise Clause protected prisoners’ religious practices.¹³⁵ Indeed, Black Muslims were plaintiffs in several 1960s and 1970s cases, as prison officials in many states targeted them.¹³⁶ Moreover, the Fourteenth Amendment’s equal protection guarantees propelled the desegregation of prisons in a line of cases Judge Johnson began in 1966 and the U.S. Supreme Court reiterated when deciding *Johnson v. California* in 2005.¹³⁷

Another resource was the Due Process Clause of the Fourteenth Amendment, prohibiting states from depriving individuals of “life, liberty, or property,

ORIGINS OF THE AMERICAN REPUBLIC (2013); Patrick Weil, *Denaturalization and Denationalization in Comparison (France, the United Kingdom, the United States)*, 43 PHIL. & SOC. CRITICISM 417 (2017). In *Perez v. Brownell*, 356 U.S. 44 (1958), decided the same day as *Trop*, the Court upheld the congressional sanction of denaturalization for a U.S. citizen who had voted in a foreign political election.

132. *Holt v. Sarver*, 309 F. Supp. 362, 372–73 (E.D. Ark. 1970). As noted, this case is often termed *Holt II*, because in 1969, Chief Judge Henley had ruled on some of the issues but not in that comprehensive a form. See *Holt v. Sarver*, 300 F. Supp. 825 (E.D. Ark. 1969).
133. For example, in *Haines v. Kerner*, Illinois provided a lengthy disquisition on how history validated its treatment of prisoners and why putting a person in a dark cell and limiting food and bedding did not violate the Eighth Amendment. The State not only garnered materials about the forms of punishment at the founding but also provided long lists of cases in which lower federal courts had, in the years before 1972, rejected challenges to similarly degrading and harmful conditions. See Brief for the Respondents at 5, 7–27, 11 n.7, 13 nn.10–11, 14 n.12, 16 n.17, 17 n.18, 21 n.19, 24 nn.21–22, 35 nn.25–26, 36–39, 36 n.28, 51, *Haines v. Kerner*, *supra* note 100.
134. *Younger v. Gilmore*, 404 U.S. 15 (1971), *aff'g* *Gilmore v. Lynch*, 319 F. Supp. 105 (N.D. Cal. 1970). Protection also came from the Constitution's prohibition on suspension of the writ of habeas corpus. See *Ex parte Hull*, 312 U.S. 546 (1941).
135. See, e.g., *Thornburgh v. Abbott*, 490 U.S. 401 (1989); *Turner v. Safley*, 482 U.S. 78 (1987); *Pell v. Procunier*, 417 U.S. 817 (1974); *Procunier v. Martinez*, 416 U.S. 396 (1974).
136. See, e.g., *Sostre v. Rockefeller*, 312 F. Supp. 863, 869 (S.D.N.Y. 1970), *aff'd in part, rev'd in part sub nom.* *Sostre v. McGinnis*, 442 F.2d 178 (2d Cir. 1971); for a discussion of *Sostre*, see *infra* notes 219, 220 and accompanying text. See *generally* KERAMET REITER, 23/7: PELICAN BAY PRISON AND THE RISE OF SOLITARY CONFINEMENT (2018).
137. 543 U.S. 499 (2005).

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without due process of law.”¹³⁸ Many of the prisoners’ complaints that Worley James cited, and which I detailed above, entailed terrifyingly arbitrary decisions that resulted in a host of in-prison punishments, including whipping and solitary confinement. Yet, given that prisoners had received some process when they were convicted or pleaded guilty and were sentenced, judges asked whether, once incarcerated, prisoners had rights to procedural

protections. Did incarcerated people retain “liberty” or “property” interests that could not be deprived without fair procedures?

Questions about the sources of liberty and of property were being asked inside and outside the context of prisons. In the 1960s, law professor Charles Reich wrote an article called *The New Property*, in which he argued that government created a host of entitlements through contracts, licenses, and employment. Reich argued that through a variety of means, including statutes (such as authorizing officials to issue driver’s and professional licenses or to fund welfare benefits), governments created forms of property that the state could not arbitrarily withdraw.¹³⁹ In 1970, in a case challenging the termination of welfare benefits, the U.S. Supreme Court agreed and required New York to provide a prior oral hearing before ending funds for welfare recipients.¹⁴⁰

In 1974, prisoners from Nebraska successfully made the analogy that the statutory grant of “good time” that reduced the length of sentences was a kind of interest that the Fourteenth Amendment protected.¹⁴¹ The Court concluded that, when prison staff punished prisoners by revoking good time credits, the prison had to provide prisoners with an opportunity to be heard and ways to present evidence on their own behalf.¹⁴²

Thus, by the time Judge Johnson decided the *Pugh* and *James* class action in 1976, he could rely on Supreme Court law recognizing that the Due Process and Equal Protection Clauses of the Fourteenth Amendment had a role to play in prisons, as did the Eighth Amendment. His decisions articulated fair treatment principles and remedies that emerged from a blend of constitutional precepts, as he concluded that prisons could not impose “arbitrary and capricious treatment.”¹⁴³

138. U.S. CONST. amend. XIV, § 1. 139. Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964). Exploration of Reich’s many contributions are provided in the *Yale Law Journal’s* tribute published in 2020 after his death. See Collection, *A Tribute to Charles Reich*, YALE L.J.F. (2020), <https://www.yalelawjournal.org/collection/charles-reich-tribute>.

140. *Goldberg v. Kelly*, 397 U.S. 254 (1970); see also Judith Resnik, *The Story of Goldberg: Why This Case Is Our Shorthand*, in *CIVIL PROCEDURE STORIES: AN IN-DEPTH LOOK AT THE LEADING CIVIL PROCEDURE CASES 473* (Kevin M. Clermont ed., 2d ed. 2008).

141. *Wolff v. McDonnell*, 418 U.S. 539, 556–58 (1974). Majorities and dissents debated the sources of liberty, and subsequent decisions cabined this ruling by focusing on the release from prison—and hence the liberty—that good time credits produced.

142. *Wolff*, 418 U.S. at 570–72. 143. *Pugh v. Locke*, 406 F. Supp. 318, 330 (M.D. Ala. 1976).

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Judge Johnson announced the principle that prison conditions could not be “so debilitating that they necessarily deprive inmates of any opportunity to rehabilitate themselves, or even to maintain skills already possessed.”¹⁴⁴ A prison could not “impede” prisoners’ “ability to attempt rehabilitation, or simply to avoid physical, mental or social deterioration.”¹⁴⁵ But, as I discuss in the next sections, Judge Johnson’s articulation of constitutional protections against debilitation did not fare well in the appellate courts,¹⁴⁶ nor have they materialized in the lives of many people held today in U.S. prisons.

IV. HYPER-INCARCERATION, TYPICALITY, AND
CONSTITUTIONALITY

No account of prisons and jails in the contemporary era can have a celebratory tone,¹⁴⁷ especially in light of the last years of litigation about the lack of safety in Alabama’s prisons.¹⁴⁸ The prisoners who went to court had a profound impact not just on doctrine but also on how prisons today are run. Yet in their wake, the question remains about why, given that prisoners have become constitutional rights-holders, prisons remain miserable.

As I detail below, law and politics limited the efforts to rethink the practices of punishment in prisons. The embrace of retributivist social policies fueled increased prosecutions, while the Court limited the application of the Eighth and the Fourteenth Amendments to prisoners. The Court refused to constrain prison overcrowding despite arguments that the intense density was cruel and unusual punishment. Further, the Court crafted a line of Fourteenth Amendment due process doctrine that distinguished between “typical” conditions in prisons, left largely to the unfettered discretion of

prison officials, and “atypical” conditions, for which some protection against arbitrary decisions was required. Moreover, as I elaborate in Part V, prisoners and judges such as Frank Johnson understood that the U.S. Constitution requires more than subsistence warehousing of people convicted of crimes. Amidst the squalor of conditions in the 1960s and 1970s, they saw that states had affirmative obligations to pre-

144. *Id.* 145. *Id.* The Fifth Circuit reversed in part the requirements for rehabilitation programs. See *Newman v. Alabama*, 559 F.2d 283, 291 (5th Cir. 1977); *infra* notes 255, 260 and accompanying text.

146. See *Newman*, 559 F.2d 283. 147. See, e.g., HOMER VENTERS, LIFE AND DEATH IN RIKERS ISLAND (2019). 148. See Katie Benner, *Plans for Alabama’s Deadly Prisons ‘Won’t Fix the Horrors,’* N.Y. TIMES (Jan. 31, 2020), <https://www.nytimes.com/2020/01/31/us/politics/alabama-prisons.html>. The inadequate responses and safekeeping of people with mental illness is chronicled in *Braggs v. Dunn*, 257 F. Supp. 3d 1171 (M.D. Ala. 2017), and *Braggs v. Dunn*, 367 F. Supp. 3d 1340 (M.D. Ala. 2019). Families of individuals who died in prison in 2019 filed a lawsuit in 2020. See Complaint, *Head v. Dunn*, No. 2:20-CV-132 (M.D. Ala. Feb. 24, 2020).

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vent debilitation. Whether a constitutional right to rehabilitation exists is distinct from the proposition that, in constitutional democracies, governments cannot set out to cause deterioration as a purpose of their punishment.

Even as my focus has been on litigation, judges are never solo actors. In the decades after Pugh and James sought relief, the overcrowding of facilities of which they and many others complained became all the more acute. The number of people held in prison, which had been relatively constant for several decades, began its dramatic rise in the 1980s through initiatives (a “war on drugs” and a “war on crime”)

that produced a flood of prosecutions.¹⁴⁹

As claims that “nothing works” gained sway, legislatures enacted harsher sentencing laws that cut off judicial discretion and mandated long minimum sentences for certain crimes. Lifetime incarceration came after repeated felonies (“three strikes”), even when minor thefts were involved. More prosecutions, longer sentences sometimes predicated on guidelines, mandatory minimum sentences, the elimination of parole in the federal system as part of “truth in sentencing,” and the loss of release opportunities meant that more people were in prison for long periods of time. Even with the subsequent calls for reform, we continue to live in an age of “hyper-incarceration” and of “mass incarceration.”¹⁵⁰ Lawsuits (including litigation ongoing in Alabama¹⁵¹) document that prison overcrowding undercuts whatever efforts are made to comply with state health codes, correctional standards, and federal court mandates.

Just as filth and whipping are not intrinsic to incarceration, overcrowded prisons are also political and legal choices. Constitutional law could have imposed significant constraints, but instead, the U.S. Supreme Court was persuaded to cut back on judicial oversight and to permit confinement of individuals in spaces that had not been designed for the number of people crammed in. And again, the constitutional law of prisons cannot be read in a vacuum but always needs to be placed in a broader framework. As the composition of the federal judiciary changed, the courts retreated from engagement with the needs of major segments of the population—from school children to consumers, employees, and prisoners. Under a Supreme Court populated by appointments by President Reagan and his successors, support for class actions, structural injunctions, and other civil rights remedies waned. And, as I detail below, the Court’s approach mirrored and interacted with shifts in legislation.

A pivotal decision about prisoners came in 1981 when, in *Rhodes v. Chapman*, the Supreme Court permitted what is politely termed “double ceiling” but really

149. See generally MARIE GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS* (2016); ELIZABETH HINTON, *FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA* (2016).

150. Loïc Wacquant, *Class, Race & Hyperincarceration in Revanchist America*, 139 *DAEDALUS* 74 (2010); MICHELE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

151. See *supra* note 148 and *infra* notes 230, 231, 236 and accompanying text.

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means forced long-term intimacy among strangers put in overcrowded jails and prisons.¹⁵² To understand the arguments about the use of prison space, some background on prison design is necessary.

In the eighteenth and nineteenth centuries, prison administrators debated whether communal or solitary cells were better for bringing about prisoners' repentance and reform. By the second half of the twentieth century, standards promulgated by the American Correctional Association recommended a minimum amount of space (at least sixty square feet per person) and the use of single celling to promote wellbeing and to prevent violence and the spread of disease.¹⁵³

As jail and prison populations grew faster than new construction, prisons routinely exceeded the number of people for which they were designed. To expand "capacity," prisoners were double- or triple-celled. The U.S. Supreme Court chose to address the legality of doing so first in 1979 in a case, *Bell v. Wolfish*, brought by federal pretrial detainees held in New York City.¹⁵⁴

The case did not arise under the Eighth Amendment because the Court has reasoned that it does not apply to pretrial detainees, who cannot be "punished" before they are convicted.¹⁵⁵ Yet treating detainees worse than convicted prisoners makes no common or legal sense. The Court has therefore concluded that people in jail are shielded from abysmal conditions by virtue of the Fifth and Fourteenth Amendments' protection against deprivation of "life, liberty, or property, without due process of law"¹⁵⁶—interpreted to create a substantive entitlement not to be punished before conviction.

Yet even as pretrial detainees may be sympathetic plaintiffs, *Bell v. Wolfish* did not have evocative facts. Unlike the nauseating conditions that

Judge Johnson and Chief Judge Henley detailed in old facilities in Alabama and Arkansas, the federal Metropolitan Correctional Center (MCC) in New York had been built in 1975. Justice Rehnquist, writing for the Court, explained that there were “no barred cells, dank, colorless corridors, or clanging steel gates.”¹⁵⁷ Rather, the MCC had the “most advanced and innovative features of modern design of detention facilities.”¹⁵⁸

However modern, the plan had been for the building to hold no more than 499 people.¹⁵⁹ But single bunks were replaced by doubles to pack more people

152. *Rhodes v. Chapman*, 452 U.S. 337 (1981). *Rhodes* was cited by the circuit in *Newman v. Graddick*, 740 F.2d 1513, 1521, 1525 (11th Cir. 1984), and, as Yackle noted, was important to the Fifth Circuit’s refusal to uphold Judge Varner’s mandate for release, see YACKLE, *supra* note 30, at 249.

153. See COMM’N ON ACCREDITATION FOR CORR., MANUAL OF STANDARDS FOR ADULT CORRECTIONAL INSTITUTIONS, Standard 4142 (1977).

154. 441 U.S. 520, 523 (1979). 155. See *id.* at 535 n.16. 156. U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1. 157. *Bell*, 441 U.S. at 525. 158. *Id.* 159. *Id.*

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into cells that were about seventy-five square feet.¹⁶⁰ Each cell had a washbasin and “an uncovered toilet.”¹⁶¹ Detainees were locked in from 11:00 p.m. until the next morning.¹⁶²

The Supreme Court rejected the lower courts’ conclusion that the government had to justify its “restrictions and privations” by showing that they stemmed from “compelling necessities of jail administration.”¹⁶³ The Court held that prisoners’ loss “of freedom of choice and privacy are inherent incidents of confinement,”¹⁶⁴ which meant that double celling was permissible. Yet the Court noted that most people at the MCC stayed no longer than sixty days and that

confining a lot of people “in such a manner . . . over an extended period of time might raise serious questions under the Due Process Clause.”¹⁶⁵

As *Bell v. Wolfish* was pending, those “serious questions” were posed by convicted prisoners in Ohio.¹⁶⁶ At issue was another new prison, the Southern Ohio Correctional Facility—known as Lucasville. Constructed in the early 1970s to replace what Thomas Hogan, the federal judge assigned to the case, called the “ancient Ohio Penitentiary,”¹⁶⁷ Lucasville was meant to hold 1,600– 1,700 prisoners in sixty-three-square-foot single cells.¹⁶⁸ Like the federal jail in New York City, the building was converted into high-density space. By 1977, 2,300 prisoners were there, and two-thirds were serving life or long sentences.¹⁶⁹ Kelly Chapman and Richard Jaworski, confined to the same cell, argued that their double celling violated the U.S. Constitution. Federal district court judge Thomas Hogan concluded that providing “at best” thirty to thirty-five square feet per person was constitutionally unacceptable.¹⁷⁰ The trial court’s opinion was sparse; the judge did not discuss the toilets and sinks unshielded from observation¹⁷¹ but distinguished *Bell v. Wolfish* because prisoners at Lucasville were there for many years.¹⁷² In 1980, the Sixth Circuit, without more explanation, affirmed that this form of double celling constituted cruel and unusual punishment.¹⁷³

160. *Id.* at 526, 541. 161. *Id.* at 541. 162. *Id.* 163. *Wolfish v. Levi*, 573 F.2d 118, 124 (2d Cir. 1978) (quoting *Rhem v. Malcolm*, 507 F.2d 333, 336 (2d Cir. 1974)), *rev’d sub nom.* *Bell v. Wolfish*, 441 U.S. 520 (1979).

164. *Bell*, 441 U.S. at 537. 165. *Id.* at 542. 166. See *Chapman v. Rhodes*, 434 F. Supp. 1007 (S.D. Ohio 1977), *aff’d*, 624 F.2d 1099 (6th Cir. 1980), *rev’d*, 452 U.S. 337 (1981).

167. *Id.* at 1009. 168. *Id.* at 1010, 1021. 169. See *id.* at 1011. 170. *Id.* at 1021. 171. For a discussion of the limited record and the impact of the litigation, see Elizabeth Alexander, *Prisoners’ Lawyers Face Critical Issues*, 13 J. NAT’L PRISON PROJECT, Fall 1987, at 22, 23, 25.

172. See *Chapman*, 434 F. Supp. at 1020. 173. See *Chapman v. Rhodes*, 624 F.2d 1099 (6th Cir. 1980).

A quote from the Ohio petition for certiorari merits repeating, for it is a testament to the impact of the decade of prisoners' rights litigation and the rulings of judges such as Frank Johnson. The state framed its request for Supreme Court review by asking whether "double celling of prison inmates constitutes cruel and unusual punishment where the record indicates that the practice does not deprive inmates of minimum constitutional guarantees to adequate food, clothing, shelter, sanitation, medical care and personal safety."¹⁷⁴ Even as the state challenged the ruling against double celling, it conceded that the Constitution *did* require it to provide what states a decade earlier had argued they had *no* legal obligation to do. Winston Talley, William King Bishop, Jerry Pugh, Worley James, and Lawrence Holt, and Judges Henley, Johnson, Blackmun, and many others had reframed the permissible in prison.

But Ronald Reagan had run on a campaign demonizing criminals and promising new tough measures. After he won in 1980, the Burger Court expanded its efforts to limit the Warren Court's reforms.¹⁷⁵ After the Ohio defendants sought Supreme Court review, amici filings from Oregon, Texas, twenty-nine other states, and the federal government argued that prison systems should be able to double cell when needed.¹⁷⁶ Moreover, the amici asserted the "expertise-based action of state correctional authorities"¹⁷⁷ should be protected from federally imposed "architectural and penological standards."¹⁷⁸ Instead, courts should intervene only if prison conditions caused "extreme or unnecessary pain."¹⁷⁹

174. Petition for Writ of Certiorari at 1–2, *Rhodes v. Chapman*, 452 U.S. 337 (1981) (No. 80-332). 175. LINDA GREENHOUSE & MICHAEL J. GRAETZ, *THE BURGER COURT AND THE RISE OF THE RADICAL RIGHT* (2016).

176. Brief of Amicus Curiae State of Oregon in Support of Petition for Writ of Certiorari, *Rhodes*, 452 U.S. 337 (No. 80-332); Brief of Amicus Curiae State of Texas in Support of the Petitioners, *Rhodes*, 452 U.S. 337 (No. 80-332); Brief of the States of Alaska, Arizona, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, North Carolina, North Dakota, Oregon, South Carolina, South Dakota, Tennessee, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming, and the Government of the Virgin Islands in Support of Petitioners, Amici Curiae, *Rhodes*, 452 U.S. 337 (No. 80-332).

As noted, by 1987, more than thirty states were involved in structural litigation. See Vincent Nathan, *Lawsuits Fundamental to Prison Reform*, 13 J. NAT'L PRISON PROJECT, Fall 1987, at 16, 17. Many of the states joining Ohio's efforts were in that mix. See, e.g., *Ruiz v. Estelle*, 503 F. Supp. 1265 (S.D.

Tex. 1980). At issue in the 1979 trial in *Ruiz v. Estelle* was the practice of placing five prisoners in a single cell, and Judge William Wayne Justice, who presided in that case, asked five individuals to stand inside the small cell that the plaintiffs' lawyers had replicated in the courtroom so as to understand what that crowding looked like. E-mail from Lucas Guttentag, Senior Research Scholar, Yale Law School, to Judith Resnik, Professor of Law, Yale Law School (Jan. 1, 2020) (on file with author) (Professor Guttentag clerked for Judge Justice in 1979.).

177. Brief of the States of Alaska, Arizona, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, North Carolina, North Dakota, Oregon, South Carolina, South Dakota, Tennessee, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming, and the Government of the Virgin Islands in Support of Petitioners, Amici Curiae, *supra* note 176, at 2.

178. *Id.* at 6.

179. *Id.*

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Lawyers for the prisoners countered that the density did cause “[m]ental [a]nd [p]hysical [i]njury,”¹⁸⁰ that it correlated with violence, and that it had no “penological justification.”¹⁸¹ The American Medical Association and the American Public Health Association told the Supreme Court about the harms produced by “social density” in “long term overcrowding.”¹⁸² The associations offered the baseline of U.S. Army regulations calling for seventy-two square feet per person.¹⁸³ Indeed, in the dissent that he filed when the Court ruled, Justice Thurgood Marshall noted that most of the windows in the Supreme Court were larger than the space allotted per person in Ohio’s double cells.¹⁸⁴

Undeterred, Justice Lewis Powell, writing for the Court in 1981, adopted the states’ stance. He used *Rhodes v. Chapman* to recalibrate the relationship between prison conditions and the Eighth Amendment so as to expand the authority of prison administrators.¹⁸⁵ Echoing the states’ arguments, Justice Powell explained that prison conditions could not “involve the wanton and unnecessary infliction of pain, nor [be] grossly disproportionate to the severity of the crime . . . [or] deprive inmates of the minimal civilized measure of life’s ne-

cessities.”¹⁸⁶ Further, “unnecessary and wanton” pain was not limited to the “physically barbarous.”¹⁸⁷ Practices that were “totally without penological justification” (such as deliberate indifference to known medical needs) counted as violations of the Eighth Amendment.¹⁸⁸

Given the stress, noise, and lack of personal privacy that double celling inflicts, the Court’s tests could have rendered it unlawful.¹⁸⁹ Instead, Justice Powell described forced intimacy as raising only a problem of “comfort”¹⁹⁰ and justified “the discomfort,” in part, by pointing to the fact that Lucasville housed “persons convicted of serious crimes.”¹⁹¹

180. Brief of Respondents at 8, *Rhodes*, 452 U.S. 337 (No. 80-332). 181. *Id.* at 18. 182. Motion for Leave to File Brief Amicus Curiae and Brief of the American Med. Ass’n and the American Pub. Health Ass’n at 3, *Rhodes*, 452 U.S. 337 (No. 80-332).

183. *Id.* at 10–25. 184. *Rhodes*, 452 U.S. at 371 (Marshall, J., dissenting). 185. *See id.* at 452. 186. *Id.* at 347. 187. *Id.* at 346 (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)). 188. *Id.* (quoting *Gregg*, 428 U.S. at 183). 189. A key issue that emerged thereafter was the question of intentionality: did state actors have to intend to inflict pain? In 1991, in *Wilson v. Seiter*, the Court, with Justice Scalia writing, defined punishment as “a deliberate act intended to chastise or deter.” 501 U.S. 294, 300 (1991) (quoting *Duckworth v. Franzen*, 780 F.2d 645, 652 (7th Cir. 1985)). Thus, Wilson’s complaint of overcrowding and disabling noise and un-sanitary and unsafe surroundings was to be assessed based on the subjective state of mind of the prison official rather than an “objective” analysis of the conditions. *Id.* at 299. A 2015 ruling, *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015), has been read to signal a retreat from the subjective inquiry into state of mind. *See Schlanger, Constitutional Law of Incarceration, supra* note 118, at 403–04.

190. *Rhodes*, 452 U.S. at 349. 191. *Id.*

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Had the ruling turned on imposing the punishment of social density on a subset of prisoners who had been “convicted of serious crimes,” double celling would not have been permissible for prisoners with

lesser sentences and for those in pretrial detention. But the Court had already upheld pretrial double celling in *Wolfish* (justified in part because it was for short periods of time).

The importance of *Rhodes* to today's massive incarceration cannot be overstated, as has become horribly clear in the wake of COVID-19. If the Court had insisted on adequate space for individuals confined for short or for long terms, states would have had to prosecute less, adjust sentencing laws to reduce populations, let out some people, or spend more to house the populations that their criminal justice policies had caused to increase. But instead of requiring states to internalize the costs of their policies by having to provide adequate space for the individuals in detention, *Wolfish* and *Rhodes* buffered states from paying for their expansive prosecution policies and placed the costs on the individuals suffering from being jammed into jails and prisons that exceeded design capacity.

Rhodes is one example of how the Court has cut back on the role that the Eighth Amendment could play in prisons. Moreover, in the next decade, Congress enacted what it called the Prison Litigation Reform Act (PLRA), which imposed a myriad of barriers to prison-conditions litigation, including directing federal judges to end remedial orders after two years unless new facts of ongoing constitutional violations were established.¹⁹²

The reminder is that *Rhodes* and the PLRA limited but did not end all such litigation. California's overcrowded prisons provide one example of a case that survived that decision as well as the hurdles of the PLRA. In 2011, in *Brown v. Plata*, the Supreme Court upheld a three-judge court order requiring a reduction in the number of prisoners held by California because the overcrowding placed incarcerated individuals' lives and health in jeopardy.¹⁹³

Constraints on prisoners' litigation came through other routes as well. As I have discussed, the Due Process Clause of the Fourteenth Amendment was another important avenue to federal court oversight of prison officials' decisions. As I noted, in the 1970s, the Court had held that good time credits could not be taken away unless prisons provided some check on arbitrary decisions. Prison officials could not retract good time without prisoners having an opportunity to contest and without providing some explanation of the grounds. In the years thereafter, the Court retreated. It reversed rulings in lower courts that

192. Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321-66 (1996). An empirical analysis of the impact comes from Margo Schlanger, *Trends in Prisoner Litigation as the PLRA Enters Adulthood*, 5 U.C. IRVINE L. REV. 153 (2015).

193. 563 U.S. 493, 502 (2011).

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had recognized that due process constrained prison officials' decisions on transfers to remote or high-security settings,¹⁹⁴ placement in segregation (whether explained as "protective custody," as "discipline," or more generally under the term "administrative segregation"), and ending opportunities to see visitors.¹⁹⁵ The rollback of constitutional protections against the arbitrariness of these decisions began in the 1970s and became ensconced in a test first set forth in *Sandin v. Conner*, decided in 1995.¹⁹⁶ Demont Conner, held in Hawaii, was sent ("sentenced" would be a better word) to thirty days of solitary confinement (with leg and waist chains) after he had spoken abruptly to a guard who had done an intrusive body-cavity search.¹⁹⁷ Conner argued a right to a fair process before such placement. Chief Justice Rehnquist wrote for the Court that lawful conviction "brings about the necessary withdrawal or limitation of many privileges and rights."¹⁹⁸ Putting Conner in solitary, while "punitive," was not a "dramatic departure from the basic conditions" of his indeterminate sentence.¹⁹⁹

By equating the normal ("basic conditions") in this context with the constitutional, the Court deferred to prison officials who shape prison conditions. The Court ruled that prisoners could not bring Fourteenth Amendment due process claims based on a deprivation

of liberty unless they could demonstrate either that statutory good time was at stake or that they had been subjected to “atypical” conditions, imposing “significant hardship.”²⁰⁰ Conner lost because being sent to disciplinary segregation, which occasioned a radical reduction in time out of cell and in activities based on a breach of a minor rule, was typical of how prison staff treated people.

194. See *Meachum v. Fano*, 427 U.S. 215 (1976); *Montanye v. Haymes*, 427 U.S. 236 (1976). The First Circuit had held that given the adverse impact of a transfer, process was required. *Fano v. Meachum*, 520 F.2d 374, 378 (1st Cir. 1975). The Second Circuit had likewise identified the harms from a transfer and had remanded to learn when punishment had been intended. *United States ex rel. Haymes v. Montanye*, 505 F.2d 977, 981–82 (2d Cir. 1974). In *Meachum*, Arthur Fano and other prisoners were in Norfolk, a prison in Massachusetts, where they were reclassified to be sent to Walpole, a maximum-security prison. The Justices held that the prisoners had neither rights to more process nor rights to federal court oversight of the process provided because Massachusetts had not created a statute governing the transfer system and because the prisoners otherwise had no liberty interest remaining in the place of their confinement. See *Meachum*, 427 U.S. at 224. Justice Stevens dissented and argued that liberty was not sourced in law alone and that prisoners retained a “residuum of constitutionally protected liberty while in legal custody pursuant to a valid conviction.” *Id.* at 232 (Stevens, J., dissenting, joined by Brennan, J., and Marshall, J.). While the state could change conditions of confinement, it could not do so arbitrarily. *Id.* at 234; see also *Montanye*, 427 U.S. at 244–46 (Stevens, J., dissenting, joined by Brennan, J., and Marshall, J.).
195. *Ky. Dept. of Corr. v. Thompson*, 490 U.S. 454 (1989); see also *Olim v. Wakinekona*, 461 U.S. 238 (1983). 196. 515 U.S. 472, 475 (1995). The case law’s evolution and debates are detailed in Judith Resnik, Hirsā Amin, Sophie Angelis, Megan Hauptman, Laura Kokotailo, Aseem Mehta, Madeline Silva, Tor Tarantola & Meredith Wheeler, *Punishment in Prison: Constituting the “Normal” and the “Atypical” in Solitary and Other Forms of Confinement*, 114 NW. U. L. REV. (forthcoming 2020).
197. *Sandin*, 515 U.S. at 475; see also *id.* at 494 (Breyer, J., dissenting). 198. *Id.* at 485 (quoting *Jones v. N.C. Prisoners’ Labor Union, Inc.*, 433 U.S. 119, 125 (1977)). 199. *Id.* 200. *Id.* at 484.

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when the Court assessed indefinite solitary confinement. According to the 2005 unanimous decision of *Wilkinson v. Austin* written by Justice Kennedy,²⁰¹ the Ohio Supermax had more than 500 cells in which it controlled “almost every aspect” of prisoners’ lives.²⁰² He described how prisoners were in spaces measuring “7 by 14 feet, for 23 hours per day. A light remains on in the cell at all times . . . [Solitary cuts off] almost any environmental or sensory stimuli and . . . almost all human contact.”²⁰³

By the time the case reached the Supreme Court, the central issue was the process due when individuals were put into solitary confinement. The Court, relying on the approach in *Sandin*, noted that the decision had not been clear about the baseline against which to measure typicality; since 1995, appellate courts had not “reached consistent conclusions for identifying the baseline from which to measure what is atypical and significant in any particular prison system.”²⁰⁴ Rather than clarify the metric, the Court concluded that Ohio’s oppressiveness created “an atypical and significant hardship under any plausible baseline.”²⁰⁵ The factors that Justice Kennedy identified as making the Supermax “atypical” (as compared to “most solitary confinement facilities”)²⁰⁶ were the extremity of the deprivations, the potential for remaining in such a setting indefinitely, and the resulting limitations of the possibility of parole.²⁰⁷

The Court’s phrasing appeared to make permissible “typical” solitary confinement as well as isolating conditions in general population. But with those factors, the Ohio prisoners had enough of a liberty interest left in avoiding that form of solitary that the state had to provide some procedural protections.²⁰⁸ During the litigation, Ohio had revised its process, and what it accorded (“notice of the factual basis” leading to the placement; an opportunity to rebut charges; “a short statement of reasons;” and annual review) sufficed as a predicate to years in such conditions.²⁰⁹

Just as *Rhodes* had limited but not extinguished all attacks on prison conditions, *Wilkinson* tolerated stunning cruelty but also made possible arguments that procedural protections were required when prisoners could establish that particular placements were “atypical” and imposed a “significant hardship.” Be-

201. 545 U.S. 209 (2005). 202. *Id.* at 214. 203. *Id.* 204. *Id.* at 223. 205. *Id.* 206. *Id.* at 224. 207. *Id.* 208. *Id.* 209. *Id.* at 226–27. The Court did not require

opportunities to call witnesses. *Id.* at 228.

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tween 1995 and 2019, those terms appear in thousands of federal court decisions.²¹⁰ While many rulings reject prisoners' claims, a few judges have found that prisoners can contest the process by which they are put into solitary confinement. One example comes from the Seventh Circuit, which opened its opinion:

Stripped naked in a small prison cell with nothing except a toilet; forced to sleep on a concrete floor or slab; denied any human contact; fed nothing but "nutri-loaf"; and given just a modicum of toilet paper—four squares—only a few times. Although this might sound like a stay at a Soviet gulag in the 1930s, it is, according to the claims in this case, Wisconsin in 2002.²¹¹

Such decisions make plain that while Ohio's Supermax had imposed significant hardships, profound isolation of individuals could be found in prisons around the United States. Indeed, the 500 beds of Ohio's Supermax were a small fraction of the expansive infrastructure of solitary confinement, which has been documented not only in case law but also through in-depth studies of specific jurisdictions and national research projects.

Data on the number of people held in isolation come from the Correctional Leaders Association (CLA, formerly the Association of State Correctional Administrators (ASCA), which is comprised of the directors of all the state prison systems and many of the major jails²¹²) and the Arthur Liman Center at Yale Law School. Since 2013, ASCA and Liman have sought to learn how many people in what conditions are held on average for twenty-two hours or more for fifteen or thirty days or more.

Answers come from a series of national surveys addressed to each state's prison system and to the federal government. The 2014

ASCA–Liman Report estimated that 80,000 to 100,000 of the 1.5 million people behind bars were in such isolation.²¹³ As of the fall of 2017, in forty-three jurisdictions providing data, 4.6% of their prison populations were held in solitary,²¹⁴ which produced

210. See Resnik, Amin, Angelis, Hauptman, Kokotailo, Mehta, Silva, Tarantola & Wheeler, *supra* note 196.

211. *Gillis v. Litscher*, 468 F.3d 488, 489 (7th Cir. 2006). The Seventh Circuit vacated the dismissal and remanded the case to the lower court for further proceedings. *Id.* at 495.

212. See *Members List*, CORRECTIONAL LEADERS ASS'N, https://www.asca.net/index.php?option=com_mcsearchresults&view=search&uuid=116ae4c9-8ee4-438c-97f8-1f3dac874f10#/ (last visited Jan. 26, 2020). 213. See ASS'N OF STATE CORR. ADM'RS & THE ARTHUR LIMAN CTR. FOR PUB. INTEREST LAW AT YALE LAW SCH., TIME-IN-CELL: THE ASCA-LIMAN 2014 NATIONAL SURVEY OF ADMINISTRATIVE SEGREGATION IN PRISON 3 (2015) [hereinafter ASCA/LIMAN TIME-IN-CELL 2014 REPORT], https://law.yale.edu/sites/default/files/area/center/liman/document/time-in-cell_combined_-web_august_2015.pdf, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2655627 (authors include Sarah Baumgartel, Corey Guilmette, Johanna Kalb, Diana Li, Josh Nuni, Devon Porter, Judith Resnik, George Camp, and Camille Camp).

214. See ASS'N OF STATE CORR. ADM'RS & THE ARTHUR LIMAN CTR. FOR PUB. INTEREST LAW AT YALE LAW SCH., REFORMING RESTRICTIVE HOUSING: THE 2018 ASCA-LIMAN NATIONWIDE SURVEY OF

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an estimate that at least 61,000 people were then in solitary confinement.²¹⁵ While many prison systems have not kept track of how long people remain in solitary, in thirty jurisdictions, some 3,500 people had been in such conditions for more than three years.²¹⁶ Furthermore, about 4,000 of the people in solitary were “seriously mentally ill” under the definition of the prison system in which they were held.²¹⁷

My discussion thus far has focused on decisions about putting people into solitary confinement, as contrasted with direct challenges to the practice. Another line of cases addresses whether the Eighth

Amendment bars profound isolation.²¹⁸ In the 1960s, the Honorable Constance Baker Motley, who was the first Black woman to become a federal judge, held that it did; she ruled that placement of Martin Sostre in solitary confinement for more than fifteen days violated the Constitution.²¹⁹ While the Court of Appeals for the Second Circuit upheld the part of her decision finding that New York state officials had unconstitutionally retaliated against Sostre for winning rights as a Black Muslim to observe his religion, the court reversed the time limit on solitary confinement.²²⁰ In the court's words: "For a federal court . . . to place a punishment beyond the power of a state to impose on an inmate is a drastic interference with the state's

TIME-IN-CELL 11 (2018) [hereinafter ASCA/LIMAN REFORMING RESTRICTIVE HOUSING 2018 REPORT], https://law.yale.edu/sites/default/files/area/center/liman/document/asca_limn_2018_restrictive_housing_released_oct_2018.pdf, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3264350 (authors include Judith Resnik, Anna VanCleave, Kristen Bell, Alexandra Harrington, Greg Conyers, Catherine McCarthy, Jenny Tumas, and Annie Wang). This report is one in a series of research projects coauthored by the Association of State Correctional Administrators (ASCA) and the Arthur Liman Center at Yale Law School and has created a longitudinal, nationwide database.

For the three prior research projects, see ASS'N OF STATE CORR. ADM'RS & THE ARTHUR LIMAN CTR. FOR PUB. INTEREST LAW AT YALE LAW SCH., RETHINKING "DEATH ROW": VARIATIONS IN THE HOUSING OF INDIVIDUALS SENTENCED TO DEATH (2016) [hereinafter ASCA/LIMAN RETHINKING "DEATH ROW" REPORT]

https://law.yale.edu/sites/default/files/documents/pdf/Liman/deathrow_reportfinal.pdf, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2806015 (authors include Celina Aldape Ryan Cooper, Katie Haas, Xionan April Hu, Jessica Hunter, Shelle Shimizu, Johanna Kalb, and Judith Resnik); ASS'N OF STATE CORR. ADM'RS & THE LIMAN CTR. FOR PUB. INTEREST LAW AT YALE LAW SCH., AIMING TO REDUCE TIME-IN-CELL: REPORTS FROM CORRECTIONAL SYSTEMS ON THE NUMBERS OF PRISONERS IN RESTRICTED HOUSING AND ON THE POTENTIAL OF POLICY CHANGES TO BRING ABOUT REFORMS (2016) [hereinafter ASCA/LIMAN TIME-IN-CELL 2016 REPORT], <https://law.yale.edu/sites/default/files/area/center/liman/document/aimingtoreducectic.pdf>, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2874492 (authors include Judith Resnik, Sarah Baumgartel, Kristen Bell, Olevia Boykin, Corey Guilmette, Tashiana Hudson, Johanna Kalb, Diana Li, Joseph Meyers, Hava Mirell, Jessi Purcell, Anna VanCleave, Camille Camp, and George Camp); ASCA/LIMAN TIME-IN-CELL 2014 REPORT *supra* note 213.

215. ASCA/LIMAN REFORMING RESTRICTIVE HOUSING 2018 REPORT, *supra* note 214, at 4. 216. *Id.* at 4–5. 217. *Id.* at 5. 218. See generally David M. Shapiro, *Solitary Confinement in the*

Young Republic, 133 HARV. L. REV. 542 (2019). 219. *Sostre v. Rockefeller*, 312 F. Supp. 863,

872 (S.D.N.Y. 1970), *aff'd in part, rev'd in part*, *Sostre v. McGinnis*, 442 F.2d 178 (2d Cir. 1971) (en banc). 220. *Sostre*, 442 F.2d at 190, 192–93.

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free political and administrative processes . . . [even if] to us the choice may seem unsound or *personally* repugnant.”²²¹

The Second Circuit’s approach to solitary confinement had parallels in other circuits, which likewise declined to find solitary confinement itself unconstitutional,²²² even as some courts—such as Chief Judge Henley’s ruling in *Holt v. Sarver*—concluded that placing many people in cramped cells in solitary confinement for more than thirty days was unlawful.²²³ Two decades later, Judge Thelton Henderson of the Northern District of California addressed a class action challenge to solitary confinement in California’s Pelican Bay State Prison.²²⁴ He ruled that the extreme isolation constituted cruel and unusual punishment for individuals who were mentally ill.²²⁵ While noting that the Eighth Amendment did not guarantee that prisoners were not to suffer “some psychological effects from incarceration or segregation,” Judge Henderson concluded that putting already mentally ill people into segregation could “greatly exacerbate mental illness, or deprive inmates of their sanity.”²²⁶

During the last decade, new challenges to solitary confinement have been filed, including some detailing the circumstances of individuals held for long periods of time in isolation.²²⁷ In addition, litigation continues to focus on sub-populations (such as individuals who have serious mental illnesses, who suffer from physical disabilities, or who are under the age of eighteen).²²⁸ The specter that putting people into solitary confinement would impair their mental health has drawn particular attention from Supreme Court justices²²⁹ and returns me to Alabama where, decades after Judge Johnson ruled on the Alabama prisons, litigation has continued about the treatment of prisoners with mental illness.

In 2016, Judge Myron Thompson, sitting in the Montgomery courtroom where

Judge Johnson worked, certified a class of “all persons with a serious mental-health . . . illness who are now, or will in the future be, subject to de-

221. *Id.* at 191. 222. See, e.g., *Nadeau v. Helgemoe*, 561 F.2d 411 (1st Cir. 1977); *Novak v.*

Beto, 453 F.2d 661 (5th Cir. 1971). 223. See *supra* notes 76, 132 and accompanying text.

224. *Madrid v. Gomez*, 889 F. Supp. 1146 (N.D. Cal. 1995). 225. *Id.* at 1266–67. 226. *Id.* at 1264. 227. See *Porter v. Clark*, 923 F.3d 348 (4th Cir. 2019); *Reyes v. Clarke*, No. 3:18CV611, 2019 WL 4044316 (E.D. Va. Aug. 29, 2019); *Reynolds v. Arnone*, 402 F. Supp. 3d 3 (D. Conn. 2019), *appeal docketed and stay granted pending appeal*, No. 19-2858 (2d Cir. Sept. 9, 2019).

228. See Complaint at 18, para. 51, *Disability Rights Network v. Wetzel*, 1:13-cv-00635-JEJ (M.D. Pa. Mar. 11, 2013), <https://www.clearinghouse.net/chDocs/public/PC-PA-0031-0001.pdf>; Settlement Agreement at 3, *Disability Rights Network v. Wetzel*, No. 3:13-CV-00635-JEJ (M.D. Pa. Jan. 9, 2015), ECF No. 59, <https://www.clearinghouse.net/chDocs/public/PC-PA-0031-0003.pdf>.

229. Justice Kennedy’s concurrence in *Davis v. Ayala*, 576 U.S. 257 (2015), was one example, and another comes from Justice Breyer’s dissent in *Glossip v. Gross*, 135 S. Ct. 2726, 2792 (2015), in which he was joined by Justice Ginsburg. See also Justice Sotomayor’s statement concerning the Court’s denial of certiorari in *Apodaca v. Raemisch*, 129 S. Ct. 5, 6 (2018).

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endants’ mental-health care policies and practices” within the Alabama Department of Corrections facilities.²³⁰ At the time of the litigation, the Alabama system included 19,500 prisoners; 3,400 were receiving “some type of mental- health treatment.”²³¹

In 2017, following a seven-week trial, the federal district court found that “inadequacies in the mental-health care system start . . . with intake screening” in which “likely thousands” of prisoners with mental illness are missed.²³² The court concluded that even when mental-health issues were identified, “prison- ers receive significantly inadequate care,” including those at risk of suicide.²³³ (One of the individuals in solitary died while the trial was underway.)²³⁴ The court held that the care provided violated the

state's constitutional obligation not to be deliberately indifferent to the "serious medical needs of prisoners."²³⁵ The Eighth Amendment prohibited placing

seriously mentally ill prisoners in segregation without extenuating circumstances and for prolonged periods of time; placing prisoners with serious mental-health needs in segregation without adequate consideration of the impact of segregation on mental health; and providing inadequate treatment and monitoring in segregation.²³⁶

230. *Braggs v. Dunn*, 317 F.R.D. 634, 673 (M.D. Ala. 2016). Excluded were those at "work release centers and Tutwiler Prison for Women." *Id.* at 673. A co-plaintiff, the Alabama Disabilities Advocacy Program, which is a designated protection agency under federal law, pursued claims on behalf of women at Tutwiler. See *Braggs v. Dunn*, 257 F. Supp. 3d 1171, 1181 (M.D. Ala. 2017).

231. *Braggs*, 257 F. Supp. 3d at 1181. 232. *Id.* at 1181, 1184. 233. *Id.* at 1185. Two people committed suicide during the course of the trial, including one of the named plaintiffs who testified in the case. *Id.* at 1186. Further, during the trial, the state's associate commissioner for health services, named defendant Ruth Naglich, admitted that it was "categorically inappropriate" to place people with serious mental illness in solitary confinement and that such placement amounted to "denial of minimal medical care." *Id.* at 1246.

234. *Id.* at 1186. 235. *Id.* at 1267–68. The standard comes from *Estelle v. Gamble*, 429 U.S. 97, 104 (1976), which held that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment" (citation omitted) (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)). In 1994, Justice Souter, writing for the Court, concluded that the test required inquiry into whether a prison official knew, as a matter of fact, that prisoners faced "a substantial risk of serious harm and disregard[ed] that risk by failing to take reasonable measures to abate it." *Farmer v. Brennan*, 511 U.S. 825, 847 (1994). Justice Blackmun, joined by Justice Stevens, argued that "inhumane prison conditions violate the Eighth Amendment even if no prison official has an improper, subjective state of mind." *Id.* at 851 (Blackmun, J., concurring).

In *Farmer* and other opinions, Justice Thomas has stated that the Eighth Amendment applies only to the decisions of judges and juries and not to conditions of confinement. See *Overton v. Bazzetta*, 539 U.S. 126, 142–44 (2003) (Thomas, J., concurring); *Helling v. McKinney*, 509 U.S. 25, 38–39 (1993) (Thomas, J., dissenting); *Hudson v. McMillian*, 503 U.S. 1, 18–19 (1992) (Thomas, J., dissenting).

236. *Braggs*, 257 F. Supp. 3d at 1268 (footnote omitted). In 2017, the correctional system was seeking to implement a process to identify prisoners with serious mental illness so that they were not placed in segregation, absent extenuating circumstances. See *Braggs v. Dunn*, No. 2:14cv601-MHT, 2018 WL 985759 (M.D. Ala. Feb. 20, 2018). The struggles to remediate the harms are chronicled in *Braggs v. Dunn*, No.

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In sum, more than forty years after Judge Johnson concluded that Alabama's prisons imposed debilitating harms on prisoners, Judge Thompson reached the same conclusion for a substantial percentage of the prison system's population. The harms he identified are, again, not limited to one state's system.²³⁷

V. ALTERNATIVE BASELINES: RIGHTS TO SAFETY, THE
QUESTION OF REHABILITATION, AND PROTECTION AGAINST
DEBILITATION

Two competing narratives are at the core of this account. The first is that, due to Jerry Lee Pugh, Worley James, Judge Johnson, and many others, constitutional law has become present in prisons and constrained aspects of their horrors. The second is that law has *not* kept prisoners safe and humanely treated. I close by exploring this puzzle, as I explain how these two propositions fit together, the role of politics and of prison administrators, and how constitutional analyses can and should do more to circumscribe the harms that incarceration can impose.

As I explain below, in the 1970s, trial judges saw how when prisoners were "warehoused" in settings with no activities or opportunities, they deteriorated. These judges held unconstitutional forms of punishment that did not try to buffer against debilitation. However, appellate courts pulled back from imposing obligations that they saw as mandating prison officials to aim to rehabilitate prisoners. When doing so, their opinions did not distinguish between remedies to limit how confinement causes deterioration and future-looking efforts to rehabilitate individuals. And decisions outside and inside courts have interacted to leave prisoners at what the Fifth Circuit

condoned—“subsistence” levels that diminish the ability of individuals to function as responsible adults.

Legal doctrine is, of course, but one factor. Had prison populations been stable in the decades after courts held that states had affirmative obligations to provide safety and security, correctional officials would have had more potential to comply. But the steep rise in prosecutions, changing sentencing policies, and declining commitments to mental health and social welfare supports in the 1980s and thereafter resulted in the overcrowding of prisons,²³⁸ which saps re- sources. As of 2019, approximately 2.3 million people were in detention, and

2:14cv601-MHT, 2019 WL 6833843 (M.D. Ala. Dec. 13, 2019); *Braggs v. Dunn*, 367 F. Supp. 3d 1340 (M.D. Ala. 2019); *Braggs v. Dunn*, No. 2:14cv601-MHT, 2018 WL 2168705 (M.D. Ala. Apr. 25, 2018); *Braggs v. Dunn*, No. 2:14cv601-MHT, 2018 WL 2440287 (M.D. Ala. Apr. 25, 2018); *Braggs v. Dunn*, No. 2:14cv601-MHT, 2018 WL 1805594 (M.D. Ala. Apr. 9, 2018); *Braggs v. Dunn*, No. 2:14cv601-MHT, 2018 WL 2057467 (M.D. Ala. Mar. 30, 2018).

237. See generally Andrea C. Armstrong, *The Missing Link: Jail and Prison Conditions in Criminal Justice Reform*, 80 LA. L. REV. 1 (2019).

238. Many commentators chronicle the policies and their impact. See generally GOTTSCHALK, *supra* note 149; HINTON, *supra* note 149; JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION— AND HOW TO ACHIEVE REAL REFORM (2017).

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large proportions of these individuals had histories of substance abuse, mental illness, and poor health.²³⁹

Correctional officials do not need constitutional law to provide good ser- vices. Yet however well-intended many are, they do need money to support well-trained and well-paid staff and to maintain facilities adequate to the task. During the 1990s, funds did flow toward prisons, but money was targeted for retributivist policies such as the construction of Supermax prisons.²⁴⁰ Moreo- ver, as I have detailed, the Court’s 1981 interpretation that the Eighth Amend- ment

permitted double celling provided no relief either for prisoners or for prison officials, some of whom could have used a decision prohibiting routine overcrowding as a buffer to limit intake or as an argument for different allocations of funds.

As I also sketched, the Court's reliance on "typical" treatment as the basis to cut back on judicial oversight of decisions about in-prison punishments (such as transfers to higher security levels and to solitary confinement) undercut the promise that the Constitution protects prisoners from the exercise of arbitrary power by state officials. Had judges focused on what were ordinary practices in the 1960s and 1970s, the "System" would have remained intact. But Judge Johnson in Alabama, as well as Chief Judge Henley in Arkansas, Judge Mehridge in Virginia, and several others, looked at what was commonplace and were revolted. Relying on the Eighth and Fourteenth Amendments, they ruled out a host of practices and decision-making that were then "usual" rather than "atypical."

Moreover, these trial judges introduced other terms—*habilitation* and *debilitation*—into the lexicon of the constitutional law of prisons. Judge Johnson first used those concepts in the context of a case brought by mentally ill individuals

239. WENDY SAWYER & PETER WAGNER, PRISON POLICY INITIATIVE, MASS INCARCERATION: THE WHOLE PIE 2019 (Mar. 19, 2019), <https://www.prisonpolicy.org/reports/pie2019.html>. In 2011, there were an estimated 1.6 million people held in state and federal prisons. E. ANN CARSON & WILLIAM J. SABOL, U.S. DEP'T JUSTICE, PRISONERS IN 2011, at 3 (2012), <https://www.bjs.gov/content/pub/pdf/p11.pdf>. On average, jail populations numbered about 750,000. See JENNIFER BRONSON & MARCUS BERZOFKY, BUREAU OF JUSTICE STATISTICS, INDICATORS OF MENTAL HEALTH PROBLEMS REPORTED BY PRISONERS AND JAIL INMATES, 2011-12 (2017), <https://www.bjs.gov/content/pub/pdf/imhprj1112.pdf>. A 2017 report released by the Bureau of Justice Statistics found that 44.3% of prison and jail inmates had been told "by a mental health professional that they had a mental disorder." *Id.* at 4.
240. For example, in 1994, Congress appropriated almost \$8 billion in funding that enabled the construction of more high-security facilities. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 20109, 108 Stat. 1818; see also BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, REPORT TO CONGRESS: VIOLENT OFFENDER INCARCERATION AND TRUTH-IN-SENTENCING INCENTIVE FORMULA GRANT PROGRAM 7-30 (2012). As explained in 2001, the number of prisoners housed in "secure units" increased, and recipients of the federal grants "had significantly more inmates housed in secure units" than states that had not taken the funds. See Susan Turner, Terry Fain, Peter W. Greenwood, Elsa Y. Chen & James R. Chiesa, National Evaluation of the Violent Offender Incarceration/Truth-in-Sentencing Incentive Grant Program 91-93 (Nov. 29, 2001), <https://www.ncjrs.gov/pdffiles1/nij/grants/191201.pdf> [<https://perma.cc/XZW2-GRQD>] (unpublished report, U.S. Department of Justice) (on file with the National Criminal Justice Reference Service).

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whom Alabama had involuntarily confined. He then wove concerns about the destructive potential of detention into his decisions on prisons.

Two years before his opinion in *Pugh*, Judge Johnson learned of shocking conditions in Alabama's mental hospitals, where people were held for decades. Between 1971 and 1972, he joined a few other lower court judges in articulating a new constitutional theory—that the predicate of the state power to hospitalize a person was the provision of treatment.²⁴¹ Faced with awful practices in dealing with severely disabled individuals held at Bryce Hospital in Tuscaloosa, Judge Johnson concluded that the state's lack of treatment violated patients' liberty rights.²⁴²

In 1972, Judge Johnson wrote that “warehousing” people was unacceptable. The state hospital’s “atmosphere of psychological and physical deprivation” was “wholly incapable of furnishing habilitation” and was instead “conducive only to the deterioration and the debilitation of the residents.”²⁴³ “Because the only constitutional justification for civilly committing a mental retardate, therefore, is habilitation, it follows ineluctably that once committed such a person is possessed of an inviolable constitutional right to habilitation.”²⁴⁴

The Fifth Circuit agreed, but instead of embracing the concept of habilitation, that court substituted the word *treatment*. Moreover, when approving the obligation to provide such treatment for the mentally ill, the appellate court

241. *Wyatt v. Stickney*, 325 F. Supp. 781, 784 (M.D. Ala. 1971).

The patients at Bryce Hospital, for the most part, were involuntarily committed through non-criminal procedures and without the constitutional protections that are afforded defendants in criminal proceedings. When patients are so committed for treatment purposes they unquestionably have a constitutional right to receive such individual treatment as will give each of them a realistic opportunity to be cured or to improve his or her mental condition. Adequate and effective treatment is constitutionally required because, absent treatment, the hospital is transformed “into a penitentiary where one could be held indefinitely for no convicted offense.” *Id.* (citations omitted) (quoting *Ragsdale v. Overholser*, 281 F.2d 943, 950 (D.C. Cir. 1960)). As that citation reflects, Judge David Bazelon on the D.C. Circuit was another of the pioneers in rejecting such warehousing. According to the ACLU, the principles announced by Judge Johnson in *Wyatt* in the early 1970s—rights to treatment and habilitation—were subsequently adopted in thirty-five states. *ACLU History: Mental Institutions*, ACLU, <https://www.aclu.org/other/aclu-history-mental-institutions> (last visited Jan. 26, 2020); see also R.L. Sadoff, *A Review of Wyatt v. Stickney: Retrospect and Prospect*, 27 J. FORENSIC SCI. 976, 976 (1982).

242. Judge Johnson wrote: “The purpose of involuntary hospitalization for treatment purposes is *treatment* and not mere custodial care or punishment.” *Wyatt*, 325 F. Supp. at 784. In a subsequent decision, Judge Johnson also found debilitating conditions at Partlow State School and Hospital. See *Wyatt v. Stickney*, 344 F. Supp. 387 (M.D. Ala. 1972).

243. *Wyatt*, 344 F. Supp. at 391. In this opinion, Judge Johnson quoted from his “Unreported Interim Emergency Order,” issued on March 2, 1972. Having ruled from the bench in light of the “urgency of the situation,” a transcript was made, and in the text of the published decision, Judge Johnson put brackets around “[habilitation]” to signal that the original transcript had dropped that word and that he was adding it. *Id.* I have deleted these brackets above to avoid the implication that the word was not in his decision.

244. *Id.* at
390.

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described that care as “beyond the subsistence level custodial care that would be provided in a penitentiary.”²⁴⁵

The circuit’s formulation limiting the right to habilitation to individuals who had not been convicted of crimes explains why prisoners’ rights law has not done more work in prisons. As long as prison law is stuck at the “subsistence level,” as long as “subsistence” is defined to exclude practices falling under the terms habilitation or treatment, and as long as practices that are “typical” are used as justifications for withdrawing judicial oversight, debilitation of prisoners can follow.

The facts in the thirteen cases in Worley James's Memorandum of Law make plain that incarceration in the United States weighs a person down. The experiences recounted by those prisoners also illuminate the challenges that thinking through the limits of state power entails. Engaging with the myriad of oppressive interactions to sort which decisions are unconstitutional is daunting, as is providing remedies. Yet the disengagement produced by deference under *Rhodes v. Chapman's* interpretation of the Eighth Amendment and by the *Sandin– Wilkinson* limits on Fourteenth Amendment procedural due process obligations undermine the proposition that the Constitution does not “stop at the prison gate.”²⁴⁶

What the prisoners who sought help, the lawyers who represented them, and the judges who responded understood in the 1970s was that forced density, overcrowding, lack of activity, arbitrary authority, and violence devastated indi-

245. Wyatt v. Aderholt, 503 F.2d 1305, 1306 n.1 (5th Cir. 1974). In an opinion by Judge John Minor Wisdom, the Fifth Circuit reiterated that civil commitment was justified by the need to treat individuals and the “right to treatment arises as a matter of federal constitutional law under the due process clause of the Fourteenth Amendment.” *Id.* at 1314 (referencing *Donaldson v. O'Connor*, 493 F.2d 507 (5th Cir. 1971)). The court further referenced *Donaldson v. O'Connor's* holding that civilly committed patients have a right “to such individual treatment as will help each of them to be cured or to improve his or her mental condition.” *Id.* at 1312. Hence, district courts had the “power to order state mental institutions to provide minimum levels of psychiatric care and treatment to persons civilly committed to the institution.” *Id.* at 1306. The court also noted that the state had not disputed the lack of treatment, *id.* at 1310, as Judge Wisdom recounted that individuals were placed “in straitjackets, without physicians’ orders,” that “54 young boys” were fed from “one very large bowl with nine plates and nine spoons,” and that there was no place to sit to eat, *id.* at 1311.

Thereafter, in a case coming up from Florida, the U.S. Supreme Court vacated a parallel Fifth Circuit ruling. See *O'Connor v. Donaldson*, 422 U.S. 563 (1975). Below, Kenneth Donaldson had won \$38,500, which included \$10,000 in punitive damages, *id.* at 572, after a jury trial in which evidence showed that the state had provided custody but no treatment, *id.* at 569. The Supreme Court concluded that it did not have to decide the “difficult issues of constitutional law” about a right to treatment, as a narrower principle applied. *Id.* at 573. “[A] State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends.” *Id.* at 576. The Court remanded to decide both the jury instructions and state liability. *Id.* at 577.

Two years earlier, in 1973, Congress enacted the Rehabilitation Act, Pub. L. No. 93-112, 87 Stat. 355 (now codified at 29 U.S.C. §§ 701–799 (2018)). The focus of litigation shifted to statutory rights and states’ immunity. The Court’s sequence of cases limiting the ability of individuals to sue states for violating state or federal obligations to provide care are *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984); and *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985).

246. *Battle v. Anderson*, 447 F. Supp. 516, 524 (E.D. Okla. 1977).

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viduals. Judge Johnson concluded that Alabama prison conditions were “so debilitating that they necessarily deprive[d] inmates of any opportunity to rehabilitate themselves, or even to maintain skills already possessed.”²⁴⁷ Judge Johnson then integrated concepts of rehabilitation and of safety into the constitutional law of punishment. He concluded that a prison system “cannot be operated in such a manner that it impedes an inmate’s ability to attempt rehabilitation, or simply to avoid physical, mental or social deterioration.”²⁴⁸ Judge Johnson also quoted from Chief Judge Henley’s Arkansas ruling in *Holt v. Sarver* that the “absence of an affirmative program of training and rehabilitation may have constitutional significance where in the absence of such a program conditions and practices exist which actually militate against reform and rehabilitation.”²⁴⁹

These quotes reflect that the Fifth Circuit’s terminology blurred rather than elucidated the ideas and that a right not to be debilitated can be distinguished from, rather than conflated with, a right to treatment and to rehabilitation. To prevent debilitation requires services and activities that can be part of treatment or of rehabilitation, but the purposes are distinct. Treatment and rehabilitation look to the future to help individuals and prisoners change by gaining new skills and capacities. In contrast, debilitation looks to the past to prevent what Judge Johnson called “deterioration.” And as I have argued in an essay focused on the impact of prisoners on United States theories of punishment, democratic orders have no legitimate aim in using criminal sanctions to make people debilitate.²⁵⁰ The reminder is that when Judge Johnson was writing, debates centered on how to achieve rehabilitative goals, which was seen as the primary purpose of punishment. In contrast, by the 1980s, retributivist attitudes (often laced with texts and subtexts of racism) came to the fore.

As Judge Johnson's remedies reflected, however, the theoretical distinctions that I have drawn between debilitation and rehabilitation do not map readily onto practice. Avoiding deterioration when individuals are imprisoned often entails providing activities identified with rehabilitation, and Judge Johnson's mandates linked the two. He ruled that Alabama prison conditions were "so debilitating" that people were not able "even to maintain skills already possessed."²⁵¹ He then drew the connection to rehabilitation by commenting that individuals stood "no chance of leaving the institution with a more positive and

247. *Pugh v. Locke*, 406 F. Supp. 318, 330 (M.D. Ala. 1976). 248. *Id.* In his 1974 decision denying Alabama's motion to dismiss, Judge Johnson had explained that the prisoners had the "burden of proving that the conditions of Alabama prisons themselves tend to encourage asocial and antisocial behavior" and that if so, rehabilitative services would be needed. *James v. Wallace*, 382 F. Supp. 1177, 1181 (M.D. Ala. 1974). Yackle explained why prisoners' lawyers focused on a right to rehabilitation based on the Eighth Amendment rather than the Due Process Clause as in *Wyatt*. See YACKLE, *supra* note 30, at 53–54, 58–59.

249. *Pugh*, 406 F. Supp. at 330 (quoting *Holt v. Sarver*, 309 F. Supp. 362, 379 (E.D. Ark. 1970)); see also YACKLE, *supra* note 30, at 63 (discussing Judge Johnson's reliance on the *Holt* precedent).

250. See Resnik, *(Un)Constitutional Punishments*, *supra* note 6. 251. *Pugh v. Locke*, 406 F. Supp. 318, 330 (M.D. Ala. 1976).

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constructive attitude than the one he or she brought in."²⁵² Judge Johnson ordered that prisoners "be assigned a meaningful job," that they "have the opportunity to participate in basic educational programs," and that they be provided "a vocational training program."²⁵³ In addition, before release, the prison had to offer "some transitional program designed to aid in . . . re-entry into society."²⁵⁴ These aspects of Judge Johnson's order did not survive appellate review.²⁵⁵ The Fifth Circuit did not parse distinctions

between efforts to buffer against debilitation and programs for rehabilitation. Instead, in 1977, the court lumped them together and held that a failure “to provide a rehabilitation program, by itself, does not constitute cruel and unusual punishment.”²⁵⁶ The appellate court did approve a bit of Judge Johnson’s rubric by stating that the prison was to provide a “meaningful job on the basis of [a person’s] abilities and interests,” with the caveats that doing so was to be “according to institutional needs,”²⁵⁷ and that this obligation was not to have “any precedential status in future cases if they should arise.”²⁵⁸ Moreover, the circuit interpreted Judge Johnson’s orders on education and training to apply only when such programs existed; if so, then the state had to provide “equal access on an objective standard of basic utility to the individual.”²⁵⁹

The degree to which the Circuit departed from Judge Johnson’s understanding of the constitutional constraints on punishment can be seen from its conclusion that, if

the State furnishes its prisoners with reasonably adequate food, clothing, shelter, sanitation, medical care, and personal safety, so as to avoid the imposition of cruel and unusual punishment, that ends its obligations under Amendment Eight. The Constitution does not require that prisoners, as individuals or as a

252. *Id.* at 325. 253. *Id.* at 335. 254. *Id.* 255. The Fifth Circuit panel included Judge James Coleman, Judge Thomas Gee, and Judge Robert Kunzig of the United States Court of Claims. Writing for the court, Judge Coleman began with a compliment. “Our first response is that the determined efforts of the highly dedicated District Judge to put an end to unconstitutional conditions in the Alabama prison system merit high commendation. We cannot believe that the good people of a great state approved the prison situation demonstrated by the evidence in this case.” *Newman v. Alabama*, 559 F.2d 283, 288 (5th Cir. 1977).

256. *Id.* at 291. 257. *Id.* at 292. 258. *Id.* 259. *Id.* In addition, the court ended the mandate for individual cells and human rights committees as well as for visits. *Id.* at 288, 291. The Supreme Court remanded with instructions to dismiss two defendants, the State of Alabama and Board of Corrections, because they had immunity under the Court’s reading of the Eleventh Amendment’s protections for states and state-level agencies. *Alabama v. Pugh*, 438 U.S. 781, 782 (1978) (per curiam).

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group, be provided with any and every amenity which some person may think is needed to avoid mental, physical, and emotional deterioration.²⁶⁰

Within a year, the Supreme Court distanced itself from endorsing rehabilitation as a facet of constitutional obligations, and the Court likewise did not address the distinction between mandates for rehabilitation and protection against debilitation. In *Hutto v. Finney*, which dealt with aspects of the Arkansas class action, *Holt v. Sarver* (cited in James's 1974 Memorandum of Law), the Court held that states were not immune from paying attorneys' fees to successful plaintiffs in civil rights cases, and it upheld the remedy of a thirty-day cap on time in solitary confinement that Chief Judge Henley had imposed.²⁶¹ When doing so, the Court deliberately stepped back from endorsing the rehabilitation concerns that had laced Chief Judge Henley's opinion.

As reflected in Justice Blackmun's papers, one could have read Henley's objection to confining individuals for more than thirty days in solitary confinement as predicated on the lack of its rehabilitative utility.²⁶² That interpretation

260. *Newman*, 559 F.2d at 291. 261. *Hutto v. Finney*, 437 U.S. 678, 680–81 (1978). As noted, one issue involved interpreting the Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (codified at 42 U.S.C. § 1988 (2018)); the Court held that Chief Judge Henley properly assessed fees against the state. *Hutto*, 437 U.S. at 700.

262. Two *Hutto v. Finney* memoranda written for Justice Blackmun by his then-law clerk Keith P. Ellison noted that the lower courts' decisions could be interpreted to establish an Eighth Amendment requirement that all methods of prison discipline served a rehabilitative purpose. In his February 1978 memorandum, Ellison wrote:

[B]oth lower courts intimated that a rehabilitative purpose was necessary to justify punitive isolation beyond a certain period of time. There is no support for such a view in any of this Court's precedents interpreting the cruel and unusual punishment clause. I think the Court

might wish to indicate its disapproval of any such theory and remand the case for reconsideration. Memorandum from Keith P. Ellison, Clerk, U.S. Supreme Court, to Harry A. Blackmun, Assoc. Justice, U.S. Supreme Court 31–32 (Feb. 14, 1978) (on file with Harry A. Blackmun Papers, Library of Congress, Box 268, Folder 76-1660). Addressing Chief Judge Henley’s opinion, Ellison stated:

The [district court] specifically found that “[w]hile most inmates sentenced to punitive isolation are released to population within less than fourteen days, many remain in the status in question for weeks or months, depending upon their attitudes as appraised by prison personnel.” Petn Appx at 68. It would seem plain from this statement that the DC’s holding, even as amended in the Clarifying Memorandum, does effect a change in prison policy in limiting punitive confinement to 30 days (absent proof of another serious infraction of prison discipline). And the rationale for this limitation—consisting partly of the assumption that such confinement was unconstitutional because it served no rehabilitative purpose—still merits judicial review. *Id.* at 4.

In his June 1978 memorandum commenting on the circulation of a draft of what would become Justice Stevens’ opinion, Ellison suggested that the concern about rehabilitative purposes was shared by Justice Blackmun:

[I]n Part I, Mr. Justice Stevens satisfactorily deals with a concern that you and I shared: that is, that the opinions below might be interpreted as requiring that all forms of prison discipline have a rehabilitative function. Footnote 8 on page 7 emphasizes that the lower court opinions should not be so read and that, indeed, there is no such requirement. Memorandum from Keith P. Ellison, Clerk, U.S. Supreme Court, to Harry A. Blackmun, Assoc. Justice, U.S. Supreme Court 1 (June 11, 1978) (on file with Harry A. Blackmun Papers, Library of Congress, Box 268, Folder 76-1660).

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reflected the idea that all punishment was to be purposeful, and that the dominant point of punishment was rehabilitation. Thus, under this logic, if a prison practice could not be justified in reference to rehabilitation, it could not stand. The Supreme Court distanced itself somewhat from that equation by adding a footnote in its 1978 decision that upholding Henley’s limit of thirty days for solitary confinement in Arkansas was not an endorsement of a view that the Constitution required “that every aspect of prison discipline serve a rehabilitative purpose.”²⁶³ And, as I have recounted, in the decades since, the Court has not rejected many in-prison practices that are not crafted with rehabilitation in mind.

These retreats from what Judge Johnson and Chief Judge Henley envisioned explain why prisoners' rights litigation altered important aspects of incarceration but left others unchanged. The Court has recognized that states have some degree of caregiving obligations. Prison officials no longer dispute that prisoners have constitutional rights, produced from a mix of the Eighth and Fourteenth Amendments, to "adequate food, clothing, shelter, sanitation, medical care and personal safety."²⁶⁴ Moreover, the state cannot impose punishment that entails "wanton and unnecessary infliction of pain"²⁶⁵ or withhold the minimum of "life's necessities." In addition, in 2019, when holding in *Timbs*

263. *Hutto*, 437 U.S. at 686 n.8. The footnote read:

The Department reads the following sentence in the District Court's 76-page opinion as an unqualified holding that any indeterminate sentence to solitary confinement is unconstitutional: "The court holds that the policy of sentencing inmates to indeterminate periods of confinement in punitive isolation is unreasonable and unconstitutional." 410 F. Supp., at 278. But in the context of its full opinion, we think it quite clear that the court was describing the specific conditions found in the Arkansas penal system. Indeed, in the same paragraph it noted that "segregated confinement under maximum security conditions is one thing; segregated confinement under the *punitive* conditions that have been described is quite another thing." *Ibid.* (emphasis in original).

The Department also suggests that the District Court made rehabilitation a constitutional requirement. The court did note its agreement with an expert witness who testified "that punitive isolation as it exists at Cummins today serves no rehabilitative purpose, and that it is counterproductive." *Id.*, at 277. The court went on to say that punitive isolation "makes bad men worse. It must be changed." *Ibid.* We agree with the Department's contention that the Constitution does not require that every aspect of prison discipline serve a rehabilitative purpose. *Novak v. Beto*, 453 F.2d 661, 670–671 (CA5 1971); *Nadeau v. Helgemoe*, 561 F.2d 411, 415–416 (CA1 1977). But the District Court did not impose a new legal test. Its remarks form the transition from a detailed description of conditions in the isolation cells to a traditional legal analysis of those conditions. The quoted passage simply summarized the facts and presaged the legal conclusion to come. *Id.*

264. Petition for Writ of Certiorari at 10, *Rhodes v. Chapman*, 452 U.S. 337 (1981) (No. 80-332). Or, as Judge Johnson put, a "prisoner has a right, secured by the eighth and fourteenth amendments, to be reasonably protected from constant threat of violence and sexual assault by his fellow inmates, and he need not wait until he is actually assaulted to obtain relief." *Pugh v. Locke*, 406 F. Supp. 318, 329 (M.D. Ala. 1976) (quoting *Woodhous v. Virginia*, 487 F.2d 889, 890 (4th Cir. 1973), which in turn had cited *Holt v. Sarver*, 442 F.2d 304, 308 (8th Cir. 1971)).

265. *Rhodes*, 452 U.S. at 347.

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v. Indiana that the Excessive Fines Clause applied to the states,²⁶⁶ the Court described the history of that clause as aiming to protect against the aggressive use of state punishment powers.²⁶⁷ Justice Thomas, concurring, cited English historians, explaining that the Excessive Fines Clause aimed to stop governments from deploying their powers to “ruin” a person financially.²⁶⁸

In short, when the various strands of the constitutional law regulating punishment are woven together, precepts emerge that punishment must be purposeful, that some purposes are illicit, and that one impermissible aim is to debilitate or ruin people. State punishment has to preserve (rather than diminish) people’s capacities to function physically, mentally, and socially. And the reason that constitutional law has shifted prison practices somewhat but has yet to support profound change is that courts have thus far not banned many debilitating practices that ought to fall under prohibitions on “unnecessary pain,” “life’s necessities,” and the extrapolation from economic to personal “ruin.”²⁶⁹ Accomplishing that difficult goal would build on what Jerry Lee Pugh, Worley James, Frank Johnson, and many others pioneered when they insisted that constitutional law constrained punishment powers. These litigants, lawyers, and many judges aimed to stop states from treating people in ways that prevented them from functioning as responsible and reciprocal adults while in prison and upon release. Were the courts as well as legislatures to embrace what Judge Johnson called habilitation (and what I have discussed as the “anti-ruination principle”),²⁷⁰ apply it to incarceration, and elaborate its contours, we could resume what Pugh, James, and Judge Johnson began, which was to require that governments not set out to cause the deterioration of people convicted of crimes.

266. 139 S. Ct. 682, 687 (2019). 267. *Id.* at 688–89. 268. *Id.* at 694 (Thomas, J., concurring) (quoting ROBERT VAUGHAN, 2 THE HISTORY OF ENGLAND UNDER THE HOUSE OF STUART, INCLUDING THE COMMONWEALTH 801 (1840)). Justice Thomas viewed the history as making plain that, as a “constitutionally enumerated right,” the Excessive Fines Clause was “a privilege of American citizenship.” *Id.* at 698.

269. I provide more analysis of the history of punishment’s aims and the courts’ responses in Resnik, *(Un)Constitutional Punishments*, *supra* note 6, at 367–414.

270. *Id.* at
365.

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APPENDI

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THE COMPLAINT IN *PUGH V. SULLIVAN* Civil Action No. 74-57-N, filed in
the Middle District of Alabama, Feb. 26, 1974

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THE COMPLAINT IN *JAMES V. WALLACE* Civil Action No. 74-203-N, filed in
the Middle District of Alabama, June 21, 1974

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