the concept of mitigation in the calculation of harm under the proposed approach would likely be sufficient to protect valuable speech.

Ultimately, a harm-focused approach to content-based speech restrictions would require a high level of judicial discipline in restraining the natural impulse toward condemnation of that which is considered distasteful or of low value. However, such a shift in First Amendment doctrine would be well worth the risks, offering flexibility, an optimal level of protection for speech, and avoidance of value judgments that contravene the spirit of the First Amendment.

B. Fourth Amendment

1. Strip Searches of Prisoners. — Prisoners have constitutional rights, including Fourth Amendment rights protecting them from unreasonable searches.[1] Despite this fact, the Supreme Court has repeatedly deferred to corrections officials' judgments in designing prison policies that might seem to infringe on constitutional rights.[2] In the past, this deference has led the Court to uphold a policy establishing mandatory strip searches of every inmate who has a contact visit[3] and a policy banning contact visits altogether.[4] Last Term, in *Florence v. Board of Chosen Freeholders*,[5] the Supreme Court held that correctional facilities may, without reasonable suspicion, strip-search every arrestee introduced into the general jail population, even when the offender in question has committed only a minor offense.[6] The Court's 5–4 ruling in *Florence* is a significant restriction of Fourth Amendment rights for prisoners. The most remarkable aspect of the ruling was the Court's reliance on the expertise of corrections officials, without any scrutiny of their knowledge, procedure, or diligence in developing the prison's strip search policy. The Court should have critically reviewed the proffered justifications for such an invasive search, examined empirical evidence, and considered clear alternatives, rather than deferring to determinations that affect basic constitutional rights. In the future, when reviewing jail administration policies,[7] the Court should apply a standard of review akin to administrative law's "hard look review."

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[1] *See, e.g.*, Turner v. Safley, 482 U.S. 78, 84 (1987) ("Prison walls do not form a barrier separating prison inmates from the protections of the Constitution."); Bell v. Wolfish, 441 U.S. 520, 545 (1979); Wolff v. McDonnell, 418 U.S. 539, 555–56 (1974). *But see* Hudson v. Palmer, 468 U.S. 517, 526 (1984) (noting that Fourth Amendment rights are "diminished" in correctional facilities).

[2] *See, e.g.*, Overton v. Bazzetta, 539 U.S. 126, 129–30, 132 (2003); *Turner*, 482 U.S. at 81–82, 89; *Bell*, 441 U.S. at 525–26, 547.

[3] *Bell*, 441 U.S. at 558–60.

[4] Block v. Rutherford, 468 U.S. 576, 589 (1984).

[5] 132 S. Ct. 1510 (2012).

[6] *See id.* at 1513–14.

[7] In accordance with the terminology of the Court's opinion, "jail" is used here to refer to detention facilities generally. *See id.* at 1513.

In 2005, a state police officer pulled over Albert Florence and his wife in a routine traffic stop in New Jersey.[8] The officer discovered that there was an outstanding warrant for Florence's arrest, so the officer arrested him and brought him to the Burlington County Detention Center.[9] Officers checked Florence for scars, marks, gang tattoos, and contraband as he got undressed and showered with a delousing agent, in accordance with jail policies.[10] He was required to open his mouth, lift his tongue, extend his arms, turn around, and lift his genitals.[11] After six days of detention in Burlington County, Florence was transferred to the Essex County Correctional Facility.[12] He passed through a metal detector when he entered and, as in Burlington County, undressed as officers looked for markings and contraband.[13] Florence was required to lift his genitals, turn around, and cough while squatting.[14] He then took a shower, while his clothes were inspected, and finally entered the jail's general population.[15] The following day, the charges against him were dismissed, and he was released.[16]

Florence filed suit in the United States District Court for the District of New Jersey against both detention facilities and a number of other government entities and individuals, including state police officers, corrections officers, and a warden.[17] Florence sought relief under 42 U.S.C. § 1983 for violations of his Fourth and Fourteenth Amendment rights, arguing that an individual arrested for minor offenses may be strip-searched only if there is a reasonable suspicion that he is concealing contraband.[18] The district court granted Florence's motion for summary judgment.[19] It applied a balancing test under *Bell v. Wolfish*[20] and concluded that "blanket strip searches of non-indictable offenders, performed without reasonable suspicion for drugs, weapons, or other contraband, [are] unconstitutional."[21]

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[8] *Id.* at 1514.

[9] *Id.*; Florence v. Bd. of Chosen Freeholders, 621 F.3d 296, 299 (3d Cir. 2010). It was later discovered that the warrant was listed in error. *Florence*, 132 S. Ct. at 1514.

[10] *Florence*, 132 S. Ct. at 1514.

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *See id.*; Complaint at 1, Florence v. Bd. of Chosen Freeholders, 595 F. Supp. 2d 492 (D.N.J. 2009) (No. 05–3619).

[18] *Florence*, 132 S. Ct. at 1514–15.

[19] *Florence*, 595 F. Supp. 2d at 513.

[20] 441 U.S. 520, 559 (1979) (instructing courts to consider the scope, manner, justification, and location of invasive personal searches).

[21] *Florence*, 595 F. Supp. 2d at 513; *see id.* at 505–13.

The Court of Appeals for the Third Circuit reversed.[22] Writing for the panel, Judge Hardiman[23] began by noting that most federal appellate courts following *Bell* determined that strip searches of minor offenders required reasonable suspicion.[24] The court assumed that "detainees maintain some Fourth Amendment rights against searches of their person upon entry to a detention facility"[25] and conceded that this type of search was an "extreme intrusion on privacy."[26] Nonetheless, the court observed, "authorities are entitled to considerable latitude in designing and implementing prison management policies."[27] The court found that three penological interests justified the searches: detection and deterrence of contraband, identification of gang members, and prevention of the spread of contagious diseases.[28] In balancing these interests against detainees' Fourth Amendment rights, the court found that the strip search procedures were reasonable.[29]

The Supreme Court affirmed.[30] Writing for the Court, Justice Kennedy[31] held that the strip search procedures at the Burlington and Essex County facilities "struck a reasonable balance between inmate privacy and the needs of the institutions."[32] In light of the difficulty of administering a jail, the concomitant security risks, and the lack of relevant judicial expertise, the Court confirmed "the importance of deference to correctional officials."[33] When evaluating security measures that may infringe on constitutional rights, Justice Kennedy explained that the Court will uphold the policies if they are "reasonably related to legitimate penological interests."[34] The Court went even further, contending that it "must defer to the judgment of correctional officials unless the record contains substantial evidence showing their policies are an unnecessary or unjustified response to problems of jail security."[35]

The Court expounded on three justifications for the invasive searches in this case. First, thorough strip searches are necessary to protect detainees and staff from health risks, particularly from conta-

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[22] Florence v. Bd. of Chosen Freeholders, 621 F.3d 296, 311 (3d Cir. 2010).

[23] Judge Hardiman was joined by Judge Sloviter.

[24] *Florence*, 621 F.3d at 299.

[25] *Id.* at 306.

[26] *Id.* at 307.

[27] *Id.* at 302.

[28] *Id.* at 307.

[29] *Id.* at 311.

[30] *Florence*, 132 S. Ct. at 1523.

[31] Justice Kennedy was joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito. Justice Thomas did not join in the penultimate section of the Court's opinion.

[32] *Florence*, 132 S. Ct. at 1523.

[33] *Id.* at 1515.

[34] *Id.* (quoting Turner v. Safley, 482 U.S. 78, 89 (1987)) (internal quotation mark omitted).

[35] *Id.* at 1513–14.

gions or infections.[36] Second, strip searches are also essential to identify "tattoos and other signs of gang affiliation," allowing staff to take precautions to control gang violence within the facility.[37] Third, strip searches allow corrections officers to detect and confiscate dangerous contraband.[38] The Court rejected Florence's argument that minor offenders who do not give rise to reasonable suspicion could safely be exempted from these search procedures, recognizing that detainees arrested for minor offenses may turn out to be particularly dangerous criminals[39] and have been caught smuggling in contraband in the past.[40] Moreover, Justice Kennedy argued that such an exemption would be unworkable, particularly because it would require police to examine criminal histories, which are often unavailable or incomplete.[41]

The penultimate section of Justice Kennedy's analysis pressed the limits of the holding.[42] Justice Kennedy expressly reserved judgment on whether suspicionless strip searches would be appropriate when arrestees can be held in facilities apart from the general jail population.[43] Justice Kennedy also noted that instances in which corrections officers engage in "intentional humiliation and other abusive practices . . . are not implicated on the facts of this case."[44] He held only that no reasonable suspicion is required to conduct a strip search of an arrestee *when he is being introduced into the general jail population*.[45]

Chief Justice Roberts concurred. He highlighted the limits of the holding, noting, "the Court does not foreclose the possibility of an exception to the rule it announces."[46] Although the Court articulated a general rule, he explained, it did not speak to circumstances in which there was an alternative to holding a detainee in the general jail population.[47] He concluded, "[t]he Court is . . . wise to leave open the possibility of exceptions, to ensure that we 'not embarrass the future.'"[48]

Justice Alito also concurred. He concurred along the same lines as Chief Justice Roberts, writing separately to emphasize that "the Court

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[36] *Id.* at 1518.
[37] *Id.* at 1519.
[38] *Id.* at 1519–20.
[39] *Id.* at 1520.
[40] *Id.* at 1520–21.
[41] *See id.* at 1521–22.
[42] Justice Thomas did not join in Part IV of the Court's opinion. While he did not write separately, the implication is that he supported a broader holding — one which would have upheld strip searches of arrestees in all scenarios, including when alternate facilities are available. *See id.* at 1522–23.
[43] *Id.* at 1522–23.
[44] *Id.* at 1523.
[45] *See id.*
[46] *Id.* at 1523 (Roberts, C.J., concurring).
[47] *Id.*
[48] *Id.* (quoting Nw. Airlines, Inc. v. Minnesota, 322 U.S. 292, 300 (1944)).

does not hold that it is *always* reasonable to conduct a full strip search of an arrestee . . . who could be held in available facilities apart from the general population."[49] He explained that many minor offenders pose no serious security risk, will be released quickly, and will rarely face a sentence of incarceration.[50] Thus, "[f]or these persons, admission to the general jail population, with the concomitant humiliation of a strip search, may not be reasonable, particularly if an alternative procedure is feasible."[51]

Justice Breyer dissented.[52] The dissent proposed its own rule: strip searches of minor offenders are categorically unreasonable "unless prison authorities have reasonable suspicion to believe that the individual possesses drugs or other contraband."[53] Justice Breyer highlighted that detainees retain "basic constitutional rights," including Fourth Amendment rights.[54] He argued that the searches addressed in this case were particularly invasive and were not justified by any penological interests.[55] Deference to corrections officials, Justice Breyer explained, is not sufficient to support a blanket strip search policy without reasonable suspicion.[56]

Justice Breyer argued that a reasonable suspicion requirement or a less invasive search could meet the Court's claimed penological interests. All parties agreed that "detainees could be lawfully subject to being viewed in their undergarments by jail officers or during showering (for security purposes)," among other searches and precautions.[57] Justice Breyer contended that such searches would satisfy any health interests and allow officers to detect tattoos and identify gang members.[58] Justice Breyer explained that a reasonable suspicion requirement would also be effective in detecting contraband for three reasons. First, empirical evidence suggests that limiting strip searches of minor offenders only to cases of reasonable suspicion would lead to the dis-

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[49] *Id.* at 1524 (Alito, J., concurring).

[50] *Id.*

[51] *Id.*

[52] Justice Breyer was joined by Justices Ginsburg, Sotomayor, and Kagan.

[53] *Florence*, 132 S. Ct. at 1525 (Breyer, J., dissenting). Justice Breyer defined a minor offense as "a traffic offense, a regulatory offense, an essentially civil matter, or any other such misdemeanor," but not offenses involving drugs or violence. *Id.*

[54] *Id.*

[55] *Id.* at 1526 (referring to such searches as "demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, [and] repulsive, signifying degradation and submission" (alteration in original) (quoting Mary Beth G. v. Chicago, 723 F.2d 1263, 1272 (7th Cir. 1984)) (internal quotation marks omitted)).

[56] *Id.* at 1531.

[57] *Id.* at 1528.

[58] *Id.*

covery of almost all contraband brought into a jail.[59] Second, professional organizations, including correctional associations, recommend a reasonable suspicion standard, and many facilities successfully employ such standards voluntarily.[60] Finally, laws in ten states and at least seven courts of appeals employ reasonable suspicion tests, and there is no evidence showing an increased level of contraband smuggling.[61]

The Court's ruling in *Florence* is a significant restriction on Fourth Amendment rights in jails. The most striking feature of this ruling is the Court's continued policy of "wide-ranging deference"[62] to corrections officers in evaluating security measures in jails. While the Court has a long tradition of deferring to corrections officials in such matters, this practice is overly broad and poorly defined. This policy of unstudied deference may cause confusion in lower courts, deter constitutional claims by prisoners, and inadequately protect constitutional rights. In contrast, the Court's administrative law jurisprudence is clearer and properly accounts for the inherent strengths and weaknesses of institutional actors. Importing administrative law's hard look review would increase protection of constitutional rights and provide greater guidance to lower courts.

The Supreme Court has repeatedly granted considerable deference to corrections officials in reviewing jail administration policies.[63] "A regulation impinging on an inmate's constitutional rights must be upheld 'if it is reasonably related to legitimate penological interests.'"[64] The Court claims that it is "unwilling to substitute [its] judgment on these difficult and sensitive matters of institutional administration and security for that of 'the persons who are actually charged with and trained in the running' of such facilities."[65] A prisoner may overcome this deference by demonstrating "substantial evidence in the record . . . that the officials have exaggerated their response to these considerations."[66] This strong deference policy has been used in a variety of

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[59] *Id.* (describing a study that found that only one instance of contraband would go undetected among 23,000 new inmates searched under a reasonable suspicion regime).

[60] *Id.* at 1529.

[61] *Id.* at 1529–30.

[62] Bell v. Wolfish, 441 U.S. 520, 547 (1979).

[63] *See, e.g.*, Turner v. Safley, 482 U.S. 78, 89 (1987); Jones v. N.C. Prisoners' Labor Union, Inc., 433 U.S. 119, 126 (1977); Procunier v. Martinez, 416 U.S. 396, 404–05 (1974).

[64] *Florence*, 132 S. Ct. at 1515 (quoting *Turner*, 482 U.S. at 89); *see also Turner*, 482 U.S. at 89 (explaining that such a standard "is necessary if 'prison administrators . . . , and not the courts, [are] to make the difficult judgments concerning institutional operations'" (alterations in original) (quoting *Jones*, 433 U.S. at 128)).

[65] Block v. Rutherford, 468 U.S. 576, 588 (1984) (citation omitted) (quoting *Bell*, 441 U.S. at 562).

[66] *Florence*, 132 S. Ct. at 1517 (quoting *Block*, 468 U.S. at 584). While the Court has expressly rejected a least-restrictive-alternative test, *see, e.g.*, *Turner*, 482 U.S. at 90–91, the existence of a less restrictive alternative that accomplishes the same goals "at *de minimis* cost to valid penologi-

cases to uphold security measures in jails.[67] While the Court has explained that this deference is not unlimited, it has failed to provide any substantive restrictions.[68] Without clear limits on this policy of unstudied deference, courts "accept uncritically the factual and empirical evidence of the government supporting its laws and policies in a profound number of cases where the deference principle is invoked."[69] The pattern of deference continued in this case, with the Court explaining that its ruling "turns in part on the extent to which this Court has sufficient expertise and information" to overrule the corrections officers.[70]

In principle, it makes sense for the Court to defer to corrections officials on questions of jail administration. Jails are "unique place[s] fraught with serious security dangers,"[71] and deferring to officials on the ground is sensible. In *Florence*, the Court focused on one essential reason for deference: expertise. Federal judges are not experts on jail administration; corrections officials offer a level of experience and expertise that is valuable to federal courts.[72] In fact, the need for deference may be particularly acute with jail administration, given the peculiar policy challenges facing correctional facilities.[73] Without affording corrections officers proper deference, there could be significant consequences for jail security.

The Court's policy of unlimited deference is troubling for two principal reasons. First, failing to clarify or impose any limitations will leave lower federal courts with little guidance in these cases. While it is conceivable that a policy of unlimited deference — in which the jail's position almost always prevails — would be more predictable, this result has not been borne out in practice. Lower courts have struggled to define and apply their own limits to the deference policy,

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cal interests" can be seen as evidence that the officials exaggerated the need for the policy, *id.* at 91.

67 *See, e.g.*, Overton v. Bazzetta, 539 U.S. 126, 131–33 (2003) (various policies, including requiring children to be accompanied by a family member or a legal guardian during visitation); *Turner*, 482 U.S. at 89–91 (policy restricting access to mail); *Block*, 468 U.S. at 586–89 (policy banning contact visits); Hewitt v. Helms, 459 U.S. 460, 467–68 (1983) (policy allowing use of administrative segregation); *Bell*, 441 U.S. at 558 (policy requiring strip searches after contact visits); *Jones*, 433 U.S. at 126–29 (policies restricting formation of a prisoners' union); Pell v. Procunier, 417 U.S. 817, 827 (1974) (policy restricting prisoner and media interactions).

68 *See, e.g.*, Eric Berger, *Individual Rights, Judicial Deference, and Administrative Law Norms in Constitutional Decision Making*, 91 B.U. L. REV. 2029, 2045–46 (2011).

69 Daniel J. Solove, *The Darkest Domain: Deference, Judicial Review, and the Bill of Rights*, 84 IOWA L. REV. 941, 953 (1999).

70 *Florence*, 132 S. Ct. at 1513.

71 *Bell*, 441 U.S. at 559.

72 *Florence*, 132 S. Ct. at 1515–17.

73 *See, e.g.*, Turner v. Safley, 482 U.S. 78, 84–85 (1987) ("Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches . . . .").

resulting in circuit splits on policies and doctrine in this area. The Court's "open-ended" standard allows courts to decide cases based only on their policy preferences.[74] Second, a policy of unstudied deference leads to diminished protection of constitutional rights.[75] Justice Stevens argued in *Hudson v. Palmer*[76] that the Court's deference policy encourages it to "overlook[] the purpose of a written Constitution and its Bill of Rights . . . to ensure that certain principles will not be sacrificed to expediency."[77] Jails are uniquely susceptible to abuse of detainees' rights, and the Court's policy of vast deference can and has severely worsened jail conditions, increasing restrictions of the rights of detainees.[78] This deference will ensure that more invasive policies are protected and will decrease the incentive for prisoners to bring these constitutional challenges in the first place,[79] further reducing the likelihood of protection.

The Court's deference policy must have material limits — limits that can be easily understood and consistently applied. The Court should look to administrative law in putting limits on the deference afforded to corrections officers. In administrative law, agencies' factual conclusions are frequently evaluated under the hard look review test.[80] Under this standard, a court seeks to ensure that an agency has taken a "hard look" at all relevant factors in making its decision.[81] "[T]he

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[74] *Id.* at 101 n.1. As Professor Peter Keenan argues, "the Court has been too willing selectively to utilize evidence and testimony to support its position." Peter Keenan, *Constitutional Law: The Supreme Court's Recent Battle Against Judicial Oversight of Prison Affairs*, 1989 ANN. SURV. AM. L. 507, 522 (comparing cases in which the Court relied on federal prison rules and cases in which it ignored the relevant rules); *see, e.g.*, *Turner*, 482 U.S. at 113 (Stevens, J., concurring in part and dissenting in part) (noting the Court's "inexplicably . . . different views" of similar evidence).

[75] *See* Hudson v. Palmer, 468 U.S. 517, 557 (1984) (Stevens, J., concurring in part and dissenting in part) ("The Court's conclusive presumption that all conduct by prison guards is reasonable is . . . a decision to sacrifice constitutional principle to the Court's own assessment of administrative expediency."); Keenan, *supra* note 74, at 539 ("If deference becomes reflexive . . . then violations of inmates' constitutional rights may go unchecked.").

[76] 468 U.S. 517.

[77] *Id.* at 556 (Stevens, J., concurring in part and dissenting in part). Justice Blackmun similarly expressed concern with "the Court's apparent willingness to substitute the rhetoric of judicial deference for meaningful scrutiny of constitutional claims in the prison setting." Block v. Rutherford, 468 U.S. 576, 593–94 (1984) (Blackmun, J., concurring in the judgment).

[78] *See* cases cited *supra* note 67; *see also Block*, 468 U.S. at 594 (Blackmun, J., concurring in the judgment) ("[C]areless invocations of 'deference' run the risk of returning us to the passivity of several decades ago, when the then-prevailing barbarism and squalor of many prisons were met with a judicial blind eye and a 'hands off' approach.").

[79] *See* Keenan, *supra* note 74, at 539 ("The standards announced by the Court discourage inmates from even seeking their day in court.").

[80] *See, e.g.*, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 41 (1983); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 413–14 (1971).

[81] Harold Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509, 514 (1974); *see, e.g.*, Sierra Club v. Costle, 657 F.2d 298, 410 (D.C. Cir. 1981) ("We have adopted a simple and straight-forward standard of review, probed the agency's rationale, studied its references . . . , endeavored to understand them where they were intelligible . . . , and on close

agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[82] The Court will strike down the policy if the agency "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[83] Therefore, it is not enough that agencies have expertise in theory; rather, agencies must demonstrate that they have *used* their expertise in establishing the policy.[84] This standard typically requires that the agency produce an *ex ante* written justification for its policy. Circuit courts have repeatedly used hard look review to reject agency decisions and demand stronger justifications.[85]

The Court should follow these administrative law principles when deferring to corrections officials. Administrative law is a logical area of comparison for criminal justice questions.[86] Deference to corrections officers is premised on the same respect for agency expertise that animates deference to agencies,[87] so the arguments in favor of hard look review of agency decisions should apply with equal vigor. Under a hard look inquiry, the Court would require corrections officials to have thoroughly examined evidence before approving the policy. Moreover, the Court would, if applicable, demand an explanation for why a policy changed or why a less restrictive policy would be less effective. The Court should endeavor not to overburden detention facili-

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questions given the agency the benefit of the doubt out of deference for the terrible complexity of its job.").

[82] *State Farm*, 463 U.S. at 43 (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)).

[83] *Id.*

[84] *See, e.g.*, Sara Lee Corp. v. Am. Bakers Ass'n Ret. Plan, 512 F. Supp. 2d 32, 37 (D.D.C. 2007) ("Even in matters of agency expertise, however, the degree of deference a court should pay a particular determination depends on the 'thoroughness, validity, and consistency of an agency's reasoning.'" (quoting FEC v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 37 (1981))); Matthew C. Stephenson, *A Costly Signaling Theory of "Hard Look" Judicial Review*, 58 ADMIN. L. REV. 753, 758 (2006) ("[Hard look review] shift[s] the emphasis of review . . . away from a substantive assessment of the government's decision and toward an evaluation of the government's explanation of the reasoning supporting that decision.").

[85] *See, e.g.*, AFL-CIO v. OSHA, 965 F.2d 962, 986 (11th Cir. 1992); Corrosion Proof Fittings v. EPA, 947 F.2d 1201, 1229–30 (5th Cir. 1991).

[86] *See, e.g.*, Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 907–09 (2009) (noting suggestions that "prosecutors, like agencies, should state reasons for their decisions to bring or not bring charges, and courts should review them to ensure they are not arbitrary and capricious," *id.* at 907); Joseph W. Luby, *Reining in the "Junior Varsity Congress": A Call for Meaningful Judicial Review of the Federal Sentencing Guidelines*, 77 WASH. U. L.Q. 1199, 1271–81 (1999) (applying a similar argument in the context of the Federal Sentencing Commission).

[87] *See, e.g.*, *Sara Lee*, 512 F. Supp. 2d at 37 (explaining that courts must be deferential where an agency has particular expertise).

ties with this new standard of review. It could make it clear in proposing such a hard look standard that it is not requiring extensive document production in every case or a least-restrictive-alternative test. The ultimate effect of a hard look review approach would be that before implementing any new policy, the jail would likely create a record justifying its decision, in preparation for any possible litigation.[88] The record need not be substantial, but it should reflect the *ex ante* justifications for the policy. If the policy fails under this reasoning, the remedy would typically be to vacate the policy and remand the issue to the jail officials for further consideration.[89]

A hard look review approach would address the problems with the current unlimited deference policy. First, hard look review would provide greater guidance to lower courts and greater predictability to litigants.[90] Lower courts are familiar with hard look review, and the policy has a number of formal requirements that would facilitate more consistent application. Second, it would lead to greater protection of constitutional rights. It would decrease both the frequency with which jails attempt to restrict constitutional rights, since jails would face additional administrative burdens in doing so,[91] and the degree to which such efforts succeed.[92]

Hard look review is not an uncontroversial approach to judicial review. While many scholars believe that it provides meaningful review and creates productive incentives,[93] others contend that hard look review leads to ossification[94] and judicial overreaching.[95] None of these criticisms should ultimately defeat a proposal for hard look review in this context. Concerns of ossification have been exaggerated in the past,[96] and there is no reason to believe that jails would be any less nimble in reacting to Court rulings. Concerns of judicial overreach

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[88] *See, e.g.*, Camp v. Pitts, 411 U.S. 138, 142 (1973) (per curiam) ("[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.").

[89] *See, e.g.*, *id.* at 143.

[90] *See, e.g.*, Berger, *supra* note 68, at 2096.

[91] *Cf.* Stephenson, *supra* note 84, at 766 ("[T]he quality of the agency's defense . . . provides a signal of the benefits the agency expects to receive if the court upholds the regulation.").

[92] *See supra* note 85 and accompanying text.

[93] *See, e.g.*, Cass R. Sunstein, *On the Costs and Benefits of Aggressive Judicial Review of Agency Action*, 1989 DUKE L.J. 522, 528; William F. Pedersen, Jr., *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38, 59–60 (1975).

[94] *E.g.*, Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEX. L. REV. 525, 528 (1997).

[95] *E.g.*, *id.* at 549.

[96] *See, e.g.*, William S. Jordan, III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?*, 94 NW. U. L. REV. 393, 396 (2000) ("[T]he hard look . . . standard generally did not significantly impede agencies in the pursuit of their policy goals during the decade under review.").

and unpredictability already exist in the current regime, and any risk of overreach is justified to counteract the present judicial abdication.

Deference to corrections officers is good policy, but unfortunately the Court's discussion in *Florence* has expanded the policy such that it appears to be the central inquiry in cases of individual rights of prisoners. Remarkably, the Court has continued to rely on a poorly defined, unstudied deference to corrections officials in these cases. Given the critical constitutional interests at stake, the Court should seek to clarify the standard of deference available. The hard look review standard supplies an effective model for the Court to define the doctrine clearly and protect constitutional rights, while being mindful of security interests and respectful of corrections officers' expertise.

2. Qualified Immunity. — In the Fourth Amendment context, government officials have qualified immunity from lawsuits when their actions are not objectively unreasonable.[1] To assess a qualified immunity claim, courts generally ask whether, given the facts of the case and the state of the law, any reasonable officer could have taken the action to which the plaintiff objects.[2] An officer's subjective understanding or intent is irrelevant to the inquiry.[3] Given this structure, classifying objective facts versus subjective beliefs is crucial for many qualified immunity claims.[4] Last Term, in *Messerschmidt v. Millender*,[5] the Supreme Court clarified the distinction between the two. The Court held that an official's inferences from a factual record are subjective beliefs and therefore do not defeat the official's qualified immunity.[6] That holding carries significant implications for future cases, particularly insofar as it suggests that a new pseudo–rational basis test will govern in qualified immunity cases.

Augusta Millender, age seventy-three, was asleep in her home one morning when, at 5:00 a.m., police officers armed with Detective Curt Messerschmidt's search warrant forced open her door.[7] Messerschmidt had drafted the search warrant to find evidence against Millender's foster son, Jerry Bowen, regarding a domestic assault three weeks ear-

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1 *E.g.*, Malley v. Briggs, 475 U.S. 335, 341, 345 (1986).

2 *See, e.g.*, Groh v. Ramirez, 540 U.S. 551, 563–64 (2004); *Malley*, 475 U.S. at 344–45, 346 n.9 (denying immunity "if no officer of reasonable competence would have requested the warrant").

3 *See, e.g.*, Harlow v. Fitzgerald, 457 U.S. 800, 815–19 (1982); *see also* Whren v. United States, 517 U.S. 806, 813 (1996) ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.").

4 This classification's centrality in qualified immunity analysis makes precise definitions particularly important. This comment will use "subjective" to refer to an actor's knowledge, beliefs, or intentions and "objective" to refer to factors unrelated to any actor's state of mind, such as the facts listed in an affidavit.

5 132 S. Ct. 1235 (2012).

6 *See id.* at 1250–51.

7 Millender v. Cnty. of Los Angeles, No. CV 05-2298 DDP (RZx), 2007 WL 7589200, at *1, *6 (C.D. Cal. Mar. 15, 2007).