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THE FORGOTTEN HISTORY OF PRISON LAW: JUDICIAL OVERSIGHT OF DETENTION FACILITIES IN THE NATION'S EARLY YEARS

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CONTENTS

THE FORGOTTEN HISTORY OF PRISON LAW: JUDICIAL OVERSIGHT OF DETENTION FACILITIES IN THE NATION'S EARLY YEARS

Wynne Muscatine Graham[*]

Prison law is characterized by judicial deference to penal administrators. Despite the well-documented horrors that occur behind prison walls, federal and state courts often decline to intervene, asserting, among other things, that prisoners' rights are limited and that the judicial branch lacks the power and expertise to get involved in the inner workings of detention facilities. Moreover, jurists often assume that the nation's first courts largely stayed out of prisons and jails, and contemporary judicial deference is therefore historically rooted.

This Article complicates that historical narrative. It shows that the nation's Founding generation established an expansive system of judicial oversight over prisons and jails that lasted through much of the nineteenth century. During that period, state and local judges across the fledgling republic conducted regular inspections of detention facilities; set prison and jail rules and policies; appointed, removed, and occasionally served as penal administrators; managed the funding and building of jail facilities; and remedied abuses. On occasion, federal courts also interceded on behalf of prisoners.

Relying on neglected state statutes, case law, and reports, as well as the writings of prison theorists and observers, this Article explores the oft-ignored history of American prison law. In so doing, this Article shows how far modern courts have diverged from their early predecessors, especially at the state and local levels. For jurists — and particularly originalists — who use history to inform contemporary doctrine, this Article provides a fuller account of the early relationship between courts and prisons. Finally, this Article reveals a model of judicial oversight from which scholars and advocates can learn.

INTRODUCTION

Every few months in the early 1790s, more than a dozen people showed up at the Walnut Street Jail,[1] where America's first penitentiary had just been established.[2] They were there to ensure that the penitentiary was operating in accordance with its design, which was meant to create a humane, rehabilitative environment for those detained within.[3] Among the regular visitors were the

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[*] Lecturer in Law, UCLA; Liman Fellow, MacArthur Justice Center. For their insights and support, I am grateful to Gregory Cui, Sharon Dolovich, Bradley Graham, Pinchas Huberman, Gabriel Karger, Emma Kaufman, Aaron Littman, Lissa Muscatine, Devi Rao, Judith Resnik, Margo Schlanger, Charles F. Walker, and Alex Weiss. Special thanks to Justin Driver for his mentorship. Finally, my gratitude to the thoughtful editors of the *Harvard Law Review*.

[1] *See* Rex A. Skidmore, *Penological Pioneering in the Walnut Street Jail, 1789–1799*, 39 J. CRIM. L. & CRIMINOLOGY 167, 171 (1948).

[2] Melvin Gutterman, *Prison Objectives and Human Dignity: Reaching a Mutual Accommodation*, 1992 BYU L. REV. 857, 862.

[3] *See* NEGLEY K. TEETERS & JOHN D. SHEARER, THE PRISON AT PHILADELPHIA, CHERRY HILL 5 (1957); David M. Shapiro, *Solitary Confinement in the Young Republic*, 133

Governor of Pennsylvania and the Mayor of Philadelphia, as well as a Board of Inspectors.[4] But many of the visitors fell into a category rarely seen in prisons today: judges.[5] At least quarterly, "Judges of the Supreme Court"[6] of Pennsylvania and "all the Judges of the several Courts of th[e] City and County" of Philadelphia personally examined the conditions at Walnut Street.[7]

Although they would be anomalies today, the Pennsylvania judges who visited Walnut Street were not so in their time. In fact, from the late eighteenth century through much of the nineteenth century, state and local judges across a young America regularly visited prisons and jails.[8] And that's not all. They also investigated complaints and remedied abuses in prisons and jails; enacted rules, policies, and practices for carceral settings; appointed, approved, removed, and sometimes even served as penal authorities; and oversaw the financing, building, and repair of detention facilities.[9] These responsibilities were, according to some of the most influential penal reform theorists and advocates of the era, essential to a humane and effective carceral system.[10]

Today, the relationship between courts and prisons looks dramatically different. Modern courts — including local, state, and federal courts — largely stay out of the workings of prisons and jails.[11] Without litigation, courts have little to no authority to intervene behind prison and jail walls. And in the course of litigation, jurists

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HARV. L. REV. 542, 553 (2019) (quoting Constitution of the Philadelphia Society for Alleviating the Miseries of Public Prisons, *quoted in* RICHARD VAUX, BRIEF SKETCH OF THE ORIGIN AND HISTORY OF THE STATE PENITENTIARY FOR THE EASTERN DISTRICT OF PENNSYLVANIA, AT PHILADELPHIA 9 (Philadelphia, McLaughlin Bros. 1872)). "[T]he philosophy of the penitentiary was first implemented in Philadelphia [at the Walnut Street Jail] through the efforts of the Philadelphia Society for Alleviating the Miseries of Public Prisons." TEETERS & SHEARER, *supra*, at 5. "It was the Society's moral ambition to spare prisoners from 'undue and illegal sufferings' and to find the 'degrees and modes of punishment' that would 'restor[e] our fellow creatures to virtue and happiness.'" Shapiro, *supra*, at 553 (quoting Constitution of the Philadelphia Society for Alleviating the Miseries of Public Prisons, *supra*, at 9); *see also* TEETERS & SHEARER, *supra*, at 5, 8.

4 Skidmore, *supra* note 1, at 171.

5 *Id.*

6 CALEB LOWNES, AN ACCOUNT OF THE ALTERATION AND PRESENT STATE OF THE PENAL LAWS OF PENNSYLVANIA. CONTAINING, ALSO, AN ACCOUNT OF THE GAOL AND PENITENTIARY HOUSE OF PHILADELPHIA — AND THE INTERIOR MANAGEMENT THEREOF 11 (Boston, Young & Minns 1799). In the 1790s, Pennsylvania's so-called supreme court had both trial and appellate jurisdiction and was not the state's court of last resort. *See* THE UNIFIED JUD. SYS. OF PA., THE SUPREME COURT OF PENNSYLVANIA 9, https://www.pacourts.us/Storage/media/pdfs/20220509/143332-supreme300booklet_web.pdf [https://perma.cc/D7F8-CLKR].

7 LOWNES, *supra* note 6, at 11.

8 *See infra* section II.B.2.b, pp. 1745–50.

9 *See infra* section II.B, pp. 1738–59.

10 *See infra* section II.A, pp. 1735–38.

11 *But cf. infra* note 362 (describing how some jurisdictions still authorize or require judges to visit detention facilities).

grant a high degree of deference to prison administrators.[12] The result is that courts are often unable or unwilling to intervene on behalf of prisoners,[13] despite the fact that, as one scholar recently put it, prisons regularly "fail to provide even minimally safe and healthy living conditions."[14]

In the course of prison litigation, federal and state jurists often give a number of reasons for their reluctance to interfere in the workings of detention facilities.[15] Prominent among these reasons is the idea that prisoners' rights are more limited than those in the free world.[16] Another is a notion that the separation of powers counsels against judicial interference.[17] And still another is that judges lack the expertise needed to monitor correctional facilities and ensure that they remain safe and secure.[18]

In presenting these justifications for restraint, courts sometimes appeal to history[19] — but an incomplete account of it. Jurists regularly suggest that early prisoners were considered "slaves of the

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[12] *See* Sharon Dolovich, *Forms of Deference in Prison Law*, 24 FED. SENT'G REP. 245, 245 (2012); *see, e.g.*, Colvin v. Inslee, 467 P.3d 953, 964 (Wash. 2020); Bresolin v. Morris, 558 P.2d 1350, 1352 (Wash. 1977).

[13] Throughout this Article, I use the term "prisoner" to refer to people detained in prisons and jails, either pretrial or postconviction. Similarly, by "prison law," I refer to law related to both prisons and jails, including both pre- and postconviction detention. The law does not usually distinguish between the former (prisons and jails), but it does sometimes distinguish between the latter (pre- and postconviction detention). Nevertheless, both pre- and postconviction law center judicial deference and have developed based on much of the same reasoning. *Compare* Shaw v. Murphy, 532 U.S. 223, 228 (2001) (centering judicial deference in the postconviction context), *with* Bell v. Wolfish, 441 U.S. 520, 547 & n.29 (1979) (citing Jones v. N.C. Prisoners' Lab. Union, Inc., 433 U.S. 119, 126, 129 (1977); Pell v. Procunier, 417 U.S. 817, 822, 826–27 (1974); Procunier v. Martinez, 416 U.S. 396, 404–05, 412–14 (1974)) (centering judicial deference in the preconviction context), *and* Florence v. Bd. of Chosen Freeholders, 566 U.S. 318, 326–28 (2012) (citing Turner v. Safley, 482 U.S. 78, 84–85 (1987); *Wolfish*, 441 U.S. at 546, 548, 558; Block v. Rutherford, 468 U.S. 576, 584–86 (1984)) (same). So this Article speaks to both pre- and postconviction law, and unless otherwise specified, I mean to include both under the term "prison law."

[14] Sharon Dolovich, *The Coherence of Prison Law*, 135 HARV. L. REV. F. 302, 302–03 (2022); *see also* Justin Driver & Emma Kaufman, *The Incoherence of Prison Law*, 135 HARV. L. REV. 515, 539 (2021) ("[P]rison law [is] so unfavorable to prisoners' civil rights claims that they are almost invariably extinguished by [the] courts."). Outside the courts, prison reform has received bipartisan support. *See* Joe Davidson, Opinion, *Federal Prison Reform Has Bipartisan Support. But It's Moving Slowly.*, WASH. POST (Jan. 9, 2020), https://www.washingtonpost.com/politics/federal-prison-reform-has-bipartisan-support-but-its-moving-slowly/2020/01/08/81edfbd6-3268-11ea-898f-eb846b7e9feb_story.html [perma.cc/W37W-TNMV].

[15] *See* MARGO SCHLANGER ET AL., INCARCERATION AND THE LAW: CASES AND MATERIALS 54 (10th ed. 2020).

[16] *See infra* section I.A, pp. 1725–30.

[17] *See infra* section I.B.1, pp. 1731–33.

[18] *See infra* section I.B.2, p. 1734.

[19] *See, e.g.*, Shaw v. Murphy, 532 U.S. 223, 228 (2001) (quoting Jones v. N.C. Prisoners' Lab. Union, Inc., 433 U.S. 119, 139 (1977) (Marshall, J., dissenting)); Colvin v. Inslee, 467 P.3d 953, 964 (Wash. 2020).

State" who lacked the opportunity to seek redress in court.[20] Further, jurists assert that early courts largely stayed out of detention settings due to concerns about the separation of powers.[21] Sometimes, this history merely serves as a backdrop for deference today.[22] But other times, and especially for jurists with originalist leanings, this purported history seems to be a justification for modern-day restraint.[23] As one current Supreme Court Justice wrote, interfering in prison administration would be improper because it would constitute a "refusal — for the first time ever — to defer to the expert judgment of prison officials."[24]

This Article complicates that narrative. First, by highlighting several cases in which federal and state judges recognized prisoners' constitutional and common law rights, this Article suggests that the "slave of the State" attitude may have been less pervasive than modern courts sometimes make it out to be.[25] Next, by detailing the vast system of legislatively authorized state and local court oversight over prisons and jails, this Article casts doubt on several assumptions about the judicial role historically.[26] It provides evidence that the separation of powers, as understood in the nation's early years, contemplated some judicial oversight over prisons and jails, particularly by state and local courts, both in the course of litigation and outside of it.[27] It also suggests that, unlike courts today, the nation's first state and local courts were expected to have the expertise needed to ensure that detention facilities met their penological aims, among them safety, security, and rehabilitation.[28]

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[20] *See, e.g.*, *Murphy*, 532 U.S. at 228 (quoting *Jones*, 433 U.S. at 139 (Marshall, J., dissenting)); Lewis v. Casey, 518 U.S. 343, 404 (1996) (Stevens, J., dissenting) (quoting Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 796 (1871)); Meachum v. Fano, 427 U.S. 215, 231 (1976) (Stevens, J., dissenting) (citing *Ruffin*, 62 Va. (21 Gratt.) at 796); Azeez v. Fairman, 795 F.2d 1296, 1298 (7th Cir. 1986) (citing *Ruffin*, 62 Va. (21 Gratt.) at 796); *In re* Jordan, 500 P.2d 873, 875 (Cal. 1972) (citing *Ruffin*, 62 Va. (21 Gratt.) at 796); Yount v. Pa. Dep't of Corr., 966 A.2d 1115, 1124–25 (Pa. 2009) (Todd, J., concurring) (citing *Murphy*, 532 U.S. at 228–29). I use *Murphy* rather than *Shaw* for the short citation here because the former was the name of the prisoner-plaintiff. *See Murphy*, 532 U.S. at 228. I make similar choices for other cases throughout this Article.

[21] *See, e.g.*, Johnson v. California, 543 U.S. 499, 528, 547 (2005) (Thomas, J., dissenting); *Casey*, 518 U.S. at 386 (Thomas, J., concurring); *Colvin*, 467 P.3d at 960.

[22] *See, e.g.*, *Johnson*, 543 U.S. at 547 (Thomas, J., dissenting).

[23] *Cf., e.g.*, *id.* at 547–48.

[24] *Id.* at 547.

[25] *See infra* section II.B.1, pp. 1739–42. As I explain below, while prisoners' rights cases were few and far between, their rarity can be explained by factors other than an absence of rights. *See infra* notes 191–94 and accompanying text.

[26] *See infra* section II.B.2, pp. 1742–59.

[27] *See infra* section II.B.2, pp. 1742–59.

[28] *See infra* section II.B.2, pp. 1742–59. As discussed below in Part III, not all of the judicial responsibilities held by early courts bear on modern prison law in the same way. *See infra* Part III, pp. 1761–67. For example, the powers held by state courts do not provide much insight into the role that federal courts should play today. And judicial oversight outside of litigation bears on deference in the context of litigation only in circumscribed ways.

To uncover the history presented in this Article, I combed through early state codes from more than a dozen states, locating provisions directed at the operation of local prisons and jails. I also searched through compilations of nineteenth-century case law on prison conditions. Finding that eighteenth- and nineteenth-century courts were heavily involved in the administration of prison and jail systems and hoping to better understand the origins of that involvement, I looked to the writings of early prison theorists. Ultimately, this process revealed a robust system of judicial power over detention facilities during the nation's Founding era and for much of the century that followed. This Article resurfaces some of that history for the first time.

While this Article conveys a number of novel findings, it is situated at the intersection of at least two existing bodies of literature. The first of these bodies describes the country's first prisons[29] and includes some recent pieces that have pushed back on assumptions about early penal policies and prison law.[30] The second body explores twentieth- and twenty-first-century developments in prison law[31] and includes a collection of work that critiques the judiciary's current policy of deference to

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[29] General accounts of the early history of prisons include EDWARD MARSTON, PRISON: FIVE HUNDRED YEARS OF LIFE BEHIND BARS (2009); 2 PIONEERS IN PENOLOGY: THE REFORMERS, THE INSTITUTIONS, AND THE SOCIETIES, 1557–1900 (David M. Horton ed., 2006); THOMAS G. BLOMBERG & KAROL LUCKEN, AMERICAN PENOLOGY: A HISTORY OF CONTROL (2d ed. 2010); Michael Meranze, *Histories of the Modern Prison: Renewal, Regression and Expansion*, *in* THE OXFORD HANDBOOK OF THE HISTORY OF CRIME AND CRIMINAL JUSTICE 672, 672–94 (Paul Knepper & Anja Johansen eds., 2016); and THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY (Norval Morris & David J. Rothman eds., 1998).

[30] *See generally, e.g.*, Donald H. Wallace, Ruffin v. Virginia *and Slaves of the State: A Nonexistent Baseline of Prisoners' Rights Jurisprudence*, 20 J. CRIM. JUST. 333 (1992) (arguing that prisoners were not denied all of their rights in the late nineteenth and early twentieth centuries); Shapiro, *supra* note 3 (arguing that, contrary to the beliefs of some, the country's earliest forms of solitary confinement were subject to significant regulation); Leonard G. Leverson, *Constitutional Limits on the Power to Restrict Access to Prisons: An Historical Re-Examination*, 18 HARV. C.R.-C.L. L. REV. 409 (1983) (challenging the misperception that early prisons were closed to the public).

In *Solitary Confinement in the Young Republic*, Professor David Shapiro notes that judicial oversight existed in the late eighteenth century at Walnut Street Jail. *See* Shapiro, *supra* note 3, at 561–62. However, Shapiro does not explore the extent of early judicial oversight of penal institutions throughout this period and the decades that followed. *See id.* at 547 ("It may be true that courts did not superintend prison conditions generally, but this Article shows such a claim would be incorrect if applied to solitary confinement specifically.").

[31] *See, e.g.*, Barbara Belbot, *Where Can a Prisoner Find a Liberty Interest These Days? The Pains of Imprisonment Escalate*, 42 N.Y. L. SCH. L. REV. 1, 1–3 (1998); Susan N. Herman, *Slashing and Burning Prisoners' Rights: Congress and the Supreme Court in Dialogue*, 77 OR. L. REV. 1229, 1229–30 (1998); Judith Resnik, *The Puzzles of Prisoners and Rights: An Essay in Honor of Frank Johnson*, 71 ALA. L. REV. 665, 693 (2020); Judith Resnik et al., Essay, *Punishment in Prison: Constituting the "Normal" and the "Atypical" in Solitary and Other Forms of Confinement*, 115 NW. U. L. REV. 45, 48–50 (2020); Margo Schlanger, *The Constitutional Law of Incarceration, Reconfigured*, 103 CORNELL L. REV. 357, 359–61 (2018); Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550, 554 (2006); Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1562–63 (2003); *Developments in the Law — The Law of Prisons*, 115 HARV. L. REV. 1838, 1844–45 (2002).

prison and jail administrators.[32] By considering how the early judicial-carceral relationship bears on deference in contemporary prison law, this Article sits between both sets of literature, drawing on each and informing each in turn.[33]

In presenting this history, this Article has a few aims. First, it seeks to draw out a comparison between the judicial-carceral relationship of past and present. Specifically, it shows that although courts of all kinds typically maintain a distant relationship with prisons today, they were once much more closely enmeshed, especially at the state and local levels. What's more, this Article shows that not only has the modern relationship between courts and prisons changed, but some of the *reasons* for the cold relationship today — including notions about prisoners' rights, the separation of powers, and judicial expertise — were more complex in the young nation than modern courts sometimes suggest.

Second, insofar as courts rely on historical accounts of the relationship between judges and prisons to explain, ground, or — for originalists — justify judicial restraint in prison doctrine today, this Article seeks to provide a fuller account of that history so as to properly inform the doctrine. Specifically, this Article casts doubt on the narrative that there existed widespread judicial deference in the nation's early years that justifies deference by nearly all courts today. Because early state courts were particularly involved in prison and jail administration, originalist justifications for deference by state courts are especially susceptible to reevaluation — an important conclusion given the increasing focus on state litigation among prison advocates and scholars.[34] But early federal courts also interceded on behalf of prisoners, thereby weakening originalist justifications at the federal level, too.

Finally, the historical account presented herein provides a model of prison oversight from which reform advocates can learn. It shows that early prison theorists viewed judicial oversight as essential to ensuring humane carceral institutions and empowered courts accordingly.

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[32] *See, e.g.*, Dolovich, *supra* note 12, at 245; Driver & Kaufman, *supra* note 14, at 538–39; Gutterman, *supra* note 2, at 859, 899–905; David M. Shapiro & Charles Hogle, *The Horror Chamber: Unqualified Impunity in Prison*, 93 NOTRE DAME L. REV. 2021, 2037–42 (2018); James E. Robertson, *"Catchall" Prison Rules and the Courts: A Study of Judicial Review of Prison Justice*, 14 ST. LOUIS U. PUB. L. REV. 153, 153–54 (1994).

[33] Just last year, Ryan Pollock argued in a Note in the *Yale Law Journal* that early conceptions of the separation of powers placed prisons under the purview of the executive branch rather than the judiciary. *See generally* Ryan Francis Pollock, Note, *The Eyes-On Doctrine*, 134 YALE L.J. 200 (2024). He identifies several of the same historical sources I present here, and although our pieces focus on different elements of the history of prison law, there is some overlap in our discussion of the separation of powers during the Founding era. Throughout this Article, I refer to his analysis where relevant.

[34] *See* Robert J. Smith et al., *State Constitutionalism and the Crisis of Excessive Punishment*, 108 IOWA L. REV. 537, 568 (2023) ("There is a recently reinvigorated dialogue among jurists and scholars aimed at restoring the primacy of state constitutions and state courts in enforcing individual rights.").

Although prison systems are significantly larger and more professionalized today than they were in the eighteenth and nineteenth centuries, modern day reform advocates might do well to consider reintroducing some judicial oversight provisions.

This Article proceeds in three parts. Part I describes the role that deference to prison administrators plays in contemporary prison doctrine. Specifically, it explains how deference has made its way into substantive standards governing prisoners' constitutional rights as well as standards for judicial remedies behind bars. This Part also details how judges, and especially originalists, sometimes attempt to root their explanations for deference in historical accounts of the relationship between courts and prisons. Part II details the role that courts played in prisons and jails in the eighteenth and early nineteenth centuries. This Part begins with the theoretical foundation for judicial oversight devised by reformers in the eighteenth century. It then describes the constitutional and common law rights recognized by early federal and state courts. Next, it delves into the wide array of statutorily authorized oversight responsibilities held by state and local courts. Part II concludes with an account of the disempowerment of the judiciary over the course of the nineteenth century. Part III turns to this Article's implications. It describes how the relationship between courts and prisons has changed since the nation's first years and the ways that the historical relationship might bear on contemporary prison doctrine. Part III also provides insight into some potential reasons and models for increased judicial oversight over prisons and jails outside of litigation.

If early theorists, advocates, judges, and even prison authorities were somehow to see the carceral system that has emerged in the twentieth century, they would likely be shocked by several features: the scale, the filth, and the use of long-term solitary confinement, to name a few. But should they learn of one more feature — the gaping absence of judicial oversight — they might understand how all the rest came to be. Indeed, the Founding generation and those that followed believed that the judiciary served as an essential guardrail against the kind of cruel and ineffective penal system they feared. The modern era may have proved them right.

I. JUDICIAL DEFERENCE IN CONTEMPORARY PRISON LAW

Judicial deference to prison administrators serves as the backdrop for contemporary prison law.[35] Deference makes its way into prison doctrine by restricting substantive constitutional rights.[36] It also

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[35] *See* Dolovich, *supra* note 12, at 245; Driver & Kaufman, *supra* note 14, at 536–37. By "deference," I mean a strong reluctance to intercede in the workings of prisons and jails.

[36] *See* Dolovich, *supra* note 12, at 246.

influences the procedural rules governing prison litigation, as well as the factual analyses conducted in the course of prisoners' lawsuits.[37]

The courts give several explanations for the vast degree of deference permeating prison law.[38] Prominent among them is the notion that prisoners' rights are limited, so there is not much to vindicate.[39] Additionally, courts often assert that because prisons are under the purview of the executive branch, a concern for the separation of powers restricts judicial interference behind prison walls.[40] And courts also regularly suggest that the judiciary lacks the expertise to weigh in on the workings of prisons and jails and to ensure that they remain safe and secure.[41] One or more of these reasons are littered throughout prison cases.[42]

What's more, in providing these justifications, jurists sometimes suggest that judicial deference is historically rooted. That is, courts assert that their early predecessors did not intervene in the lives of prisoners, and modern-day deference is therefore a reflection of — or, to the extent courts deferred less for part of the twentieth century,[43] a return to — that regime.[44] In presenting this account, courts do not always make clear exactly how the purported history of judicial deference bears on contemporary prison law. Sometimes, jurists seem to use history as a guidepost for modern-day deference, without going so far as to say that history justifies or even mandates deference today.[45] But other times, judges and justices — especially originalists — seem to suggest that history has normative weight, such that historical deference to penal authorities is not merely an explanation but also a reason for maintaining a similar regime today.[46] And as originalism becomes

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[37] *Id.*

[38] *See* SCHLANGER ET AL., *supra* note 15, at 54.

[39] *See, e.g.*, Thornburgh v. Abbott, 490 U.S. 401, 407 (1989); Overton v. Bazzetta, 539 U.S. 126, 131 (2003) (citing Jones v. N.C. Prisoners' Lab. Union, Inc., 433 U.S. 119, 125 (1977); Shaw v. Murphy, 532 U.S. 223, 229 (2001)).

[40] *See* SCHLANGER ET AL., *supra* note 15, at 54. As noted below, other reasons include "federalism . . . and a concern that judicial intervention will . . . inundate the courts with prisoners' complaints." *Id.*

[41] *See, e.g.*, *Abbott*, 490 U.S. at 407–08; Procunier v. Martinez, 416 U.S. 396, 404–05 (1974).

[42] *See infra* sections I.A–B, pp. 1725–34.

[43] *See* SCHLANGER ET AL., *supra* note 15, at 45 ("[I]n the 1960s and 1970s . . . courts, with increasing frequency, agreed to review claims of prisoners alleging violations of their constitutional rights."); Driver & Kaufman, *supra* note 14, at 526. The Court recognized constitutional rights related to access to courts, *see Ex parte* Hull, 312 U.S. 546, 548–49 (1941); Cochran v. Kansas, 316 U.S. 255, 257–58 (1942); Burns v. Ohio, 360 U.S. 252, 258 (1959), freedom of religion, *see* Cruz v. Beto, 405 U.S. 319, 322 (1972) (per curiam), procedural due process, *see* Wolff v. McDonnell, 418 U.S. 539, 579 (1974), equal protection, *see* Lee v. Washington, 390 U.S. 333, 333–34 (1968) (per curiam), and freedom from cruel and unusual punishment, *see* Estelle v. Gamble, 429 U.S. 97, 104 (1976) (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976) (plurality opinion)). Scholars debate whether judicial deference was ever truly discarded in the 1960s and 1970s or whether it was merely weakened. *See* Belbot, *supra* note 31, at 1–3.

[44] *See, e.g.*, *Murphy*, 532 U.S. at 228 (quoting *Jones*, 433 U.S. at 139 (Marshall, J., dissenting)).

[45] *See, e.g.*, *id.*

[46] *See, e.g.*, Johnson v. California, 543 U.S. 499, 547–48 (2005) (Thomas, J., dissenting).

increasingly prominent in judicial reasoning, the historical role of the courts will only take on greater relevance.[47]

This Part explores the prominent role that deference plays in contemporary prison law. It examines in particular three of the most common justifications for deference: prisoners' limited rights, the separation of powers, and judicial expertise. This Part also describes the way that courts sometimes appeal to history when setting out these justifications for deference.

Before turning to the case law, several notes are in order. First, although I attempt to tease apart different justifications for deference, courts often invoke more than one of these justifications in the same breath, often without explaining how they relate to (or differ) from one another.[48] That presents interpretive challenges; it is not always clear what work each justification is doing. Nevertheless, I attempt to disentangle the courts' reasoning in order to shed light on the various justificatory threads embedded in prison case law.

Second, there are some reasons jurists give for deference today that this Article does not address. For example, federal courts sometimes appeal to federalism as a reason not to interfere in state prisons.[49] Jurists also point to the practical challenges of monitoring the vast, complex, and professionalized carceral systems of the modern day.[50] And courts express concern that judicial involvement in prisons and jails will result in more prisoner litigation that will burden the judiciary.[51] This Article does not explore these justifications for deference, nor does it consider how the history presented in Part II bears on these justifications. Rather, I focus only on contemporary and historical notions of prisoners' rights, the separation of powers, and judicial expertise, as these are particularly salient in prison law, and they best showcase how prison law has transformed from its early American ancestor.

Third, I focus in this Part on both federal and state court litigation, with some emphasis on federal courts, as they have largely set prison law's deferential standards and heavily influenced state courts.[52] But as discussed in Part III, the history described in this Article — though relevant to federal courts — may have special import for state courts. Similarly, I focus in this first Part exclusively on litigation, as that is where the relationship between courts and prisons plays out today. But,

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[47] *See* Jonathan Gienapp, *Why Is the Supreme Court Obsessed with Originalism?*, YALE UNIV. PRESS (Oct. 21, 2024), https://yalebooks.yale.edu/2024/10/21/why-is-the-supreme-court-obsessed-with-originalism [https://perma.cc/3NBB-GUK8] (discussing the spread of originalism and originalists' "emphasis on history in constitutional interpretation").

[48] *See, e.g.*, Procunier v. Martinez, 416 U.S. 396, 404–05 (1974); Bell v. Wolfish, 441 U.S. 520, 547–48 (1979).

[49] SCHLANGER ET AL., *supra* note 15, at 54.

[50] *See, e.g.*, *Martinez*, 416 U.S. at 404–05.

[51] SCHLANGER ET AL., *supra* note 15, at 54.

[52] *See, e.g.*, Bresolin v. Morris, 558 P.2d 1350, 1352 (Wash. 1977) (en banc); Avant v. Clifford, 341 A.2d 629, 639 n.17 (N.J. 1975).

as elaborated on below, the history presented in this Article ultimately bears on the relationship between courts and prisons outside litigation too.

Finally, judicial deference and the justifications given for it promote prison law's "consistently and predictably pro-state" "orientation."[53] Insofar as jurists are committed to that orientation, casting doubt on justifications for it may have no bearing on prison law; courts will just find other justifications. Nevertheless, this Article proceeds under the assumption that justifications for judicial deference are not mere window dressing, and without them, courts may be less deferential and, ultimately, less pro-state and more pro-prisoner.

A. Prisoners' Rights

Although prisoners are protected by the Constitution, the courts have repeatedly warned that their rights are more limited than those of people in the free world.[54] According to the courts, prisoners' rights extend until prison administrators' discretion begins.[55] Or, as the Supreme Court has put it, prisoners' "rights must be exercised with due regard for the 'inordinately difficult undertaking' that is modern prison administration."[56] In this way, deference to prison administrators is baked into prisoners' constitutional rights.

This deferential regime was ossified in significant part in the 1987 case *Turner v. Safley*,[57] a case Professors Justin Driver and Emma Kaufman recently referred to as "perhaps the single most important case in modern prison law."[58] There, the Supreme Court set out a highly deferential standard for prisoners' rights claims, holding that "when a prison regulation impinges on inmates' constitutional rights, the

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[53] Dolovich, *supra* note 14, at 302; *see also* Sharon Dolovich, *Canons of Evasion in Constitutional Criminal Law*, *in* THE NEW CRIMINAL JUSTICE THINKING 111, 112–13 (Sharon Dolovich & Alexandra Natapoff eds., 2017) ("Supreme Court doctrine . . . systematically encourages judges at all levels . . . to affirm the constitutionality of state action on grounds having little to do with the facts of the case," *id.* at 112.).

[54] *See, e.g.*, Thornburgh v. Abbott, 490 U.S. 401, 407 (1989) (quoting Turner v. Safley, 482 U.S. 78, 85 (1987)); Overton v. Bazzetta, 539 U.S. 126, 131 (2003) (citing Jones v. N.C. Prisoners' Lab. Union, Inc., 433 U.S. 119, 125 (1977); Shaw v. Murphy, 532 U.S. 223, 229 (2001)).

[55] *See, e.g.*, *Abbott*, 490 U.S. at 407; *Bazzetta*, 539 U.S. at 131 (citing *Jones*, 433 U.S. at 125; *Murphy*, 532 U.S. at 229).

[56] *Abbott*, 490 U.S. at 407 (quoting *Safley*, 482 U.S. at 85). Or, phrased elsewhere: "The curtailment of certain rights is necessary, as a practical matter, to accommodate a myriad of 'institutional needs and objectives' of prison facilities . . . ." Hudson v. Palmer, 468 U.S. 517, 524 (1984) (quoting Wolff v. McDonnell, 418 U.S. 539, 555 (1974)). And yet elsewhere: "[L]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." Pell v. Procunier, 417 U.S. 817, 822 (1974) (quoting Price v. Johnston, 334 U.S. 266, 285 (1948)). And again: "Many of the liberties and privileges enjoyed by other citizens must be surrendered by the prisoner. An inmate does not retain rights inconsistent with proper incarceration." *Bazzetta*, 539 U.S. at 131 (citing *Jones*, 433 U.S. at 125; *Murphy*, 532 U.S. at 229).

[57] 482 U.S. 78 (1987).

[58] Driver & Kaufman, *supra* note 14, at 523.

regulation is valid if it is reasonably related to legitimate penological interests."[59] By restricting prisoners' rights to the realm in which no "legitimate penological interest[]"[60] applies, *Safley* "cemented a long tradition of deference to prison officials."[61]

Indeed, judicial deference to prison administrators permeates almost every legal standard governing prisoners' federal constitutional rights.[62] Deference has made its way into the standards governing the First Amendment[63] and Fourth Amendment[64] behind bars. It is baked into the Equal Protection[65] and Due Process Clauses[66] as they apply in detention settings. And crucially, deference has seeped into perhaps the most important standards for prisoners seeking to vindicate their constitutional rights: Eighth Amendment claims challenging conditions of confinement, use of force, and medical care.[67] What's more, deference has made its way into a number of standards governing provisions under state constitutions, influenced in part by *Safley* and other federal case law.[68] In sum, deference now extends into basically every corner of prison law, restricting prisoners' rights so that they are a shadow of those in the free world.

Lurking in the background of some of the cases that limit prisoners' constitutional rights is a notion about history: namely, that prisoners' rights were limited or not recognized at all until the twentieth century. As evidence of this era, courts often point to a case decided by a state high court in the late nineteenth century.[69] In that case, *Ruffin v.*

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[59] *Safley*, 482 U.S. at 89.

[60] *Id.*

[61] Driver & Kaufman, *supra* note 14, at 537; *see, e.g.*, Firewalker-Fields v. Lee, 58 F.4th 104, 115 (4th Cir. 2023); Dunn v. White, 880 F.2d 1188, 1194 (10th Cir. 1989) (quoting *Safley*, 482 U.S. at 89–90); Johnson v. Goord, 445 F.3d 532, 534–35 (2d Cir. 2006) (citing *Safley*, 482 U.S. at 89).

[62] *See* Dolovich, *supra* note 12, at 245; Shapiro & Hogle, *supra* note 32, at 2037; *see, e.g.*, *In re* Jordan, 500 P.2d 873, 875 (Cal. 1972).

[63] *See, e.g.*, Pell v. Procunier, 417 U.S. 817, 827–28 (1974); *Safley*, 482 U.S. at 93; Bell v. Wolfish, 441 U.S. 520, 550–51, 562 (1979); Jones v. N.C. Prisoners' Lab. Union, Inc., 433 U.S. 119, 133 (1977).

[64] *See, e.g.*, Hudson v. Palmer, 468 U.S. 517, 536 (1984).

[65] *See, e.g.*, *Jones*, 433 U.S. at 136.

[66] *See* Driver & Kaufman, *supra* note 14, at 537; Meachum v. Fano, 427 U.S. 215, 225 (1976); Overton v. Bazzetta, 539 U.S. 126, 128, 136 (2003); *Wolfish*, 441 U.S. at 538–39, 562.

[67] *See* Driver & Kaufman, *supra* note 14, at 537; Dolovich, *supra* note 12, at 246; Farmer v. Brennan, 511 U.S. 825, 846–47 (1994); Whitley v. Albers, 475 U.S. 312, 321–22 (1986).

[68] *See, e.g.*, Antenor v. Dep't of Corr., 462 P.3d 1, 16–17 (Alaska 2020) ("conclud[ing] that the [*Safley*] approach is appropriate for evaluating free speech claims by prisoners who challenge restrictions on incoming publications," *id.* at 17, under Article I, section 5 of the Alaska Constitution (citing *Safley*, 482 U.S. at 89)); Rivera v. Smith, 472 N.E.2d 1015, 1019–20 (N.Y. 1984) (citing in part federal case law in explaining that restrictions on the right to free exercise under the state constitution "must be weighed against the [prison's] institutional needs and objectives," *id.* at 1020 (citing *Wolfish*, 441 U.S. at 546; Wolff v. McDonnell, 418 U.S. 539, 556 (1974); Shahid v. Coughlin, 444 N.Y.S.2d 264, 267 (App. Div. 1981))).

[69] *E.g.*, Johnson v. California, 543 U.S. 499, 528 (2005) (Thomas, J., dissenting) (citing Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 796 (1871)); Gilmore v. California, 220 F.3d 987, 991 (9th

Commonwealth,[70] Virginia's highest court held that while incarcerated, "[a] convicted felon . . . [has] not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the State."[71] Jurists often assert that *Ruffin* exemplified a common understanding in the early years of the nation that prisoners lacked rights and recourse in court for the conditions they experienced behind bars.[72] Indeed, U.S. Supreme Court Justices have cited *Ruffin* for that proposition on at least five occasions.[73]

Though twentieth-century judges largely rejected the principles underlying *Ruffin*,[74] it is still cited in case after case, haunting prison law. And while it is not always invoked as an express justification for continued deference today, its ubiquity makes clear that courts continue to find it relevant to prison doctrine — a historical tether of sorts.

Consider the 2001 case *Shaw v. Murphy*.[75] There, eight Supreme Court Justices joined an opinion that declined to recognize prisoners' First Amendment rights to provide legal assistance to one another.[76] In

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Cir. 2000) (citing *Ruffin*, 62 Va. (21 Gratt.) at 796); Morales v. Schmidt, 489 F.2d 1335, 1338 n.2 (7th Cir. 1973) (quoting *Ruffin*, 62 Va. (21 Gratt.) at 796) (asserting that *Ruffin* "apparently represents the common law's view of the status of the offender"); *In re* Jordan, 500 P.2d 873, 875 (Cal. 1972) (citing *Ruffin*, 62 Va. (21 Gratt.) at 796). *Cf.* Wallace, *supra* note 30, at 334 (challenging the contemporary emphasis on *Ruffin*).

Other holdings like *Ruffin*'s are hard to come by. Justice Thomas has suggested that the Eighth Amendment did not apply behind prison walls based on "*Weems v. United States*, 217 U.S. 349 (1910), [where] the Court extensively chronicled the background of the [Eighth] Amendment . . . [but] [n]owhere . . . even hint[ed] that the Clause might regulate not just criminal sentences but the treatment of prisoners." Hudson v. McMillian, 503 U.S. 1, 18–19 (1992) (Thomas, J., dissenting) (citing *Weems*, 217 U.S. 349). But declining to mention the application of the Eighth Amendment behind bars is not proof that it did not apply in prisons and jails. One scholarly work has also suggested that *Ruffin* "was consistent with the earlier U.S. Supreme Court case *Pervear v. Massachusetts*[, 72 U.S. (5 Wall.) 475] (1866)." MARY K. STOHR & ANTHONY WALSH, CORRECTIONS: THE ESSENTIALS 228 (2012). But that case suggested only that the Eighth Amendment did not apply to the states, *see Pervear*, 72 U.S. (5 Wall.) at 479–80 (citing Barron v. Mayor of Balt., 32 U.S. (7 Pet.) 243 (1833)), given that it was not yet incorporated by the Fourteenth Amendment. *See* Wallace, *supra* note 30, at 335; *see also infra* note 190 (discussing *Ex parte* Taws, 23 F. Cas. 725, 725 (C.C.D. Pa. 1809) (No. 13,768)).

[70] 62 Va. (21 Gratt.) 790 (1871).

[71] *Id.* at 795–96.

[72] *See, e.g.*, *Gilmore*, 220 F.3d at 991; *Morales*, 489 F.2d at 1338 n.2.

[73] *E.g.*, *Johnson*, 543 U.S. at 528 (Thomas, J., dissenting) (citing *Ruffin*, 62 Va. (21 Gratt.) at 796); Shaw v. Murphy, 532 U.S. 223, 228 (2001) (quoting Jones v. N.C. Prisoners' Lab. Union, Inc., 433 U.S. 119, 139 (1977) (Marshall, J., dissenting) (quoting *Ruffin*, 62 Va. (21 Gratt.) at 796)); Lewis v. Casey, 518 U.S. 343, 404 (1996) (Stevens, J., dissenting) (quoting *Ruffin*, 62 Va. (21 Gratt.) at 796); *Jones*, 433 U.S. at 139 (citing *Ruffin*, 62 Va. (21 Gratt.) at 796); Meachum v. Fano, 427 U.S. 215, 231 (1976) (Stevens, J., dissenting) (citing *Ruffin*, 62 Va. (21 Gratt.) at 796); *see also* McKune v. Lile, 536 U.S. 24, 59 (2002) (Stevens, J., dissenting) (asserting that the "view that a prison inmate had no more rights than a 'slave of the State'" was "the once-prevailing view" (citing *Meachum*, 427 U.S. at 231 (Stevens, J., dissenting))).

[74] *See* SCHLANGER ET AL., *supra* note 15, at 45.

[75] 532 U.S. 223 (2001).

[76] *Id.* at 231–32.

explaining its deferential posture, the Court asserted that, "[t]raditionally, federal courts . . . 'adopted a broad hands-off attitude toward problems of prison administration.'"[77] Then, citing *Ruffin*, the Court alleged: "Indeed, for much of this country's history, the prevailing view was that a prisoner was a mere 'slave of the State' . . . ."[78] While the Court went on to note that "[i]n recent decades," it had come to recognize "that incarceration does not divest prisoners of all constitutional protections," it still retained a highly deferential test for when prisoners' rights could be vindicated.[79] "To prevail," the Court said, the plaintiff would need to "overcome the presumption that the prison officials acted within their 'broad discretion.'"[80] In this way, *Ruffin* provided a historical backdrop against which the Court could impose contemporary deference and deny the plaintiff relief. Since *Murphy* was decided, more than half of the federal courts of appeals have relied on it to grant deference to prison authorities.[81]

Following the Supreme Court's lead, lower federal courts have also looked to *Ruffin* in denying prisoner-plaintiffs relief. For example, in *Azeez v. Fairman*,[82] the Seventh Circuit found that a prisoner did not have a First Amendment right to have his Islamic name recognized by prison officials without first undergoing a state statutory procedure for his name change.[83] Citing *Ruffin*, the court explained, "[t]here was a time when federal courts did not intervene in the internal affairs of prisons at all," and "though that time is past, even today these courts regulate prisons with a considerably lighter touch than they regulate other public institutions alleged to deprive their charges . . . of federal

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[77] *Id.* at 228 (quoting Procunier v. Martinez, 416 U.S. 396, 404 (1974)). I discuss the "hands-off" attitude further below. *See infra* note 120 and accompanying text.

[78] *Murphy*, 532 U.S. at 228 (quoting *Jones*, 433 U.S. at 139 (Marshall, J., dissenting) (quoting *Ruffin*, 62 Va. (21 Gratt.) at 796)).

[79] *Id.* at 228–29.

[80] *Id.* at 232 (quoting Thornburgh v. Abbott, 490 U.S. 401, 413 (1989)).

[81] *See, e.g.*, United States v. Savage, 970 F.3d 217, 311 (3d Cir. 2020) ("[W]e 'presum[e] that the prison officials acted within their "broad discretion."'" (second alteration in original) (quoting *Murphy*, 532 U.S. at 232)); Brown v. Collier, 929 F.3d 218, 243 n.172 (5th Cir. 2019) (citing *Murphy*, 532 U.S. at 228–32); Hanrahan v. Mohr, 905 F.3d 947, 954 (6th Cir. 2018) ("[W]e generally 'defer[] to the judgments of prison officials in upholding [prison] regulations against constitutional challenge' . . . ." (second and third alterations in original) (quoting *Murphy*, 532 U.S. at 229)); Prison Legal News v. Sec'y, Fla. Dep't of Corr., 890 F.3d 954, 965 (11th Cir. 2018) (noting that the Court "generally ha[s] deferred to the judgments of prison officials in upholding [prison] regulations against constitutional challenge" (second alteration in original) (quoting *Murphy*, 532 U.S. at 229)); Fogle v. Palomino, 687 F. App'x 730, 733 (10th Cir. 2017) ("The Supreme Court has 'adopted a unitary, deferential standard for reviewing prisoners' constitutional claims . . . .'" (quoting *Murphy*, 532 U.S. at 229)); Blaisdell v. Frappiea, 729 F.3d 1237, 1247 (9th Cir. 2013) ("Traditionally federal courts did not intervene in the internal affairs of prisons and instead 'adopted a broad hands-off attitude toward problems of prison administration.'" (quoting *Murphy*, 532 U.S. at 228)); Veney v. Wyche, 293 F.3d 726, 732 (4th Cir. 2002) (noting that "[i]n a prison context," the court applies a "deferential standard" (citing *Murphy*, 532 U.S. at 225)).

[82] 795 F.2d 1296 (7th Cir. 1986).

[83] *Id.* at 1301–02.

constitutional rights."[84] So, although the courts have moved away from *Ruffin*, they will not travel too far from it.

State high courts have also invoked *Ruffin* while developing highly deferential standards for evaluating prisoners' claims. For example, the Supreme Court of California cited *Ruffin* in explaining that "[t]he traditional response of the courts to a review of prison regulations is that those rules are best left in control of the prison administration and departments of correction."[85] While ultimately holding that, in light of legislation on attorney-client correspondence in prison, the purported history of judicial nonintervention could not "justify" the court's abstention from review of that issue, the California high court seemed to imply that the "premises" undergirding *Ruffin* might continue to apply in other contexts.[86]

Similarly in *Yount v. Pennsylvania Department of Corrections*,[87] the Pennsylvania Supreme Court denied a prisoner's challenge to a transfer between correctional facilities,[88] with three of seven justices issuing a concurrence asserting that "until the middle of the 20th century, the rights of prisoners were, if any, exceedingly limited."[89] According to the justices, although courts have begun to recognize some constitutional rights, they are still required to "properly exercise restraint."[90]

So *Ruffin* loiters in the background of case after case. And while its bearing on contemporary doctrine is sometimes vague and unspecified, its import seems especially strong for originalists. Of course, originalists place normative value on historical — specifically, *original* — understandings of constitutional provisions,[91] including in the prison context.[92] Against this backdrop, their invocation of the history of judicial deference in prison law may be best understood as an effort not only to explain but also to justify deference today. Consider, for example, *Johnson v. California*,[93] where the Court considered a challenge to a prison policy of placing people in cells with others of the same race when they

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[84] *Id.* at 1298 (citing Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 796 (1871); Caldwell v. Miller, 790 F.2d 589, 595–600 (7th Cir. 1986)).

[85] *In re* Jordan, 500 P.2d 873, 875 (Cal. 1972) (citing *Ruffin*, 62 Va. (21 Gratt.) at 796).

[86] *See id.*

[87] 966 A.2d 1115 (Pa. 2009).

[88] *Id.* at 1122.

[89] *Id.* at 1124, 1128 (Todd, J., concurring) (citing Shaw v. Murphy, 532 U.S. 223, 228–29 (2001)). Although the justices in *Yount* did not cite *Ruffin* directly, they did cite the portion of *Murphy* that cited *Ruffin*. *See id.* at 1124 (citing *Murphy*, 532 U.S. at 228–29).

[90] *Id.* at 1125; *see id.* at 1124.

[91] *See, e.g.*, City of Grants Pass v. Johnson, 144 S. Ct. 2202, 2227 (2024) (Thomas, J., concurring) (discussing the history of the Eighth Amendment); Bucklew v. Precythe, 139 S. Ct. 1112, 1123 (2019) (appealing to the original meaning of the Eighth Amendment).

[92] *See* Overton v. Bazzetta, 539 U.S. 126, 142–45 (2003) (Thomas, J., concurring in the judgment) (asserting that a prison regulation restricting prisoners' visitation rights was constitutional in light of eighteenth- and nineteenth-century visitation practices).

[93] 543 U.S. 499 (2005).

first arrived at prison.[94] Justice Thomas, joined by Justice Scalia, dissented from the majority opinion that strict scrutiny applied to the policy.[95] Citing *Ruffin*, Justice Thomas asserted that "[f]or most of this Nation's history, only law-abiding citizens could claim the cover of the Constitution: Upon conviction and incarceration, defendants forfeited their constitutional rights and possessed instead only those rights that the State chose to extend to them."[96] Justice Thomas went on to recognize that although the Court had more recently "decided that incarceration does not divest prisoners of all constitutional protections,"[97] still "the extension of the Constitution's demands behind prison walls had to accommodate the needs of prison administration."[98] Read against his commitment to originalism, Justice Thomas's appeal to *Ruffin* and "most of this Nation's history" in the *Johnson* dissent might best be understood as a justification for modern-day restraint.[99]

In sum, courts regularly defer to prison administrators by asserting that prisoners' rights are limited by penological objectives. In these cases, *Ruffin*'s "slave of the State" attitude is frequently in the background. While the courts are not always explicit about exactly how the alleged history of nonintervention should inform contemporary doctrine, their repeated invocation of the past suggests that the *Ruffin* era remains a relevant touchstone for contemporary prison law, especially for originalists. And while *Ruffin* may well have represented an attitude among some early courts that people convicted of crimes forfeited their constitutional rights,[100] that attitude was not uniformly held in the nation's early years. As Part II will show, a number of federal and state courts in the eighteenth and nineteenth centuries recognized that prisoners were entitled to some constitutional and common law protections and could seek redress in court.[101]

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[94] *Id.* at 502.

[95] *Id.* at 524 (Thomas, J., dissenting).

[96] *Id.* at 528 (citing Shaw v. Murphy, 532 U.S. 223, 228 (2001); Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 796 (1871)).

[97] *Id.* at 528–29 (citing Wolff v. McDonnell, 418 U.S. 539, 555–56 (1974); Cruz v. Beto, 405 U.S. 319, 322 (1972) (per curiam)).

[98] *Id.* at 529.

[99] *Id.* at 528.

[100] *See* SCHLANGER ET AL., *supra* note 15, at 42. *Ruffin*'s invocation of slavery — and, specifically, its appeal to slavery as an analogy or model for the prisoner — may also have reflected a reaction to abolition. *See Ruffin*, 62 Va. (21 Gratt.) at 796. As Professor Michelle Alexander has explained, *Ruffin* was "issued at the height of Southern Redemption" following the the Thirteenth Amendment's abolition of slavery. MICHELLE ALEXANDER, THE NEW JIM CROW 31 (2010). In the years that followed, the prison population became "disproportionately black," as "[t]he criminal justice system was strategically employed to force African Americans back into a system of extreme repression and control." *Id.* at 32.

[101] *See infra* section II.B, pp. 1738–59.

B. The Role of Courts

Deference in contemporary prison law is grounded not only in notions about prisoners' rights but also in notions about the proper role of the judiciary.[102] On this score, jurists regularly assert that the courts should not interfere in the workings of prisons and jails, both because the separation of powers limits judicial authority over detention facilities and because judges lack the expertise to intercede behind prison walls. Below, I describe each of these justifications, as well as the way that jurists attempt to root the former in history.

1. Separation of Powers. — In the 1974 decision *Procunier v. Martinez*,[103] the Supreme Court asserted that federal courts "[t]raditionally" declined to intervene in the "problems of prison administration."[104] As the Court explained it, "the problems of prisons in America are . . . peculiarly within the province of the legislative and executive branches of government."[105] Although the Court in *Martinez* ultimately ruled on behalf of the prisoner-plaintiffs, it emphasized that, in light of the separation of powers, the Court should exercise restraint in future prison conditions cases.[106]

Five years later, the Court reiterated its admonition that courts should not get involved in detention facilities due in part to a concern about the separation of powers. In *Bell v. Wolfish*,[107] pretrial detainees brought a series of challenges under the First Amendment, the Fourth Amendment, and the Fifth Amendment Due Process Clause.[108] The Court denied them all.[109] In so doing, it condemned the courts for becoming "enmeshed in the minutiae of prison operations," asserting that "the first question" is not whether judges have the "best" "plan" for prisons, but rather, "in what branch of the Government is lodged the authority to initially devise the plan."[110] According to the Court, "[t]he wide range of 'judgment calls' that meet constitutional and statutory requirements are confided to officials outside of the Judicial Branch of Government."[111]

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[102] *See* Lewis v. Casey, 518 U.S. 343, 361 (1996) ("[A] deferential standard is necessary . . . 'if "prison administrators . . . , and not the courts, [are] to make the difficult judgments concerning institutional operations."'" (second alteration in original) (quoting Turner v. Safley, 482 U.S. 78, 89 (1987))).

[103] 416 U.S. 396 (1974).

[104] *Id.* at 404. As discussed further below, the Court's holding in *Martinez* was also animated by concerns about "order," "discipline," and "securi[ty]" in prisons, and the recognition that "the problems of prisons in America are complex and intractable, and . . . not readily susceptible of resolution by decree." *Id.* at 404–05.

[105] *Id.* at 404–05.

[106] *Id.* at 398, 404–05.

[107] 441 U.S. 520 (1979).

[108] *Id.* at 523, 544.

[109] *Id.* at 523–24.

[110] *Id.* at 562.

[111] *Id.*

Lower federal courts have frequently reiterated *Martinez* and *Wolfish*'s concerns about the separation of powers in the course of denying prisoners relief.[112] And while *Martinez* and *Wolfish* were concerned in part about federal courts intervening in state prisons, state courts have applied their reasoning to state court intervention in state prisons, too.[113]

Moreover, federal and state courts sometimes suggest that this understanding of the separation of powers as counseling against judicial intervention in prisons and jails has longstanding historical roots. As described in Ryan Pollock's student Note, *The Eyes-On Doctrine*, jurists regularly assert that early courts historically declined to intervene in the administration of prisons and jails due to concerns about the separation of powers.[114]

For example, consider *Colvin v. Inslee*.[115] There, the supreme court of Washington declined to intervene on behalf of prisoners challenging COVID-19 procedures in prison,[116] despite affirming that "the risk of COVID-19 in Washington's prisons" "clearly" "require[d] an immediate response to protect the lives of inmates and staff."[117] Citing the "design[]" of "[t]he framers of the federal constitution," who created a "three-part system to prevent any one branch of government from gaining too much power," the court determined that it was not permitted to intervene.[118]

Similarly, in *Levier v. State*,[119] the Kansas Supreme Court asserted that "*until comparatively recent times* courts have largely adhered to that which has been called the 'hands-off' doctrine, which essentially means that courts are without power to supervise prison administration

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112 *See, e.g.*, Goff v. Nix, 803 F.2d 358, 362 (8th Cir. 1986) ("The rationale for judicial deference has been explained by the fact that the management of corrections institutions is peculiarly the responsibility of the executive and legislative branches of government . . . ."); Duran v. Elrod, 760 F.2d 756, 759 (7th Cir. 1985) (asserting that "managerial judgments" related to prison administration "generally are the province of other branches of government than the judicial").

113 *See, e.g.*, Bresolin v. Morris, 558 P.2d 1350, 1352 (Wash. 1977) (en banc) (quoting *Martinez*'s assertion about the "[t]raditional[]" role of the judiciary, Procunier v. Martinez, 416 U.S. 396, 404 (1974), and noting that, while *Martinez* "was directed primarily to the question of the intervention of federal courts in state penal matters, its import is equally valid with respect to the role of state courts in such matters").

114 *See* Pollock, *supra* note 33, at 203–08. Some scholars suggest that the attitude of the courts shifted between the late 1800s and early 1900s. *See, e.g.*, SCHLANGER ET AL., *supra* note 15, at 43. According to these scholars, "[t]he notion [in the 19th century] that prisoners have no rights gradually was displaced in the 20th century by a different — though still non-interventionist — approach to prisoners' claims," based on the view that "courts generally had neither the duty nor the power to define and protect [prisoners'] rights." *Id.*

115 467 P.3d 953 (Wash. 2020); *see also* Pollock, *supra* note 33, at 202–03 (discussing *Colvin* as an example of judicial deference in prison administrators).

116 *Colvin*, 467 P.3d at 960; *see* Pollock, *supra* note 33, at 202–03.

117 *Colvin*, 467 P.3d at 960.

118 *Id.*

119 497 P.2d 265 (Kan. 1972).

or to interfere with the ordinary prison rules and regulations."[120] Although the *Levier* court ultimately ruled on behalf of the prisoner-plaintiffs,[121] Kansas courts have since cited the case as a reason to defer to prison authorities and deny relief.[122]

And as with the history of prisoners' rights, the history of the separation of powers plays an especially prominent role in originalist reasoning. For example, in *Johnson v. California*, Justice Thomas, joined by Justice Scalia, claimed that the majority's decision to apply strict scrutiny to a prison policy was improper because it constituted a "refusal — for the first time ever — to defer to the expert judgment of prison officials."[123] For Justice Thomas, it was the divergence from the purported historical relationship between courts and prisons that rendered the majority opinion incorrect.[124]

Or take the 1992 dissent authored by Justice Thomas in *Hudson v. McMillian*.[125] That case involved the use of excessive force in prison in violation of the Eighth Amendment.[126] Again joined by Justice Scalia, Justice Thomas asserted that judges often declined to intervene on behalf of prisoners in the young nation.[127] He wrote that even though "prison was not a more congenial place in the early years of the Republic than it is today . . . historically, the lower courts routinely rejected prisoner grievances by explaining that the courts had no role in regulating prison life."[128] With this in mind, he suggested that the Court should deny the prisoner-plaintiff relief.[129]

Concerns about the separation of powers are thus regularly used as a justification for judicial deference to prison administrators today, and sometimes courts suggest that modern conceptions about the separation of powers should be grounded in historical ones.

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120 *Id.* at 271 (emphasis added) (citing Banning v. Looney, 213 F.2d 771 (10th Cir. 1954)). The "hands-off" doctrine was first coined by a student Note published in 1963. SCHLANGER ET AL., *supra* note 15, at 43 (citing Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506, 506 (1963)).

121 *Levier*, 497 P.2d at 273.

122 *See* Roark v. Graves, 936 P.2d 245, 247 (Kan. 1997) ("Prison officials are given wide latitude in matters concerning the administration of correctional facilities. Such discretion should not be interfered with by the court in the absence of abuse or unless exercised unlawfully, arbitrarily, or capriciously." (citing, inter alia, *Levier*, 497 P.2d 265)).

123 Johnson v. California, 543 U.S. 499, 547 (2005) (Thomas, J., dissenting).

124 *See id.*

125 503 U.S. 1 (1992).

126 *Id.* at 4.

127 *Id.* at 19 (Thomas, J., dissenting).

128 *Id.*

129 *Id.* at 17. *Murphy* might also be read to be suggesting that the "tradition" identified in *Martinez* existed "for much of this country's history." Shaw v. Murphy, 532 U.S. 223, 228 (2001). There, the Court quoted *Martinez* and the "[t]raditional[]" role of the courts, and immediately after stated, "[i]ndeed, for much of this country's history." *Id.* (quoting Procunier v. Martinez, 416 U.S. 396, 404 (1974)).

2. Judicial Expertise. — Jurists also regularly defer to prison administrators on the ground that courts lack the expertise to interfere with the workings of prisons and jails, and that judicial intervention will therefore compromise penological aims, including safety and security.[130] Here, too, *Martinez* is a good place to start. In addition to asserting that the separation of powers counseled against judicial involvement in prisons and jails, the Court noted that judicial deference "springs from complementary perceptions about the nature of the problems and the efficacy of judicial intervention."[131] "Prison administrators," the Court pointed out, "are responsible for maintaining internal order and discipline," "securi[ty]," and "rehabilitati[on]."[132] Doing each of these successfully is a tall order, and "courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform."[133]

Lower federal courts widely quote *Martinez*'s language on this score when denying prisoners relief.[134] So too do state courts.[135] Assertions about judicial incompetence have thus become a common justification for judicial deference.[136]

And although modern notions about judicial expertise are not justified by appeals to history, jurists seem to assume, as described above, that judges have always deferred to prison administrators.[137] But that assumption ignores that early judges — especially at the state and local levels — retained substantial oversight over prisons and jails, and were expected to have the expertise needed to ensure that prisons met their penological aims. I turn to that history now.

II. JUDICIAL OVERSIGHT IN THE EIGHTEENTH AND NINETEENTH CENTURIES

During the Founding era and those that followed, courts and prisons maintained a complex relationship. A number of federal and state courts recognized that prisoners enjoyed some constitutional and common law protections,[138] suggesting that courts did not uniformly view

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130 *See, e.g.*, *Procunier*, 416 U.S. at 404–05; Bell v. Wolfish, 441 U.S. 520, 562 (1979).

131 *Martinez*, 416 U.S. at 404.

132 *Id.*

133 *Id.* at 405.

134 *See, e.g.*, Hosna v. Groose, 80 F.3d 298, 303–04 (8th Cir. 1996) (quoting *Martinez*, 416 U.S. at 404–05); Fraise v. Terhune, 283 F.3d 506, 516 (3d Cir. 2002) (quoting Turner v. Safley, 482 U.S. 78, 84–85 (1987) (quoting *Martinez*, 416 U.S. at 405)).

135 *See, e.g.*, Avant v. Clifford, 341 A.2d 629, 639 n.17 (N.J. 1975) (quoting *Martinez*, 416 U.S. at 404); *see also* State v. Bayaoa, 656 P.2d 1330, 1327 (Haw. 1982) ("Because of the essential need for security and the recognition that courts are ill-equipped to deal with matters of prison administration, wide-ranging deference is given to prison administrators in the exercise of their discretion." (quoting Holdman v. Olim, 581 P.2d 1164, 1167 (Haw. 1978))).

136 *See* SCHLANGER ET AL., *supra* note 15, at 54.

137 *See, e.g.*, Colvin v. Inslee, 467 P.3d 953, 964 (Wash. 2020).

138 *See infra* section II.B.1, pp. 1739–42.

prisoners as slaves of the state. Moreover, state and local judges exercised vast supervisory responsibilities over prisons and jails, both in and out of the courtroom.[139] These responsibilities suggest that early understandings of the separation of powers and judicial expertise contemplated substantial judicial involvement in detention settings, at least at the state and local levels.

In what follows, I detail this history. I show that, around the time of the American Revolution, prominent prison theorists like John Howard advocated for judicial checks on prison and jail administration. His advocacy heavily influenced American leaders, who structured their fledgling republic to give courts significant power over prisons and jails. This power was apparent not only in judicial opinions but also in early state codes, which imbued judges with a wide range of oversight responsibilities. For many courts, the mandate to intervene behind prison walls lasted for much of the nineteenth century.

A. The Theory of Judicial Oversight

In the mid- to late eighteenth century, theorists and advocates pushed for judicial oversight of jails and prisons. Perhaps most prominent among them was John Howard.[140] An English prison reform advocate, Howard traveled widely through Europe, investigating prison and jail conditions and writing about his findings and reflections.[141] In addition to influencing the English penal system, he was known in America "as the great authority on prison discipline and prison construction" and "was in many respects a founder of our American prison system."[142] Because of his substantial influence, his views provide clues into the intended structure of the first American prisons, including the role that the judiciary was meant to play in overseeing them.

Howard believed that courts provided an essential check on penal authorities. He worried that prison and jail officials were not always incentivized to provide adequate care to those in custody. As he explained, the jailer is "paid indeed for his attendance, but often tempted by his passions, or interest, to fail in his duty."[143] By devising carceral policies and monitoring for adherence, the judiciary prevented against this failure.[144]

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[139] *See infra* section II.B.2, pp. 1742–59.

[140] *See* O.F. LEWIS, THE DEVELOPMENT OF AMERICAN PRISONS AND PRISON CUSTOMS, 1776–1845, at 33 (1922).

[141] TESSA WEST, THE CURIOUS MR HOWARD: LEGENDARY PRISON REFORMER, at xxv (2011).

[142] LEWIS, *supra* note 140, at 33; *see also* Shapiro, *supra* note 3, at 553–55 (discussing Howard's influence on early reformers in Pennsylvania).

[143] 1 JOHN HOWARD, *The State of Prisons in England and Wales, with Preliminary Observations and an Account of Some Foreign Prisons*, *in* THE WORKS OF JOHN HOWARD, ESQ. 36 (London, J. Johnson, C. Dilly & T. Cadell 4th ed. 1792).

[144] *See id.*

In two of his most influential works, *The State of the Prisons in England and Wales* and *An Account of the Principal Lazarettos in Europe*, both published in the late eighteenth century, Howard detailed the specific ways in which judicial oversight should manifest.[145] First, he explained, magistrates should help establish rules and regulations for penal facilities.[146] He stated: "[M]uch [of penal rules and policies] must ultimately depend on the active, judicious, and discreet concurrence of magistrates and gentlemen of weight in the different parts of the kingdom."[147] Among other things, Howard believed that magistrates should be responsible for determining the number of jailers per facility, setting their salaries,[148] and "impartially" distributing "[m]oney sent, collected, or bequeathed" to the jail.[149]

Howard also believed that magistrates and other supervisory authorities should be responsible for punishing a detainee's violation of prison rules. He wrote that sanctions for failing to abide by the "rules for cleanliness, and orders against garnish, gaming, drunkenness, quarreling, profaneness and obscenity . . . should be fixed by the magistrates, or by law."[150] Punishments for more serious violations, Howard wrote, should also be determined by magistrates or inspectors: "Faults that deserve more severe animadversion [than 'closer confinement'], should be reserved for the cognisance of the magistrates, or an inspector" rather than the jail keeper.[151]

Howard was also adamant that judges inspect and monitor prisons for abuse. He wrote: "I could wish *judges*, and their successors, to be constituted perpetual guardians of the Penitentiary houses."[152] These judges, he explained, should conduct "proper *inspections*," which he

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145 *See id.*; 2 JOHN HOWARD, *An Account of the Principal Lazarettos in Europe*; *with Various Papers Relative to the Plague: Together with* Further *Observations on Some Foreign Prisons and Hospitals; and Additional Remarks on the* Present State *of Those in Great Britain and Ireland*, *in* THE WORKS OF JOHN HOWARD, ESQ. 230 (London, J. Johnson, C. Dilly, & T. Cadell 2d ed. 1791).

146 *See* HOWARD, *supra* note 145, at 230. Magistrates, also known as justices of the peace, held quasi-executive, quasi-judicial roles in the Founding era. *See* Pollock, *supra* note 33, at 212, 245. Pollock argues that their dual responsibilities make it hard to tell whether their prison and jail oversight responsibilities were part of their judicial or executive roles, and that one may determine that these roles were judicial because some justices of the peace lost these responsibilities once they became wholly executive officials, *see id.* at 248, or because of the way that justices of the peace were granted authority over purely executive officials, *id.* at 249–51. I hesitate to adopt that methodology for determining whether prison oversight was judicial in nature during the nation's early years and posit instead that imbuing magistrates with prison and jail oversight responsibilities suggests that these responsibilities were, at the very least, not a purely executive function in the nation's Founding years.

147 HOWARD, *supra* note 145, at 230.

148 *See* HOWARD, *supra* note 143, at 29–30.

149 *Id.* at 34 (emphasis omitted). Additionally, Howard wrote: "I leave it to the consideration of the justices, whether a room or two in the gaoler's house may not be as convenient as a separate ward" for women debtors who were detained. *Id.* at 25.

150 *Id.* at 35.

151 *Id.* at 34.

152 HOWARD, *supra* note 145, at 224.

viewed as "*so absolutely necessary* to the good government of Penitentiary houses, that neither *expense*, nor a *few* other conveniences, ought to be set in competition with so *important* a circumstance."[153] Howard's vision thus involved not only judicial rulemaking but also a robust system of judicial inspection.

Howard's work influenced leading American reformers.[154] Among them was Benjamin Rush, a signer of the Declaration of Independence who served as a politician, professor, and prison reform advocate in Pennsylvania.[155] In *An Enquiry Into the Effects of Public Punishments Upon Criminals*, published in 1787, Rush laid out a vision of punishment that was, he noted, "supported . . . by the facts that are contained in Mr. Howard's history of prisons."[156] In particular, Rush adopted Howard's view of the role of the courts. He wrote that "the nature — degrees — and duration of the punishments, should all be determined beyond a certain degree, by a court properly constituted for that purpose, and whose business it should be to visit the receptacle for criminals once or twice a year."[157]

William Bradford, who served on the Pennsylvania Supreme Court and later became U.S. Attorney General,[158] was also influenced by Howard's views on inspections. In 1793, he published *An Enquiry How Far the Punishment of Death Is Necessary in Pennsylvania*, a pamphlet written at the request of the Governor of Pennsylvania[159] and published in the *Journal of the Pennsylvania Senate*.[160] There, Bradford invoked

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[153] *Id.* Elsewhere, Howard wrote that each prison should have a magistrate or justice appointed as its "*Inspector*." HOWARD, *supra* note 143, at 36 ("To every prison there should be an *Inspector* appointed; either by his colleagues in the magistracy, or by parliament. . . . [A]mong justices, and town magistrates, there may always be found one man generous enough to undertake this important service. Or if the constant trouble be thought too much for one person, it may proceed by annual, quarterly, or monthly rotation."). According to Howard, the magistrate or justice appointed:

> should make his visit once in a week, changing his days. He should take with him a memorandum of all the rules, and inquire into the observance or neglect of them. He should . . . look into every room, to see if it be clean . . . [and h]e should speak with every prisoner; hear all complaints; and immediately correct what he finds manifestly wrong . . . .

Id. Howard reiterated this belief over a decade later in *An Account of the Principal Lazarettos in Europe*, writing that inspectors should visit "at unexpected times — to view the whole prison, and hear prisoners' complaints — to examine and weigh provisions — to inquire into the conduct of prisoners, and represent proper objects for favour." HOWARD, *supra* note 145, at 228.

[154] *See* LEWIS, *supra* note 140, at 33–34.

[155] *See Benjamin Rush*, BRITANNICA, https://www.britannica.com/biography/Benjamin-Rush [https://perma.cc/A332-TLS7]; Pollock, *supra* note 33, at 215.

[156] BENJAMIN RUSH, AN ENQUIRY INTO THE EFFECTS OF PUBLIC PUNISHMENTS UPON CRIMINALS, AND UPON SOCIETY 13 (Philadelphia, Joseph James 1787).

[157] *Id.* at 12. *See also* Pollock, *supra* note 33, at 213–21 (discussing Rush's views on penal reform and the separation of powers).

[158] *See* Shapiro, *supra* note 3, at 556.

[159] WILLIAM BRADFORD, AN ENQUIRY HOW FAR THE PUNISHMENT OF DEATH IS NECESSARY IN PENNSYLVANIA (Philadelphia, T. Dobson 1793), *reprinted in* 12 AM. J. LEGAL HIST. 122, 125 (1968).

[160] Shapiro, *supra* note 3, at 556.

Howard and echoed his view that prisons should be built near cities to facilitate inspections by non-prison officials[161] who do not receive compensation.[162]

Howard also influenced members of the Philadelphia Society for Alleviating the Miseries of Public Prisons,[163] a group of reformers who were instrumental in "overhaul[ing] the [Pennsylvania] prison system"[164] — America's first[165] — in the late eighteenth century. Among these reformers were prominent members of Philadelphia society, including Caleb Lownes,[166] who would eventually become an inspector of America's first penitentiary at the Walnut Street Jail.[167] As the next section will show, these theorists and leaders helped shape early state laws granting judges substantial oversight over prisons and jails.

B. Judicial Oversight in Practice

In the eighteenth and nineteenth centuries, judges played a major role in the administration and regulation of the country's first jails and prisons.[168] Federal and state judges recognized some constitutional and common law protections for prisoners and provided redress in court, suggesting that the first American prisoners were not uniformly considered "slaves of the State."[169]

What's more, state and local judges were authorized and sometimes required by statute to oversee prison and jail operations, both in the course of litigation and outside of it. Specifically, judges helped to remedy poor conditions, inspect and monitor facilities, set rules and policies, appoint jail and prison authorities, and oversee the building and repair of jail facilities. While these statutory grants of authority provide no insight into early prisoners' constitutional and common law protections, they complicate the notion that the separation of powers historically

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161 *See* BRADFORD, *supra* note 159, at 173 ("[H]ouses for convicts at labour, ought to be in or near a large town or city, and easily accessible to those who have the inspection of them. This last circumstance seems to be of the utmost importance."); *cf.* HOWARD, *supra* note 145, at 224 ("I could wish the judges, and their successors, to be constituted perpetual guardians of the Penitentiary houses. In this case, vicinity to the Metropolis will be essential to a proper situation for them . . . ." (emphasis omitted)).

162 *See* BRADFORD, *supra* note 159, at 173. As Bradford explained approvingly: "Mr. Howard uniformly found those houses best managed, when the inspection was undertaken without *mercenary views*, and solely from a sense of duty, and a love to humanity." *Id.*

163 *See* Shapiro, *supra* note 3, at 552–53. The group was also known as the Pennsylvania Prison Society. *Id.* at 552.

164 *Id.* at 561.

165 *See* Gutterman, *supra* note 2, at 862.

166 *See* Shapiro, *supra* note 3, at 552.

167 *See* Negley K. Teeters, *Caleb Lownes of Philadelphia: 1754–1828*, 43 PRISON J. 34, 34 (1963).

168 The structure of state court systems varied from state to state, as did the terminology used for facilities housing people pretrial and postconviction. Because the focus of this Article is the vast judicial oversight over all of these facilities, I mention but do not emphasize the distinctions between different kinds of courts or facilities in the discussion below.

169 Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 796 (1871).

precluded judicial intervention behind bars, particularly at the state and local levels. And this early history also suggests that, unlike today, local and state courts were expected to have the expertise to intervene in detention settings. In fact, judicial oversight was thought necessary to achieve penal aims.

1. Vindicating Rights. — *Ruffin* expressed a view that prisoners were "slaves of the State" who, by virtue of that status, lacked constitutional and common law protections.[170] But that view was not as ubiquitous[171] as modern courts have sometimes assumed.[172] Rather, a further look at nineteenth-century case law shows that some federal and state courts recognized federal and state constitutional protections for prisoners. And though these cases were not common, their rarity is best explained by a variety of factors other than a pervasive "slave-of-the-state" attitude among courts.

Records of a few cases in the nineteenth century suggest that prisoners enjoyed limited protections under the U.S. Constitution. In 1879, the same decade that *Ruffin* was decided, a plaintiff sued the sheriff of a local jail in federal court for "wantonly and maliciously cut[ting] off [his] queue," which was "regarded by [people of Chinese descent] as degrading and as entailing future suffering."[173] The plaintiff argued that an ordinance authorizing sheriffs to cut the hair of those in custody was "degrading and cruel punishment upon a class of persons who are entitled . . . to the equal protection of the laws" under the U.S. Constitution.[174] The court ruled for the plaintiff, declaring the ordinance unconstitutional.[175]

Similarly, in the 1889 case *In re Birdsong*,[176] a federal district judge held that chaining a prisoner by the neck such that he could not lie or sit down for several hours during the night constituted "cruel and unusual" punishment "in violation of the prisoner's constitutional rights."[177] Although the case involved criminal rather than civil prosecution of the jailer, the court made a point of recognizing the rights of the detained.[178] Moreover, the court emphasized that it had authority to intervene, asking rhetorically: "[C]an it be pretended that the court is powerless to

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170 *See id.*

171 *See* Wallace, *supra* note 30, at 334–35 (discussing cases showing that prisoners were not denied all of their rights in the late nineteenth and early twentieth centuries); *see also* SCHLANGER ET AL., *supra* note 15, at 42 ("The idea [that prisoners had no rights] was not quite universally held . . . .").

172 *See supra* section I.A, pp. 1725–30.

173 Ho Ah Kow v. Nunan, 12 F. Cas. 252, 253 (C.C.D. Ca. 1879) (No. 6,546).

174 *Id.* The court also found that the board that had enacted the ordinance was not authorized to do so, as the provision "was not intended and cannot be maintained as a measure of discipline or as a sanitary regulation." *Id.* at 254.

175 *Id.* at 256–57.

176 39 F. 599 (S.D. Ga. 1889).

177 *Id.* at 600; *see* SCHLANGER ET AL., *supra* note 15, at 42 (discussing *In re Birdsong*).

178 *See In re Birdsong*, 39 F. at 599–600.

compel the jailer to the performance of his duty, or to prevent or punish its non-performance in the presence of this important relation to the administration of justice imposed by law?"[179] The court went on to explicitly reject administrative discretion in prisons and jails: "Is it competent for the jailer in his *discretion* to inflict penalties and to exercise arbitrary powers which are not deemed safe or appropriate to be intrusted to the judges? The proposition is unworthy of any intelligent mind trained in the letter or the philosophy of the law."[180] The holding was reported in the *American Law Register* in 1889,[181] *The Criminal Law Magazine and Review* in 1890,[182] and *Ruling Case Law* in 1915.[183] It was also cited in a 1911 Note in the *Harvard Law Review* for the proposition that "[a]ll courts would agree in holding some punishments forbidden, as, to chain a prisoner by the neck for several hours so that he must remain standing."[184]

Moreover, at least one state constitution also protected prisoners and provided for damages actions against officials who acted beyond the scope of their authority. In 1894, the Kansas Supreme Court noted that authorities may be held liable in damages for "needless sufferings and indignities" imposed on prisoners under their charge.[185] The Chief Justice further explained in a concurrence that "the constitution of the state forbids cruel or unusual punishments, and the courts have ample power to prevent such punishments from being inflicted."[186]

Finally, the common law also conferred protections over detainees, according to at least one state high court. In 1823, the Supreme Court of Ohio[187] considered whether a debtor held in custody could sue a sheriff for confining him in the same room as those accused and convicted of crimes.[188] The court ruled that, if a jail had two rooms available, then a debtor could sue the sheriff for relief under the common law.[189] So, while *Ruffin* set out the law in one state in the late 1800s, it may not

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179 *Id.* at 600.

180 *Id.* at 601 (emphasis added).

181 *Abstracts of Recent Decisions*, *Public Officers*, 28 AM. L. REG. 785, 793 (1889).

182 *Contempt by Jailer in Cruel Punishment of Prisoner.*, 12 CRIM. L. MAG. & REP. 59, 59 (1890).

183 6 RULING CASE LAW 495 (William M. McKinney & Burdett A. Rich eds., 1915).

184 Note, *What is Cruel and Unusual Punishment*, 24 HARV. L. REV. 54, 55 (1911). Other kinds of constitutional rights were also recognized by some courts. For example, although some jurisdictions held that prisoners did not have a right to a speedy trial, the "weight of authority was to the contrary." Wallace, *supra* note 30, at 335 (citations omitted).

185 City of Topeka v. Boutwell, 35 P. 819, 822 (Kan. 1894).

186 *Id.* at 825 (Horton, C.J., concurring specially).

187 At the time, the Supreme Court of Ohio exercised "original and appellate jurisdiction both in common law and in chancery." Judge Lee E. Skeel, *Constitutional History of Ohio Appellate Courts*, 6 CLEV.-MARSHALL L. REV. 323, 324 (1957) (internal quotation marks omitted).

188 Campbell v. Hampson, 1 Ohio 119, 120, 123 (1823).

189 *Id.* at 123–24.

have been characteristic of eighteenth- and nineteenth-century American prison law.[190]

Nevertheless, constitutional and common law relief were not frequently granted to prisoners in the nation's first century. But this fact may be best explained not by a pervasive view that prisoners were slaves of the state, but instead by a variety of factors unique to eighteenth- and nineteenth-century law — and which cannot so easily serve as originalist justifications for deference today. First, the Eighth Amendment did not apply to the states prior to the ratification of the Fourteenth Amendment, which occurred in 1868.[191] Moreover, governmental immunity applied widely, preventing suits challenging negligent government conduct both inside and outside the prison context.[192] Furthermore, even when prisoners could get around these obstacles, common law and constitutional relief may simply have been unnecessary given the expansive system of statutorily authorized judicial oversight, which I discuss in detail below. As one example, in 1876, the Illinois Supreme Court found that a suit brought in equity for relief from "cruel and inhuman" conditions had to be dismissed because a state statute required county courts to ensure that prisoners were humanely treated and thus provided "an ample remedy."[193] Similarly, in 1867, the Kentucky Court of Appeals held that it need not determine whether a jailer's failure to keep his "jail clean and in a condition to promote the health and comfort of prisoners" was "punishable at common law . . . since the Legislature has provided an effectual remedy."[194] Thus, the rarity of constitutional and common law relief may be explained in large part by the Eighth Amendment's inapplicability to the states, governmental immunity, and the availability of statutory remedies that existed at the time.

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[190] In *Ex parte Taws*, 23 F. Cas. 725 (C.C.D. Pa. 1809) (No. 13,768), decided in 1809, the Circuit Court of the District of Pennsylvania declined to rule on behalf of a prisoner's habeas petition, citing the court's reluctance "to interfere with the jailer in the exercise of the discretion vested in him, as to the security of his prisoners; unless it appeared that he misused it for purposes of oppression." *Id.* at 725; *see* Pollock, *supra* note 33, at 251–52. Though the court in *Ex parte Taws* deferred to the jailer, some scholars have noted that the court's opinion — and nineteenth-century commentary on the case — indicates that the court was open to ruling on prison-conditions cases in contexts where prison security was not implicated, or where a jailer "misused" his discretion with respect to prisoner security "for purposes of oppression." *See* Pollock, *supra* note 33, at 251–53 (quoting *Taws*, 23 F. Cas. at 725); BAYARD MARIN, INSIDE JUSTICE: A COMPARATIVE ANALYSIS OF PRACTICES AND PROCEDURES FOR THE DETERMINATION OF OFFENSES AGAINST DISCIPLINE IN PRISONS OF BRITAIN AND THE UNITED STATES 224–25 (1983). In that way, *Taws*, too, may provide evidence of the early judiciary's willingness to intervene in prison and jail conditions — at least in some contexts.

[191] *See* Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 463 (1947) (explaining that the Eighth Amendment applies to the states through the Fourteenth Amendment).

[192] *See* Wallace, *supra* note 30, at 335.

[193] Stuart v. Bd. of Supervisors, 83 Ill. 341, 344–48 (1876).

[194] Commonwealth v. Mitchell, 66 Ky. (3 Bush) 39, 39–40 (1867).

Ultimately, this history suggests that the slaves-of-the-state attitude widely cited by the courts may not have been as pervasive as contemporary jurists sometimes suggest.

2. Judicial Oversight. — Some early state and local courts also had broad power to intervene in detention facilities even when they were not vindicating constitutional or common law rights. This power was largely authorized by state legislatures and therefore does not bear on whether prisoners enjoyed constitutional or common law protections. Rather, the legislatively authorized powers described here complicate other justifications for judicial restraint in prison and jail cases. They provide evidence that the separation of powers, as understood in the eighteenth and nineteenth centuries, did not preclude the legislature from granting courts the authority to intervene in prison and jail administration, at least at the state and local levels. They also suggest that, in the early years of the nation, judges — at least state and local ones — were expected to have the expertise needed to oversee prisons and jails and help ensure that they met their penological objectives.[195]

Before detailing these responsibilities, I pause to note that not all of the judicial responsibilities of old bear on modern prison law in the same way. For example, while the early powers of state courts provide some evidence of the contours of the separation of powers at the state level, they provide less insight into the separation of powers at the federal level. Moreover, the judicial oversight that occurred outside litigation in the nation's early years sheds some light on the role of the early judiciary, but its bearing on modern understandings of prison oversight in the litigation context is less obvious. In Part III, I explore in greater detail how the varied judicial responsibilities in the nation's early years might bear on different aspects of contemporary prison law.

(a) Remedying Abuse, Misconduct, and Poor Conditions. — As Pollock explains, the powers granted to state and local American courts to remedy abuse and poor conditions was reminiscent of powers exercised by England's King's Bench.[196] That court could hold accountable prison keepers alleged to have exhibited cruelty toward prisoners and could order prison staff to remedy certain poor conditions.[197] For example, in *Lady Broughton's Case*,[198] decided in 1672, the King's Bench "ordered information against" a jailer accused of misconduct.[199] Upon finding her guilty of "extortion of fees, and hard usage of the prisoners in a most barbarous manner," the court removed her from office and fined her.[200] Over fifty years later, in 1726, the court noted that "[t]he

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195 *Contra* Procunier v. Martinez, 416 U.S. 396, 404–05 (1974).

196 Pollock, *supra* note 33, at 254.

197 *See id.*

198 (1672) 83 Eng. Rep. 112; Raym. Sir T. 216 (KB).

199 Dominus Rex and the Lady Braughton (1672) 84 Eng. Rep. 578, 578; 3 Keb. 32, 32 (KB); *see also Lady Broughton's Case*, 83 Eng. Rep. at 112; Pollock, *supra* note 33, at 254 n.310.

200 *Lady Broughton's Case*, 83 Eng. Rep. at 112–13; *see also* Pollock, *supra* note 33, at 254 n.310.

prison [was] in a ruinous condition" due to rain damage, and ordered the "proprietors" of the prison "to attend the Court," where "[t]he Court was moved to enlarge the rules of the prison . . . that the prisoners might be removed thither."[201] Moreover, the court instructed that "the proprietors were obliged" "to put the prison in repair."[202] Several years later, in 1730, a report on detention facilities in England noted that "this prison of the King's Bench" was "much better regulated than any other prison" reviewed by the committee issuing the report, thanks to "the care" of the chief justice of the Bench, who "hath heard, and redressed, the complaints of the prisoners."[203]

In the American colonies, state and local courts were vested with similar powers. In the eighteenth century, Pennsylvania legislators passed a law allowing people in custody to petition the courts with "complain[ts] of any exaction or extortion by any gaoler . . . or other officer or person employed in the keeping or taking care of any gaol or prison . . . or any other abuse whatsoever committed or done in their respective offices or places."[204] Petitioners could bring these complaints to a number of courts.[205] Upon hearing the complaints, justices and judges were empowered to issue orders "for redressing such abuse and punishing of such officer or person complained of and making reparation to the party or parties injured as they shall think just."[206] In 1836, the Pennsylvania Supreme Court affirmed that "if improperly treated," the court "may grant some redress" to "those legally confined under the sentence of the law."[207]

Similarly, a Maryland statute empowered courts to "act upon" prison reports that the grand jury presented to the court each term, "and to make such order therein as shall appear to [the court] to be necessary."[208] And a Kentucky law declared that the county court had the "power, by

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[201] Case of the Prison of the King's Bench (1726) 93 Eng. Rep. 778, 778; 2 Strange 678, 678 (KB); *see also* Pollock, *supra* note 33, at 254 & n.312.

[202] Case of the Prison of the King's Bench 93 Eng. Rep. at 778.

[203] THIRD REPORT OF THE SELECT COMMITTEE APPOINTED TO ENQUIRE INTO THE STATE OF THE GAOLS OF THIS KINGDOM (Mar. 12, 1730), *reprinted in* 8 COBBETT'S PARLIAMENTARY HISTORY OF ENGLAND 803, 810 (Johnson Reprint Corp. 1966) (1811); *see* Pollock, *supra* note 33, at 254 n.313.

[204] Act of Feb. 14, 1729–30, ch. CCCXV, § XIII, *reprinted in* 4 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801, at 171, 181–82 (James T Mitchell & Henry Flanders eds., n.p., Clarence M Busch 1897) [hereinafter THE STATUTES OF PENNSYLVANIA].

[205] *Id.* at 182 (noting that the courts that could receive complaints included "any of His Majesty's courts of record within this province from whence such process issued or under whose power such gaol or prison is, or to any two justices of such court in the time of vacation, or to the judges of the supreme court or any of them in their respective sessions of oyer and terminer or general gaol delivery").

[206] *Id.*

[207] Reddill's Case, 1 Whart. 445, 448 (Pa. 1836). The court did not identify whether the source of judicial authority derived from common law or state law. *See id.*

[208] Act of 1797, ch. 17, § 8, *reprinted in* 3 THE GENERAL PUBLIC STATUTORY LAW AND PUBLIC LOCAL LAW OF THE STATE OF MARYLAND 2093, 2095 (Clement Dorsey ed., Baltimore, John D. Toy 1840) [hereinafter THE LAW OF THE STATE OF MARYLAND].

fine or otherwise, to enforce the rules [of the jail] and punish the jailer for neglect thereof or disobedience thereto."[209]

Moreover, some early American state and local courts were not only authorized but required to remedy abuse. For example, under Illinois law, as interpreted by the state supreme court, circuit courts not only had to "know[] that the prisoners [in their county jails] are humanely treated" but also had "to make and enforce all orders necessary to that end."[210] Such humane treatment, the state supreme court explained, involved both "sanitary condition[s]" and even "reasonabl[e] comfort[]."[211]

Besides the broad authority granted to the courts, a number of state statutes delineated specific remedial powers or duties for their judges. For example, some states authorized or required judges to respond to the spread of illness within a detention facility.[212] Other states permitted court intervention in the event of a dispute over jail allowances.[213]

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[209] Commonwealth v. Mitchell, 66 Ky. (3 Bush) 39, 40 (1867) (emphasis omitted) (quoting KY. REV. STAT., ch. 91, art. II, § XI, *reprinted in* 2 THE REVISED STATUTES OF KENTUCKY 349 (Richard H. Stanton ed., Cincinnati, Robert Clarke & Co. 1867)). The Kentucky state constitution also authorized criminal proceedings against a jail keeper "for malfeasance or misfeasance in office, or willful neglect in the discharge of their official duties." McBride v. Commonwealth, 67 Ky. (4 Bush) 331, 332 (Ky. 1868) (emphasis omitted) (quoting KY. CONST. of 1850, art. VI, § 36, *reprinted in* 1 THE REVISED STATUTES OF KENTUCKY, *supra*, at 119, 138–39). Pursuant to this provision, the Kentucky Court of Appeals affirmed in 1868 the conviction of a jail keeper who had "permitt[ed] the jail to become so filthy as to endanger the comfort, health, and lives of the prisoners then in his custody." *Id.* at 331–32, 333.

[210] Stuart v. Bd. of Supervisors, 83 Ill. 341, 347 (1876).

[211] *Id.* at 346.

[212] *See, e.g.*, Act of Oct. 11, 1798, *reprinted in* ACTS AND LAWS OF THE STATE OF CONNECTICUT IN AMERICA 493, 494 (Hartford, Hudson & Goodwin 1805) [hereinafter LAWS OF THE STATE OF CONNECTICUT] ("Whenever the Prisoners in any Gaol in this State, shall be exposed to any prevailing malignant sickness, it shall be the duty of the Judge of the County Court, or two Justices of the quorum in the County where such sickness prevails, to cause such Prisoner or Prisoners to be removed at the expense of the State, to some place of safety."); Act of Feb. 21, 1785, § 8, *reprinted in* 1 THE PERPETUAL LAWS OF THE COMMONWEALTH OF MASSACHUSETTS 218, 221 (Boston, Isaiah Thomas & Ebenezer T. Andrews 1801) (instructing courts to secure facilites from "sickness and infection"); Act of Feb. 10, 1791, § 6, *reprinted in* THE LAWS OF THE STATE OF NEW-HAMPSHIRE 148, 150 (Exeter, C. Norris & Co. 1815) (same); Act of Apr. 10, 1799, ch. 29, § II, *reprinted in* AN ABRIDGMENT OF THE LAWS OF PENNSYLVANIA 199, 199 (John Purdon, Jr., ed., Philadelphia, Farrand, Hopkins, Zantzinger & Co. 1811) [hereinafter THE LAWS OF PENNSYLVANIA] (permitting judges of the state supreme court "to remove from any pestilential danger, the prisoners who may be confined" in Philadelphia).

[213] *See, e.g.*, Act of Feb. 21, 1785, § 9–10, *reprinted in* 1 THE PERPETUAL LAWS OF THE COMMONWEALTH OF MASSACHUSETTS, *supra* note 212, at 218, 222 (authorizing Massachusetts courts "to hear and finally . . . determine all such disputes" that arise when "the Gaoler or Prison-Keeper may demand an unreasonable compensation for articles provided for a prisoner"); Act of Feb. 10, 1791, § 9, *reprinted in* THE LAWS OF THE STATE OF NEW-HAMPSHIRE, *supra* note 212, at 148, 151 ("[I]f any prison-keeper shall defraud the prisoners of their allowance, or shall not afford them sustenance and accommodations equal to what such prison-keeper is paid therefor, any court on complaint of the prisoner and proof sufficient, shall and may amerce such prison-keeper in such sum as they may think just and reasonable, considering the nature and aggravation of his offence, not exceeding for one offence, five pounds.").

Ultimately, this history shows that the structure of early governments, at least at the state and local level, contemplated substantial judicial power over detention facilities, such that judges were meant to play a prominent role in ensuring that detention facilities were the secure, humane institutions they were designed to be. This history suggests that whatever separation of powers concerns existed, they did not stop the state legislatures from permitting and sometimes requiring state and local courts to intervene in prisons and jails, nor did they seem to prevent courts from actually remedying abuse and misconduct. And state and local judges were expected to have the expertise needed to do so.

(b) Inspecting and Monitoring. — In addition to remedying abuses, state and local judges in the young nation were legislatively authorized to proactively inspect and monitor prisons and jails. Their authority to do so provides further insight into historical understandings of the separation of powers and judicial expertise at the state and local levels.

The mandate to inspect and monitor detention facilities followed a similar mandate in eighteenth-century England. The Vagrant Act, passed in 1744, required two English justices to visit the houses of correction "twice, or oftener if need be, in every year; and to examine into the estate and management thereof, and to report" on the findings.[214] In particular, the justices were to "take effectual care that the houses of correction — be duly fitted up, furnished, and supplied with sufficient implements, materials, and furniture."[215] To supplement these visits, "an *experienced [s]urgeon or [a]pothecary* [was] appointed to every gaol" and had to supply judges with information on the "state of the health of the prisoners under [their] care."[216]

After the American Revolution, state legislatures enacted similar requirements. Beginning in 1785, Massachusetts mandated that, each term, county courts "inquire into . . . the condition and accommodation of the prisoners" in their county jails.[217] Over a decade later, Massachusetts reaffirmed the investigative role of the courts, directing them,

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[214] HOWARD, *supra* note 143, at 36 n.1 (quoting The Vagrant Act 1744, 17 Geo. 2 c. 5, § 31 (Eng.)). English magistrates were also authorized to inspect houses of correction under a statute enacted in 1782. *See* 22 Geo. 3 c. 64 (1782) (Eng.); *see also* George Fisher, *The Birth of the Prison Retold*, 104 YALE L.J. 1235, 1241 n.25 (1995).

[215] HOWARD, *supra* note 143, at 38 n.‡ (quoting The Vagrant Act 1744, 17 Geo. 2 c. 5, § 31 (Eng.)).

[216] *Id.* at 29 (citing Health of Prisoners Act 1774, 14 Geo. 3 c. 59, § 1 (Eng.)). As Pollock describes, by 1785, a justice of the peace in England wrote that "local justices" regularly received information about "[t]he state of" "a house of correction in Herefordshire," "and all abuses [were] obviated or speedily remedied." *See* Pollock, *supra* note 33, at 231 (quoting Letter from Sir Thomas Beevor, J. of the Peace, to Sec'y of the Bath Soc'y (Jan. 20, 1785), *in* THE SOC'Y, ESTABLISHED IN PHILA., FOR ALLEVIATING THE MISERIES OF PUB. PRISONS, EXTRACTS AND REMARKS ON THE SUBJECT OF PUNISHMENT AND REFORMATION OF CRIMINALS 7 (Philadelphia, Zacharia Poulson, Jr., 1790)).

[217] Act of Feb. 21, 1785, § 8, *reprinted in* 1 THE PERPETUAL LAWS OF THE COMMONWEALTH OF MASSACHUSETTS, *supra* note 212, at 218, 221.

"at every term, [to] inquire into the state of the house of correction, and examine the register and accounts of the Overseers and Masters, and make such further regulations and alterations in the treatment and government of the prisoners, as they shall judge necessary or proper."[218] New Hampshire similarly required county courts to look into the conditions of people detained in its county jails[219] and tasked judges with monitoring the state prison to "see that all laws and resolutions, by-laws and regulations made for the government and upholding of [the] prison [were] duly observed and executed."[220] An Arkansas statute declared it "the duty of the several county [circuit] courts within this territory to see that all prisoners, civil and criminal are humanely treated."[221] In Illinois, circuit courts were also required, "at each term, to enquire and see that all prisoners, civil and criminal, are humanely treated."[222] And a Kentucky statute required the county court to "inspect the [county] jail at least once a month."[223]

To adequately monitor penal institutions, many judges personally visited the facilities in their jurisdictions. Although states often limited public access to prisons and jails, judges were authorized to visit in many states,[224] and in some places, visits were required. For example,

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[218] Act of Feb. 27, 1798, §§ 1–2, *reprinted in* 2 THE LAWS OF THE COMMONWEALTH OF MASSACHUSETTS, FROM NOVEMBER 28, 1780 TO FEBRUARY 28, 1807, at 812, 812–13 (Boston, J.T. Buckingham 1807) [hereinafter THE LAWS OF THE COMMONWEALTH OF MASSACHUSETTS].

[219] Act of Feb. 10, 1791, § 6, *reprinted in* THE LAWS OF THE STATE OF NEW-HAMPSHIRE, *supra* note 212, at 148, 150.

[220] Act of June 19, 1812, § 5, *reprinted in* THE LAWS OF THE STATE OF NEW-HAMPSHIRE, *supra* note 212, at 143, 145.

[221] Act of Jan. 20, 1816, § 6, *reprinted in* LAWS OF ARKANSAS TERRITORY 270, 271 (J. Steele & J. M'Campbell eds., Little Rock, J. Steele 1835) (alteration in original).

[222] Act of Jan. 26, 1827, § 7, *reprinted in* THE PUBLIC AND GENERAL STATUTE LAWS OF THE STATE OF ILLINOIS 385, 386–87 (Chicago, Stephen F. Gale 1839) [hereinafter THE LAWS OF THE STATE OF ILLINOIS].

[223] Commonwealth v. Mitchell, 66 Ky. (3 Bush) 39, 40 (1867) (quoting KY. REV. STAT. ch. 91, art. II, § XI (1852), *reprinted in* 2 THE REVISED STATUTES OF KENTUCKY, *supra* note 209, at 339, 349). Pennsylvania also enacted a statute requiring judges to inspect county jails specifically: to monitor for the selling of "spirituous liquors" by jail keepers to people in custody. Act of Apr. 4, 1807, § V, *reprinted in* THE LAWS OF PENNSYLVANIA, *supra* note 212, at 199, 199–200.

[224] *See, e.g.*, Act of Apr. 3, 1801, ch. CXXI, § X, *reprinted in* 1 LAWS OF THE STATE OF NEW-YORK 414, 417 (Albany, Charles R. & George Webster 1802); Act of Dec. 19, 1816, No. 384, § 15, *reprinted in* A COMPILATION OF THE LAWS OF THE STATE OF GEORGIA, PASSED BY THE LEGISLATURE SINCE THE YEAR 1810 TO THE YEAR 1819, INCLUSIVE 659, 664 (Lucius Q.C. Lamar ed., Augusta, T. S. Hannon 1821) [hereinafter THE LAWS OF THE STATE OF GEORGIA]; An Act in Relation to the Officers and Discipline of the State Prison, §§ 28–29, *reprinted in* PUBLIC LAWS OF THE STATE OF RHODE-ISLAND AND PROVIDENCE PLANTATIONS 413, 418 (Providence, Knowles & Vose 1844); Act of Apr. 5, 1790, ch. MDXVI, § XVIII, *reprinted in* 13 THE STATUTES OF PENNSYLVANIA, *supra* note 204, at 511, 519; *see also* Pollock, *supra* note 33, at 237–38 (discussing visitation privileges for judges in New Jersey); HARRY ELMER BARNES, THE EVOLUTION OF PENOLOGY IN PENNSYLVANIA: A STUDY IN AMERICAN SOCIAL HISTORY 133 (1927) (quoting Act of April 23, 1829, Art. VII, 1828–29 Pa. Laws 341) (stating that Pennsylvania

a New Hampshire statute required judges to visit the state prison "annually, and as much oftener as they th[ought] proper."[225] In 1794, Caleb Lownes, an inspector of the Walnut Street Jail in Philadelphia,[226] wrote that "*Judges of the [Pennsylvania] Supreme Court, and . . . all the Judges of the several Courts of this City and County, as well as the Grand Juries*," visited the Walnut Street Jail four times per year.[227] And in the early 1800s, judges in New York conducted "semi-annual visits" to their state prison.[228]

In addition to personally visiting and assessing detention facilities, judges in many states appointed inspectors to conduct examinations. In 1789, the Pennsylvania legislature passed a law requiring justices of the peace to appoint inspectors for their respective jails.[229] The inspectors' duties included reporting official misconduct to the court and alerting judges of any needs for jail "repairs, alterations or additions."[230] When the nation's first penitentiary was established in Pennsylvania in 1790,[231] the justices, mayor, and aldermen of Philadelphia were authorized to appoint twelve inspectors.[232] Two of the inspectors were obligated by statute to "examine into and inspect the management" of the penitentiary each week,[233] but in practice, they conducted even more

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law allowed judges to visit prisons). *But see* Leverson, *supra* note 30, at 409 (finding that early penitentiaries were open to the public); G. DE BEAUMONT & A. DE TOCQUEVILLE, ON THE PENITENTIARY SYSTEM IN THE UNITED STATES, AND ITS APPLICATION IN FRANCE 30 (Francis Lieber trans., Philadelphia, Carey, Lea & Blanchard 1833) (observing that American prisons were generally open to visitors in the 1830s).

[225] Act of June 19, 1812, § 5, *reprinted in* THE LAWS OF THE STATE OF NEW-HAMPSHIRE, *supra* note 212, at 143, 145.

[226] BRADFORD, *supra* note 159, at 173; LeRoy B. DePuy, *The Walnut Street Prison: Pennsylvania's First Penitentiary*, 18 PA. HIST. 130, 142 (1951).

[227] LOWNES, *supra* note 6, at 11. As noted above, *supra* note 6, Pennsylvania's supreme court had both original and appellate jurisdiction at the time and was not yet a court of last resort.

[228] LEWIS, *supra* note 140, at 57; *see* Pollock, *supra* note 33, at 237 (noting that New York judges "did not sleep on th[eir] prerogative" to visit state prisons).

[229] Act of Mar. 27, 1789, ch. MCDIX, § VIII, *reprinted in* 13 THE STATUTES OF PENNSYLVANIA, *supra* note 204, at 243, 246 ("[T]he . . . mayor and aldermen of the said city . . . [and] the justices of the peace of the several counties in their general [courts of] quarter sessions of the peace . . . are hereby enjoined and required to appoint annually or oftener if necessary six suitable and discreet persons within . . . the respective counties as inspectors of the said prison . . . ." (third alteration in original)).

[230] *Id.* § VIII, at 246–47. This law was repealed in 1790. *See* Act of Apr. 5, 1790, § XXXVI, *reprinted in* 13 THE STATUTES OF PENNSYLVANIA, *supra* note 204, at 511, 527–28.

[231] Gutterman, *supra* note 2, at 862.

[232] Act of Apr. 5, 1790, § XXIII, *reprinted in* 13 THE STATUTES OF PENNSYLVANIA, *supra* note 204, at 511, 522. This statute was at least partially repealed in 1795. *See* Act of Apr. 18, 1795, § II, *reprinted in* THE LAWS OF PENNSYLVANIA, *supra* note 212, at 198, 198. In 1809, the legislature enacted a law requiring that inspectors of the state penitentiary in Philadelphia be elected by ballot by "the select and common councils of the city." Act of Feb. 23, 1809, § III, *reprinted in* THE LAWS OF PENNSYLVANIA, *supra* note 212, at 200, 200. But the 1809 law also mandated that the Philadelphia county court "appoint three discreet and suitable persons as auditors . . . [to] audit and settle the accounts of the inspectors of the prison." *Id.* § II.

[233] Act of Apr. 5, 1790, § XXIV, *reprinted in* 13 THE STATUTES OF PENNSYLVANIA, *supra* note 204, at 511, 522.

regular visits, with at least one of them attending the prison daily.[234] They were, "[b]y all accounts . . . 'unquestionably diligent in their business.'"[235]

Judges in other states also appointed inspectors. Delaware required "the supreme court of this state, or either of the judges in vacation . . . to nominate and appoint, under their hands and seals, five judicious, sober and discreet persons in each county . . . as a board of inspectors of the common prison or gaol of each county."[236] These inspectors, who were responsible for providing prisoners "clothing [and] bedding,"[237] were required to visit prisons or gaols weekly and submit quarterly reports to the court.[238] Similarly, Kentucky required its courts to appoint six inspectors,[239] and the city court of Richmond, Virginia, had to appoint twelve, two of whom had to visit the jail each week.[240] In Massachusetts, courts were obligated to appoint between three and five so-called "Overseers," who had the "power to see that the rules appointed by the said Court, for the government of the house, and the persons therein confined, be duly observed; and also to examine the accounts of the keeper, with respect to the earnings of the prisoners, and the expense of the institution."[241] In Maryland, grand jurors were responsible for visiting and inspecting the state penitentiary[242] and county jails and reporting their findings to the court.[243] Specifically, Maryland law

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[234] Shapiro, *supra* note 3, at 561–62.

[235] *Id.* (quoting TEETERS & SHEARER, *supra* note 3, at 52).

[236] Act of Jan. 25, 1805, ch. CLXXXII, § 1, *reprinted in* LAWS OF THE STATE OF DELAWARE 392, 393 (Dover, Wootten & Allee 1805); *see* Pollock, *supra* note 33, at 239.

[237] Act of Jan. 25, 1805, ch. CLXXXII, § 4, *reprinted in* LAWS OF THE STATE OF DELAWARE, *supra* note 236, at 392, 394–95; *see* Pollock, *supra* note 33, at 239–40. When this Act was passed, Delaware's so-called supreme court had trial jurisdiction and was not a court of last resort. *See* Henry R. Horsey & William Duffy, *The Supreme Court Until 1951: The "Leftover Judge" System*, DEL. CTS.: JUD. BRANCH, https://courts.delaware.gov/supreme/history/history2.aspx [https://perma.cc/GC3V-WR7C].

[238] Act of Jan. 25, 1805, ch. CLXXXII, § 2, *reprinted in* LAWS OF THE STATE OF DELAWARE, *supra* note 236, at 392, 393; *see* Pollock, *supra* note 33, at 240.

[239] Act of Dec. 20, 1800, § 38, *reprinted in* A COLLECTION OF ALL THE PUBLIC AND PERMANENT ACTS OF THE GENERAL ASSEMBLY OF KENTUCKY WHICH ARE NOW IN FORCE 345, 357–58 (Harry Toulmin ed., Frankfort, William Hunter 1802) [hereinafter ACTS OF THE GENERAL ASSEMBLY OF KENTUCKY].

[240] Act of Dec. 15, 1796, ch. CC, §§ XXXVIII–XXXIX, *reprinted in* A COLLECTION OF ALL SUCH ACTS OF THE GENERAL ASSEMBLY OF VIRGINIA, OF A PUBLIC AND PERMANENT NATURE, AS ARE NOW IN FORCE 355, 361 (Richmond, Samuel Pleasants, Jun. & Henry Pace 1803) [hereinafter ACTS OF THE GENERAL ASSEMBLY OF VIRGINIA].

[241] Act of Feb. 27, 1798, § 1, *reprinted in* 2 THE LAWS OF THE COMMONWEALTH OF MASSACHUSETTS, *supra* note 218, at 812, 812–13. Judges also set the compensation for the Overseers. *Id.* at 813.

[242] Act of 1809, ch. 138, § 46, *reprinted in* INDEX TO THE LAWS AND RESOLUTIONS OF THE STATE OF MARYLAND, FROM 1800 TO 1813, INCLUSIVE (Annapolis, J. Green 1815) (noting that grand jurors are responsible for "visit[ing] and examin[ing]" the state penitentiary each term and "inquir[ing] into the conduct of the keeper").

[243] Act of 1797, ch. 17, § 8, *reprinted in* THE LAW OF THE STATE OF MARYLAND, *supra* note 208, at 2093, 2095; MD. CODE, art. LI, § 22, *reprinted in* 2 THE MARYLAND CODE 872 (John Prentiss Poe ed., Baltimore, King Bros. 1888).

required grand jurors to visit jails "once in every term, and to inspect the several apartments thereof, and to inquire into the treatment of the several prisoners therein confined, and into their health and situation, and to present, or otherwise report to the court such facts and circumstances."[244] In Arkansas,[245] Vermont,[246] and Illinois,[247] grand jurors were also responsible for visiting and inspecting the county jails and supplying the court with their findings. The Arkansas and Illinois jurors were specifically tasked with examining "the condition" of the jail and "the treatment of the prisoners."[248] Finally, in North Carolina, county courts were required to appoint a "Treasurer of the public buildings," whose responsibilities included "hear[ing] the complaints of persons confined respecting their diet and treatment" and "examin[ing] into the conduct and character of the Jailer, and mak[ing] information thereof to the court or grand jury of the county or district, as circumstances may require."[249]

Inspectors' reports were sometimes highly critical of conditions of confinement, mandating judicial intervention. In 1876, an Illinois grand jury reported that its county jail was "so ingeniously constructed as to effectually exclude both the circulation of fresh air and sunshine," such that it "almost stifle[d] the breath of a person just entering it from the fresh air outside," and was "so unhealthy that not infrequently robust and healthy persons, after a short confinement in the jail, ha[d] to be removed on account of sickness contracted therein."[250] The report also noted that the jail contained "no beds" for those detained, "except bunks and blankets," and "in hot weather, the rooms of the jail would absolutely swarm with bugs and other loathsome vermin, were it not for the incessant efforts of the janitor."[251] Moreover, the report found that the facility violated a state statute requiring the separation of "debtors and witnesses" and "prisoners committed for crimes," "male and female prisoners," "minors" and "notorious offenders," and "persons charged with or convicted of offenses not infamous" and "those charged with or

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[244] Act of 1797, ch. 17, § 8, *reprinted in* THE LAW OF THE STATE OF MARYLAND, *supra* note 208, at 2093, 2095.

[245] Act of Mar. 3, 1838, ch. 93, § 8, *reprinted in* DIGEST OF THE STATUTES OF ARKANSAS 624, 625 (Josiah Gould ed., Little Rock, Johnson & Yerkes 1858).

[246] Act of Mar. 9, 1797, ch. XXVIII, § 2, *reprinted in* LAWS OF THE STATE OF VERMONT, DIGESTED AND COMPILED 280, 280 (Randolph, Sereno Wright 1808) [hereinafter LAWS OF THE STATE OF VERMONT].

[247] Act of Jan. 26, 1827, § 7, *reprinted in* THE LAWS OF THE STATE OF ILLINOIS, *supra* note 222, at 385, 386.

[248] *Id.*; Act of Mar. 3, 1838, ch. 93, § 8, *reprinted in* DIGEST OF THE STATUTES OF ARKANSAS, *supra* note 245, at 624, 625.

[249] Act of Nov. 2, 1795, ch. 4, § 2, *reprinted in* 2 THE PUBLIC ACTS OF THE GENERAL ASSEMBLY OF NORTH-CAROLINA 71, 72 (Francois-Xavier Martin ed., Newbern, Martin & Ogden 1804).

[250] Stuart v. Bd. of Supervisors, 83 Ill. 341, 343 (1876).

[251] *Id.*

convicted of infamous crimes."[252] In light of these conditions, the grand jury authoring the report stated "unhesitatingly . . . that the jail [wa]s wholly unfit to confine a human being in even for one night, and that it is absolutely inhuman to confine any person in the . . . county jail for any length of time."[253]

After reviewing the report, the court held that "[t]he law has provided the most ample and obvious means to secure prisoners from oppression and wrong" by "mak[ing] it the duty of the grand jury . . . to examine and report to the court" on their conditions and requiring "the circuit court . . . to inquire into the condition[s] . . . and to see that all prisoners . . . are humanely treated . . . [and] to make all necessary orders in the premises against the keeper of the jail, and to enforce the same."[254] Illinois's system of inspection and monitoring, then, prompted judicial intervention in the face of unacceptable conditions.

Finally, at least two states required that judges receive reports directly from prison or jail keepers on jail finances. New Hampshire's state prison warden, although appointed by the governor, was required to provide the court with an account of prison finances at the start of every judicial session.[255] Similarly, in Massachusetts, jail keepers had to present their financial accounts to the county courts "annually, and also whenever [t]he [keepers] shall by the[courts] be thereunto directed."[256]

The judiciary's responsibility over inspection and monitoring shows that prison administration in the eighteenth and nineteenth centuries was not cordoned off from the courts due to concerns about the separation of powers and judicial competence. To the contrary, state and local judges had a significant role in overseeing the proper functioning of detention facilities.

(c) Setting Rules, Policies, and Practices. — As John Howard and Benjamin Rush had hoped, many states also authorized judges to set or approve prison and jail rules and policies. This practice followed the example set by the chief magistrate of Manchester, England, Thomas Butterworth Bayley. After finding his local jail "much crowded, and extremely dirty and offensive,"[257] Bayley not only ordered it be rebuilt but also helped implement broad changes to the jail's daily

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[252] *Id.* at 346.

[253] *Id.* at 343–44.

[254] *Id.* at 347.

[255] Act of June 19, 1812, § 3, *reprinted in* THE LAWS OF THE STATE OF NEW-HAMPSHIRE, *supra* note 212, at 143, 144.

[256] Act of Mar. 26, 1788, § 5, *reprinted in* 1 THE LAWS OF THE COMMONWEALTH OF MASSACHUSETTS, *supra* note 218, at 411, 413.

[257] SAMUEL CLOWES JR. & THOMAS BUTTERWORTH BAYLEY, THE REPORT OF SAMUEL CLOWES THE YOUNGER AND THOMAS BUTTERWORTH BAYLEY ESQUIRES OF THE STATE OF THE HOUSE OF CORRECTION AT MANCHESTER 1 (Manchester, J. Harrop 1783); *see* Fisher, *supra* note 214, at 1259.

operations.[258] A new set of prison rules, likely written by Bayley, governed the behavior of officers, cleanliness, diet, and discipline within the new facility.[259] Indeed, "Bayley personally supervised every aspect of . . . punishment" in his jurisdiction.[260]

Many American states adopted a similar model, delegating to courts broad power over rules and regulations for detention facilities. North Carolina, for example, granted its courts the "full power and authority . . . from time to time to order and establish such rules and regulations . . . for the government and management of the prisons as may be conducive to the interest of the public, and the security and comfort of the persons confined."[261] Under a Massachusetts statute passed in 1802, county courts had to "from time to time make and establish all necessary rules and regulations" for the county jails, including rules related to prison labor, the "procurement and preservation of . . . materials," and financial accounts.[262] A Kentucky statute stated that "it shall be the duty of the county court, from time to time, to prescribe rules for the government and cleanliness of the jail and the comfort and treatment of prisoners."[263] In New York, judges joined a group of state authorities who together were tasked with developing the regulations that governed the state penitentiaries.[264] And in Pennsylvania, inspectors were required to get approval from a number of officials, including "two . . . judges of the supreme court, or two . . . judges of the court of common pleas of Philadelphia county," before enacting "rules and regulations" in the state prison.[265]

In addition to granting courts general rulemaking authority, some states permitted or required courts to establish specific kinds of policies. For example, states frequently tasked courts with setting the physical

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[258] Fisher, *supra* note 214, at 1260–63. For a general discussion of Thomas Butterworth Bayley's jail reform efforts, see *id.* at 1258–67.

[259] *See id.* at 1263.

[260] *Id.* at 1241.

[261] Act of Nov. 2, 1795, ch. 4, § 1, *reprinted in* 2 THE PUBLIC ACTS OF THE GENERAL ASSEMBLY OF NORTH-CAROLINA, *supra* note 249, at 71, 72.

[262] Act of June 23, 1802, § 1, *reprinted in* 3 THE LAWS OF THE COMMONWEALTH OF MASSACHUSETTS, *supra* note 218, at 78, 78.

[263] Commonwealth v. Mitchell, 66 Ky. (3 Bush) 39, 40 (1867) (quoting KY. REV. STAT., ch. 91, art. II, § 11, *reprinted in* 2 THE REVISED STATUTES OF KENTUCKY 349 (Richard H. Stanton ed., Cincinnati, Robert Clarke & Co. 1867)).

[264] Act of Mar. 26, 1796, ch. 30, *reprinted in* 3 LAWS OF THE STATE OF NEW YORK 669, 672 (Albany, Weed, Parsons & Co. 1887) (empowering inspectors along "with the justices of the supreme court or any two of them . . . to make such rules as they shall deem proper for the government of the convicts confined in each of the said prisons respectively, their diet cloathing and maintenance, and for all other the interior regulations of the said respective prisons not inconsistent with the laws and constitution of this State and the intention of this act").

[265] Act of Sept. 23, 1791, § XVIII, *reprinted in* THE LAWS OF PENNSYLVANIA, *supra* note 212, at 197, 197. As noted above, Pennsylvania's supreme court had both original and appellate jurisdiction and was not a court of last resort. *Supra* note 6.

boundaries within which people in jails had to remain.[266] The Virginia and New Hampshire state legislatures also authorized courts to oversee jail allowances.[267]

Some state legislatures also tasked judges with selecting punishments for certain rule violations. For example, in Kentucky, courts were responsible for punishing jail detainees for offenses that the "keeper [was] not authorized to punish, or for which he . . . [thought] the said punishment [was] not sufficient, by reason of the enormity of the offence."[268] In Pennsylvania, the court set punishments for escapes and attempted escapes.[269] Moreover, certain kinds of sanctions, like long-term solitary confinement, could be imposed in Pennsylvania only by the courts.[270]

Ultimately, by setting rules, policies, and punishments, state and local courts held vast power over prison and jail administration. This power suggests that early state and local governments did not view the separation of powers as prohibiting state and local judges from interceding in the inner workings of prisons and jails. To the contrary, judges were granted the power, and expected to have the expertise, to do so.

(d) Appointing and Removing Prison and Jail Administrators. — In eighteenth-century England, judges on the King's Bench made

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[266] *See, e.g.*, Act of Feb. 14, 1791, *reprinted in* THE LAWS OF THE STATE OF NEW-HAMPSHIRE, *supra* note 212, at 152, 152; Act of Dec. 3, 1792, ch. LXVII, § XV, *reprinted in* ACTS OF THE GENERAL ASSEMBLY OF VIRGINIA, *supra* note 240, at 83, 86; Act of Feb. 14, 1799, § 100, *reprinted in* LAWS OF THE STATE OF NEW JERSEY 355, 365 (William Paterson ed., New Brunswick, Abraham Blauvelt 1800); Act of Dec. 20, 1800, § 6, *reprinted in* ACTS OF THE GENERAL ASSEMBLY OF KENTUCKY, *supra* note 239, at 168, 169; Act of Mar. 30, 1801, ch. XCI, § V, *reprinted in* 1 LAWS OF THE STATE OF NEW-YORK, *supra* note 224, at 358, 359–60; *see also* Act of Mar. 9, 1797, ch. XXVIII, § 9, *reprinted in* LAWS OF THE STATE OF VERMONT, *supra* note 246, at 280, 283 (requiring the "several county courts, in their respective counties, to set out yards, for the liberty of the prisoners, to their respective jails").

[267] Act of Dec. 12, 1792, ch. LXVI, § XVII, *reprinted in* ACTS OF THE GENERAL ASSEMBLY OF VIRGINIA, *supra* note 240, at 72, 76; *see* Act of Dec. 20, 1796, ch. CCXIII, § I, *reprinted in* ACTS OF THE GENERAL ASSEMBLY OF VIRGINIA, *supra* note 240, at 368, 369 ("[T]he several district courts, shall be, and they are hereby empowered at each session, to order and direct such allowance to be made for the prisoners confined in the jail of such district . . . provided the allowance so made, shall not exceed thirty-four cents *per* day, for each prisoner."); Act of Feb. 10, 1791, § 8, *reprinted in* THE LAWS OF THE STATE OF NEW-HAMPSHIRE, *supra* note 212, at 148, 151 ("[T]he prison-keeper shall furnish and provide each prisoner committed for debt, or for any crime, diet and sustenance such as the justices of the sessions may order, for which the prisoner if he be committed for debt, before he be discharged, shall pay at the rate of five shillings per week, or such sum as the court of general sessions of the peace shall order, and in case the prisoner be committed for any crime, three shillings per week, or such sum as the said court shall order, and the prison-keeper shall furnish them with diet in that proportion as to quality."). Courts in Pennsylvania also had to provide "allowance and provision for fuel and blankets" to indigent debtors. Act of Apr. 4, 1792, § V, *reprinted in* THE LAWS OF PENNSYLVANIA, *supra* note 212, at 197, 198.

[268] Act of Dec. 20, 1800, § 36, *reprinted in* ACTS OF THE GENERAL ASSEMBLY OF KENTUCKY, *supra* note 239, at 345, 357. In such a case, the court could "order such offences to be punished by moderate whipping, or repeated whippings, not exceeding thirteen lashes each, or by close confinement in the said solitary cells with bread and water only for sustenance, for any time not exceeding six days, or by all the said punishments." *Id.*

[269] *See* BARNES, *supra* note 224, at 131.

[270] *See* Shapiro, *supra* note 3, at 595.

recommendations to the king regarding prison leadership.[271] In the young American states, some courts enjoyed even greater power over prison personnel. Judges in several states appointed prison and jail administrators and set their salaries. Occasionally, judges served as prison and jail administrators themselves. And in some jurisdictions, judges were authorized or required to remove or punish prison and jail personnel.

Take, first, Pennsylvania. In 1790, when Pennsylvania opened the country's first penitentiary at the Walnut Street Jail in Philadelphia,[272] the state legislature required that two justices of the peace in the county of Philadelphia, along with members of the executive and legislative branches, appoint a prison keeper.[273] The keeper was permitted to appoint deputies and assistants only with the approval of the justices, mayor, and aldermen.[274] In the mid-1820s, the legislature passed a law requiring three of the nine board members governing one of the state's two new penitentiaries to be chosen by county justices.[275] Three years later, the legislature amended the law to require that each of the new penitentiaries be governed by a board of five members, all of whom would be appointed by the Pennsylvania Supreme Court.[276]

Many other courts also appointed or approved the heads of detention facilities and, in some cases, guards. In Maryland, the judiciary was in charge of "appoint[ing] and employ[ing] a fit and proper person or persons to take care of . . . criminals."[277] In Massachusetts and Kentucky, county judges appointed jail keepers,[278] and the Delaware Levy Court and court of appeal in each county helped appoint jail commissioners.[279] In Virginia, although public jail keepers were appointed by the governor and council, the choice had to be "amenable to the Judges of the District Court."[280] Similarly, in Pennsylvania, sheriffs had to get approval from county courts for the appointment of keepers overseeing certain county

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[271] *See* Pollock, *supra* note 33, at 254; New Marshall of the King's Bench Prison (1768) 98 Eng. Rep. 138, 138; 4 Burr. 2183, 2183–84 (KB).

[272] Gutterman, *supra* note 2, at 862.

[273] Act of Apr. 5, 1790, ch. MDXVI, § XXII (repealed 1795), *reprinted in* 13 THE STATUTES OF PENNSYLVANIA, *supra* note 204, at 511, 521.

[274] *Id.*

[275] *See* BARNES, *supra* note 224, at 124.

[276] *Id.*

[277] Act of Dec. 25, 1789, ch. XLIV, § X, *reprinted in* LAWS OF MARYLAND (Annapolis, Frederick Green 1790).

[278] Act of Mar. 26, 1788, § 2, *reprinted in* 1 THE LAWS OF THE COMMONWEALTH OF MASSACHUSETTS, *supra* note 218, at 411, 411; Act of Dec. 19, 1799, *reprinted in* ACTS OF THE GENERAL ASSEMBLY OF KENTUCKY, *supra* note 239, at 42, 42.

[279] Act of Feb. 5, 1827, § 6, *reprinted in* LAWS OF THE STATE OF DELAWARE 447, 448–49 (Wilmington, R. Porter & Son rev. ed. 1829).

[280] Act of Dec. 12, 1792, ch. LXVI, § XVII, *reprinted in* ACTS OF THE GENERAL ASSEMBLY OF VIRGINIA, *supra* note 240, at 72, 76.

facilities.[281] And in Kentucky, courts retained some power over the hiring of jail guards.[282]

And in a disagreement over who had authority over a county jail under New Jersey law, the state supreme court[283] considered whether the case presented "a proper occasion for the exercise of the power of the court."[284] It answered in the affirmative, emphasizing that historically, court intervention was especially important in cases involving the "right to execute a [public] office" when "reasons of public policy" were concerned.[285] The court explained that "[j]ails and their custody are peculiarly a public concern."[286] Since "[t]here [was] no other adequate specific remedy for the wrong," the court decided to apply "[a] prompt and efficient remedy."[287]

In certain states, judges who appointed prison or jail authorities also set their salaries. For example, in Pennsylvania, judges helped determine the salaries for keepers of facilities holding people sentenced to hard labor.[288] And Virginia and Massachusetts judges determined the salaries of jail keepers.[289]

On occasion, judges served as jail or prison authorities themselves. In Georgia, justices of the inferior courts in the counties of Pulaski and Jones were appointed commissioners of their jails in 1811 and 1816, respectively.[290] And in Vermont, if the state prison board had a vacancy while the legislature was in recess, the rest of the board could "call to

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281 Act of Apr. 5, 1790, ch. MDXVI, § XXVIII, *reprinted in* 13 THE STATUTES OF PENNSYLVANIA, *supra* note 204, at 511, 524 (requiring approval from county courts for the appointment of keepers overseeing facilities that housed people sentenced to hard labor).

282 Act of Feb. 12, 1798, § 24, *reprinted in* ACTS OF THE GENERAL ASSEMBLY OF KENTUCKY, *supra* note 239, at 174, 177 ("Where a jail is insufficient, the district court or a judge thereof in vacation may order the jailor to impress or hire guards . . . .").

283 In the nineteenth century, New Jersey's so-called supreme court was not the state's highest appellate court. *See NJ Supreme Court History*, N.J. CTS., https://www.njcourts.gov/public/museum/nj-supreme-court-history [https://perma.cc/9YKE-WCKH]. The New Jersey supreme court had jurisdiction over "original common law cases" and appeals "from the Courts of Common Pleas," among other cases. *Judiciary Branch*, STATE OF N.J. DEP'T OF STATE, https://nj.gov/state/archives/catjudiciary.html [https://perma.cc/VLB7-YBLE].

284 State *ex rel.* Bd. of Chosen Freeholders v. Layton, 28 N.J.L. 244, 244–45, 250 (1860).

285 *Id.* at 250 (quoting Rex v. Barker (1762) 97 Eng. Rep. 823, 824; 3 Burr. 1265, 1266 (KB)).

286 *Id.*

287 *Id.*

288 Act of Apr. 5, 1790, ch. MDXVI, § XXVIII, *reprinted in* 13 THE STATUTES OF PENNSYLVANIA, *supra* note 204, at 511, 524.

289 Act of Dec. 12, 1792, ch. LXVI, § XVII, *reprinted in* ACTS OF THE GENERAL ASSEMBLY OF VIRGINIA, *supra* note 240, at 72, 76 ("[T]he Judges of the District Court . . . are hereby authorised and required, from time to time . . . to fix what shall be paid to the keeper thereof for his trouble, as the said Judges shall think reasonable . . . ."); Act of Feb. 27, 1798, § 1, *reprinted in* 2 THE LAWS OF THE COMMONWEALTH OF MASSACHUSETTS, *supra* note 218, at 812, 813 ("And the Overseers shall receive, out of the wages of the prisoners, such reasonable compensation as the Court of Sessions shall allow.").

290 Act of Dec. 13, 1811, No. 124, § 1, *reprinted in* THE LAWS OF THE STATE OF GEORGIA, *supra* note 224, at 188, 188; Act of Dec. 18, 1816, No. 155, *reprinted in* THE LAWS OF THE STATE OF GEORGIA, *supra* note 224, at 220, 220.

their assistance any of the judges of the county court for the county of Windsor" where the prison was located to serve as a board member until the vacancy was filled.[291]

In some states, judges also had the power to remove jail officials. In 1786, the Pennsylvania legislature empowered the county courts "either ex-officio or upon information against . . . [a county jail] keeper for partiality or cruelty to call before them such keeper, together with the material witnesses and inquire into his conduct."[292] If a keeper "appear[ed] . . . guilty of gross partiality or cruelty," the county court was authorized "to suspend or remove him."[293] Judges of the Supreme Court of Pennsylvania[294] were also permitted, "either on their own motion or on complaint made by any other," to "take original cognizance of the misbehaviours of any keeper and remove him from office if they s[aw] cause."[295] Similarly, a Rhode Island statute authorized courts to

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[291] Act of Nov. 7, 1809, ch. XXIX, No. 3, § 6, *reprinted in* 3 LAWS OF THE STATE OF VERMONT 68, 69 (Rutland, Fay, Davison & Burt 1817). In Vermont, board members were referred to as "visitors" and were appointed by the legislature. Act of Nov. 9, 1808, ch. XXIX, No. 1, § 3, *reprinted in* 3 LAWS OF THE STATE OF VERMONT, *supra*, at 61, 62.

[292] Act of Sept. 15, 1786, ch. MCCXLI, § IX, *reprinted in* 12 THE STATUTES OF PENNSYLVANIA, *supra* note 204, at 280, 285–86. A nearly identical law was passed in 1790. *See* Act of Apr. 5, 1790, ch. MDXVI, § XXIX, *reprinted in* 13 THE STATUTES OF PENNSYLVANIA, *supra* note 204, at 511, 524–25.

[293] Act of Sept. 15, 1786, ch. MCCXLI, § IX, *reprinted in* 12 THE STATUTES OF PENNSYLVANIA, *supra* note 204, at 280, 286. Over a decade earlier, Virginia's 1776 Committee of Revisors had proposed a similar bill, likely drafted by Thomas Jefferson, which would have given "[t]he court of the county" the:

> power, either ex officio, or on information against any such keeper for partiality or cruelty, to call before them such keeper . . . and enquire into his conduct; and if it shall appear that he has been guilty of gross partiality or cruelty, they shall . . . represent the matter [to the General Court] . . . for their final determination.

Pollock, *supra* note 33, at 224–25 (alterations in original) (quoting A Bill for the Employment, Government and Support of Malefactors Condemned to Labour for the Commonwealth [hereinafter Bill No. 68], *reprinted in* 2 THE PAPERS OF THOMAS JEFFERSON 513, 514 (Julian P. Boyd ed., 1950)). The proposed bill further contemplated that, "if the cruelty of such keeper shall require it," the court would have the "power to suspend him and to appoint another to exercise his office until the General Court shall take order therein." *Id.* (quoting Bill No. 68, *reprinted in* 2 THE PAPERS OF THOMAS JEFFERSON, *supra*, at 514). And, the bill added, "[t]he General Court may nevertheless either on their own motion, or on complaint made by any other, take original cognizance of the misbehaviour of any keeper and remove him from his office if they see cause." *Id.* (quoting Bill No. 68, *reprinted in* 2 THE PAPERS OF THOMAS JEFFERSON, *supra*, at 514–15). Ultimately, in 1779, the Virginia legislature passed an act providing that "the Judges of the General Court shall have the direction of the public jail," which had previously been overseen by the "Governor and Council." *Id.* at 227 (quoting An Act to Empower the Judges of the General Court to Superintend and Regulate the Public Jail, ch. XIX, §§ 1–2, 1779 Va. Acts 111, 111). And the Virginia Revisors' bill, including the proposed judicial oversight provisions, likely influenced the passage of Pennsylvania's similar bill in 1786. *See id.* at 229–30. For further discussion of the differences between the proposed Virginia bill and the bill passed in Pennsylvania, see *id.* at 229–31.

[294] As noted above, this court had both original and appellate jurisdiction in the late eighteenth century and was not a court of last resort. *Supra* note 6.

[295] Act of Sept. 15, 1786, ch. MCCXLI, § IX, *reprinted in* 12 THE STATUTES OF PENNSYLVANIA, *supra* note 204, at 280, 286.

"remove any . . . jailer for misdemeanor[s] in office."[296] And a Delaware statute authorized judges to mandate that a sheriff remove a jailer if the court's appointed prison inspectors found the jailer to be neglectful.[297] A judge could fine the sheriff if he did not comply.[298]

Several states also empowered courts to punish prison and jail authorities without removing them. A North Carolina act passed in 1795 stated:

> [I]f the keeper of a public gaol shall do or cause to be done any wrong or injury to the prisoners committed to his custody contrary to the intentions of this act, he shall not only pay treble damages to the person injured, but such fine, not exceeding twenty pounds for each offence, in addition thereto, as the court of the county where the prisoner is confined, shall think fit to impose.[299]

In 1805, Connecticut passed a similar law.[300] And in Pennsylvania, courts could suspend jail officials for misconduct. In *Lutz's Case*,[301] a district attorney in Pennsylvania accused the warden of the Berks County prison of "gross partiality."[302] The court determined that, under state law, it was "the duty of the court to investigate and determine[] whether the warden ha[d] been guilty."[303] The court underscored that judges "personally, by virtue of their office, [we]re to question, examine and inquire, of keeper and witnesses, and decide whether the keeper ha[d] been guilty of partiality."[304] The court found the warden guilty and suspended him for sixty days.[305]

Ultimately, by appointing, approving, punishing, removing, and serving as prison and jail authorities, state and local courts held extensive power over the nation's first prison and jail officials. Once again,

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296 An Act in Relation to Sheriffs, Deputy Sheriffs and Jailers § 13, *reprinted in* PUBLIC LAWS OF THE STATE OF RHODE-ISLAND AND PROVIDENCE PLANTATIONS, *supra* note 224, at 77, 80.

297 Act of Jan. 25, 1805, ch. CLXXXII, § 3, *reprinted in* LAWS OF THE STATE OF DELAWARE, *supra* note 236, at 392, 393; *see* Pollock, *supra* note 33, at 239.

298 Act of Jan. 25, 1805, ch. CLXXXII, § 3, *reprinted in* LAWS OF THE STATE OF DELAWARE, *supra* note 236, at 392, 393; *see* Pollock, *supra* note 33, at 239.

299 Act of Nov. 2, 1795, ch. 4, § VIII, *reprinted in* 2 THE PUBLIC ACTS OF THE GENERAL ASSEMBLY OF NORTH-CAROLINA, *supra* note 249, at 71, 73.

300 *See* An Act for Regulating Gaols and Gaolers ¶ 9, *reprinted in* LAWS OF THE STATE OF CONNECTICUT, *supra* note 212, at 220, 221 ("[I]f any Keeper of a common Gaol shall do, or cause to be done to any Prisoner committed to his Custody, any Wrong or Injury contrary to the true Intent of this Act, he shall pay treble Damages to the Party grieved; also such Fine as the County Court of the County wherein the Offence is committed, upon Information or Complaint to them made, shall (on considering all circumstances) think fit to impose upon him.").

301 8 Pa. C. 133 (Ct. of Quarter Sess. 1890).

302 *See id.* at 134.

303 *Id.*

304 *Id.* at 135.

305 *Id.* at 136. In *Pember's Case*, 1 Whart. 439 (Pa. 1836), the Pennsylvania supreme court underscored that prison keepers could be punished if they mistreated those in their custody. *Id.* at 443–44. According to the court, "[i]f the keepers misbehave, by using undue rigour or imposing hardships or severities on the prisoner not authorised by law, they may be punished." *Id.*

this history provides a clue that early notions of the separation of powers and judicial expertise were understood to accommodate state and local courts' vast powers over prisons and jails.

(e) Building, Maintenance, and Repairs of Detention Facilities. — Finally, the nation's early state and local courts frequently oversaw the building and repair of jail facilities. State legislatures often permitted or required courts to construct and care for jails and, in some cases, to levy taxes on citizens in order to pay the costs. Some states also penalized judges who failed to maintain adequate jails.

At least six states authorized or required judges to oversee or approve the construction of new jail facilities. Under a 1785 Massachusetts statute, judges were required "to direct and order the building . . . [of] gaols, according to their discretion."[306] Virginia and New Hampshire adopted similar statutes,[307] and Virginia courts were authorized to purchase two acres of land for the new buildings.[308] In Maryland, judges were also tasked with "procur[ing] a proper place or places for the confinement of . . . criminals."[309] In 1815, Georgia enacted a law permitting the judges in Richmond County "to sell and dispose of [a] jail . . . and to erect and build" another in a more "fit and proper place."[310] And in Philadelphia, although judges did not directly oversee the purchase and building of jails, they played a role in approving county appropriations for doing so.[311]

In addition to purchasing land and building facilities, courts were also responsible for jail upkeep. Kentucky, Massachusetts, New Hampshire, and Virginia required judges to maintain and repair their respective jails.[312] In North Carolina, courts were authorized to appoint county treasurers to contract for "alterations, repairs or improvements"

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[306] Act of Feb. 21, 1785, § 1, *reprinted in* 1 THE PERPETUAL LAWS OF THE COMMONWEALTH OF MASSACHUSETTS, *supra* note 212, at 218, 218.

[307] *See* Act of Dec. 3, 1792, ch. LXVII, § XIII, *reprinted in* ACTS OF THE GENERAL ASSEMBLY OF VIRGINIA, *supra* note 240, at 83, 86; Act of Feb. 10, 1791, § 6, *reprinted in* THE LAWS OF THE STATE OF NEW-HAMPSHIRE, *supra* note 212, at 148, 150.

[308] Act of Dec. 3, 1792, ch. LXVII, § XIII, *reprinted in* ACTS OF THE GENERAL ASSEMBLY OF VIRGINIA, *supra* note 240, at 83, 86.

[309] Act of Dec. 25, 1789, ch. XLIV, § X, *reprinted in* LAWS OF MARYLAND, *supra* note 277.

[310] Act of Dec. 16, 1815, No. 153, § 1, *reprinted in* THE LAWS OF THE STATE OF GEORGIA, *supra* note 224, at 217, 217.

[311] *See* Act of Feb. 26, 1773, ch. DCLXXIII, §§ I, III, *reprinted in* 8 THE STATUTES OF PENNSYLVANIA, *supra* note 204, at 300, 300–01. An 1807 statute also required county courts to approve the purchase of land and the construction of "additional buildings as may be necessary" to ensure "sufficient room or conveniences in and about the common gaol." Act of Apr. 4, 1807, § IV, *reprinted in* THE LAWS OF PENNSYLVANIA, *supra* note 212, at 199, 199.

[312] *See* Act of Dec. 20, 1800, § 5, *reprinted in* ACTS OF THE GENERAL ASSEMBLY OF KENTUCKY, *supra* note 239, at 168, 169; Act of Feb. 21, 1785, § 1, *reprinted in* 1 THE PERPETUAL LAWS OF THE COMMONWEALTH OF MASSACHUSETTS, *supra* note 212, at 218, 218; Act of Feb. 10, 1791, § 6, *reprinted in* THE LAWS OF THE STATE OF NEW-HAMPSHIRE, *supra* note 212, at 148, 150; Act of Dec. 3, 1792, ch. LXVII, § XIII, *reprinted in* ACTS OF THE GENERAL ASSEMBLY OF VIRGINIA, *supra* note 240, at 83, 86.

to county jails.[313] And in Vermont, a sheriff could conduct repairs only "by and with the advice, and under the direction of one or more of the judges of the county court," and all money spent on repairs had to be reported to the court.[314] Judges in Vermont could also order repairs of county jails, which they did in 1851,[315] after reports that a county jail was "very much out of repair, insecure, and wholly unfit for the purposes of a prison."[316] The judges "appointed . . . agents to superintend the making of such repairs and improvements under the direction of said court."[317] As the Supreme Court of Vermont later reported, "[a]ll the work was done under the frequent inspection and direction of the county judges."[318]

In order to build and maintain jail facilities, some courts were permitted to tax county residents. In Massachusetts, judges were empowered "from time to time, [to] assess the polls and estates within their several counties, in such sums as may be necessary to erect and keep in repair a good and sufficient gaol."[319] North Carolina and Connecticut also enacted laws authorizing courts to tax county residents for the "building, repairing and furnishing" of their jails.[320] Georgia passed a law specifically permitting the justices of Jasper County to "levy an extra tax" in order to repair the county jail.[321] And a Pennsylvania statute passed in 1789 mandated that Philadelphia County commissioners receive approval from three county justices — as well as from the Philadelphia "mayor, recorder and . . . three aldermen" — before setting taxes "for the purposes of altering, accomodating and enlarging" the county jail.[322]

In at least two states, judges who failed to properly care for prison and jail facilities could be fined. Under a 1792 Virginia statute, if judges "fail[ed] to keep and maintain a good and sufficient Prison, . . . every

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313 Act of Nov. 2, 1795, ch. 4, § II, *reprinted in* 2 THE PUBLIC ACTS OF THE GENERAL ASSEMBLY OF NORTH-CAROLINA, *supra* note 249, at 71, 72.

314 Act of Mar. 9, 1797, ch. XXVIII, § 2, *reprinted in* LAWS OF THE STATE OF VERMONT, *supra* note 246, at 280, 280–81.

315 *See* Campbell v. County of Franklin, 27 Vt. 178, 179 (1855).

316 *Id.* at 178.

317 *Id.* at 179–80.

318 *Id.* at 181.

319 Act of Feb. 21, 1785, § 1, *reprinted in* 1 THE PERPETUAL LAWS OF THE COMMONWEALTH OF MASSACHUSETTS, *supra* note 212, at 218, 218.

320 Act of Nov. 2, 1795, ch. 4, § 1, *reprinted in* 2 THE PUBLIC ACTS OF THE GENERAL ASSEMBLY OF NORTH-CAROLINA, *supra* note 249, at 71, 72; An Act for Regulating Gaols and Gaolers ¶ 3, *reprinted in* LAWS OF THE STATE OF CONNECTICUT, *supra* note 212, at 220, 220.

321 Act of Nov. 26, 1818, No. 594, § 1, *reprinted in* THE LAWS OF THE STATE OF GEORGIA, *supra* note 224, at 919, 919–20.

322 Act of Mar. 27, 1789, ch. MCDIX, § XV, *reprinted in* 13 THE STATUTES OF PENNSYLVANIA, *supra* note 204, at 243, 249–50. This law was repealed a year later. *See* Act of Apr. 5, 1790, ch. MDXVI, § XXXVI, *reprinted in* 13 THE STATUTES OF PENNSYLVANIA, *supra* note 204, at 511, 527–28.

Member of the Court[] so failing" had to "forfeit and pay ten dollars."[323] In Kentucky, "member[s] of a court . . . [that] fail[ed] to keep up a sufficient prison" had to "forfeit[] 500 pounds of tobacco."[324] Through these provisions, courts held significant responsibility over the building and upkeep of detention facilities. This history suggests that early conceptions of the separation of powers and judicial expertise were consistent with judicial oversight over prisons and jails.[325]

C. The End of Judicial Oversight

Over the course of the nineteenth century, the bulk of prison and jail administrative oversight was transferred from the judicial to the executive branch. The withdrawal of judicial oversight occurred both in state legislatures, which over the course of the eighteenth century enacted new laws placing prison oversight under the purview of the Executive,[326] as well as in the courts, which largely refused to intervene in

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[323] Act of Dec. 3, 1792, ch. LXVII, § XIII, *reprinted in* ACTS OF THE GENERAL ASSEMBLY OF VIRGINIA, *supra* note 240, at 83, 86.

[324] Act of Dec. 20, 1800, § 5, *reprinted in* ACTS OF THE GENERAL ASSEMBLY OF KENTUCKY, *supra* note 239, at 168, 169.

[325] As for whether early judicial oversight ultimately helped achieve the penological aims for which it was intended, the fragmentary nature of the historical record precludes a robust analysis of this question.

[326] Some states transferred judicial power to the executive branch within a few decades after the Founding, while other states retained judicial oversight regimes throughout the nineteenth century. For example, Virginia was one of the earliest states to begin transferring power. As mentioned above, the Virginia legislature adopted a provision in 1796 that required the Richmond City Court to appoint jail inspectors. *See* Act of Dec. 15, 1796, ch. CC, § XXXVIII, *reprinted in* ACTS OF THE GENERAL ASSEMBLY OF VIRGINIA, *supra* note 240, at 355, 361. Just five years later, in 1801, the Virginia state legislature transferred this power to "the governor with the advice of the council." Act of Jan. 21, 1801, ch. CCLXXXIV, § III, *reprinted in* ACTS OF THE GENERAL ASSEMBLY OF VIRGINIA, *supra* note 240, at 413, 414. In 1807, the state legislature empowered the governor and council to exercise "any or all of the powers and duties [related to the penitentiary] at any time heretofore vested in, or enjoined upon . . . the court of [Richmond] . . . whenever the exercise of . . . [such] powers . . . shall to them appear expedient and necessary for the good government of the jail and penitentiary house." Act of Jan. 20, 1807, ch. CXI, § 3, *reprinted in* COLLECTION OF ALL SUCH ACTS OF THE GENERAL ASSEMBLY OF VIRGINIA OF A PUBLIC AND PERMANENT NATURE AS HAVE PASSED SINCE THE SESSION OF 1801, at 140, 140 (Richmond, Samuel Pleasants, Junior, 1808).

Pennsylvania judges, by contrast, retained oversight authority for much of the nineteenth century. The 1790 statute that gave county courts the power to investigate and remove jail keepers for "partiality or cruelty" remained law for over a century. *See* Lutz's Case, 8 Pa. C. 133, 134–36 (Ct. of Quarter Sess. 1890). And judicial power over the appointment of members to the state penitentiary board, which had been established in the 1820s, also remained in force for much of the nineteenth century, until such power was first reduced in 1874 and then completely removed in 1909. *See* Act of May 25, 1874, P.L. 228, § 1, *reprinted in* DIGEST OF PENNSYLVANIA STATUTE LAW 1920 (COMPLETE) 1245, 1245 (West 1921) (transferring to the governor all penitentiary board appointments previously granted to the supreme court); Act of May 10, 1909, P.L. 500, § 1, *reprinted in* DIGEST OF PENNSYLVANIA STATUTE LAW 1920 (COMPLETE), *supra*, at 1245 (transferring to the governor the three penitentiary board appointments previously granted to the courts of common pleas); *see also* BARNES, *supra* note 224, at 124.

prison conditions cases in the first half of the twentieth century.[327] Why judicial power over prisons diminished is beyond the scope of this Article. But I offer here a few possible reasons that each warrant further exploration.

First, as the size and number of detention facilities grew, and prisons became less localized, judges may not have had capacity to continue overseeing daily operations. The earliest prisons were small.[328] The Walnut Street penitentiary, for example, housed seventy-two people when it was first built in 1790.[329] But by the 1820s, these prisons had become "overcrowded,"[330] and several states built more — and larger — prisons. Pennsylvania constructed two new prisons in the late 1810s and early 1820s, the first of which had 190 cells, and the second of which had 250 cells, to which the legislature added "'at least 400' more in 1831."[331] New York's Auburn prison, completed in 1825, had 550 cells.[332] By the 1860s, many prisons again struggled with "overcrowding."[333] As states built more detention facilities, and the sizes of these facilities grew, state legislatures may have decided that courts simply lacked oversight capacity and the executive branch was better suited to the task.

Relatedly, some states may have been influenced by a broader transformation in the role of the judiciary during the Progressive Era. In the nineteenth century, the courts took on prominent governance responsibilities in a variety of areas.[334] But by the end of the century, the judiciary's "inherent limitations" in providing supervision in a new economic age became apparent, and opposition to judicial power grew.[335] President Theodore Roosevelt, who had little confidence in the courts' ability to respond to "the challenges of government in an industrial society,"[336] developed a "vision of executive stewardship."[337] His

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Other states also retained statutes authorizing courts to remedy jail misconduct for much or all of the nineteenth century. *See, e.g.*, Stuart v. Bd. of Supervisors, 83 Ill. 341, 347–48 (1876); State *ex rel.* Cocking v. Wade, 87 Md. 529, 540 (1898). In some states, judges still retain the authority to visit jail facilities. *See infra* note 362.

327 *See* SCHLANGER ET AL., *supra* note 15, at 43 (describing the "hands-off" era that characterized the early- to mid-1900s); MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS 31 (1998); *see also, e.g.*, United States *ex rel.* Atterbury v. Ragen, 237 F.2d 953, 955–56 (7th Cir. 1956) (exemplifying the "hands-off" era that characterized the early and mid-twentieth century).

328 *See* Matthew W. Meskell, Note, *An American Resolution: The History of Prisons in the United States from 1777 to 1877*, 51 STAN. L. REV. 839, 850 (1999).

329 *See id.*

330 *Id.*

331 *Id.* at 853–54 (quoting BARNES, *supra* note 224, at 145).

332 *See id.* at 853.

333 *See id.* at 862.

334 *See* STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877–1920, at 41 (1982).

335 *Id.* at 41–42.

336 *Id.* at 254.

337 *Id.* at 173.

presidency, and those of his successors, helped pave the way for the burgeoning executive power that emerged via the administrative state in the twentieth century.[338] The transfer of jail and prison oversight responsibilities from courts to the executive may thus reflect a broader consolidation of executive power in the nineteenth and early twentieth centuries.

Furthermore, changing attitudes toward prisons and prisoners in the nineteenth century may also help explain the shift from judicial to executive power. Judicial oversight was designed to ensure that people in custody were treated humanely.[339] But the public's sympathy toward prisoners decreased by the mid- to late nineteenth century.[340] With less interest in ensuring that prisoners were properly treated, states may not have felt compelled to provide judicial oversight mechanisms.

Finally, increasing recognition that people in custody had specialized needs that required professional expertise also may have contributed to decisions to transfer power from the courts to the executive branch. In the nineteenth and early twentieth centuries, jail and prison administrators increasingly differentiated among populations in custody, including "young first offenders," people suffering from mental illness, and people with intellectual disabilities.[341] Care for these populations likely required varied expertise, and states may have viewed the executive branch as the appropriate repository for oversight authority.

Ultimately, whatever the cause, the trend was clear. Over the course of the nineteenth century, the executive branch assumed control over prisons and jails while the courts largely retreated. Some of the possible reasons for this transfer of authority might still counsel in favor of limited judicial oversight over prisons and jails today. But, as the next Part describes, the early history of judicial oversight also prompts questions about whether some judicial oversight might be worth reinstating.

III. IMPLICATIONS

The findings in this Article have important implications. First, they show that, unlike judges today, judges in the eighteenth and nineteenth centuries were heavily involved in the operations of American detention facilities. This was especially true of state and local judges, who not only recognized some constitutional and common law rights but also held vast legislatively authorized powers to intervene behind prison walls. And while federal courts did not hold the same powers, they did occasionally vindicate prisoners' rights. This history demonstrates that

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[338] *See id.* at 176; Ronald J. Pestritto, *The Progressive Origins of the Administrative State: Wilson, Goodnow, and Landis*, 24 SOC. PHIL. & POL'Y 16, 21–22 (2006).

[339] *See supra* section II.A, pp. 1735–38.

[340] *See* Meskell, *supra* note 328, at 862.

[341] *See* Harry Elmer Barnes, *The Historical Origin of the Prison System in America*, 12 J. AM. INST. CRIM. L. & CRIMINOLOGY 35, 58–59 (1921).

the early relationship between courts and prisons was varied and complex. By describing this relationship, this Article complicates originalist justifications for the broadly applied judicial deference characteristic of prison law in federal and state courts today. Furthermore, this Article sheds light on the potential value of enhanced judicial oversight beyond prison doctrine and provides models for what that oversight could look like.

A. Expanding the Historical Narrative

This Article provides a fuller account of the early relationship between courts and prisons than scholars and courts have so far recognized. It shows that the nation's first generations implemented an expansive regime of judicial oversight that lasted through much of the nineteenth century. Indeed, early state and local courts' responsibilities included remedying misconduct and abuse; inspecting and monitoring facilities; setting rules and regulations; selecting prison and jail administrators; and securing funding for, building, and repairing detention facilities.[342] Federal courts also occasionally recognized constitutional protections for prisoners.[343] These findings expand and complicate the historical account of the early relationship between courts and prisons.

B. Doctrinal Implications

As Part I details, jurists ruling on prison cases often appeal to history — but an incomplete version of it. Having provided a fuller account of the early relationship between courts and prisons, I pause to consider how this history might bear on contemporary prison doctrine. A comprehensive analysis is well beyond the scope of this Article, but I offer here a couple of reflections.

First, jurists appealing to history must do away with the narrative that their early predecessors were highly deferential to prison administrators. The history presented herein[344] suggests that *Ruffin*'s "slave of the State" attitude was not as ubiquitous as jurists often make it out to be,[345] nor did early notions of the separation of powers preclude judicial intervention behind prison walls,[346] as jurists sometimes suggest.[347] Instead, the historical relationship between courts and prisons was far more varied and complex — and often involved substantial judicial intervention. As a result, originalists — especially at the state and local levels — may have a harder time justifying contemporary judicial

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[342] *See supra* section II.B, pp. 1738–59.
[343] *See supra* notes 173–84 and accompanying text.
[344] *See supra* section II.B.1, pp. 1739–42.
[345] *See supra* section I.A, pp. 1725–30.
[346] *See supra* section II.B.2, pp. 1742–59.
[347] *See supra* section I.B, pp. 1731–34.

deference based on early notions of prisoners' rights and the separation of powers.[348]

Second, the history resurfaced in this Article casts doubt on the presumption in prison case law that judges — especially in state and local courts — are not competent to intervene in prison conditions cases. Indeed, common to a number of federal and state prison law cases is the notion that judges are not well suited to prison administration, given the complexities of incarceration.[349] The fact that judges *did in fact* exercise substantial power over prisons and jails in the nation's early years, not only in litigation but also outside of it, provides prima facie evidence that the common presumption about judicial incompetency to intervene in prisons and jails is misplaced. Of course, there may be modern developments that counsel in favor of deference today, including the size of contemporary prisons and jails and complex security concerns that did not exist in the nation's early years. But judicial deference in prison law should focus on these modern shifts rather than a broad presumption that prisons and jails are no place for a judge.

In prompting reconsideration of some of the justifications for deference in modern prison doctrine, this Article joins a number of other scholarly works.[350] These pieces widely condemn how deference sets the scales against prisoners and unfairly limits their ability to seek relief in court.[351] They also describe how deference doctrine is unprincipled and confused.[352] As Professor Sharon Dolovich puts it, prison case law "reveal[s] no principled basis for determining when deference is justified, what forms it may legitimately take, or the proper limits on its use."[353] And as Professors Driver and Kaufman recently explained, the Supreme Court's deference doctrine has been applied across substantive civil rights doctrines in a way that diverges from the usual, rights-specific

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[348] This Article joins a series of pieces that challenge positions taken by contemporary originalists on their own, originalist terms. *See, e.g.*, Shapiro, *supra* note 3, at 595 (on early solitary confinement regimes); Lindsay Nash, *Deportation Arrest Warrants*, 73 STAN. L. REV. 433, 444–45 (2021) (on early expulsion laws); Michael Clemente, Note, *A Reassessment of Common Law Protections for "Idiots*," 124 YALE L.J. 2746, 2749 (2015) (on capital punishment for people with intellectual disabilities and mental illnesses).

[349] *See, e.g.*, Bell v. Wolfish, 441 U.S. 520, 562 (1979); Fraise v. Terhune, 283 F.3d 506, 516 (3d Cir. 2002) (citing Turner v. Safley, 482 U.S. 78, 84–85 (1987)); State v. Bayaoa, 656 P.2d 1330, 1334 (Haw. 1982) (quoting Holdman v. Olim, 581 P.2d 1164, 1167 (Haw. 1978)); Avant v. Clifford, 341 A.2d 629, 639 n.17 (N.J. 1975) (quoting Procunier v. Martinez, 416 U.S. 396, 404–05 (1974)).

[350] *See supra* note 32 and accompanying text.

[351] *See* Dolovich, *supra* note 12, at 245, 249; Driver & Kaufman, *supra* note 14, at 539; Gutterman, *supra* note 2, at 899; Shapiro & Hogle, *supra* note 32, at 2037–42.

[352] *See* Driver & Kaufman, *supra* note 14, at 537–39.

[353] Dolovich, *supra* note 12, at 245.

processes for developing doctrine.[354] This Article piles on more reason to reconsider deference.[355]

Although the early case law presented in this Article has some bearing on federal courts, it may be especially relevant for state court litigation given that early judicial oversight responsibilities were heavily vested in state judges. Indeed, this Article has little to say about whether federal courts historically intervened in state prisons, though Part II identifies some early examples of federal courts vindicating the rights of people in county jails.[356] Because much of the history recounted herein demonstrates how heavily involved state and local courts were in the prisons in their jurisdictions, the history, insofar as it should bear on contemporary doctrine at all, may be most applicable in state court. As a result, this Article may provide advocates with further reason to direct prison litigation to state rather than to federal courts, a trend that has already emerged in recent years.[357]

C. Nondoctrinal Enhancements to Judicial Oversight

The findings in this Article also prompt questions about whether judicial oversight should be expanded outside the courtroom. Again, a comprehensive response to these questions lies outside the scope of this Article. But I gesture here at a few ways in which this Article might bear on the role that expanded judicial oversight could play outside the courtroom. Specifically, I point both to historical *reasons* for enhanced judicial oversight that still apply today and to *models* for implementing that oversight. Most of these models would be best implemented through legislation, but in some cases, judges could independently choose to be more involved in prison and jail operations.

First, the Founding generation believed that the judiciary should oversee conditions postconviction in part because those conditions affected a person's sentence and sentencing fell under the purview of the judiciary.[358] Put differently, prisons are meant to carry out the sentence

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354 *See* Driver & Kaufman, *supra* note 14, at 538–39.

355 The findings in this Article may inform not only the role of deference in prison law but in neighboring areas of the law as well. Administrative law presents one example, as the courts are currently in the process of renegotiating the judiciary's relationship to the administrative state, including the role of deference and the way that expertise should bear on legal analysis. *See, e.g.*, Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2266–69 (2024); Egan v. Del. River Port Auth., 851 F.3d 263, 281 (3d Cir. 2017) (Jordan, J., concurring in the judgment) (suggesting that deference in administrative law may be more appropriate when an agency has "expertise" on a "technical issue[]"); *see also* Craig Green, Chevron *Debates and the Constitutional Transformation of Administrative Law*, 88 GEO. WASH. L. REV. 654, 714 (2020) (discussing alternatives to *Chevron* deference).

356 *See supra* notes 173–84 and accompanying text.

357 *See* Eyal Press, *Can State Supreme Courts Preserve — Or Expand — Rights?*, NEW YORKER (June 3, 2024), https://www.newyorker.com/magazine/2024/06/10/can-state-supreme-courts-preserve-or-expand-rights [https://perma.cc/5XGS-KGB2].

358 *See supra* note 157 and accompanying text.

the *judge herself* imposed, so it makes sense for sentencing judges to weigh in on what happens in those institutions. The same reasoning applies today: Sentencing judges should have some control over what happens in the places where they send people.[359]

To that end, the historical record surfaced in this Article provides several models for judicial oversight. First, like their early counterparts, sentencing judges could visit and learn about the jails and prisons to which they sentence people.[360] Indeed, some modern judges and justices, like former Chief Justice Burger, have been strong supporters of prison visits.[361] And several jurisdictions still have statutes and regulations authorizing and occasionally mandating that judges visit detention facilities.[362] More could adopt them.

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[359] As Professors Driver and Kaufman recently put it, "prisons are unlike other domains that courts regulate because they are institutions that *judges themselves* fill with people. . . . [This] is to say, . . . they are part of the criminal legal system, made possible only because judges impose prison sentences." Driver & Kaufman, *supra* note 14, at 581; *see also* Davis v. Ayala, 576 U.S. 257, 288 (2015) (Kennedy, J., concurring) (noting that public discourse on punishment focuses too much on guilt and too little on what comes after, and that "[t]here is no accepted mechanism" by which judges may consider prison conditions at sentencing).

[360] *Cf.* Driver & Kaufman, *supra* note 14, at 522 ("[P]rison cases often read as if penal institutions are foreign to federal courts."); EUGENE VICTOR DEBS, WALLS AND BARS 242 (1927) ("It is a pity indeed that the judge who puts a man in the penitentiary does not know what a penitentiary is.").

[361] *See, e.g.*, Warren E. Burger, Chief Just., U.S. Sup. Ct., Address at the Centennial Convocation of the Association of the Bar of the City of New York (Feb. 17, 1970), *in* REC. ASS'N BAR CITY N.Y., Mar. 1970, at 14, 21–22; *see also* Madrid v. Gomez, 889 F. Supp. 1146, 1156 (N.D. Cal. 1995) (noting that Judge Thelton Henderson visited Pelican Bay State Prison for two days prior to a trial on the conditions of solitary confinement). One former judge reflected after his own fifteen-month stint in prison that he and his colleagues "should have done more to learn" about the places where they were sending people, including the nature of practices like solitary confinement and strip searches. *See* SOL WACHTLER, AFTER THE MADNESS: A JUDGE'S OWN PRISON MEMOIR 28, 31 (1997).

[362] For examples of state provisions mandating that judges visit prisons and jails, see N.Y. COMP. CODES R. & REGS. tit. 22, § 17.1(a)(3) (1982) (requiring judges with terms of "four years or longer" to visit select detention facilities at least once every four years); V.I. CODE ANN. tit. 4, § 11-175 (1983) ("Family Division judges shall visit, at least annually, the juvenile pre-trial detention facilities, shelter care facilities, and other facilities providing services to juveniles as a dispositional alternative.").

For examples of provisions authorizing but not requiring judicial visits, see ALA. CODE § 11-14-22 (1886) ("[T]he probate judge [is] hereby authorized and empowered, once each week, without informing the sheriff or jailer of the time when such visit will be made, to visit and examine the condition of the jail, to make a memorandum in writing of such examination and to report under oath such examination to the grand jury."); S.D. CODIFIED LAWS § 24-11-27 (1938) ("The judge of the circuit court may visit, inspect, and supervise all the jails in his circuit and all county and municipal officers shall comply with the orders of such court relating to jails or inmates therein.").

Some states permit or require visits by officials or grand juries who then report their findings to select courts. *See, e.g.*, 83 NEB. ADMIN. CODE § 1-002 (2021) (authorizing select officials "to visit and inspect all juvenile detention facilities," "prepare a written report of each inspection," and "provide copies [of such reports]" to the presiding district judge and the juvenile court judge, among others); MO. REV. STAT. § 48.9205 (1939) ("It shall be the duty of the grand jury, at each term . . . to visit the jail of their county, and examine the condition thereof, and inquire into the treatment of the prisoners, and make report thereof to the court.").

In addition to requiring judges to visit prisons and jails, legislatures could appoint inspectors or other entities to conduct regular visits and report on their findings to the courts.[363] This model could help ensure that prisons are getting sufficient attention by the judiciary without undercutting judges' ability to get through their caseloads. What's more, modern-day consent decrees often rely on a similar model, whereby third parties are appointed by the courts to ensure that court orders are enforced in prisons and jails post-adjudication. Instituting proactive rather than reactive visits by third parties could ensure that conditions remain humane.

Additionally, legislatures could authorize or mandate that contemporary judges follow in the footsteps of their predecessors by setting, or at least reviewing, the rules and policies governing prisons.[364] These rules could relate, for example, to prison allowances, sanitation, food, health, or the use of solitary confinement. Judges could also play a larger role in ensuring that these rules are properly imposed by participating — themselves or through proxies — in the adjudication of prisoners' grievances. Or judges could be legislatively authorized to participate in review committees that determine what security level prisoners are confined to and what privileges they are allowed. Each of these forms of judicial oversight could help ensure that detention facilities operate in ways that carry out the sentences judges intend to impose.

Besides ensuring that sentencing judges know and exercise some oversight over the conditions to which they sentence people, there is a second reason that early theorists and courts believed that judicial oversight was valuable, and this too applies with equal force today. John Howard, who, as described above, greatly influenced prison reformers in the Founding generation,[365] viewed judicial power as a check on the authority of prison and jail administrators.[366] According to Howard, prison officials were susceptible to following their own "passions" and "interest[s]," and the judiciary could protect against that.[367]

Today, prison authorities are still susceptible to abusing their power and pursuing their interests at the expense of prisoners' wellbeing. Beatings by correctional staff are one example.[368] The use of long-term

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[363] *See supra* section II.B, pp. 1738–59.

[364] *See supra* section II.B, pp. 1738–59.

[365] *See supra* section II.A, pp. 1735–38.

[366] *See* 1 HOWARD, *supra* note 143, at 36–37.

[367] *Id.* at 36.

[368] *See, e.g.*, Hudson v. McMillian, 503 U.S. 1, 4 (1992) (describing prisoner testimony that one correctional officer "punched [the prisoner] in the mouth, eyes, chest, and stomach while [another officer] held the inmate in place and kicked and punched him from behind," and the "supervisor on duty[] watched the beating but merely told the officers 'not to have too much fun'").

solitary confinement is another.[369] Regular inspections by judges or their proxies might help prevent these abuses behind bars. So too might provisions like those at Walnut Street[370] that required judges to approve and regularly review placement in solitary confinement.

Or consider jail expansion as another example of officials' interests run amok. As Professor Aaron Littman details in *Jails, Sheriffs, and Carceral Policymaking*, despite the growing interest in decarceration,[371] sheriffs have pursued larger jail systems.[372] Their desire for expansion may be driven, at least in part, by their interest in "ensur[ing] the viability and growth of the criminal legal apparatus of which they are an integral part and hence . . . shor[ing] up and augment[ing] their institutional power."[373]

Placing a judicial check on jail funding and size, a measure used in the nation's early years,[374] provides a potential remedy for this problem. Even if modern judges are no longer equipped to oversee jail and prison financing, as some of their historical counterparts did,[375] contemporary judges might still be able to review prison and jail population numbers or appoint others who could. In this way, the historical account provides a starting point for considering whether and how to enhance judicial oversight as a means of protecting against abuse.

CONCLUSION

The late eighteenth and nineteenth centuries witnessed not only the birth of a new democracy but also that of a fledgling carceral system, born out of the work of theorists and advocates determined to establish more humane and just penal institutions. Judges played a central role. Their powers enabled and even required them not only to remedy abuse but also to exert influence over almost every aspect of jail and prison administration.

In the twenty-first century, this history is illuminating and instructive. It shows just how far modern judges and prisons have strayed from their early American ancestors, especially at the state and local levels. Indeed, that the modern judiciary's attitude toward prisons is so unlike that of its historical predecessor may help explain why twenty-

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[369] *See, e.g.*, CORR. LEADERS ASS'N & THE ARTHUR LIMAN CTR. FOR PUB. INT. L. AT YALE L. SCH., TIME-IN-CELL: A 2021 SNAPSHOT OF RESTRICTIVE HOUSING BASED ON A NATIONWIDE SURVEY OF U.S. PRISON SYSTEMS 5–10 (2022), https://law.yale.edu/sites/default/files/area/center/liman/document/time_in_cell_2021.pdf [https://perma.cc/89D5-LKXB] (discussing the use of solitary confinement in the United States).

[370] *See* Shapiro, *supra* note 3, at 545–46.

[371] *See* Aaron Littman, *Jails, Sheriffs, and Carceral Policymaking*, 74 VAND. L. REV. 861, 929 (2021).

[372] *See id.* at 865–66, 924–29.

[373] *See id.* at 925.

[374] *See supra* section II.B.2.e, pp. 1757–59.

[375] *See supra* notes 255–56 and accompanying text.

first-century prisons differ from what the Founders envisioned. Today, prisons are dangerous and inhumane.[376] As scholars and jurists reflect on the failures of the contemporary penal system, the nation's early years make clear that prisons and jails were not designed to be cordoned off from the judicial branch. Instead, they were configured to have layers of judicial oversight. By separating detention facilities from the courts, modern governments may be preventing them from becoming the humane institutions they were intended to be.

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[376] *See, e.g.*, Farmer v. Brennan, 511 U.S. 825, 830 (1994); Brown v. Plata, 563 U.S. 493, 503 n.1 (2011).