

FOREWORD: PERPETUAL GUARDIANS OF THE PENITENTIARY HOUSES

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The *Rutgers University Law Review's* annual symposium took place just across the Delaware River from an extraordinary historical site—the old Walnut Street Prison. In its day, the prison became the epicenter of penological thought in the United States.¹ As the founders hammered out the Constitution, criminal justice reformers designed the first American system for punishing crime with incarceration, implementing it at the Walnut Street Prison, just a block from Independence Hall.²

In this system, state court judges wielded power over prison affairs and regulated prison operations. The history of the Walnut Street Prison and other prisons in the early republic shows that eighteenth-century jurists, intellectuals, and legislators proposed and implemented a practice of prison oversight by American judges.³ Some two centuries later, federal judges reinvigorated judicial scrutiny of prisons and made it a task for the federal courts,⁴ but federal judges of the civil rights era did not invent judicial power over American prisons. Pennsylvanians did so in the late 1700s.

Pennsylvania judges took a proactive role in designing Walnut Street Prison regulations and improving conditions. They inspected prisons hands-on and in-person, and they had a big say over the conditions experienced by the people they sentenced.⁵

Viewed in this historical context, the fine scholarship comprising this symposium issue calls for a renaissance rather than a revolution in the role of state courts in regulating criminal punishment. The specific arguments advanced in this issue by scholars and advocates are bold and original—but the idea that state courts should regulate criminal punishment is as old as the country itself. As federal court oversight of

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1. See David M. Shapiro, *Solitary Confinement in the Young Republic*, 153 HARV. L. REV. 542, 552–53 (2019). The first section of this foreword is based heavily on that article.

2. See *id.*; LeRoy B. DePuy, *The Walnut Street Prison: Pennsylvania's First Penitentiary*, 18 PA. HIST. 130, 130–31 (1951).

3. See *infra* Part I.

4. See *infra* Part II.

5. See *infra* Part I.

prison conditions continues to deteriorate, state courts should revive their role in prison regulation—and fast. The contributions in this issue provide a roadmap for state court judges across the United States to do just that.

I. JUDICIAL OVERSIGHT OF THE WALNUT STREET PRISON

In state criminal justice systems today, judges more or less wash their hands of the sentences they impose. Prison officials handle the day-to-day infliction of sentences, with minimal intervention from state courts. Things do not have to be this way, as history shows. In the late 1700s, Pennsylvania judges took an active and robust role in the regulation of prison conditions and affairs.

When the Revolutionary War ended in 1783, a group of civic leaders in Philadelphia spearheaded reforms to scale back capital punishment.⁶ In the years that followed, a series of laws enacted by the Pennsylvania legislature dramatically reduced the number of offenses punished by death, largely replacing capital punishment with imprisonment.⁷ As incarceration became the cornerstone of criminal punishment, the prison system demanded new attention.⁸ This ushered in a rich period of discourse and experimentation in prison reform—more precisely, prison *formation*, as there was not an existing prison system to reform.⁹ This new system came online in the Walnut Street Jail; in other words, the jail evolved to also function as a prison.

The leaders of this movement in the late 1700s were serious intellectuals and legal thinkers: Benjamin Rush, William White (Bishop of the Philadelphia Episcopal Church), and Chief Justice Bradford of the Pennsylvania Supreme Court, who went on to serve as Attorney General of the United States.¹⁰ They viewed themselves as the intellectual heirs of John Howard, an English sheriff whose work profoundly affected the implementation of solitary confinement in Philadelphia.¹¹

The title of this lecture comes from Howard, who wrote in 1791 that judges should be “constituted perpetual guardians of the Penitentiary houses.”¹² Howard considered external oversight vital to a just system of

6. HARRY ELMER BARNES, *THE EVOLUTION OF PENOLOGY IN PENNSYLVANIA: A STUDY IN AMERICAN SOCIAL HISTORY* 81 (1927).

7. *Id.* at 73.

8. *See id.* at 79.

9. *See id.* at 73.

10. Shapiro, *supra* note 1, at 552–53, 556.

11. *See* BARNES, *supra* note 6, at 77–78.

12. JOHN HOWARD, *AN ACCOUNT OF THE PRINCIPAL LAZARETTOS IN EUROPE* 224 (London, T. Cadell, J. Johnson, C. Dilly & J. Taylor 1789).

incarceration and solitary confinement; he was not content to leave prison conditions in the hands of wardens alone. “I think a proper inspection so absolutely necessary to the good government of Penitentiary houses,” he wrote, “that neither expense, nor a few other conveniences, ought to be set in competition with so important a circumstance.”¹³ Magistrates were “[t]o visit at proper periods without previous notice — to see and examine all prisoners separately.”¹⁴ In addition, prison inspectors were to appear “at unexpected times — to view the whole prison, and hear prisoners’ complaints.”¹⁵ In short, prison inspection was an indispensable component of Howard’s vision.

Following Howard’s model, Pennsylvania established a system of oversight for the jail, giving judges at various levels of the state judiciary major power over jail administration. During the colonial period and immediately after the Revolution, the sheriff of Philadelphia operated the jail.¹⁶ A 1789 Pennsylvania statute transferred control of the Walnut Street Jail to a group of government-appointed prison inspectors, and a 1790 Act superseded those provisions and stated that the mayor and aldermen of Philadelphia and two justices of the peace for the county of Philadelphia would select the prison inspectors.¹⁷ Prisoners at the jail were “subject to the visitation and superintendence”¹⁸ of the inspectors, two of whom would “attend at the . . . gaol at least once in each week, and . . . examine into and inspect the management of the . . . gaol, and the conduct of the . . . keeper and his deputies.”¹⁹ By all accounts, “[t]he inspectors were unquestionably diligent in their business.”²⁰ At least one of them visited the prison on a daily basis.²¹

In addition to the inspectors, the governor, state supreme court justices, mayor of Philadelphia, and all city and county judges visited the prison four times a year.²² In 1791, the inspectors were also given the

13. *Id.*

14. *Id.* at 228.

15. *Id.*

16. BARNES, *supra* note 6, at 121.

17. *Id.* at 122–23; Act of Apr. 5, 1790, ch. MDV, § XXIII (1790) [hereinafter 1790 Act], reprinted in 2 LAWS OF THE COMMONWEALTH OF PENNSYLVANIA, 1700–1810, at 531, 538 (Philadelphia, John Bioren 1810).

18. 1790 Act, *supra* note 17, § X, at 534.

19. *Id.* § XXIV, at 539.

20. NEGLEY K. TEETERS, THE CRADLE OF THE PENITENTIARY: THE WALNUT STREET JAIL AT PHILADELPHIA, 1773–1835, at 52 (1955).

21. *Id.*

22. See 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).

power to make rules and regulations for the prison, so long as the rules were met with approval from the mayor, two aldermen, and two judges of the state supreme court or the court of common pleas.²³ In short, judges were all over jail administration.

There was also a second way in which judges controlled prison conditions—through sentencing. Certain aspects of incarceration that we call “conditions” today used to be considered sentences. In Pennsylvania in the late 1790s, for example, long-term solitary confinement was considered a sentence.²⁴ Only judges could impose long-term solitary confinement, and they could only do so when the legislature enacted a statute authorizing solitary confinement for a particular offense.²⁵

To understand this system, it is important to distinguish between solitary confinement as a prison disciplinary measure and solitary confinement as criminal punishment. Jail officials had the power to impose solitary confinement to discipline prisoners, but only for days or weeks. More specifically, jailers could not subject rule violators to more than two days of solitary confinement without the consent of high-level government officials.²⁶ But even with that approval, the jailers had no power to impose solitary confinement for more than fifteen days for disciplinary infractions.²⁷

Longer periods of solitude could be imposed only as criminal punishment by a court statutorily authorized to do so.²⁸ And the statutes bounded the authority of courts by (1) reserving solitary confinement for the most serious crimes and (2) establishing a range for any solitary confinement component of a sentence.²⁹ A 1794 Act both defined which crimes merited solitary confinement and established a solitary confinement sentencing range for those crimes.³⁰ For prisoners convicted of crimes that required isolation, a mathematical rule bound the court: The length of solitary confinement could not be less than one-twelfth, nor more than one-half, of the total prison sentence.³¹

23. Act of Sept. 23, 1791, ch. MDLXXII, § XVIII (1791), *reprinted in* 4 LAWS OF THE COMMONWEALTH OF PENNSYLVANIA, 1700–1802, at 82 (Philadelphia, M. Carey & J. Bioren 1803); BARNES, *supra* note 6, at 123.

24. *See* Shapiro, *supra* note 1, at 563–65.

25. *See id.*

26. *See id.* at 562–63.

27. *See* Act of Apr. 18, 1795, ch. MDCCCL, § III, *reprinted in* 3 LAWS OF THE COMMONWEALTH OF PENNSYLVANIA 1700–1810, at 246, 247 (Philadelphia, John Bioren 1810).

28. *See* Shapiro, *supra* note 1, at 563–65.

29. *See id.* at 563–64.

30. *See* Act of Apr. 22, 1794, ch. MDCCLXVI, § XI (1794), *reprinted in* 3 LAWS OF THE COMMONWEALTH OF PENNSYLVANIA 1700–1810, *supra* note 27, at 186, 189.

31. *Id.*

My research, summarized above, focused on Pennsylvania specifically, but recent scholarship extends this analysis considerably. Wynne Muscatine Graham uncovers historical evidence showing that

State and local judges [in the founding era] exercised vast supervisory responsibilities over prisons and jails, both in and out of the courtroom. 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.³²

A recent student note also describes the extent of judicial supervision of prisons and jails in the original thirteen states.:

[I]n the thirty-odd years following American independence, in state after state—in all the original thirteen, finally—the judicial power came to comprehend actionable, supervisory authority over prisons and jails. Judges could second-guess the warden. Sometimes they had to. Judges were called upon to appoint prison inspectors, to act on those inspectors' presentments, to frame rules of internal prison government, and to review a sheriff's selection of jailers.³³

Our current prison system would benefit from state court judges taking an active role in prison oversight, as they did in the early years of the republic. As discussed below, federal judges began to assume this role in the mid-twentieth century, only to retreat from it over the past decades. The time is ripe for state courts to step into the void.

II. THE RISE AND FALL OF FEDERAL COURT OVERSIGHT

Half a century ago, U.S. Supreme Court doctrine hit its high water mark in constitutional protection against abusive prison conditions. In 1974, the Supreme Court held in *Procunier v. Martinez* that when prisons restrict free speech rights, “the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved.”³⁴ Two months later, the

32. Wynne Muscatine Graham, *The Forgotten History of Prison Law: Judicial Oversight of Detention Facilities in the Nation's Early Years*, 138 HARV. L. REV. 1715, 1735 (2025).

33. Ryan Francis Pollock, Note, *The Eyes-On Doctrine*, 134 YALE L.J. 200, 210–11 (2024).

34. 416 U.S. 396, 413 (1974).

Court famously declared in *Wolff v. McDonnell*: “There is no iron curtain drawn between the Constitution and the prisons of this country.”³⁵ Turning to prisoners’ health, the Court held in *Estelle v. Gamble* that the Eighth Amendment obligates the government “to provide medical care for those whom it is punishing by incarceration.”³⁶

Having proclaimed these rules in the 1970s, the Court spent the last fifty years whittling them down. Judicial oversight of prison conditions under the Federal Constitution shifted toward judicial deference bordering on abdication. In 1989, for instance, the Court underscored the need for “considerable deference to the determinations of prison administrators who, in the interest of security, regulate the relations between prisoners and the outside world.”³⁷ “State prisons,” the Court now declared, “should be run by the state officials with the expertise and the primary authority for running such institutions. Absent the most ‘extraordinary circumstances,’ federal courts should refrain from meddling in such affairs. Prison administrators have a difficult enough job without federal court intervention.”³⁸

The trend toward ever-increasing deference has only continued in recent years. Today, federal courts provide exceedingly thin oversight of prison conditions. Scholars of the law of incarceration describe federal judicial review of prison conditions as “extradeferential and chronically imprecise,”³⁹ an “extreme form of judicial deference,”⁴⁰ and “a skewed process that deprives a whole category of vulnerable citizens of meaningful constitutional protections while only seeming to take their legal claims seriously.”⁴¹

Prison oversight by federal courts will not improve in the near future, and it may deteriorate even further. Right-wing Justices occupy a supermajority of seats on the U.S. Supreme Court and have used their power to overrule a range of longstanding precedents.⁴² When the new majority turns to prison conditions under the Eighth Amendment, it may gut the law of incarceration even further.

35. 418 U.S. 539, 555–56 (1974).

36. 429 U.S. 97, 103 (1976).

37. *Thornburgh v. Abbott*, 490 U.S. 401, 408 (1989).

38. *Lewis v. Casey*, 518 U.S. 343, 387 (1996) (quoting *Jones v. North Carolina Prisoners’ Labor Union, Inc.*, 433 U.S. 119, 137 (1977) (Burger, C. J., concurring)).

39. Justin Driver & Emma Kaufman, *The Incoherence of Prison Law*, 135 HARV. L. REV. 515, 576 (2021).

40. Aaron Littman, *Free-World Law Behind Bars*, 131 YALE L.J. 1385, 1392 (2022).

41. Sharon Dolovich, *Forms of Deference in Prison Law*, 24 FED. SENT’G REP. 245, 245 (2012).

42. *See, e.g.*, *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022) (overruling *Roe v. Wade*, 410 U.S. 113 (1973)); *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024) (overruling *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

The six-Justice majority already has a bleak record on the Eighth Amendment. In *Jones v. Mississippi* (a case I argued before the Court in 2020), the Court rolled back protections for juveniles sentenced to life without parole.⁴³ The landscape shifted under my client's feet, with Justice Ginsburg passing away and Justice Barrett ascending to her seat after the Court granted *certiorari* but before the oral argument and decision.⁴⁴ During the COVID-19 pandemic, the Supreme Court issued orders (without written opinions) on stay requests in cases brought by incarcerated people. In these decisions, issued in 2020 both before and after Justice Barrett's confirmation, the Court delayed time-sensitive district court orders designed to curb the spread of the virus in jails.⁴⁵ And last term, the Supreme Court upheld an anti-camping ordinance applied against unhoused people who argued that they slept in public places because they had nowhere else to go.⁴⁶ The Court upheld the ordinance against a challenge that it criminalized homelessness in violation of the Eighth Amendment.⁴⁷

The Court in its current configuration has not yet considered prison conditions under the Eighth Amendment. That won't last forever. Soon after ascending to the Supreme Court, Justice Thomas argued in a dissent that judges had *no role whatsoever* in prison oversight under the original meaning of the Eighth Amendment: "Until recent years, the Cruel and Unusual Punishments Clause was not deemed to apply at all to deprivations that were not inflicted as part of the sentence for a crime."⁴⁸ In a later concurrence, he argued that "[p]rinciples of federalism and separation of powers dictate that exclusive responsibility for administering state prisons resides with the State and its officials."⁴⁹ Donald Trump's reelection and Republican control of the Senate may help to further solidify a right-wing supermajority on the Supreme Court, increasing the chances that views like this, once considered fringe, will become the law of the land.

III. STATE COURTS INTO THE BREACH

As the Supreme Court has retreated from Eighth Amendment limits on criminal punishment, state courts have stepped up more and more.

43. 593 U.S. 98 (2021).

44. See *Jones v. Mississippi*, 140 S. Ct. 1293 (2020); *Jones*, 598 U.S. 98.

45. See, e.g., *Valentine v. Collier*, 140 S. Ct. 1598 (2020); *Valentine v. Collier*, 141 S. Ct. 57 (2020); *Barnes v. Ahlman*, 140 S. Ct. 2620 (2020).

46. *City of Grants Pass v. Johnson*, 603 U.S. 520 (2024).

47. See *id.* at 560–61.

48. *Hudson v. McMillian*, 503 U.S. 1, 18 (1992) (Thomas, J., dissenting).

49. *Lewis v. Casey*, 518 U.S. 343, 364 (1996) (Thomas, J., concurring).

After the U.S. Supreme Court rolled back federal limits on juvenile life without parole despite my best efforts in *Jones*, I found myself in Michigan, arguing as amicus counsel that the state supreme court should extend protections for juveniles beyond anything I would have dared to argue in federal court. The Michigan Supreme Court adopted the position I had supported, prohibiting mandatory life without parole for eighteen-year-olds (not just juveniles) under the state constitution.⁵⁰ In other cases argued and decided on the same day, the Court announced other new protections against extreme sentences for young people.⁵¹

The Michigan decisions provided a fitting coda to *Jones*. After all, in justifying its retreat from oversight over criminal punishment, the U.S. Supreme Court has repeated many times that the job is one for the states. In *Jones* itself, the Court underscored that its holding “does not preclude the States from imposing additional sentencing limits in cases involving defendants under 18 convicted of murder.”⁵² After listing out an array of possible limits, the Court reiterated: “[a]ll of those options, and others, remain available to the States. Indeed, many States have recently adopted one or more of those reforms.”⁵³

The Michigan Supreme Court’s new jurisprudence on long sentences for young people is just one example of state supreme courts filling the void in constitutional limits on punishment. I provided several examples in the juvenile sentencing context in a 2021 piece.⁵⁴ Since then, the trend has continued, perhaps accelerated. The Brennan Center’s online State Court Report⁵⁵ and State Case Database⁵⁶ provide an excellent new resource for following these decisions. For example, the North Carolina Supreme Court held that its constitution prohibits sentencing “a juvenile homicide offender who has been determined to be ‘neither incorrigible nor irredeemable’ to life without parole.”⁵⁷ In 2023, the Massachusetts Supreme Judicial Court held that sentencing adults under 21 to life without parole violates the state constitution.⁵⁸ In 2024, the Michigan Supreme Court held that applying a state sex offender registration law

50. *People v. Parks*, 987 N.W.2d 161, 171 (Mich. 2022).

51. *See* *People v. Poole*, 977 N.W.2d 530 (Mich. 2022); *People v. Stovall*, 987 N.W.2d 85 (Mich. 2022).

52. *Jones v. Mississippi*, 593 U.S. 98, 120 (2021).

53. *Id.*

54. David M. Shapiro & Monet Gonnerman, *To the States: Reflections on Jones v. Mississippi*, 135 HARV. L. REV. F. 67 (2021).

55. STATE CT. REP., <https://statecourtreport.org>.

56. *State Case Database*, STATE CT. REP., <https://statecourtreport.org/state-case-database>.

57. *State v. Kelliher*, 873 S.E.2d 366, 370 (N.C. 2022).

58. *Commonwealth v. Mattis*, 224 N.E.3d 410, 428 (Mass. 2024).

to people who did not commit sex-related crimes constitutes “cruel or unusual punishment in violation of the Michigan Constitution.”⁵⁹

Through cases like these, state supreme courts are creating a new jurisprudence of state constitutional limits on sentencing. We also need a new jurisprudence of prison conditions under state constitutional law, but so far, few state courts have begun to create it. Notably, nearly all of the recent state supreme court cases recognizing new limits on criminal punishment relate to sentencing. Even as state courts have set new limits on extreme sentences, they don’t make a habit of intervening in prison affairs. State courts need to step into the void created by the U.S. Supreme Court, and lawyers need to bring them cases to develop the law.

I had the honor of presenting the above ideas in the 2024 Robert F. Williams State Constitutional Law Lecture. Professor Williams has been the driving intellectual force behind the development of state constitutional law for decades. He doggedly maintained his focus on state constitutions when the vast majority of scholars and civil rights advocates, myself included, were beguiled by the spell of federal law made by federal courts. If there is hope now for a renaissance in state constitutional limits on punishment, it is because Professor Williams kept the field of state constitutionalism alive through a rare combination of passion, brilliance, and determination.

59. *People v. Lymon*, No. 164685, 2024 WL 3573528, at *1 (Mich. July 29, 2024).