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The Eyes-On Doctrine

ABSTRACT. For decades, American courts have taken for granted that the separation of powers severs the judiciary from prison administration. In its more stringent forms, this idea characterized the so-called "hands-off doctrine." Under the hands-off doctrine, courts would decline to intervene in prison government, even when presented with claims that conditions of life inside prisons were so bad that they violated inmates' constitutional rights. This stringent view fell away over the course of the 1960s and 1970s. But the gist of it survives. The separation-of-powers principle is a pillar of contemporary prison law. It supports vast judicial deference to prison administrators. It tends to rule out injunctive orders that might aim to regulate or remedy conditions of confinement. Courts find prison management to be all but exclusively the political branches' business.

This Note discovers an earlier, more reasoned regime. In the thirty-odd years following American independence, the judicial power uniformly came to encompass supervisory authority over prisons. 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. In some jurisdictions, on their own motion, they could remove a prison keeper for misbehavior. Nor is that all. The statutes vesting these powers in judges went on the books amid sustained debates over the meaning of the separation of powers, as Founding Era constitutions enshrined that principle. Its major exponents, Thomas Jefferson among them, were sometimes responsible for drafting these statutes and then lobbying for their passage.

Across the germinal period of our constitutional and penological history, a ubiquitous, cohesive body of law gave force to the following view: supervision of prison government is consistent with, if not an incident of, a separated judicial power and its exercise. I call it the eyes-on doctrine. This Note argues for its studious revival.

AUTHOR. J.D. expected 2025, Yale Law School; B.A. 2013, Yale College. It is a pleasure to thank James Whitman for his encouragement, advice, and example, and Dhruv Aggarwal for his. For their trust and vision, my former colleagues at Sher Tremonte LLP, especially Michael Tremonte, Justine Harris, and Noam Biale. Fiona Doherty, my compañeros in her seminar on criminal law, and Derrick Lin. My parents and my brothers. This Note is fondly dedicated to Pete DiNardo on the occasion of his retirement—with more gratitude than I know how to express. Any omissions or errors in what follows are mine alone.

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INTRODUCTION

In the early days of the COVID-19 pandemic, the Washington Supreme Court decided *Colvin v. Inslee*.[1] Shyanne Colvin and her copetitioners sued for a writ of mandamus.[2] Had this writ issued, judges would have commanded the governor, Jay Inslee, to take measures to reduce the size of the state's inmate population.[3] Correctional officers and incarcerated people agreed: Washington's prisons were too crowded to allow for adequate social distancing.[4] Petitioners sought targeted decarceration.[5] Specific groups, such as those scheduled for release within the next eighteen months, would have become eligible for immediate release under the relief the petition requested.[6] Four weeks after the petition was filed,[7] the court, in a first, heard argument by videoconference.[8] Counsel for petitioners noted an irony of this arrangement: "COVID-19 is so dangerous and so contagious that it's actually illegal for us to be in the same room this morning. But nonetheless, my clients sleep in the same room with two or three or twenty-five other people."[9]

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1. 467 P.3d 953, 957 (Wash. 2020).
2. *Id.*
3. *Id.*
4. *See* Petitioners' Brief in Support of Petition for a Writ of Mandamus at 3, 11-12, *Colvin*, 467 P.3d 953 (No. 98317-8); *Colvin*, 467 P.3d at 959 ("The Office of Corrections Ombuds toured [the Monroe Correctional Complex] and concluded that it was unable to effectively impose social distancing with its population, noting that both staff and incarcerated individuals asked that some offenders be released to increase the space available.").
5. *See* Petitioners' Brief in Support of Petition for a Writ of Mandamus, *supra* note 4, at 4.
6. *See id.*; *Colvin*, 467 P.3d at 958.
7. *Compare* Petitioners' Brief in Support of Petition for Writ of Mandamus, *supra* note 4, at 6 (noting the March 24, 2020 filing date), *with Washington State Supreme Court, Oral Arguments: Shyanne Colvin, et al. v. Jay Inslee, et al.*, TVW (Apr. 23, 2020, 9:00 AM), https://tvw.org/video/washington-state-supreme-court-2020041052 [https://perma.cc/FR6J-WX7N] (reflecting oral argument occurring on April 23, 2020).
8. Jim Brunner, *Washington Supreme Court Rejects Lawsuit Seeking Additional Release of Prisoners Due to Coronavirus Threat*, Seattle Times (Aug. 24, 2020, 2:47 PM), https://www.seattletimes.com/seattle-news/law-justice/watch-washington-supreme-court-considers-lawsuit-seeking-release-of-prisoners-due-to-coronavirus [https://perma.cc/3WRC-EN6K]; Jim Brunner, *Inmates with Health Problems Sue Inslee to Force Release of Thousands from Prison over Coronavirus Fears*, Seattle Times (Mar. 25, 2020, 9:29 AM), https://www.seattletimes.com/seattle-news/law-justice/inmates-with-health-problems-sue-inslee-to-force-release-of-thousands-from-prison-over-coronavirus-fears [https://perma.cc/42UJ-W5SY].
9. *Washington State Supreme Court, Oral Arguments: Shyanne Colvin, et al. v. Jay Inslee, et al.*, *supra* note 7, at 1:06-1:21; *see also* Wash. Proclamation No. 20-25 ¶ 3 (Mar. 23, 2020),

The case was "extraordinary"[10] in many ways. Not so its result. Four dissenting judges would have retained jurisdiction, appointed a factfinder to continue inspecting crowded facilities, and given petitioners' claims the ongoing "scrutiny they deserve."[11] But a five-member majority of the court dismissed the suit.[12] It held that prison management is "an undeniably executive function."[13] For judges to order the governor to exercise his discretion in the ways that petitioners urged "would contravene the historical roles of the executive and judicial branches."[14] Citing *Federalist 47* alongside state mandamus precedent, the court maintained that the Framers of the U.S. Constitution designed a government of separated powers like Washington's[15] "to prevent any one branch of government from gaining too much power."[16]

These received ideas, crucial to the narrow *Colvin* majority, are commonplace in modern American prison law. The Supreme Court has decided that "the Constitution does not mandate comfortable prisons," and problems like overcrowding "properly are weighed by the legislature and prison administration rather than a court."[17] More broadly, it is to "the legislative and executive branches" that prison administration "has been committed."[18] Operating prisons is, in fact, "peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial."[19] "[S]eparation of powers concerns

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https://governor.wa.gov/sites/default/files/proclamations/20-25%20Coronovirus%20Stay%20Safe-Stay%20Healthy%20%28tmp%29%20%28002%29.pdf [https://perma.cc/YQB3-M9RD] (restricting in-person operations of businesses).

10. *Colvin*, 467 P.3d at 957.

11. *Id.* at 969.

12. *See id.* at 957, 965-66, 969.

13. *Id.* at 964 (citing Robinson v. Peterson, 555 P.2d 1348, 1352 (Wash. 1976)). *Robinson* itself cites a 1969 decision for the proposition. 555 P.2d at 1352 (citing January v. Porter, 453 P.2d 876, 879 (Wash. 1969)). *January* treats the proposition as a time-honored precept needing no support by specific legal authority. *See* 453 P.2d at 879 ("The courts have long recognized this division of power and the transfer of jurisdiction over a finally convicted felon from the judicial to the executive branch of government.").

14. *Colvin*, 467 P.3d at 964.

15. *See* WASH. CONST. art. II, § 1 (vesting the legislative power in the state legislature); *id.* art. III, § 2 (vesting the executive power in the state governor); *id.* art. IV, § 1 (vesting the judicial power in the state courts).

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

17. Rhodes v. Chapman, 452 U.S. 337, 349 (1981).

18. Turner v. Safley, 482 U.S. 78, 84-85 (1987).

19. Bell v. Wolfish, 441 U.S. 520, 548 (1979).

counsel a policy of judicial restraint" in this area.[20] Even when rules of internal prison government go so far as to limit inmates' access to courts, "it is for the political branches . . . to manage prisons in such fashion that official interference with the presentation of claims will not occur."[21] The judge defers to the warden.[22]

I quote liberally from these opinions because their reasoning here relies so much on quotable assertion, so little on analysis of constitutional text or structure, or legal history or tradition. Sometimes, courts reinforce their assertions with the idea that judges could not intervene with wisdom or due care; they

20. *Turner*, 482 U.S. at 85; *see also* Hutto v. Finney, 437 U.S. 678, 714 (1978) (Rehnquist, J., dissenting) ("[N]either this Court nor any other federal court is entrusted with . . . a [prison] management role under the Constitution."); Jones v. N.C. Prisoners' Lab. Union, Inc., 433 U.S. 119, 137 (1977) (Burger, C.J., concurring) ("The federal courts, as we have often noted, are not equipped by experience or otherwise to 'second guess' the decisions of . . . administrators in this sensitive area except in the most extraordinary circumstances."); Pitts v. Thornburgh, 866 F.2d 1450, 1453 (D.C. Cir. 1989) ("It is increasingly recognized that issues of prison management are . . . by reason of separation of powers [among other reasons] . . . peculiarly ill-suited to judicial resolution, and that, accordingly, courts should be loath to substitute their judgment for that of prison officials and administrators."); Hamilton v. Schriro, 74 F.3d 1545, 1550 (8th Cir. 1996) (same); Law v. Ambrose, No. 21-CV-04187, 2023 WL 2479914, at *9 (D.S.D. Mar. 13, 2023) (same); *cf.* Hughbanks v. Dooley, 788 F. Supp. 2d 988, 993 (D.S.D. 2011) ("It is not the role of federal courts to micro-manage state prisons." (citing Klinger v. Dep't of Corr., 31 F.3d 727, 733 (8th Cir. 1994)); John F. Stinneford, *Is Solitary Confinement a Punishment?*, 115 NW. U. L. REV. 9, 13 (2020) ("The Supreme Court's modern prison conditions jurisprudence shows little awareness of the separation of powers principles prohibiting executive officials from imposing punishments on their own authority. Instead, the Court has focused on a different separation of powers problem: the need to prevent the judiciary from involving itself in the running of prisons." (footnote omitted)).

21. Lewis v. Casey, 518 U.S. 343, 349 (1996); *see also id.* at 350 (pressing an "essential distinction between judge and executive").

22. *See, e.g.*, Overton v. Bazzetta, 539 U.S. 126, 132 (2003) ("We must accord substantial deference to the professional judgment of prison administrators, who bear a significant responsibility for defining the legitimate goals of a corrections system and for determining the most appropriate means to accomplish them." (citing Pell v. Procunier, 417 U.S. 817, 826-27 (1974); Hewitt v. Helms, 459 U.S. 460, 467 (1983); Thornburgh v. Abbott, 490 U.S. 401, 408 (1989); *N.C. Prisoners' Lab. Union*, 433 U.S. at 126, 128; *Turner*, 482 U.S. at 85, 89; Block v. Rutherford, 468 U.S. 576, 588 (1984); *Wolfish*, 441 U.S. at 562)); Mays v. Dart, 974 F.3d 810, 820-21 (7th Cir. 2020) (holding that, in the context of a prospective COVID release order, a court's failure to discuss the considerable deference it owes to prison administrators is legal error); Sharon Dolovich, *The Coherence of Prison Law*, 135 HARV. L. REV. F. 302, 316-25 (2022); Danielle C. Jefferis, *Carceral Deference: Courts and Their Pro-Prison Propensities*, 92 FORDHAM L. REV. 983, 991-99 (2023).

lack the needful expertise in prison administration.[23] It sounds prudential enough, but this idea has to be corollary to an understanding of what the separation of powers requires. Judges could not try to gain or maintain fluency in the challenges of prison administration if constitutional prescript prevents them from doing so in the first place. Other times, courts worry that by inserting themselves, they would circumvent and undercut prison staff's authority in the eyes of inmates and compromise prison discipline in turn.[24] Courts sometimes express this concern in terms of the separation of powers,[25] and for good reason. It takes for granted that judicial intervention means judicial intermeddling. For the prison to be subject to oversight, for prisoners to be able to seek redress for alleged mistreatment—these things are hardly thought, in themselves, to threaten good order. Consider inmate grievance procedures,[26] nonjudicial oversight bodies,[27] and evidence that both promote discipline.[28] By what assumed necessity do judges sit in splendid isolation from those apparatuses? It must again be an understanding—however unexplained, however clothed in feelings of sound policy—of what the separation of powers requires.

Still other times, as in *Colvin*, judges validate the separation-of-powers truisms they rely on by attributing a Founding Era pedigree to them. Justice Thomas, for instance, has doubted "the legitimacy of that mode of constitutional decision-making, the logical result of which . . . is to transform federal judges into superintendents of prison conditions nationwide."[29] His doubt,

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23. *See, e.g.*, *N.C. Prisoners' Lab. Union*, 433 U.S. at 137 (Burger, C.J., concurring); Jefferis, *supra* note 22, at 1026 ("Courts' pro-prison propensities are driven by a sweeping deference principle built on mythical notions of prison official expertise . . . .").

24. *See, e.g.*, *Wolfish*, 441 U.S. at 547; Arcamone v. Phillips, No. 08cv166, 2009 WL 416447, at *5 (N.D. W. Va. Feb. 17, 2009); Kenneth C. Haas, *Judicial Politics and Correctional Reform: An Analysis of the Decline of the "Hands-Off" Doctrine*, 1977 DET. COLL. L. REV. 795, 810-21.

25. *See, e.g.*, State v. Hacker, 229 N.E.3d 38, 45 (Ohio 2023) ("[P]rison discipline is an exercise of executive power." (quoting State *ex rel.* Bray v. Russell, 729 N.E.2d 359, 362 (Ohio 2000))).

26. *See, e.g.*, Tiffany Yang, *The Prison Pleading Trap*, 64 B.C. L. REV. 1145, 1152 n.37 (2023) (reviewing state prison inmate grievance procedures); *Substantive Rights Retained by Prisoners: Rights Related to Conditions of Confinement and the Use of Force Against Prisoners*, 52 GEO. L.J. ANN. REV. CRIM. PROC. 1226, 1253 n.3137 (2023) (reviewing case law requiring prisoners to exhaust the Bureau of Prisons's administrative remedies before seeking relief in federal courts).

27. *See, e.g.*, Richard T. Wolf, *Reflections on a Government Model of Correctional Oversight*, 30 PACE L. REV. 1610, 1623 (2010) (concluding that these boards promote "safe, secure, and humane correctional environments for staff and inmates").

28. *See, e.g.*, Wolff v. McDonnell, 418 U.S. 539, 588-89 (1974) (Marshall, J., concurring in part and dissenting in part); Wolf, *supra* note 27, at 1623; Haas, *supra* note 24, at 815-17 & nn.93-100.

29. Farmer v. Brennan, 511 U.S. 825, 859-60 (1994) (Thomas, J., concurring in the judgment).

jealous both of separation-of-powers and federalism principles, hearkens back to the original frame of American government. The Founders "never imagined that federal judges would displace state executive officials and state legislatures in charting state policy" in this domain.[30] Justice Scalia, for his part, seemed to assume that these separation-of-powers truisms constituted timeless tradition. In 2011, the Court upheld a decision ordering a reduction in the size of the prison populations at chronically overcrowded California facilities.[31] Dissenting from the bench,[32] Scalia said that the Court's decision brought judges well "outside the traditional judicial role" and raised "grave separation-of-powers concerns."[33]

The tradition Scalia referred to does trace back to the 1940s and 1950s. Those years marked the heyday of what came to be called the hands-off doctrine.[34] Courts reliably would hold that passing on prisoners' complaints, even when those complaints alleged that conditions of confinement amounted to cruel and unusual punishment, would extend the judicial power beyond its proper bounds.[35] In an early, influential case in point, the Fifth Circuit decided that the "court has no power to interfere with the conduct of the prison or its discipline, but only on habeas corpus to deliver from the prison those who are illegally detained there."[36] No authority is cited for the proposition, but the opinion's author, a certain Samuel Sibley, might as well have cited himself. Eight years earlier, from the bench of the Northern District of Georgia, Judge Sibley asseverated his way to the conclusion that "our frame of government"

30. Lewis v. Casey, 518 U.S. 343, 386 (1996) (Thomas, J., concurring).

31. Brown v. Plata, 563 U.S. 493, 499-502 (2011).

32. Adam Liptak, *Justices, 5-4, Tell California to Cut Prisoner Population*, N.Y. TIMES (May 23, 2011), https://www.nytimes.com/2011/05/24/us/24scotus.html [https://perma.cc/WP3E-UEQS].

33. *Brown*, 563 U.S. at 555, 564 (2011) (Scalia, J., dissenting); *see also* Johnson v. California, 543 U.S. 499, 547 (2005) (Thomas, J., joined by Scalia, J., dissenting) (stating that the "majority[] refus[ed]—for the first time ever—to defer to the expert judgment of prison officials").

34. *See* Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506, 506-09 (1963).

35. *See id.* at 508 & nn.12-13 (collecting cases and various formulations of the hands-off doctrine in the 1940s through 1960s); *id.* at 515 ("In ruling that an inmate's complaint lies beyond the scope of judicial review, courts invariably advance a rationale based on a quasi-'separation of powers' argument.").

36. Platek v. Aderhold, 73 F.2d 173, 175 (5th Cir. 1934). For cases relying on *Platek*, see, for example, *Sarshik v. Sanford*, 142 F.2d 676, 676 (5th Cir. 1944); *Shepherd v. Hunter*, 163 F.2d 872, 874 (10th Cir. 1947); *Numer v. Miller*, 165 F.2d 986, 986-87 (9th Cir. 1948); *Williams v. Steele*, 194 F.2d 32, 34 (8th Cir. 1952); and their respective progeny.

prevents courts from vindicating whatever rights prisoners have.[37] Over the course of the 1960s and 1970s, judges became, so to speak, more hands-on. They heard and acted on prisoners' complaints; they guided reforms to the ways that prisons, particularly state prisons, were run.[38] But by the 1980s and 1990s, the premises underlying the hands-off doctrine began to reassert themselves, opening what several commentators call a period of retrenchment.[39] These days, federal courts conform to the "hands-off attitude" as the judiciary's traditional stance.[40] State courts do, too.[41] *Colvin* and other cases decided dur-

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37. *See* Miller v. Snook, 15 F.2d 68, 69 (N.D. Ga. 1926) ("Under our system of government the judicial and executive functions are very substantially separated. The ascertainment of guilt and the fixing of punishment are essentially judicial. The seeing that the punishment is executed and enforcing the judgment of the court is executive. Discretion is given the courts in fixing punishment before execution begins, but after execution commences the prisoner is considered to be beyond the power of the court and in the hands of the executive. . . . Considering our frame of government, it would seem that the power of the court should logically end when the prisoner passes into the custody and control of the executive under a legal and valid sentence.").

38. Ira P. Robbins, *The Cry of* Wolfish *in the Federal Courts: The Future of Federal Judicial Intervention in Prison Administration*, 71 J. Crim. L. & Criminology 211, 213 (1980); *see also* Haas, *supra* note 24, at 829 (concluding, as of 1977, that "the continuing erosion of each of the five major justifications for judicial refusal to assess the constitutionality of prison life indicates that the hands-off policy has been refuted with considerable success and has lost much of its previous vitality" while conceding, presciently, that "despite the obvious relaxation of judicial restraint in the correctional field, . . . it is still too early to sound the death knell for the hands-off doctrine"). But for the major treatment of this topic, see generally Malcolm M. Feeley & Edward L. Rubin, Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons (1998). The book takes the fruits of prison-reform litigation in the 1960s and 1970s as the signal example of what it calls judicial policymaking. *See* Feeley & Rubin, *supra*, at 30-95, 145-48. Whether this form of judicial intervention represented a departure from or instead a return to the roots of American prison law is among the questions this Note considers.

39. *See, e.g.*, Feeley & Rubin, *supra* note 38, at 47-49; Justin Driver & Emma Kaufman, *The Incoherence of Prison Law*, 135 Harv. L. Rev. 515, 539 (2021); James B. Jacobs, *The Prisoners' Rights Movement and Its Impacts, 1960-80*, 2 Crime & Just. 429, 444 (1980).

40. *E.g.*, Procunier v. Martinez, 416 U.S. 396, 404 (1974) ("Traditionally, federal courts have adopted a broad hands-off attitude toward problems of prison administration."); Hughbanks v. Dooley, 788 F. Supp. 2d 988, 993 (D.S.D. 2011) (same); Jarrett v. Faulkner, 662 F. Supp. 928, 929 (S.D. Ind. 1987) (same); Money v. Pritzker, 453 F. Supp. 3d 1103, 1129 (N.D. Ill. 2020) ("There are serious separation of powers concerns, too, [raised by plaintiffs' requested release order] because running and overseeing prisons is traditionally the province of the executive and legislative branches." (citing Turner v. Safley, 482 U.S. 78, 84-85 (1987)).

41. *E.g.*, Skipper v. S.C. Dep't of Corr., 633 S.E.2d 910, 914 (S.C. Ct. App. 2006) ("Courts traditionally have adopted a 'hands off' doctrine regarding judicial involvement in prison disciplinary procedures and other internal prison matters, although they must intercede when

ing the COVID-19 pandemic confirm that the gist of the hands-off doctrine has enduring force.[42] To be sure, courts recognize inmates' constitutional rights, whether they arise under the Eighth Amendment or something else.[43] At the same time, the way judges think about unconstitutional conditions of confinement "equate[s] what [i]s typical in prison with what [i]s constitutional."[44] Judges systematically defer to how legislatures and executives typically see fit to run the prisons they control.

The separation-of-powers principle is a cornerstone of contemporary American prison law. It supports thoroughgoing judicial deference to prison administrators. It tends to rule out injunctive orders that might aim at regulating or remedying conditions of confinement. What does this cornerstone rest on, though? It is to "the legislative and executive branches" that prison administration "has been committed."[45] What did the committing? The Constitution? State constitutions? Statutes? Use and wont? Upon execution of a criminal sentence, "the prisoner is considered to be beyond the power of the court and in

infringements complained of by an inmate reach constitutional dimensions." (quoting Al-Shabazz v. State, 527 S.E.2d 742, 757 (S.C. 2000))); Hamersley v. Ind. Dep't of Corr., No. 18A-PL-955, 2019 WL 440972, at *2 (Ind. Ct. App. Feb. 5, 2019) (embracing a "hands-off approach" as a "long-standing principle in this state" (citing Kimrey v. Donahue, 861 N.E.2d 379, 383 (Ind. Ct. App. 2007))); Washington v. Meachum, 680 A.2d 262, 283 (Conn. 1996) ("We are . . . unwilling to invade the province of the department and order specific modifications of department [of correction] regulations or otherwise micromanage attorney-client contact in a prison setting."); Alqawasmeh v. State, 328 So. 3d 321, 322 (Fla. Dist. Ct. App. 2021) ("'Operation of the county jail is within the province of the executive and legislative branches of government, not the judicial branch.' . . . '[U]nder the constitutional doctrine of separation of powers, the judicial branch must not interfere with the discretionary functions of the legislative or executive branches of government absent a violation of constitutional or statutory rights.'" (first quoting Armor Corr. Health Servs., Inc. v. Ault, 942 So. 2d 976, 977 (Fla. Dist. Ct. App. 2006); and then quoting Trianon Park Condo. Ass'n v. City of Hialeah, 468 So. 2d 912, 918 (Fla. 1985) (alteration in original))).

42. *See, e.g.*, *In re* Request to Modify Prison Sentences, 231 A.3d 667, 686 (N.J. 2020) (affirming arguments that "point[] to separation of powers concerns . . . [to the effect] that 'control of policy-making [belongs] to the Governor and Legislature'" (quoting Caporusso v. N.J. Dep't of Health & Senior Servs., 82 A.3d 290, 298 (N.J. Super. Ct. App. Div. 2014) (fourth alteration in original)); *cf.* Winston v. Polis, 496 P.3d 813, 820 (Colo. App. 2021) (assessing whether "the trial court—invoking separation of powers principles—[rightly] dismissed Plaintiffs' claims," which would have required "scrutinizing whether the government is violating [prisoners'] basic liberties").

43. *E.g.*, Brown v. Plata, 563 U.S. 493, 510-11 (2011).

44. Judith Resnik, *(Un)Constitutional Punishments: Eighth Amendment Silos, Penological Purposes, and People's "Ruin*," 129 YALE L.J.F. 365, 406 (2020).

45. Turner v. Safley, 482 U.S. 78, 85 (1987); *see supra* text accompanying note 18.

the hands of the executive."[46] Who considers it so, and why? "The courts have long recognized this division of power and the transfer of jurisdiction over a finally convicted felon from the judicial to the executive branch of government."[47] What is the wellspring, what the history of that recognition? Judges "must accord substantial deference to the professional judgment of prison administrators, who bear a significant responsibility for defining the legitimate goals of a corrections system and for determining the most appropriate means to accomplish them."[48] Where do those imperatives come from? These opinions do not tell us. Some argue that, in the early republic, the separation-of-powers principle was little more than a slogan.[49] Be that as it may, in our times, in this context, separation-of-powers analyses depend on *ipse dixit*—on assertions seen as undeniable.[50] The theory behind and the legal-historical basis of decisions like *Colvin* are, at the end of the day, a pig in a poke.

This Note means to let the cat out of the bag. It is the first to explore what people throughout the early republic might have made of current notions of the proper role of the judiciary in prison administration.[51] This study's findings de-

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46. Miller v. Snook, 15 F.2d 68, 69 (N.D. Ga. 1926); *see supra* text accompanying note 37.

47. January v. Porter, 453 P.2d 876, 879 (Wash. 1969); *see supra* text accompanying note 13.

48. Overton v. Bazzetta, 539 U.S. 126, 132 (2003); *see supra* text accompanying note 22.

49. *See, e.g.*, Neil C. McCabe, *Four Faces of State Constitutional Separation of Powers: Challenges to Speedy Trial and Speedy Disposition Provisions*, 62 TEMP. L. REV. 177, 179 (1989).

50. *See supra* note 13 and accompanying text.

51. Here and throughout this Note, I use the term prison in an expansive sense, covering jails, houses of correction, and penitentiaries. I take my cue, in part, from modern courts, which have applied versions of the separation-of-powers reasoning underlying the hands-off doctrine indiscriminately to prisons and jails. *See, e.g.*, *supra* note 18 (citing *Turner v. Safley*, a prison case); *supra* note 19 (citing *Bell v. Wolfish*, a jail case); *supra* note 41 (citing state prison and jail cases). I also use the term prison in an expansive sense because the differences between the prison and the jail were not altogether fixed in the period under review. Prisons have been defined as places of punitive incarceration, jails as places of (pretrial) detention. *See, e.g.*, INCARCERATION AND THE LAW: CASES AND MATERIALS 4-5 (Margo Schlanger, Sheila Bedi, David M. Shapiro & Lynn S. Branham eds., 10th ed. 2020). For much of the history of secular Western criminal law, on those definitions, prisons did not exist. Death, maiming, and fines were the ordinary punishments for crime, not incarceration. *See, e.g.*, John H. Langbein, *The Historical Origins of the Sanction of Imprisonment for Serious Crime*, 5 J. LEGAL STUD. 35, 36-38 (1976); RICHARD STARKE, THE OFFICE AND AUTHORITY OF A JUSTICE OF PEACE EXPLAINED AND DIGESTED 232 (Williamsburg, Alexander Purdie & John Dixon 1774) ("[T]he Jail is intended, in most Cases, for Custody and not for Punishment, and Confinement itself . . . ."). *But see, e.g.*, RALPH B. PUGH, IMPRISONMENT IN MEDIEVAL ENGLAND 10-17 (1968) (noting the tendency "to underestimate the antiquity of penal imprisonment" in systems of both secular and ecclesiastical law and offering examples of medieval English punitive incarceration). That said, American independence roughly coincided with an international penal-reform movement that introduced imprisonment as the

fy today's common wisdom. This Note discovers that, in the thirty-odd years following American independence, in state after state—in all the original thirteen, finally[52]—the judicial power came to comprehend actionable, supervisory

standard punishment for serious crimes. *See, e.g.*, Erin E. Braatz, *The Eighth Amendment's Milieu: Penal Reform in the Late Eighteenth Century*, 106 J. CRIM. L. & CRIMINOLOGY 405, 426-54 (2016). *But cf.* Langbein, *supra*, at 44-53 (dating the rise of punitive incarceration earlier, to the seventeenth century, with the establishment and spread of workhouses for the poor, concluding furthermore that "[t]he modern sanction of imprisonment for serious crime traces back to the workhouse for the poor more than to any other source"). Even those states that came later to this type of penal reform, like South Carolina, *see* Reid C. Toth, *Prisons and Penitentiaries*, S.C. ENCYC. (Aug. 22, 2022), https://www.scencyclopedia.org/sce/entries/prisons-and-penitentiaries [https://perma.cc/VRV5-RFHT], had sometimes previously opened their jail doors to prisoners on *federal* criminal process, *see* Act of Dec. 20, 1800, 1800 S.C. Acts Dec. Sess. 30, 30, which the 1790 Federal Act for the Punishment of Certain Crimes Against the United States provided as a sanction, *see* Act of Apr. 30, 1790, ch. 9, §§ 2, 5-7, 11-13, 15, 18, 1 Stat. 112, 112-16. Put simply, jails sometimes performed double duty as prisons during the Founding Era and beyond.

A brief word, here, about sources of and citations to old state statutes in this Note. Where my citation style follows the form given for state session laws in *The Bluebook*, *see* THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 242-94 tbl.T1.3 (Columbia L. Rev. Ass'n et al. eds., 21st ed. 2020), the date of enactment, title, chapter numeration, section numeration, pagination, text, and other information pertaining to the cited statute are drawn from the relevant session laws volume represented in HeinOnline's indispensable (if imperfectly word-searchable) *Session Laws Library*.

52. I set aside supportive evidence from elsewhere in the United States. There is no shortage of it. *See, e.g.*, Act of Feb. 10, 1798, ch. 4, §§ 18-19, 38, 1798 Ky. Acts 11, 16, 25; Act of Dec. 19, 1799, ch. 10, 1799 Ky. Acts 30, 30-31; Act of Nov. 7, 1803, ch. 31, § 6, 1803 Tenn. Pub. Acts 76, 78-79; Act of Mar. 9, 1797, §§ 2, 5, 7, *in* THE LAWS OF VERMONT, OF A PUBLICK AND PERMANENT NATURE: COMING DOWN TO, AND INCLUDING, THE YEAR 1824, at 217, 217-18 (William Slade, Jr. ed., Windsor, Simeon Ide 1825); Act of Nov. 14, 1803, § 1, *in* THE LAWS OF VERMONT, *supra*, at 229, 229.

I also set aside congruent evidence, past and present, from abroad (apart from England), except here to note that what I call the eyes-on doctrine is not uniquely Anglo-American. *See, e.g.*, CODE PÉNITENTIAIRE [Penitentiary Code] art. D131-2 (Fr.) ("Lors de ses visites d'établissements pénitentiaires, le juge de l'application des peines vérifie les conditions dans lesquelles les personnes condamnées y exécutent leur peine. Il lui appartient de faire part de ses observations éventuelles aux autorités compétentes pour y donner suite."); Stanislaw Plawski, *Le Contrôle Judiciaire de l'Application des Peines en Droit Comparé*, 25 REVUE INTERNATIONALE DE DROIT COMPARÉ 375, 377-78, 386 (1973) (discussing the French tribunals presided over by these *juges de l'application des peines*, who supervise the execution of criminal punishment, and analogous tribunals in other countries); Albert Cheron, *De l'Intervention de l'Autorité Judiciaire dans l'Exécution des Peines et des Mesures de Sécurité*, *in* QUATRIÈME CONGRÈS INTERNATIONAL DE DROIT PÉNAL, PARIS (26-31 JUILLET 1937): RAPPORTS 541, 541-42 (1937) (discussing the separation of powers in relation to reform proposals antecedent to the establishment of the *juges de l'application des peines* system in France); ROBERT SIMONNET, DU RÔLE DU JUGE DANS L'EXÉCUTION DES PEINES 39-43 (1934) (analyzing, as Albert Cheron does not, the historic legacy in France of judicial oversight of prison administra-

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. In some jurisdictions, judges on their own motion could remove prison keepers for misbehavior. Even when legislatures assumed primary oversight responsibilities by way of overseers answerable to themselves, they still granted judges exceptional privileges of access to the lockups. No *cordon sanitaire* divided the judiciary from the prison. Quite the contrary.

And then some. Not only did legislatures routinely grant judges supervisory powers over prisons. The laws codifying this contrary understanding of the judicial power's scope went on the books amid sustained debates over the meaning of the separation of powers, as Founding Era constitutions enshrined that principle. The principle's major exponents, Thomas Jefferson among them, were sometimes responsible for drafting these laws and then lobbying for their passage.

The hands-off doctrine and its abiding separation-of-powers rationale are not traditional. They are a countertradition. They devolve from an earlier and, I hope to show, more reasoned regime. I call it the eyes-on doctrine. The American eyes-on doctrine arose alongside the first American penitentiaries and the first efforts to realize the separation of powers. The eyes-on doctrine made good on then-popular ideas due to the Italian jurist Cesare Beccaria, who stressed the importance of certainty, uniformity, and proportionality of punishment in the criminal law. Under the eyes-on doctrine, who watches the watchmen?[53] Judges. The eyes-on doctrine is that body of law lending force to the view that supervision of prison government is consistent with, if not an incident of, a separated judicial power and its exercise.

Because the regime this Note discovers differs markedly from modern prison law, it seems right to waste no time in introducing a Founding Era spokesman for the eyes-on doctrine. Part I finds him in Benjamin Rush. A close reading of his *Enquiry into the Effects of Public Punishments upon Criminals and upon Society*, published in Philadelphia in 1787, helps to reconstruct a possible rationale for the eyes-on doctrine. Rush's reasoning stands to explain why the laws instantiating the doctrine raised no separation-of-powers concerns in the Founding Era.

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tion). In future work, I plan to take up the eyes-on doctrine as a topic in comparative penal law.

53. *See* JUVENAL, *Satire 6*, *in* THE SATIRES 37, 50 (William Barr ed., Niall Rudd trans., Oxford World's Classics paperback ed. 1999) (c. 117).

Part II brings those laws to light. It shows that legislatures enacted them in periods of heightened sensitivity to what the separation of powers might require or proscribe.

Section II.A deals with states that vested supervisory powers over prisons in superior courts. I begin with this evidence because it supports my thesis in a relatively straightforward way: I am unaware of any theory under which powers exercised by superior-court judges might not be taken to embody the judicial power itself. Section II.A presents evidence in roughly chronological order.

Section II.B moves to the prison-oversight powers of Maryland's Court of Oyer and Terminer and Gaol Delivery, which sat in Baltimore. This court was presided over, in the first instance, by justices of the peace (JPs), who were shortly replaced with justices having "sound legal knowledge." The court was, in a word, professionalized.

Section II.B therefore serves as a kind of pivot between discussion of the powers of professional judges in Section II.A and the subject of Section II.C: the JPs and their courts. The reason for taking peculiar care with evidence related to JPs and discussing them separately is that these magistrates were understood to exercise both judicial *and* ministerial power. In certain jurisdictions at certain times, as Section II.C further explains, JP courts enjoyed fused judicial, quasi-executive, and even quasi-legislative authority. So when legislatures vested JPs with supervisory authority over prisons and jails, the question arises: were those powers thought to fall within the compass of JPs' ministerial, rather than their judicial, authority? Legislative patterns across Massachusetts, New Hampshire, Georgia, and the Carolinas indicate that when JPs were vested with powers over prison government, those powers were in fact thought to have a judicial cast. Section II.C identifies and explains those patterns. To bring them out, and let different statutes illuminate each other, Section II.C groups evidence thematically.

So far, so much state law. Section II.D reviews the federal component of the eyes-on doctrine in the form of a reappraisal of *Ex parte Taws*. *Taws* was among the earliest federal habeas corpus cases. Some consider it an early inkling of the hands-off attitude toward prison administration. Section II.D argues that this interpretation is wrong. Modern commentators (though not one important early commentator) misapprehend the case's holding. *Taws* in fact chimes with the eyes-on doctrine. It also chimes with ample, if half-forgotten, background English common-law precedent and practice. Without pretending to offer a comprehensive account of the English background to the American eyes-on doctrine, Section II.D's analysis of *Taws* nonetheless occasions a quick glance further backward in time to the tradition of prison supervision by not only English JPs but England's highest law court, the King's Bench.

Part III resumes chronology and discusses the post-*Taws* career of the eyes-on doctrine in antebellum America. Section III.A first discusses evidence from two states that Part II passes over, Connecticut and Rhode Island, which came late to separating the powers of their state governments. Section III.B then observes signs of fundamental changes to the prison-law landscape after the Civil War. To do so, it rereads the infamous *Ruffin v. Commonwealth*, which held prisoners to be "slaves of the state."

This Note ends where Part I began, with Rush. It observes resonances of his views in the present day and argues, in turn, for a revival of the eyes-on doctrine. I briefly sketch some forms its revival could take. But only briefly. This Note's overriding aim is to challenge one of modern American prison law's major, unfounded truisms. For decades, down to the weeks and months just past,[54] state and federal courts have held against imprisoned complainants by taking the position that the hands-off doctrine or its separation-of-powers cornerstone is the stuff of immemorial tradition, common accord, or mere self-evidence. This Note seeks to lay those canards to rest. It seeks to clear the ground for fresh thinking about how judges might watch over the justice of custodial sentences they impose.

I. BENJAMIN RUSH'S *ENQUIRY*

Daniel Epps notes the dearth of Founding Era texts that lay bare the "precise relationship between the separation of powers and criminal punishment in the Framers' thinking."[55] He conjectures that this void in the literature signifies a lack of meaningful dispute about the overall nature of that relationship.[56] Part

54. *See, e.g.*, State v. Jerido, No. 2209011322, 2024 WL 3887189, at *1 (Del. Super. Ct. Aug. 21, 2024) ("In Delaware, courts are 'generally very reluctant to interfere with the administration of prisons.' The administration of the State prison system falls 'within the auspices of the Executive branch of our State government.'" (quoting State v. Goodman, No. 0805001946, 2010 WL 547394, at *2 (Del. Super. Ct. Feb. 9, 2010)); Fuentes v. Choate, No. 24-cv-01377, 2024 WL 2978285, at *13 (D. Colo. June 13, 2024) ("Courts in general are reluctant to intrude on the administrative aspects of institutional facilities." (citing Turner v. Safley, 482 U.S. 78, 85 (1987))); Rindahl v. Reisch, No. 22-CV-04073, 2024 WL 960913, at *3 (D.S.D. Mar. 6, 2024) ("A preliminary injunction is not a mechanism for courts or inmates to insert themselves into prison administration by determining what is the most cost efficient or effective processes and policies for the Department of Corrections to implement. Such decisions are exclusively within the purview of the legislative and executive branches, not the judiciary." (citing *Turner*, 482 U.S. at 84-85)); Sheldon v. Bureau of Prisons, No. 23-cv-00273, 2024 WL 473534, at *4-6 (D. Colo. Feb. 7, 2024).

55. Daniel Epps, *Checks and Balances in the Criminal Law*, 74 VAND. L. REV. 1, 12 (2021).

56. *Id.* at 12 n.31.

II will bear out Epps's conjecture as to the separation of powers and judicial supervision of prison administration. Before going there, this Part lingers over an exception to the general rule that the links between these subjects escaped written commentary in eighteenth-century America. Reading between the lines of Benjamin Rush's *Enquiry into the Effects of Public Punishments upon Criminals, and upon Society*, published in Philadelphia in 1787,[57] reveals the outlines of a theory of the judicial role in and beyond the sentencing context. This theory represents a plausible reason why Founding Era political and legal communities found no separation-of-powers problem with the laws that made up the eyes-on doctrine.

Like John Locke, Benjamin Rush was a medical practitioner and occasional writer on the separation of powers, among other topics.[58] He published on the abolition of slavery, abolition of the death penalty, theories of mind and psychiatry, women's education, public education, cultivation of the sugar maple, and much else.[59] A prolific letter writer, he regularly corresponded with Thomas

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57. Benjamin Rush, An Enquiry into the Effects of Public Punishments upon Criminals, and upon Society (Philadelphia, Joseph James 1787). The reading I offer in what follows is consonant with Michael Meranze, Laboratories of Virtue: Punishment, Revolution, and Authority in Philadelphia, 1760-1835, at 132-36 (1996), and David M. Shapiro, *Solitary Confinement in the Young Republic*, 133 Harv. L. Rev. 542, 554 (2019). But I lay particular emphasis on three facts about the *Enquiry*: (1) it is not silent about the separation-of-powers implications of the penology it prescribes; (2) it confounds the distinction one might draw between punishment and conditions of carceral confinement; and (3) its implicit separation-of-powers argument and its tendency to regard conditions of confinement as part and parcel of punishment both follow from the particular conception of *proportionality* that the essay relies on.

58. *See* Roger Woolhouse, Locke: A Biography 33-35, 95-97, 265 (2007); Stephen Fried, Rush: Revolution, Madness and the Visionary Doctor Who Became a Founding Father 33-43, 89-98 (2018); Epps, *supra* note 55, at 10; M.J.C. Vile, Constitutionalism and the Separation of Powers 161 (2d ed. 1998).

59. See Fried, *supra* note 58, at 560-62 for a partial bibliography; and Benjamin Rush, Considerations on the Injustice and Impolicy of Punishing Murder by Death (Philadelphia, Mathew Carey 1792), whose title tells well enough Benjamin Rush's position. This is not to suggest the confused eclecticism of the dabbler. Why might Rush devote himself, say, to the subject of maple trees? Not for their sap's interesting flavor and uses alone; he thought maple syrup might just supplant the products of sugar cane, a slave crop. *See* Fried, *supra* note 58, at 336; Benjamin Rush, An Account of the Sugar Maple-Tree of the United States (July 10, 1791), *reprinted in* Essays, Literary, Moral & Philosophical 275, 281, 284-88, 294 (Philadelphia, Thomas & Samuel F. Bradford 1798) ("I cannot help contemplating a sugar maple tree with a species of affection and even veneration, for I have persuaded myself, to behold in it the happy means of rendering the commerce and slavery of our African brethren, in the sugar Islands as unnecessary, as it has always been inhuman and unjust."); *cf.* William Blake, The Marriage of Heaven and Hell (1790), *reprinted in* The Complete Poetry and Prose of William Blake 33, 35 (David V. Erd-

Jefferson, James Madison, John Dickinson, and Alexander Hamilton,[60] figures Part II will return to. Rush was also a proponent of penal reform. In 1796, he would dispatch Caleb Lownes—a colleague in the Philadelphia Society for Alleviating the Miseries of Public Prisons (PSAMPP), which the two had helped found[61]—to visit then-Governor John Jay in New York to discuss what would become Newgate, the state's first penitentiary.[62] PSAMPP still exists under the name of the Pennsylvania Prison Society.[63] It formed shortly after Rush read his *Enquiry* in 1787 to a sympathetic audience at Benjamin Franklin's home.[64] PSAMPP's early lobbying efforts persuaded the Pennsylvania legislature to pass an act in 1790 making of Philadelphia's Walnut Street Gaol the state's first penitentiary, designed primarily for punitive confinement.[65] "This law, it may be

man ed., rev. ed. 1988) ("A fool sees not the same tree that a wise man sees."). Rush was a systematic thinker whose systems enthusiastically took in theology, science, moral philosophy, politics, economics, epidemiology, psychiatry, and, yes, agriculture and foodstuffs. *See also infra* note 84 (on the subject of prisoners' diet); *infra* note 97 (regarding the many routes, for Rush, to singular truth).

60. *See* Fried, *supra* note 58, at 8, 301, 412-13. That maple tree essay, for instance, *see supra* note 59, was a published version of a 1791 letter from Rush to Jefferson. *See* Rush, *supra* note 59, at 281, 294.

61. Shapiro, *supra* note 57, at 552-53.

62. Letter from Benjamin Rush to John Jay (Aug. 2, 1796), *in* 6 The Selected Papers of John Jay, 1794-1798, at 489, 489-90 (Elizabeth M. Nuxoll ed., 2020) [hereinafter 6 Jay Papers].

63. *See Pennsylvania Prison Society Records: Collection 1946*, Hist. Soc'y Pa. 1-2 (2006), https://hsp.org/sites/default/files/legacy_files/migrated/findingaid1946prisonsociety.pdf [https://perma.cc/84VH-C4XR].

64. Negley K. Teeters, The Cradle of the Penitentiary: The Walnut Street Jail at Philadelphia, 1773-1835, at 29-30 (1955); Daniel R. Lee, *The Adolescent Development of the Penitentiary: A Review and Comment on* The Cradle of the Penitentiary *by Negley Teeters*, 84 Prison J. 115S, 116S (2004). While this Part will argue that Rush's argument would have been persuasive to a contemporaneous audience because of that argument's widely shared first principles, there are reasons to think that his particular conclusions, discussed below, were also representative of a broader current of legal opinion. Michael Meranze notes that James Wilson—who, some two months later, plied a laboring oar in drafting the Constitution of the United States, *see* 1-2 Max Farrand, The Records of the Federal Convention of 1787 *passim* (1911)—was in attendance at this address and that, with the significant exceptions of Thomas McKean and George Bryan, "many of the major legal thinkers in Philadelphia . . . either heard or encouraged Rush in his presentation." Michael Meranze, *The Penitential Ideal in Late Eighteenth-Century Philadelphia*, 108 Pa. Mag. Hist. & Biography 419, 435 & n.54 (1984).

65. Negley K. Teeters & John D. Shearer, Prison at Philadelphia, Cherry Hill: The Separate System of Penal Discipline, 1829-1913, at 9-10 (1957); Paul Takagi, *The Walnut Street Jail: A Penal Reform to Centralize the Powers of the State*, 39 Fed. Prob., no. 4, 1975, at 18, 23-24.

said, was *forced* from the legislature; for nothing but their confidence in the individuals who composed this association, could have persuaded them to risk a further experiment" in penal reform.[66]

That prior experiment, enacted in 1786, prescribed public convict labor.[67] Rush's 1787 *Enquiry* is, in the first place, an argument against this form of punishment.[68] From that point of departure, the essay attempts a broader criminology. "Laws can only be respected, and obeyed, while they bear an exact proportion to crimes,"[69] Rush argues, echoing Cesare Beccaria, whom he later cites.[70] Beccaria was a world-renowned eighteenth-century Italian jurist who stood for the abolition of the death penalty and a "fixed proportion between crimes and punishments calibrated according to the extent of the injury done to society"[71]—alongside a related, more general endorsement of reducing law to written, clear, organized, rational codes.[72]

Proportionality preoccupies Rush. To assess proportionality, he recommends measuring punishment using three coefficients: punishment's *duration*, its *nature*, and its *degree*.[73] Modern Eighth Amendment case law draws a bright line between punishment, on the one hand, and conditions of carceral confinement, on the other.[74] Whatever the merits of Rush's penology, that modern distinction is foreign to his logic and duration/nature/degree trichotomy. Rush regards as an "axiom[]" that "[a] separation from [kindred and society] . . . has ever been considered as one of the severest punishments that can be inflicted upon man."[75] Also axiomatic: "Personal liberty is so dear to all men, that the loss of it, for an indefinite time, is a punishment so severe, that death has often

66. Robert J. Turnbull, A Visit to the Philadelphia Prison 8 (London, James Phillips & Son 1797). This passage was quoted, in part, by Negley K. Teeters. *See* Teeters, *supra* note 64, at 39.

67. *See* Teeters, *supra* note 64, at 27-28.

68. Rush, *supra* note 57, at 10-11.

69. *Id.* at 9.

70. *Id.* at 15.

71. Kathryn Preyer, Cesare Beccaria and the Founding Fathers, *in* Blackstone in America: Selected Essays of Kathryn Preyer 239, 239-40, 246-48 (Mary Sarah Bilder, Maeva Marcus & R. Kent Newmyer eds., 2009).

72. John D. Bessler, The Birth of American Law: An Italian Philosopher and the American Revolution 55 (2014).

73. *See* Rush, *supra* note 57, at 12-13.

74. *See, e.g.*, Farmer v. Brennan, 511 U.S. 825, 837 (1994) ("The Eighth Amendment does not outlaw cruel and unusual 'conditions'; it outlaws cruel and unusual 'punishments.'").

75. Rush, *supra* note 57, at 10.

been preferred to it."[76] The privations brought on by imprisonment make imprisonment itself a punishment, and a grave one. Incarceration's *duration* could not but be the term of a custodial sentence. As a conceptual matter, though, incarceration's punitive *nature* and punitive *degree* would seem to incorporate the totality of circumstances a person faces within the four walls of the penitentiary.

Rush considers these circumstances. He speaks of the availability of religious tuition;[77] commodious architecture fit for the facility's purposes;[78] the resources of an adjoining farm and kitchen garden;[79] and the (to Rush, potentially salutary) fear and trembling that the facility's name, its geographic setting, and the "difficult and gloomy" path leading up to it might excite.[80] Even the sonic atmosphere of the penitentiary matters in this relation. The only time Rush mentions prison staff is in reference to their role in guarding the prison's clanking iron gate and their need to keep about them, at all times, a hue of somber quiet.[81] As Rush descends to the more particular forms that punishments should assume within the "house of repentance"[82] he envisions, the matter of their proportionate degree further subsumes what we might now call conditions of confinement. "THE punishments should consist of BODILY PAIN, LABOUR, WATCHFULNESS, SOLITUDE, and SILENCE. They should all be joined with CLEANLINESS and a SIMPLE DIET."[83] It would be idle to consider the degree of punishment that a regime of penal servitude visits upon a person without some idea of work conditions. Prayerful watchfulness, likewise, resembles less a thing inflicted than something a cloistral environment, in the round, might encourage more or less. That healthful dietary and hygienic regimes should "be joined"—not administered or applied alongside, but joined—with them fashions wholesome, daily bread a constituent part of

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76. *Id.*

77. *See id.* at 13 (prescribing "regular instruction in the principles, and obligations of religion, by persons appointed for that purpose").

78. *Id.* at 10 (prescribing "a large house, of a construction agreeable to its design").

79. *See id.* at 13.

80. *See id.* at 10-11.

81. *See id.* ("Let [the house's] doors be of iron; and let the grating, occasioned by opening and shutting them, be encreased by an echo from a neighbouring mountain, that shall extend and continue a sound that shall deeply pierce the soul. Let a guard constantly attend at a gate that shall lead to this place of punishment, to prevent strangers from entering it. Let all the officers of the house be strictly forbidden ever to discover any signs of mirth, or even levity, in the presence of the criminals.").

82. *Id.* at 12.

83. *Id.* at 13.

punishment itself.[84] Measuring proportionality as the *Enquiry* would have us measure it blends punishment with conditions of confinement.

The same conclusion follows from Rush's views on what proportionality should gauge, that is to say his views on the things to be proportioned. As mentioned above, Rush discovers rule-of-law values in the fitness between crime and punishment.[85] But he also casts proportionality in medical terms[86] —

84. Further support for this reading comes from Rush's later correspondence with another prison reformer, Thomas Eddy — more about whom in due course. *See infra* notes 352-354 and accompanying text. In one place, Rush writes of what he considers to be the worthy penological purposes of solitary confinement. Letter from Benjamin Rush to Thomas Eddy (Oct. 19, 1803), *in* 2 LETTERS OF BENJAMIN RUSH: 1793-1813, at 874, 875 (L.H. Butterfield ed., 1951) ("Solitary beds and rooms are a great desideratum for the convicts. They are calculated to awaken delicacy, which is one of the outposts of virtue, and to favor reflection, repentance, and silent or oral devotion."). In the next sentence, talk turns to the jerky ration. *Id.* ("The salt meat or salt fish in the diet of the prisoners in the summer and autumnal months I conceive to be judicious. It has been known in many instances to prevent fevers and bowel complaints, both of which I observe are common diseases in your jail."). But physical health and institutional economy are not the only or even the primary ends Rush has in mind. The subject of prisoners' diet immediately widens out to give upon food — more precisely, occasional *feasting* — as an efficient component of imprisonment's reformative potential. *See id.* ("In addition to the common diet mentioned in your publication, what do you think of allowing them from private contributions a more plentiful meal of less cheap or common aliment once or twice a year on some public day? Would it not tend to show them that the ties which once connected them with their fellow men are not totally dissolved, and that a fund of kindness still existed in their breasts towards them even while they were suffering for the injuries they had done to them? In this way the kind parent of the human race often visits his most refractory children, and sometimes by that means brings them back again to himself. The practice would tend further to convey to the criminals an idea of the mixture of divine mercy with divine justice, so as to extinguish all resentments against their fellow creatures as far as they were excited by their conviction and punishments, and to work upon the fragments of good which are left in them, for I believe there never was a soul so completely shipwrecked by vice that something divine was not saved from its wreck."). Rush alludes here, none too subtly perhaps, to that juicy, free-range veal one memorable father served his penitent son. *See Luke* 15:11-32; *cf. also* Rush, *supra* note 57, at 14 ("His friends and family bathe his cheeks with tears of joy; and the universal shout of the neighbourhood is, 'This our brother was lost and is found — was dead, and is alive.'"). At any rate, to Rush's mind, diet is something fully "joined with" an overall penology. He does not valorize healthful dietary and hygienic regimes out of a freestanding humanitarianism or loving-kindness. He valorizes them for their perceived contributions to the ends of carceral confinement. Mark the logic well: it is *good food*, not *bad food*, that is the punishment.

85. *See, e.g.*, RUSH, *supra* note 57, at 8-9 ("[L]ike the indiscriminate punishment of death, [ignominy] not only confounds and levels all crimes, but by *encreasing* the disproportion between crimes and punishments, it creates a hatred of all law and government, and thus disposes to the perpetration of every crime. Laws can only be respected, and obeyed, while they bear an exact proportion to crimes.").

in terms, that is, of the proportionate *dose* of punishment, adjusted according to "the variations of the constitution and temper of the criminal" and "the progress of their reformation."[87] Punishments are "physical remedies" that occur by imprisonment and within the prison.[88] The prison itself turns out to be a sort of hospital or asylum. "[W]hy should receptacles be provided and supported at an immense expence, in every country, for the relief of persons afflicted with bodily disorders, and an objection be made to providing a place for the cure of the diseases of the mind?"[89] Everything that acts on the body, mind, and spirit of the individual inmate pertains to proportionality so conceived and constitutes punishment as reformative remedy. The totality of circumstances an individual faces within the penitentiary makes up that individual's punishment.

Who, then, is to calibrate duration, nature, and degree of punishment with an offender's crime and character? "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."[90] Rush continues:

> I am aware of the prejudices of freemen, against entrusting power to a discretionary court. But let it be remembered, that no power is committed to this court, but what is possessed by the different courts of justice in all free countries; nor so much as is now wisely and necessarily possessed by the supreme and inferior courts, in the execution of the penal laws of Pennsylvania.[91]

As Section II.A will show, such discretionary power had indeed been vested in Pennsylvania's supreme and lower courts the previous year,[92] whatever the

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86. Is that a category mistake? For Rush, there is no such thing. "Truth is an [sic] unit. It is the same thing in war—philosophy—medicine—morals—religion and government; and in proportion as we arrive at it in one science, we shall discover it in others." *Id.* at 4.

87. *Id.* at 11, 13; *see also id.* at 13 ("I have no more doubt of every crime having its cure in moral and physical influence, than I have of the efficacy of the Peruvian bark in curing the intermitting fever.").

88. *Id.* at 13.

89. *Id.* at 12.

90. *Id.* (emphasis added).

91. *Id.*

92. *See infra* note 139 and accompanying text.

prejudices of freemen, sensitive to the specter of an overweening judiciary and eager to confine judges to the exercise of judicial power alone.[93]

On Rush's understanding, then, a judge may not be the custodian of the body of the prisoner, but he is the custodian of the sentence and the punishment it imposes. The degree and nature of punishment encompass what we now call conditions of confinement. They implicate the judicial power because the integrity and efficacy of the judge's sentence rise or fall with its proportionality. As we shall see, the *Enquiry* adopts the controversial view that judges should enjoy great latitude in fixing terms of incarceration.[94] Rush furthermore frames imprisonment as a quasi-medical intervention. While these views may tend toward idiosyncrasy, the thrust of the essay's argument does not. The way Rush follows the substance of proportionality beyond the courtroom and into the interior of the prison is nothing if not assiduously applied Beccarianism—at least, its American version. Gordon S. Wood observes that widespread "Beccarian sentiments" led to "demands for the weeding out of British law and the codification and simplification of American law."[95] And yet it "began to seem to some that Americans could not have specific legislative enactment and equity at the same time, or, contrary to the Beccarian belief, that codification and simplification of the law demanded an increase, not a lessening, of judicial interpretation and discretion."[96] The *Enquiry* swims in these very crosscurrents. Rush advocates judicial "determin[ation] beyond a certain degree" of the fitness between punishment and crime.[97] One thinks of the (notionally) clear, preset, rational, algorithmic table that federal judges are today obliged to consider in connection with sentencing,[98] or an eighteenth-century French analogue the

93. *See, e.g.*, Gordon S. Wood, Power and Liberty: Constitutionalism in the American Revolution 128-33 (2021); Vile, *supra* note 58, at 181-82; *infra* notes 147-148 and accompanying text (regarding apprehension that judges of the Pennsylvania Supreme Court might become "lords paramount" throughout the commonwealth).

94. *See supra* note 90 and accompanying text; *infra* notes 147-151 and accompanying text.

95. Gordon S. Wood, The Creation of the American Republic, 1776-1787, at 300 (1969); *see also, e.g.*, *infra* notes 102-104, 260, 319-321, 326 and accompanying text (regarding codification efforts in Virginia, Massachusetts, Connecticut, and Rhode Island).

96. Wood, *supra* note 95, at 303.

97. Rush, *supra* note 57, at 12.

98. *See* U.S. Sent'g Guidelines Manual ch. 5, pt. A (U.S. Sent'g Comm'n 2023) (setting forth the Sentencing Table that computes a range of sentence durations using two inputs: a (numerical) offense level and an individual defendant's criminal history score); United States v. Booker, 543 U.S. 220, 245-46 (2005) (holding that the guidelines ranges are advisory but must be considered by courts).

Enquiry halfheartedly endorses.[99] But Rush does not stop there. He does not see the judge as a cipher performing a one-off proportionality calculation at the time of sentencing and then washing his hands of the matter. Instead, Rush envisions regular judicial visits to the penitentiary and, by extension, an unfolding relationship among judges, prison administrators, and prisoners. If this judicial "business" necessitates some quantity of judicial "discretion[]"—offensive, maybe, to "the prejudices of freemen"—so be it.[100] Rush advocates this oversight scheme in the name of preserving, through time, the proportionate fairness and reformative efficacy of the sentence.

Rush's *Enquiry* therefore encapsulates an understanding of the judicial role whose broader currency would explain why Founding Era political communities found no separation-of-powers problem in vesting judges with supervisory authority over the prison. Judicial supervision of prison administration stands to bring precision and proportion to the custodial sentence. The judge fixes not only the length of a term of incarceration, but also oversees and stands ready to remedy conditions of confinement so as to calibrate, through time, the punishment an inmate experiences with the severity of the offense giving rise to that punishment and its reformative potential. The eyes-on doctrine, on this view, reinforces the judicial power over sentencing—the application of general criminal law to the case of a specific defendant. The eyes-on doctrine operates to shore up an independent, separated judicial power and its exercise.

But Rush does not cast the scheme of judicial oversight he proposes as anything other than a version of already existing law and practice, "in all free countries" anyway. Was he exaggerating? To test his claim, I now turn to the reality and prevalence of the eyes-on doctrine before and after the *Enquiry*'s 1787 publication date.

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99. RUSH, *supra* note 57, at 13 ("Mr. Dufriche de Valazé, in his elaborate treatise upon penal laws, . . . has divided crimes into classes, and has affixed punishments to each of them, in a number of ingenious tables. Some of the connections he has established between crimes and punishments, appear to be just.—But many of his punishments are contrary to the first principles of action in man; and all of them are, in my opinion, improper, as far as he orders them to be inflicted in the *eye* of the *public*. His attempt, however, is laudable, and deserves the praise of every friend to mankind."). For those tables, see M. DUFRICHE DE VALAZÉ, LOIX PÉNALES, DÉDIÉES À MONSIEUR, FRÈRE DU ROI 356-400 (Alençon, Malassis le Jeune 1784). Dufriche de Valazé had given a copy of his book to Benjamin Franklin, at whose home Rush read the *Enquiry*. Letter from Dufriche de Valazé to Benjamin Franklin (Jan. 14, 1784), *in* 41 THE PAPERS OF BENJAMIN FRANKLIN, SEPTEMBER 16, 1783, THROUGH FEBRUARY 29, 1784, at 458, 458 & n.1 (Ellen R. Cohn, Jonathan R. Dull, Robert P. Frankel, Jr., Kate M. Ohno, Philipp Ziesche, Alicia K. Anderson, Allegra di Bonaventura, Alysia M. Cain, Adrina M. Garbooshian & Michael Sletcher eds., 2014); *supra* note 64 and accompanying text.

100. RUSH, *supra* note 57, at 12.

II. THE EYES-ON DOCTRINE IN THE FOUNDING ERA

A. Supervisory Authority Vested in Superior Courts

1. Virginia

James Madison said "the most severe" of Thomas Jefferson's "public labours" was not his governorship of Virginia, nor presidency of the United States, nor any other formal officeholding in his various career.[101] It was his work in the late 1770s for a committee tasked with drafting a wholesale revision of Virginia law.[102]

Having passed a generic reception statute in 1776,[103] the Virginia legislature sought to bring state law into closer conformity with "the powers of government as now organised" after independence.[104] Jefferson's fitness for the task was likely felt not only in his status as an influential politician, writer, lawyer, and revolutionary.[105] He also bore peculiar responsibility for the powers of Virginian government as then organized. He had authored portions of the 1776 state constitution's provision that "[t]he legislative, executive, and judiciary departments, shall be separate and distinct, so that neither exercise the Powers properly belonging to the other; nor shall any person exercise the powers of more than one of them at the same time."[106]

M.J.C. Vile argues that this declaration, "which the framers of [Virginia's Constitution considered] the basis of their system of government, was the clearest, most precise statement of the doctrine which had at that time ap-

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101. 2 THE PAPERS OF THOMAS JEFFERSON 313 (Julian P. Boyd, Lyman H. Butterfield & Mina R. Bryan eds., 1950) [hereinafter 2 JEFFERSON PAPERS].

102. *Id.*

103. Charles T. Cullen, *Completing the Revisal of the Laws in Post-Revolutionary Virginia*, 82 VA. MAG. HIST. & BIOGRAPHY 84, 84 (1974).

104. An Act for the Revision of the Laws, ch. 9, 1776 Va. Acts Oct. Sess. 41, *in* 9 WILLIAM WALLER HENING, THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619, at 175, 176 (New York, R. & W. & G. Bartow 1823); JOURNAL OF THE HOUSE OF DELEGATES OF VIRGINIA 1776, at 41 (Richmond, Samuel Shepherd & Co. 1828); 2 JEFFERSON PAPERS, *supra* note 101, at 305.

105. *See* 1 DUMAS MALONE, JEFFERSON AND HIS TIME 180-96 (1948).

106. VA. CONST. of 1776, *transcribed in Transcription: First Virginia Constitution, June 29, 1776*, LIBR. OF VA. 2, https://edu.lva.virginia.gov/ocapi/uploads/1644249419040_first-va-constitution-transcription.pdf [https://perma.cc/EM2U-SZSA]; ROBERT P. SUTTON, REVOLUTION TO SECESSION: CONSTITUTION MAKING IN THE OLD DOMINION 46 (1989).

peared anywhere, in the works of political theorists, or in the pronouncements of statesmen."[107] The provision was indeed no dead letter to the General Assembly. Over the coming years, the legislature would reconsider and modify the scope of departmental powers and interbranch checks and balances.[108] Throughout, Jefferson found their efforts to be unacceptable half-measures. He complained of a governmental structure that left "[t]he judiciary and executive members . . . dependant . . . for their subsistence in office" on the whims of the Virginia legislature's "173 despots," an "*elective despotism*" that was "not the government we fought for" in the Revolution.[109] He complained, in fine, of a recalcitrant gentry. Committed to the old ways and dominant in the General Assembly, this "squireocracy" would guard that body's prerogatives in what Jefferson perceived to be defiance of constitutional command.[110] Toward the

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107. VILE, *supra* note 58, at 131.

108. In 1778, for instance, it broadened the governor's power to appoint and remove justices of the peace. An Act to Extend the Powers of the Governor and Council, ch. 5, §§ 3-4, 1778 Va. Acts Oct. Sess. 81, 81. In 1782, it scrupled to modify the governor's role in appointing sheriffs. *Compare* VA. CONST. of 1776, *transcribed in Transcription: First Virginia Constitution, June 29, 1776*, LIBR. OF VA. 4, https://edu.lva.virginia.gov/ocapi/uploads/1644249419040_first-va-constitution-transcription.pdf [https://perma.cc/EM2U-SZSA] ("The Sheriffs . . . shall be nominated by the respective [county] Courts, approved by the Governour with the advice of the privy Council, and commissioned by the Governour." (emphasis omitted)), *with* An Act Concerning the Appointment of Sheriffs, ch. 39, 1782 Va. Acts Oct. Sess. 181, 181 ("[T]he court of every county . . . shall . . . nominate to the governor, or chief magistrate for the time being, two persons named in the commission of the peace for their county, one of which persons so nominated shall be commissioned by the governor to execute the office of sheriff . . . .").

Here and throughout this Note, I content myself with a workaday understanding of checks and balances, drawn from *Federalist 48*. Checks and balances equip separate branches of government with specific powers as against other branches. These prerogatives make the separation of powers more than a "parchment barrier[] against the encroaching spirit of power," but a practical reality, enforced in no small part by the give-and-take of interbranch dynamics themselves. THE FEDERALIST NO. 48, at 308-09 (James Madison) (Clinton Rossiter ed., 1961). Checks and balances, on this understanding, alloy the separation of powers to fortify it. If certain provisions of the statutes that this and the next Part analyze resemble or constitute judicial checks on legislative or executive authority, they can still be understood to further a bedrock structural imperative: the separation of powers.

By the same token, I content myself with an off-the-shelf, simple definition of the separation of powers, due to M.J.C. Vile. The separation-of-powers principle holds that there are such things as legislative, executive, and judicial power, and political liberty depends upon vesting those powers in distinct legislative, executive, and judicial departments of government. *See* VILE, *supra* note 58, at 14.

109. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 120-21 (William Peden ed., 1996) (1781).

110. SUTTON, *supra* note 106, at 50-51.

end of his life, he would arrive at the view that republican government demanded nothing less than strict separation of governmental powers, beyond checks and balances, and that officers of each department, including judges, must be made directly accountable to the people by way of elections.[111] Put simply, Jefferson stood at the bleeding edge of an emerging separation-of-powers doctrine that found comparatively limited but nevertheless appreciable support in the Virginia legislature.

The 1776 Committee of Revisors would have overhauled the state's criminal law. One of its proposed bills, "for Proportioning Crimes and Punishments in Cases Heretofore Capital," made to replace the death sentence for most felonies with punishment at hard labor for varying terms of years.[112] Another, "for the Employment, Government and Support of Malefactors Condemned to Labour for the Commonwealth," elaborated the conditions of penal servitude.[113] While the committee's surviving records are fragmentary,[114] it appears Jefferson drafted both.[115] Beccaria's influence suffuses them.[116] There is at least one respect,

111. VILE, *supra* note 58, at 181-83.

112. Bills Reported by the Committee of Revisors: A Bill for Proportioning Crimes and Punishments in Cases Heretofore Capital (No. 64), *reprinted in* 2 JEFFERSON PAPERS, *supra* note 101, at 492-507.

113. Bills Reported by the Committee of Revisors: A Bill for the Employment, Government and Support of Malefactors Condemned to Labour for the Commonwealth (No. 68) [hereinafter Bill No. 68], *reprinted in* 2 JEFFERSON PAPERS, *supra* note 101, at 513-15.

114. *See* 2 JEFFERSON PAPERS, *supra* note 101, at 321; Kathryn Preyer, Crime, the Criminal Law and Reform in Post-Revolutionary Virginia, *in* BLACKSTONE IN AMERICA, *supra* note 71, at 147, 151 n.11.

115. On Jefferson's painstaking authorship of the "Bill for Proportioning Crimes and Punishments in Cases Heretofore Capital," see 1 MALONE, *supra* note 105, at 269-70; and Markus D. Dubber, *"An Extraordinarily Beautiful Document": Jefferson's "Bill for Proportioning Crimes and Punishments" and the Challenge of Republican Punishment*, *in* MODERN HISTORIES OF CRIME AND PUNISHMENT 115, 127-40 (Markus D. Dubber & Lindsay Farmer eds., 2007). On Jefferson's authorship of "A Bill for the Employment, Government and Support of Malefactors Condemned to Labour for the Commonwealth," see 2 JEFFERSON PAPERS, *supra* note 101, at 320, 515; and Braatz, *supra* note 51, at 433. But on the contributions of Jefferson's colleague on the committee, George Wythe, to these two proposed bills, see William Munford, *Oration Pronounced at the Funeral of George Wythe*, RICHMOND ENQUIRER, June 13, 1806, at 3, 3 (on file with Encyc. Va., https://encyclopediavirginia.org/entries/oration-pronounced-at-the-funeral-of-george-wythe-1806 [https://perma.cc/2RX4-EGCT]) ("It became therefore necessary to new-model our laws, and lay the foundations of the temple of freedom firmly in the wisdom and justice of our institutions. The persons appointed to execute this great work, and by whom it was *accomplished* were Thomas Jefferson, Edmund Pendleton, and *George Wythe*; who, tho' mentioned last, might with propriety be considered as the chief; for, great and exalted as is the merit of Mr. Jefferson, it must be confessed that he is in a great measure indebted for it to George Wythe, his preceptor and his friend. Between these two extraordinary men the warmest friendship has ever existed, and the president of the

though, in which the bill "for the Employment, Government, and Support of Malefactors Condemned to Labour for the Commonwealth" is original. After specifying that "malefactors condemned by judgment of law to hard labour" shall toil in gallies, lead mines, or other "fortifications," the bill provides that

> [t]he court of the county wherein such malefactors labour . . . shall have 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.[117]

But "if the cruelty of such keeper shall require it,"

> the said county court shall also have power to suspend him and to appoint another to exercise his office until the General Court shall take order therein. The 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.[118]

The General Court, furthermore, was to

United States has always been proud to acknowledge himself the pupil of the wise and modest Wythe. . . . [T]he committee of revisors are not only entitled to praise for the laws, of which they were instrumental in obtaining the establishment, but for several which they proposed without success. Among those may be found . . . [two that] furnished a hint, which gave birth to our present Penitentiary system, by a bill for proportioning crimes and punishments in cases heretofore capital, and a bill for the employment, government and support, of malefactors condemned to labor for the commonwealth."). *See also infra* notes 131-135 and accompanying text (regarding the Richmond Penitentiary).

Wythe was indeed Jefferson's "antient master, [his] earliest & best friend"—and also his law professor. Letter from Thomas Jefferson to William DuVal (June 14, 1806), *reprinted by* Founders Online, Nat'l Archives, https://founders.archives.gov/documents/Jefferson/99-01-02-3844 [https://perma.cc/67DV-PY5U]; *Marshall Wythe Blackstone Commemoration Ceremonies: The Rededication of the Anglo-American Bench and Bar to Its Traditions of Representative Constitutional Government*, Wm. & Mary L. Sch. 17 (Sept. 25, 1954), https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1010&context=history [https://perma.cc/YA5V-KPXR].

116. *See* Jessica K. Lowe, Murder in the Shenandoah 76-85 (2019); Preyer, *supra* note 114, at 150-66; Against the Death Penalty: Writings from the First Abolitionists—Giuseppe Pelli and Cesare Beccaria 154-55, 161-62 (Peter Garnsey trans., 2020); Braatz, *supra* note 51, at 427-34.

117. Bill No. 68, *supra* note 113, at 513, 514.

118. *Id.* at 514-15.

> assign some person of discretion, humanity and attention, in the neighbourhood of the place where any malefactors labour, to enquire, from time to time, into their condition and treatment, and the conduct of their keepers and to represent the same to the said court whenever it shall seem to him requisite.[119]

This language appears nowhere in earlier Virginia law.[120] On the one hand, it contemplates the keeper's cruelty. That recalls the prohibition on cruel and unusual punishment from the 1776 Virginia Constitution's Bill of Rights.[121] On the other hand, the language contemplates remedies for the keeper's "misbehaviour" and for court appointment of a benevolent inspector. Those prerogatives broaden judicial power beyond vindication of constitutional right. Amid an attempt to republicanize Virginia law—one that elsewhere takes halfway-quixotic aim at achieving the separation of powers[122]—Jefferson and his colleagues innovated a scheme of judicial oversight of prisons.

While the legislature's appetite for thoroughgoing penal-law reform would not crest until the 1790s, it did consider these proposed bills. On June 18, 1779, the "Speaker laid before the House, a letter from [Jefferson and Wythe] on the subject of the revision of the laws, enclosing a list of the revised laws, and referring to manuscript copies" of them.[123] During the following session, when these manuscripts were presumably circulating, a bill "to empower the Governor and Council to superintend and regulate the public jail" came up for renewal. It was committed to the House of Delegate's Committee of Courts of

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119. *Id.* at 515.

120. At least, it does not show up in William Waller Hening's *Statutes at Large*. That multivolume work purported to compile all extant records of Virginia's colonial and early state law, including those reflected only in Jefferson's manuscript collection of early statutes. *See* 1 WILLIAM WALLER HENING, THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619, at x-xiii (New York, R. & W. & G. Bartow 1823).

121. VA. CONST. of 1776, Bill of Rights § 9.

122. *See, e.g.*, 2 JEFFERSON PAPERS, *supra* note 101, at 582 (regarding the Committee's long-shot decision "to assault the main stronghold of the county court system"). For more on the fused powers of local courts in the Founding Era, see *infra* Section II.C.

123. JOURNAL OF THE HOUSE OF DELEGATES OF THE COMMONWEALTH OF VIRGINIA; BEGUN AND HELD AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, ON MONDAY, THE THIRD DAY OF MAY, IN THE YEAR OF OUR LORD ONE THOUSAND SEVEN HUNDRED AND SEVENTY-NINE 56-57 (Richmond, Thomas W. White 1827) (June 18, 1779); *see also* Letter from Thomas Jefferson and George Wythe to Benjamin Harris (June 18, 1779), *in* 2 JEFFERSON PAPERS, *supra* note 101, at 301, 301-302 (providing a copy of the letter from Jefferson and Wythe to Speaker Benjamin Harrison).

Justice.[124] Some two weeks earlier, that committee had recommended the act's continuance, as it had the previous session.[125] This time, however, the committee returned several amendments.[126] The final Act provided that since

> the act of Assembly passed in [1778], entitled *An act to empower the Governor and Council to superintend and regulate the public jail*, has been found inconvenient by placing that business in the hands of the Governor and Council, and it is judged proper to put the direction of the said jail into the hands of the Judges of the General Court . . . *BE it therefore enacted*, that from and after the end of this session of Assembly, the Judges of the General Court shall have the direction of the public jail . . . .[127]

Conceivably, the Committee of Courts of Justice read Jefferson's proposal regarding judicial supervision of sites of penal servitude, found the idea proper, and adapted it to pending legislation.[128] In any case, the language of the 1779 Act is no matter of conjecture. The Virginia legislature, in the name of propriety, reassigned superintendency of the public jail of the commonwealth from the governor to the judiciary.

This legislation had staying power. The 1779 Act was continued in 1782 and passed without a sunset provision in 1785.[129] James Madison, by then sitting in

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124. Journal of the House of Delegates of the Commonwealth of Virginia; Begun and Held at the Capitol, in the City of Williamsburg, on Monday, the Fourth Day of October, in the Year of Our Lord One Thousand Seven Hundred and Seventy-Nine 34 (Richmond, Thomas W. White 1827) (Nov. 2, 1779) [hereinafter Journal of the House of Delegates].

125. Journal of the House of Delegates, *supra* note 124, at 10 (Oct. 16, 1779); 1 Official Letters of the Governors of the State of Virginia 376 (H.R. McIlwaine ed., 1926).

126. Journal of the House of Delegates, *supra* note 124, at 51 (Nov. 10, 1779).

127. An Act to Empower the Judges of the General Court to Superintend and Regulate the Public Jail, ch. 19, §§ 1-2, 1779 Va. Acts Oct. Sess. 111, 111.

128. On the General Assembly occasionally lifting portions of the Report of the Committee of Revisors for immediate enactment, see Thomas Jefferson, The Autobiography of Thomas Jefferson, 1743-1790, at 70-71 (Paul Leicester Ford ed., 1914).

129. *See* An Act to Continue the Act Entitled an Act to Empower the Judges of the General Court to Superintend and Regulate the Public Jail, ch. 3, § 1, 1782 Va. Acts Oct. Sess. 171, 171; An Act to Revive the Act, Intituled "An Act to Empower the Judges of the General Court to Superintend and Regulate the Public Jail,["] ch. 68, §§ 1-2, 1785 Va. Acts Oct. Sess. 36, 36 (reviving the Act with no sunset provision); *see also* 13 William Waller Hening, The Statutes at Large: Being a Collection of All the Laws of Virginia from the First Session of the Legislature in the Year 1619, at 113 (Philadelphia, Thomas De-

the Virginia legislature, would again present the Revisors' penal-reform bills (as written) for consideration, after seeing to the publication of the full balance of them in 1784.[130] The Revisors' proposed penal-reform bills did finally feed, in altered form, into the regulation of Virginia's first penitentiary in 1796, an institution designed primarily for punitive incarceration.[131] Under the terms of the statute providing for the penitentiary's erection, the court of the city of Richmond was obliged to appoint inspectors of the penitentiary for fixed terms at regular intervals.[132] These inspectors enjoyed broad powers over prison governance.[133] Jefferson's reservations about the 1796 law notwithstanding,[134] the Revisors' penal-reform proposals, including the scheme of judicial oversight they would have established, were substantially enacted.[135]

With the benefit of further hindsight, Jefferson would voice one regret about the Revisors' work: it had not considered the proposals Rush and PSAMPP would put forward in the 1780s. "[W]hen our report was made, the idea of a Penitentiary had never been suggested: the happy experiment of Pensylvania [sic] we had not then the benefit of."[136] As explained below, though, the legislators who pursued penal reform in Pennsylvania might well have relied, in part, on Jefferson's proposal.

2. *Pennsylvania*

As Part I discussed, in 1786 the Pennsylvania legislature adopted a regime of punishment involving public convict labor[137] but came to disapprove of its

silver 1823) (describing the 1785 Act as correctly numbered chapter forty-eight and erroneously numbered chapter sixty-eight).

130. 8 THE PAPERS OF JAMES MADISON 48, 396 (Robert A. Rutland, William M.E. Rachal, Barbara D. Ripel & Fredrika J. Teute eds., 1973); Letter from J. Madison Jr. to Thomas Jefferson (Jan. 9, 1785), *in* 8 THE PAPERS OF JAMES MADISON, *supra*, at 222, 232.

131. *See* Act of Dec. 15, 1796, ch. 2, §§ 4-12, 1796 Va. Acts Nov. Sess. 4, 4-5.

132. *See id.* § 38, 1796 Va. Acts Nov. Sess. at 8.

133. *See, e.g.*, *id.* § 40, 1796 Va. Acts. Nov. Sess. at 9.

134. *See* 1 MALONE, *supra* note 105, at 273.

135. Guyora Binder, *The Origins of American Felony Murder Rules*, 57 STAN. L. REV. 59, 149 (2004).

136. Letter from Thomas Jefferson to Skelton Jones (July 28, 1809), *reprinted by* FOUNDERS ONLINE, NAT'L ARCHIVES, https://founders.archives.gov/documents/Jefferson/03-01-02-0311 [https://perma.cc/K3UZ-NXCS].

137. *See, e.g.*, MERANZE, *supra* note 57, at 55-127 (1996).

results and repealed it in the context of further reform in 1790.[138] The 1790 law nonetheless preserved something the 1786 law had introduced, a provision bearing a striking resemblance to the Virginia Committee of Revisors' proposed bill regulating penal servitude. The 1786 "Act Amending the Penal Laws of this State" had provided that

> the court of quarter sessions of the county wherein the malefactors labor shall have power either ex-officio or upon information against any such keeper for partiality or cruelty to call before them such keeper . . . and if it shall appear that he hath been guilty of gross partiality or cruelty, it shall and may be lawful for the said court to suspend or remove him . . . [but] the judges of the supreme court . . . on their own motion or on complaint made by any other may take original cognizance of the misbehaviours of any keeper and remove him from office if they see cause.[139]

The similarities between the language of the 1786 Pennsylvania Act and the Virginia Revisors' bill suggest a genetic connection. By 1784, the Revisors' bills had been published in an edition of five hundred copies.[140] George Logan, a member of the Pennsylvania General Assembly and apparent supporter of the Pennsylvania bill,[141] did receive an inscribed copy of this *Report of the Committee of Revisors* from Madison.[142] Note, though, how the Pennsylvania provision

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138. Braatz, *supra* note 51, at 447-49; Christopher Seeds, *Historical Modes of Perpetual Penal Confinement: Theories and Practices Before Life Without Parole*, 44 LAW & SOC. INQUIRY 305, 312 (2019); Ashley T. Aubuchon-Rubin, *Rehabilitating Durkheim: Social Solidarity and Rehabilitation in Eastern State Penitentiary, 1829-1850*, 5 INT'L J. PUNISHMENT & SENT'G 12, 37 nn.14-15 (2009). For evidence of similar doubts over punishments involving public humiliation in Massachusetts, see Adam J. Hirsch, *From Pillory to Penitentiary: The Rise of Criminal Incarceration in Early Massachusetts*, 80 MICH. L. REV. 1179, 1233 (1982).

139. An Act Amending the Penal Laws of This State, ch. 1241, § 9, *in* 12 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801, at 280, 285-86 (1906). For the substantively identical 1790 language, see An Act to Reform the Penal Laws of This State, ch. 565, § 29, 1789-1790 Pa. Laws 801, 812.

140. 2 JEFFERSON PAPERS, *supra* note 101, at 310-11; *supra* note 130 and accompanying text.

141. *See* MINUTES OF THE THIRD SESSION OF THE TENTH GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA, WHICH COMMENCED AT PHILADELPHIA, ON TUESDAY, THE TWENTY-SECOND DAY OF AUGUST, IN THE YEAR OF OUR LORD ONE THOUSAND SEVEN HUNDRED AND EIGHTY-SIX 281-83, 334-35 (Philadelphia, Hall & Sellers n.d.).

142. *See Report of the Committee of Revisors Appointed by the General Assembly of Virginia in MDCCLXXVI. (Record No. 50188)*, LIBR. CO. OF PHILA., https://librarycompany.kohacatalog.com/cgi-bin/koha/opac-MARCdetail.pl?biblionumber=50188 [https://perma

subtly varies its seeming prototype. Under the Virginia Revisors' bill, local courts would investigate and initiate process against the cruel or partial prison keeper. "[I]f the cruelty of [a] keeper shall require it," the local court can remove him, but only provisionally, "until the General Court shall take order therein."[143] That is, the superior court ultimately determines the offending jailer's fate, all while retaining the power, on its own motion, to remove any jailer for generic misbehavior. Under Pennsylvania's 1786 Act, by slight contrast, local judges shared the power of permanent removal with supreme-court judges. Local judges could nonetheless only act on a heightened standard, a finding of partiality or cruelty after a hearing.[144] Supreme-court judges retained an independent power of removal upon a finding of generic misbehavior.[145]

Floor debate shows that one reason for this difference was what Rush called the "prejudices of freemen" against judicial discretion.[146] Thomas Fitzsimons "thought it very right that the justices of the court of quarter sessions should have th[e] [removal] power, and very improper for the judges of the supreme court; he would wish the power of taking cognizance of these matters to be intirely in the court of quarter sessions."[147] Why? Because "by putting all these [removal] powers in [supreme court judges'] hands they would be *lords paramount throughout Pennsylvania*."[148] Other assemblymen disagreed, thinking that local courts were in fact not lordly enough, a poor bulwark against an offending jailer's importuning cronies.[149] After further discussion touching on the sheriff's role in jailer removals, Fitzsimons agreed "to amend the whole clause" after taking "some time to consider of it" further.[150] He returned the next day

.cc/5UD3-5RC8] (indicating under "local note" that the Report was "inscribed from James Madison to George Logan").

143. Bill. No. 68, *supra* note 113, at 514.

144. *See supra* note 139 and accompanying text.

145. *See supra* note 139 and accompanying text.

146. RUSH, *supra* note 57, at 12.

147. *Philadelphia, Sept. 2. Proceedings of the General Assembly*, PA. PACKET, Sept. 2, 1786, at 2, 3 (reporting the floor debate from August 31, 1786).

148. *Id.* (emphasis added).

149. *See id.* (quoting John Smilie, who argued that since court-of-quarter-sessions judges "are ever on the spot, the friends of the offend[ing] [jailer] would compel them to mitigate their severity; whereas the judges of the supreme court are but seldom in the counties, and therefore not so liable to solicitation").

150. *Id.*

with language substantively identical to what passed, dividing the removal power between local and supreme-court judges.[151]

Whatever influence the Virginia Revisors' proposed bill had on the 1786 Pennsylvania Act, the Pennsylvania legislature would soon come to rely on other proponents of judicial superintendency over prisons. PSAMPP, for instance, published a pamphlet in 1790 for use in lobbying the legislature as it considered the establishment of the first Pennsylvania penitentiary.[152] The pamphlet reproduced letters from an English justice of the peace, who oversaw a house of correction in Herefordshire. The state of the house of correction, his letters reported, was made constantly known to local justices, "and all abuses obviated or speedily remedied."[153] Justices of the peace prescribed a program of "employment" for those confined, drew up "rules and orders" for the government of the house, and were empowered to dismiss its governor.[154]

These 1786 and 1790 statutes passed in the midst of political and constitutional ferment in the state.[155] One historian characterizes the 1780s as a period of sustained struggle between emergent "Radical" and "Conservative" factions and slow-rolling retreat from the radical democratism inaugurated by the commonwealth's 1776 constitution.[156] There is nonetheless a sense in which Pennsylvania's Constitution of 1776 expressly invited periodic controversy over the basic structure of state government. That constitution called for the septennial election of a Council of Censors who were "to enquire whether the constitution has been preserved inviolate in every part; and whether the legislative and executive branches of government have performed their duty as guardians

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151. *Philadelphia, Sept. 4. Proceedings of the General Assembly*, Pa. Packet, Sept. 4, 1786, at 2, 3 (reporting the floor debate from September 1, 1786).

152. *See* Shapiro, *supra* note 57, at 554-55; Takagi, *supra* note 65, at 23; Harry Elmer Barnes, *The Place of the Philadelphia Society for Alleviating the Miseries of Public Prisons in American Prison Reform*, 2 Prison J. 3, 8-9 (1922).

153. 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, Zachariah Poulson, Jr. 1790).

154. *Id.* at 5-9.

155. *See* The Pennsylvania Constitution: A Treatise on Rights and Liberties § 3.3.[f][1] (Ken Gormley, Jeffrey D. Bauman, Joel Fishman & Leslie Kozler eds., 2004). On the extent to which these debates informed the framing of the Federal Constitution, see Robert F. Williams, *The State Constitutions of the Founding Decade: Pennsylvania's Radical 1776 Constitution and Its Influence on American Constitutionalism*, 62 Temp. L. Rev. 541, 576-80 (1989).

156. *See* Robert Levere Brunhouse, The Counter-Revolution in Pennsylvania, 1776-1790, at 88-227 (1942).

of the people, or assumed to themselves or exercised other or greater powers than they are entitled to" exercise.[157]

While to ratifiers of the 1776 constitution the separation of powers might primarily have meant prohibitions on plural officeholding,[158] the first Council of Censors, meeting in 1783, found broader implications in the principle. They debated, among other things, the judiciary's dependence on the executive council and the legislature's power to remove judges for misbehavior.[159] The Censors' final report furthermore identified significant danger in the legislature's practice of hearing private causes in equity.[160] The Censors failed to attain the two-thirds majority needed to call a constitutional convention,[161] but seven years later, goaded in part by the ratification of the U.S. Constitution, the Pennsylvania Assembly would convene one.[162] The convention's product provided for "a bicameral legislature, a single executive, [and] a judiciary with life tenure."[163] It also addressed the matter of dual officeholding.[164] It patterned itself off the Federal Constitution in its structure, with distinct articles addressing distinct departments of government.[165] In short, Pennsylvania's scheme of

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157. PA. CONST. of 1776 § 47; *see* Gordon S. Wood, *Foreword: State Constitution-Making in the American Revolution*, 24 RUTGERS L.J. 911, 922 (1993).

158. *See* J. PAUL SELSAM, THE PENNSYLVANIA CONSTITUTION OF 1776, at 201 (1936).

159. ROSALIND L. BRANNING, PENNSYLVANIA CONSTITUTIONAL DEVELOPMENT 18 (1960).

160. Council of Censors, A Report of the Committee Appointed to Enquire "Whether the Constitution has been preserved inviolate in every Part, and whether the legislative and executive Branches of Government, have performed their Duty as Guardians of the People, or assumed to themselves or exercised other or greater Powers, than they are intitled to by the Constitution," *in* THE CONSTITUTION OF THE COMMONWEALTH OF PENNSYLVANIA, AS ESTABLISHED BY THE GENERAL CONVENTION, CAREFULLY COMPARED WITH THE ORIGINAL 35, 38 (Philadelphia, Francis Bailey 1784).

161. FREDERICK A. MUHLENBERG, AN ADDRESS OF THE COUNCIL OF CENSORS TO THE FREEMEN OF PENNSYLVANIA 1 (Philadelphia, Hall & Sellers 1784).

162. BRUNHOUSE, *supra* note 156, at 221-26; Matthew J. Herrington, *Popular Sovereignty in Pennsylvania, 1776-1791*, 67 TEMP. L. REV. 575, 605-06 (1994).

163. John L. Gedid, *Pennsylvania Constitutional Conventions—Discarding the Myths*, 82 PA. BAR ASS'N Q. 151, 155 (2011).

164. Joseph F. Foster, *The Politics of Ideology: The Pennsylvania Constitutional Convention of 1789-90*, 59 PA. HIST. 122, 136-37 (1992).

165. *Compare* U.S. CONST. art. I, § 1 (vesting the legislative powers in Congress), *and id.* art. II, § 1, cl. 1 (vesting the executive power in the President) *and id.* art. III, § 1 (vesting the judicial power in the federal courts), *with* PA. CONST. of 1790 art. I, § 1 (vesting the legislative power in a general assembly), *and* PA. CONST. of 1790 art. II, § 1 (vesting the executive power in a governor), *and* PA. CONST. of 1790 art. V, § 1 (vesting the judicial power in the state courts). Robert F. Williams argues that whereas the framers of the 1776 constitution pursued a system based on a theory of the separation of powers, the framers of the 1790

judicial oversight of penal servitude and the prison passed through a period of extended debate over how best to realize the separation of powers.

That debate reached the topic of penal reform. The 1786 Act provided that people "convicted of robbery, burglary, sodomy or buggary, or as accessory thereof before the fact, shall . . . be sentenced to . . . undergo a servitude for any term or time at the discretion of the court who passes the sentence, not exceeding ten years in the public gaol or house of correction."[166] Some thought this sort of "discretionary power should be left somewhere, none so proper (having such full information) as the judges: leave it to juries, and you then make them both judges and jury."[167] Their view won the day. One dissenting voice conceded that "crimes of the same class might have a greater or less degree of enormity, and that a discretionary power should be lodged somewhere, to apportion their punishment."[168] But he concluded that this power should not lie with judges. "[J]udges should pronounce what the law was, and not their own private opinion of what is right," one assemblyman argued, "quot[ing] Montesquieu and another very celebrated author"—Beccaria?—"to prove the propriety of this opinion."[169]

Pennsylvania legislators had the words, the learned allusions, and the presence of mind to voice separation-of-powers concerns over the administration of criminal law and punishment. They did not use them when it came to the question of judicial oversight of prisons.

3. New York and New Jersey

Rush's and PSAMPP's lobbying efforts extended beyond Pennsylvania and found a receptive audience in New York.[170] As in Pennsylvania, penal reform in New York unfolded alongside constitutional debate over the separation of powers.

Under New York's Constitution of 1777, the state's Council of Appointment was a five-member body composed of four senators and the governor, sitting *ex*

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constitution preferred a system based on a theory of checks and balances. Robert F. Williams, *The Influences of Pennsylvania's 1776 Constitution on American Constitutionalism During the Founding Decade*, 112 PA. MAG. HIST. & BIOGRAPHY 25, 47-48 (1988).

166. An Act Amending the Penal Laws of This State, ch. 1241, § 1, *in* 12 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801, *supra* note 139, at 280, 281.

167. *Philadelphia, Sept. 1. Proceedings of the General Assembly*, PA. PACKET, Sept. 1, 1786, at 2, 2 (reporting the floor debate from August 30, 1786 (statement of Mr. Clymer)).

168. *Id.* (statement of Mr. Robinson).

169. *Id.*

170. *See supra* notes 61-62 and accompanying text.

officio.[171] They controlled appointment to offices of public trust, commissioning the secretary of state, judges, mayors, and county clerks, among others.[172] By the 1790s, a technical problem had surfaced. The text of the 1777 constitution left unclear whether the power to nominate officeholders was the governor's alone, or whether he shared that power with members of the Council.[173] Three senators on the Council of Appointment—that is, a majority and quorum of that body—could in practice assume the appointment power for themselves, so long as they did indeed possess the power to nominate officers and were prepared to act as a bloc and outvote the governor. The idea had taken hold that, judges of the state supreme court and some others excepted, officeholders served only at the pleasure of the Council.[174] With party antagonisms waxing, appointments could and soon did become a sort of spoils system for rewarding copartisans.[175] The controversy would result in a constitutional convention in 1801.[176]

Upon his election to the governorship in 1795, John Jay's immediate care was managing the government's response to a yellow-fever epidemic.[177] That crisis having abated by January of the next year, Jay invited the legislature to take up other problems, including "how far the severe penalties prescribed by our laws . . . admit of mitigation, and whether certain establishments for confining, employing, and reforming criminals, will not immediately become indispensable."[178] He also solicited a determination, once and for all, of the status of the appointment power. "Circumstanced as I am in relation to this question, I think it proper merely to state it, and to submit to your consideration the expediency of determining it by a declaratory act,"[179] he pronounced, before proceeding to discuss the application of separation-of-powers doctrine to a differ-

171. N.Y. CONST. of 1777, § XXIII; *see also id.* § XII (describing the four districts from which the senator-members would be selected).

172. 7 THE SELECTED PAPERS OF JOHN JAY, 1799-1829, at 139 (Elizabeth M. Nuxoll ed., 2021) [hereinafter 7 JAY PAPERS].

173. PETER J. GALIE, THE NEW YORK STATE CONSTITUTION: A REFERENCE GUIDE 6 (1991).

174. *See* J. HAMPDEN DOUGHERTY, CONSTITUTIONAL HISTORY OF THE STATE OF NEW YORK 68 (2d ed. 1915); J.M. Gitterman, *The Council of Appointment in New York*, 7 POL. SCI. Q. 80, 93 (1892).

175. *See* DOUGHERTY, *supra* note 174, at 68, 71.

176. *Id.* at 74-78.

177. 6 JAY PAPERS, *supra* note 62, at 345-55.

178. John Jay, Address to the New York State Legislature (Jan. 6, 1796), in 6 JAY PAPERS, *supra* note 62, at 417, 420.

179. *Id.* at 419.

ent matter.[180] The legislature, controlled by fellow Federalists, declined Jay's invitation to settle the Council of Appointment controversy. One historian writes that they did so "because they meant to use the state patronage to assist Hamilton in building up a machine to perpetuate the Federalist régime, and they rightly judged that Jay was too high-minded and scrupulous a man to lend himself to such a scheme."[181] That judgment, if truly felt, would not have been without reason. Some three years earlier, as Chief Justice of the United States, for example, Jay forged a precedent against federal judges issuing advisory opinions.[182] He declined an invitation to issue one largely on separation-of-powers grounds.[183]

But the legislature did take Jay up on the matter of penal-law reform. It abolished the death penalty for a number of felony crimes, provided for incarceration instead,[184] and also provided for the erection of new state prisons.[185] Features of this 1796 Act echo Rush's prescriptions. Its preamble invoked proportionality as among the law's ends.[186] One provision called for consistency between imprisoned persons' sex, age, health, and ability, on the one hand, and the conditions of confinement and regimes of hard labor they were subjected to, on the other.[187]

A board of inspectors, appointed by the Council of Appointment, would oversee these facilities.[188] As for their internal government:

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180. *See id.* ("The more the principles of government are investigated, the more it becomes apparent, that those powers and those only, should be annexed to each office and department, which properly belong to them. If this maxim be just, the policy of uniting the office of the keeper of the great seal, with that of governor, is far from being unquestionable.").

181. Gitterman, *supra* note 174, at 100; *see also* VERNON A. O'ROURKE & DOUGLAS W. CAMPBELL, CONSTITUTION-MAKING IN A DEMOCRACY: THEORY AND PRACTICE IN NEW YORK STATE 35-37 (1943) (describing the postconvention Council of Appointment as a "political machine" that "dispensed patronage with a high hand").

182. *See* Letter from Chief-Justice Jay and Associate Justices to President Washington (Aug. 8, 1793), *in* 3 CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY, 1782-1793, at 488, 488-89 (Henry P. Johnston ed., New York, G.P. Putnam's Sons 1891).

183. *See id.*

184. Act of Mar. 26, 1796, ch. 30, 1796 N.Y. Laws 669, 669; *see* 6 JAY PAPERS, *supra* note 62, at 472.

185. Act of Mar. 26, 1796, 1796 N.Y. Laws at 671-72.

186. *See id.* at 669 ("[T]he dictates of humanity and the principles of justice require[] that the punishment of crimes shall be proportioned to the different degrees of guilt of the offenders.").

187. *See id.* at 675.

188. *See id.* at 672-73.

> [T]he said inspectors of each of the said prisons together with the justices of the supreme court or any two of them shall have power from time to time 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.[189]

A 1798 Act also gave the Attorney General and Assistant Attorney General of the district where the penitentiary would eventually be located, along with the mayor and recorder of the city, "equal power in respect to making such rules with a justice of the supreme court."[190] It further amended provisions related to the appointment of the prison keeper.[191] But the power of supreme-court justices to contribute to framing internal rules of government passed on otherwise undiluted. After Democratic-Republicans secured a twenty-five-seat majority in the assembly in 1800,[192] the provision was essentially reratified in 1801,[193] and again in 1802.[194] Through it all, Jay would continue to urge the legislature to consider the doctrine of the separation of powers, for instance in connection with its offering "gratuitous allowances" to members of the executive branch and judiciary,[195] and, again, as to the Council of Appointment's power of nom-

189. *Id.* at 672. On the New York Supreme Court's status, at that time, as the state's highest court of law with original jurisdiction, see *"Duely & Constantly Kept": A History of the New York Supreme Court, and an Inventory of Its Records (New York, Albany, Utica, and Geneva Offices), 1691-1847*, N.Y. STATE CT. OF APPEALS AND N.Y. STATE ARCHIVES 17-19, 34 (2d ed. 2022), https://www.archives.nysed.gov/sites/archives/files/duely_and_constantly_kept.pdf [https://perma.cc/F9WV-ARG4].

190. Act of Mar. 30, 1798, ch. 56, 1798 N.Y. Laws 216, 217. On what was then the novelty of the office of Assistant Attorney General, see Bennett Liebman, *The Common Law Powers of the New York State Attorney General*, 23 N.Y.U. J. LEGIS. & PUB. POL'Y 95, 100-02, 106-07 (2020).

191. Act of Mar. 30, 1798, 1798 N.Y. Laws at 217.

192. DOUGHERTY, *supra* note 174, at 72.

193. Act of Apr. 3, 1801, ch. 121, 1801 N.Y. Laws 283, 283.

194. Act of Mar. 30, 1802, ch. 68, § 8, 1802 N.Y. Laws 37, 39.

195. John Jay, Address to the New York State Legislature (Jan. 28, 1800), *in* 7 JAY PAPERS, *supra* note 172, at 52, 53 ("The Constitution of this State having with great wisdom committed the legislative, executive and judicial powers of Government, to three distinct Departments, I submit to your Consideration whether the recent Practice of annual gratuitous allowances by the Legislature, to the officers of the Executive and judicial Departments, can consist with that Independence by which alone the constitutional Ballance between all the Departments can be kept even, and their reciprocal check on each other be preserved.").

ination.[196] And he would voice no objection to judicial involvement in framing the internal rules of government of the state's new penitentiary. That power evidently enjoyed bipartisan support.

Another feature of these early New York prison laws deserves mention. Access to New York state prisons was closely controlled. A visitor would need a written license signed by two inspectors to enter.[197] Setting aside men of the cloth, only certain officeholders—including the governor, lieutenant governor, attorney general, the chancellor of the state, and judges of the supreme court—could visit at their pleasure without a license.[198] Judges did not sleep on this prerogative.[199]

Broad access privileges for members of the judicial system represent a typical feature of the eyes-on doctrine. Take New Jersey. Judicial regulation of its prisons in the early 1790s[200] gave way to a scheme of imprisonment in a state prison facility[201] overseen by legislatively appointed inspectors.[202] Like in New York, judges, inasmuch as they were understood to be "officers and ministers

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196. John Jay, Message to the New York State Assembly (Feb. 26, 1801), *in* 7 JAY PAPERS, *supra* note 172, at 145, 145 ("It has generally and justly been considered as highly important to the security and duration of free States, that the different Departments and Officers of Government should exercise those powers only, which are constitutionally vested in them; and that all controversies between them, respecting the limits of their respective jurisdictions and authorities, be circumspectly and speedily settled.").

197. *See* Act of Mar. 30, 1798, ch. 56, 1798 N.Y. Laws 216, 217 (providing that only the "governor, lieutenant governor, chanceller, judges of the supreme court and mayor, recorder, attorney general, assistant attorney general and [certain] ministers of the gospel" may visit at their pleasure); Act of Apr. 3, 1801, ch. 121, 1801 N.Y. Laws 283, 285 (providing further that "no other person" apart from these officeholders "shall be permitted to enter within the walls where the convicts shall be confined without a written licence signed by two of the inspectors").

198. *See supra* note 197.

199. *See* THOMAS EDDY, AN ACCOUNT OF THE STATE PRISON OR PENITENTIARY HOUSE, IN THE CITY OF NEW-YORK 21 (New York, Isaac Collins & Son 1801).

200. In 1791, justices of the New Jersey Supreme Court were given authority to inquire into the conduct of jailers who might have "demeaned themselves" in office. Act of Nov. 23, 1791, ch. 361, § 1, 1791 N.J. Laws 749, 749-50. This power went unrepealed in a 1794 statute further regulating courts of oyer and terminer and gaol delivery. *See* Act of Nov. 26, 1794, ch. 497, 1794 N.J. Laws 947. The 1791 Act was ultimately repealed wholesale, though, in the context of a reorganization of the state's judiciary in 1798. Act of Mar. 9, 1798, ch. 717, § 17, 1798 N.J. Laws 346, 350.

201. Act of Feb. 14, 1798, ch. 693, § 1, 1798 N.J. Laws 280, 280-81.

202. *Id.* § 13, 1798 N.J. Laws at 285.

of justice," had untrammeled access privileges.[203] Unlike the governor of New York, though, New Jersey's chief executive did not have such access.[204] That is, the governor of the state would have had to request and receive written permission from the penitentiary's inspectors in order to pay a call. Analogous provisions in later forms of Pennsylvania's and Virginia's prison laws, reviewed above, similarly cabined broad privileges of access to officers and ministers of justice, including attorneys.[205]

Whatever their practical importance, the contours of these visitation privileges are significant. They clash with the notion that the prison lay peculiarly within the province of the executive and legislative branches.[206]

4. Delaware

Some years earlier, in Delaware, dissatisfaction with the state's 1776 constitution was growing. The Delaware legislature concluded in 1791 that the state's "general departments . . . are so blended together, and improperly arranged, as to prevent an impartial, beneficial, and energetic operation" of government.[207] That year, John Dickinson, who had argued at the Federal Constitutional Convention "that the Legislative, Executive, & Judiciary departments ought to be made as independent as possible,"[208] was elected to preside over a state consti-

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203. *Id.* § 8, 1798 N.J. Laws at 283. For evidence that "officers and ministers of justice" would have been understood to include judges, see, for example, William Livingston, A Proclamation (Oct. 5, 1778), *in* 2 Documents Relating to the Revolutionary History of the State of New Jersey 465, 466 (Francis B. Lee ed., 1903), which referred to "all Judges, Justices of the Peace and other Officers or Ministers of Justice"; John Platt, Two Thousand Dollars Reward (Apr. 28, 1781), *in* 5 Documents Relating to the Revolutionary History of the State of New Jersey 243, 243 (Austin Scott ed., 1917), which referred to "all Justices of the Peace, Coroners, Constables, and other Officers and Ministers of Justice"; 3 The Works of the Honourable James Wilson, L.L.D. 137 (Philadelphia, Lorenzo Press 1804), which defined a warrant as "a precept from a judicial to a ministerial officer of justice"; and Act of Apr. 8, 1801, ch. 190, 1801 N.Y. Laws 553, 553, 564-65, which regulated the "fees of the several officers and ministers of justice within this State," including fees payable to court-of-common-pleas judges and justices of the peace.

204. *See* Act of Feb. 14, 1798, § 8, 1798 N.J. Laws at 283.

205. *See* Act of Apr. 5, 1790, ch. 565, § 18, 1789 Pa. Laws 801, 808; Act of Dec. 15, 1796, ch. 2, § 33, 1796 Va. Acts 4, 8.

206. *See supra* note 19 and accompanying text.

207. Randy J. Holland, The Delaware State Constitution 11 (2d ed. 2017). On the composition and jurisdiction of the state's supreme court, see *id.* at 13-14.

208. *See* John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 Harv. L. Rev. 1939, 1999 n.308 (2011) (citing James Madison, Notes of Debates in the Federal Convention of 1787, at 56 (Adrienne Koch ed., 1966)).

tutional convention.[209] Its ultimate proposals included vesting clauses like those of the U.S. Constitution[210] and wholesale reorganization of the judiciary.[211] As Delaware's supreme court put it some two centuries later: "In accordance with John Dickinson's formulation, Delaware has always separated its powers of government by keeping them both 'distinct in department' and 'distinct in office.'"[212]

Delaware's 1792 constitution also enshrined Eighth Amendment-type rights absent from its predecessor. "Excessive bail," it said, "shall not be required, nor excessive fines imposed, nor cruel punishments inflicted; and in the construction of jails a proper regard shall be had to the health of prisoners."[213] In 1805, the legislature moved to make good on that last protection. The General Assembly concluded "that a due regard is not had in the care of the persons confined in the gaols of this state, to their cleanliness, their health and their morals."[214] It then provided, by way of remedy, that

> the supreme court of this state, or either of the judges in vacation, be and they are hereby authorized, empowered and required, immediately after the passing of this act, 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; which said inspectors, when so nominated and appointed, shall serve not longer than two in any term of three years.[215]

Upon these inspectors' findings of jailers' neglect, judges were empowered to demand that the sheriff remove the jailer and impose a forty-dollar fine on the sheriff if he failed to comply.[216] The inspectors were also to see to provisions

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209. *In re* Request of Governor for an Advisory Op., 722 A.2d 307, 316 (Del. 1998).

210. *Compare* U.S. CONST. art. I, § 1 (vesting the legislative powers in Congress), *and id.* art. II, § 1, cl. 1 (vesting the executive power in the President), *and id.* art. III, § 1 (vesting the judicial power in the federal courts), *with* DEL. CONST. of 1792, art. II, § 1 (vesting the legislative power in a general assembly), *and* DEL. CONST. of 1792, art. III, § 1 (vesting the executive powers in a governor), *and* DEL. CONST. of 1792, art. VI, § 1 (vesting the judicial power in the state courts).

211. *See* William F. Swindler, *Seedtime of an American Judiciary: From Independence to the Constitution*, 17 WM. & MARY L. REV. 503, 508 & n.19 (1976).

212. *In re* Request of Governor for an Advisory Op., 722 A.2d at 318.

213. DEL. CONST. of 1792, art. I, § 11.

214. Act of Jan. 25, 1805, ch. 182, pmbl., 1805 Del. Laws 392, 392.

215. *Id.* § 1, 1805 Del. Laws at 393.

216. *Id.* § 3, 1805 Del. Laws at 394.

for and the comfort of prisoners.[217] When the time came to vindicate the prisoner protections enshrined in the state's constitution—one framed in part to realize a true *trias politica*—the Delaware legislature looked first to the judiciary.

The Act's preamble mentions petitions the legislature had received on the subject.[218] At least one of them survives.[219] Addressed to the General Assembly, it refers, like the 1805 Act's preamble, to a lack of "proper regard . . . to cleanliness, the needful accommodation and the morals of the Prisoners"[220] and complains of local jailers charging inmates greater fees than they are legally entitled to for inmates' keep.[221] It furthermore describes these problems as effects of certain causes. A busy court of quarter sessions neglects to enforce jailer-fee regulations; grand-jury inspections of the jails are too intermittent to be effective.[222] Recall Rush's prescription: judges should pay a call to the prison not just when problems arise in its administration but on a regular basis.[223] The petitioners were of the same mind, and they prevailed. The 1805 Act mandated not only weekly inspector visits but also quarterly reports to the court.[224]

Who were these petitioners? Names like Thomas Berry, Warner Mifflin, Daniel Cowgill, and Clayton Cowgill show up in the records of the nearby

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217. *Id.* § 4, 1805 Del. Laws at 394-95.

218. *Id.*, pmbl., 1805 Del. Laws at 392.

219. William Killen et al., Petition for Memorial in Relation to the Gaol & Prisoners in Kent County (1805) (on file with the Del. Pub. Archives, Gen. Assembly, Legis. Papers, res. identifier no. 1111-000-000_5202d), https://cdm16397.contentdm.oclc.org/digital/collection/p15323coll6/id/89444/rec/1 [https://perma.cc/2YDH-QXFB].

220. *Id.* at 1.

221. *Id.* at 1-2.

222. *Id.* at 1 ("[T]he Grand Jury of [Kent] County are at present, charged with the care and oversight of the said Gaol; but they being a transient body, and not always duly impressed with the importance and responsibility of their situation, neglect, or omit often to inspect the state of the said Gaol and the condition of the Prisoners . . . ."); *id.* at 1-2 ("[F]rom the accumulated business of the [court of general quarter sessions of the peace], or some other cause this [requirement to post legally allowed jailer fees in a conspicuous place in the jail] has not been strictly complied with . . . .").

223. *See supra* note 90 and accompanying text.

224. Act of Jan. 25, 1805, ch. 182, § 2, 1805 Del. Laws 392, 393 ("[T]wo of the said inspectors are hereby required to visit and view the inner apartments and places of said gaols on some one day of each and every week; . . . and the whole number of the said board of inspectors . . . shall and may visit and view the same once every month . . . and at the close of each and every quarter year to report to the supreme court or either of the judges thereof in vacation, the state and condition of the said gaols, of the prisoners therein confined, and the conduct and behaviour of gaolers, or keepers of the same.").

Third Haven Quaker congregation.[225] The first-listed subscribers, though, are William Killen and Richard Bassett.[226] Bassett, who had also signed the U.S. Constitution, was a former Delaware governor, U.S. senator, and chief justice of the Delaware Court of Common Pleas, fresh off a brief stint as a judge of the Third Circuit.[227] The interesting causes of that stint's briefness led Bassett to emit a "Protest" that, among other things, sang praises to the separation of powers.[228] Killen, for his part, was Delaware's first chancellor.[229] His involvement may recommend the inference that a considerably marked-up 1805 manuscript in the Delaware Public Archives is the very bill the petitioners "solicit[ed] leave to present" to the legislature.[230] That draft bill focused on Kent County jails and would have lodged inspector appointment and related powers, not with justices of the supreme court, but with Chancery—Killen's successors in office.[231] So it would seem that among the last public acts of Delaware's first

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225. *See* Killen et al., *supra* note 219, at 2; Kenneth L. Carroll, *The Nicholites Become Quakers: An Example of Unity in Disunion*, 47 Bull. Friends' Hist. Ass'n 3, 17 n.33 (1958). For more on the bona fide tradition of prison reformism in the Society of Friends before, during, and after the nineteenth century, see Mike Nellis & Maureen Waugh, *Quakers and Penal Reform*, *in* The Oxford Handbook of Quaker Studies 377, 377-87 (Stephen W. Angell & Pink Dandelion eds., 2013).

226. *See* Killen et al., *supra* note 219, at 2.

227. *Gov. Richard Bassett*, Nat'l Governors Ass'n (2024), https://www.nga.org/governor/richard-bassett [https://perma.cc/KL3T-9D3D]; William T. Quillen & Michael Hanrahan, *A Short History of the Court of Chancery, 1792-1992*, Del. Cts. Jud. Branch (1993), https://courts.delaware.gov/chancery/history.aspx [https://perma.cc/VQ3B-5BEC].

228. Richard Bassett, The Protest of the Hon. Richard Bassett, One of the Judges of the Circuit Courts of the United States, for the Third Circuit; Against Two Acts of Congress of the 8th of March and 29th of April 1802, Attempting to Abolish the Offices and Salaries of the Judges of the Circuit Courts of the United States 9, 11, 14 (Philadelphia, Bronson & Chauncey 1802) ("The constitution of the United States, by *three* several articles, each following the other, has formed *three* distinct powers of government; the *legislative* power, the *executive* power, and the *judicial* power. . . . From the structure, then, of the constitution, and by, indeed, a natural order, each department is to be distinct. . . . This was the best security which could be devised, to preserve free, distinct, and permanent, the legislative, executive, and judicial powers; the separation and independence of which have been agreed, by all writers, to be essential to the preservation of civil liberty.").

229. Quillen & Hanrahan, *supra* note 227.

230. Killen et al., *supra* note 219, at 2.

231. An Act for the Better Regulation of the Gaols ~~of Kent County~~ Within This State and for Other Purposes 1 (Jan. 1805) (on file with the Del. Pub. Archives, Gen. Assembly, Legis. Papers, res. identifier no. 1111-000-000_5099d), https://cdm16397.contentdm.oclc.org/digital/collection/p15323coll6/id/89259/rec/1 [https://perma.cc/WTP5-UUHB]. As the final Act shows, the legislature would expand coverage to all of Delaware and assign these powers to the supreme court instead. *See id.*; Bill to Regulate Gaols in Senate 1 (Jan. 25, 1805) (on file

chancellor—Killen died later in 1805[232]—was a successful effort to persuade the legislature to evolve supervisory powers over jails from inferior to superior courts.

B. Supervisory Authority Vested in Courts of Special Jurisdiction

1. Maryland

Maryland's 1776 constitution placed a forthright statement of the separation-of-powers principle in its Declaration of Rights: "[W]e . . . declare . . . [t]hat the legislative, executive and judicial powers of government, ought to be forever separate and distinct from each other."[233] As elsewhere, state legislators over the ensuing decades worked to vindicate that provision.[234] This project did not stop them from vesting penal-oversight powers in the state judiciary.

A 1787 statute noted "the present insecure situation of many of the public gaols of this state" and empowered the governor to commission courts of oyer and terminer and gaol delivery.[235] During its next session, the legislature specifically requested the governor to commission special courts of criminal jurisdiction, courts of oyer and terminer and gaol delivery, in Baltimore, to be presided over by JPs.[236] The Act prescribed sentences of imprisonment at hard labor[237] and provided that the general court of the state, or any county court in the state, could impose sentences of imprisonment at hard labor in the Baltimore County facility.[238] The law was preemptively continued, with some amendments, the next year; this reratification was to take effect on January 1,

with the Del. Pub. Archives, Gen. Assembly, Legis. Papers, res. identifier no. 1111-000-000_5101d), https://cdm16397.contentdm.oclc.org/digital/collection/p15323coll6/id/89271/rec/1 [https://perma.cc/GC7E-FJTU]; Act of Jan. 25, 1805, ch. 182, §§ 1-3, 1805 Del. Laws 392, 393-94.

232. *Obituary*, MISCELLANY (Trenton, N.J.), Oct. 21, 1805, at 79, 79.

233. MD. CONST. of 1776, Declaration of Rights, § VI.

234. *See, e.g.*, Act of May 26, 1787, ch. 39, § 2, 1787 Md. Laws Apr. Sess. (no page numbers) (altering governor's and legislature's power to remove judges); An Act to Define and Ascertain the Powers of the Governor on the Subject Therein Mentioned, ch. 34, § 2, 1793 Md. Laws Nov. Sess. (no page numbers) (clarifying that gubernatorial powers included the ability to quarantine incoming ships suspected of carrying plague).

235. Act of Nov. 26, 1787, ch. 1, pmbl., § 2, 1787 Md. Laws Nov. Sess. (no page numbers).

236. Act of May 27, 1788, ch. 11, §§ 2-3, 1788 Md. Laws May Sess. (no page numbers).

237. *Id.* § 9.

238. *Id.* § 14.

1790, and expire on January 1, 1791.[239] It prescribed sex-segregated workhouses and added to the list of crimes punishable by imprisonment at hard labor.[240]

An important development came in 1791. The Baltimore Court of Oyer and Terminer and Gaol Delivery was professionalized. The relevant statute obliged the governor to appoint a "person of integrity, experience, and sound legal knowledge" to serve as the court's chief justice, and four "persons of integrity, experience and knowledge" to serve as associate justices.[241] The chief justice was to be paid an annual salary rather than a per diem.[242] The justices generally had the "same jurisdiction, power and duties" as the JPs did.[243] This Act was continued in 1793.[244] The next year, the powers of the Court of Oyer and Terminer and Gaol Delivery were transferred to the Baltimore County Court under substantially similar terms.[245]

Through it all, one facet of the court's presiding judges' power endured. Under the terms of the 1789 Act "for the more effectual punishment of criminals," justices "may procure a proper place or places for the confinement of such criminals, and may appoint and employ a fit and proper person or persons to take care of such criminals,"[246] which included the appointment of a prison physician.[247] The Act further assigned justices "full power" to order close confinement of incarcerated people, whipping "not exceeding thirty-nine lashes," or a diet of bread and water for misconduct or refusal to labor.[248] Maryland's regime, in short, established an ongoing judicial superintendency. It called for judges to keep their eyes on the prison and empowered them to intervene in its

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239. Act of Dec. 25, 1789, ch. 44, § 37, 1789 Md. Laws Nov. Sess. (no page numbers).

240. *Id.* §§ 10-11.

241. Act of Dec. 27, 1791, ch. 50, § 2, 1791 Md. Laws Apr. Sess. (no page numbers).

242. *Compare id.* § 4 (providing that the salary would be £200 per year), *with* Act of May 27, 1788, ch. 11, § 5, 1788 Md. Laws May Sess. (no page numbers) (providing that the salary would be ten shillings per day), *and* Act of Dec. 25, 1789, ch. 44, § 6, 1789 Md. Laws Nov. Sess. (no page numbers) (same).

243. *See* Act of Dec. 27, 1791, ch. 50, § 2, 1791 Md. Laws Apr. Sess. (no page numbers).

244. *See generally* Act of Dec. 28, 1793, ch. 57, 1793 Md. Laws Nov. Sess. (no page numbers) (reviving the 1791 Act on substantially similar terms). This statute reiterated judges' powers over conditions of confinement. *Id.* § 10. It was set to continue through January 1, 1795. *Id.* § 37.

245. *See* Act of Dec. 28, 1794, ch. 65, § 3, 1794 Md. Laws Nov. Sess. (no page numbers). This Act was continued until 1798. *Id.* § 7.

246. Act of Dec. 25, 1789, ch. 44, § 10, 1789 Md. Laws Nov. Sess. (no page numbers).

247. *Id.*

248. *Id.*

government. It vested them with partial control, to borrow Rush's terms, over the nature and degree of punishments prisoners faced while incarcerated.

C. Supervisory Authority Vested in Justice of the Peace Courts

The professionalization of Baltimore's Court of Oyer and Terminer and Gaol Delivery—the replacement of JPs with justices having sound legal knowledge[249]—invites a broader consideration of JPs' role in prison and jail administration during the Founding Era.

Who was the justice of the peace? What was he? In one sense, he was simply a local magistrate judge. As a seventeenth-century JP manual explained, and later American JP manuals repeated:

> The reason why his Authority of a Justice of Peace is suspended during his Sheriffwick seemeth to be, for that the Sheriff is a Minister, and a Justice of the Peace is a Judge; and the one is as necessary as the other. And besides, the Office of a Judge being to command, and of a Minister to execute the Commandment; if one man shall be both Judge and Minister, thereof it would follow, that the Sheriff ought to command himself, or that he should, as an Officer, serve his own Precept made as Justice or Judge, the which cannot be.[250]

State constitutions that mentioned JPs reliably treated them as low-level judicial officers.[251] Their criminal jurisdiction was generally confined to petty

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249. *See supra* note 241 and accompanying text.

250. MICHAEL DALTON, THE COUNTREY JUSTICE; CONTAINING THE PRACTICE OF THE JUSTICES OF THE PEACE AS WELL IN AS OUT OF THEIR SESSIONS 12 (T.M. ed., London, John Streater, James Flesher & Henry Twyford 1666); GEORGE WEBB, THE OFFICE AND AUTHORITY OF A JUSTICE OF PEACE 293 (Williamsburg, William Parks 1736) (citing DALTON, *supra*); *accord* JOHN FAUCHERAUD GRIMKÉ, THE SOUTH-CAROLINA JUSTICE OF PEACE 422 (New York, T. & J. Swords, 3d ed. 1810) ("But no sheriff shall exercise the office of a justice of peace, in any county wherein he is sheriff, and in such case his acts as a justice shall be void."); *cf.* 1 James Booth, Notes of Lectures Delivered by the Hon. James Gould, One of the Judges of the Supreme Court of Connecticut on Pleas and Pleading, Image 22 (1810-11) (on file with Yale L. Sch., Lillian Goldman L. Library), https://collections.library.yale.edu/catalog/32395932 [https://perma.cc/85A6-96NN] ("The sheriff in England is a judicial and a ministerial officer. But in Connecticut—and most of the states in the union he is merely a ministerial [and executive] officer."). This principle was current as far back as the sixteenth century. *See* 1 WILLIAM LAMBARDE, EIRENARCHA: OR OF THE OFFICE OF THE JUSTICES OF PEACE IN FOURE BOOKS 72 (London, Thomas Wight, 4th ed. 1599).

251. *See, e.g.*, GA. CONST. of 1798, art. III, § 5; MASS. CONST. of 1780, ch. III, art. III; N.H. CONST. of 1792, pt. II, §§ 75, 77, 79.

offenses.[252] All the same, JPs were something more than judges. They possessed fused powers, a fact often noticed at the time, sometimes by superior courts themselves.[253] JPs enjoyed, for instance, limited tax-assessment powers, particularly as to road repair and construction.[254] Sitting as a body—variously styled general sessions of the peace, quarter sessions of the peace, or simply county courts—they exercised broad authority in local government.[255] JPs did not necessarily possess legal training but did avail themselves of lawbooks addressed specifically to officeholders, as their English counterparts had for centuries.[256] In England, JPs had also traditionally been involved in managing jail construction and administration.[257] Colonial America did not break from that

252. *See, e.g.*, *Justice of the Peace Court: History*, DEL. CTS. JUD. BRANCH, https://courts.delaware.gov/jpcourt/history.aspx [https://perma.cc/X96S-JNWS].

253. *See* Edwin H. Greenebaum & W. Willard Wirtz, *Separation of Powers: The Phenomenon of Legislative Courts*, 42 IND. L.J. 153, 166-67 (1967) (citing Whittington v. Polk, 1 H. & J. 236 (Md. 1802)); Wise v. Withers, 7 U.S. (3 Cranch) 331, 336 (1806) (noting that the justice of the peace's "powers, as defined by law, seem partly judicial, and partly executive.").

254. *See, e.g.*, Act of Dec. 20, 1792, 1792 Ga. Laws 39, 41; Act of Dec. 4, 1799, § 11, 1799 Ga. Laws 57, 63-64.

255. *See* GORDON WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 81-82 (1993); Daniel Farbman, *Reconstructing Local Government*, 70 VAND. L. REV. 413, 416 n.4 (2017).

256. *See* John A. Conley, *Doing It by the Book: Justice of the Peace Manuals and English Law in Eighteenth Century America*, 6 J. LEGAL HIST. 257, 257-61 (1985).

257. *See* THE BOKE FOR A JUSTYCE OF PEACE NEUER SO WEL AND DYLYGENTLY SET FORTHE fol. 11 (London, Roberti Redman 1534) ("The Justyces of the pees, or the most part of them in euery of the shyres of Essex, Suffolke, [etc.] shall within a yere after the ende of this parlyamente, within the lemittes of theyr commissyons, appoynt the townes and places for a common Jayle newly to be made, for the edifyeng whereof [the] sayde Justices withi [sic] their limyttes shall haue power to call before them the hyghe constables, tythyngmen, [etc.], and in theyr presence by theyr assente, or of the most parte of them, shall agree upon certayne . . . sommes of money . . . for the makynge of a newe Jayle in the shyre where they be Justyces . . . ."); MICHAEL DALTON, OFFICIUM VICECOMITUM: THE OFFICE AND AUTHORITIE OF SHERIFS 181 (London, Co. of Stationers 1623) ("[T]he Justices of Gaole deliverie have authoritie to heare [prisoners'] complaints that will complaine of the Sherife and Gaoler in such case, to punish them if they be found guilty."); NICHOLAS COLLYN, A BRIEFE SUMMARY OF THE LAVVES AND STATUTES OF ENGLAND SO FAR FORTH AS THE SAME DO CONCERNE THE OFFICE OF JUSTICES OF THE PEACE, SHERIFFS, BAYLIFFS, CONSTABLES, CHURCHWARDENS, AND OTHER OFFICERS AND MINISTERS OF THE COMMONWEALTH: TOGETHER WITH DIVERS OTHER MATTERS NOT ONELY ACCEPTABLE FOR THEIR RARITY, BUT ALSO VERY NECESSARY FOR THEIR GREAT USE AND PROFIT FOR ALL PERSONS, BUT ESPECIALLY FOR SUCH AS BEAR OFFICE IN THIS COMMON-WEALTH 37 (London, T.L. 1655) ("And such Justices may at their said quarter Sessions, next after such houses [of correction are] built, and lo from time to time appoint Governours or Masters thereof, and may make them such allowance and maintenance as they shal [sic] think meet."); SIDNEY WEBB & BEATRICE WEBB, ENGLISH PRISONS UNDER LOCAL GOVERNMENT 1-17 (1922); *supra* notes 152-154 and accompanying text.

tradition.[258] After independence, some state legislatures saw fit to reaffirm the powers of the JP over local jails and prisons.

JPs, for the purposes of this Note, therefore present a twofold question. First, what supervisory powers over prisons and jails did JPs exercise? Second, were those powers understood to have a judicial as opposed to quasi-legislative, administrative, or otherwise nonjudicial character? Statutes from Massachusetts, Georgia, New Hampshire, and the Carolinas vested considerable powers in JPs over the administration of prisons and jails. In Massachusetts, Georgia, and New Hampshire, the judicial character of those powers reveals itself in how they moved around, or stayed put, as legislatures modified local courts' authority around the turn of the nineteenth century. In the Carolinas, the judicial character of those powers reveals itself in how they joined up with the structure of local government.

1. *Massachusetts, Georgia, and New Hampshire*

"The separation of departments which the Massachusetts statesmen established" in the state's 1780 constitution "must be characterized as exceedingly moderate and, from the persistence of the debates, they can scarcely have regarded the provisions as final."[259] Indeed not. In 1780, the legislature appointed a committee, not unlike Virginia's Committee of Revisors, to "select, abridge, alter, digest, and methodize" the laws of the commonwealth "so as to make them consistent with the constitution."[260] Other contemporaneous legislative activity addressed itself to settling the scope of departmental powers.[261] Election sermons regularly equated the polity's liberty with continued fidelity to

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258. *See, e.g.*, Act of July 8, 1730, *in* Acts of the General Assembly of the Province of New-Jersey, from the Surrender of the Government to Queen Anne, on the 17th Day of April, in the Year of Our Lord 1702, to the 14th Day of January 1776, at 92 (Burlington, Isaac Collins 1776); Act of 1768, ch. 14, *in* Laws of Maryland, Made Since M,DCC,LXIII, Consisting of Acts of Assembly Under the Proprietary Government, Resolves of Convention, the Declaration of Rights, the Constitution and Form of Government, the Articles of Confederation, and, Acts of Assembly Since the Revolution (Annapolis, Frederick Green 1787) (no page numbers) (providing that justices shall sell at auction a defunct prison).

259. Ellen E. Brennan, Plural Office-Holding in Massachusetts, 1760-1780: Its Relation to the "Separation" of Departments of Government 178 (1945).

260. Res. of Nov. 30, 1780, ch. 98, *in* Acts and Laws of the Commonwealth of Massachusetts 187, 187 (Boston, Benjamin Edes & Sons 1890).

261. *See* Brennan, *supra* note 259, at 171 (regarding a legislative committee appointed to study gubernatorial recess-appointment powers); Hirsch, *supra* note 138, at 1201-02 n.113 (regarding legislative debate over the proper location of the pardon power).

separation-of-powers doctrine.[262] In 1785, newly elected governor James Bowdoin invited legislators to bring to his attention any gubernatorial act that, in their view, improperly encroached upon the prerogatives of other departments of government.[263] A month later, he vetoed a resolve related to the administration of public welfare. He explained his veto by reference to the state constitution's separation-of-powers provision, alluding as well to prior legislative "apprehension" on the question.[264]

The meaning of the separation of powers was, in short, a live question when the legislature took up the matter of penal-law reform in 1785.[265] Around that same time, an early instance of the eyes-on doctrine went on the books. The legislature imposed a duty on JPs, at the opening of each of their quarter sessions, "to enquire into the state of the prisons in their respective counties, with respect to the security of such prisons from escape, the condition and accommodation of the prisoners," and "from time to time [to] take such measures as may best tend to secure them from escape, sickness and infection."[266] A few years later, JPs were empowered to appoint masters of houses of correction[267] and establish those facilities' rules and regulations.[268]

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262. *See*, *e.g.*, BRENNAN, *supra* note 259, at 165 (quoting the 1781 election sermon of Jonas Clark, to the effect that "all the members should know their place, and the duties of their station"); HENRY CUMINGS, A SERMON PREACHED BEFORE HIS HONOR THOMAS CUSHING, ESQ., THE HONORABLE THE COUNCIL, AND THE TWO BRANCHES OF THE GENERAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS MAY 28, 1783, BEING THE ANNIVERSARY OF GENERAL ELECTION 15 (Boston, T. & J. Fleet 1783).

263. *See* Governor's Speech (May 31, 1785), *in* ACTS AND LAWS OF THE COMMONWEALTH OF MASSACHUSETTS 706, 707 (Boston, Adams & Nourse 1884).

264. *See* Governor's Message (July 1, 1785), *in* ACTS AND LAWS OF THE COMMONWEALTH OF MASSACHUSETTS, *supra* note 263, at 722, 722-24.

265. On 1785 as a watershed year in the rise of punitive imprisonment in Massachusetts, see Hirsch, *supra* note 138, at 1191, 1200, 1213. On the occasional use of punitive imprisonment in Massachusetts even before 1785, see *id.* at 1186-87.

266. Act of Feb. 21, 1785, ch. 9, 1785 Mass. Acts Jan. Sess. 235, 238.

267. Houses of correction, originating in Elizabethan England and Holland, were an early form of quasi-punitive incarceration, established, in the first instance anyway, to punish the crime of "vagrancy" or "vagabondage" often through penal labor. *See, e.g.*, 1 PIONEERS IN PENOLOGY: THE REFORMERS, THE INSTITUTIONS, AND THE SOCIETIES, 1557-1900, at 32-46 (David M. Horton ed., 2006); Langbein, *supra* note 51, at 47.

268. Act of March 26, 1788, ch. 54, 1787 Mass. Acts 623, 623-24 ("[T]he Court of general sessions of the Peace in each County, may nominate and appoint at their will & pleasure, a suitable person to be master of such house of correction. And also to make, ordain & establish such rules & orders as may be necessary, (not repugnant to the Laws of this Commonwealth) for the ruling, governing & punishing of such persons as may be there committed; & such rules and orders by them made, shall be in force & put in execution.").

Hendrik Hartog argues that over the course of the 1790s, in part out of separation-of-powers concerns, the legislature distilled the JPs' previously undifferentiated authority down to local administrative functions alone.[269] The coup de grâce fell in 1804, when the JPs' role became almost entirely nonjudicial.[270] Powers they had previously enjoyed were revested in state courts of common pleas.[271] This transition might serve as a kind of litmus test. Which powers over local jails, if any, remained with the courts of general sessions? The 1804 statute explicitly carved out the power "to erect[] and repair[] gaols, and other county buildings."[272] And nothing else related to prisons. The obligation to inquire into conditions of confinement at local jails was not repealed[273] and was therefore, as a matter of law, reallocated to the courts of common pleas. As the Massachusetts courts of general sessions came into their own as administrative, nonjudicial bodies, the power to supervise jail administration was revested in other courts.

Statutes from the 1790s related to the taxing power of inferior courts in New Hampshire and Georgia urge a similar conclusion: JPs' powers over jail administration were thought to fall within the compass of JPs' judicial authority. Under the terms of a 1796 act, Georgia's inferior-court judges had "full power and authority at all times to enquire into the conduct of gaolers and the state of gaols in their respective counties, and on neglect of duty to cause such gaolers to be removed by an order to the sheriff" directing as much.[274] The statute also provided that "all laws, or parts of laws, clause or clauses, heretofore made, or such parts of them as authorise the county courts of this state to levy a tax for county purposes be, and the same are hereby repealed."[275] The same act that aimed to deprive local courts of certain taxing powers also affirmed their supervisory role in jail administration. Under the terms of a 1791 statute, New

269. Hendrik Hartog, *The Public Law of a County Court; Judicial Government in Eighteenth Century Massachusetts*, 20 AM. J. LEGAL HIST. 282, 284, 312-14, 324-25 (1976).

270. *Id.* at 314.

271. *See* Act of Mar. 9, 1804, ch. 89, §§ 3-4, 1804 Mass. Acts Jan. Sess. 490, 491.

272. *Id.* § 3, 1804 Mass. Acts at 491. The JPs had been obliged "from time to time [to] assess the polls and estate within their several counties, in such sums as may be necessary to erect and keep in repair a good and sufficient gaol." Act of Feb. 21, 1785, ch. 9, 1785 Mass. Acts Jan. Sess. 235, 235.

273. For evidence that the 1785 Act continued in force, see Act of June 20, 1809, ch. 33, 1809 Mass. Acts May Sess. 38, which was titled an act "supplementary to the [February 21, 1785] act, for providing and regulating of Prisons."

274. Act of Feb. 21, 1796, 1796 Ga. Laws Jan. Sess. 16, 16 (second page numbered sixteen in the volume).

275. *Id.*

Hampshire's courts of general sessions of the peace were required, at the beginning of every term, to "enquire into the State of the prisons in their respective counties" and "from time to time to take care to secure [prisoners] from escape sickness and infection."[276] Later that year, a constitutional convention was held in Concord; objects of debate included abolition of these courts[277] and, generally, how further to actualize the separation of powers.[278] Ratification of the new constitution marked the beginning of the end of special legislation and, arguably, the birth of an independent judiciary in the state.[279] Convention goers punted the question whether to abolish the general sessions to the legislature, which soon opted to do so. Their act revested all powers previously enjoyed by courts of general sessions in courts of common pleas, with the exception of taxing powers, which reverted to the legislature.[280]

To the extent the power to tax was conceived of as a legislative function—an idea New Hampshire's 1792 constitution explicitly embraced[281]—the laws of Georgia and New Hampshire worked to disaggregate fused judicial and legislative power in the local court systems of those states. The fact that, across this disaggregation, supervisory powers over prisons and jails remained with or were transferred to comparatively judicial officeholders suggests that, as in Massachusetts, these powers were understood to have a judicial character.

2. North and South Carolina

Under the terms of a 1785 South Carolina statute, JPs did not enjoy ongoing supervisory authority over jails, but were granted the ability to review personnel appointments ex ante. The sheriff's selection of his undersheriff and

276. Act of Feb. 10, 1791, ch. 60, *in* 5 Laws of New Hampshire 656, 657-58 (Henry Harrison Metcalf ed., 1916).

277. Journal of the Convention Which Assembled in Concord, to Revise the Constitution of New Hampshire 57, 98-99, 123-24, 137 (Nathaniel Bouton ed., Concord, Edward A. Jenks 1876).

278. *Id.* at 56, 123.

279. *See* Timothy A. Lawrie, *Interpretation and Authority: Separation of Powers and the Judiciary's Battle for Independence in New Hampshire, 1786-1818*, 39 Am. J. Legal Hist. 310, 319-20, 322-23, 332-36 (1995).

280. *See* Act of Feb. 21, 1794, *in* The Laws of the State of New-Hampshire, Passed at a Session of the Honorable General-Court, Begun and Holden at Exeter, December 1793, at 467, 467 (Portsmouth, John Melcher 1794).

281. *See* N.H. Const. of 1792, art. XXVIII.

other deputies needed the "approbation" of JPs.[282] The jailer was, by longstanding law, the sheriff's deputy—the sheriff was the ultimate custodian of the jails[283]—and both, in relation to JPs, were ministerial or quasi-executive officers.[284] An executive's choice of jail managers was subject to a kind of judicial review.

In 1795, the North Carolina legislature vested county courts with authority to frame 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."[285] The courts also had to appoint a Treasurer of the Public Buildings, whose duties included an obligation "to hear complaints of persons confined respecting their diet and treatment," "to examine into the conduct and character of the Jailer," and then to "make information thereof to the court or grand jury of the county or district."[286] The courts were also empowered to fine the jailer "treble damages to the person injured," for committing "any wrong" to any person in his custody.[287] The Treasurer of the Public Buildings would receive disbursements directly from the General Assembly in support of improvements to jail facilities.[288] He would "carry[] . . . into effect," alongside court-appointed commissioners, orders related to jail construction and maintenance.[289] What the statute established, in other words, was a kind of executive officer in the Treasurer of the Public Buildings, taking care to effect judicial orders and to assist in making presentments to those courts—presentments that might result in punishment of jailer miscon-

282. An Atc [sic] for Establishing County Courts, and for Regulating the Proceedings Therein, 1785 S.C. Acts 1, 14.

283. *See* THE REVISED STATUTES OF THE STATE OF SOUTH CAROLINA, PREPARED BY COMMISSIONERS UNDER AN ACT OF THE GENERAL ASSEMBLY, APPROVED MARCH 9, 1869, TO WHICH IS PREFIXED THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF SOUTH CAROLINA 758 (Columbia, Republican Printing Co. 1873); GRIMKÉ, *supra* note 250, at 422-23; *cf.* FRANCOIS-XAVIER MARTIN, A TREATISE ON THE POWERS AND DUTIES OF A SHERIFF, ACCORDING TO THE LAW OF NORTH-CAROLINA 129 (Newbern, John C. Sims 1806) ("The gaoler is the sheriff's servant, and for his conduct the principal is responsible.").

284. *See supra* note 250 and accompanying text.

285. An Act to Amend the Laws Heretofore Passed Concerning Court-Houses and Prisons, and to Provide for the Safe Keeping and Humane Treatment of Persons in Confinement, ch. 4, § 1, 1795 N.C. Sess. Laws 71, 72.

286. *Id.* § 2, 1795 N.C. Sess. Laws at 72.

287. *Id.* § 8, 1795 N.C. Sess. Laws at 73.

288. *Id.* § 7, 1795 N.C. Sess. Laws at 73.

289. *Id.* § 4, 1795 N.C. Sess. Laws at 72.

duct. While he at first held his office indefinitely during good behavior,[290] the Treasurer's term became annual in 1797.[291] As in Delaware, or Rush's *Enquiry*, where routine, regular prison inspections were the order of the day, so too in North Carolina, where the one responsible for conducting inspections became subject to routine, regular (re)appointment by the courts.

In sum, in North and South Carolina, JPs exercised prison-oversight powers as against executive or quasi-executive officers. This structural dynamic throws into relief the nonexecutive (hence, for JPs, the judicial) character of those powers.

D. The Federal and Common-Law Components of the Eyes-On Doctrine

The preceding Sections dwell on state prison law because there was no federal prison system until the latter part of the nineteenth century.[292] More precisely, the federal prison system *was* the state prison system.[293] There was furthermore little federal criminal law during the Founding Era and few federal criminal causes; federal appellate criminal jurisdiction would not arrive until 1879.[294]

Within a correspondingly spare body of case law, *Ex parte Taws* looms large. The case, decided in the Circuit Court of the District of Pennsylvania in 1809, is taken to be an early, if not the earliest, federal habeas corpus decision and one origin of the judicial "hands-off" approach to prison administration.[295] Modern commentators' understanding of the court's holding, however,

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290. *Id.* § 2, 1795 N.C. Sess. Laws at 72.

291. *See* An Act to Amend an Act Passed in the Year One Thousand Seven Hundred and Ninety Five, Entitled "An Act to Amend the Several Laws Heretofore Passed Concerning Court-Houses and Prisons, and to Provide for the Safe Keeping and Humane Treatment of Persons in Confinement," and to Revive and Continue in Force the Eleventh Section of Said Act, ch. 23, § 1, 1797 N.C. Sess. Laws 110, 110.

292. Gregory L. Hershberger, *The Development of the Federal Prison System*, 43 FED. PROB., no. 4, 1979, at 13, 13.

293. *See, e.g.*, Act of Oct. 24, 1789, ch. 200, 2 Del. Laws 957, 957 (opening state jails to prisoners on federal criminal process); Act of Nov. 11, 1789, ch. 262, § 1, 1789 N.J. Laws 523, 523 (same); Act of Dec. 25, 1789, ch. 30, § 2, 1789 Md. Laws Nov. Sess. (no page numbers) (same); Act of Sept. 29, 1789, ch. 10, § 1, 1790 N.C. Sess. Laws 488, 488 (same); Act of Dec. 20, 1800, 1800 S.C. Acts Dec. Sess. 30, 30-31 (same).

294. *See* David Rossman, *Were There No Appeal: The History of Review in American Criminal Courts*, 81 J. CRIM. L. & CRIMINOLOGY 518, 521, 559-60 (1990).

295. *See, e.g.*, JIM THOMAS, PRISONER LITIGATION: THE PARADOX OF THE JAILHOUSE LAWYER 76-77 (1988); BAYARD MARIN, INSIDE JUSTICE: A COMPARATIVE ANALYSIS OF PRACTICES AND PROCEDURES FOR THE DETERMINATION OF OFFENSES AGAINST DISCI-

does not square with nineteenth-century legal scholarship that analyzed the case. In fact, *Ex parte Taws* is consistent with the eyes-on doctrine.

Taws, having violated an embargo, was confined on district-court process to recover a penalty for that violation; Taws petitioned the court for a writ of habeas corpus "for the purpose of inquiring into the cause of [his] confinement, without the privilege being allowed him" of a yard adjoining the debtors' apartments.[296] The court's opinion reads in its entirety: "We do not think it right 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, of which there is no evidence in this case."[297]

Modern commentators offer a blinkered interpretation. They would have us understand the first clause of this long sentence as the court's entire holding.[298] On these scholars' reading, everything following "as to" does nothing to delimit the hands-off principle, including what would seem to be a general exception indicated by the "unless" language which follows. Ira P. Robbins's otherwise unimpeachable account of the status of the hands-off doctrine circa 1980 furnishes historical background to the doctrine with a citation to *Taws*, but in quoting the case, he places a period where that semicolon sits.[299] Bayard Marin argues that "[p]erhaps the earliest expression of judicial noninterference was *Ex parte Taws*,"[300] but then walks back that claim: the court "denied relief to the prisoner, but even then recognized that there might be circumstances when a different result should obtain."[301]

At least one early commentator, by contrast, emphasized the second and third clauses of the opinion as integral parts of the court's holding. The discretion deferred to relates *only* to the matter of prisoners' security, and this discretion is *itself* reviewable if abused. Joel Prentiss Bishop was a renowned author of legal treatises whose *Commentaries on the Criminal Law*, first published in

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pline in Prisons of Britain and the United States 224 (1983); Raja Raghunath, *A Promise the Nation Cannot Keep: What Prevents the Application of the Thirteenth Amendment in Prison?*, 18 Wm. & Mary Bill Rts. J. 395, 400 & n.22 (2009); Amy L. Riederer, Note, *Working 9 to 5: Embracing the Eighth Amendment Through an Integrated Model of Prison Labor*, 43 Val. U. L. Rev. 1425, 1430 & n.36 (2009); Robbins, *supra* note 38, at 211 n.13; Lee Freudberg, Note, *Administrative Decisions in Prisons: Are Prisoners Entitled to Procedural Due Process?*, 2 Mem. St. U. L. Rev. 85, 87 (1971).

296. *See Ex parte* Taws, 23 F. Cas. 725, 725 (C.C.D. Pa. 1809).

297. *Id.*

298. *See supra* note 295.

299. *See* Robbins, *supra* note 38, at 211 n.13.

300. Marin, *supra* note 295, at 224 (footnote omitted).

301. *Id.*

1856, ultimately went through eight lifetime editions.[302] It refers to *Ex parte Taws* in a chapter titled "Malfeasance and Non-Feasance in Office" and a section titled "Sheriffs and their deputies, constables, coroners, and the like."[303] That section opens by stating: "The criminal liability of these officers for malfeasance and non-feasance in office is clear beyond question."[304] Bishop cites *Taws* in a footnote collecting cases for the proposition that "any like officer is . . . amenable for not taking to prison one committed on a magistrate's warrant."[305] The first case cited, *Regina v. Johnson*, is said to hold that it is no excuse for an officer of the court "that he kept safely the prisoner in the officer's own house, and had him before the magistrate for examination at the time required."[306] The second case, *Rex v. Mills*, involved a "[s]heriff indicted for neglecting to execute a warrant . . . for the apprehending of a constable who had refused to do his office."[307] Then comes the citation to *Taws*.

In Bishop's reading, then, *Taws* demonstrates the limits of executive control over prisoners. The phrase "as to their security" in *Taws* delineates the type of jailer discretion that the opinion permits: jailers' liability for escapes, the subject of *Regina v. Johnson*. The language following the opinion's "unless" reflects the broader subject matter of that section of the treatise: liability for sheriff or jailer malfeasance or nonfeasance, the subject of *Rex v. Mills*. Bishop takes *Taws* to stand for the idea that jailers face liability for failure to exercise their discretion to secure their prisoners in an effective, unoppressive way.[308] For Bishop, then, this case is not about judicial deference to jailer discretion. It is instead about jailer liability and judicial attention thereto. That he gives force to every word of this short opinion, while modern interpreters largely ignore its second

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302. Stephen A. Seigel, *Joel Bishop's Orthodoxy*, 13 Law & Hist. Rev. 215, 215-16, 219-20, 219 n.17 (1995).

303. 2 Joel Prentiss Bishop, Commentaries on the Criminal Law 519, 521-22 (Boston, Little, Brown & Co., 4th ed. 1868).

304. *Id.* at 521.

305. *Id.* at 522 & n.1.

306. *Id.* at 522 n.1.

307. *Id.*; R v. Mills (1681-1683) 89 Eng. Rep. 877, 877; 2 Show. K.B. 181, 181-82 (KB). Here and in the following footnotes, citations to entries in the *English Reports* vary slightly on the style *The Bluebook* recommends, *see* The Bluebook, *supra* note 51, tbl.2.43, in that the year I give in parentheticals after the matter's name refers to the year of decision, not the year of publication. To determine that year, I consulted the regnal year(s) given on the relevant page of the *English Reports*, and converted to calendar year(s) using the charts in A Handbook of Dates for Students of British History 40-45 (C.R. Cheney ed., new ed. 2004).

308. He elsewhere collects authority for the proposition that a "jailor who confines a prisoner in an unwholesome room, and neglects to give him necessaries for cleanliness, whereby he contracts a disease of which he dies, commits murder." 2 Bishop, *supra* note 303, at 379, 388.

half, strongly recommends his gloss. On this reading, *Taws* does not foreshadow the hands-off doctrine. It accords instead with the laws reviewed in this Part.

Bishop at the same time assimilates *Taws* with background English common-law precedent. While a full account is beyond the scope of this Note, a brief review suffices to show that a similar exercise might be performed for the statutes reviewed above. Far from derogating from the common law, those statutes carried forward a centuries-old tradition of English judges overseeing prisons and adapted that tradition to republican government. We have already seen what the English JPs had been up to on this score.[309] Their brethren on England's highest law court, the King's Bench, exercised kindred powers. They played a role in initiating process against the allegedly cruel prison keeper.[310] They advised the crown on prison leadership.[311] They haled prison proprietors into court and ordered them to fix a failed roof after a storm, "upon pain of forfeiting their right" to run the place.[312] They involved themselves in day-by-day prison government.[313] They transferred imprisoned persons to other facilities

309. *See supra* note 257 and accompanying text.

310. See, for example, *Dominus Rex and the Lady Braughton* (1672) 84 Eng. Rep. 578, 578; 3 Keb. 32, 32 (KB) (basing its decision "on several complaints of prisoners against her," the court "committed [defendant jailer], and ordered information against her"); and, as separately reported, *Lady Broughton's Case* (1672) 83 Eng. Rep. 112, 112-13; Raym. Sir T. 216, 216 (KB) ("The lady Broughton, keeper of the Gate-house prison in Westminster . . . was found guilty; and her crime was extortion of fees, and hard usage of the prisoners in a most barbarous manner; and . . . she was fined one hundred marks, removed from her office, and the custody of the prison was at present delivered to the Sheriff of Middlesex, till the dean and chapter should farther order the same, *salvo jure cujuslibet*.").

311. New Marshal of the King's Bench Prison (1768) 98 Eng. Rep. 138, 138; 4 Burr. 2183, 2183-84 (KB) ("Lord Mansfield, Lord Chief Justice of the King's Bench had recommended Mr. Thomas, as a person fit and every way qualified to execute [the office of marshal of the prison of the King's Bench]. Whereupon the King nominates constitutes and appoints him to be marshal of the Marshalsea of this Court . . . .").

312. Case of the Prison of the King's Bench (1726) 93 Eng. Rep. 778, 778; 2 Strange 678, 678 (KB) ("The prison being in a ruinous condition, and the late rains having broke in, there was an order made for the proprietors to attend the Court; and upon their attendance the Court was moved to enlarge the rules of the prison, so as to take in the Marshalsea, that the prisoners might be removed thither. But the Court would do nothing in it, till there was an undertaking by rule of Court to put the prison in repair, which they said the proprietors were obliged to do, upon pain of forfeiting their right. Whereupon the proprietors submitted to a rule, and the rules were enlarged accordingly.").

313. *See* Joanna Innes, Inferior Politics: Social Problems and Social Policies in Eighteenth-Century Britain 245-53 (2009); Third Report of the Select Committee Appointed to Enquire into the State of the Gaols of this Kingdom (May 11, 1730), *reprinted in* 8 William Cobbett, Parliamentary History of England

in light of medical need.[314] And judges of the central law courts had been entrusted with doing those sorts of things since at least Edward III's reign.[315]

Taws cites no statutes, no case law. As Bishop indicates, the opinion's key proviso, "unless it appeared that he misused it for purposes of oppression," nonetheless harmonizes with contemporaneous legal background. That background does not want for examples of English judges treating prison oversight as a portion of their inherent power.

III. THE LATER CAREER OF THE EYES-ON DOCTRINE

A. Connecticut and Rhode Island

Not every state provided for the separation of powers in its Founding Era constitution. Discussing eighteenth-century state constitutions' embrace of the principle, Madison deliberately "pass[ed] over [those] of Rhode Island and Connecticut, because they were formed . . . before the principle . . . had become an object of political attention."[316] In the first half of the nineteenth century, Connecticut and Rhode Island would rework their constitutions to enshrine the separation of powers. Revisions to state codes ensued. These changes to the

803, 810 (London, T.C. Hansard 1811) ("It appeared to the Committee, that . . . this prison of the King's Bench is much better regulated than any other prison, the Committee hath enquired into; which they cannot but ascribe to the care of the Lord Chief Justice Raymond, who, not accepting of any presents, or fees, from the Marshal of the said prison, hath kept the said Marshal strictly to the performance of his duty; and his lordship hath heard, and redressed, the complaints of the prisoners.").

314. R and Huggins (1730) 94 Eng. Rep. 241, 244; 1 Barn. K.B. 358, 361-62 (KB) ("The defendant then desired, he might be turned over from Newgate to the Marshalsea. The Court refused that too, till he produced an affidavit of his health being endangered by the closeness of that prison; but upon his doing that, they did make such rule; tho' said, he must still be kept under strict confinement.").

315. *See* 2 CALENDAR OF THE PATENT ROLLS, EDWARD III 442-43 (Mar. 5, 1333, Pontefract) (London, Her Majesty's Stationery Office 1893) ("[Commission of oyer and terminer] to William de Herle, John de Stonore, John de Cantebrigge, John de Preston and Richard de Aldeburgh, on complaint that Hugh de Croydon, deputed by the sheriffs of London to the custody of Newgate gaol, and other ministers there have been guilty of oppressions and extortions by colour of their offices, confining men committed for trespasses other than felony among notorious felons, bailing out homicides, by torture and otherwise taking large ransoms and fines from those in their custody, and committing other excesses."). The previous few years, one William Herle, John Stonor, John Cambridge (our John de Cantebrigge?), and Richard Aldeburgh had been appointed either chief or puisne justice of the Court of Common Pleas. THE JUDGES OF ENGLAND, 1272-1990: A LIST OF JUDGES OF THE SUPERIOR COURTS, at xi-xii, 61-63 (John Sainty ed., 1993).

316. THE FEDERALIST NO. 47, *supra* note 108, at 305 (James Madison).

basic structure of their governments and law did not result in the repeal of previously enacted statutes granting judges supervisory authority over the administration of prisons.

In 1816, Connecticut's legislature obliged county courts to take up certain aspects of jail management and prisoner accommodations.[317] In 1818, a new constitution revested the legislature's fused legislative, judicial, and executive powers in separate departments of government.[318] In 1819, a committee was appointed "to examine the statute laws of this state, and to recommend such alterations and provisions, as may be necessary and expedient, to render the statutes comformable [sic] to the constitution, and better adapt them to the changes which have been introduced thereby."[319] One legislator likened this endeavor to taking out the trash.[320] That committee's product, a revised code, met with legislative approval in May 1820 and was published the next year.[321] Connecticut's judicial penal-oversight provision remained intact.[322]

In Rhode Island, a new constitution was adopted in 1843, in part to deprive the general assembly of their "long exercised judicial power."[323] It provided that the "powers of the government shall be distributed into three departments: the legislative, executive, and judicial."[324] As of 1822, the state's supreme judicial court and courts of common pleas, "on complaint to them made," were "au-

317. *See, e.g.*, An Act in Addition to an Act, Entitled, "An Act for Regulating Gaols and Gaolers," ch. 7, § 1, 1816 Conn. Acts May Sess. 259, 259 ("That suitable fuel and bedding for the accommodation of debtors closely confined in goal and of prisoners, for matters, of a criminal nature, shall, as occasion may require, be furnished in each county in this State, under the direction of the county court . . . .").

318. *See, e.g.*, Convention Debates (Sept. 2, 1818) (statement of Mr. Fairchild), *in* 19 THE PUBLIC RECORDS OF THE STATE OF CONNECTICUT FROM MAY THROUGH OCTOBER 1818, at 196, 199-200 (Douglas M. Arnold ed., 2007); RICHARD J. PURCELL, CONNECTICUT IN TRANSITION: 1775-1818, at 243, 261-62 (1963).

319. 20 THE PUBLIC RECORDS OF THE STATE OF CONNECTICUT FROM 1819 TO 1820, at 73 (Douglas M. Arnold ed., 2012).

320. *Id.* at xxi-xxii.

321. Act of May 29, 1820, *in* 20 THE PUBLIC RECORDS OF THE STATE OF CONNECTICUT FROM 1819 TO 1820, *supra* note 319, at 273, 273-76.

322. An Act Concerning Gaols and Gaolers, *in* THE PUBLIC STATUTE LAWS OF THE STATE OF CONNECTICUT AS REVISED AND ENACTED BY THE GENERAL ASSEMBLY IN MAY 1821, at 250, 252 (Hartford, S.G. Goodrich, Huntington & Hopkins 1821).

323. PATRICK T. CONLEY, NEITHER SEPARATE NOR EQUAL: LEGISLATIVE AND EXECUTIVE IN RHODE ISLAND CONSTITUTIONAL HISTORY 83-84 (1999) (citing Taylor v. Place, 4 R.I. 324, 349-51 (1856)).

324. R.I. CONST. of 1843, art. III.

thorized to remove any deputy-sheriff or jailer for misdemeanor in office."[325] After a revision of the laws—pursued (as in Connecticut) to bring the body of state law into closer conformity with, among other things, the new constitution's distribution-of-powers provision[326]—this power remained.[327]

B. The Civil War

Connecticut's and Rhode Island's post-Founding Era prison law shows the persistence of the eyes-on doctrine beyond the Founding Era. To be sure, some states in the antebellum era elected to vest the authority to oversee newly erected penitentiaries in legislatively or gubernatorially appointed inspectors.[328] But other states clung to Founding Era arrangements like those reviewed in Part II. In 1862, for instance, Pennsylvania's supreme court considered the constitutionality of a kind of good-conduct-time sentencing reduction scheme. Striking it down as a usurpation of judicial authority to fix sentences, the court reviewed the recent history of penitentiaries in Pennsylvania, recalling that their government

> was committed to boards of inspectors, "consisting of five taxable citizens of Pennsylvania," to be appointed by the judges of the Supreme

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325. An Act Relating to Sheriffs, Deputy-Sheriffs and Jailers, § 12, *in* The Public Laws of the State of Rhode-Island and Providence Plantations as Revised by a Committee, and Finally Enacted by the Honorable General Assembly, at Their Session in January, 1822, at 304, 307 (Providence, Miller & Hutchens 1822).

326. *See* Judge Knowles, Statement of the Circumstances Under Which the Constitution Was Framed, and the Intent of Its Framers in Regard to a Continuance of the Powers of the General Assembly (Sept. 11, 1858), *reprinted in* J.B. Thayer, Memorandum on the Legal Effect of Opinions Given by Judges to the Executive and the Legislature Under Certain American Constitutions 23, 32-33 (Boston, Alfred Mudge & Son 1885).

327. An Act in Relation to Sheriffs, Deputy Sheriffs and Jailers, § 13, *in* Public Laws of the State of Rhode-Island and Providence Plantations, as Revised by a Committee, and Finally Enacted by the General Assembly at the Session in January, 1844, at 77, 80 (Providence, Knowles & Vose 1844).

328. *See, e.g.*, Of the State Prison, and the Government and Discipline Thereof, ch. 144, §§ 1-3, *in* The Revised Statutes of the Commonwealth of Massachusetts, Passed November 4, 1835, to Which are Subjoined, an Act in Amendment Thereof, and an Act Expressly to Repeal the Acts Which Are Consolidated Therein, Both Passed in February 1836, at 789, 790 (Boston, Dutton & Wentworth 1836). *But see, e.g.*, Of Detention and Imprisonment in the County Jail, or the House of Correction, and the Government and Regulation of Those Prisons, ch. 143, § 28, *in* The Revised Statutes of the Commonwealth of Massachusetts, *supra*, at 777, 784 (providing that judges of certain inferior courts are to serve as inspectors of local prisons).

> Court, and they were to act under "rules and regulations for the better ordering and governing of said penitentiaries," which [an] Act of 1829 set forth in full.[329]

The opinion found its grounds for decision in a theory of the separation of powers. Longstanding judicial involvement in prison-inspector appointments raised no alarm.

Indications of more fundamental changes in the prison-law landscape emerged after the Civil War. Scholars consider *Ruffin v. Commonwealth* a central authority standing for the proposition that, in nineteenth-century America, prisoners had limited to nonexistent rights.[330] Seen in light of the foregoing evidence, this reading might obscure the role of another legal entitlement in the case. *Ruffin* is a decision about the judicial power. It reflects the judiciary's construction of the judicial power's breadth. The case's holding on the breadth of the judicial power denigrates the eyes-on doctrine and anticipates its hands-off replacement.

Ruffin was decided in 1871, in an opinion authored by Judge Joseph Christian, among the first judges to preside over the state's highest court after the 1870 end of military rule in Virginia, where he had served as a senator during the Civil War.[331] The case involved a question of venue. Ruffin was charged with killing a correctional officer while working as a convict laborer in Bath County.[332] He was tried, not by a jury drawn from the vicinage of Bath County, but from Richmond County, home of the penitentiary which technically had legal custody over him.[333] Did the state constitution's bill of rights compel a new trial with jurors from Bath County?[334] Judge Christian denied that Ruffin enjoyed a judicially cognizable constitutional right because, as a prisoner, Ruffin was a "slave of the State."[335] Relief for prisoners is available only by operation of laws that the legislature "in its wisdom may enact for the government of [the penitentiary] and the control of its inmates,"[336] the executive's

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329. Commonwealth *ex rel.* Johnson v. Halloway, 42 Pa. 446, 446-47 (1862).

330. *See, e.g.*, INCARCERATION AND THE LAW, *supra* note 51, at 42.

331. *See* Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 791 (1871); William M.E. Rachal, *The Capitol Disaster, April 27, 1870: A Letter of Judge Joseph Christian to His Wife*, 68 VA. MAG. HIST. & BIOGRAPHY 193, 193-94 (1960).

332. *Ruffin*, 62 Va. (21 Gratt.) at 792.

333. *Id.* at 792, 797.

334. *See* VA. CONST. of 1869, art. I, § 10 (enumerating the right "to a speedy trial by an impartial jury *of his vicinage*") (emphasis added).

335. *Ruffin*, 62 Va. (21 Gratt.) at 796.

336. *Id.*

pardon power, or the writ of habeas corpus.[337] In tandem with describing prisoners as slaves of the state, *Ruffin* presaged current doctrine. It suggested that administration of correctional facilities is peculiarly the province of the legislative and executive branches.[338] Nikolas Bowie and Daphna Renan find a revanchist, "juristocratic" turn in separation-of-powers doctrine after the Civil War.[339] Jurists seized on the separation-of-powers principle and assumed for themselves the exclusive authority to interpret its meaning, as a means of checking muscular, Reconstruction Era legislation designed to vindicate civil rights.[340] What *Ruffin* may well mark is the beginning of that juristocratic turn in American prison law.

CONCLUSION

Part I showed that Rush's *Enquiry* enfolds a plausible candidate for the eyes-on doctrine's Founding Era rationale. That rationale's pertinence and force endure. Prior to the latter part of the eighteenth century, death, maiming, and fines were the standard punishments for serious crime in Western legal systems.[341] While failure to pay a fine might have resulted in confinement,[342] what these punishments had in common was the immediacy of their infliction, at least as compared with incarceration. Terms of incarceration extend over periods of time. The institutional setting mediates the punishment that inmates experience. If carceral punishment is to be just, its punitive degree and its punitive nature for people living at a penal facility, over the course of their term of incarceration, must be proportionate to their culpability. Proportionate punishment remains a legal requirement.[343] What makes the eyes-on doctrine more reasoned than its hands-off alternative is precisely this. It vests judges—those legally required to assess proportionality—with the power to make pro-

337. *Id.* at 797.

338. *See supra* note 19 and accompanying text.

339. *See* Nikolas Bowie & Daphna Renan, *The Separation-Of-Powers Counterrevolution*, 131 YALE L.J. 2020, 2047-49, 2062-74 (2022).

340. *See id.*

341. *See* Langbein, *supra* note 51, at 36-38, 52.

342. *Cf. supra* Section II.D (discussing the facts of *Ex parte Taws*).

343. *See* 18 U.S.C. § 3553(a) (2018) (stipulating that sentences must be "sufficient, but not greater than necessary, to comply with the purposes" of sentencing, such as "reflect[ing] the seriousness of the offense . . . and provid[ing] just punishment for the offense"); U.S. SENT'G GUIDELINES MANUAL, ch. 1, pt. A (U.S. SENT'G COMM'N 2023) ("Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity.").

portionality something more than legal fiction, form without substance, or mechanical recourse to a sentencing table,[344] but instead a reality extending across a term of incarceration.

The notion that conditions of confinement could or should inform assessments of punishment's severity meets with wide-ranging present-day sympathy. It is common sense, in Rush's own halfway uncommon sense of that phrase: an opinion in unison with a broader bulk of belief.[345] Critics of contemporary Eighth Amendment jurisprudence have found that one can, and must, consider the cruelty that an institution itself can visit upon inmates.[346] Students of law and economics have noted how features of everyday life inside the penitentiary might contribute to the relative severity of punishment.[347] The American Bar Association commends rehabilitation and deterrence as being among the legitimate goals of sentencing.[348] Where sentencing results in imprisonment, these goals plainly intersect with conditions of confinement. Judges' acquaintance with conditions of confinement would help them assess the degree of deterrence afforded by incarceration at specific facilities and the extent to which conditions of life inside a facility serve rehabilitative ends.

First principles counsel a revival of the eyes-on doctrine. But do institutional discontinuities, past to present, qualify this conclusion? One might well wonder if the institution Rush envisioned, like the institutions that early American legislatures created, were by present-day standards rinky-dink affairs, small in scale and simple in administration, controlled largely by a sheriff and his jailer. Contrast the American prison systems of today, like the New York State Department of Corrections and Community Supervision (DOCCS). As of December 2022, it incarcerated some 31,000 and employed some 25,000 New Yorkers.[349] A complex site-specific bureaucracy manages each of DOCCS's for-

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344. *See supra* notes 98-99 and accompanying text.

345. *See* BENJAMIN RUSH, THOUGHTS ON COMMON SENSE (Apr. 3, 1791), *reprinted in* ESSAYS, LITERARY, MORAL & PHILOSOPHICAL, *supra* note 59, at 249, 251.

346. *See, e.g.*, Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 899-901, 910-35 (2009); Alexander A. Reinert, *Eighth Amendment Gaps: Can Conditions of Confinement Litigation Benefit from Proportionality Theory?*, 36 FORDHAM URB. L.J. 53, 76-86 (2009).

347. *See* Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1212 (1985).

348. STANDARDS FOR CRIMINAL JUSTICE SENTENCING § 18-2.1(a) (AM. BAR ASS'N 1994).

349. *Handbook for the Families and Friends of New York State DOCCS Incarcerated Individuals*, N.Y. STATE DEP'T OF CORR. & CMTY. SUPERVISION 4 (Dec. 2022), https://doccs.ny.gov/system/files/documents/2023/03/2022-family-handbook-12-12-2022.pdf [https://perma.cc/D9YY-LYT3].

ty-four facilities.[350] Judicial intervention in those prisons' administration is therefore likely to entail what Owen M. Fiss called structural reform.[351] Is the eyes-on doctrine a historical curiosity, a creature of a time before penal confinement in America assumed its current scale and judicial power would have to operate on a complicated structure of institutional government?

In 1801, Thomas Eddy (an admirer of Rush[352]) wrote a short book about DOCCS's ancestor, Newgate.[353] As he had helped lead the charge for its foundation, Eddy also helped lead this prison's government in its early years.[354] On his account, around the end of 1801, Newgate incarcerated some 344 people.[355] The facility's administration included a seven-member inspectorate, their clerk, an inspector-appointed principal keeper, and his twelve assistants (one of whom was designated the deputy keeper), working alongside a physician and resident apothecary.[356] The assistant keepers were themselves assisted, for the purposes of securing the place, by a prison guard under the direction of New York City's mayor.[357] That prison guard's 1801 organic law referred to a captain, sergeant, two corporals, not more than twenty privates, and a drummer and a fifer.[358] Something on the order of fifty people had a fixed place in Newgate's multitiered organizational hierarchy at the turn of the nineteenth century. Administrative density characterized even the comparatively simple penal systems reviewed above. In North Carolina, for example, upon apprehensions that a given district jail was insecure, state law obliged a sheriff or his jailer to report to a judge of the superior court, the attorney general, the solicitor general, or three justices of the peace, who in turn were to weigh ordering a detachment

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350. *Id.* (noting that each facility "has a Superintendent, and most facilities have Deputy Superintendents for Security, Programs, and Administration. Security staff consists of Captains, Lieutenants, Sergeants, and Correction Officers . . . [alongside] a myriad of Program and Administrative staff from the civilian ranks including Food Services Administrators, Institution Stewards," and so forth).

351. *See* Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 2-5, 21 (1979).

352. *See* Meranze, *supra* note 64, at 419-20.

353. *See generally* EDDY, *supra* note 199 (discussing Newgate).

354. W. DAVID LEWIS, FROM NEWGATE TO DANNEMORA: THE RISE OF THE PENITENTIARY IN NEW YORK, 1796-1848, at 4-5 (paperback ed. 2009); SAMUEL L. KNAPP, THE LIFE OF THOMAS EDDY; COMPRISING AN EXTENSIVE CORRESPONDENCE WITH MANY OF THE MOST DISTINGUISHED PHILOSOPHERS AND PHILANTHROPISTS OF THIS AND OTHER COUNTRIES 18-19, 56-59 (New York, Conner & Cooke 1834).

355. EDDY, *supra* note 199, at 79.

356. *Id.* at 20-28, 47-48.

357. *Id.* at 29.

358. Act of Apr. 3, 1801, ch. 121, § 20, 1801 N.Y. Laws 283, 286.

from the county's militia to stand guard.[359] Colonial models of jail administration, already primitive by the turn of the nineteenth century, similarly spanned well beyond the simple sheriff/jailer dyad. A 1722 lawbook addressed to justices of the peace, for instance, alludes to interactions among those justices, churchwardens, constables, sheriffs, keepers, and underkeepers in managing, supplying, and superintending local jails.[360] At least so far as the prison was concerned, the eyes-on doctrine emerged in a historical context that was no stranger to managerial, even protobureaucratic, complexity.

So meaningful institutional continuities stand alongside enduring first principles in counseling a revival of the eyes-on doctrine. That revival might take any number of forms. I briefly sketch some here.

Legislatures might revisit those laws that deprive judges of the discretion to shape a sentence that accounts for its prospective punitive nature and degree.[361] The American Law Institute recently recommended that legislatures create "a wholly new judicial decisionmaker for the sentence-modification process, preferably a 'panel' of several judges or retired judges."[362] Their "second look" authority would only activate, however, upon an offender's serving fifteen or more years of a sentence. A dramatically shorter time window, and a requirement that reviewing judges account for conditions of confinement at facilities

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359. MARTIN, *supra* note 283, at 120-21; *see also supra* notes 285-289 and accompanying text (discussing the involvement, among others, of the Treasurer of Public Buildings).

360. JAMES PARKER, CONDUCTOR GENERALIS, OR THE OFFICE, DUTY AND AUTHORITY OF JUSTICES OF THE PEACE, HIGH-SHERIFFS, UNDER-SHERIFFS, CORONERS, CONSTABLES, GAOLERS, JURY-MEN, AND OVERSEERS OF THE POOR 112, 248 (The Lawbook Exchange, Ltd. 2002) (1722); *see also* WILLIAM LAMBARD, THE DUTIES OF CONSTABLES, BORSHOLDERS, TYTHINGMEN, AND SUCH OTHER LOWE AND LAY MINISTERS OF THE PEACE 28-29 (London, Thomas Wight & Bonham Norton, rev. ed. 1599) ("The money appointed to bee leuied by the Churchwardens of euery Parish each Sunday, for the reliefe of prisoners in the Gaole, ought . . . to bee paid by them once euery quarter of a yeare, to the high Constables, or heade Officers of euery Hundred, Riding, Wapentake, town[] [and] parish: and the said high Constables, or head Officers ought (under the paine of fiue pounde) to pay ouer the same money so to them paide, at the next quarter Sessions of the Peace, to the person appointed by the Iustices of Peace to receiue the same.").

361. In the federal system, for instance, judges can only make recommendations as to the facility where defendants will serve out their sentence. 18 U.S.C. § 3621(b)(4) (2018). According to its own statistics, the Bureau of Prisons honors those recommendations in full less than seventy-five percent of the time. Alicia Vasquez & Todd Bussert, *How Federal Prisoners Are Placed: Shedding Light on the BOP's Inmate Classification and Designation Process*, 31 CRIM. JUST. 19, 21 (2016). Alicia Vasquez and Todd Bussert's article was cited in Judge Jack B. Weinstein's opinion in *United States v. D.W.*, 198 F. Supp. 3d 18, 18, 138, 147 (E.D.N.Y. 2016).

362. *See* MODEL PENAL CODE: SENTENCING app. A § 305.6 cmt. d. (AM. L. INST., Proposed Final Draft Apr. 10, 2017).

where a prisoner has been incarcerated, would better accord with the regime reviewed in Parts II and III.

Federal judges might take a second look at current law on (re)sentencing. Skylar Albertson has identified an emerging interpretation of the First Step Act of 2018's "extraordinary and compelling reasons" provision; under this interpretation, the law implies a broad, equitable power to modify sentences upon changed conditions of confinement.[363] Judges might seize on analogous clauses in other statutes, and characterize them as what they are: not "escape hatches" exactly, but reserves of equitable power that, wittingly or not, carry forward some of the oldest traditions in American prison law.[364] The device of framing a sentence so that the term of imprisonment it imposes is automatically vacated if correctional authorities commit a defendant to a certain facility, one known to visit inhumane conditions of confinement upon prisoners[365]—this is plainly a blunt instrument. But, in the federal context, does it encroach upon the Bureau of Prisons's authority to designate the facility where an incarcerated person serves time?[366] Again, not exactly: it corrects a *prior* encroachment on judicial discretion. It restores to judges the tools they need to carry out their mandate of proportionate and uniform sentencing.[367] It, too, carries forward some of the oldest traditions in American prison law.

Then there is the matter of the professional culture of the judiciary. Judges can and should open correspondence with prison administrators and oversight officials;[368] visit those facilities where defendants they sentence to prison will

363. Skylar Albertson, *Do Prison Conditions Change How Much Punishment a Sentence Carries Out? Lessons from Federal Sentence Reduction Rulings During the COVID-19 Pandemic*, 18 Nw. J. L. & Soc. Pol'y 1, 7, 36 (2022).

364. *E.g.*, United States v. Chavez, No. 22-CR-303, 2024 WL 50233, at *1-2, *5-8 (S.D.N.Y. Jan. 4, 2024) (finding that the "dreadful" conditions of confinement at the Metropolitan Detention Center in Brooklyn constitute an "exceptional reason[] why [a] person's detention [there] would not be appropriate" under 18 U.S.C. § 3145(c) (2018)); *id.* at *2 (describing § 3145(c) as "a safety valve of sorts").

365. *See* United States v. Colucci, No. 23-CR-417, 2024 WL 3643857, at *7 (E.D.N.Y. Aug. 5, 2024).

366. *See id.* at *6 (citing 18 U.S.C. § 3621(b) (2018)); *supra* note 361.

367. *Cf. Colucci*, 2024 WL 3643857, at *6-7 (citing various subsections of 18 U.S.C. § 3553(a) (2018)).

368. *See* Federal Prison Oversight Act, Pub. L. No. 118-71, § 2(a), 138 Stat. 1492, 1496 (2024) (amending 5 U.S.C. § 413 to provide for a new Department of Justice Ombudsman tasked with overseeing the Bureau of Prisons, who is to receive complaints from "member[s] of the judicial branch" and others regarding, among other things, conditions of confinement in federal prisons).

serve time;[369] and visit prisons whose internal operations they are unfamiliar with prior to sentencing. Enterprising judges have formed visiting committees or paid calls on ad hoc bases.[370] Some judges take it upon themselves to visit penal facilities located in their jurisdiction.[371] A small number of state judiciaries mandate as much.[372] More should do the same, and judges should regularize these practices.

The simplest and perhaps most urgent form that a revival of the eyes-on doctrine might take, however, is jurisprudential. Parts II and III of this Note revealed that a crucial premise of modern American prison law, identified in the Introduction,[373] relies on faulty assumptions and dubious assertions about American legal history. This Note's primary conclusion is that judges must dispense with the conceit that the separation of powers self-evidently works to

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369. *Cf.* Rhodes v. Chapman, 452 U.S. 337, 374-77 (1981) (Marshall, J., dissenting) (arguing for deference to the trial judge's factfinding regarding crowding and other conditions of confinement in part because the trial judge was "the only one who actually visited the prison"); Driver & Kaufman, *supra* note 39, at 581-82 (discussing fitful efforts within the judiciary to encourage judicial visitation).

370. *See, e.g.*, Judge Robin S. Garson, Judge Cheryl J. Gonzales, Judge Brenda P. Murray & Judge Betty J. Williams, *National Association of Women Judges (NAWJ) Women in Prison Committee (WIP) Second Visit to BOP's Metropolitan Detention Center (MDC), Brooklyn, New York*, NAT'L ASS'N WOMEN JUDGES, WOMEN IN PRISON COMM. 1-3 (June 3, 2016), https://www.nawj.org/uploads/files/monthly_update/referenced_docs/july_2016/bop_nawj_june_3_2016_visit_metropolitan_detention_center_ny.pdf [https://perma.cc/5D6C-FP6K]; Nick Pinto, *The Power Is Back on at Brooklyn Jail, but a Visiting Federal Judge Found Untreated Gunshot Wound, "Black Blotchy Mold," and Ongoing Crisis*, INTERCEPT (Feb. 6, 2019, 1:50 PM), https://theintercept.com/2019/02/06/mdc-brooklyn-metropolitan-detention-center-federal-judge-tour [https://perma.cc/K9WG-H97L] ("After hearing this testimony, [Judge] Torres took the remarkable step of moving her hearing from the courtroom to the jail itself, touring the facility personally, and bringing along the lawyers arguing before her.").

371. Ed Cohen, *Poll Suggests That Judges Know What Life Is Like in Their Jails and Prisons*, NAT'L JUD. COLL. (May 16, 2022), https://www.judges.org/news-and-info/poll-suggests-that-judges-know-what-life-is-like-in-their-jails-and-prisons [https://perma.cc/A3KW-QHSN] (stating that of respondents to an "unscientific poll," some ninety-six percent of judges reported having visited a local prison or jail at least once).

372. *See id.*; N.Y. COMP. CODES R. & REGS. tit. 22, § 17.1(a)(2) (2024) ("In order to ensure that every judge or justice be familiar with those facilities where the judge or justice is authorized to direct the detention, treatment, examination or confinement of any person in connection with Criminal or Family Court proceedings, the following steps shall be taken: . . . each judge or justice . . . shall visit a facility or institution of each type specified in subdivision (d). To comply with this requirement, visits shall be completed no later than one year after the assumption of office, or shall have been made no earlier than three years before the assumption of office . . . .").

373. *See supra* notes 13-50 and accompanying text.

curtail or preclude judicial involvement in prison oversight. That conceit is not an immemorial tradition. Nor does it reflect an original expected application of the judicial power, as enshrined by Founding Era constitutions, to the challenges of prison government. If anything, it is a byproduct of Reconstruction Era revanchism.[374]

Not so with the eyes-on doctrine. The eyes-on doctrine is coeval with the first flush of republicanism in America and some of the earliest efforts on our shores toward a more humane and enlightened penology.

374. *See supra* Section III.B.