SUPREME COURT OF THE UNITED STATES

No. 02–94

WILLIAM OVERTON, DIRECTOR, MICHIGAN DEPARTMENT OF CORRECTIONS, ET AL., PETITIONERS *v.* MICHELLE BAZZETTA ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[June 16, 2003]

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, concurring in the judgment.

I concur in the judgment of the Court because I would sustain the challenged regulations on different grounds from those offered by the majority.

I

A

The Court is asked to consider "[w]hether prisoners have a right to non-contact visitation protected by the First and Fourteenth Amendments." Brief for Petitioners i. In my view, the question presented, as formulated in the order granting certiorari, draws attention to the wrong inquiry. Rather than asking in the abstract whether a certain right "survives" incarceration, *ante*, at 4, the Court should ask whether a particular prisoner's lawful sentence took away a right enjoyed by free persons.

The Court's precedents on the rights of prisoners rest on the implicit (and erroneous) presumption that the Constitution contains an implicit definition of incarceration. This is manifestly not the case, and, in my view, States are free to define and redefine all types of punishment, including imprisonment, to encompass various types of deprivations—*provided only that those deprivations are*

consistent with the Eighth Amendment. Under this view, the Court's precedents on prisoner "rights" bear some reexamination.

When faced with a prisoner asserting a deprivation of constitutional rights in this context, the Court has asked first whether the right survives incarceration, *Pell* v. *Procunier,* 417 U. S. 817, 822 (1974), and then whether a prison restriction on that right "bear[s] a rational relation to legitimate penological interests." *Ante*, at 4 (citing *Turner* v. *Safley,* 482 U. S. 78, 89 (1987)).

Pell and its progeny do not purport to impose a substantive limitation on the power of a State to sentence a person convicted of a criminal offense to a deprivation of the right at issue. For example, in *Turner*, the Court struck down a prison regulation that forbade inmates from marrying absent permission from the superintendent. 482 U. S., at 89, 94–99. *Turner* cannot be properly understood, however, as holding that a State may not sentence those convicted to both imprisonment and the denial of a constitutional right to marry.* The only provision of the Constitution that speaks to the scope of criminal punishment is the Cruel and Unusual Punishment Clause of the Eighth Amendment, and *Turner* cited neither that Clause nor the Court's precedents interpreting it. Prisoners challenging their sentences must, absent an unconstitutional procedural defect, rely solely on the Eighth Amendment.

The proper inquiry, therefore, is whether a sentence validly deprives the prisoner of a constitutional right

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*A prisoner's sentence is the punishment imposed pursuant to state law. Sentencing a criminal to a term of imprisonment may, under state law, carry with it the implied delegation to prison officials to discipline and otherwise supervise the criminal while he is incarcerated. Thus, restrictions imposed by prison officials may also be a part of the sentence, provided that those officials are not acting ultra vires with respect to the discretion given them, by implication, in the sentence.

enjoyed by ordinary, law-abiding, persons. Whether a sentence encompasses the extinction of a constitutional right enjoyed by free persons turns on state law, for it is a State's prerogative to determine how it will punish violations of its law, and this Court awards great deference to such determinations. See, *e.g.*, *Payne* v. *Tennessee,* 501 U. S. 808, 824 (1991) ("Under our constitutional system, the primary responsibility for defining crimes against state law [and] fixing punishments for the commission of these crimes . . . rests with the States"); see also *Ewing* v. *California,* 538 U. S. ___, ____ (2003) (opinion of O'CONNOR, J.) (slip op., at 12) ("[O]ur tradition of deferring to state legislatures in making and implementing such important [sentencing] policy decisions is longstanding").

Turner is therefore best thought of as implicitly deciding that the marriage restriction was not within the scope of the State's lawfully imposed sentence and that, therefore, the regulation worked a deprivation of a constitutional right without sufficient process. Yet, when the resolution of a federal constitutional issue may be rendered irrelevant by the determination of a predicate state-law question, federal courts should ordinarily abstain from passing on the federal issue. *Railroad Comm'n of Tex.* v. *Pullman Co.,* 312 U. S. 496 (1941). Here, if the prisoners' lawful sentences encompassed the extinction of any right to intimate association as a matter of state law, all that would remain would be respondents' (meritless, see Part II, *infra*) Eighth Amendment claim. Petitioners have not asked this Court to abstain under *Pullman*, and the issue of *Pullman* abstention was not considered below. As a result, petitioners have, in this case, submitted to the sort of guesswork about the meaning of prison sentences that is the hallmark of the *Turner* inquiry. Here, however, *Pullman* abstention seems unnecessary because respondents make no effort to show that the sentences imposed on them *did not* extinguish the right they now seek to

enforce. And for good reason.

It is highly doubtful that, while sentencing each respondent to imprisonment, the State of Michigan intended to permit him to have any right of access to visitors. Such access seems entirely inconsistent with Michigan's goal of segregating a criminal from society, see *Morrissey* v. *Brewer,* 408 U. S. 471, 482 (1972) (incarceration by design intrudes on the freedom "to be with family and friends and to form the other enduring attachments of normal life"); cf. *Olim* v. *Wakinekona*, 461 U. S. 238 (1983) (upholding incarceration several hours of flight away from home).

B

Though the question of whether the State of Michigan intended to confer upon respondents a right to receive visitors is ultimately for the State itself to answer, it must nonetheless be confronted in this case. The Court's *Turner* analysis strongly suggests that the asserted rights were extinguished by the State of Michigan in incarcerating respondents. Restrictions that are rationally connected to the running of a prison, that are designed to avoid adverse impacts on guards, inmates, or prison resources, that cannot be replaced by "ready alternatives," and that leave inmates with alternative means of accomplishing what the restrictions prohibits, are presumptively included within a sentence of imprisonment. Moreover, the history of incarceration as punishment supports the view that the sentences imposed on respondents terminated any rights of intimate association. From the time prisons began to be used as places where criminals served out their sentences, they were administered much in the way Michigan administers them today.

Incarceration in the 18th century in both England and the Colonies was virtually nonexistent as a form of punishment. L. Friedman, Crime and Punishment in American History 48 (1993) (hereinafter Friedman) ("From our

standpoint, what is most obviously missing, as a punishment [in the colonial system of corrections], is imprisonment"). Colonial jails had a very limited function of housing debtors and holding prisoners who were awaiting trial. See *id.*, at 49. These institutions were generally characterized by "[d]isorder and neglect." McGowen, The Well-Ordered Prison: England, 1780–1865, in The Oxford History of the Prison: The Practice of Punishment in Western Society 79 (N. Morris & D. Rothman eds 1995) (hereinafter McGowen). It is not therefore surprising that these jails were quite permeable. A debtor could come and go as he pleased, as long as he remained within a certain area ("'prison bounds'") and returned to jail to sleep. Friedman 49. Moreover, a prisoner with connections could get food and clothing from the outside, *id.*, at 50; see also W. Lewis, From Newgate to Dannemora: The Rise of the Penitentiary in New York, 1796–1848, p. 49 (1965) (hereinafter Lewis) ("Many visitors brought the felons such items of contraband as rum, tools, money, and unauthorized messages"). In sum, "[t]here was little evidence of authority," McGowen 79, uniformity, and discipline.

Prison as it is known today and its part in the penitentiary system were "basically a nineteenth-century invention." Friedman 48. During that time, the prison became the centerpiece of correctional theory, while whipping, a traditional form of punishment in colonial times, fell into disrepute. The industrialization produced rapid growth, population mobility, and large cities with no well-defined community; as a result, public punishments resulting in stigma and shame wielded little power, as such methods were effective only in small closed communities. *Id.*, at 77.

The rise of the penitentiary and confinement as punishment was accompanied by the debate about the Auburn and Pennsylvania systems, both of which imposed isolation from fellow prisoners and the outside. D. Rothman, The Discovery of the Asylum 82 (1971) (hereinafter Roth-

man) ("As both schemes placed maximum emphasis on preventing the prisoners from communicating with anyone else, the point of dispute was whether convicts should work silently in large groups or individually within solitary cells"); *id.*, at 95. Although there were several justifications for such isolation, they all centered around the belief in the necessity of constructing a special setting for the "deviant" (*i.e.*, criminal), where he would be placed in an environment targeted at rehabilitation, far removed from the corrupting influence of his family and community. *Id.*, at 71; A. Hirsch, The Rise of the Penitentiary: Prisons and Punishment in Early America 17, 19, 23 (1992); cf. Friedman 77 (describing the changing attitudes toward the origin of the crime). Indeed, every feature of the design of a penitentiary—external appearance, internal arrangement, and daily routine—were aimed at achieving that goal. Rothman 79–80; see also *id.*, at 83.

Whatever the motives for establishing the penitentiary as the means of combating crime, confinement became standardized in the period between 1780 and 1865. McGowen 79. Prisons were turned into islands of "undeviating regularity," Lewis 122, with little connection to the outside, McGowen 108. Inside the prisons, there were only prisoners and jailers; the difference between the two groups was conspicuously obvious. *Id.*, at 79. Prisoners' lives were carefully regulated, including the contacts with the outside. They were permitted virtually no visitors; even their letters were censored. Any contact that might resemble normal sociability among prisoners or with the outside world became a target for controls and prohibitions. *Id.,* at 108.

To the extent that some prisons allowed visitors, it was not for the benefit of those confined, but rather to their detriment. Many prisons offered tours in order to increase revenues. During such tours, visitors could freely stare at prisoners, while prisoners had to obey regulations cate-

gorically forbidding them to so much as look at a visitor. Lewis 124. In addition to the general "burden on the convict's spirit" in the form of "the galling knowledge that he was in all his humiliation subject to the frequent gaze of visitors, some of whom might be former friends or neighbors," presence of women visitors made the circumstances "almost unendurable," prompting a prison physician to complain about allowing women in. *Ibid*.

Although by the 1840's some institutions relaxed their rules against correspondence and visitations, the restrictions continued to be severe. For example, Sing Sing allowed convicts to send one letter every six months, provided it was penned by the chaplain and censored by the warden. Each prisoner was permitted to have one visit from his relatives during his sentence, provided it was properly supervised. No reading materials of any kind, except a Bible, were allowed inside. S. Christianson, With Liberty for Some: 500 Years of Imprisonment in America 145 (1998). With such stringent regimentation of prisoners' lives, the prison "had assumed an unmistakable appearance," McGowen 79, one which did not envision any entitlement to visitation.

Although any State is free to alter its definition of incarceration to include the retention of constitutional rights previously enjoyed, it appears that Michigan sentenced respondents against the backdrop of this conception of imprisonment.

II

In my view, for the reasons given in *Hudson* v. *McMillian*, 503 U. S. 1, 18–19 (1992) (THOMAS, J., dissenting), regulations pertaining to visitations are not punishment within the meaning of the Eighth Amendment. Consequently, respondents' Eighth Amendment challenge must fail.