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THE EXTRAVAGANCE OF EIGHTH AMENDMENT DEFERENCE

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ABSTRACT

We live in an era of extremely long prison sentences, visibly excruciating executions, and violence-plagued prisons. We also live in an era of penological judicial restraint, which manifests through the practice of deference, wherein courts put a thumb on the scale in favor of finding laws and policies constitutional. On this basis, courts have been reluctant to use the Eighth Amendment's ban on cruel and usual punishments to invalidate even some of the most extreme features of our criminal legal system.

This Article traces the profound effect of deference on the construction and application of the Eighth Amendment. To do so, this Article also assesses the meanings of cruelty and unusualness, as well as the logic of deference. What we learn from these inquiries is that deference can corrode and confuse the meaning of our rights. In the Eighth Amendment context, deference has also undermined some of the Civil War's fundamental legal achievements, including the ability of individuals to seek protection under federal constitutional law against state-imposed forced labor and deprivations of freedom. But deference need not corrode the Eighth Amendment in this way. A better rendering of deference, and the Eighth Amendment, is possible.

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INTRODUCTION

By prohibiting "cruel and unusual" punishments in the Eighth Amendment, we gave our judges a staggering task.[1] They would have to define not just unusualness but also *cruelty*—a profound concept probably as hard to define as, say, *love*. Philosophers from Aristotle to Hume have struggled to define cruelty for centuries.[2] But the task is even more difficult for judges, who, unlike philosophers, cannot settle upon a neat definition in the abstract. Judges have to *enforce* their definition against democratic decisions about appropriate punishment.

How have judges fared with this difficult task? They have largely avoided it. Rather than defining cruelty and unusualness and enforcing a prohibition against them, the Supreme Court has instead given legislators, governors, and prison administrators a pass to punish as they please. As Justice O'Connor candidly put it, deference to policymakers is the Eighth Amendment's "governing legal principle."[3]

This Article investigates deference's force on Eighth Amendment law. Deference, as a concept, is tricky. It is an amorphous matter that eases the tension between judicial enforcement of rights on the one hand and the necessary latitude of our elected government to conduct its business on the other. Words like cruelty and issues like punishment create environments ripe for the proliferation of deference because cruelty is hard to define, and the politics of punishment make it controversial for courts to strike legislation. Deference becomes the salve for this tense constitutional dynamic. It gives courts permission to not define cruelty and unusualness and to not intervene in the penal system.

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1. The Eighth Amendment provides that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. This Article addresses only the last clause—the prohibition on cruel and unusual punishments.

2. *See* GIORGIO BARUCHELLO, PHILOSOPHY OF CRUELTY 2–3 (2017).

3. Lockyer v. Andrade, 538 U.S. 63, 76 (2003).

These virtues of deference give it a gravitational pull. For over a century, scholars have proposed theories for and expounded the virtues of judicial restraint and deference.[4] And courts have embraced these efforts.[5] But the pull of deference should be managed with caution—a point many scholars have also already made. In particular, scholars have critiqued deference for its ubiquity, lack of definition, and inconsistent usage.[6]

Using the Eighth Amendment as a case study, this Article contributes to and complicates our understanding of deference. The Article shows that deference, when left unchecked, can corrode and confuse the substance and logic of a constitutional right. In focusing on the Eighth Amendment, this Article draws out the penological implications of deference.[7] How has deference contributed to mass incarceration? How has it contributed to the system of capital punishment? How has it shaped daily life in prisons?

This Article begins by describing how deference operates throughout the Eighth Amendment. Part I offers a history of Eighth Amendment adjudication, with a particular focus on the Supreme Court's use of deference as a tool to shape sentence review, death penalty law, and prison law. As we will see, the scope of deference is breathtaking—no corner of Eighth Amendment law remains untouched. Part II tries to organize these various modes of deference by working them into a rough typology.

Having described the anarchic abundance of deference in Eighth Amendment law and offered an organizing typology, Part III proposes some operating principles. When can a court use deference? Are there circumstances when it must? What are the justifications for deference, and are they well-reasoned? Here, I introduce what I call the relevance requirement for deference: the simple but oft-violated principle that courts should only defer to legislative or policy decisions that are relevant to the judicial inquiry at hand. In our case, the judicial inquiry at hand is whether a particular punishment is cruel and unusual. To flesh out this

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4. *See, e.g.*, James Bradley Thayer, *The Origin and Scope of American Constitutional Law,* 7 HARV. L. REV. 129, 148 (1893); ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 199–200 (1962).

5. *See* Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CALIF. L. REV. 519, 525–32 (2012).

6. *See, e.g.*, Daniel J. Solove, *The Darkest Domain: Deference, Judicial Review, and the Bill of Rights*, 84 IOWA L. REV. 941, 1003–19 (1999) (arguing for the abandonment of the practice of deference on the ground that it relies on a faulty conception of the judicial function); Paul Horwitz, *Three Faces of Deference*, 83 NOTRE DAME L. REV. 1061, 1069–99 (2008) (offering a definition of deference, a taxonomy of its justifications, and a series of questions probing its utility).

7. In addressing this topic, I am aided by the work of many. I lean on Sharon Dolovich's helpful analysis of deference in prison law, *see* Sharon Dolovich, *Forms of Deference in Prison Law*, 24 FED. SENT'G REP. 245, 246–48 (2012), and I have drawn upon Malcolm Feeley and Edward Rubin's historical account of the relationship between courts and prison reform, MALCOLM FEELEY & EDWARD RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS (1999). I share Eric Berger and William Berry's concerns that the application of deference in the Eighth Amendment is incoherent and incorporate some of their prescriptions into mine. *See* Eric Berger, *In Search of a Theory of Deference: The Eighth Amendment, Democratic Pedigree, and Constitutional Decision Making*, 88 WASH. U. L. REV. 1, 75–76 (2010); William W. Berry III, *Unusual Deference*, 70 FLA. L. REV. 315, 315 (2018).

requirement, I explore various philosophical conceptions of cruelty. The upshot is significant. If the relevance requirement is valid, much of the Court's current deference is invalid. I then turn to the traditional justifications for deference—that legislatures are better situated to make certain decisions or are otherwise constitutionally authorized to make certain decisions without judicial interference. I take these justifications seriously but find them insufficient to uphold the current extreme use of deference.

In Eighth Amendment law, deference is omnipresent, sloppily applied, and insufficiently justified. It endures, however, because it enables the Court to sidestep the monumental institutional and political challenges inherent in enforcing a ban on cruel and unusual punishments. But those challenges, great as they are, must be faced head-on because at stake is nothing less than the nature of constitutional democracy, the meaning of cruelty, and the freedom and welfare of our family and friends whom we choose to incarcerate.[8]

I. THE INFLUENCE OF DEFERENCE

First, a definition of deference: Judicial deference is a judge's substitution of someone else's judgment for their own.[9] It is thus a mechanism for relinquishing authority or exercising restraint, depending on how one wants to frame it. To make it concrete, imagine a judge deciding whether a police officer's action was necessitated by a threat to public safety. The judge could make their assessment of the public safety threat, or they could defer to the police officer's assessment.

Adopting that definition, this part describes how deference is used in the adjudication of Eighth Amendment claims. The claim is this: deference is outcome-determinative in many cruel-and-unusual punishment cases and highly influential in all the rest. Deference even outweighs the text of the Eighth Amendment itself as a decisional factor. I concede outright that one can never be sure what motivated a particular judicial decision. But the Court's explicit invocation of deference throughout Eighth Amendment law is a strong indication that deference guides the case law, or at least provides cover for some unspoken decisional factor.

A. The Predecessors of Deference

Deference, like everything, has its predecessors. The earliest Eighth Amendment claims against state-imposed prison sentences were not dismissed on the grounds of

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8. Almost half of all Americans have had an immediate family member incarcerated. BRIAN ELDERBROOM, LAURA BENNETT, SHANNA GONG, FELICITY ROSE & ZOË TOWNS, FWD.US, EVERY SECOND: THE IMPACT OF THE INCARCERATION CRISIS ON AMERICA'S FAMILIES 17, 21, 24, 28–29 (2018), https://everysecond.fwd.us/downloads/everysecond.fwd.us.pdf.

9. Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 5 (1983). This definition is widely adopted. *See, e.g.*, Robert A. Schapiro, *Judicial Deference and Interpretive Coordinacy in State and Federal Constitutional Law*, 85 CORNELL L. REV. 656, 665 (2000); PHILIPPE NONET & PHILIP SELZNICK, LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW 22 (2d ed. 2001); Solove, *supra* note 6, at 946; Horwitz, *supra* note 6, at 1072; Berger, *supra* note 7, at 37.

deference to legislative decision-makers. Instead, they were dismissed on the grounds that courts lacked authority to apply federal constitutional rights against states.[10] In 1866, for example, the Court dismissed a claim that a three-month state-imposed sentence for distributing alcohol was "excessive, cruel, and unusual."[11] The Court dismissed the claim not because it disagreed on the merits or because of a principle of deference to state legislative decisions, but instead because the Eighth Amendment simply did not apply against the states at that time.[12] Before the Civil War and the passage of the Fourteenth Amendment, this was the conventional understanding of the relationship between the federal Constitution and state governments—it did not apply to them. But the Fourteenth Amendment, which was ratified a year after the decision just mentioned, arguably changed that relationship. It provided that:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[13]

So, after 1868, it was an open question of whether the Eighth Amendment did in fact apply to states. Could a state prisoner argue that his sentence was cruel and unusual under federal law? At first, the Court said no. In 1892, for example, the Supreme Court denied a claim that a fifty-four-year sentence for selling liquor from New York to Vermont was cruel and unusual under the Eighth Amendment.[14] Just like it had done in the pre-Fourteenth Amendment case, the Court denied this claim on jurisdictional grounds, noting that "it has always been ruled that the Eighth Amendment to the Constitution of the United States does not apply to the states."[15]

The watershed moment came in 1962. Nearly a century after the Civil War and the passage of the Fourteenth Amendment, the Court "incorporated" the Eighth Amendment against the states and thereby held that state prisoners could raise a federal constitutional cruel and unusual punishment claim.[16] But the watershed

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10. The focus here is on state claims because the Supreme Court has never engaged actively with challenges to federal sentences. One well-known exception is *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (holding that stripping a citizen of their citizenship as a punishment for desertion was barred by the Eighth Amendment as a cruel and unusual punishment).

11. Pervear v. Commonwealth of Massachusetts, 72 U.S. 475, 479–80 (1866).

12. *Id.* at 479 n.6 ("Of this proposition it is enough to say that the article of the Constitution relied upon in support of it does not apply to State but to National legislation." (citing Barron v. City of Baltimore, 32 U.S. 243 (1833) (holding that the Fifth Amendment only applies to federal legislation))).

13. U.S. CONST. amend. XIV, § 1.

14. O'Neil v. State of Vermont, 144 U.S. 323, 331–32 (1892) ("[I]t has always been ruled that the Eighth Amendment to the Constitution of the United States does not apply to the States."); *see also In re* Kemmler, 136 U.S. 436, 447–49 (1890) (disposing of case for lack of jurisdiction).

15. *O'Neil*, 144 U.S. at 331–32.

16. The Cruel and Unusual Punishments Clause of the Eighth Amendment was ultimately incorporated to apply against the states in *Robinson v. California*, 370 U.S. 660, 666 (1962).

moment proved to be a major letdown. Though the claims were now formally allowed, the Court enlisted a new tool to deny the claims in practice: deference.

Deference, therefore, became the new method for enforcing the pre-Civil War, pre-Fourteenth Amendment, and pre-incorporation status quo. Prior to incorporation, federal courts uniformly declined to intervene in state penal policy on the grounds of formal jurisdictional limits.[17] After incorporation, federal courts remained uninvolved but instead relied on the idea of deference.[18]

One useful account of this shift is offered by Professor Louis Henkin, who has written about "constitutional displacement," in which legal substance may disappear from one area of the law only to reappear elsewhere.[19] Similarly, in Professor Kenji Yoshino's framing, "[s]queezing law is often like squeezing a balloon. The contents do not escape but erupt in another area."[20]

We might understand deference, then, as the progeny of the pre-Civil War status quo in which state citizens did not have federal constitutional protection. In this light, the use of deference represents a judicial resistance to the hard-earned federal constitutional authority to protect citizens—especially Black citizens—from harsh, dehumanizing state policies.[21]

B. General Sentence Review[22]

In the contemporary application of the Eighth Amendment, deference reigns supreme, but its application is nonetheless varied. When reviewing criminal sentences, courts have created a bifurcated system.[23] Some claims are treated with a highly deferential form of review that functionally denies all claims. I call this

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17. This is not to say, however, that there was no federal court invalidation of state statutes prior to the passage of the Fourteenth Amendment and the subsequent piecemeal incorporation. To the contrary, federal courts were invalidating state statutes as early as 1792. *See* Charles Warren, *Earliest Cases of Judicial Review of State Legislation by Federal Courts*, 32 YALE L.J. 15, 15 (1922) ("[A]s early as 1792, a United States Circuit Court in Rhode Island held a statute of that State invalid . . . .").

18. *See infra* Section I.B. General Sentence Review.

19. Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1417 (1974).

20. Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 748 (2011).

21. Perhaps the most influential argument for judicial restraint and deference was written in 1893, just twenty-five years after the passage of the Fourteenth Amendment. Thayer, *supra* note 4, at 148 ("The judicial function is merely that of fixing the outside border of reasonable legislative action."). But recent historical work shows that Thayer was not motivated by a desire to let states obviate federal constitutional rules, but rather by a desire to free federal legislation from a conservative court. *See* Samuel Moyn & Rephael G. Stern, *To Save Democracy from Juristocracy: J.B. Thayer and Congressional Power after the Civil War*, 38 CONST. COMMENT. (forthcoming) (manuscript at 29). Thayer, on Moyn and Stern's account, "was consistently concerned about the Court's propensity to invalidate congressional acts on the basis of the Reconstruction Amendments." *Id*. It was not until the post-Warren Court era that Thayer's project of deference was utilized to resist, in particular, the rights of prisoners and, more broadly, the effect of incorporation.

22. I use this term to describe the review of any sentence on the grounds that it is disproportionate to the defendant's individual culpability. Other cases that are described in the next subsection are reviewed on the theory that the sentence is disproportionate because the defendant or the crime is of a particular identity which renders all sentences of that type disproportionate.

23. *See* Daniel Loehr, *The Problem of Habitual Offender Laws in States with Felony Disenfranchisement*, 113 J. CRIM. L. & CRIMINOLOGY 307, 316 (2023).

"general sentence review" because it is the default review for Eighth Amendment claims that a sentence is unconstitutionally long. But certain categories of claims are treated as exceptions and get a slightly less deferential form of review. These are claims made by people who committed their crimes as juveniles, those who have qualifying mental illnesses and intellectual disabilities, and those who have been sentenced to death. I call the review applied to these cases "exception-based review" and will discuss it in the section that follows this one.

In general sentence review, criminal sentences are always upheld, and I mean that literally: not a single sentence has been overturned using this doctrine in the last thirty-five years.[24] This is not for a lack of extreme sentences. In 1991, for example, Ronald Harmelin challenged his sentence of life without parole for cocaine possession.[25] The Court denied his claim, citing deference.[26] In 2002, Gary Ewing challenged his sentence of twenty-five years to life for the theft of a golf club.[27] The Court denied his claim, again citing deference.[28] In 2003, Leandro Andrade challenged his sentence of two consecutive terms of twenty-five years to life for the theft of five videotapes worth approximately $150.[29] At this point, you know the result.[30]

If we jump back a few decades, we can see how deference corroded the Eighth Amendment's protection against cruel and unusual punishment. In *Rummel v. Estelle*, decided in 1980, the Court cited deference as it upheld a life sentence for three minor thefts.[31] Writing for the majority, Justice Rehnquist argued that decisions about criminal sentences are "pre-eminently the province of the legislature" and that therefore the Court should be "reluctan[t] to review legislatively mandated terms of imprisonment."[32] Justice Rehnquist did not attempt to define the words cruel and unusual but instead grounded the denial of the claim on the principle of deference, noting that "Texas is entitled to make its own judgment as to where such [penological] lines lie[.]"[33]

Two years later, the Court doubled down on its deferential approach in *Hutto v. Davis*,[34] upholding a forty-year sentence for possession and distribution of marijuana.[35] The Court based its ruling on deference and quoted favorably the notion

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24. The last reversal of which the author is aware, in the Supreme Court or any lower federal court, is *Solem v. Helm*, 463 U.S. 277, 303 (1983).

25. Harmelin v. Michigan, 501 U.S. 957, 961 (1991) (plurality opinion).

26. *Id.* at 994–95 (majority opinion).

27. Ewing v. California, 538 U.S. 11, 19–20 (2003) (plurality opinion).

28. *Id.* at 24.

29. Lockyer v. Andrade, 538 U.S. 63, 70 (2003).

30. *See id.* at 77 (denying respondent's sentence challenge).

31. Rummel v. Estelle, 445 U.S. 263, 274–75 (1980) (William Rummel, a Texas native, was convicted of obtaining $80 worth of goods with a fraudulent credit card in 1964, passing a forged check worth $28.36 in 1969, and stealing $120.75 in 1975).

32. *Id.*

33. *Id.* at 284.

34. 454 U.S. 370 (1982) (per curiam).

35. *Id.* at 388 (Brennan, J., dissenting).

from *Rummel* that courts should be "reluctan[t] to review legislatively mandated terms of imprisonment."[36] But unlike in *Rummel*, where the Court provided a merits analysis in an authored opinion, the Court in *Davis* dismissed the claim in a short per curiam opinion, signaling that deference had become so powerful as to preclude any consideration of whether particular sentences are cruel and unusual.[37]

The ease with which the Court dismissed the claim—of Mr. Davis, a Black man who Virginia locked up for decades for marijuana possession—was uncomfortably reminiscent of the pre-Civil War status quo in which the Court summarily dismissed Eighth Amendment claims for lack of jurisdiction.[38] Despite the Civil War, the passage of the Fourteenth Amendment, and the incorporation of the Eighth Amendment, the Court denied Mr. Davis' claim outright, just as it would have a hundred years earlier. Deference had become dispositive, just as lack of jurisdiction was dispositive before the Civil War. In that light, Justice Brennan left much unsaid in his dissent when he asserted that the "general principle of deference surely cannot justify the complete abdication of our responsibility to enforce the Eighth Amendment."[39]

While the nearly dispositive deference announced in *Davis* has generally persisted, there was a brief lapse only one year later. In *Solem v. Helm*, the Court struck a sentence that looked very similar to those upheld in *Rummel* and *Davis*.[40] The change was caused by Justice Blackmun, who voted with the majority to uphold the sentences in the earlier cases of *Rummel* and *Davis* but joined the dissenters in those two cases to form a majority in *Solem*.[41]

Solem offered a different approach to deference rather than a new interpretation of the words "cruel and unusual." The majority opinion, written by Justice Powell, addressed the issue of deference directly:

> [W]e hold as a matter of principle that a criminal sentence must be proportionate to the crime for which the defendant has been convicted. Reviewing courts, of course, should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals. But no penalty is *per se* constitutional.[42]

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36. *Id.* at 374 (per curiam).

37. *See id.*

38. Mike Sager, *9 Ounces Equal 40-Year Sentence*, WASH. POST (Jan. 22, 1982), https://www.washingtonpost.com/archive/local/1982/01/22/9-ounces-equal-40-year-sentence/3623fd3c-87ab-4498-bcc0-ae3659f400c5/.

39. *Davis*, 454 U.S. at 383 (Brennan, J., dissenting).

40. 463 U.S. 277, 303 (1983).

41. Though not centrally important, the shift is illuminating. As I have written, my hypothesis is that Justice O'Connor's recent arrival on the Court, and her heavy-handed deference to states, led Justice Blackmun to see himself as a defender of a strong conception of *Marbury*. This tension was building right at the time of Blackmun's *Davis-Solem* switch. *See* THE BURGER COURT: POLITICAL AND JUDICIAL PROFILES 73–74 (Charles M. Lamb & Stephen C. Halpern eds., 1991); LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN 147 (2006) (describing the O'Connor-Blackmun tension in the decision of *FERC v. Mississippi*).

42. *Solem*, 463 U.S. at 290.

Justice Burger wrote the dissent, which was a full-throated defense of deference.[43] "Legislatures are far better equipped than we are," he wrote, "to balance the competing penal and public interests and to draw the essentially arbitrary lines between appropriate sentences for different crimes."[44] Justice Burger encouraged his colleagues to "heed Justice Black's comments about judges overruling the considered actions of legislatures under the guise of constitutional interpretation."[45]

Though *Solem* moved the Court away from the extreme deference of *Rummel* and *Davis*, the shift lasted less than a decade. In 1991, the Court returned to dispositive deference in *Harmelin v. Michigan*, which upheld a life sentence for cocaine possession.[46] *Harmelin* achieved deference, however, in a new way. Rather than avoiding the merits as previous cases had done, *Harmelin* used deference to affirmatively narrow the substantive scope of the protection against cruel and unusual punishments.

Justice Kennedy's controlling opinion listed four "common principles" of the Court's Eighth Amendment sentencing precedent, all of which relate to deference.[47] The first is that the length of a sentence is a legislative decision because it requires substantive penological judgment.[48] The second, an extension of the first, is that the Eighth Amendment does not require the adoption of a single penological theory.[49] The third is that deference to legislative judgment requires acceptance of the fact that divergences among the states are inevitable.[50] And the fourth is that objective factors should inform proportionality review to the maximum extent possible.[51]

The Court held that these principles require limiting the scope of the Eighth Amendment right itself.[52] In Justice Kennedy's words, "[a]ll of these principles . . . inform the final one: The Eighth Amendment does not require strict proportionality between crime and sentence."[53] Deference, therefore, shaped the scope of the right itself. We know this, because Justice Kennedy says so: he explicitly says that due to the principles of deference, the meaning of the Eighth Amendment right, and the scope of the protection that it provides, is substantively narrow. This new discounted-for-deference proportionality right has proven to be so narrow that it captures nothing at all.

Since *Harmelin*, no court in the country has vacated any sentence under this Eighth Amendment doctrine. And the Supreme Court has only increased its

43. *Id.* at 314 (Burger, J., dissenting).
44. *Id.*
45. *Id.* at 317.
46. Harmelin v. Michigan, 501 U.S. 957, 999 (1991) (Kennedy, J., concurring).
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.* at 999–1000.
51. *Id.* at 1000–01.
52. *Id.*
53. *Id.* at 1001.

rhetorical reliance on deference. For example, Justice O'Connor's majority opinion in the 2003 case *Ewing* noted that even though "Ewing's sentence is a long one . . . it reflects a rational legislative judgment, entitled to deference."[54] In *Lockyer*, as I noted earlier, Justice O'Connor went so far as to call deference to legislatures the Eighth Amendment's "governing legal principle."[55] Through all these cases, the Court has taken us back to the functional equivalent of the pre-Civil War (and pre-Fourteenth Amendment and pre-incorporation) status quo, in which the Eighth Amendment was useless to citizens challenging their state sentences.

C. General Death Penalty Review

Deference has also shaped death penalty law. Since the incorporation of the Cruel and Unusual Punishments Clause in 1962, the fate of the death penalty has been intertwined with the question of deference. When, in 1972, the Court temporarily abolished the death penalty in *Furman v. Georgia*, deference featured heavily in each of the Court's splintered opinions.[56] Justices Brennan and Marshall, writing non-controlling concurrences, concluded that the Court's responsibility to enforce the Eighth Amendment superseded the importance of deference.[57] That responsibility required the invalidation of all death penalty statutes and a blanket prohibition against the death penalty.[58] The four dissenting justices shared versions of the opposite view—that despite the potential constitutional concerns with the application of the death penalty, the principle of deference supported leaving state death penalty statutes intact.[59] The three plurality justices took a middle road on deference. They held that, as presently written, the death penalty statutes violated the Constitution, but that it was at least theoretically possible for legislatures to construct different statutory regimes that would be entitled to more deference and possibly pass constitutional muster.[60]

Following *Furman*, states energetically adopted revised death penalty statutes and sought to construct regimes that would be held constitutional.[61] The Court was ultimately receptive to these legislative efforts. In *Gregg v. Georgia*, the Court upheld a death penalty statute because, according to the majority, the statute sufficiently guided the discretion of judges and juries in determining who should

54. Ewing v. California, 538 U.S. 11, 30 (2003).

55. Lockyer v. Andrade, 538 U.S. 63, 76 (2003).

56. Furman v. Georgia, 408 U.S. 238 (1972).

57. *Id.* at 257 (Brennan, J., concurring).

58. *Id.*

59. *Id.* at 375–405 (Burger, J., dissenting); *id.* at 414–65 (Powell, J., dissenting); *id.* at 405–14 (Blackmun, J., dissenting); *id.* at 465–70 (Rehnquist, J., dissenting).

60. *Id.* at 306–10 (Stewart, J., concurring); *id.* at 310–14 (White, J., concurring); *id.* at 240–57 (Douglas, J., concurring).

61. Gregg v. Georgia, 428 U.S. 153, 179–80 (1976) (explaining that thirty-five states passed new death penalty legislation following *Furman*).

receive the death penalty.[62] Since then, "guided discretion" has been the key ingredient for making a death penalty statute constitutional.[63] Twenty-seven states now have such statutes.[64]

The concept of guided discretion creates its own form of deference. Through the requirement of guided discretion, the Court essentially deputized the states to help ensure that each sentence was proportionate—by requiring that they guide the discretion of their judges—and then deferred to the states in finding the sentences constitutional. Thus, rather than enforcing a substantive prohibition, the Court offers to leave it to the states as long as they have certain procedural safeguards. As James Liebman writes, "[t]hrough this ingenious system of delegated proportionality judgments, the Court decentralized Eighth Amendment decision-making by sharing it with a variety of local actors."[65] Since *Gregg*, the Court has not deviated from its deferential position that death penalty statutes with guided discretion are constitutional, other than in the case of the narrow exceptions to which I will now turn.[66]

D. Exception-Based Review

Though the Court has used various forms of deference to condone both term-of-years sentences and death sentences, it has carved out a few exceptions to this general tolerance. For example, the Court has held that the death penalty is unconstitutional for people with qualifying intellectual disabilities and mental illnesses,[67] for people who committed their crimes before the age of eighteen,[68] and for all individuals convicted of non-homicide crimes.[69] It has also held that life without parole is unconstitutional for people who committed non-homicide crimes before they turned eighteen,[70] and that mandatory life without parole is unconstitutional for

62. *Id.* at 222 (White, J., concurring) ("The Georgia Legislature has plainly made an effort to guide the jury in the exercise of its discretion, while at the same time permitting the jury to dispense mercy on the basis of factors too intangible to write into a statute, and I cannot accept the naked assertion that the effort is bound to fail . . . . There is, therefore, reason to expect that Georgia's current system would escape the infirmities which invalidated its previous system under *Furman*.").

63. *See* Mary Sigler, *Contradiction, Coherence, and Guided Discretion in the Supreme Court's Capital Sentencing Jurisprudence*, 40 AM. CRIM. L. REV. 1151 (2003) (discussing guided discretion, its contradictions, and its enduring role in death penalty litigation).

64. *State by State*, DEATH PENALTY INFORMATION CENTER (2023), https://deathpenaltyinfo.org/states-landing.

65. James S. Liebman, *Slow Dancing with Death: The Supreme Court and Capital Punishment, 1963-2006*, 107 COLUM. L. REV. 1, 113 (2007). Note that while Liebman describes the arrangement as "sharing," it sometimes looks more like judicial abdication. The amount of responsibility retained by the court depends on how the structure is applied. For example, courts have been permissive with the requirement for guided discretion. By holding that any amount of guided discretion is enough, the Court has indicated that it is inclined to give deference even where states have not demonstrated meaningfully guided discretion.

66. One point of clarification: I offer this description of *Gregg*'s guided discretion not to press any normative claim about its merits, but rather to illustrate the many forms that deference can take, and also to show yet another instance where the Court is declining to define cruelty on its own.

67. Atkins v. Virginia, 536 U.S. 304, 321 (2002).

68. Roper v. Simmons, 543 U.S. 551, 578 (2005).

69. Kennedy v. Louisiana, 554 U.S. 407, 446–47 (2008).

70. Graham v. Florida, 560 U.S. 48, 74–75 (2010).

people who committed any crime before they turned eighteen.[71] Unlike the general review cases described above, in which courts ask whether a particular sentence is cruel as applied to a particular crime or individual, courts hearing exception-based cases ask whether a *type* of sentence is unconstitutional for a *class* of person or crime. Put differently, in order to get a claim considered as an exception to the general practice of deference, you have to convince the Court that you fit into one of the carve-outs or that a new carve-out is necessary.

Although the Court has been more willing to strike down sentences in these narrow categories, deference still plays a major role.[72] The doctrine in these cases takes the form of a two-prong test. First, the Court looks to the states to determine whether the practice is inconsistent with evolving standards of decency.[73] For example, do most states execute people who committed their crimes under the age of eighteen? This inquiry, often referred to as "state counting," comes from the Court's decision in *Trop v. Dulles*, in which the Court acknowledged that it had not defined "cruel and unusual" but held that the amendment protects nothing less than the "dignity of man."[74] The Court then held that the measurement of the dignity of man can be found in society's "evolving standards of decency."[75] The Court did not specify whether the "evolving standards" inquiry went to the term "cruelty" or to the term "unusual." In either case, however, it represented a form of deference—making the Court's judgment contingent on present state practices.

The second prong, however, is not deferential. In exception-based cases, the Court makes its own moral judgment about the proportionality of the crime to the punishment.[76] Thus, in *Roper v. Simmons*, a case about juvenile sentencing, the Court held that "the task of interpreting the Eighth Amendment remains our responsibility."[77] And in *Graham v. Florida*, another case about juvenile sentencing, the Court noted that "the judicial exercise of independent judgment requires consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question."[78] These substantive considerations are a

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71. Miller v. Alabama, 567 U.S. 460, 465 (2012).

72. At least two articles helpfully discuss deference in this area of the law. *See* Berger, *supra* note 7, at 12–27 (2010) (discussing tension between the Court's deference in a prison case (citing Baze v. Rees, 553 U.S. 35 (2008)) and lack of deference in death penalty case (citing *Kennedy*, 554 U.S. 407), and arguing that "democratic pedigree" should be the inquiry that shapes deference decisions); *see also* Susan Raeker-Jordan, *Kennedy, Kennedy, and the Eighth Amendment: "Still in Search of a Unifying Principle"?*, 73 U. PITT. L. REV. 107, 112–30 (2011) (describing the history of the Court's jurisprudence, with an eye to the Court's willingness to engage in substantive judgments of their own, rather than deferring).

73. *See Graham,* 560 U.S. at 62 (2010); *see also* Raeker-Jordan, *supra* note 72, at 132–33 (2011) ("The three-justice plurality fashioned this 'objective indicia' test out of whole cloth . . . . "); Tonja Jacobi, *The Subtle Unraveling of Federalism: The Illogic of Using State Legislation as Evidence of an Evolving National Consensus*, 84 N.C. L. REV. 1089, 1113 (2006).

74. 356 U.S. 86, 100 (1958).

75. *Id*. at 101.

76. *Graham*, 560 U.S. at 69–70.

77. Roper v. Simmons, 543 U.S. 551, 575 (2005).

78. *Graham*, 560 U.S. at 67.

far cry from the blanket deference applied elsewhere, but the Court only engages in such judgments in a narrow set of cases.

E. Prison Conditions

Deference also animates Eighth Amendment prison law. As Professor Sharon Dolovich and others have described, the changing status of prisoners' rights has been tied to the Court's changing use of deference.[79] From 1865 to 1900, federal courts regularly dismissed prison conditions cases brought under the Eighth Amendment on the ground that prisoners were "slaves of the state" without "the rights of freemen."[80] Courts thus lacked authority to review their claims. As with sentencing cases, a clear lack of authority in the pre-Civil War years transformed into a self-consciousness about authority in the post-Civil War years. Thus, from 1900 to the 1960s, though the Fourteenth Amendment had been ratified and citizens were entitled to federal protection, courts still took a hands-off approach to prisoners' Eighth Amendment claims.[81] This approach was defined by the explicit invocation of deference to agency decisions about a prison's conditions.[82]

The Court changed course in the late 1960s and 1970s, an era defined by a "hands-on" approach.[83] Rather than using the principle of deference to dispose of cases, federal courts in this era often subordinated it to the enforcement of constitutional rights.[84] But this did not last long. The Court retreated from prison reform in the 1980s—a retreat that continues to this day.[85]

In this most recent era, the Court has primarily used deference to narrow the scope of the Eighth Amendment right itself.[86] To remove federal courts from prison-conditions litigation, for example, the Court in *Wilson v. Seiter* held that the Eighth Amendment was not violated so long as poor prison conditions were not the result of "deliberate indifference."[87] By raising the standard to prove cruelty

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79. *See, e.g.*, Dolovich, *supra* note 7, at 245 (identifying three roles that deference plays in prison litigation cases and calling for a theory of deference in prison law); FEELEY & RUBIN, *supra* note 7 (providing a historical account of the Court's relationship to prison reform, and offering deference, and the lack thereof, as the determinative factor for changes in the doctrine).

80. Ruffin v. Commonwealth, 62 Va. 790, 796 (1871).

81. *See* FEELEY & RUBIN, *supra* note 7.

82. *Id.*

83. Sharon Dolovich, *The Coherence of Prison Law*, 135 HARV. L. REV. F. 301, 305–06 (2022).

84. *See, e.g.*, Procunier v. Martinez, 416 U.S. 396, 404–05 (1974), *overruled in part by* Thornburgh v. Abbott, 490 U.S. 401, 413–14 (1989). In her forthcoming book, Judith Resnik documents some of these internal debates occurring within the judicial system in Arkansas. *See* JUDITH RESNIK, IMPERMISSIBLE PUNISHMENTS: THE PROBLEM PUNISHMENTS POSE FOR DEMOCRACY (forthcoming) (on file with author).

85. For an incisive account of this sustained retreat, see Dolovich, *supra* note 83, at 307.

86. For discussion of this practice in prison law, see Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 881 (1999) ("Expansive district court structural reform of prisons where conditions are not chronically or severely unconscionable has provoked the Supreme Court to curtail the scope of the right.").

87. 501 U.S. 294, 297, 303 (1991); *see, e.g.*, Turner v. Safley, 482 U.S. 78, 89 (1987) (lowering the standard of review for prisoners' claims by holding that "when a prison regulation impinges on inmates' constitutional

and unusualness, the Court created a system that would filter out claims and more likely result in deference to decision-makers.

This brief history of deference in prison-conditions law shows that, as in sentencing cases and death penalty cases, the trajectory of prison-conditions doctrine has less to do with disputes about the meaning of the words "cruel and unusual" than with disputes about how much a court should intrude on the discretion of legislators and prison officials. As Sharon Dolovich recently wrote, "In almost all its prison law cases since 1974, the court has emphasized the imperative of judicial deference to prison officials' judgments."[88] Yet this type of deference is also different than much of the deference in sentence review, both because it relates to the scope of the right and because it relates to administrative procedure rather than to sentences passed by legislatures and imposed by courts. These differences will be explored further in the next Part.

II. A TYPOLOGY OF DEFERENCE

Though deference dominates Eighth Amendment case law, it remains entirely lacking in structure. Different modes of deference are applied to different degrees at different times, all without definition or explanation. Yet deference is not conceptually allergic to structure; courts have applied deference with structure in other areas of the law. In corporate law, courts apply a multi-pronged scheme to determine what type of deference is due to corporate decision-making.[89] In equal-protection law, the Court has developed tiers of scrutiny that condition deference on the nature of the alleged rights violation.[90] In administrative law, the Court has devised clearly distinct forms of deference—each of which even has its own name.[91] But in the Eighth Amendment context, courts just say "deference" and call it a day.

This section offers categories for thinking in a more structured way about the spectrum of Eighth Amendment deference and how it operates. It parses deference in two ways, first considering the different modes of deference that the Court uses and then considering the various subjects of deference and whether deference applies equally to them.

But first, a threshold question: What is the point of a typology? Here, I use it to help us see deference more clearly. In the Eighth Amendment context, courts speak of deference generically but use it in distinct ways. I hope that by naming these

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rights, the regulation is valid if it is reasonably related to legitimate penological interests."), *partially superseded by statute*, Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (2006).

88. Dolovich, *supra* note 83, at 308–09.

89. *See* Lewis H. Lazarus & Brett M. McCartney, *Standards of Review in Conflict Transactions on Motions to Dismiss: Lessons Learned in the Past Decade*, 36 DEL. J. CORP. L. 967, 972–75 (2011).

90. *See, e.g.*, Williamson v. Lee Optical, 348 U.S. 483, 487–91 (1955); Johnson v. California, 543 U.S. 499, 509–15 (2005).

91. *See* William Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1098–115 (2008).

distinct modes of deference, we begin to understand deference better. Creating a typology of deference also starts to uncover some of its pitfalls. Once we know there are different forms of deference, we begin to wonder why they appear when they do. And once we start thinking about the different subjects of deference, we wonder if they are equally entitled to deference. This Part tees up these questions, and the final Part addresses them head-on.

A. Modes of Deference

The term "deference" expresses the broad principles of judicial restraint and leeway to policymakers. But the Court applies these principles in distinct ways, and this Part aims to identify four of them.

1. Absolute Deference

The first type of deference is when the Court concludes that a particular claim will *always* be denied out of deference to the legislative process. I call this "absolute deference." In *Rummel*, the Court denied the Eighth Amendment claim because it concluded that it lacked the tools to determine whether a right was violated at all and that the legislature had those tools instead.[92] That holding amounted to absolute deference because no set of facts could have convinced the Court not to defer.[93] The issue was an inability to consider the claim, not the particulars of the claim itself.

Absolute deference is also evident in the Court's prison-conditions cases. The Court's hands-off approach, for example, ignores substantive questions of whether conditions are cruel and unusual and instead dismisses claims on the grounds that the Court is incapable of managing the minutia of prison administration.[94] In many ways, absolute deference sounds of justiciability.

2. Conditional Deference

In contrast to absolute deference, sometimes the Court offers deference only when certain conditions are met. I will call this second type of deference "conditional deference."[95] In *Gregg*, the Court held that it would defer to decisions about who should be executed *only if* statutes guided the discretion of judges and juries.[96] If this procedural protection were implemented, the Court would defer to the

92. Rummel v. Estelle, 445 U.S. 263, 284 (1980) ("Texas is entitled to make its own judgment as to where such lines lie, subject only to those strictures of the Eighth Amendment *that can be informed by objective factors*.") (emphasis added).

93. *Id.*

94. *See* FEELEY & RUBIN, *supra* note 7, at 30–39.

95. Sharon Dolovich describes this form of deference as "procedural rule-revising" and describes its operation in prison law. Dolovich, *supra* note 7, at 246–48.

96. Gregg v. Georgia, 428 U.S. 153, 155 (1976).

legislative act and assume that the procedure produced constitutional results.[97] The deference, therefore, was conditional.

In general-review sentencing cases, the Court has set forth different conditions for deference. For example, in *Ewing*, Justice O'Connor held that "[i]t is enough that the State of California has a reasonable basis for believing that dramatically enhanced sentences for habitual felons 'advance[s] the goals of [its] criminal justice system in any substantial way.'"[98] In other words, deference is conditioned on a legislative assertion of social utility. This looks a lot like rational-basis review, though the Court does not describe it as such.

3. Rights-Narrowing Deference

A third type of deference emerges when the Court accomplishes deference not by denying certain claims and citing deference, but rather by changing the substantive scope of a right in order to effectuate deference. Sharon Dolovich aptly describes this form of deference as "doctrine-constructing."[99] In line with that framing, I refer to it as "rights-narrowing deference" to highlight that courts use deference specifically to *narrow* rights, not to shape them in any direction. Once the right is narrowed, fewer cases will filter through the courts successfully, and policies will be stuck down less often—a deferential outcome.

To put it concretely, consider what the Court did in *Harmelin*. The Court expressed a desire to defer to state legislative decision-making, and it did so by elevating the standard for reversal.[100] Rather than requiring a disproportionate sentence, *Harmelin* held that it would only reverse if there was a *grossly* disproportionate sentence.[101] In this way, the Court narrowed the scope of the right itself and, in doing so, increased its deference to legislative decision-making. It gave legislatures a bigger field in which to operate.

Since *Harmelin*, this mode of deference has dominated modern sentence-review doctrine.[102] Describing this strategy, Justice Souter wrote in *Lockyer* that the Court

97. By contrast, the Court held in *Woodson*, for example, that mandatory death sentences were unconstitutional because they circumvented all process and deliberation by judges and juries. *See* Woodson v. North Carolina, 428 U.S. 280, 303, 305 (1976).

98. Ewing v. California, 538 U.S. 11, 28 (2002).

99. Dolovich, *supra* note 7, at 246.

100. Harmelin v. Michigan, 501 U.S. 957, 999 (Kennedy, J., concurring).

101. *Id.* at 1001.

102. *Id.* In *Harmelin,* Justice Kennedy held that principles of deference required the Court's conception of the right to be narrow. So narrow, he wrote, that violations would be "exceedingly rare." *Id.* at 963. While Justice Kennedy implies that narrowing the right is the inevitable or the only method of effectuating deference, he could have expressed deference by other means, such as the conditional mode described above. Instead, by narrowing the right, Justice Kennedy sought to limit the intrusions on legislatures writ large, while allowing a narrow space for enforcement of the right. The trade-off that emerges here is similar to the trade-off often discussed between finding something to be a political question and leaving a narrow right open for enforcement. *See generally* Joshua Stillman, *The Costs of "Discernible and Manageable Standards" in* Vieth *and Beyond*, 84 N.Y.U. L. REV. 1292 (2009) (contending the prudential political question doctrine should not be relied upon and comparing it to merits standards like rational basis as another form of judicial avoidance).

"require[s] the comparison of offense and penalty to disclose a *truly gross* disproportionality before the constitutional limit is passed, in large part because we believe that legislatures are institutionally equipped with better judgment than courts in deciding what penalty is merited by particular behavior."[103] Justice Souter thus demonstrated how the narrowing of the right was justified by a principle of deference. To be clear, nothing in the Eighth Amendment says anything about "gross" disproportionality. That word emerges from the principle of deference, not the text of the Amendment.

This method of deference is also used in prison-conditions cases, as demonstrated by *Wilson*'s requirement of "deliberate indifference."[104] On Professor Levinson's account, this move in the prison context was precipitated by a concern that the courts were giving insufficient deference to the decisions of prison officials.[105] As he wrote, "[e]xpansive district court structural reform of prisons . . . provoked the Supreme Court to curtail the scope of the right."[106]

4. State-Counting Deference

The final type of deference emerges when the Court defers not to a single legislative choice but instead to the choices made by many jurisdictions. I will call this "state-counting deference."[107] A unique feature of this form of deference is that the Court can strike down state legislation in the name of deference to states.[108] While the Court may be invalidating the law of one jurisdiction, it is doing so in consideration of the views expressed by the majority of other jurisdictions. It follows that the Court could use this type of deference to affirm a practice that appears cruel and unusual simply because other states use it.

State-counting deference is on display in death penalty law. In *Gregg*, the Court asserted that the adoption of death penalty statutes by thirty-five states warranted deference and supported upholding the death penalty as constitutional.[109] State-counting deference is also on display in exception-based sentence review. In that line of cases, the Court tallies the number of states that support or oppose the action under review.[110] At least in theory, state-counting is also part of the doctrine in

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103. 538 U.S. 63, 80 (2003) (Souter, J., dissenting) (emphasis added).

104. Wilson v. Seiter, 501 U.S. 294, 297 (1991).

105. Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 881 (1999).

106. *Id.*

107. In Eighth Amendment law, this has come to include not just other legislatures, but also judges, juries, and occasionally other countries. *See, e.g.*, Graham v. Florida, 560 U.S. 48, 61–62 (2010).

108. *See* Tonja Jacobi, *The Subtle Unraveling of Federalism: The Illogic of Using State Legislation as Evidence of an Evolving National Consensus*, 84 N.C. L. REV. 1089, 1113 (2006) ("[D]eclaring an action unconstitutional because a significant number of states prohibit the practice leaves the Supreme Court enforcing constitutional protections only in cases where they are least needed.").

109. *See* Gregg v. Georgia, 428 U.S. 153, 179–81 (1976).

110. *See* Atkins v. Virginia, 536 U.S. 304, 314 (2002); Roper v. Simmons, 543 U.S. 551, 564 (2005); Kennedy v. Louisiana, 554 U.S. 407, 423 (2008); *Graham*, 560 U.S. at 64; Miller v. Alabama, 567 U.S. 460, 482 (2012).

general sentence-review cases because the final prong of analysis asks the Court to compare a sentence in one state to the sentences in other states.[111] But the Court has never actually gotten to that step of the analysis because claimants always fail at the first step, which looks for "gross disproportionality."[112]

B. Subjects of Deference

Further distinctions are worth making when talking about deference. First, who is the decisionmaker whose decision receives deference? Deference can be given to the legislative branch, the executive branch, prison administrators, or judges and juries. Ought they all receive the same type or level of deference? In general sentence-review cases, the Court applies the same doctrine for sentencing decisions that come straight from the statute (such as mandatory sentences) and sentencing decisions that come from a judge or jury (such as when a judge or jury chooses from a range of sentences).[113] That parity suggests that state judges and legislatures are entitled to the same level of deference. But if we look further, that seems wrong. One of the leading rationales for deference (which I discuss more in the next Part) is the unique legislative capacity to make penological decisions. Why, then, would a trial court's decision about a sentence be entitled to the same form of deference?

The death penalty cases reveal some sensitivity to the question of who is making the underlying decision. Here, the Court seems unwilling to defer to the legislature or the judge-jury combination when either is acting alone. Instead, the Court will defer only when they are acting in concert. For example, the Court prohibits mandatory death sentence statutes, which by their nature ensure that the decision of who to kill is exclusively in the hands of the legislature.[114] On the other end of the spectrum, the Court also prohibits death sentences that result from a pure judge-jury determination in the absence of guiding principles from the legislature. In these cases, the Court requires a joint effort: legislative cabining of judge-jury discretion, which the Court calls "guided" discretion.[115]

Another key distinction is whether the decision is made at the state or federal level. Should state legislation be entitled to the same deference as federal legislation? Scholars have argued that federal legislation is entitled to more deference than state legislation, but the Court has not embraced any such distinction.[116]

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111. *See* Ewing v. California, 538 U.S. 11, 43 (2003) (Breyer, J., dissenting).

112. *See, e.g.*, *Ewing*, 538 U.S. at 30; Lockyer v. Andrade, 538 U.S. 63, 72 (2003).

113. *Compare, e.g.*, Hutto v. Davis, 454 U.S. 370, 378 (1982) (jury sentence), *with* Rummel v. Estelle, 445 U.S. 263, 284 (1980) (statutory sentence).

114. *See* Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

115. *See* Gregg v. Georgia, 428 U.S. 153, 155, 193 (1976).

116. Nikolas Bowie, *How the Supreme Court Dominates Our Democracy*, WASH. POST (July 16, 2021, 6:00 AM) (grounding his theory of asymmetry in the Ku Klux Klan Act of 1871 which "instructs federal courts to invalidate state actions that violate the Constitution"); James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 154 (1893) (arguing that federal legislation should be reviewed under a

Under current law, the doctrine is stable regardless of whether the decision is made at the federal or state level.[117]

I offer this typology not to claim impenetrable boundaries but rather to highlight the distinct uses of deference. Recognizing the distinctions puts pressure on the Court's generic treatment of all types of deference. The next Part uses these distinctions to show how a more sensitive, nuanced form of deference might operate.

III. THE PROPER USE OF DEFERENCE

Part I argued that the animating question in cruel-and-unusual-punishment cases is not what the text of the Eighth Amendment means but rather how much a court should defer to legislative and executive decision-making. Part II added structure to the discussion by categorizing four types of deference. This final Part considers when deference is appropriate. In this order, I ask: are there circumstances when courts cannot defer? Are there circumstances when courts must defer? And, if a court can defer but is not required to, under what circumstances should it defer?

A. When Courts Cannot Defer

To determine when courts cannot defer, this section puts some basic premises of deference on the table and, by necessity, engages in a substantive discussion about the meaning of cruelty. Because that process is a bit arduous, I offer the conclusion up front. This section suggests that there is one circumstance in which courts cannot defer: when the underlying legislative or executive decision is irrelevant to the required judicial determination. But, as we will see, to figure out whether or not the underlying decision is relevant to the judicial determination, courts will need to first define the nature of the judicial determination itself. In this case, that means reaching some substantive understanding of "cruelty." I suggest that cruelty is defined by both the severity of the punishment and the relationship between the punishment and the crime. It is not defined by social utility or procedure. The upshot is that much of the Court's current deference, which defers to legislative judgments about social utility and procedural fairness, is improper.

The starting point is this simple proposition: for a court to defer, there must be something to which it can defer. That *thing*, importantly, cannot be a person or an institution. Instead, it must be a decision or judgment produced by a person or institution. This follows from the definition of deference. Deference is the replacement of judicial judgment about a question with another actor's *judgment* about that question. It is not the replacement of judges with prison officials or the replacement

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clear error rule, but that when it comes to "whether State action be or be not conformable to the paramount [federal] constitution, the supreme law of the land, we have a different matter in hand").

117. For an argument that the Court should begin conditioning deference on the qualities of its subject, see Eric Berger, *In Search of a Theory of Deference: The Eighth Amendment, Democratic Pedigree, and Constitutional Decision Making*, 88 WASH. U. L. REV. 1, 27 (2010).

of the judiciary with the legislative branch.[118] This should be obvious, but rhetorical sloppiness necessitates its explication. Too often, legal writing misleadingly refers to "deference to the legislature" or "deference to prison officials" when the correct phrasing would be "deference to legislative *decisions*" or "deference to prison officials' *judgments*."[119]

Once we recognize that judges defer to decisions and judgments rather than the people who make them, a prerequisite for deference emerges. For a decision to be eligible for deference, it must, at a bare minimum, be *relevant* to the judicial question at hand. By relevant, I mean that the decision made by the person or institution must inform, or help answer, the judicial question. I will call this the "relevance requirement." When we talk about deference to people, the relevance requirement is obscured because it would seem that anything that person says or does deserves deference. But once we narrow in on the idea of deference to *decisions*, we can see more clearly when deference becomes incoherent.

A few examples help illustrate the propriety of the relevance requirement. Suppose a legislature passes a new tax on billionaires on the theory that doing so is necessary for the policy goal of equal opportunity. Then, the billionaires sue, raising an equal-protection claim. According to equal-protection doctrine, the reviewing court has to decide whether the stated purpose—equality of opportunity—is a legitimate state interest and whether the tax is rationally related to that interest.[120] The legislature's perspective about the state interest is relevant to deciding that question. The constitutional test makes it relevant because the test asks whether the state interest is legitimate. The relevance requirement is thus met, and deference would be permitted. Note, however, that we are not deferring to the legislature wholesale but instead to the limited judgment they offer about the significance of the state interest in equal opportunity.

Now consider a First Amendment example. Suppose a public university decides that homophobic slurs must be prohibited to fulfill its educational mission. A student is expelled for repeatedly uttering homophobic slurs and then sues the school for violating his First Amendment rights. The doctrine requires a court to consider whether the prohibition is "reasonable."[121] The university's judgment about the value of the restriction might help the court make that determination. The doctrine's search for "reasonableness" brings the university's judgment into relevance. Indeed, the university's insight into the harm that homophobia causes on campus

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118. This is because when courts defer, they are still in the business of constitutional adjudication—judges, ultimately, are the ones who must produce the opinion. Relying on someone else's decision just helps them with that task; it does not relieve them of it. Moreover, this distinction is required by judicial supremacy, which is discussed more fully in the following paragraphs.

119. To test the frequency of this misleading phrasing, I ran searches in Westlaw of these two phrases. The phrase "deference to the legislature" appears in 3,429 law-review articles. The phrase "deference to prison officials" appears in 404 law-review articles.

120. City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (per curiam).

121. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969).

informs the judicial question of whether the prohibition is reasonable. The institution's judgment is thus relevant to the judicial question, and a court could choose to defer to the university's judgment.[122] Of course, the court could also disagree about the harm of homophobia on campus. It could even agree on that issue but nonetheless strike down the rule because of the infringement on speech. No matter the outcome, however, the university's position is relevant to the judicial question and is thus *eligible* for deference. Note again that the court would not be deferring to the institution as an institution but rather to a particular, doctrinally relevant, institutional judgment.

The same dynamic exists in the Fourth Amendment context. Suppose a police officer decides to use force on the theory that such force is necessary to save her life. When her force is challenged under the Fourth Amendment, the doctrine requires a court to ask whether the use of force was objectively "reasonable."[123] Though it would not be dispositive, the officer's judgment about the danger of the situation is relevant to the constitutional inquiry. Their judgment is thus eligible for deference.

In each of these examples, the actor's judgment is relevant to the constitutional question. But this is not always the case with penological judgments and the Eighth Amendment, which monitors for cruelty and unusualness, not "reasonableness" or a "rational relationship." When legislators choose punishments, they can consider a range of factors, including the heinousness of the crime, the costs of imposing punishment, and the social utility of the punishment, such as deterrence, rehabilitation, or incapacitation. Is it the case that all of these determinations are relevant to the meaning of cruelty or unusualness? Is a legislator's belief that executing drug dealers promotes deterrence relevant to the determination of whether such a punishment is cruel?[124] Is a prison guard's judgment that beating inmates promotes order relevant to whether that beating is cruel?

These questions point us to a critical fact about deference in the Eighth Amendment. In order to determine when deference is appropriate, we need to have a substantive definition of the phrase "cruel and unusual." This is because the underlying decision must be relevant to the constitutional question, and we need to have a substantive definition of the constitutional question to determine what is relevant. What *informs* cruelty? What has no bearing on it? If a legislative judgment

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122. *See* Robert C. Post, *The Classic First Amendment Tradition Under Stress: Freedom of Speech and the University*, *in* THE FREE SPEECH CENTURY 106, 120 (Lee C. Bollinger & Geoffrey R. Stone eds., 2019) ("That is why, in the context of higher education, the Court has explicitly announced that 'a university's mission is education' and that the First Amendment does not deny a university's 'authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities' . . . . " (citing Widmar v. Vincent, 454 U.S. 263, 268 n.5 (1981))).

123. Tennessee v. Garner, 471 U.S. 1, 7 (1985).

124. On the theory of deterrence, President Trump has proposed this policy. *See* Darlene Superville, *Death Penalty for Drug Traffickers Part of Trump Opioid Plan*, ASSOCIATED PRESS (Mar. 18, 2018, 8:16 PM), https://apnews.com/article/659d41f8a3bf4b6dbc8d5cdba33e7ab1.

has no bearing on the meaning of cruelty, a court cannot defer to it because it is irrelevant.

To elucidate this point and to show how the propriety of deference turns on our understanding of cruelty, I will offer four possible conceptions of cruelty and the implication that each has for deference.[125] Further, drawing on Giorgio Baruchello's conceptual analysis of cruelty,[126] I will trace each conception to its philosophical roots.

1. The Absolutist Conception of Cruelty

One way to think about cruelty is that it is defined by the nature of the punishment alone. Some punishments are cruel and will always be cruel, no matter the behavior or the person to whom they respond. Reflecting this conception, courts have concluded that the Eighth Amendment prohibits torture as a punishment, no matter the crime committed.[127] Justice Scalia, in particular, embraced this conception.[128] In his view, this is the only way to think about cruelty as a matter of original constitutional understanding.[129]

Many philosophers have also embraced this conception of cruelty. Baruchello notes that Montesquieu included "torture," "bloody 'punishments,'" "legal servitude for insolvent debtors," and "colonial occupation" in his definition of cruel.[130] Notably, these punishments are deemed cruel regardless of the underlying crime.[131] Further, he summarizes Voltaire's definition of "cruel" to include things like "rape" and "corporal punishment and mutilation, even when legally administered in the name of justice."[132] Baruchello dubs this conception as "Montainesque"—so-called because of Montaigne's specific hatred of cruelty as "the extreme of all vices."[133] What unites these descriptions is that they

125. For another analytical overview of conceptions of cruelty, see Paulo Barrozo, *Cruelty in Criminal Law: Four Conceptions*, 51 CRIM. L. BULL. 1025 (2015).

126. Giorgio Baruchello, *No Pain, No Gain: The Understanding of Cruelty in Western Philosophy and Some Reflections on Personhood*, 65 FILOZOFIA 170, 174 (2010).

127. *See, e.g.*, O'Neil v. Vermont, 144 U.S. 323, 339 (1892) (noting that the term "cruel and unusual" typically applies to "punishments which inflict torture, such as the rack, the thumb-screw, the iron boot, the stretching of limbs, and the like").

128. Harmelin v. Michigan, 501 U.S. 957, 982 (1990).

129. *Id.* at 985. *See also* Anthony F. Granucci, *Nor Cruel and Unusual Punishments Inflicted*: *The Original Meaning*, 57 CALIF. L. REV. 839, 840–42 (1969). *But see* Michael J. Mannheimer, *Harmelin's Faulty Originalism*, 14 NEV. L.J. 522, 525–37 (2014) (providing a point-by-point refutation of Scalia's analysis in *Harmelin*).

130. *See* Baruchello, *supra* note 126, at 174 (citing and quoting CHARLES DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS VI.12 (Thomas Nugent trans., Hafner Press 1949) (1748)).

131. *See id.*

132. *Id.* (first citing VOLTAIRE, TOLERATION AND OTHER ESSAYS 85–86 (Joseph McCabe trans., G.P. Putnam's Sons 1912) (1763); then citing VOLTAIRE, CANDIDE 118–20, 148–50, 158–62 (Wordsworth ed., 1993) (1759)).

133. *Id.* (quoting MICHEL DE MONTAIGNE, THE COMPLETE ESSAYS 313 (Donald M. Frame trans., Stan. Univ. Press 1998)).

define cruelty by listing punishments, not by balancing a punishment against other considerations. Cruelty is absolute, not contingent.

If we adopt this conception of cruelty, then legislative judgments about the social utility of a punishment are irrelevant to the constitutional question. A cruel punishment is not made less cruel if it is socially useful. It would, therefore, be inappropriate for a court to defer to a legislative judgment about social utility when assessing cruelty because utility, by this account, has nothing to do with cruelty. Similarly, it would be inappropriate for a court to defer to a legislative judgment about the heinousness of the crime because the severity of the crime does not implicate cruelty. As Hallie writes, cruelty is "the infliction of ruin, *whatever the motives*."[134]

2. The Culpability-Proportionalist Conception of Cruelty

A second conception defines cruelty by the relationship between the punishment and the culpability of the person being punished. A cruel punishment is one that is unjustified by, or disproportionate to, the moral culpability of the convicted individual. Under this theory, we are opposed to executing people for selling drugs (because the crime is not that bad) and opposed to executing children who have committed murder (because, though the crime is bad, their age mitigates culpability).

This conception is widely adopted in the philosophical and legal literature. Seneca, for example, claimed that those "who have a reason for punishing but who punish without moderation" are cruel.[135] Professor John Stinneford has shown that, as a matter of original understanding, the Founders considered cruelty to include this conception of proportionality between culpability and punishment.[136]

The Court is also nearly unanimous in adopting this view.[137] As Justice Kennedy wrote in *Montgomery v. Louisiana*, "protection against disproportionate punishment is the central substantive guarantee of the Eighth Amendment."[138] And the case law reflects this. The Court has found it unconstitutional, for example, to execute individuals with qualifying intellectual disabilities on the basis that they will always lack the culpability necessary to make the death penalty morally

134. *Id.* (emphasis added).

135. *Id.* at 172 (quoting LUCIUS ANNAEUS SENECA, DE CLEMENTIA 418 (Aubrey Stewart trans., George Bell ed., 1889)).

136. John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899, 938–47 (2011).

137. *But see* Graham v. Florida, 560 U.S. 48, 99 (2011) (Thomas, J., dissenting) ("It is by now well established that the Cruel and Unusual Punishments Clause was originally understood as prohibiting [only] torturous 'methods of punishment.'"). *See also* Mannheimer, *supra* note 129, at 522 (referring to Thomas' claim as "demonstrably untrue" and "puffery"). More recently, Justice Thomas noted that the Eighth Amendment's "prohibition 'relates to the character of the punishment, and not the process by which it is imposed.'" United States v. Tsarnaev, 595 U.S. 302, 318 n.2 (2022) (quoting Gardner v. Florida, 430 U.S. 349, 371 (1977) (Rehnquist, J., dissenting)).

138. Montgomery v. Louisiana, 577 U.S. 190, 206 (2016).

proportionate.[139] Similarly, the Court has prohibited the death penalty for the crime of rape on the ground that it is always morally disproportionate to execute someone for a crime in which no one dies.[140] If we adopt this conception, the Court could logically defer to the legislature's moral judgment about the heinousness of the crime, the punishment, and the relationship between the two, but it could not defer to legislative judgments about social utility, such as predictions about the deterrent benefits of a particular punishment. Those judgments, because they are irrelevant to both the culpability of the offender and the severity of the punishment, do not implicate what is cruel, and would therefore be ineligible for deference.

3. The Social Utility-Proportionalist Conception of Cruelty

A third conception of cruelty defines it by the relationship between the punishment and the social justification for the punishment. On this account, a punishment is cruel if it is unjustified by, or disproportionate to, its social utility. Thus, a punishment is not cruel to *them* if it is sufficiently useful to *us*.[141] If we adopt this conception, the Court could logically defer to legislative judgments about the utility of a sentencing regime (such as its deterrent effect) because utility would be relevant to the constitutional consideration of what is cruel. This would approximate rational-basis review, in which the Court has decided that the constitutional question requires a consideration of stated social utility.[142]

As far as I am aware, no philosopher has ever conceived of cruelty in this way. That is, no philosopher has claimed that cruelty is the absence of sufficient social utility or that sufficient social utility can save otherwise cruel treatment. In fact, some have said the opposite. As Professor Judith Shklar wrote, "[cruelty] is the deliberate infliction of physical, and secondarily emotional, pain upon a weaker person or group by stronger ones *in order to achieve some end*."[143] Thus, the fact that one party derives gain from another's pain might contribute to cruelty, not mitigate it.

It is easy to understand why cruelty has not been defined in terms of social utility. Such a conception, for example, could render torture for a pickpocket not cruel so long as pickpocketing caused enough economic harm nationally to justify the deterrent effect of the torture. But the Court's cases do embrace this conception, if only sporadically and implicitly. In general sentence-review cases, for example, the Court suggests that the punishment is not cruel if it is justified by any

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139. Atkins v. Virginia, 536 U.S. 304, 321 (2002).

140. Kennedy v. Louisiana, 554 U.S. 407, 446–47 (2008).

141. Youngjae Lee calls this theory of the Eighth Amendment the "disjunctive theory" and points out that the Court has implicitly adopted it in a number of cases. Lee argues that the theory is inconsistent with the meaning of the Eighth Amendment. *See* Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 682–83 (2005).

142. United States v. Carolene Products Co., 304 U.S. 144, 152, 154 (1938).

143. Judith Shklar, *The Liberalism of Fear*, *in* LIBERALISM AND MORAL LIFE 21, 29 (Nancy L. Rosenblum ed., Harv. Univ. Press 1989) (emphasis added).

reasonable public-policy goal. Recall the language in Justice O'Connor's majority opinion in *Ewing*: "It is enough that the State of California has a reasonable basis for believing that dramatically enhanced sentences for habitual felons 'advance[s] the goals of [its] criminal justice system in any substantial way.'"[144]

Justice Scalia, in a concurrence, rejected this conception of proportionality.[145] He wrote: "Proportionality—the notion that the punishment should fit the crime—is inherently a concept tied to the penological goal of *retribution*" as opposed to, for example, deterrence.[146] In other words, the sentence must be proportional to the culpability of the offender, not proportional to the utility of deterrence. As he wrote, "'it becomes difficult even to speak intelligently of "proportionality," once deterrence and rehabilitation are given significant weight'—not to mention giving weight to the purpose of California's three strikes law: incapacitation."[147]

4. The Proceduralist Conception of Cruelty

A fourth conception defines cruelty by the legitimacy of the process that produced the punishment. To put it concretely, was the legislative process that produced a sentencing law sufficiently fair? Was the jury selection process fair? Was it sufficiently free of racial bias? Was the administrative process that produced a prison policy sufficiently fair? If so, then the resulting sentences and prison conditions are not cruel—no matter what they are.

If this conception is adopted, courts could defer to legislative assertions of legitimate process. But no philosopher has adopted this view, and some argue the opposite. Thomas Aquinas, for example, asserted that "cruelty contains an element of rational deliberation."[148] On this account, process does not mitigate cruelty, but aggravates it. It is easy to understand why this philosophical conception has not been adopted, since it could render horrendous forms of punishment not cruel so long as they have been sufficiently deliberated.

Courts mostly reject this proceduralist conception of cruelty. In deciding prison-conditions cases and sentencing cases, for example, the Court does not concern itself with whether there was sufficient process.[149] The Court's death penalty doctrine, however, is an exception. In *Furman*, the Court found that the arbitrary nature of the death penalty and its disproportionate use against Black people was central to what made it unconstitutional.[150] And in reviving the death penalty in

144. Ewing v. California, 538 U.S. 11, 28 (2002) (quoting Solem v. Helm, 463 U.S. 277, 297 n.22 (1983)).

145. *Id.* at 31 (Scalia, J., concurring).

146. *Id.* (emphasis added).

147. *Id.* (quoting Harmelin v. Michigan, 501 U.S. 957, 985 (1991)).

148. *See* Baruchello, *supra* note 126, at 170 (summarizing THOMAS AQUINAS, SUMMA THEOLOGICA 159 (Benzinger ed., 1947)).

149. *See, e.g.*, *Ewing*, 538 U.S. at 31 (2002) (sentencing case with no consideration of underlying process); Sharon Dolovich, *The Coherence of Prison Law*, 125 HARV. L. REV. F. 302, 319–20, 325 (2022) (describing prison law cases and revealing that the doctrine is not concerned with adequate decision-making procedures).

150. Furman v. Georgia, 408 U.S. 238, 259 (1972).

Gregg, the Court created a system to ensure adequate process.[151] Once a purportedly legitimate process was created, the Court held that the death penalty was constitutional.[152] Thus, the Court's death penalty jurisprudence embraces a proceduralist conception of cruelty. But the Court has also stated that process alone cannot save an otherwise cruel punishment. In *Montgomery*, for example, Justice Kennedy wrote that the guarantee of the Eighth Amendment "goes far beyond the *manner* of determining a defendant's sentence."[153]

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What does all this discussion of cruelty amount to? The first point is that if we embrace the relevance requirement, we must define cruelty. Different definitions of cruelty make different policy judgments relevant to the judicial question of what is cruel.

Having offered four conceptions of cruelty, I will only adopt two as reasonable: cruelty is properly defined both by the quality of the punishment (the absolutist conception) and by the relationship between that punishment and the punished conduct (the culpability-proportionalist conception). By contrast, cruelty is less convincingly contingent on the social utility of the punishment or the underlying process that produced the punishment. Of course, anyone could disagree. But the point is that the Court must decide if it wants to apply deference appropriately because it needs to know what cruelty is in order to ascertain which legislative decisions are relevant. For our purposes, I am defining cruelty using the absolutist and culpability-proportionalist conceptions.

If we adopt these conceptions of cruelty, legislative judgments about the social utility of punishment and the processes underlying punishment are not relevant to the constitutional consideration of which punishments are cruel. Yet the Court often defers to such legislative judgments. In *Harmelin*, the Court deferred to a legislative judgment about the efficacy of deterrence, which was sufficient to uphold a Michigan statute that gave mandatory life without parole for simple drug possession.[154] In *Ewing*, the Court deferred to a legislative judgment about the efficacy of incapacitation in upholding California's three-strikes law.[155] Courts also make this error in prison-conditions cases, in which they regularly defer to the judgment of prison officials about the efficacy of various policies and conditions, assessments that, on my account, have nothing to do with cruelty.[156]

But it is not a foregone conclusion that all of the Court's Eighth Amendment deference would violate the relevance requirement. For example, legislatures could impose sentencing regimes based in part on their assessment of the moral heinousness of the triggering crime. Because the heinousness assessment is relevant to

151. Gregg v. Georgia, 428 U.S. 153, 195 (1976).
152. *Id.* at 207.
153. Montgomery v. Louisiana, 577 U.S. 190, 206 (2016) (emphasis added).
154. Harmelin v. Michigan, 501 U.S. 957, 996 (1991).
155. Ewing v. California, 538 U.S. 11, 30–31 (2002).
156. *See* Sharon Dolovich, *The Coherence of Prison Law*, 125 HARV. L. REV. F. 302, 306, 312, 316 (2022).

the constitutional question of what is cruel (as defined by the culpability-proportionalist conception), courts could defer to that legislative judgment consistent with the relevance requirement.

To sum up: courts cannot defer to underlying decisions that are not relevant to the judicial decision. This would amount to making a decision about whether a sandwich is *delicious* by deferring to someone else's statement that the sandwich is *cheap*. Cost has nothing to do with deliciousness, just as social utility and proceduralism have nothing to do with cruelty.

When courts are making decisions about cruelty under the Eighth Amendment, they should be looking for only two things: the severity of the punishment and the relationship between the punishment and the crime. They should not be looking for judgments about social utility or procedural fairness. Those judgments, under the definition of cruelty I press, do not bear on cruelty. To the extent that courts defer to such judgments—which at present is a vast extent—deference is being used improperly.

B. When Courts Must Defer

The preceding section noted one instance when courts cannot defer. This section takes up the question of whether there are instances when courts *must* defer.[157] Courts have implied over the years that the Constitution assigns penological decisions to the legislative branch. In *Weems*, a 1910 Eighth Amendment case, Justice White's dissent warned that interpreting the Eighth Amendment to prohibit disproportionate sentences would impermissibly intrude on the "independent legislative power to punish and define crime."[158] In *Solem,* Justice Powell described the "broad authority that legislatures *necessarily* possess in determining the types and limits of punishment."[159]

If it is true that legislatures possess special constitutional authority to make penological decisions, then courts would be required to defer; it would be constitutionally necessary. But as much as courts allude to this special legislative authority, they routinely decline to explain its provenance.[160] The best we can do is speculate.

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157. For current work that discusses epistemic-based and authority-based deference in other contexts, see, for example, Daniel J. Solove, *The Darkest Domain: Deference, Judicial Review, and the Bill of Rights*, 84 IOWA L. REV. 941 (1999); Paul Horwitz, *Three Faces of Deference*, 83 NOTRE DAME L. REV. 1061 (2008); Gary Lawson & Christoper D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1278–79 (1996); Larry Solum, L. THEORY BLOG (Sept. 16, 2007), http://lsolum.typepad.com/legaltheory/2007/09/legal-theory–4.html; Maria Ponomarenko, *Administrative Rationality Review*, 104 VA. L. REV. 1399 (2018).

158. Weems v. United States, 217 U.S. 349, 388 (1910) (White, J., dissenting).

159. Solem v. Helm, 463 U.S. 277, 290 (1983) (emphasis added). These two examples represent the Court's clearest articulation of a constitutional rationale for judicial deference to legislative decisions on sentencing. But notably even these examples do not explicitly invoke the Constitution. The Constitution is nonetheless implicitly invoked when the Court refers to an "independent legislative power" and the "broad authority that legislatures necessarily possess" because from where else, other than the Constitution, would that power and authority flow?

160. *See Weems*, 217 U.S. at 388 (White, J., dissenting) (relying on the principle without explaining its origin); *Solem*, 463 U.S. at 290 (same).

One possibility is that courts are silently invoking the police power deduced from the Tenth Amendment, which states that "powers not delegated to the United States . . . are reserved to the States."[161] But to say that a state has a power is not to say that it is immune from federal constitutional review in the exercise of that power.[162] Invoking the police power, in other words, says nothing about the separate federal constitutional authority of judicial review. Also, invoking the Tenth Amendment would provide no explanation for the deference to federal legislation, which federal courts apply in parity with deference to state legislation.[163] It does not seem, then, that the Constitution exclusively assigns penological decisions to state legislatures.

Even without textual assignment of penological decisions, it could be that structural principles nonetheless communicate that certain types of decisions, penological ones among them, belong to the legislature. The Supreme Court has repeatedly marshaled separation-of-powers principles to imply that penological decisions are distinctly legislative. In *Rummel,* Justice Rehnquist wrote that the line-drawing necessary for sentencing decisions makes those decisions "pre-eminently [within] the province of the legislature . . . ."[164] Additionally, in reversing a Fourth Circuit opinion, the per curiam opinion in *Davis* accused the lower court of having "sanctioned an intrusion into the basic line-drawing process that is properly within the province of legislatures, not courts."[165] And, dissenting in *Solem*, Justice Burger cited Justice Frankfurter for the proposition that sentencing decisions are "peculiarly questions of legislative policy."[166]

These arguments rely on Montesquieu's theory that governing power comes in three qualitatively distinct forms—legislative, executive, and judicial—and that each form should be separated in government to prevent one branch from dominating.[167] Otherwise, the path to tyranny is unobstructed. This principle also informs the non-delegation doctrine, in which courts try to ensure that nothing "legislative"

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161. U.S. CONST. amend. X. *Mugler v. Kansas* spells out the operation of the police power in relation to judicial review. 123 U.S. 623, 661 (1887) ("Under our system that power is lodged with the legislative branch of the government. It belongs to that department to exert what are known as the police powers of the state, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety."). As Professor Thomas Nachbar has written, however, the relationship between deference and the police power was "severed" after the Court's decision in *Carolene Products*. Thomas B. Nachbar, *The Rationality of Rational Basis Review*, 102 VA. L. REV. 1627 (2016).

162. We see this construction play out in *Bartemeyer v. Iowa*, which first notes strongly that "No one has ever pretended, that I am aware of, that the fourteenth amendment interferes in any respect with the police power of the State" but then conceded that "the State could not be permitted to encroach upon any of the just rights of the citizen, which the Constitution intended to guard against abridgment." 85 U.S. 129, 138 (1873).

163. *See, e.g.*, United States v. Brant, 62 F.3d 367 (11th Cir. 1995) (analyzing an Eighth Amendment challenge to a sentence for a federal conviction by applying Eighth Amendment doctrine from state cases).

164. Rummel v. Estelle, 445 U.S. 263, 275 (1980).

165. Hutto v. Davis, 454 U.S. 370, 374 (1982) (citations omitted).

166. Solem v. Helm, 463 U.S. 277, 314 (1983) (Burger, J., dissenting) (citing Gore v. United States, 357 U.S. 386, 393 (1958)).

167. CHARLES DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 151 (J.V. Prichard ed., Thomas Nugent trans., 1900) (1748).

is improperly placed in the executive branch.[168] But these metaphysical notions about distinct forms of decision-making are suspect and difficult to enforce.[169] James Madison, elaborating on Montesquieu's theory in Federalist 47, conceded that the boundaries are not so neat.[170] This is especially true on the issue of penological decisions, which involve moral judgments, principled distinctions, arbitrary distinctions, and empirical assessments about the utility of different measures—a healthy mix of the three "distinct" forms of governmental decisions. It thus goes too far to suggest that penological decisions are "peculiarly" legislative.[171] Even if the policy part of the decision is legislative, the constitutional question of cruelty and unusualness is surely judicial.

Nor is it clear that the separation-of-powers theory applies across the federal/state line. According to the theory, the three forms of power must remain distinct within each government, meaning that they must remain distinct within the federal government and distinct within each state government.[172] But it is not necessarily true that this theory requires the same boundary between the judicial component of the federal government and the legislative component of a state government. This is because the federal government, as a whole, and the state government, as a whole, compete for power to prevent too much accruing to either. Federalism is the referee for federal-state relations, not separation of powers.

Thus, Montesquieu's theory of separation of powers, even if we assume it applies within one government, is not applicable when applied across two. The theory thus fails to justify the Court's decision to defer to state legislative acts. Put differently, the theory of separation of powers would have no problem with the federal judicial branch policing the state legislative branch. Even one of the early leading proponents of deference, James Bradley Thayer, excluded state legislation from his scope of proposed deference. When he argued for a deferential clear-error rule for judicial review, he specifically cabined his argument to review of federal legislation.[173]

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168. *See, e.g.*, Panama Refin. Co. v. Ryan, 293 U.S. 388, 421 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529 (1935).

169. *See, e.g.*, Yakus v. United States, 321 U.S. 414 (1944).

170. The Federalist No. 47, at 1–2 (James Madison) (Clinton Rossiter ed., 1999). Madison stated:

> From these facts, by which Montesquieu was guided, it may clearly be inferred that, in saying "There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates," or, "if the power of judging be not separated from the legislative and executive powers," he did not mean that these departments ought to have no PARTIAL AGENCY in, or no CONTROL over, the acts of each other. His meaning, as his own words import, and still more conclusively as illustrated by the example in his eye, can amount to no more than this, that where the WHOLE power of one department is exercised by the same hands which possess the WHOLE power of another department, the fundamental principles of a free constitution are subverted.

Id.

171. Solem v. Helm, 463 U.S. 277, 314 (1983) (Burger, J., dissenting) (citing Gore v. United States, 357 U.S. 386, 393 (1958)).

172. *See* MONTESQUIEU, *supra* note 167, at lvi (editor's note).

173. James Bradley Thayer, *The Origin and Scope of American Constitutional Law*, 7 HARV. L. REV. 129, 148 (1893).

I have tried in earnest to find a plausible constitutional requirement for deference in certain instances, but I find none. Neither police powers nor separation-of-powers principles shield legislatures from constitutional review. I am certainly not the first person to conclude this. As Professor Black explained:

> [T]here is simply no problem about the fundamental legitimacy of judicial review of the actions of the states for federal constitutionality. Article VI says as much, literally and directly . . . . On the whole, there is nothing in our entire governmental structure which has a more leak-proof claim to legitimacy than the function of the courts in reviewing state acts for federal constitutionality.[174]

Thus, there is never a time—at least in the Eighth Amendment context—when the Constitution *requires* a court to defer. Deference is always discretionary.

C. When Courts Should Defer

I have argued that courts *may* defer to decisions that are relevant to the constitutional question but that they are never required by the Constitution to do so. Courts, therefore, have discretion. The next question is whether and when courts should exercise that discretion. The answer turns on the commonly offered "epistemic-based rationale" for deference. This rationale asserts that legislatures (or prison officials) are superior to courts at making the penological decisions in question.[175] Even if they do not have more authority to make the decision, they are simply better at it, and therefore, leeway is warranted.

Justice Souter articulated this epistemic-based justification for deference in *Lockyer*: "[W]e believe that legislatures are institutionally equipped with better judgment than courts in deciding what penalty is merited by particular behavior."[176] Justice Burger made a similar claim in *Solem*: "Legislatures are far better equipped than we are to balance the competing penal and public interests and to draw the essentially arbitrary lines between appropriate sentences for different crimes."[177]

The first problem with the epistemic-based theory of deference is that it conflates the distinct questions presented to courts and to the legislature. The legislature is tasked with deciding what penalty is merited by particular behavior. A court is tasked with deciding whether that penalty is cruel and unusual. *These are not the same question*. How, then, is it possible to even say that the legislature is "better equipped" than a court to answer the question? This is simply incoherent. It could be true that the legislature is better at assessing the deterrent effect of a particular punishment, but that would say nothing about a court's capacity and authority to

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174. CHARLES BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 73–74 (1969).

175. The literature generally frames the question as "who is best at making the decision?" I wonder though if a helpful alternative or additional framing would be: "who is best at identifying or remedying a violation?"

176. Lockyer v. Andrade, 538 U.S. 63, 80 (2003) (Souter, J., dissenting).

177. Solem v. Helm, 463 U.S. 277, 314 (1983) (Burger, J., dissenting).

review that legislative decision under the Eighth Amendment's prohibition on cruel and unusual punishment.

For the most part, then, the epistemic-based theory that the legislature is better suited to calculate the proper sentence is useless. But we can salvage some of the theory. If courts were more specific about what legislatures are better at, we could perhaps incorporate that legislative insight into a judicial constitutional decision. For example, suppose a court claims that the legislature is better at determining the optimal sentence for deterrence. In that case, that determination is constitutionally useless and cannot receive deference if we adopt a definition of cruelty that is not contingent on social utility. But what if the court claims that the legislature is actually better at making the moral measurement between crime and punishment? That would be a judgment worthy of deference on epistemic superiority grounds if we agree that the legislature is indeed better at this.

Is the average legislature a better moral barometer than the average court? A fun question, but one with no answer. As Richard Rorty has written, because socialization "goes all the way down," there is no objective difference between kindness and cruelty.[178] It becomes incoherent, then, to say that either branch is better at answering the question. As Rorty argues, morality is entirely subjective.[179] All we can say is who we prefer to answer the question, and that turns on a bundle of priors.

The legislature is presumably more likely to measure morality in a way that is consistent with the views of a broader portion of the public. Legislators are more proximate to the public and more democratically accountable, notwithstanding hefty accountability deficits.[180] To the extent that adopting majoritarian beliefs on morality is desirable, a court might exercise discretion and defer to this morally grounded judgment on an epistemic-superiority rationale.

On the other hand, the Court's answer to the question of morality is less likely to be distorted by majoritarian pressure, which itself might be desirable. Majoritarian pressure often excludes the voices of incarcerated people and pulls decision-makers toward more extreme sentencing.[181] The politics of fear and anger in election cycles causes one to wonder whether legislative input on sentence length is really a moral judgment or a strategic judgment based on the electoral salience of carceral politics. Given all this, moral judgments about proportionality might be more safely made by the judiciary. We can at least say that it is not clear that courts

178. *See* RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY 185 (1989).

179. *See id.*

180. See Nicholas O. Stephanopoulos, *Accountability Claims in Constitutional Law*, 112 NW. U. L. REV. 989 (2018), for a discussion of legislative accountability and its limits.

181. *See, e.g.*, Erwin Chemerinsky, *The Constitution in Authoritarian Institutions*, 32 SUFF. U. L. REV. 441, 459 (1999) ("Those . . . in prisons . . . are classic discrete and insular minorities, who have little political power."); Furman v. Georgia, 408 U.S. 238, 251–52 (1972) (Douglas, J., concurring) ("One searches our chronicles in vain for the execution of any member of the affluent strata of this society.").

should defer to legislatures because they are better at making moral decisions about punishment.

The other element of the epistemic-based theory is not that the legislature is uniquely qualified but that courts are uniquely *un*qualified. As I have argued, these concerns are overblown.[182] The Court claims not to be able to draw lines between sentence lengths, but it readily draws similar lines in other areas of the law, such as when it decides how many days make a speedy-trial violation or how many months of a potential prison sentence trigger the right to a jury trial.[183]

The Court also claims not to be able to draw lines about the severity of a crime. Yet, at the same time, it draws such lines for sentences. For example, Justice Burger called the distinction between violent and nonviolent offenses "subjective" but then relied on the violent/non-violent distinction when measuring the severity of the punishment.[184] The Court, then, appears to be inconsistent or opportunistic in its asserted incompetence to draw lines within the crime and sentence spectrums.

To summarize, the epistemic-based theory of deference rests on very shaky ground. The idea that legislatures are better equipped to determine sentences is mostly incoherent because the task they are better equipped to perform is not the same task that the court is engaged in. Even if you, my colleague, are better at measuring the efficacy of deterrence, why would I consult you on the question of what is cruel? The skill is irrelevant and entitled to no deference. Even if we charitably attempt to save the theory, claiming only that the legislature is better at deciding constitutionally relevant decisions—such as on questions of proportionality—we are left in a quandary because one cannot explain *how* the legislature is better equipped in this way. The idea that the court is incompetent to draw lines based on moral judgments is inconsistent with its practice in other constitutional law areas. Thus, the court should only exercise its discretion to defer when it believes that the legislature is superior at making a constitutionally relevant judgment—and though it is not clear when that is, we can leave the court some latitude to make that decision.

CONCLUSION

This Article has argued that deference in the Eighth Amendment context lacks discipline. In addition to the lack of specificity with which deference is discussed,

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182. Loehr, *supra* note 23.

183. *See* Klopfer v. North Carolina, 386 U.S. 213, 222 (1967) (speedy trial); Baldwin v. New York, 399 U.S. 66, 73–74 (1970) (jury trial).

184. Solem v. Helm, 463 U.S. 277, 309–10 (1983) (Burger, J., dissenting). Justice Burger stated:

> Other crimes, of course, implicate other societal interests, making any such comparison inherently speculative . . . . Once the death penalty and other punishments different in kind from fine or imprisonment have been put to one side, there remains little in the way of objective standards for judging whether or not a life sentence imposed under a recidivist statute for several separate felony convictions not involving "violence" violates the cruel and unusual punishment clause of the Eighth Amendment.

Id. (citations omitted).

its use is often unjustified on logical, constitutional, and epistemic grounds. I have offered a structure for talking more clearly about deference and three principles for bringing discipline to Eighth Amendment jurisprudence.

First, the relevance requirement teaches that when adjudicating Eighth Amendment claims, courts may not defer to legislative or executive branch judgments about the social utility or procedural fairness of the action under review. This is because social utility and procedural fairness are irrelevant to the constitutional question of cruelty. By contrast, courts may defer to legislative or executive branch judgments about relevant components of the constitutional question, such as the heinousness of a crime or the retributive force of a particular sentence.

Second, there is no constitutional requirement for courts to engage in any deference when legislative or executive action violates a court's conception of the Eighth Amendment. This follows from rejecting the notion that the Constitution textually or structurally grants exclusive or preferential authority over penological decisions to the legislative and executive branches.

Third, the epistemic justification for deference is mostly hollow, except where the court specifically claims that the legislature is better at deciding a relevant component of the ultimate constitutional question, such as where the court claims that the legislature is better at making a moral judgment about punishment.

A weakness of these principles is that they seem unlikely to be adopted. After all, my proposal asks the Court to define cruelty. It would lead the Court to strike down more sentences and engage more in prison-conditions cases. And it would be less protective of legislative and executive decision-making. But the strength of my proposal is this: it offers a form of deference that is justifiable. It applies deference so far as it can be supported, but no further.

Deference, as currently practiced in Eighth Amendment law, has become unmoored from coherent justifications. It is a useful device to avoid conflict with state governments, to avoid the difficulty of defining cruelty, and to keep people in prison—and to do it all without having to say much. Perhaps because of this utility, its use has become nothing short of extravagant. This Article offers a needed dose of discipline.