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# Federalism and the Eighth Amendment

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# Federalism and the Eighth Amendment

*Youngjae Lee\**

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## INTRODUCTION

How many “cruel and unusual punishments” clauses are there? Michael Mannheimer, in his article, *Cruel and Unusual Federal Punishments*, argues that there are two—one for the federal government and one for state governments.<sup>1</sup> Mannheimer contends that courts have been unduly neglecting the former and mistakenly applying the latter to the federal government without adequate reflection.<sup>2</sup> Mannheimer further argues that the Eighth Amendment is primarily a device to promote state sovereignty and that we should accordingly read it as requiring that federal punishments be no more severe than state punishments for equivalent crimes.<sup>3</sup> I cannot do justice in this brief Response to the richness of Mannheimer’s various arguments, so I will limit myself to three comments.

First, if, as Mannheimer argues, the Supreme Court’s jurisprudence has been “driven by concerns of federalism,”<sup>4</sup> then it seems to follow that such federalism concerns should play no role when asking whether federal punishments are cruel and unusual. However, as I will argue below, federalism has played only a minor role in the Court’s proportionality jurisprudence and taking its federalism concerns out of the equation is thus unlikely to make much of a difference. Second, Mannheimer’s thesis that the Eighth Amendment should be read as a device to promote state sovereignty<sup>5</sup> has drastic implications about the Eighth Amendment’s ability to regulate state punishments, and such implications may well constitute a reason to reject his account. Third, the existing proportionality jurisprudence, with some adjustments, can easily accommodate Mannheimer’s concerns about the excessive scope and harshness of the federal criminal law,<sup>6</sup> and adopting Mannheimer’s account is not necessary to devise a theoretical basis for the Eighth Amendment to regulate federal criminal law and punishment.

## I. IS THE PROPORTIONALITY JURISPRUDENCE FEDERALISM-DRIVEN?

Mannheimer argues that the Supreme Court’s proportionality doctrine has been “driven by concerns of federalism”<sup>7</sup> and that the Court has “proceeded from the assumption that concerns of federalism figure *greatly* in determining the precise bounds of the proportionality requirement.”<sup>8</sup>

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1. Michael J. Zydney Mannheimer, *Cruel and Unusual Federal Punishments*, 98 IOWA L. REV. 69 (2012).

2. *Id.* at 72.

3. *Id.* at 73.

4. *Id.* at 130.

5. *See id.* at 100–09.

6. *See id.* at 74–80.

7. *Id.* at 130.

8. *Id.* at 87 (emphasis added).

Mannheimer attributes the Court's "extreme deference" to such "federalism concerns,"<sup>9</sup> and wonders what "the Cruel and Unusual Punishments Clause, in its pure form, free from concerns about federalism" would look like.<sup>10</sup> It seems to me that the answer is that it would not look all that different, as I believe he overstates the role of federalism in the Court's jurisprudence. What is driving the Court's jurisprudence, rather, is the Court's reluctance to take a side on debates over competing theories of punishment.

There is, to be sure, some textual support for Mannheimer's position. For instance, in *Ewing v. California*, which upheld a prison term of twenty-five years to life under California's three-strikes law for shoplifting by a repeat offender,<sup>11</sup> Justice O'Connor wrote in the plurality opinion that "[t]hough three strikes laws may be relatively new, our tradition of deferring to state legislatures in making and implementing such important policy decisions is longstanding,"<sup>12</sup> that "[s]electing the sentencing rationales is generally a policy choice to be made by state legislatures, not federal courts,"<sup>13</sup> and 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.'"<sup>14</sup> And in *Harmelin v. Michigan*, Justice Kennedy wrote in his influential concurring opinion that "marked divergences both in underlying theories of sentencing and in the length of prescribed prison terms are the inevitable, often beneficial, result of the federal structure."<sup>15</sup>

However, consider other parts of Justice Kennedy's opinion in *Harmelin*. While he named "the nature of our federal system"<sup>16</sup> as one of the fundamental "principles that give content to the uses and limits of proportionality review," he named four other principles in addition, and these were "the primacy of the legislature,"<sup>17</sup> "the variety of legitimate penological schemes,"<sup>18</sup> the need for "objective factors to the maximum possible extent,"<sup>19</sup> and the supposition that "[t]he Eighth Amendment does not require strict proportionality between crime and sentence."<sup>20</sup> Justice

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9. *Id.* at 74.

10. *Id.* at 90.

11. *Ewing v. California*, 538 U.S. 11, 30–31 (2003) (plurality opinion).

12. *Id.* at 24.

13. *Id.* at 25.

14. *Id.* at 28 (second and third alterations in original) (quoting *Solem v. Helm*, 463 U.S. 277, 297 n.22 (1983)).

15. *Harmelin v. Michigan*, 501 U.S. 957, 999 (1991) (Kennedy, J., concurring) (citing *Solem*, 463 U.S. at 291 n.17).

16. *Id.* at 1001.

17. *Id.*

18. *Id.*

19. *Id.* at 1000 (quoting *Rummel v. Estelle*, 445 U.S. 263, 274–75 (1980)) (internal quotation marks omitted).

20. *Id.* at 1001.

Kennedy's listing of factors suggests that the Court's weak proportionality jurisprudence may be overdetermined, and subtracting the federalism concerns from the equation likely would not make a large difference to it.

One could avoid this conclusion, of course, by arguing that federalism concerns are of such paramount importance that they constitute the driving force behind all the other factors. That is, perhaps the Kennedy concurrence cites the need to defer to legislatures *because* the legislatures it has in mind are state legislatures, it talks about "the variety of legitimate penological schemes" *because* of the felt need to defer to prerogatives of state governments to devise their own criminal justice policies, it requires "objective factors" *because* of its view that federal judges should not strike down state policies on the basis of mere subjective preferences, and the Court "does not require strict proportionality"<sup>21</sup> *because* of its deference to state sovereignty. It seems to me, however, that this federalism-based explanation is false.

To see why the proposed explanation fails, consider one of the principles that Justice Kennedy mentioned, "the variety of legitimate penological schemes."<sup>22</sup> He explained that "the Eighth Amendment does not mandate adoption of any one penological theory," as "[t]he federal and state criminal systems have accorded different weights at different times to the penological goals of retribution, deterrence, incapacitation, and rehabilitation."<sup>23</sup> Justice O'Connor took this idea and developed it further in *Ewing*, in which she, after citing *Harmelin* for the proposition that retribution, deterrence, incapacitation, and rehabilitation are all legitimate aims of punishment, stated that "[s]ome or all of these justifications may play a role in a State's sentencing scheme" and that "[s]electing the sentencing rationales is generally a policy choice to be made by state legislatures, not federal courts."<sup>24</sup> She went on to note that "[r]ecidivism has long been recognized as a legitimate basis for increased punishment" and that California has an interest in incapacitating repeat offenders and deterring crimes.<sup>25</sup> She concluded by announcing that "[i]t is enough that the State . . . has a reasonable basis for believing that . . . [the punishments it imposes] 'advance[] the goals of [its] criminal justice system in any substantial way.'"<sup>26</sup>

In my view, these passages show that what characterizes the Court's jurisprudence in this area is not federalism, but a reluctance to adjudicate among the traditional justifications of punishment. This feature of the law,

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21. *Id.*

22. *Id.*

23. *Id.* at 999.

24. *Ewing v. California*, 538 U.S. 11, 25 (2003) (plurality opinion).

25. *Id.* at 25-27.

26. *Id.* at 28 (last two alterations in original) (quoting *Solem v. Helm*, 463 U.S. 277, 297-98 n.22 (1983)).

which Mannheimer himself notes,<sup>27</sup> becomes even more apparent if we look at the Court's proportionality cases in the capital context.<sup>28</sup>

In the last few decades, the Court's proportionality jurisprudence applied the following two-part test in evaluating proportionality challenges in the capital context.<sup>29</sup> First, the Court reviews legislation and sentencing practices to identify an objective national consensus on the sentencing practice in question.<sup>30</sup> Second, the Court engages in an independent proportionality analysis to determine whether the Court agrees or disagrees with the national consensus.<sup>31</sup> The proportionality analysis, in turn, consists of two tests—the culpability test and the purposes of punishment test.<sup>32</sup> Under the culpability test, the Court considers the culpability of the crime or the criminal.<sup>33</sup> The purposes of punishment test, in turn, considers whether the punishment would advance either the retribution or deterrence purposes of punishment.<sup>34</sup>

The relationship between the culpability test and the purposes of punishment test has not always been clear. The Court has stated that a punishment that does not advance one of the purposes of punishment “is nothing more than the purposeless and needless imposition of pain and suffering,”<sup>35</sup> but what happens if a punishment passes the purposes of punishment test by advancing, say, the deterrence or incapacitation purposes, but fails the culpability test?

A review of the Court's recent cases shows that the Court has not been eager to face this question. Every time it struck down a sentencing practice, the Court also magically produced the conclusion that the practice in question failed not only the culpability test but also the purposes of punishment test. In *Roper v. Simmons*, the Court, declaring a juvenile death penalty unconstitutional, “conclud[ed] that neither retribution nor deterrence provides adequate justification for imposing the death penalty on juvenile offenders.”<sup>36</sup> In *Atkins v. Virginia*, the Court, holding that the

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27. Mannheimer, *supra* note 1, at 83–84 (“The almost complete deference the Court has afforded to legislative bodies to dictate the appropriate punishment for crime . . . is the predictable, perhaps inexorable, result of a doctrine that allows legislative decisions about punishment to be justified on any one of the major, often competing, theories of punishment . . .”).

28. The next few paragraphs draw from Youngjae Lee, *The Purposes of Punishment Test*, 23 FED. SENT'G REP. 58 (2010).

29. Starting with *Graham v. Florida*, the Court began to apply the test in noncapital cases as well. See *Graham v. Florida*, 130 S. Ct. 2011 (2010).

30. *Id.* at 2022.

31. See *id.* at 2022–23.

32. *Id.* at 2026.

33. *Id.* at 2026–28.

34. *Id.* at 2028–30.

35. *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion).

36. *Roper v. Simmons*, 543 U.S. 551, 572 (2005).

death penalty is unconstitutional when imposed on mentally retarded offenders, stated that it was “not persuaded that the execution of mentally retarded criminals will measurably advance the deterrent or the retributive purpose of the death penalty.”<sup>37</sup> In *Kennedy v. Louisiana*, too, the Court found that “the death penalty for child rape would not further retributive purposes”<sup>38</sup> and that “punishment by death may not result in more deterrence or more effective enforcement.”<sup>39</sup>

However, the Court’s application of the purposes of punishment test is often so half-hearted and weak, it is not clear how seriously the Court itself takes the test. Consider, for instance, the *Roper* Court’s analysis of the deterrence question. The Court argued “that juveniles will be less susceptible to deterrence”<sup>40</sup> by noting “[t]he likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent.”<sup>41</sup> The Court did not say how it came to this conclusion, even though the truth of the statement is hardly self-evident, keeping in mind that the teenagers in question could potentially be seventeen-year-olds. The Court then added, as if acknowledging the speculative nature of its analysis, “To the extent the juvenile death penalty might have [a] residual deterrent effect, it is worth noting that the punishment of life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person.”<sup>42</sup> But life imprisonment without the possibility of parole is a severe sanction for everyone, not just juveniles. Was the Court in effect saying that the death penalty has no marginal deterrence value as a general matter? Such a position would be respectable, but the Court cited no evidence for what is perhaps one of the most contested claims in criminology.<sup>43</sup> That the Court was willing to conclude from such a flimsy set of steps that the deterrence goal was not advanced is especially odd given that the Court prefaced its analysis with the proposition that “[i]n general we leave to legislatures the assessment of the efficacy of various criminal penalty schemes.”<sup>44</sup>

The Court also does not always seem to recognize that the deterrence value of imposing the death penalty on one group cannot be measured simply by asking whether members of *that* group would be deterred from

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

38. *Kennedy v. Louisiana*, 554 U.S. 407, 442 (2008).

39. *Id.* at 445.

40. *Roper*, 543 U.S. at 571.

41. *Id.* at 572 (alteration in original) (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 837 (1988) (plurality opinion)) (internal quotation marks omitted).

42. *Id.*

43. See, e.g., John J. Donohue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 STAN. L. REV. 791 (2005); Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703 (2005).

44. *Roper*, 543 U.S. at 571.

committing a crime. Nothing in the idea of deterrence limits the relevant group of potentially deterred offenders to the group whose fate would be directly affected by the punishment practice in question. That is, if executing an insane person fails to deter insane people from committing crimes but successfully deters a sane person from committing a crime, then that deterrence value has to be included in the overall deterrence calculation. Neither is there anything absurd about the idea of deterring homicides by being ruthless about less serious offenses, nor is it far-fetched to imagine a person of average intelligence being deterred from committing a crime after learning about an execution of a mentally retarded offender.<sup>45</sup> The Court's deterrence analysis tends to either ignore this aspect entirely, as it did in *Roper*, or simply brush it aside with a blanket assertion that exempting one group from the death penalty will not make a difference to other groups, as it did in *Atkins*.<sup>46</sup> To be sure, the Court may in fact be right on all of these issues. However, the point is not that the Court is wrong but rather that complex empirical questions are involved, and the Court's attempt to wade into the controversy has not been a model of sound reasoning.

It has not always been like this. In *Coker v. Georgia*, in deciding that the death penalty for the crime of rape is unconstitutional,<sup>47</sup> the Court, after mentioning the culpability test and the purposes of punishment test, stated that “[a] punishment might fail the test on *either* ground.”<sup>48</sup> The Court later made the same point in a footnote by stating, “Because the death sentence is a disproportionate punishment for rape, it is cruel and unusual punishment within the meaning of the Eighth Amendment *even though it may measurably serve the legitimate ends of punishment and therefore is not invalid for its failure to do so*.”<sup>49</sup> The Court ultimately decided the case by relying exclusively on the culpability test, paying little attention to the purposes of punishment test.<sup>50</sup>

So what explains the Court's recent attempts to demonstrate that a punishment has no deterrence value whenever it has sought to invalidate a sentencing practice—especially when no such showing is necessary according to *Coker*? The answer, again, is that the Court has been trying hard to avoid engaging with deep philosophical issues regarding the purposes of

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45. For a similar argument, see H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 19 (1968) (criticizing a view similar to the Court's as relying on “a spectacular *non sequitur*”).

46. *Atkins v. Virginia*, 536 U.S. 304, 320–21 (2002).

47. *Coker v. Georgia*, 433 U.S. 584, 600 (1977) (plurality opinion).

48. *Id.* at 592 (emphasis added).

49. *Id.* at 592 n.4 (emphasis added).

50. To the extent that it paid attention to the deterrence question, it appears to be confined to the following single sentence in a footnote, which implies an extremely demanding version of the purposes of punishment test: “We observe that . . . it would be difficult to support a claim that the death penalty for rape is an indispensable part of the States' criminal justice system.” *Id.*

punishment and what limitations should be placed on it. If neither a retribution nor a deterrence goal is advanced, then the Court need not face the difficult task of sorting through the vexed issue of what to do when retribution and deterrence theories give conflicting counsel and how to strike a balance when the two conflict. This approach, in turn, stems from the fact that the Court has been reluctant to devise a theory of Eighth Amendment proportionality jurisprudence that prioritizes one theory of punishment over the others. Its current jurisprudence has accordingly been designed to find a path that allows the Court to make decisions with minimal philosophical commitments.<sup>51</sup>

One could still maintain that this phenomenon can be attributed to “concerns of federalism”<sup>52</sup>—that the Court’s reluctance to engage debates within criminal law about competing philosophies of punishment stems from its respect for state sovereignty, and so on—however, I find it difficult to see it that way. What I instead see is a deep skepticism among Justices regarding the wisdom of picking sides on contentious debates about punishment and a concern about appearing hubristic and anti-democratic by restricting the government’s ability to combat crime. I find it highly unlikely that such a deep-seated insecurity and skepticism would suddenly evaporate once the Court shifts its focus away from state governments and towards the federal government.

## II. IS THE EIGHTH AMENDMENT A STATE SOVEREIGNTY PROTECTING PROVISION?

Regardless of what the Supreme Court has done and will do in the future, Mannheimer appears to be more interested in making a normative argument about what the Supreme Court, and other courts interpreting the Eighth Amendment, *ought* to do. Mannheimer argues throughout the article that “[t]he Eighth Amendment . . . was concerned primarily with protecting the States’ interests and those of their respective citizens vis-à-vis the new, powerful central government,”<sup>53</sup> that “state power was thought to be the principal protection for individual rights,”<sup>54</sup> that “we fool ourselves into thinking that the provisions of the Bill of Rights have an individual-rights-colored hue”<sup>55</sup> when in fact the primary purpose of the Bill of Rights was to “preserv[e] state primacy in the criminal-justice arena,”<sup>56</sup> that “the right to be free from cruel and unusual punishment is largely about local control of

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51. For a more detailed discussion of this feature of the Court’s proportionality jurisprudence in both capital and noncapital contexts, see Youngjae Lee, *International Consensus as Persuasive Authority in the Eighth Amendment*, 156 U. PA. L. REV. 63, 111–14 (2007).

52. Mannheimer, *supra* note 1, at 87.

53. *Id.* at 100.

54. *Id.* at 101.

55. *Id.* at 106.

56. *Id.* at 107.

criminal justice,”<sup>57</sup> and that “[a]t [the] core [of the Eighth Amendment] is a judgment that criminal justice is largely better left to the States.”<sup>58</sup>

Mannheimer’s argument for these propositions stems from his analysis of historical records and the Framers’ understandings and expectations. I leave the merits of his historical account aside; my main concern is that a doctrinal approach based on his reading of the provision would eviscerate most of the existing Eighth Amendment jurisprudence. As Mannheimer himself emphasizes, Eighth Amendment proportionality jurisprudence has developed almost exclusively through state cases.<sup>59</sup> Over time, the Supreme Court has ruled that the death penalty is disproportionately harsh for the crime of rape (*Coker v. Georgia*)<sup>60</sup> even if the victim is a child (*Kennedy v. Louisiana*),<sup>61</sup> for someone who does not kill or intend to kill but is convicted under a felony murder statute for aiding and abetting a murder (*Enmund v. Florida*),<sup>62</sup> for a crime committed when the criminal was under the age of eighteen (*Roper v. Simmons*),<sup>63</sup> or for a mentally retarded criminal (*Atkins v. Virginia*).<sup>64</sup> The Court has also ruled that the Eighth Amendment prohibits a sentence of life in prison without parole for a nonhomicide crime committed by a minor (*Graham v. Florida*)<sup>65</sup> and a mandatory sentence of life in prison without parole for a crime committed by a minor, even for homicide crimes (*Miller v. Alabama*).<sup>66</sup>

Every single one of the aforementioned cases is a state case, and these are just proportionality cases under the Eighth Amendment. The cruel and unusual punishment jurisprudence of the Eighth Amendment contains much more, as it consists of roughly four categories of cases. The first category prohibits certain types of punishments, such as burning at the stake, crucifixion, drawing and quartering, and torture.<sup>67</sup> In the second are constitutionally permitted types of punishments that are nevertheless unconstitutional because they are disproportionate to the crimes for which

57. *Id.*

58. *Id.* at 130.

59. *Id.* at 80 (“[A]ll of the cases the [Supreme] Court has decided concerning the proportionality of sentences have arisen under state law . . .”).

60. *Coker v. Georgia*, 433 U.S. 584, 600 (1977) (plurality opinion).

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

62. *Enmund v. Florida*, 458 U.S. 782, 797, 801 (1982).

63. *Roper v. Simmons*, 543 U.S. 551, 578–79 (2005).

64. *Atkins v. Virginia*, 536 U.S. 304, 320–21 (2002).

65. *Graham v. Florida*, 130 S. Ct. 2011, 2034 (2010).

66. *Miller v. Alabama*, 132 S. Ct. 2455, 2475 (2012).

67. *See, e.g., Gregg v. Georgia*, 428 U.S. 153, 170–71 (1976) (plurality opinion) (discussing whether torture as a means of execution was constitutional under early Eighth Amendment jurisprudence); *In re Kemmler*, 136 U.S. 436, 446–47 (1890) (recognizing the duty of courts, under the Eighth Amendment, to proscribe cruel and unusual punishment, even where such punishment is prescribed by state law); *Wilkerson v. Utah*, 99 U.S. 130, 135–36 (1878) (discussing historical torture scenarios as cruel and unusual punishment).

they are imposed; these are the previously mentioned proportionality cases.<sup>68</sup> The third category includes the so-called “super due process for death”<sup>69</sup> or “death is different”<sup>70</sup> cases, which allow sentences of death only after procedures mandated and approved by the Supreme Court have been satisfied.<sup>71</sup> Finally, in the fourth category are punishments that satisfy the requirements of type, proportionality, and procedure but are nevertheless unconstitutional because of how they are administered. Prison conditions so inhumane that they cross the constitutional line to become “cruel and unusual” fall into this group.<sup>72</sup> Most of these cases, too, concern punishments imposed by state governments.

If Mannheimer is correct that “[t]he Eighth Amendment . . . was concerned primarily with protecting the States’ interests,”<sup>73</sup> that the primary purpose of the Bill of Rights was to “preserv[e] state primacy in the criminal-justice arena,”<sup>74</sup> that “the right to be free from cruel and unusual punishment is largely about local control of criminal justice,”<sup>75</sup> and that “[a]t [the] core [of the Eighth Amendment] is a judgment that criminal justice is largely better left to the States,”<sup>76</sup> and if Mannheimer is also arguing that this original understanding of the Eighth Amendment should govern our interpretation of it today, then it seems likely that most of the Eighth Amendment jurisprudence is built on a colossal mistake. It is unclear from the Article what Mannheimer thinks of the constitutional restrictions on punishment that the Court has imposed through these cases, and how the Eighth Amendment ought to be enforced against the states.

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68. See, e.g., *Coker v. Georgia*, 433 U.S. 584, 599–600 (1977) (plurality opinion) (holding that a death sentence for rape was grossly disproportionate and forbidden by the Eighth Amendment). A subcategory of this includes constitutional restrictions on what may be criminalized. See, e.g., *Robinson v. California*, 370 U.S. 660, 667–68 (1962) (holding it unconstitutional to criminalize drug addiction).

69. See Margaret Jane Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143 (1980).

70. See, e.g., Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 370–71 (1995) (explaining the influence of the “death is different” argument in the Court’s capital punishment jurisprudence).

71. See, e.g., *Woodson v. North Carolina*, 428 U.S. 280, 303–05 (1976) (plurality opinion); *Gregg*, 428 U.S. at 206–07 (requiring the finding of at least one statutory aggravating factor before the death penalty will be imposed); see also Steiker & Steiker, *supra* note 63, at 371–403 (providing a comprehensive summary and discussion of the Court’s capital punishment jurisprudence).

72. See, e.g., *Estelle v. Gamble*, 429 U.S. 97, 102–03 (1976) (describing the government’s obligation to provide medical care for inmates).

73. Mannheimer, *supra* note 1, at 100.

74. *Id.* at 107.

75. *Id.*

76. *Id.* at 130.

Perhaps, since the Eighth Amendment does apply to the states through the Fourteenth Amendment, all of these cases would stay intact under Mannheimer's analysis, and his arguments would solely concern federal punishments. But that option is not available to him. If his reading of the Eighth Amendment is correct, it is not clear what it would even mean to enforce it against the states. His argument is that the Eighth Amendment, by its nature, must be viewed as a constraint on the federal government and as a device for protecting state sovereignty. This argument seems to further imply that the idea of the Eighth Amendment constraining state governments is probably a contradiction in terms. Mannheimer may not be bothered by this implication, or maybe there is a way to avoid the implication altogether, but he has not articulated how to do so. The only doctrinal consequence that Mannheimer discusses involves placing restrictions on the federal government, but the obvious question that arises is what to make of the drastic implications of his theory for virtually the entirety of the existing Eighth Amendment jurisprudence.

### III. HOW SHOULD WE THINK ABOUT FEDERALISM AND THE EIGHTH AMENDMENT?

Despite my misgivings about his account, I share Mannheimer's evident concern about the scope of federal criminal law and harsh federal sentences. Mannheimer's core normative position that federal criminal law encroaches upon state sovereignty seems to me to be an interesting and important view. In the remainder of this Response, I will describe the ways in which current jurisprudence can accommodate many of Mannheimer's ideas without necessarily committing to his reading of the purpose of the Eighth Amendment.

Consider *Solem v. Helm*, in which the Court outlined a three-step process to review punishments for excessiveness.<sup>77</sup> First, courts should compare "the gravity of the offense and the harshness of the penalty,"<sup>78</sup> the gravity of the offense being determined "in light of the harm caused or threatened to the victim or society, and the culpability of the offender."<sup>79</sup> Second, the Court stated that "it may be helpful to compare the sentences imposed on other criminals in the same jurisdiction" to determine whether "more serious crimes are subject to the same penalty, or to less serious penalties."<sup>80</sup> Third, the Court suggested that "courts may find it useful to compare the sentences imposed for commission of the same crime in other jurisdictions."<sup>81</sup> The

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77. *Solem v. Helm*, 463 U.S. 277, 290–92 (1983).

78. *Id.* at 290–91.

79. *Id.* at 292.

80. *Id.* at 291.

81. *Id.* at 291–92.

second and third steps of this framework I will call “intra-jurisdictional analysis” and “inter-jurisdictional analysis,” respectively.

I will note before proceeding that the current status of this three-step test is in flux. First, the three-step test was substantially weakened in *Harmelin v. Michigan*<sup>82</sup> and in *Ewing v. California*.<sup>83</sup> Second, in *Graham v. Florida*, the Court, considering a proportionality challenge to a prison sentence, announced that “the appropriate analysis” was not the one used in *Harmelin* and *Ewing*, both of which dealt with prison sentences, but rather the analysis used in *Atkins*, *Roper*, and *Kennedy*, all death penalty cases.<sup>84</sup> After *Graham*, it seems that the *Solem–Harmelin–Ewing* line of cases may thus end up becoming obsolete. Nevertheless, it seems to me that there are certain elements in the *Solem* framework that are worth reinvigorating.

To explain, let me start with a general theory of the Eighth Amendment jurisprudence on proportionality in sentencing. In my view, this category of cases should be read as an instantiation of the retributivist principle that the harshness of punishment should not exceed the gravity of the crime, or that one should not be punished more harshly than one deserves. I have previously defended this reading of the caselaw in detail.<sup>85</sup>

Retributivism, defined as the view that one should receive the punishment that one deserves and no more, has both comparative and noncomparative aspects. The noncomparative aspect is obvious: when we say that it would be clearly disproportionate to punish a parking violation with one year in prison, that statement would be true even if every parking violation were treated the same way, and more serious crimes were treated more harshly. In other words, even if a sentencing scheme generates a series of sentences that are in perfect comparative desert relationship to one another, it is possible for some or all of those sentences to be too harsh from the perspective of retributivism.

That retributivism also has a comparative aspect is less obvious; in fact, certain philosophers have argued that desert is essentially a noncomparative idea.<sup>86</sup> However, no theory of retributivism is complete without an account of the role of comparative desert because what one deserves is sometimes

82. *Harmelin v. Michigan*, 501 U.S. 957, 1004–05 (1991) (Kennedy, J., concurring).

83. *Ewing v. California*, 538 U.S. 11, 23–31 (2003) (plurality opinion).

84. *Graham v. Florida*, 130 S. Ct. 2011, 2023 (2010).

85. See Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677 (2005) [hereinafter Lee, *Constitutional Right*]. I refine the argument further in the following pieces: Youngjae Lee, *Why Proportionality Matters*, 160 U. PA. L. REV. 1835 (2012); Lee, *supra* note 21; Youngjae Lee, *Judicial Regulation of Excessive Punishments Through the Eighth Amendment*, 18 FED. SENT’G REP. 234 (2006) [hereinafter Lee, *Judicial Regulation*]. Others have defended alternative readings. See Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: “Proportionality” Relative to What?*, 89 MINN. L. REV. 571 (2005); Alice Ristroph, *Proportionality as a Principle of Limited Government*, 55 DUKE L.J. 263 (2005).

86. See, e.g., Samuel Scheffler, *Justice and Desert in Liberal Theory*, 88 CALIF. L. REV. 965, 983–87 (2000) (contending that the justification for claims of desert must be individualistic).

determined in reference to what others deserve. The reason for this is that the institution of punishment has an expressive dimension. When it punishes, it condemns the behavior it punishes as wrong, and the degree to which the behavior is condemned is expressed by varying the amount of punishment. In other words, when the state punishes, how one's punishment stands in relation to punishments for other crimes supplies a crucial piece of information as to how wrong the punished behavior is viewed by society.

This means that a punishment imposed on a criminal would be "undeserved" if it is more severe than the punishment imposed on those who have committed more serious crimes or crimes of the same seriousness because the judgment it expresses about the seriousness of the criminal's behavior would be inappropriate. For example, the death penalty carries a social meaning as the ultimate punishment reserved for only the most serious crimes. Thus, each time the State imposes a death sentence, it sends the message that it considers the crime to be not only among the most serious offenses, but also equally serious to other crimes that society has labeled—and punished—as the most serious. Those who commit less serious offenses and are still sentenced to death would receive harsher sentences than they deserve, because to receive the punishment they deserve they must be punished less harshly than the worst criminal.<sup>87</sup>

I have argued previously that, for a number of reasons, comparative desert analysis is crucial for judicial enforcement of the Eighth Amendment,<sup>88</sup> and the part of the *Solem* framework that embodies this comparative desert analysis is the second step, the intrajurisdictional analysis.<sup>89</sup> Through this analysis, the Court can ask how the punishment in question "fits" into the penal code of a state, and whether it stands in appropriate relation to punishment for crimes that are as serious or more serious than the crime for which the punishment is being imposed within the same jurisdiction. And one advantage of the intrajurisdictional test, which is of particular relevance to Mannheim's paper, is that it is a test that demands internal coherence from states; it does not require them to conform to the punitive sensibilities of other states or even other countries, and therefore respects the basic proposition that criminal law is primarily a matter left to states.

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87. Comparative desert is not the same as equal desert. Equality has generally come to mean equal treatment for similarly situated individuals. Comparative desert, by contrast, requires this and more: "like cases [should] be treated alike . . . [and] unlike cases [should] be treated in an appropriately unlike way." Thomas Hurka, *Desert: Individualistic and Holistic*, in *DESERT AND JUSTICE* 45, 54 (Serena Olsaretti ed., 2003). Differential treatment is thus fundamental to comparative desert, which the term "equality" does not capture very well.

88. For details, see Lee, *Constitutional Right*, *supra* note 78.

89. *Solem v. Helm*, 463 U.S. 277, 291 (1983).

The interjurisdictional analysis, on the other hand, seems more problematic, as it puts pressure on states to determine the punishments for similar crimes based on a national norm determined by other states' practices. It is for that reason difficult to square with our federalist structure of government. I have previously argued against the interjurisdictional analysis for this reason,<sup>90</sup> except to note that "in our system of government, another inter-jurisdictional comparison is possible: federal-state comparison" and that "[t]he nature of the federalism issues that federal-state comparisons raise is different from the nature of those raised by state-state comparisons and should be analyzed separately."<sup>91</sup> What I had in mind when I wrote those words was precisely to preserve the possibility of tests like the one that Mannheimer now proposes, which is "that federal sentences be no stricter than state sentences for the same crime."<sup>92</sup> Accordingly, I am generally sympathetic to the doctrinal bottom line of Mannheimer's paper.

The question then is whether we can take Mannheimer's doctrinal proposal without adopting Mannheimer's arguments for it, which are problematic for the reasons outlined in Part II.<sup>93</sup> It seems to me that the answer to this question is yes, although I cannot fully develop an alternative justification here. So let me just say that the interjurisdictional analysis of the *Solem* framework, as applied to a federal-state punishment comparison, provides an avenue to introduce the idea that criminal law is generally best practiced as a local, not centralized, matter<sup>94</sup> without stripping the Eighth Amendment of its ability to restrain state criminal laws. What we need is an account that establishes that when the federal punishment for a crime is much harsher than the state punishment for an equivalent crime, the federal government should carry the burden of justifying the difference. A full elaboration of this proposition will require another article, and I look forward to continuing this dialogue.

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90. See Lee, *Judicial Regulation*, *supra* note 78.

91. Lee, *Constitutional Right*, *supra* note 78, at 719 n.183. Yet another type of interjurisdictional analysis is the kind that the Supreme Court used in *Roper* about international consensus. I have doubts about this practice as well, but my concerns do not apply to the current context. See Lee, *supra* note 51, at 67–71 (referencing the Supreme Court's international consensus analysis in *Roper v. Simmons*, 543 U.S. 551, 575–78 (2005)).

92. Mannheimer, *supra* note 1, at 74.

93. See *supra* Part II.

94. See, e.g., WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* (2011); Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. 519 (2011).