

KIDS ARE DIFFERENT

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The Supreme Court recently handed down its decision in *Graham v. Florida*.¹ The case involved a juvenile, Graham, who was sentenced to life in prison after being convicted as an adult of a nonhomicidal crime. The offense, a home invasion robbery, was his second; the first was attempted robbery. Due to Florida's abolition of parole, the judge's imposition of a life sentence meant that Graham was constructively sentenced to life without parole for a nonhomicide crime. Graham challenged this sentence as unconstitutional under the Eighth Amendment.

Somewhat surprisingly, the Supreme Court invalidated Graham's sentence by a 6–3 majority. By a 5–4 majority, the Court declared the practice of sentencing juveniles to life without parole for nonhomicide crimes categorically unconstitutional under the Eighth Amendment's Cruel and Unusual Punishment Clause. Chief Justice Roberts was the lone crossover vote; he agreed that the sentence in Graham's particular case violated the Eighth Amendment, but was unwilling to declare such sentences categorically unconstitutional. Otherwise, the case was split along the traditional ideological lines, with Justice Kennedy playing his usual role as the swing vote. What makes the result in this case unusual is that the Court seems to have made a significant break from its past jurisprudence on sentencing. In fact, *Graham* may have completely altered the landscape of the Court's Eighth Amendment jurisprudence. While the old approach was summed up by the adage “death is different,” the new approach may be that “kids are different.” In addition, the Court may have exposed itself to a whole host of difficult sentencing issues down the line.

I. THE TRADITIONAL APPROACH: “DEATH IS DIFFERENT”

Until *Graham*, the Court generally adopted a bifurcated approach to sentencing, with different lines of precedent for death penalty and non-death penalty cases. When it came to the death penalty, the Court was willing to address issues categorically, not concerning itself solely with the facts of the case at bar. For example, in *Roper v. Simmons*² the Court declared the application of the death penalty to juveniles unconstitutional regardless of the underlying facts. But when it assessed nondeath sentences in the Eighth

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1. 130 S. Ct. 2011 (2010).
2. 543 U.S. 551 (2005).

Amendment context, the Court was typically far more deferential to the states. It had only been willing to invalidate sentences individually, and only then where the sentences failed an ambiguous “proportionality” standard.³ So, for example, while the Court invalidated one sentence of life without parole for an offender’s seventh nonviolent crime in *Solem v. Helm*,⁴ it also upheld a life sentence for possession of a large quantity of cocaine in *Harmelin v. Michigan*. In *Graham*, though, the Court was faced with, and upheld, a challenge that merged these two doctrines: “a categorical challenge to a term-of-years sentence.”

Justice Thomas, filing the primary dissent in *Graham*, argued that the majority’s decision was a significant break in the Court’s jurisprudence, a break which he believed to be problematic. Among his other arguments, Justice Thomas claimed that the adage “death is different” (that the death penalty was treated differently by the Court than terms of years or other, less harsh sentences), which held favor with the Court at least until *Graham*, is itself now dead.

The fact that death was treated differently by the Court stemmed from its severity. As recently as *Roper*, the Court has noted that “[b]ecause the death penalty is the most severe punishment, the Eighth Amendment applies to it with special force.” Accordingly, a broad range of substantive and procedural rights apply to capital defendants that do not apply to other defendants, even those accused or convicted of homicide. The dissenters’ main fear going forward appears to be that the Court’s death penalty jurisprudence is no longer isolated from the rest of criminal procedure, and that one regime may slowly spill over into the other.

II. IDEOLOGICAL DIFFICULTIES AFTER *GRAHAM*

The question now seems to be whether death is indeed still different. Let us for the sake of argument assume that the Court in its current make-up is willing to approach the death penalty and term-of-years sentences identically, or at the very least more similarly. Such an approach would be likely to have serious repercussions in its sentencing jurisprudence. By treating death and nondeath sentences similarly, the Court could go in one of two directions. First, it could start backpedaling on its recent decisions restricting the use of the death penalty, reserving categorical decisions for only the most barbaric of punishments (say, drawing and quartering). After all, if death is no longer different, the Court may see little reason to approach it with the more skeptical eye that it has in the recent past. This result would actually be a boon to the conservative wing of the Court, as it would allow the Court to return control over such decisions to the states and bring the Court’s interpretation of the Eighth Amendment closer in line with what they believe

3. See *Harmelin v. Michigan*, 501 U.S. 957, 996 (1991) (Kennedy, J., concurring) (noting that the Eighth Amendment requires a “narrow proportionality” principle).

4. 463 U.S. 277 (1983), *abrogated in part* by *Harmelin*, 501 U.S. 957.

is its original meaning. It could mean the reversal of decisions such as *Roper* and *Atkins v. Virginia*.⁵

Of course, this is an unlikely scenario. The Court's decisions categorically restricting the death penalty, such as *Roper* and *Atkins*, have been decidedly fairly recently. The ideological makeup of the Court, even with the recent appointments of Justices Sotomayor and Kagan, appears unlikely to change on this issue. Furthermore, the *Graham* decision was, if anything, a logical extension of *Roper*, so to believe that it would lead down the path to overruling decisions such as *Roper* is illogical. The *Graham* opinion cited significant language from *Roper* discussing the developmental issues juveniles face which are not present with adult offenders. It presented evidence that juvenile offenders still have significant amounts of psychological development ahead of them, and that therefore the prospect of rehabilitation is much more realistic than it is with adult offenders. The *Graham* Court also noted that juveniles are less likely to understand the true effects and consequences of their crimes than are adults, and that therefore the retributive value of such sentences is much lower than it is with adult offenders. Finally, the Court recognized that the mental calculus of juveniles who contemplate criminal activity is too incomplete to fully comprehend the potential consequences of such crimes. To that end, the deterrent effect of life sentences without parole adds little to the general deterrent effect of imprisonment.

It is more likely, then, that *Graham* will lead to the categorical approach used in *Roper* and *Atkins* being taken in other non-death penalty cases. This is what the conservative wing of the Court fears. For example, one logical extension of *Graham* may be to categorically invalidate life without parole for *all* nonhomicidal offenders, including adults. Despite the Court's reliance on the differences between juvenile offenders and adult offenders, it would not be too much of a stretch to envision the Court citing the rehabilitative goals of imprisonment in nullifying such a practice, particularly in light of the fact that those imprisoned for life without parole are typically excluded from many of the rehabilitative activities provided, such as psychological therapy and education.

Graham may also lead to the Court taking a more liberal approach to the death penalty as a practice. Granted, the logical extensions are not as clear. But *Graham* could be one step in a slow shift towards mandating less and less severe sentences for certain classes of offenders. More prohibitions to the death penalty along the lines of *Roper* and *Atkins*, as well as more restrictions on harsh sentencing such as *Graham*, could be added until the death penalty is so restricted that it is nearly impossible to impose. This could eventually lead the Court to decide that the death penalty itself is archaic, unproductive, and contrary to the Eighth Amendment.

The slippery slope argument that follows is obvious. If I were a conservative leader developing talking points, I would say that the road that began

5. 536 U.S. 304 (2002) (holding categorically that the execution of mentally retarded persons is cruel and unusual under the Eighth Amendment).

with *Roper* and continued with *Graham* could lead not only to the abolition of the death penalty altogether but to the Supreme Court (an unelected body drawn from the intellectual elite, I would remind the public) determining the appropriate sentences for every crime on the books in every state. But slippery slope arguments, effective oratorical devices though they may be, rarely have any basis in reality. It is difficult to foresee any circumstance in which the Court would wish to engage in any sort of term-of-years sentencing assessments aside from the most severe or disproportionate cases.

Still, *Graham* may not signal an end to the Court's willingness to categorically invalidate nondeath sentences, especially with regard to nonhomicidal crimes. There are two potential philosophical approaches that the Court could take that would indicate this might be the case, but neither one of them sound in what Justice Thomas sees as the eradication of the "death is different" approach to sentencing.

The first approach that the Court could take would be to maintain that "death is different"—just not necessarily the death of the defendant. Perhaps, instead, it is the death of the victim that makes a case "different," or the fact that the death of either the defendant or the victim is at issue. After all, *Graham* invalidated life without parole for *non*-homicidal cases. The Court said nothing about invalidating juvenile life without parole for homicide offenses. This approach could be easily extended to the realm of adult offenders. Were the Court to adopt this extension of "death is different," it would provide a clear line at which categorical inquiries would end and only "narrow proportionality" inquiries would exist.

Another approach is that death is still different in the traditional sense, but that the Court now recognizes that kids are different as well. The Court could try to maintain separate jurisprudences for adult and juvenile sentencing. For adult offenders, "death is different" could be the same as it was before the *Graham* decision, and now, after *Graham*, juvenile offenders may be subject to an entirely different sentencing approach. While juvenile sentencing is generally *at most* as harsh as adult sentencing, the Court could choose to vary it in several areas to demand even less harsh sentences. The Court has already taken two steps down this path with *Graham* and *Roper*.

Given the language used in the majority opinion in *Graham*, "kids are different" seems to be the more likely approach. In fact, Justice Kennedy seemed to be fighting against the idea that the approach in *Graham* should be extended to adult offenders. He quoted numerous studies to support the notion that juvenile offenders are psychologically different from adult offenders and that different levels and methods of incapacitation, deterrence, and rehabilitation are appropriate for juveniles and adults. If the Court wanted to, it could have easily taken the opportunity presented in *Graham* to invalidate all sentences of life without parole for nonhomicidal offenders regardless of age. The fact that the Court did not do so suggests that the Court intends to treat juvenile sentencing differently from adult sentencing.

Having separate approaches for adult and juvenile sentencing would also mesh with the Court's general Eighth Amendment jurisprudence, which looks to evolving social standards when assessing whether a punishment is

constitutional. As we learn more about juvenile psychology, it stands to reason that we will learn more about the appropriate punishments and treatments for juveniles. This may lead to our societal standards of decency evolving more quickly towards less harsh sentences for juveniles than for adults, especially if there is no corresponding evidence that adult offenders would benefit from the same types of punishment as juveniles.

III. PRACTICAL DIFFICULTIES AFTER *GRAHAM*

For most states, the result in *Graham* is simple to follow: they can simply offer the possibility of parole to any juvenile who receives a life sentence. But there would still remain a whole host of potential practical issues involved in nearly any sentencing scheme.

One such practical question arises in states like Florida, which has entirely abolished the practice of parole. This means that unlike other states which maintain their parole systems, states like Florida are categorically barred from sentencing a juvenile to life imprisonment. The only way the state could now give such sentences would be to reinstitute some sort of parole system to handle those juveniles given life sentences for nonhomicide crimes. This could be a viable option, especially in light of the fact that such sentences are relatively rare, leaving administrative costs relatively low.

What seems more likely is that states like Florida will simply assign lengthy term-of-years sentences to such offenders. Technically, a sentence of one hundred years' imprisonment without the possibility of parole to a sixteen-year-old nonhomicidal offender does not violate the Eighth Amendment under the letter of *Graham*. As Justice Alito noted in his brief dissent, "[n]othing in the [*Graham*] opinion affects the imposition of a sentence to a term of years without the possibility of parole." Certainly, though, such a sentence would violate the spirit of the decision. After all, a one hundred year sentence is effectively a life sentence, yet a judge in any state would seem to be permitted to give juveniles one hundred year sentences without the possibility of parole. This is a glaring loophole. The Court will at some point be forced to address the constitutionality of juvenile sentences of less than life, with no possibility of parole, especially where the term of years is so long that it is practically a life sentence.

It will be interesting to see what happens at *Graham*'s resentencing. If he is given a term of years sentence that is effectively a life sentence, that sentence will almost certainly be challenged; *Graham* could find his case back in the Supreme Court. Regardless of whether *Graham* is the particular defendant, a challenge of this nature is practically inevitable. The Court must have known this when it handed down its decision in *Graham*, and one would like to think that it has a plan for such a scenario.

Here, if anywhere, is where the slippery slope argument is best applied. On the one hand, it is highly unlikely that the Court would render its own opinion in *Graham* toothless by upholding a one hundred year sentence without the possibility of parole to a nonhomicidal juvenile simply because the sentence was not styled as a life sentence. On the other hand, it is also

difficult to see the Court engaging in the analysis necessary to enforce *Graham* if the states decide to try to circumvent it. The Court would have to establish some sort of numerical ceiling on the length of sentences that could be given to juveniles convicted of nonhomicide crimes where there is no possibility of parole. This kind of analysis is not one that the Court engages in either routinely or eagerly.

Another potential practical issue involves the actual likelihood of being paroled. If a state had parole on the books but never released anyone on parole, then that state could also give sentences which are essentially life without parole to juveniles convicted of nonhomicide crimes. These sentences, much like a one hundred year sentence with no possibility of parole, would be in line with *Graham* in the most technical sense only. If the Court wished to prevent such sentences from being imposed, it would be forced to determine how often or under what circumstances a state must release prisoners on parole in order for the parole system to be considered viable. Again, this is not the type of analysis that the Court is well equipped to undertake.

Even if a state did have a viable parole system, a sentence could be structured to make parole virtually unattainable. Florida, for instance, could reinstitute parole for juveniles, but declare that it would only be available after the first hundred years of a life sentence. By reinstituting parole, Florida would be technically in line with *Graham*, but by only allowing parole after such a long period of time, it would again go against the spirit of the decision. If the Court wanted to prevent this, it would again be forced to engage in some sort of line-drawing, determining how many years of a sentence can be served before a meaningful opportunity for parole is presented to the juvenile offender.

This practice of the Court engaging in such low-level policy determinations could result in peculiar and inconsistent applications of the law. For example, if the Court decided that the maximum sentence for juveniles where there is no possibility of parole was forty years, then an odd result would arise. States with no possibility of parole, which presumably intended the lack of parole to make sentences harsher, would actually have less severe maximum sentences for juveniles convicted of nonhomicide crimes than states with parole systems, if parole is unlikely to ever be granted.

Ultimately, it will be up to the states and their judges to decide how hard the practical issues raised by *Graham* will be pressed. They could decide to comply with the spirit of *Graham* across the board. But it will take only one rogue judge to force the Court's hand and require it to render a difficult decision that will seem unsatisfying no matter what the outcome.

CONCLUSION

The *Graham* decision may have created as many problems as it solved. The Court now faces an ideological battle as well as complex practical issues going forward. Ideologically, the Court must decide whether it intends to create a bifurcated jurisprudence for juvenile and adult offenders. It also

must determine whether its traditional bifurcated approach to death and nondeath sentences remains viable. Practically, the Court may have opened the door to a whole host of problems. Should the states choose to try to circumvent *Graham*, for example by assessing term of years sentences so long as to be practically life sentences without the possibility of parole, the Court will either have to begin to assign a number to the otherwise generic term “life sentence” or develop a creative new approach that will allow it to avoid engaging in such difficult, low-level determinations.

Unfortunately, there is no simple answer to any of these problems, at least from the Court’s perspective. Based on the language used in the majority opinion in *Graham*, the Court is at least willing to have separate approaches to adult and juvenile sentencing. Whether or not “death is different” still applies remains to be seen. It seems safe to assume, though, that the Court now recognizes that kids are different. Given the mounting evidence pointing to the psychological differences between adult and juvenile offenders, this is a welcome addition to the Court’s sentencing approach, in spite of the practical difficulties it may have raised.