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JUVENILES

Kids Really Are Different: Looking Past *Graham v. Florida*



By MARSHA LEVICK

On May 17, in *Graham v. Florida*,¹ the U.S. Supreme Court ruled 5-4 that sentences of life without the possibility of parole imposed on juveniles convicted of nonhomicide offenses violate the Cruel and Unusual Punishment Clause of the Eighth Amendment. In spare but emphatic language, Justice Anthony M. Kennedy articulated the central holding of this ground-breaking decision:

The Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide. A State need not guarantee the offender eventual release, but if it imposes a

sentence of life it must provide him or her some realistic opportunity to obtain release before the end of that term.

In banning life-without-parole sentences in these cases, the court relied specifically upon developmental and scientific research that demonstrated the reduced culpability of juvenile offenders for their criminal conduct. The court's decision in *Graham* comes five years after its landmark decision in *Roper v. Simmons*,² in which the court banned the imposition of the death penalty on juvenile offenders as similarly violative of the Eighth Amendment. Together, these two decisions provide the framework for a developmentally driven juvenile Eighth Amendment jurisprudence that has poten-

¹ 130 S. Ct. 2011, 2010 U.S. LEXIS 3881 (2010).

² 543 U.S. 551 (2005).

tially broad implications for the laws, policies, and practices that govern the treatment of offenders under the age of 18, particularly sentencing practices.

In fact, these decisions should be read against the backdrop of a series of Supreme Court decisions over the past several decades in which the court has repeatedly accorded children and youth distinct treatment under the Constitution. While the court's consideration of youth status is particularly pronounced in cases involving children in the juvenile and criminal justice systems, the characteristics of youth have also led to a specialized jurisprudence under the First and Fourth amendments, as well as the due process clauses of the Fifth and 14th amendments. With the more recent *Graham* and *Roper* decisions, this doctrinal approach to determining children's rights under the Constitution may well expose cracks in other adult sentencing schemes or practices that have been blindly extended to juveniles in recent years as their numbers in the adult criminal justice system have swelled.

Roper v. Simmons

In prohibiting the execution of juvenile offenders in *Roper*, the court relied on medical, psychological, and sociological studies, as well as common experience, which all showed that children under 18 are less culpable and more amenable to rehabilitation than adults who commit similar crimes. The *Roper* court reasoned that because juveniles have reduced culpability, they cannot be subjected to the harshest penalty reserved for the most depraved offenders; instead, punishment for juveniles must be moderated to some degree to reflect their diminished blameworthiness.

The court's holding that juveniles are less culpable than adults was premised on three core research findings on children and adolescents: Compared with adults, juveniles have a "lack of maturity and an undeveloped sense of responsibility," they "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure," and their characteristics are "not as well formed."

The *Roper* court stressed the incongruity of imposing a final and irrevocable penalty on an adolescent who had capacity to change and grow. It said, "From a moral standpoint it would be misguided to equate the failings

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of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." The court underscored that the state was not permitted to extinguish the juvenile's "potential to attain a mature understanding of his own humanity." Significantly, *Roper* embedded its reasoning in science, relying on recent research on adolescent development to bring a new scientific lens to its constitutional jurisprudence concerning juveniles.

Graham v. Florida

The court ruled in *Graham* that juveniles cannot be sentenced to life without a meaningful and realistic opportunity for parole for nonhomicide offenses. The court explained:

The juvenile should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential. . . . Life in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope.

The defendant's age and the fact that the offenses were nonhomicide crimes were the salient factors in the *Graham* court's decision: "The age of the offender and the nature of the crime each bear on the analysis." As the *Graham* court recognized, because juveniles are more likely to be reformed than adults, it is inappropriate to subject them to a sentence with no meaningful opportunity for release. Such a sentence "improperly denies the juvenile offender a chance to demonstrate growth and maturity," the court said.

The court was clear in its affirmation of the research findings underlying *Roper*. It said, "No recent data provide reason to reconsider the court's observations in *Roper* about the nature of juveniles. . . . Developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds." The court acknowledged that "parts of the brain involved in behavior control continue to mature through late adolescence." Noting that "the differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive" a sentence of life without parole for a nonhomicide crime, the court wrote:

These salient characteristics mean that "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." Accordingly, "juvenile offenders cannot with reliability be classified among the worst offenders." A juvenile is not absolved of responsibility for his actions, but his transgression "is not as morally reprehensible as that of an adult."

As it did in *Roper*, the *Graham* court adopted a categorical ban, prohibiting life-without-parole sentences for juveniles convicted of nonhomicide offenses.³ With-

³ Chief Justice John G. Roberts Jr. concurred in the court's judgment that *Graham*'s sentence violated the Eighth Amendment, but he declined to join the majority's adoption of a categorical ban on such sentences for all juveniles convicted of nonhomicide crimes. Roberts

out a categorical rule, the court noted, an “unacceptable likelihood exists that the brutality or coldblooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course” Were the court to allow a case-by-case assessment of culpability, courts might not “with sufficient accuracy distinguish the few incorrigible juvenile offenders from the many that have the capacity to change,” it said. The court noted that juvenile nonhomicide offenders are “not sufficiently culpable to merit that punishment,” and it said the categorical rule “gives all juvenile non-homicide offenders a chance to demonstrate maturity and reform.”

Implications of *Graham*

Kennedy’s opinion in *Graham* is an expansive statement about the limitations under the Constitution of applying adult sentencing principles and practices to juvenile offenders whose personal and developmental attributes remain sharply distinct from their adult counterparts. The court engaged in what purported to be a routine Eighth Amendment analysis—considering both objective indicia of national consensus as well as applying its own independent judgment—but ultimately crafted a developmentally driven approach that seemed to abandon the widely accepted understanding that “death is different” under the Eighth Amendment in favor of an understanding that “kids are different.”

The *Graham* court’s analysis invites challenges to other sentencing practices involving juvenile offenders that share these characteristics, including sentences of life without parole for felony murder, exceptionally lengthy sentences in nonhomicide cases that allow no realistic opportunity for release prior to the expiration of the sentence, and mandatory life-without-parole sentences.

In striking life-without-parole sentences in *Graham*, the court held that none of the legitimate penological goals that support such sentences for adult offenders—retribution, deterrence, incapacitation, and rehabilitation—“provides an adequate justification” for imposing the sentence on juveniles. The court echoed

expressly acknowledged, however, that *Graham*’s juvenile status mattered for the purposes of even a narrow proportionality review under the Eighth Amendment. He noted that the culpability of the offender can “play a central role” in that analysis and, perhaps most significantly, that *Roper*’s conclusion about the reduced culpability of juvenile offenders “has pertinence beyond capital cases.”

its earlier holding in *Roper*, emphasizing the reduced blameworthiness of juvenile offenders in rejecting both retribution and deterrence as proffered rationales for the sentence. Its rejection of incapacitation in defense of life-without-parole sentences went further, however, underscoring the folly of making irrevocable judgments about youth:

To justify life without parole on the assumption that the juvenile offender forever will be a danger to society requires the sentencer to make a judgment that the juvenile is incorrigible. The characteristics of juveniles make that judgment questionable. . . . Even if the State’s judgment that *Graham* was incorrigible was later corroborated by prison misbehavior or failure to mature, the sentence was still disproportionate because that judgment was made at the outset. A life without parole sentence denies the juvenile offender a chance to demonstrate growth and maturity. Incapacitation cannot override all other considerations, lest the Eighth Amendment’s rule against disproportionate sentences be a nullity.

The goal of rehabilitation was likewise dismissed, as the court found the punishment simply at odds with the rehabilitative ideal. “By denying the defendant the right to reenter the community, the State makes an irrevocable judgment about that person’s value and place in society”—a judgment inconsistent with a juvenile nonhomicide offender’s “capacity for change and limited moral culpability.”

The irrevocable nature of life-without-parole sentences and the gross disproportionality of the punishment to juveniles who do not kill featured prominently in the court’s ban on such punishments. The *Graham* court’s analysis invites challenges to other sentencing practices involving juvenile offenders that share these characteristics, including sentences of life without parole for felony murder, exceptionally lengthy sentences in nonhomicide cases that allow no realistic opportunity for release prior to the expiration of the sentence, and mandatory life-without-parole sentences.

Graham itself opened the door to extending its ruling to juvenile felony murder cases. According to the court, “when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability.” The felony-murder doctrine is a legal fiction that transfers intent to commit the underlying felony to the homicide that occurs in the course of that felony. While exact numbers are unavailable, as many as one-fourth to one-third of all juvenile lifers in the United States may be serving such sentences for felony murder. In many of these cases, the juvenile may have served as a lookout, driver, or lure—and may have had no prior knowledge that a homicide was intended and indeed may have played no role in the homicide. Under such circumstances, the central rationale of *Graham* would undermine the constitutionality of a life-without-parole sentence, where the juvenile’s intent to kill is lacking. And while a categorical ban on life-without-parole sentences for all instances of felony murder may be difficult to obtain, arguments in individual cases that demonstrate the limited role and reduced blameworthiness of a particular juvenile may well support the invalidation of these sentences.

Additionally, while we have a reasonably accurate picture of the numbers of juveniles serving life-without-parole sentences for either nonhomicide or homicide

cases, it is believed that substantial numbers of juveniles are also serving exceptionally lengthy terms of years for nonhomicide crimes. While these juveniles are technically eligible for parole, many will have no “realistic opportunity” to demonstrate rehabilitation and obtain release prior to the expiration of their sentences. As an example, two cases currently pending before the courts in California and Ohio involve juveniles convicted of nonhomicide crimes who are serving sentences of 75 and 89 years respectively. Their first opportunity for parole will not occur before each passes the age of 90; if their sentences stand, both young men will likely die in prison.

In *Graham*, Kennedy stressed that there is a line “between homicide and other serious and violent offenses against the individual.” While nonhomicide crimes may be devastating, he said, “they cannot be compared to murder in their ‘severity and irrevocability.’” According to Kennedy, this is because “[l]ife is over for the victim of the murderer,” but for the victim of even a very serious non-homicide crime, ‘life . . . is not over and normally is not beyond repair.’”

The court’s insistence on a bright-line rule in *Graham* further supports its extension to any sentence that effectively imprisons a juvenile for life. Without a categorical rule, an “unacceptable likelihood exists that the brutality or coldblooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course,” the court said. If a case-by-case assessment of culpability were allowed, courts might not “with sufficient accuracy distinguish the few incorrigible juvenile offenders from the many that have the capacity to change,” it said. The simple reality is that there is neither a principled distinction nor a practical difference between these formal sentences of life without parole and a term of years that dooms a child to die in prison:

Life without parole is an especially harsh punishment for a juvenile. Under this sentence a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender. A 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only. See *Roper v. Simmons*, 543 U.S. 551, 572 (2005); cf. *Harmelin v. Michigan*, 501 U.S. 957, 996 (1991) (“In some cases . . . there will be negligible difference between life without parole and

other sentences of imprisonment—for example, . . . a lengthy term sentence without eligibility for parole, given to a 65-year-old man”). This reality cannot be ignored.

Lastly, mandatory sentences of life without parole—in both felony murder and murder cases—deserve scrutiny in the wake of *Graham*. The *Graham* majority was unequivocal in its insistence that irrevocable judgments about the character of juvenile offenders are impermissible under the Constitution—at least where they deny juveniles any opportunity to prove their rehabilitation and their eligibility to re-enter society. Both *Graham* and *Roper* are explicit in their belief that juvenile offenders’ capacity to change and grow, combined with their reduced blameworthiness and inherent immaturity of judgment, set them apart from adult offenders in fundamental—and constitutionally relevant—ways. Mandatory sentencing schemes by definition allow for no individualized determinations. Yet it is precisely this “one size fits all” feature that is so directly at odds with the court’s reasoning in these cases. Indeed, the constitutionality of these sentences is “twice diminished”—prohibiting consideration of age as a factor at all in sentencing while simultaneously proscribing any “realistic opportunity” for release. These sentences run afoul of *Graham* because “that judgment [of irredeemability] was made at the outset.”

As Kennedy wrote, “a State need not guarantee an offender eventual release.” The ban on life-without-parole sentences is not a promise of a return to society—it is merely a requirement that juvenile offenders be provided the opportunity to be considered for release within some reasonable period of time before the completion of their sentences. Grounded in science, the ruling marks a reiteration of the court’s long-held view that minors are different than adults. This principle permeates our law. As Justice Felix Frankfurter wrote more than 50 years ago in *May v. Anderson*,⁴ “Children have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a state’s duty towards children.” Such reasoning remains apt today. Adult sentencing practices that take no account of youth are subject to challenge under the Constitution.

⁴ 345 U.S. 528 (1953).