2010

Graham's Good News--and Not

Richard Frase
University of Minnesota Law School, frase001@umn.edu

Graham's Good News—and Not

RICHARD S. FRASE

Benjamin N. Berger Professor of Criminal Law, University of Minnesota Law School

In *Graham v. Florida*, the Supreme Court struck down a severe prison sentence under the Eighth Amendment—something it has only done once before, in *Solem v. Helm*, back in 1983.[1] Moreover, the language and approach of Justice Kennedy's majority opinion carries the potential for further expansion and clarification of Eighth Amendment protections. That's good news for those of us who view post-1983 decisions upholding severe prison sentences as an abdication of the Court's constitutional responsibility to protect politically powerless criminal defendants from excessive penalties.[2] At a minimum, Kennedy's opinion suggests a more unified approach to proportionality review, in place of the Court's previous two-track distinction between death and prison sentences.[3]

The bad news is that the Court's decision could wind up being a very narrow precedent—the proverbial ticket good for this day and this train only—and one that doesn't actually shorten many prison terms. The further bad news is that the majority in *Graham* may have managed to make Eighth Amendment law even *less* clear than it was before (the Court itself has noted that "our precedents in this area . . . have not established a clear or consistent path for courts to follow"[4]). Justice Kennedy purports to recognize two types of Eighth Amendment precedent: categorical bans (previously applied only in death-penalty cases) and case-specific assessments (previously the only type of analysis applied to lengthy prison sentences). He then applies the death penalty approach to Graham's prison sentence. But these two approaches are not as distinct as the Court seems to think; lower courts will now have to decide which one to use, and whether the choice really makes much difference.

Moreover, the majority opinion and Justice Roberts's concurrence continued to apply a standard of "gross disproportionality" without saying what that means—disproportionate relative to what?[5] In particular, is retributive disproportionality ever a sufficient basis to invalidate a prison sentence, or even a death sentence? If not—if unconstitutionally severe prison sentences must also be grossly disproportionate relative to all applicable non-retributive sentencing purposes (mainly deterrence, incapacitation, and rehabilitation)—how is such non-retributive proportionality defined? The Court's silence on these matters gives lower courts very little guidance, and will result in either widely conflicting applications of *Graham* or (more likely) a refusal to take the Court's decision seriously and give it any further application beyond its specific facts.

I. The Good News

Justice Kennedy's majority opinion suggests that at least five justices are now willing to adopt meaningful Eighth Amendment limits on severe prison sentences, and to do so under categoric prohibitions such as those previously applied only to death sentences. Kennedy's opinion also sheds further light on what factors enter into a finding of Eighth Amendment disproportionality. (Justice Roberts rejects the majority's categoric rule, and his case-specific analysis may limit his condemnation of juvenile life without parole (LWOP) to the particular, rather extreme facts of *Graham*,[6] but his concurrence at least shows some willingness to use the *Solem* standards to limit extreme prison sentences under the Eighth Amendment, as well as a rejection of the hands-off approach of Justices Scalia and Thomas.)

A. Death Isn't So Different

The Court's prior case law, invalidating many more death sentences than prison terms and often (but not always) applying categoric, bright-line prohibitions, suggested that for Eighth Amendment purposes, "death is different."[7] The majority opinion in *Graham* seems to partially erase that distinction, and to permit more generous Eighth Amendment review of severe prison sentences—at least if enough *other things* about the case are different. In prior cases, the Court had held that juvenile offenders are different from adults, and thus can never receive the death penalty.[8] The Court had also held that nonhomicide crimes are different (i.e., death is different on the *offense* side), so such offenders can never receive the death penalty.[9] What the majority arguably held in *Graham* is that the latter two "differents" (juvenile offender, nonhomicide crime) outweigh the first, and allow more generous Eighth Amendment scrutiny even for a nondeath sentence.

B. Disproportionality Relative to What

In discussing why juveniles and nonhomicide crimes are different, the majority opinion gives strong emphasis to

Federal Sentencing Reporter, Vol. 23, No. 1, pp. 54–57, ISSN 1053-9867 electronic ISSN 1533-8363.
 DOI: 10.1525/fsr.2010.23.1.54.

the two sentencing factors normally associated with retributive punishment philosophy, the offender's personal culpability[10] and the seriousness of the harm caused or threatened by the offense.[11] Although the Court also discusses whether Graham's crime could be justified to achieve nonretributive sentencing purposes, its emphasis on culpability and harm suggests that in a future case retributive disproportionality might, by itself, be a basis for finding a prison sentence to be in violation of the Eighth Amendment.[12]

Such a purely retributive cap on punishment severity has been advocated by a number of scholars,[13] and was apparently adopted in at least one of the Court's death penalty cases. In *Coker v. Georgia*,[14] the Court stated that a death sentence is excessive and unconstitutional if either of two conditions is met: (a) the sentence "makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering" *or* (b) the sentence is "grossly out of proportion to the severity of the crime." The second condition seemed to imply a retributive standard, because proportionality has been most commonly associated with that punishment theory;[15] moreover, the Court invalidated Coker's sentence entirely on that ground—that is, on the basis of the lesser harm of his nonhomicide offense—ignoring case facts that might have supported a death sentence to deter other violent offenders.[16] Subsequent cases barring use of the death penalty have been based on both prongs of the *Coker* standard, but the Court's most recent case, *Kennedy v. Louisiana*, extends *Coker* and quotes the *Coker* standards, including the language that each prong is independent.[17]

As noted, the majority in *Graham* also discusses the other *Coker* prong—whether the punishment serves legitimate penological goals other than retribution. But the good news here is that, in rejecting these sentencing purposes as sufficient justifications for Graham's LWOP sentence, Justice Kennedy's opinion may shed some light on a question the Court has studiously ignored in previous decisions: What makes a sentence grossly disproportionate relative to these nonretributive purposes? In previous writings,[18] I have proposed two nonretributive proportionality principles and have shown how they have been applied in a wide variety of constitutional contexts.

The first principle, what I call ends-benefits proportionality, requires that the costs and burdens of punishment should not exceed the likely benefits to be achieved; furthermore, the added costs and burdens of a more severe penalty compared with a lesser one should not exceed the likely added benefits. The second principle, alternative-means proportionality (referred to by some writers as the principle of parsimony or necessity, and akin to constitutional requirements of narrow tailoring), posits that, because punishment is itself an evil (it is harmful to offenders, and costly), a penalty should be the least severe measure that will suffice under the circumstances—in other words, if a less severe punishment will achieve essentially the same benefits, the more severe penalty is excessive.

Each of these two utilitarian proportionality principles finds some support in Justice Kennedy's opinion. Ends-benefits proportionality is implicit in his rejection of deterrence as a sufficient rationale for Graham's LWOP sentence; Justice Kennedy argues that the same factors of immaturity, underdeveloped sense of responsibility, and susceptibility to peer pressure that make juveniles less morally culpable also make them less deterable; thus, "any limited deterrent effect provided by life without parole [or any *added* effect compared to life with parole?] is not enough to justify the sentence."[19]

The other utilitarian principle, alternate-means proportionality, is implicit in Justice Kennedy's rejection of incapacitation and rehabilitation as justifications for Graham's sentence. Because juveniles have a greater capacity for change than adults, a sentencing court cannot know whether, at some time before he dies, this particular juvenile will become much less dangerous due to maturation, religious conversion, and/or rehabilitation. An LWOP sentence represents an irrevocable judgment of permanent incorrigibility, and is thus constitutionally excessive because it may prove unnecessarily severe.[20] One important broader implication of this argument is that mandatory minimum sentences likewise cannot be justified on incapacitation grounds—inevitably, some of the offenders who fall within the scope of the mandatory minimum will be, or become, insufficiently dangerous to justify the fixed minimum term.[21]

II. The Bad News

Despite the hopeful signs highlighted previously, there is reason to doubt that *Graham* will have many, or even any, of these broader and beneficial effects. Moreover, the justices have once again missed an opportunity to more clearly define Eighth Amendment standards; indeed, Justice Kennedy's opinion may have made those standards even more opaque.

A. Kennedy's Majority Opinion—Less Than Meets the Eye?

The scope of Justice Kennedy's opinion is potentially very narrow (and Justice Roberts's opinion is even narrower). The factors that encouraged Justice Kennedy to overcome the death-is-different barrier are, themselves, fairly unique and different from most other cases challenging a prison term on Eighth Amendment grounds—Graham was a juvenile offender, receiving an LWOP sentence, for a nonhomicide crime. The majority stressed all three of these differences. In lieu of the death-is-different distinction, Justice Kennedy seemingly drew a new dividing line, citing *Solem v. Helm* for the proposition that, among prison sentences, LWOP is qualitatively different from life with parole, especially for a juvenile.[22] In a future prison-sentence case, if any of these three factors is lacking, the Court can easily say—"*Graham* was different."

Moreover, the actual holding of Kennedy's opinion does not necessarily prevent this or other defendants from spending the rest of their lives in prison. The opinion emphasizes that it does not guarantee a right to actual release, only a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[23] So despite the extended discussion by Justice Kennedy (and Justice Roberts) of the diminished culpability of juvenile nonhomicide offenders, it appears that they can end up serving life without parole unless, at some point, crime-control purposes justify release—their diminished culpability and other retributive values based on the original offense impose no upper limit on prison time served.

B. Eighth Amendment Standards May Have Become Even *More* Unclear

Justice Kennedy's extension of death penalty standards to some prison sentences raises many new problems. Moreover, it remains unclear how the underlying standard of gross disproportionality is defined, especially in relation to nonretributive punishment purposes such as deterrence and incapacitation.

1. Death Penalty Standards Versus *Solem* Standards

Justice Kennedy's majority opinion applies standards previously used only in death penalty cases, rather than the standards of *Solem v. Helm*, as modified in the *Harmelin* and *Ewing* plurality opinions. But when are courts *required* to use the majority's approach, and how much does this approach actually differ in substance and likely results from the *Solem* standards?

Justice Kennedy initially seems to choose the categoric, death penalty approach because that's what Graham's counsel asked the Court to do.[24] But as Justice Roberts points out, Graham also asked, in the alternative, for a ruling using the *Solem* standards, and surely the majority could have chosen that approach if it wanted to. (Moreover, not all of the death penalty cases cited by the majority were fully categoric; *Enmund v. Florida*[25] was arguably based on the specific facts of the defendant's limited accomplice role and intent.) However, there were good reasons to adopt a broader, categoric rule in a case like *Graham*. Justice Kennedy noted one of those reasons later in his opinion: Any case involving a juvenile offender raises greater risks of unwise defendant litigation choices and poor communication with counsel, leading to overall defense ineffectiveness and an unacceptable risk that some of these offenders will receive an unconstitutionally severe sentence.[26]

Other familiar arguments in favor of a broad, bright-line ruling are that it gives lower courts more guidance and protects reviewing courts from a flood of new sentencing appeals. It also lessens gross sentencing disparities. Under a case-specific ruling (or the hands-off approach of the dissent), juvenile nonhomicide LWOP sentences would remain very rare in practice; such highly selective severity would make the penalty as capricious, wanton, and freakish as some death penalties the Court has invalidated.[27]

Still, how will lower courts know whether and when to use the categoric approach, in cases seeking to extend *Graham*? And beyond the difference between categoric and case-specific rulings, how much do the death penalty and *Solem-Harmelin-Ewing* standards differ? The latter requires the reviewing court to first find an inference of gross disproportionality (based on a threshold comparison of the defendant's sentence with his crimes—*Solem*, step one), *before* the court may engage in intra- and inter-jurisdictional comparisons (steps two and three), whereas the categoric death penalty approach seems to proceed in the opposite order: The Court first conducts an inter-jurisdictional comparison (*Solem*, step three), looking for evidence of a national consensus against the type of sentence at issue. The Court then essentially conducts a *Solem* step-one analysis, making its own independent disproportionality assessment by comparing the severity of the penalty with the defendant's culpability and the harmfulness of the offense, in light of precedent and the Eighth Amendment's "text, history, meaning, and purpose."[28]

Thus, the main effect of using the national-consensus-plus-independent-judgment approach is to guarantee interjurisdictional comparisons in every case by eliminating the *Solem-Harmelin-Ewing* step-one threshold requirement (while also eliminating *Solem* step two—intrajurisdictional comparisons). But are lower courts bound to take this approach? Or can a court that wants to uphold a severe prison sentence simply choose to rule on a case-specific basis and apply the much stricter *Solem-Harmelin-Ewing* standards?

2. Utilitarian Disproportionality Standards As noted previously, Justice Kennedy's majority opinion implies that a sentence based on nonretributive (crime-control) punishment purposes can also be grossly disproportionate. But neither his opinion nor the Roberts concurrence defines any standards of utilitarian proportionality, although at least two such principles may underlie Kennedy's rejection of crime-control justifications for Graham's LWOP sentence.

Kennedy also says very little about how the applicable proportionality standards relate to each other, but he implies that they are not independent, and that a sentence must be grossly disproportionate to *all* applicable purposes—"A sentence lacking any legitimate penological justification is by its nature disproportionate to the offense."[29] As I have argued in previous writings, each of the three proportionality principles (one retributive and two nonretributive) reflects distinct and important values, so a violation of any one of them should suffice to make a sentence unconstitutionally excessive.[30]

At a minimum, the Court should have made explicit what is only implicit in *Graham*: that the two nonretributive proportionality principles are independent of each other, so that a violation of either principle can invalidate

a proposed nonretributive punishment rationale. Finally, the Court should avoid using imprecise language that confuses very different sentencing purposes—for example, when it says that, for reasons of incapacitation, Graham "deserved" some period of incarceration, and that he might eventually prove so irredeemable and permanently dangerous as to "deserve" LWOP.[31] Deserved punishment is the language of retribution, not incapacitation.

III. Conclusion

Graham is both good news and bad news for those seeking meaningful and clear Eighth Amendment limits on excessive prison sentences. Juvenile nonhomicide offenders will certainly benefit from taking LWOP off the table, but it remains to be seen how many of those offenders will actually serve less than their full lives in prison. Moreover, in cases not governed by the majority's categoric rule (e.g., a juvenile nonhomicide offender with a fifty-year minimum sentence), will the Court and lower courts expand *Graham* and its novel, death-isn't-so-different approach? Alternatively, will they limit *Graham* to its facts—or go in multiple, inconsistent directions? Doctrinally, will the Court more clearly define its standards of retributive and nonretributive proportionality, building on the implicit standards applied in *Graham*? Or, will it continue to speak loosely, and confusingly, about proportionality and deserved punishment?

Notes

1 Solem v. Helm, 463 U.S. 277 (1983).

2 *See, e.g.*, Rachel Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 Mich. L. Rev. 1145 (2009); Donna H. Lee, *Resuscitating Proportionality in Noncapital Criminal Sentencing*, 40 Ariz. St. L.J. 527 (2008); Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?* 89 Minn. L. Rev 571 (2005); Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 Va. L. Rev. 677 (2005) ["Y. Lee"].

3 Barkow, *supra* note 2.

4 Lockyer v. Andrade, 538 U.S. 63, 72 (2003).

5 *See generally* Frase, *supra* note 2.

6 Those extreme facts included not only the "differents" cited by Justice Kennedy (see text) and the sentencing judge's decision to impose LWOP despite a more lenient prosecutorial recommendation but also the broad scope of Florida's burglary-LWOP law.

7 *Solem*, 463 U.S. at 294; Harmelin v. Michigan, 501 U.S. 957, 994 (plurality opinion). *See generally* Barkow, *supra* note 2.

8 Roper v. Simmons, 543 U.S. 551 (2005); Thompson v. Oklahoma, 487 U.S. 815 (1988).

9 Kennedy v. Louisiana, 128 S. Ct. 2641 (2008); Coker v. Georgia, 433 U.S. 584 (1977).

10 *Graham*, 130 S. Ct. at 2026–27.

11 *Id*. at 2032–33.

12 *Solem* had strongly implied that Eighth Amendment proportionality was to be measured by retributive criteria of the offender's culpability in committing the crime being sentenced, and the harm caused or threatened, but *Ewing v. California* fudged this decision, holding that the defendant's prior record is part of the severity of his offense. *See generally* Frase, *supra* note 2.

13 *See, e.g.*, Frase, *supra* note 2; Y. Lee, *supra* note 2.

14 *Coker*, 433 U.S. at 592.

15 Frase, *supra* note 2, at 589 n.98.

16 The Court admitted that the death penalty for rape might measurably serve acceptable punishment goals, 433 U.S. at 592 n.4, but then ignored this rationale. A crime-control rationale arguably applied in Coker's case, because he had prior convictions for rape, murder, and kidnapping.

17 *Kennedy*, 128 S. Ct at 2661.

18 *See, e.g.*, E. Thomas Sullivan & Richard S. Frase, Proportionality Principles in American Law: Controlling Excessive Government Actions (2009); Frase, *supra* note 2.

19 *Graham,* 130 S. Ct. at 2028–29.

20 *Id*. at 2028–30.

21 Frase, *supra* note 2, at 641.

22 *Graham*, 130 S. Ct at 2028–29.

23 *Id*. at 2030. Later, the opinion refers to a "realistic opportunity to obtain release." *Id*. at 2034.

24 *Id*. at 2022.

25 Enmund v. Florida, 458 U.S. 782, 797 (1982); *cf*. Tison v. Arizona, 481 U.S. 137 (1987) (distinguishing *Enmund*).

26 *Graham*, 130 S. Ct. at 2032.

27 *See Harmelin*, 501 U.S. at 1028–29 (Stevens, J., dissenting) (comparing defendant's LWOP sentence to being struck by lightning, and citing Justice Stewart's concurring opinion in an early death penalty case, *Furman v. Georgia*, 408 U.S. 238, 309–310 (1972)).

28 *Graham*, 130 S. Ct. at 2022.

29 *Id*. at 2028.

30 Frase, *supra* note 2.

31 *Graham*, 130 S. Ct. at 2029, 2030.