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REDEMPTION SONG: *GRAHAM V. FLORIDA* AND THE EVOLVING EIGHTH AMENDMENT JURISPRUDENCE

Robert Smith and G. Ben Cohen**†*

Introduction

In *Graham v. Florida*,[1] the Supreme Court held that the Eighth Amendment prohibits a sentence of life without parole ("LWOP") for a juvenile under eighteen who commits a non-homicide offense. For Terrance Graham, who committed home-invasion robbery at seventeen, the decision does not mean necessarily that he someday will leave the brick walls of Florida's Taylor Annex Correctional Institution. Unlike previous Eighth Amendment decisions, such as *Roper v. Simmons*,[2] where the Court barred the death penalty for juveniles, this new categorical rule does not translate into automatic relief for members of the exempted class: "A State need not guarantee the offender eventual release," Justice Kennedy wrote for the majority, "but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term." *Graham* offers the possibility of redemption but not its guarantee.

Pragmatists are understandably skeptical.[3] Yet beyond the narrow application of this rule to the small class of child-offenders, *Graham* contains the ingredients to be of transformative significance to the Supreme Court's Eighth Amendment jurisprudence. First, the opinion—employing a method of comparative analysis typically reserved for its capital cases—cements a proportionality requirement in the Court's non-capital Eighth Amendment jurisprudence. Second, the Court uses for the first time a method of constitutional elucidation that draws two separate and seemingly parallel lines of jurisprudence together to articulate an independent constitutional principle. Third, the Court articulates the "possibility of redemption" as an essential

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1. 78 U.S.L.W. 4387 (2010).

2. 543 U.S. 551 (2005).

3. States that have enacted prohibitions on parole for child offenders could simply convert statutory prohibitions into de jure limitations, by allowing parole under the law, but denying it indefinitely. An opportunity for parole that might be realistic in Washington D.C. could be completely unattainable before parole boards in Florida, California and Louisiana.

consideration arising from evolving standards of decency. These three components—proportionality, constitutional triangulation, and the notion that people and their propensities are not static—suggest that *Graham* could have far greater significance in the life of the law than in the life of child defendants toiling, for instance, in the fields of the Florida Penitentiary.[4]

I. The Eighth Amendment's Proportionality Principle

The *Graham* opinion's most significant doctrinal conclusion is that the Eighth Amendment proportionality provision applies to non-homicide offenses and allows for categorical exclusions of certain offenders (here, juveniles) for certain types of offenses (here, non-homicides) from certain punishments (life without parole). Whether the Court's "death is different" jurisprudence limited this broad conception of proportionality to capital offenses had plagued the Court for nearly three decades.

A. *Non-Capital Eighth Amendment Jurisprudence*

In *Weems v. United States*,[5] the Court held that the Eighth Amendment could not condone a fifteen-year sentence at hard labor in chains and with permanent civil disabilities for the crime of falsifying a public document. Reversing Mr. Weems's sentence, the Court underscored the notion that "punishment for crime should be graduated and proportioned to the offense." The Court echoed the importance of the proportionality mechanism fifty years later in *California v. Robinson*.[6] The *Robinson* Court reversed as excessive a 90 day prison sentence for "addiction to the use of narcotics." Ninety days' incarceration is not inherently excessive punishment, the Court noted, but the proper question is whether the *particular* sentence is excessive considering the *particular* crime: "Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."

Following Robinson, the nine justices traded blows for the next three decades over the existence and scope of a proportionality principle in non-capital Eighth Amendment cases. However, before describing those cases, we briefly highlight the death-is-different jurisprudence that serves as a counterpoint to the non-capital jurisprudence developed after *Robinson*. In his concurring opinion in *Furman v. Georgia*,[7] where the Court struck down the three capital sentencing statutes at issue and effectively halted the administration of capital punishment in America, Justice Stewart articulated what has come to be known as the "death is different" approach:

> The penalty of death differs from all other forms of criminal punishment not in degree, but in kind. It is unique in its total irrevocability. It is unique

4. Graham is one of 72 juveniles sentenced to LWOP in Florida.
5. 217 U.S. 349 (1910).
6. 370 U.S. 660 (1962).
7. 408 U.S. 238 (1972).

> in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.

The Court applied the death-is-different approach in *Coker v. Georgia*,[8] prohibiting the death penalty as a possible punishment for the rape of an adult woman. More recently, the Court has used the same analysis to bar capital punishment for homicides committed by juveniles[9] and the mentally retarded,[10] and for all non-homicide offenses.[11]

Non-capital defendants have struggled greatly against the weight of the death-is-different philosophy. In *Rummel v. Estelle*,[12] then-Justice Rehnquist wrote for the Court that sentences less than death were functionally unsusceptible to Eighth Amendment proportionality analysis: "Outside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare." The Court emphasized that it could "draw a 'bright line' between the punishment of death and the various other permutations and commutations of punishments short of that ultimate sanction. . . . [T]his line was considerably clearer than would be any constitutional distinction between one term of years and a shorter or longer term of years." The pendulum swung the other way in *Solem v. Helm*,[13] where the Court reversed as excessive a life sentence without parole for a minor nonviolent felony committed by a recidivist offender. Emphasizing the "principle that a punishment should be proportionate to the crime" as one "deeply rooted and frequently repeated in common-law jurisprudence," the Court reaffirmed that proportionality applied to non-homicide offenses. Distinguishing *Solem* from *Rummel* on the grounds that *Solem* enjoyed the possibility of parole, the Court refused to reverse *Rummel* outright.

The Court reversed gears again in *Harmelin v. Michigan*,[14] holding that the Eighth Amendment did not prohibit a life without parole sentence for a first-time offender convicted of possessing a large quantity of cocaine. Noting that "[p]roportionality review is one of several respects in which we have held that 'death is different,' and have imposed protections that the Constitution nowhere else provides," the Court expressly cabined the concept of excessiveness under the Eighth Amendment to its capital jurisprudence. However, in a separate concurring opinion, Justice Kennedy observed that the Eighth Amendment does contain a "narrow proportionality principle," that "does not require strict proportionality between crime and sentence" but rather "forbids only extreme sentences that are 'grossly

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8. 433 U.S. 584 (1977).
9. Roper v. Simmons, 543 U.S. 551 (2005).
10. Atkins v. Virginia, 536 U.S. 304 (2002).
11. Kennedy v. Louisiana, 128 S. Ct. 2641 (2008).
12. 445 U.S. 263 (1980).
13. 463 U.S. 277 (1983).
14. 501 U.S. 957 (1991).

disproportionate' to the crime." He then concluded that "[t]he Eighth Amendment proportionality principle also applies to noncapital sentences."

In *Ewing v. California*,[15] the Court explicitly validated Justice Kennedy's *Harmelin* concurrence, finding that the Eighth Amendment "contains a narrow proportionality principle that applies to noncapital sentences." Nonetheless, Justice O'Connor's opinion gave the impression that the substance of *Harmelin* and *Rummel* still held sway. For example, O'Connor reiterated the line from *Rummel* that successful challenges in the non-capital context are (and should be) exceedingly rare. Moreover, the Court rejected *Ewing*'s contention that his recidivist sentence of 25-years-to-life for stealing three golf clubs constituted cruel and unusual punishment. Concurring in the judgment, Justice Scalia wrote that in addition to his belief that the Eighth Amendment simply barred particular modes of punishment, he could not follow the Court's proportionality analysis even out of respect for precedent, because he did not believe that it could be intelligently applied. The ray of light left shining by Justice Kennedy's concurring opinion appeared to have been extinguished.

But the approach articulated by Justice Kennedy's concurring opinion in *Harmelin* appears to have won the day in *Graham*. Borrowing from the Court's capital jurisprudence, Justice Kennedy wrote, "[T]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change." He then returned to the basic premise that punishment must not be disproportionate to the crime, emphasizing that the "concept of proportionality is central to the Eighth Amendment." Intertwining citations from the Court's capital and non-capital Eighth Amendment jurisprudence, the *Graham* opinion drops the death-is-different motif but nonetheless conducts the same type of proportionality review contained in capital cases like *Simmons, Atkins,* and *Kennedy*.

The best indicator of the Eighth Amendment's tide shift away from cases like *Rummel* and *Ewing* is expressed in the dissent by Justices Thomas and Scalia,[16] which decries the Court's "departure from the 'death is different' distinction" and laments that the break is "especially mystifying when one considers how long it has resisted crossing that divide." Justice Stevens' answer to Justice Thomas, joined by Justices Sotomayor and Ginsburg, accepts and welcomes that change in the law:

> In his dissenting opinion, Justice Thomas argues that today's holding is not entirely consistent with the controlling opinions in *Lockyer v. Andrade*, *Ewing v. California*, *Harmelin v. Michigan*, and *Rummel v. Estelle*. Given that "evolving standards of decency" have played a central role in our Eighth Amendment jurisprudence for at least a century, see *Weems v. United States*, this argument suggests the dissenting opinions in those cases more accurately describe the law today than does Justice Thomas' rigid in-

15. 538 U.S. 11 (2003).

16. Justice Alito joined Parts I and III of Justice Thomas's dissent, but not the relevant portion in Part II.

> terpretation of the Amendment. Society changes. Knowledge accumulates. We learn, sometimes, from our mistakes. Punishments that did not seem cruel and unusual at one time may, in the light of reason and experience, be found cruel and unusual at a later time; unless we are to abandon the moral commitment embodied in the Eighth Amendment, proportionality review must never become effectively obsolete.

All nine justices appear to have agreed on one thing in *Graham*: the Eighth Amendment's proportionality principle has risen again in non-capital cases and it appears poised to stay.

B. *Are Categorical Challenges the New Different?*

Justice Kennedy's opinion attempts to bridge some of the perceived distance between the previous non-capital Eighth Amendment decisions and *Graham* by distinguishing between categorical challenges to a sentencing practice and challenges to an individual sentence. The distinction is more semantic than substantive. For example, Justice Kennedy suggests that the type of analysis conducted in *Harmelin* and *Ewing* is appropriate in assessing a "gross proportionality challenge" instead of a categorical challenge. Kennedy describes the principles that guide this type of analysis:

> A court must begin by comparing the gravity of the offense and the severity of the sentence. In the rare case in which this threshold comparison leads to an inference of gross disproportionality the court should then compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions. If this comparative analysis validates an initial judgment that the sentence is grossly disproportionate, the sentence is cruel and unusual.

By contrast, so-called categorical challenges to non-capital sentences, Kennedy suggests, should borrow from the approach taken in the Court's capital cases:

> The Court first considers "objective indicia of society's standards, as expressed in legislative enactments and state practice" to determine whether there is a national consensus against the sentencing practice at issue. Next, guided by "the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose," the Court must determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution.

The shortcomings of this distinction are apparent. The defendants in *Ewing* and *Harmelin* challenged the constitutionality of a type of punishment (life imprisonment), for a class of offenses (drug and recidivist offenses), committed by any offender. In *Graham*, the challenge involved the constitutionality of a type of punishment (life imprisonment), for a class of offenses (non-homicide felonies), committed by a particular class of offender (adolescent offenders). If *Ewing* had prevailed, a state would be hard pressed to

distinguish a sentence of twenty-five years to life for a nonviolent triggering offense where the prior offenses were also nonviolent. On the other hand, if the Court had struck down Graham's sentence without explicitly delineating the categorical rule, the vast majority of juvenile LWOP sentences would be void. To label such a result an "individual challenge" because the petitioner did not label a specific subcategory for whom this rule should be applicable is conceptually challenging. The practical difference is marginal, and the mere fact that Graham was successful and Ewing not, does not warrant the conclusion that two different modes of analysis are necessary. Furthermore, the fact that the Court repeatedly refused to require state courts to conduct proportionality review in capital cases (or to do such review in the first instance),[17] but would conduct review of individual challenges to the proportionality of an individual offender's non-capital sentencing, does not accord with the unique seriousness of capital punishment.

II. The Transformation of Constitutional Exegesis

More significant than the core Eighth Amendment holding adopted in *Graham*, is the textured manner in which Justice Kennedy brought the Court to the opinion. The opinion brings two separate constitutional holdings together to create a third. The opinion identifies the first constitutional principle, "With respect to the nature of the offense, the Court has concluded that capital punishment is impermissible for nonhomicide crimes against individuals." The second constitutional principle the Court identified concerned adolescent development and culpability: "*Roper* established that because juveniles have lessened culpability they are less deserving of the most severe punishments." The Court converged these two separate principles to articulate a third: "It follows that, when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability."

The articulation of this method of constitutional mathematics (*Kennedy v. Louisiana* + *Roper v. Simmons* = *Graham v. Florida*) is not limited solely to this instance. For example, it would appear that a claim exists that a sentence of LWOP would also be unconstitutional for a mentally retarded defendant who did not kill or participate in a homicide; similarly a juvenile offender involved in a felony that resulted in death and who was not death eligible under *Enmund v. Florida*[18] would also have a constitutional claim to the possibility of parole.

But even more meaningful than the operation of this constitutional mathematics to this narrow line of cases is its potential operation within the wider death penalty framework. As the Court observed in *Kennedy*, its prior death penalty jurisprudence has been marked by the "tension between general rules and case-specific circumstances" that has "produced results not all

17. Walker v. Georgia, 129 S. Ct. 453 (2008) (statement of Stevens, J.); Pulley v. Harris, 465 U.S. 37 (1983).

18. 458 U.S. 782 (1982).

together satisfactory." Indeed this combination of constitutional principles may have been what the Court found lacking when it acknowledged that the Eighth Amendment "case law [] is still in search of a unifying principle." In *Graham*, the Court acknowledged that "restraint," "decency," and moral consistency operate to conjoin constitutional principles rather than separate them into individual strains, each unknowable but by five (or more) of the Court's justices.

III. The Constitutionally Significant Possibility of Redemption

Graham's most significant role may be in its recognition of redemption as an Eighth Amendment constitutional principle, rejecting a legislative determination that entire classes of individuals were irredeemable:

> Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives. The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life. It does forbid States from making the judgment at the outset that those offenders never will be fit to reenter society.

Before *Graham*, redemption was hardly mentioned as a constitutional principle. Only two cases even reference it in a constitutional context.[19] Rehabilitation, on the other hand, has always been an essential component of the calculus in assessing the proper goals of punishment. But rehabilitation and redemption are separate concerns. The possibility of rehabilitation provides a response to, or mediates, the goal of incapacitation. However, the possibility of rehabilitation fails to rebut the concept of retribution. Hence *Gregg*'s finding that the death penalty was justified. Rehabilitation provides no moral salve that defeats the need for retribution—all rehabilitation does is provide an efficiency basis for defeating a death (or LWOP) sentence. Redemption, or the possibility of it, however, offers a moral response to the need for retribution. It responds to the call for infliction of suffering, to capital punishment's "expression of society's moral outrage at particularly offensive conduct."

The Court in *Graham* held that the Eighth Amendment "forbid[s] States from making the judgment at the outset that [juvenile] offenders never will be fit to reenter society." Such a judgment, the Court explained, is tantamount to a determination that the juvenile is not redeemable. While some juvenile offenders might be forever dangerous to society, the "subjective

19. Ayers v. Belmontes, 549 U.S. 7, 44 (2006) (Stevens, J., dissenting) ("In response to the majority's suggestion that this case may be inconsistent with *Johnson v. Texas* . . . I note only that *Johnson* addressed a very different question, namely, whether a jury considering future dangerousness could give adequate weight to a capital defendant's youth. Whatever connection may exist between a defendant's youth and his future dangerousness, there is no connection whatsoever between respondent's evidence that he was capable of redemption and a 'circumstance which extenuates the gravity of the crime' . . . ."); Doggett v. United States, 505 U.S. 647, 668-69 (1992) (Thomas, J., dissenting) ("However uplifting this tale of personal redemption, our task is to illuminate the protections of the Speedy Trial Clause, not to take the measure of one man's life").

judgment[s] by a judge or jury that the offender is irredeemably depraved, are insufficient to prevent the possibility that the offender will receive a life without parole sentence for which he or she lacks the moral culpability." Rather, juvenile offenders must be given the opportunity to "to achieve maturity of judgment and self-recognition of human worth and potential." In other words, States must give juvenile offenders at least a shot at redemption.

We have come a long way. For most of our history we have treated offenders in a one-size-fits-all fashion that views the individual as a one-dimensional, interest-maximizing, deliberate being that carefully calculates the risks and harms associated with his transgressions. The Eighth Amendment question focused on the offense and the punishment, largely ignoring the characteristics of the offender. The Court has affirmed sentences as proportionate to the crime by referring to the individual offender as "one who is simply unable to bring his conduct within the social norms prescribed by the criminal law of the State."[20] The offender's circumstances—social, cognitive, physiological—mattered little.

In the capital context, the Court has found that the "respect for human dignity underlying the Eighth Amendment requires consideration of aspects of the character of the individual offender," and that a capital statute cannot "treat[] all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass . . . ."[21] In *Atkins*, the Court looked to the culpability of mentally retarded defendants in general, and concluded that they possess "diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." Furthermore, "there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders."

Similarly, in *Simmons*, the Court determined that juvenile offenders as a class are less likely to "engage[] in the kind of cost-benefit analysis that attaches any weight to the possibility of execution," more likely to possess "[a] lack of maturity and an underdeveloped sense of responsibility . . . qualities [that] often result in impetuous and ill-considered actions and decisions," and are "more vulnerable or susceptible to negative influences and outside pressures, including peer pressure." Further, the Court explained, "personality traits of juveniles are more transitory, less fixed."

The *Graham* opinion began with a detailed description of its namesake, Terrance Jamar Graham: His "parents were addicted to crack cocaine, and their drug use persisted in his early years. Graham was diagnosed with attention deficit hyperactivity disorder in elementary school. He began drinking alcohol and using tobacco at age 9 and smoked marijuana at age 13." Including this description in at the fore of the case extends the character

20. Rummel v. Estelle, 445 U.S. 263, 284 (1980).

21. Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

of the offender focus beyond capital jurisprudence and infuses the Eighth Amendment with a sense that external forces help to shape the life choices of the offender, and, conversely, help to explain why a person is not intrinsically incapable of redemption.

But the most significant aspect of the Court's decision is the recognition that a once-and-for-all determination of an offender's capacity to change cannot be made at the onset of the sentence. Once we leave the limited example of the juvenile who is not fully developed, we find the same lack of perspective, foresight and impulse control in the drug and alcohol addicted offender and the offender with a severe mental illness, among others. And as an offender who committed a crime while under the grips of insufficiently treated schizophrenia or the chemical dependency of a heroin addiction is treated or becomes sober, and as their lives change and grow around them, *Graham* should be read more broadly as allowing for the possibility of hope despite cruel sentencing practices that leave little room for it to shine.

Conclusion

The *Graham* Court explicitly embraced the possibility that people can change, and in doing so, the justifications for continued incarceration weaken. Recognizing that juveniles are both categorically less culpable than adult offenders due to their underdeveloped maturity and decision-making capacity, and that at least some of these children can be redeemed over time, the Court prohibits states from rejecting the possibility of release at the onset of the conviction in nonhomicide cases involving juvenile offenders. This awareness that people are not static, and that they have within them the opportunity for moral development, opens the door to the possibility of redemption as a counter-consideration to the penological goal of retribution. And this realization suggests that the Court's notion of capital punishment as an expression of society's moral outrage at particularly offensive conduct may ultimately be tempered with its recognition of the possibility for redemption.