

Supplementary Material

Chapter 11: The Contemporary Era – Criminal Justice/Punishments/Juvenile Offenders

Graham v. Florida, 560 U.S. ____ (2010)

Terrance Graham, when he was seventeen years old, was arrested for armed burglary and robbery while on parole for a separate armed burglary and robbery offense. After his probation officer informed a Florida judge that Graham had violated the terms of his probation, the judge sentenced Graham to life in prison without parole. Graham appealed. He claimed that sentencing juvenile offenders who had not committed murder to life in prison without parole violated the cruel and unusual punishment clause of the Eighth Amendment as incorporated by the due process clause of the Fourteenth Amendment. A succession of Florida courts denied that claim. Graham appealed to the Supreme Court of the United States.

The Supreme Court by a 6–3 vote declared that the Constitution forbade punishing juveniles who committed crimes other than murder by life in prison without parole. Justice Kennedy’s majority opinion maintained that life in prison without parole was a constitutionally disproportionate punishment for juveniles who committed non-homicidal crimes. Why did Justice Kennedy emphasize proportionality? Is that the correct standard for determining whether a punishment is cruel and unusual or was the dissent correct that the Eighth Amendment restricts only certain punishments? Why did Justice Kennedy think life without parole always disproportionate for a juvenile offender? Was he correct or was Justice Roberts correct that some juvenile crimes merit that sanction? Graham was an early instance in which Chief Justice Roberts split from his more conservative colleagues. Did his concurrence suggest that he is less conservative than Scalia, Thomas, and Alito, or that the chief justice believes he should be in the middle of the Court?

JUSTICE KENNEDY delivered the opinion of the Court.

The Eighth Amendment states: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” To determine whether a punishment is cruel and unusual, courts must look beyond historical conceptions to “the evolving standards of decency that mark the progress of a maturing society.” “This is because ‘[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.’”

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The concept of proportionality is central to the Eighth Amendment. Embodied in the Constitution’s ban on cruel and unusual punishments is the “precept of justice that punishment for crime should be graduated and proportioned to [the] offense.” The Court’s cases addressing the proportionality of sentences fall within two general classifications. The first involves challenges to the length of term-of-years sentences given all the circumstances in a particular case. The second comprises cases in which the Court implements the proportionality standard by certain categorical restrictions on the death penalty.

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In the cases adopting categorical rules the Court has taken the following approach. 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.

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The analysis begins with objective indicia of national consensus. “[T]he ‘clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures.’” Six jurisdictions do not allow life without parole sentences for any juvenile offenders. Seven jurisdictions permit life without parole for juvenile offenders, but only for homicide crimes. Thirty-seven States as well as the District of Columbia permit sentences of life without parole for a juvenile nonhomicide offender in some circumstances. Federal law also allows for the possibility of life without parole for offenders as young as 13. Relying on this metric, the State and its *amici* argue that there is no national consensus against the sentencing practice at issue.

This argument is incomplete and unavailing. . . . Actual sentencing practices are an important part of the Court’s inquiry into consensus. Here, an examination of actual sentencing practices in jurisdictions where the sentence in question is permitted by statute discloses a consensus against its use. . . . [T]here are 123 juvenile nonhomicide offenders serving life without parole sentences. A significant majority of those, 77 in total, are serving sentences imposed in Florida. The other 46 are imprisoned in just 10 States—California, Delaware, Iowa, Louisiana, Mississippi, Nebraska, Nevada, Oklahoma, South Carolina, and Virginia. . . .

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It must be acknowledged that in terms of absolute numbers juvenile life without parole sentences for nonhomicides are more common than the sentencing practices at issue in some of this Court’s other Eighth Amendment cases. This contrast can be instructive, however, if attention is first given to the base number of certain types of offenses. For example, in the year 2007 (the most recent year for which statistics are available), a total of 13,480 persons, adult and juvenile, were arrested for homicide crimes. That same year, 57,600 juveniles were arrested for aggravated assault; 3,580 for forcible rape; 34,500 for robbery; 81,900 for burglary; 195,700 for drug offenses; and 7,200 for arson. Although it is not certain how many of these numerous juvenile offenders were eligible for life without parole sentences, the comparison suggests that in proportion to the opportunities for its imposition, life without parole sentences for juveniles convicted of nonhomicide crimes is as rare as other sentencing practices found to be cruel and unusual.

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. . . Many States have chosen to move away from juvenile court systems and to allow juveniles to be transferred to, or charged directly in, adult court under certain circumstances. Once in adult court, a juvenile offender may receive the same sentence as would be given to an adult offender, including a life without parole sentence. But the fact that transfer and direct charging laws make life without parole possible for some juvenile nonhomicide offenders does not justify a judgment that many States intended to subject such offenders to life without parole sentences.

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Community consensus, while “entitled to great weight,” is not itself determinative of whether a punishment is cruel and unusual. In accordance with the constitutional design, “the task of interpreting the Eighth Amendment remains our responsibility.” The judicial exercise of independent judgment requires consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question. In this inquiry the Court also considers whether the challenged sentencing practice serves legitimate penological goals.

Roper v. Simmons (2005) established that because juveniles have lessened culpability they are less deserving of the most severe punishments. As compared to adults, juveniles have a “lack of maturity and an underdeveloped sense of responsibility”; they “are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure”; and their characters are “not as well formed.” 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.”

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The Court has recognized that defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers. . . . Serious nonhomicide crimes “may be devastating in their harm . . . but ‘in terms of moral depravity and of the injury to the person and to the public,’ . . . they cannot be compared to murder in their ‘severity and irrevocability.’” . . .

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 age of the offender and the nature of the crime each bear on the analysis.

As for the punishment, life without parole is “the second most severe penalty permitted by law.” It is true that a death sentence is “unique in its severity and irrevocability;” yet life without parole sentences share some characteristics with death sentences that are shared by no other sentences. The State does not execute the offender sentenced to life without parole, but the sentence alters the offender’s life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency – the remote possibility of which does not mitigate the harshness of the sentence. . . .

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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. . . .

The penological justifications for the sentencing practice are also relevant to the analysis. . . . Retribution is a legitimate reason to punish, but it cannot support the sentence at issue here. Society is entitled to impose severe sanctions on a juvenile nonhomicide offender to express its condemnation of the crime and to seek restoration of the moral imbalance caused by the offense. But “[t]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender.” . . . The case becomes even weaker with respect to a juvenile who did not commit homicide. *Roper* found that “[r]etribution is not proportional if the law’s most severe penalty is imposed” on the juvenile murderer. *Ibid.* The considerations underlying that holding support as well the conclusion that retribution does not justify imposing the second most severe penalty on the less culpable juvenile nonhomicide offender.

Deterrence does not suffice to justify the sentence either. *Roper* noted that “the same characteristics that render juveniles less culpable than adults suggest . . . that juveniles will be less susceptible to deterrence.” Because juveniles’ “lack of maturity and underdeveloped sense of responsibility . . . often result in impetuous and ill-considered actions and decisions,” they are less likely to take a possible punishment into consideration when making decisions. . . .

Incapacitation, a third legitimate reason for imprisonment, does not justify the life without parole sentence in question here. Recidivism is a serious risk to public safety, and so incapacitation is an important goal. . . . 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. “It 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.”

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A sentence of life imprisonment without parole, however, cannot be justified by the goal of rehabilitation. The penalty forswears altogether 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. This judgment is not appropriate in light of a juvenile nonhomicide offender’s capacity for change and limited moral culpability. . . .

In sum, penological theory is not adequate to justify life without parole for juvenile nonhomicide offenders. This determination; the limited culpability of juvenile nonhomicide offenders; and the severity of life without parole sentences all lead to the conclusion that the sentencing practice under consideration is cruel and unusual. This Court now holds that for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole. This clear line is necessary to prevent the possibility that life without parole sentences will be imposed on juvenile nonhomicide offenders who are not sufficiently culpable to merit that punishment. Because “[t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood,” those who were below that age when the offense was committed may not be sentenced to life without parole for a nonhomicide crime.

... [E]ven if we were to assume that some juvenile nonhomicide offenders might have “sufficient psychological maturity, and at the same time demonstrat[e] sufficient depravity,” to merit a life without parole sentence, it does not follow that courts taking a case-by-case proportionality approach could with sufficient accuracy distinguish the few incorrigible juvenile offenders from the many that have the capacity for change. . . .

Another problem with a case-by-case approach is that it does not take account of special difficulties encountered by counsel in juvenile representation. As some *amici* note, the features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings. Juveniles mistrust adults and have limited understandings of the criminal justice system and the roles of the institutional actors within it. They are less likely than adults to work effectively with their lawyers to aid in their defense.

... [A] categorical rule gives all juvenile nonhomicide offenders a chance to demonstrate maturity and reform. 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. Maturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation.

... There is support for our conclusion in the fact that, in continuing to impose life without parole sentences on juveniles who did not commit homicide, the United States adheres to a sentencing practice rejected the world over. This observation does not control our decision. The judgments of other nations and the international community are not dispositive as to the meaning of the Eighth Amendment. But “[t]he climate of international opinion concerning the acceptability of a particular punishment” is also “not irrelevant.” . . . A recent study concluded that only 11 nations authorize life without parole for juvenile offenders under any circumstances; and only 2 of them, the United States and Israel, ever impose the punishment in practice. . . . We also note that Article 37(a) of the United Nations Convention on the Rights of the Child, ratified by every nation except the United States and Somalia, prohibits the imposition of “life imprisonment without possibility of release . . . for offences committed by persons below eighteen years of age.”

The State’s *amici* stress that no international legal agreement that is binding on the United States prohibits life without parole for juvenile offenders and thus urge us to ignore the international consensus. These arguments miss the mark. The question before us is not whether international law prohibits the United States from imposing the sentence at issue in this case. The question is whether that punishment is cruel and unusual. In that inquiry, “the overwhelming weight of international opinion against” life without parole for nonhomicide offenses committed by juveniles “provide[s] respected and significant confirmation for our own conclusions.

... 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 with some realistic opportunity to obtain release before the end of that term. The judgment of the First District Court of Appeal of Florida is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

JUSTICE STEVENS, with whom JUSTICE GINSBURG and JUSTICE SOTOMAYOR join, concurring.

. . . 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.

CHIEF JUSTICE ROBERTS, concurring in the judgment.

...
Today, the Court views *Roper v. Simmons* (2005) as providing the basis for a new categorical rule that juveniles may never receive a sentence of life without parole for nonhomicide crimes. I disagree. In *Roper*, the Court tailored its analysis of juvenile characteristics to the specific question whether juvenile offenders could constitutionally be subject to capital punishment. . . . This conclusion does not establish that juveniles can never be eligible for life without parole. A life sentence is of course far less severe than a death sentence, and we have never required that it be imposed only on the very worst offenders, as we have with capital punishment. Treating juvenile life sentences as analogous to capital punishment is at odds with our longstanding view that “the death penalty is different from other punishments in kind rather than degree.” . . .

But the fact that *Roper* does not support a categorical rule barring life sentences for all juveniles does not mean that a criminal defendant’s age is irrelevant to those sentences. On the contrary, our cases establish that the “narrow proportionality” review applicable to noncapital cases itself takes the personal “culpability of the offender” into account in examining whether a given punishment is proportionate to the crime. There is no reason why an offender’s juvenile status should be excluded from the analysis. Indeed, given *Roper*’s conclusion that juveniles are typically less blameworthy than adults, an offender’s juvenile status can play a central role in the inquiry.

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Applying the “narrow proportionality” framework to the particular facts of this case, I conclude that Graham’s sentence of life without parole violates the Eighth Amendment.

I begin with the threshold inquiry comparing the gravity of Graham’s conduct to the harshness of his penalty. There is no question that the crime for which Graham received his life sentence—armed burglary of a nondomicil with an assault or battery—is “a serious crime deserving serious punishment.” So too is the home invasion robbery that was the basis of Graham’s probation violation. But these crimes are certainly less serious than other crimes, such as murder or rape.

As for Graham’s degree of personal culpability, he committed the relevant offenses when he was a juvenile—a stage at which, *Roper* emphasized, one’s “culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.” There is no reason to believe that Graham should be denied the general presumption of diminished culpability that *Roper* indicates should apply to juvenile offenders. If anything, Graham’s in-court statements—including his request for a second chance so that he could “do whatever it takes to get to the NFL”—underscore his immaturity.

. . . Based on the foregoing circumstances, I conclude that there is a strong inference that Graham’s sentence of life imprisonment without parole was grossly disproportionate in violation of the Eighth Amendment. I therefore proceed to the next steps of the proportionality analysis.

Both intrajurisdictional and interjurisdictional comparisons of Graham’s sentence confirm the threshold inference of disproportionality.

Graham’s sentence was far more severe than that imposed for similar violations of Florida law, even without taking juvenile status into account. For example, individuals who commit burglary or robbery offenses in Florida receive average sentences of less than 5 years and less than 10 years,

respectively. Unsurprisingly, Florida’s juvenile criminals receive similarly low sentences—typically less than five years for burglary and less than seven years for robbery. . . .

Finally, the inference that Graham’s sentence is disproportionate is further validated by comparison to the sentences imposed in other domestic jurisdictions. As the majority opinion explains, Florida is an outlier in its willingness to impose sentences of life without parole on juveniles convicted of nonhomicide crimes.

So much for Graham. But what about Milagro Cunningham, a 17-year-old who beat and raped an 8-year-old girl before leaving her to die under 197 pounds of rock in a recycling bin in a remote landfill? Or Nathan Walker and Jakaris Taylor, the Florida juveniles who together with their friends gang-raped a woman and forced her to perform oral sex on her 12-year-old son? The fact that Graham cannot be sentenced to life without parole for his conduct says nothing whatever about these offenders, or others like them who commit nonhomicide crimes far more reprehensible than the conduct at issue here. The Court uses Graham’s case as a vehicle to proclaim a new constitutional rule—applicable well beyond the particular facts of Graham’s case—that a sentence of life without parole imposed on *any* juvenile for *any* nonhomicide offense is unconstitutional. This categorical conclusion is as unnecessary as it is unwise.

...

Those under 18 years old may as a general matter have “diminished” culpability relative to adults who commit the same crimes, but that does not mean that their culpability is always insufficient to justify a life sentence. It does not take a moral sense that is fully developed in every respect to know that beating and raping an 8-year-old girl and leaving her to die under 197 pounds of rocks is horribly wrong. The single fact of being 17 years old would not afford Cunningham protection against life without parole if the young girl had died—as Cunningham surely expected she would—so why should it do so when she miraculously survived his barbaric brutality?

...

The Court is of course correct that judges will never have perfect foresight—or perfect wisdom—in making sentencing decisions. But this is true when they sentence adults no less than when they sentence juveniles. It is also true when they sentence juveniles who commit murder no less than when they sentence juveniles who commit other crimes. . . . Some crimes are so heinous, and some juvenile offenders so highly culpable, that a sentence of life without parole may be entirely justified under the Constitution. . . .

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, and with whom JUSTICE ALITO joins in part, dissenting.

...

It is by now well established that the Cruel and Unusual Punishments Clause was originally understood as prohibiting torturous “*methods of punishment,*” specifically methods akin to those that had been considered cruel and unusual at the time the Bill of Rights was adopted. . . . [T]here is virtually no indication that the Cruel and Unusual Punishments Clause originally was understood to require proportionality in sentencing.

. . . The Eighth Amendment prohibits the government from inflicting a cruel and unusual method of punishment upon a defendant. Other constitutional provisions ensure the defendant’s right to fair process before any punishment is imposed. But, as members of today’s majority note, “[s]ociety changes,” and the Eighth Amendment leaves the unavoidably moral question of who “deserves” a particular nonprohibited method of punishment to the judgment of the legislatures that authorize the penalty, the prosecutors who seek it, and the judges and juries that impose it under circumstances they deem appropriate.

...

Until today, the Court has based its categorical proportionality rulings on the notion that the Constitution gives special protection to capital defendants because the death penalty is a uniquely severe punishment that must be reserved for only those who are “most deserving of execution.” Of course, the Eighth Amendment itself makes no distinction between capital and noncapital sentencing, but the

“‘bright line’” the Court drew between the two penalties has for many years served as the principal justification for the Court’s willingness to reject democratic choices regarding the death penalty.

Today’s decision eviscerates that distinction. “Death is different” no longer. The Court now claims not only the power categorically to reserve the “most severe punishment” for those the Court thinks are “‘the most deserving of execution,’” *but also* to declare that “less culpable” persons are categorically exempt from the “*second* most severe penalty.” No reliable limiting principle remains to prevent the Court from immunizing any class of offenders from the law’s third, fourth, fifth, or fiftieth most severe penalties as well.

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According to the Court, proper Eighth Amendment analysis “begins with objective indicia of national consensus,” and “[t]he clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures.” As such, the analysis should end quickly, because a national “consensus” in favor of the Court’s result simply does not exist. . . . [T]he Federal Government, the other 37 States, and the District authorize life-without-parole sentences for certain nonhomicide offenses, and authorize the imposition of such sentences on persons under 18. Only *five* States prohibit juvenile offenders from receiving a life-without-parole sentence that could be imposed on an adult convicted of the same crime.

Moreover, the consistency and direction of recent legislation—a factor the Court previously has relied upon when crafting categorical proportionality rules underscores the consensus *against* the rule the Court announces here. . . . States over the past 20 years have consistently *increased* the severity of punishments for juvenile offenders. This, in my view, reveals the States’ widespread agreement that juveniles can sometimes act with the same culpability as adults and that the law should permit judges and juries to consider adult sentences—including life without parole—in those rare and unfortunate cases. Second, legislatures have moved away from parole over the same period. Congress abolished parole for federal offenders in 1984 amid criticism that it was subject to “gamesmanship and cynicism.” In light of these developments, the argument that there is nationwide consensus that parole must be available to offenders less than 18 years old in *every* nonhomicide case simply fails.

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The Court nonetheless insists that the 26 States that authorize this penalty, but are not presently incarcerating a juvenile nonhomicide offender on a life-without-parole sentence, cannot be counted as approving its use. . . . But this misapplies the Court’s own evolving standards test, “[i]t is not the burden of [a State] to establish a national consensus *approving* what their citizens have voted to do; rather, it is the ‘heavy burden’ of petitioners to establish a national consensus *against* it.” In light of this fact, the Court is wrong to equate a jurisdiction’s disuse of a legislatively authorized penalty with its moral opposition to it. The fact that the laws of a jurisdiction permit this sentencing practice demonstrates, at a minimum, that the citizens of that jurisdiction find tolerable the possibility that a jury of their peers could impose a life-without-parole sentence on a juvenile whose nonhomicide crime is sufficiently depraved.

The recent case of 16-year-old Keighton Budder illustrates this point. Just weeks before the release of this opinion, an Oklahoma jury sentenced Budder to life without parole after hearing evidence that he viciously attacked a 17-year-old girl who gave him a ride home from a party. . . . Budder allegedly put the girl’s head “‘into a headlock and sliced her throat,’ “ raped her, stabbed her about 20 times, beat her, and pounded her face into the rocks alongside a dirt road. Miraculously, the victim survived.

Budder’s crime was rare in its brutality. The sentence the jury imposed was also rare. According to the study relied upon by this Court, Oklahoma had no such offender in its prison system before Budder’s offense. Without his conviction, therefore, the Court would have counted Oklahoma’s citizens as morally opposed to life-without-parole sentences for juveniles nonhomicide offenders.

Yet Oklahoma’s experience proves the inescapable flaw in that reasoning: Oklahoma citizens have enacted laws that allow Oklahoma juries to consider life-without-parole sentences in juvenile nonhomicide cases. Oklahoma juries invoke those laws rarely—in the unusual cases that they find exceptionally depraved. I cannot agree with the Court that Oklahoma citizens should be constitutionally disabled from using this sentencing practice merely because they have not done so more frequently. If

anything, the rarity of this penalty's use underscores just how judicious sentencing judges and juries across the country have been in invoking it.

...

[T]he Court acknowledges that, at a minimum, the imposition of life-without-parole sentences on juvenile nonhomicide offenders serves two "legitimate" penological goals: incapacitation and deterrence. By definition, such sentences serve the goal of incapacitation by ensuring that juvenile offenders who commit armed burglaries, or those who commit the types of grievous sex crimes described by THE CHIEF JUSTICE, no longer threaten their communities. That should settle the matter, since the Court acknowledges that incapacitation is an "important" penological goal. . . .

...

. . . [The] research relied upon by the *amici* cited in the Court's opinion differentiates between adolescents for whom antisocial behavior is a fleeting symptom and those for whom it is a lifelong pattern. That research further suggests that the pattern of behavior in the latter group often sets in before 18. And, notably, it suggests that violence itself is evidence that an adolescent offender's antisocial behavior is *not* transient.

In sum, even if it were relevant, none of this psychological or sociological data is sufficient to support the Court's "'moral'" conclusion that youth defeats culpability in *every* case.

. . . The integrity of our criminal justice system depends on the ability of citizens to stand between the defendant and an outraged public and dispassionately determine his guilt and the proper amount of punishment based on the evidence presented. That process necessarily admits of human error. But so does the process of judging in which we engage. As between the two, I find far more "unacceptable" that this Court, swayed by studies reflecting the general tendencies of youth, decree that the people of this country are not fit to decide for themselves when the rare case requires different treatment.

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Under the Court's precedents, I fail to see how an "inference" of gross disproportionality arises here. The concurrence notes several arguably mitigating facts—Graham's "lack of prior criminal convictions, his youth and immaturity, and the difficult circumstances of his upbringing." But the Court previously has upheld a life-without-parole sentence imposed on a first-time offender who committed a *nonviolent* drug crime. See *Harmelin v. Michigan* (1991). Graham's conviction for an actual violent felony is surely more severe than that offense. As for Graham's age, it is true that *Roper* held juveniles categorically ineligible for capital punishment, but as the concurrence explains, *Roper* was based on the "explicit conclusion that [juveniles] 'cannot with reliability be classified among the *worst* offenders'"; it did "not establish that juveniles can never be eligible for life without parole." . . .

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The "objective" elements of the *Solem* test provide no additional support for the concurrence's conclusion. The concurrence compares Graham's sentence to "similar" sentences in Florida and concludes that Graham's sentence was "far more severe." But strangely, the concurrence uses average sentences for burglary or robbery offenses as examples of "similar" offenses, even though it seems that a run-of-the-mill burglary or robbery is not at all similar to Graham's criminal history, which includes a charge for armed burglary with assault, *and* a probation violation for invading a home at gunpoint.

And even if Graham's sentence is higher than ones he might have received for an armed burglary with assault in other jurisdictions, this hardly seems relevant if one takes seriously the principle that "'[a]bsent a constitutionally imposed uniformity inimical to traditional notions of federalism, some State will *always* bear the distinction of treating particular offenders more severely than any other State.'"

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JUSTICE ALITO, dissenting.

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