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"Death is Different" No Longer: Graham v. Florida and the Future of Eighth Amendment Challenges to Noncapital Sentences.

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"'DEATH IS DIFFERENT' NO LONGER": GRAHAM v FLORIDA AND THE FUTURE OF EIGHTH AMENDMENT CHALLENGES TO NONCAPITAL SENTENCES

In *Graham v Florida*,[1] a Florida state prisoner asked the Supreme Court to hold that the Cruel and Unusual Punishments Clause of the Eighth Amendment categorically precludes the imposition of life-without-parole sentences for any juvenile offender who has committed a nonhomicide offense.[2] There was no Supreme Court

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[1] 130 S Ct 2011 (2010).

[2] The Supreme Court originally granted certiorari in two Florida cases in which two defendants had been sentenced to life without parole for nonhomicide offenses committed while they were juveniles. In *Graham v Florida* the defendant was sixteen years old when he was arrested with three other juveniles for the bungled robbery of a barbecue restaurant. Id a 2018. "No money was taken" but one of the other youths "struck the manager in the back of the head with a metal bar." Id. Graham was prosecuted as an adult and pled guilty to attempted armed robbery and to armed burglary with assault or battery, the latter of which carried a maximum possible penalty of life without parole. Graham was sentenced to probation. At the age of seventeen, Graham was arrested in connection with a home invasion robbery. A different judge revoked his probation and sentenced him to life without

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precedent to support such a holding. Indeed, the relevant Supreme Court jurisprudence seemed clearly to preclude Graham's argument. The Court had previously held in *Roper v Simmons*[3] that the Eighth Amendment categorically prohibits capital sentences for offenders who were below the age of eighteen when they committed their crimes, but the Court did so for the expressed reason that death is different.[4] Members of the Court had long explained the uniqueness of capital cases by intoning the mantra "death is different" in countless cases since at least 1972.[5] Remarkably, however, the Court accepted Graham's invitation and left behind more than thirty years of consistent Supreme Court jurisprudence, seemingly without a second thought or backward glance. Indeed, the Court did not even acknowledge that the law had changed, still less that it had changed substantially and dramatically. The result reached in *Graham* was consistent with sound constitutional policy and could have been supported with many good reasons, but the Court failed to provide a candid explanation for its decision. Death was different no longer, but the Court did nothing to explain why that was the case.

In the thirty-year period preceding *Graham*, the Supreme Court had developed two clear and distinct lines of precedent.[6] The Court had enforced the Cruel and Unusual Punishments Clause in capital

parole on the original case. See id at 2018–20. Graham framed his question presented broadly to cover all juveniles: "Whether the Eighth Amendment's ban on cruel and unusual punishments prohibits the imprisonment of a juvenile for life without the possibility of parole as punishment for the juvenile's commission of a non-homicide." Petition for Writ of Certiorari, *Graham v Florida*, No 08-7412, *i (filed Nov 20, 2008) (available on Westlaw at 2008 WL 6031405). In *Sullivan v Florida*, 130 S Ct 2059 (2010) (dismissing writ of ceriorari as improvidently granted), the defendant presented a question that was narrowly tailored to his own circumstances: Whether "imposition of a life-without-parole sentence on a thirteen-year-old for a non-homicide violates . . . the Eighth and Fourteenth Amendments, where the freakishly rare imposition of such a sentence reflects a national consensus on the reduced criminal culpability of children." Petition for Writ of Certiorari, *Sullivan v Florida*, No 08-7621, *i (filed Dec 4, 2008) (available on Westlaw at 2008 WL 6031406).

[3] 543 US 551 (2005).

[4] Id at 568 (describing the Court's special treatment of death penalty cases).

[5] See, for example, *Furman v Georgia*, 408 US 238, 290 (1972) (Brennan, J, concurring) ("Death is a unique penalty."); id at 306 (Stewart, J, concurring) ("[P]enalty of death differs from all other forms of criminal punishment, not in degree but in kind."). See also *Graham*, 130 S Ct at 2046 (Thomas, J, dissenting) ("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.") (citations omitted).

[6] See Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 Mich L Rev 1145, 1146 (2009) (describing a "stark two-track system for sentencing").

cases by applying a two-step test to decide when to create categorical rules which prohibited the imposition of the death sentence for certain crimes and certain classes of offenders. For example, the death penalty could not be imposed for rape; nor could it be imposed on offenders who were mentally retarded. By contrast, the Court did not articulate categorical rules for noncapital cases; it required those sentences to be evaluated on a case-by-case basis under a balancing test. Because this balancing test caused courts to focus on the nature and specifics of the offense, before *Graham* it was virtually impossible for juvenile offenders in noncapital cases to prove that their sentences were unconstitutional. In *Graham*, however, the Court adopted a variation of the categorical rule that it had most recently applied in *Roper* to prohibit the imposition of the death penalty based on age. The Court thus took the radical step of announcing a categorical rule applicable to noncapital cases. By a 6-to-3 vote, the Court held that the life-without-parole sentence in *Graham* violated the Eighth Amendment. Five Justices held that the imposition of life-without-parole sentences for nonhomicide crimes committed by juvenile offenders categorically violates the Eighth Amendment.[7] Because the majority opinion provided scant explanation for switching to a categorical rule, it is not clear how the Court will treat future cases. The Court's decision prompted Justice Thomas, one of the three dissenters, to observe: "'Death is different' no longer."[8]

The Court's decision to abandon the balancing test in this context had an important practical effect: it ensured that no juvenile would ever be subject to a life-without-parole sentence for a crime short of homicide.[9] The decision had immediate and profound effects for

[7] *Graham*, 130 S Ct at 2034. Chief Justice Roberts expressly rejected the majority's categorical rule, but concluded in a separate concurrence that Graham had shown that his sentence violated the Eighth Amendment under the traditional proportionality test applicable to noncapital cases. Id at 2042 (Roberts, CJ, concurring).

[8] Id at 2046 (Thomas, J, dissenting).

[9] The Court dismissed the *Sullivan* petition as improvidently granted, presumably because of certain procedural defects identified by the state. Sullivan, who was thirteen years old at the time he committed his crimes, was convicted in 1989 for the brutal rape and robbery of a seventy-nine-year-old woman in her home. Brief for Respondent, *Sullivan v Florida*, No 08-7621, *4 (filed Sept 4, 2009) (available on Westlaw at 2009 WL 2954164) ("Sullivan Res Brief"). Sullivan was sentenced to serve a term of life imprisonment without possibility of parole. Following the Supreme Court's decision in *Roper*, Sullivan filed a successive postconviction petition under Florida law, contending that the Supreme Court's decision in *Roper* applied to his case, and entitled him to relief, even though he had not been sentenced to death. The Florida trial court held that Sullivan was not entitled to

that admittedly small subset of juveniles. Before, when the offender's culpability was simply one factor to be considered in the sentencing decision, juvenile offenders had little hope of proving that their sentences should be set aside: juveniles lacking in genuine culpability, and fully capable of rehabilitation, might well receive sentences that made it impossible for them ever to redeem themselves or lead productive lives. That danger existed because judges applying a fact-dependent balancing test on a case-by-case basis were likely to place too much weight on the nature and specifics of the offense, while giving too little attention to the diminished culpability of juvenile offenders. There was reason to be concerned about whether the balancing test was capable, as a practical matter, of accomplishing what must be accomplished if the Eighth Amendment is to be given effect in this area.[10]

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file a successive petition under Florida law because such otherwise time-barred petitions could be filed, as a matter of state law, only in cases in which a new, applicable constitutional right had been established. Id at *8. According to the trial court, that exception did not apply because *Roper* did not create a new constitutional right that was applicable to Sullivan's case. Id at *12–*13. The state appellate court affirmed without opinion, and the Florida Supreme Court, as a matter of Florida law, lacked jurisdiction to hear a further appeal. Id at *1. Although the Supreme Court of the United States granted review, the state argued that the Court lacked jurisdiction because Sullivan's claims were time-barred under state law. At oral argument, the state continued to press that point, but conceded that Sullivan would be entitled, as a matter of state law, to file a new postconviction petition in the event that the Court reversed the decision in *Graham*. Thus, following its decision in *Graham*, the Court dismissed the petition in *Sullivan*, and thereby avoided having to deal with both the nettlesome procedural issues and the unsavory facts presented in *Sullivan*.

[10] The decision to alter course also situated the Court within a larger debate. Some of the most fundamental questions for theories of adjudication involve locating the proper line between issues of fact and questions of law, the division of authority between factfinder and expositor of law, and the proper role of discretion in legal decision making. These issues arise in different forms in many areas of law, the most notable, perhaps, involving the proper division of authority between judge and jury in cases in which a jury trial is guaranteed by either the Sixth or Seventh Amendment to the Constitution. See US Const, Amend VI; US Const, Amend VII. However, these issues also arise in somewhat different form in other areas. They arise, for example, in administrative law, where, even absent the possibility of a trial by jury, the choice between rulemaking and adjudication is often thought to have significant practical consequences. See generally *United States v Storer Broadcasting Company*, 351 US 192 (1956) (holding that applicants for an FCC license to operate a broadcasting station must be given a "full hearing" if they have reached their existing limit of stations and presented adequate reasons to justify why the FCC's regulations should be changed or waived upon their application). One particularly important situation in which this issue arises is when the Supreme Court identifies a constitutional violation, defines its limits, and prescribes how it is to be proved. Compare *Swain v Alabama*, 380 US 202 (1965), with *Batson v Kentucky*, 476 US 79 (1986). Sometimes the Court provides for enforcement of a particular constitutional value by announcing a balancing test, which necessarily requires case-by-case adjudication, close attention to particular factual circumstances, and the exercise of discretion. At other times, the Court simply prescribes a categorical rule, which takes one or another factor to be dispositive, and effectively dictates the outcome once that factor has been established. The Court

The first part of this article will discuss the evolution of the Court's two lines of Eighth Amendment jurisprudence leading up to *Graham*, those relating to noncapital and capital cases, respectively, and will discuss the two distinct frameworks the Court has applied to the two categories: a balancing test for noncapital cases and a categorical approach for capital cases. It will also distill three factors that underlie both tests. The second part will discuss the Court's decision to apply the categorical approach to *Graham*, even though it was a noncapital case. The second part will then analyze the Court's holding and the principal alternative opinions (authored by Chief Justice Roberts and Justice Thomas) to determine why the Court was willing to break so fundamentally with its prior jurisprudence. The third part will consider the ramifications of *Graham* and will make some predictions about where the doctrinal innovation of *Graham* may lead. In particular, the third part will consider what *Graham* bodes for three subsets of offenders: juvenile offenders who commit homicides, mentally retarded defendants, and adult defendants who commit nonhomicides.

I. The Court's Cruel and Unusual Punishment Jurisprudence

Until *Graham*, the Court had drawn a clear and unmistakable line down the middle of its Eighth Amendment Cruel and Unusual Punishments Clause jurisprudence. Capital cases were analyzed under a "categorical" test, and all punishments of imprisonment for a term of years, even those that might seem to be functionally indistinguishable from capital sentences, were analyzed under a "balancing" test.[11] Specifically, in capital cases, the Court had used a multipart test to decide whether to formulate a categorical rule binding on the lower courts that would prohibit the death penalty with respect to an entire class of offenses or offenders. In noncapital (or term-of-years) cases, by contrast, the Court had engaged in a multipart, case-by-case analysis to determine whether, in light of all the circumstances, a particular sentence was constitutionally dis-

presumably chooses one approach or the other depending on what work needs to be done and how well the Court thinks one or the other approach will facilitate that work. At times, these practical considerations are strong enough to compel the Court to deviate from precedent.

[11] See generally Kathleen M. Sullivan, *The Supreme Court 1991 Term: Foreword: The Justices of Rules and Standards*, 106 Harv L Rev 22 (1992) (discussing categorical and balancing tests).

proportionate to the particular crime that the offender had committed. Before discussing the categorical-balancing distinction between the Court's capital and noncapital jurisprudence and the way in which that distinction was elided in *Graham*, it is useful to note that the two lines of jurisprudence share certain underlying commonalities; three common factors run through both tests.

A. THE THREE UNDERLYING FACTORS

The three factors that can be distilled from the Court's capital and noncapital Cruel and Unusual Punishments Clause jurisprudence are: the nature and seriousness of the offense (Factor 1), the culpability of the offender (Factor 2), and the nature and harshness of the penalty (Factor 3). The Court has focused on these three factors in determining whether a particular punishment is prohibited by the Eighth Amendment, and has incorporated these factors at different stages of its analysis depending on whether it is reviewing a capital or noncapital case. It is necessary to flesh out these factors before showing how they are manifested in the very different legal tests that have evolved in capital and noncapital cases.

First, the Court has considered offense-related considerations, which can be grouped together as Factor 1. These include the nature of the offense, the number of crimes committed by the defendant, and "the harm caused or threatened to the victim or society."[12] The Court has essentially divided the universe of crimes into three categories for purposes of proportionality analysis: murder, other crimes against individuals (including rape of a child), and certain crimes thought to constitute crimes against society, such as treason, terrorism, and drug trafficking. In the capital context, the Court has deemed the death penalty to be categorically impermissible for certain crimes (e.g., the crime of rape). In reviewing the imposition of life-without-parole sentences under recidivism statutes, the Court also has looked to the nature of the predicate crimes on which eligibility depends.

Second, the Court has focused on the culpability of the offender. We call this offender-related consideration Factor 2. At the threshold, the Court has distinguished among defendants with presumptively full adult capacity and culpability, those with severely

[12] *Graham*, 130 S Ct at 2042 (Roberts, CJ, concurring).

diminished culpability due to mental retardation, and those with presumptively diminished culpability by virtue of their youth. With respect to defendants with presumptively full adult capacity and culpability, the Court has found that the proportionality principle requires individualized consideration of the offender's "mental state and motive in committing the crime," as well as his or her criminal history, including prior convictions and such collateral matters as probation or parole violations.[13] The Court has constitutionally excluded from some punishments for some crimes those with severely diminished culpability by virtue of actual mental defect, as well as those who are categorically deemed to have constructive diminished culpability because of their membership in a particular age group. Presumably, special factors such as somewhat diminished mental capacity, psychological problems, and extraordinary emotional immaturity might also be considered. In general, however, the case law has suggested that offenders with full adult culpability will be eligible for the imposition of any punishment that is theoretically available with respect to the crime charged.

Third, the Court has considered the nature and harshness of the penalty. We call this consideration Factor 3. This factor also breaks down into three categories: capital sentences, noncapital sentences that may be deemed functionally similar to the death penalty (e.g., life without parole), and ordinary noncapital sentences. Despite the Court's repeated incantation that "death is different," the *Graham* Court acknowledged that some noncapital sentences are sufficiently like a capital sentence (either categorically or in particular circumstances) that they should be evaluated on that basis.[14] There also seems to be considerable disagreement within the Court as to whether such a realist or functional view of sentences is justified, and, if so, how far it should be permitted to affect the substance of the Court's Eighth Amendment jurisprudence.

B. THE TWO TESTS FOR CRUEL AND UNUSUAL PUNISHMENT CHALLENGES

The three factors we have distilled are evident in the very dif-

[13] Id at 2037.

[14] Id at 2027.

ferent tests the Court has formulated in noncapital and capital cases to determine whether a particular penalty is unconstitutionally cruel and unusual. In noncapital cases before the *Graham* decision, the Court applied what began as a three-part balancing test and evolved into a two-stage balancing test. The two stages are as follows. At Stage 1, the Court and lower courts engage in a threshold analysis to determine whether the defendant has established "an inference of gross disproportionality."[15] This threshold analysis requires an inquiry into "the gravity of the offense," which encompasses both the nature of the offense (Factor 1) and the culpability of the offender (Factor 2). To complete the threshold analysis, the gravity of the offense (Factors 1 and 2) is then weighed and balanced against the type of sentence imposed (Factor 3). Not every showing of disproportionality is sufficient to warrant further constitutional scrutiny; only in the "rare case"[16] in which the court determines that the defendant has indeed established an inference of *gross* disproportionality is the court required to proceed to the second stage. At Stage 2, the court considers "sentences imposed on other criminals in the same jurisdiction" ("intrajurisdictional" analysis) and "sentences imposed for commission of the same crime in other jurisdictions" ("interjurisdictional" analysis).[17] For both analyses, the court looks both to the legislatively available sentencing possibilities and to actual sentencing outcomes within the jurisdiction.[18]

The Court has applied a very different test to determine whether the Eighth Amendment categorically prohibits imposition of the death penalty for a particular kind of offense or class of offender. The Court's test in capital cases is a two-step categorical test. At Step 1 of the test, the Court determines whether "objective indicia of society's standards"[19] demonstrate a national consensus against the death penalty. (This part of the test is based on the notion that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing

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[15] *Harmelin v Michigan*, 501 US 957, 1005 (1991) (Kennedy, J, concurring).

[16] Id.

[17] Id, quoting *Solem v Helm*, 463 US 277, 291–92 (1983).

[18] *Solem*, 463 US at 298–300.

[19] *Roper*, 543 US at 563. This aspect of the test derives originally from *Gregg v Georgia*, 428 US 153, 173 (1976) (discussing the importance of "objective indicia that reflect the public attitude toward a given sanction").

society.")[20] The Court determines whether a national consensus exists by looking to the number of jurisdictions in which legislation authorizes the death penalty for a particular category of offender or offense,[21] and by looking as well to how often, if at all, a legislatively authorized sentencing option has been utilized with respect to the particular offense or class of offender.[22] In examining sentencing outcomes, the Court may consider the total number of individuals within that class of offender who have received the death penalty for that offense in each jurisdiction.[23] At Step 2 of the test, the Court makes a "subjective,"[24] "independent judgment"[25] about whether capital punishment for the particular type of crime or class of offenders violates the Eighth Amendment. The Court does so by considering the same factors it considers at the threshold first stage of the balancing test in noncapital cases: It weighs the seriousness of the crime or class of crime at issue (Factor 1) and the culpability of the offender or class of offenders (Factor 2) against the severity of the punishment (Factor 3).[26] At this second step of the test, the Court also considers the "penological justifications" for the death penalty,[27] and especially whether it serves the goals of retribution and deterrence.[28] In addition, "the Court has referred to the laws of other countries

[20] *Trop v Dulles*, 356 US 86, 101 (1958).

[21] *Atkins v Virginia*, 536 US 304, 312 (2002).

[22] See *Roper*, 543 US at 567 (including among "objective indicia of consensus" "the infrequency of [a punishment's] use even where it remains on the books"). See also *Kennedy v Louisiana*, 554 US 407, 433 (2008) (noting the importance of examining "statistics about the number of executions" in addition to legislation).

[23] See, for example, *Kennedy*, 554 US at 433–34. Although this analysis is clearly a type of interjurisdictional analysis, the Court has never termed it such in its death penalty jurisprudence. Nor has the Court even analogized the interjurisdictional analysis used in noncapital cases to the national consensus analysis used in death cases.

[24] *Gregg*, 428 US at 173; *Coker v Georgia*, 433 US 584, 592 (1977).

[25] *Roper*, 543 US at 564.

[26] This subjective and independent comparative analysis goes back to *Gregg*, in which the Court held that "the imposition of capital punishment for the crime of murder" was not "invariably disproportionate to the crime." 428 US at 187. The Court engaged in the same analysis in its later capital cases. See, for example, *Enmund v Georgia*, 458 US 782, 797 (1982) ("the death penalty [Factor 3] . . . is an excessive penalty for the robber who, as such, does not take human life [Factor 1]"); *Atkins*, 536 US at 320–21 (concluding that especially in light of the "reduced capacity" of mentally retarded offenders (Factor 2), the death penalty is an "excessive" punishment (Factor 3)).

[27] *Roper*, 543 US at 571.

[28] See, for example, *Gregg*, 428 US at 183; *Coker*, 433 US at 592; *Edmund*, 458 US at 798–801; *Atkins*, 536 US at 318–21; *Roper*, 543 US at 571–75.

and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of 'cruel and unusual punishments.'"[29] The international consensus is not a formal part of the test; the Court deems it to be "instructive" but "not . . . controlling."[30]

c. the evolution of the court's noncapital and capital tests

A review of the Court's precedents demonstrates the evolution of the balancing test in the noncapital cases and the categorical test in the capital cases, and shows that until *Graham*, the Court had never imported the test for one type of case into the other context.

1. *The noncapital cases*. The Court's modern Eighth Amendment noncapital sentencing jurisprudence dates to 1980. In dissent in *Rummel v Estelle*,[31] Justice Powell laid out the first incarnation of what would become the Court's standard cruel and unusual test for noncapital cases. In *Rummel*, the Court faced the first proportionality challenge to a state noncapital sentence since the Court's 1962 holding that the Cruel and Unusual Punishments Clause of the Eighth Amendment applied to the states.[32] By a 5-to-4 vote, the Court rejected the challenge, holding that Texas had not violated the Eighth Amendment when, in accordance with its recidivism statute, it imposed a life sentence on a defendant who had been convicted of a series of three offenses—credit card fraud, passing a forged check, and obtaining money by false pretenses—which netted him a total of $229.11.[33] The Court held that "the length of the sentence actually imposed is purely a matter of legislative prerogative,"[34] and that Texas, "having twice imprisoned him for felonies, . . . was entitled to place upon Rummel the onus of one who is simply unable to bring his conduct within the social norms prescribed by the criminal law of the State."[35]

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[29] *Roper*, 543 US at 575. See also *Coker*, 433 US 596 n 10 ("[T]he climate of international opinion" is "not irrelevant."); *Enmund*, 458 US at 796 n 22; *Atkins*, 536 US at 318–20.

[30] *Roper*, 543 US at 575.

[31] 445 US 263 (1980).

[32] See *Robinson v California*, 370 US 660, 667 (1962).

[33] *Rummel*, 445 US at 285.

[34] Id at 274.

[35] Id at 284.

However, the Court acknowledged that it had "on occasion stated that the Eighth Amendment prohibits imposition of a sentence that is grossly disproportionate to the severity of the crime"[36] and conceded in a footnote that a proportionality principle might come into play "in the extreme example mentioned by the dissent, . . . if a legislature made overtime parking a felony punishable by life imprisonment."[37]

In his dissent, Justice Powell suggested a test for determining unconstitutional disproportionality in a noncapital case. Powell's test had three steps, the first of which rested on one of the three factors we have distilled: First, courts should consider the nature of the offense (Factor 1); second, courts should examine the penalties imposed within the jurisdiction for similar crimes (intrajurisdictional analysis); and third, courts should look to penalties imposed in other jurisdictions for the same crime (interjurisdictional analysis).[38]

Three years later, in *Solem v Helm*,[39] another 5-to-4 decision, the Court specifically adopted the three-part test that the *Rummel* Court had rejected.[40] Justice Powell, writing for the Court, articulated Step 1 of the test as comparing "the gravity of the offense" (which could be discerned by evaluating "the harm caused or threatened to the victim or society" (Factor 1) as well as "the culpability of the offender" (Factor 2)) with "the harshness of the penalty."[41] Steps 2 and 3 remained the intrajurisdictional and interjurisdictional analyses.[42] Because of Helm's six prior nonviolent felony convictions, the court had sentenced him to life imprisonment without parole under South Dakota's recidivism statute.[43]

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[36] Id at 271.

[37] Id at 274.

[38] Id at 295 (Powell, J, dissenting).

[39] 463 US 277 (1983).

[40] Id at 290–92.

[41] Id at 291–92.

[42] Id ("the sentences imposed on other criminals in the same jurisdiction; and . . . the sentences imposed for commission of the same crime in other jurisdictions.").

[43] Helm had committed a series of relatively minor offenses over a fifteen-year period, culminating in a drunken episode in which he uttered a "no account" check for $100 in circumstances he could not later recall. Helm was convicted of three third-degree burglaries, one each in 1964, 1966, and 1969. He was convicted of obtaining money by false pretense in 1972 and of grand larceny in 1973. In 1975, he was convicted of driving while intoxicated. Finally, in 1979, he pleaded guilty to the offense of uttering a "no account" check for $100. At the time of his guilty plea, Helm explained that he had been drinking

In view of Helm's record as a "habitual criminal," the trial judge thought that "the only prudent thing . . . is to lock you up for the rest of your natural life."[44] The *Solem* Court set aside the sentence as unconstitutionally disproportionate.[45] A proportionality challenge would not succeed in another noncapital case until *Graham*.

In 1991, the Court was asked in *Harmelin v Michigan*[46] to hold that the imposition of a mandatory life-without-parole sentence, without consideration of mitigating factors (such as the absence of prior felony convictions), violated the Cruel and Unusual Punishments Clause.[47] Harmelin was a first-time offender who had been convicted of simple possession of 672 grams of cocaine.[48] The relevant statute required imposition of a life-without-parole sentence for possession of 650 or more grams of a narcotic mixture, without regard to its purity.[49]

In an opinion by Justice Scalia, the Court in *Harmelin* declined to find that the mandatory life-without-parole sentence was unconstitutional, holding, again by a 5-to-4 vote, that severe mandatory penalties may be cruel, but that such penalties are not "unusual in the constitutional sense."[50] Justice Scalia, joined by Chief Justice Rehnquist, would have gone on to hold that the Eighth Amendment contains no proportionality requirement in noncapital cases.[51] While Justice Scalia acknowledged that "one can imagine extreme examples that no rational person, in no time or place, could accept," such examples are both "easy to decide" and "certain never to occur."[52] While acknowledging that the

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and that he knew that he had ended up with more money than he had started out with, but he could not otherwise recall the circumstances. The maximum sentence for uttering a "no account" check was five years' imprisonment and a $5,000 fine. Id at 279–83.

[44] Id at 282–83.

[45] Id at 303. The Court reasoned that Helm had "received the penultimate sentence for relatively minor criminal conduct," had "been treated more harshly than other criminals in the state who have committed more serious crimes," and had "been treated more harshly than he would have been in any other jurisdiction, with the possible exception of a single state." Id.

[46] 501 US 957 (1991).

[47] Petition for Writ of Certiorari, *Harmelin v Michigan*, No 89-7272, *I (filed Aug 13, 1990) (available on Westlaw at 1990 WL 515104).

[48] *Harmelin*, 501 US at 961.

[49] Id.

[50] Id at 994–95.

[51] See generally *Harmelin*, 501 US 957.

[52] Id at 985–86.

Court previously had applied a proportionality principle in capital cases, Justice Scalia presumably found no constitutional basis for that practice either.[53] Justice Scalia stated that he would not overrule that line of cases, but neither would he "extend it further."[54]

Justice Kennedy, writing for himself and two other members of the Court, concurred in the judgment, but rejected Justice Scalia's general views with respect to proportionality, on the ground that "stare decisis counsels our adherence to the narrow proportionality principle that has existed in our Eighth Amendment jurisprudence for 80 years."[55] Justice Kennedy also asserted that *Solem* "did not announce a rigid three-part test."[56] Instead, according to Justice Kennedy, it established a "threshold" inquiry into whether a "comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality."[57] "[O]nly in the rare case" in which such an inference was created was it appropriate to engage in "intrajurisdictional and interjurisdictional analyses."[58] The *Harmelin* plurality thereby redefined Justice Powell's three-part test as a two-stage test, consisting of a difficult-to-meet threshold gross disproportionality inquiry at Stage 1, followed at Stage 2 by intrajurisdictional and interjurisdictional analyses.

The four dissenting Justices would have held that Harmelin's sentence was cruel and unusual.[59] Particularly noteworthy was Justice White's emphasis on the limited universe of sentences available in Michigan. He found significance in the fact that "[t]he mandatory sentence of life imprisonment without possibility of parole 'is the most severe punishment that the State could have

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[53] Id at 965.

[54] Id at 995.

[55] Id at 996 (Kennedy, J, concurring). Justice Kennedy's reference to "80 years" is a reference to *Weems v United States*, 217 US 349 (1910), in which the Court held that a noncapital sentence violated the Cruel and Unusual Punishments Clause because it was excessive compared to the crime. The case involved a criminal conviction from the Philippines, which was then subject to federal jurisdiction. The defendant had been convicted of falsifying pay records and sentenced to fifteen years' hard labor, permanent deprivation of civil rights, and lifetime surveillance. Although this "narrow proportionality principle" has "existed in our Eighth Amendment jurisprudence" since *Weems*, its routine application in capital cases dates only to 1977, when the Court decided *Coker v Georgia*, 433 US 584 (1977), and in noncapital cases to 1980, when the Court decided *Rummel v Estelle*, 445 US 63 (1980).

[56] *Harmelin*, 501 US at 1004 (Kennedy, J, concurring).

[57] Id at 1005.

[58] Id.

[59] Id at 1027 (White, J, dissenting).

imposed on any criminal for any crime,' for Michigan has no death penalty."[60] The *Graham* Court would later justify its holding by reference to a similar consideration, noting that its decision in *Roper* had left life without parole as the most severe penalty any juvenile could receive.

Finally, in 2003, the Court decided two noncapital proportionality cases involving California's "three strikes" recidivism law.[61] In the first case, *Ewing v California*,[62] a defendant with two prior felony convictions was sentenced to a term of twenty-five years to life imprisonment as an enhanced penalty for shoplifting three golf clubs valued at $399 each.[63] The Court upheld the sentence by a 5-to-4 vote. In a plurality opinion for herself, the Chief Justice, and Justice Kennedy, Justice O'Connor held, "The proportionality principles in our cases distilled in Justice Kennedy's concurrence [in *Harmelin*] guide our application of the Eighth Amendment" in noncapital cases.[64] Specifically, the *Ewing* Court held that *Solem* "did not *mandate*" comparative analysis "within and between jurisdictions."[65] *Ewing* thus solidified the transformation of *Solem*'s three-part test into a two-stage test with an onerous threshold inquiry. Justice Scalia and Justice Thomas each separately concurred in the judgment on the ground that the Eighth Amendment contains no proportionality principle.[66]

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[60] Id at 1022. In addition, because of the mandatory life sentence imposed for mere possession, and the absence of any more punitive penalty, the same sentence would be imposed for the crime of possession with intent to distribute.

[61] Under that law, a defendant who previously had been convicted of one "serious" or "violent" felony would be subject, when later convicted of a felony, to a mandatory sentence "twice the term otherwise provided." Cal Penal Code § 667(e)(1) (West). A defendant who had two or more prior convictions for "serious" or "violent" felonies would receive a mandatory "indeterminate term of life imprisonment" as a sentence for a new felony conviction. Cal Penal Code § 667(e)(2)(A) (West).

[62] 538 US 11 (2003).

[63] Id at 19–20.

[64] Id at 23.

[65] Id (emphasis added).

[66] Justice Scalia reiterated the substance of his opinion in *Harmelin*, that is, that the Eighth Amendment's prohibition of cruel and unusual punishments "was aimed at excluding only certain modes of punishment, and was not a 'guarantee against disproportionate sentences.'" Id at 31. Justice Scalia went on to state that the "narrow proportionality principle" which had evolved from the majority's footnote concession in *Rummel*, and had been articulated at length in *Solem*, was incapable of coherent application and thus not entitled to stare decisis effect. Id. Justice Scalia argued that "the notion that the punishment should fit the crime . . . is inherently . . . tied to the penological goal of retribution," whereas, as the plurality concedes, a "sentence can have a variety of justifications, such

Justices Stevens, Breyer, Souter, and Ginsburg dissented. The dissenters would have held that Ewing's sentence was unconstitutionally disproportionate.[67] Among other things, Justice Breyer noted in his dissent that "Ewing's sentence, unlike Rummel's (but like Helm's sentence in *Solem*), is long enough to consume the productive remainder of almost any offender's life. (It means that Ewing himself, seriously ill when sentenced at age thirty-eight, will likely die in prison.)."[68]

In *Lockyer v Andrade*,[69] a federal habeas case that was decided the same day, the Court held, by the same 5-to-4 vote, that the California Court of Appeals had not ruled "contrary to" or unreasonably applied "clearly established" Supreme Court precedent when it rejected a disproportionality attack on the two consecutive twenty-five-year terms the sentencing court had imposed for two counts of petty theft by a person with a prior conviction.[70] The two counts of petty theft involved two instances of shoplifting videos with a total combined value of $150.[71] The majority found that the "clearly established" test (applicable to habeas cases because of the limitations on federal review mandated by the Antiterrorism and Effective Death Penalty Act of 1996)[72] was not met because the Court's jurisprudence was unclear: "In most situations, the task of determining what we have clearly established will be straightforward. The difficulty with Andrade's position, however, is that our precedents in this area have not been a model of clarity."[73]

Justice Souter, writing for the four dissenting Justices, would have found that the law was "clearly established" because Andrade's case was virtually identical to Helm's.[74] In addition, Justice Souter made the common-sense point that, practically speaking, a sentence of fifty years (for what he characterized as two trivial

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as incapacitation, deterrence, retribution, or rehabilitation"—none of which logically can be evaluated in terms of proportionality. Id.

[67] Id at 35 (Breyer, J, dissenting).

[68] Id at 39.

[69] 538 US 63 (2003).

[70] Id at 77.

[71] Id at 66.

[72] Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub L No 104-132, 110 Stat 1214 (1996).

[73] *Lockyer*, 538 US at 72.

[74] Id at 78 (Souter, J, dissenting).

offenses) imposed on an ill thirty-seven-year-old man "amounts to life without parole."[75] The majority responded:

> Justice Souter's position would treat a sentence of life without parole for the 77-year-old person convicted of murder as equivalent to a sentence of life with the possibility of parole in 10 years for the same person convicted of the same crime. Two different sentences do not become materially indistinguishable based solely upon the age of the persons sentenced.[76]

2. *The capital cases*. In its death penalty jurisprudence, the Court has employed a two-step test to determine when to adopt categorical, bright-line rules holding that the imposition of the death penalty could never be justified for a particular offense or category of offender. While the categorical test itself has changed little since its earliest articulation, defendants have had substantial success in convincing the Court that they have met the test's criteria, and, as a result, the number of circumstances in which the Court categorically prohibits capital punishment has grown.

As noted above, to determine whether there is a national consensus against the imposition of the death penalty for a particular crime (e.g., rape) or a particular class of offender (e.g., the mentally retarded), the Court first examines "objective" criteria (Step 1 of the test), and then brings to bear its own "subjective" judgment about whether the imposition of the death penalty for that same crime or on that same class of offenders constitutes cruel and unusual punishment (Step 2 of the test).[77] If both steps of the test are met, the Court categorically prohibits the imposition of the death penalty for the type of crime or class of offender at issue. The Court also considers whether there is an international consensus on the issue, although that inquiry is not formally one of the steps of the test.

The Court's categorical rules in capital cases have been based on two of the factors we have distilled. Sometimes the Court imposes a categorical rule based on "the nature of the offense" (Factor 1), prohibiting the death penalty for a particular crime; sometimes the Court imposes a categorical rule based on "the

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[75] Id at 79.

[76] Id at 74.

[77] *Gregg*, 428 US at 173; *Coker*, 433 US at 592; *Enmund*, 458 US at 788–89; *Thompson v Oklahoma*, 487 US 815, 821–23 (1988); *Atkins*, 536 US at 312–13; *Kennedy*, 554 US at 421. See also Part I.B above.

characteristics of the offender" (Factor 2), prohibiting the death penalty for a particular class of defendants.[78] The cases in which the Court has categorically prohibited the imposition of death based on the nature of the offense include *Coker v Georgia*[79] (rape of an adult), *Enmund v Florida*[80] (felony murder), and *Kennedy v Louisiana*[81] (rape of a child), while the Court has prohibited the death penalty based on the characteristics of the offender in cases such as *Thompson v Oklahoma*[82] (youth under sixteen), *Atkins v Virginia*[83] (mental retardation), and *Roper v Simmons*[84] (youth under eighteen).

The modern development of proportionality analysis in capital cases begins after the Court's 1976 reinstatement of the death penalty in *Gregg v Georgia*.[85] In 1977, the Court ruled in *Coker v Georgia*[86] that the Cruel and Unusual Punishments Clause categorically prohibited the imposition of the death penalty for the crime of rape of an adult woman. Four Justices applied the two-step test and concluded that the punishment was grossly disproportionate to the severity of the crime.[87] The plurality determined that Step 1 of the test was satisfied because "the objective evidence of the country's present judgment"[88] demonstrated that death was not an acceptable penalty for the crime at issue.[89] In reaching this determination, the plurality focused on three facts: no other state authorized the death penalty for rape of an adult, only two other states authorized the death penalty for rape of a child, and Georgia juries had not imposed the death penalty in 90 percent of rape convictions.[90] Step 2 of the test was satisfied because, in the Court's independent judgment, comparing the seriousness of the crime of

[78] *Graham*, 130 S Ct at 2022.

[79] 433 US 584 (1977).

[80] 458 US 782 (1982).

[81] 554 US 407 (2008).

[82] 487 US 815 (1988).

[83] 536 US 304 (2002).

[84] 543 US 551 (2005).

[85] 428 US 153 (1976).

[86] 433 US 584 (1977).

[87] Id at 592.

[88] Id at 593.

[89] Id at 596.

[90] Id at 586–600.

rape (Factor 1) with the harshness of capital punishment (Factor 3) leads to the conclusion that "the death penalty . . . is an excessive penalty for the rapist who, as such, does not take human life."[91] According to these four Justices, mere aggravating circumstances could not justify imposition of the death penalty on a defendant whose victim did not die.[92] Two Justices would have held that the death penalty violates the Eighth Amendment in all circumstances.[93]

Several members of the *Coker* Court rejected the appropriateness of a categorical rule. Justice Powell concurred in the judgment, but he would have upheld the imposition of the death penalty in a case in which the rape was committed with "excessive brutality" or resulted in "serious or lasting injury" to the victim.[94] In a dissent joined by Justice Rehnquist, Chief Justice Burger also rejected the appropriateness of a categorical rule.[95] They suggested that imposition of the death penalty would be constitutionally permissible, for example, in the case of "a person who has, within the space of three years, raped three separate women, killing one and attempting to kill another, who is serving prison terms exceeding his probable lifetime and has not hesitated to escape confinement at the first available opportunity."[96]

The Court continued to recognize additional categorical exclusions from capital punishment through the late 1980s. In 1983, in *Enmund v Florida*,[97] the Court again applied the two-step test and adopted another bright-line rule, holding that the death penalty could not be imposed for felony murder, where the defendant had not committed the actual murder and lacked intent to kill.[98] The *Enmund* Court referred back to *Gregg* to add an additional consideration to the Court's Step 2 subjective analysis: To pass constitutional muster, capital punishment must contribute to the penological purposes of retribution and deterrence.[99] Four Justices

[91] Id at 598.

[92] Id at 599.

[93] Id at 600.

[94] Id at 604.

[95] See id at 606–07 (Burger, CJ, dissenting).

[96] Id at 607.

[97] 458 US 782 (1982).

[98] Id at 801.

[99] Id at 798–99.

dissented.[100] In 1986, in *Ford v Wainwright*,[101] the Court held that the Eighth Amendment categorically prohibited the execution of prisoners who were insane at the time of execution.[102] Five Justices held that the Eighth Amendment prohibited the execution of the insane. Two Justices joined in the judgment on the narrow ground that Florida had deprived the defendant of a state-created liberty interest without affording due process of law, and two other Justices dissented.[103] In 1988, the Court held in *Thompson v Oklahoma*,[104] by a vote of 5-to-3, that juveniles under the age of sixteen could not be executed pursuant to death penalty statutes that did not specify any minimum age.[105] Four Justices would have held that the Eighth Amendment categorically prohibited the execution of people younger than sixteen, regardless of what the statute provided.[106]

The next year, the Court declined to extend categorical protection from capital punishment to mentally retarded persons and to juveniles who commit capital crimes while under the age of seventeen. In *Penry v Lynaugh*,[107] the Court was asked to hold that executing mentally retarded persons categorically violated the Eighth Amendment.[108] The Court held that the Eighth Amendment was violated because the trial court failed to instruct the jury that it could consider and give effect to mitigating evidence of the defendant's mental retardation and abused background, but only four Justices would have held that the Eighth Amendment categorically prohibited the execution of the mentally retarded.[109] Also in 1989, in *Stanford v Kentucky*,[110] the Court declined to adopt a bright-line rule prohibiting the execution of persons who com-

[100] See generally id at 801–31 (O'Connor, J, dissenting).

[101] 477 US 399 (1986).

[102] Id at 410.

[103] See id at 399.

[104] 487 US 815 (1988).

[105] Id at 838 (Stevens, J) (plurality).

[106] Id.

[107] 492 US 302 (1989).

[108] Id at 307.

[109] See generally id.

[110] 492 US 361 (1989).

mitted capital crimes while sixteen or seventeen.[111] Four Justices would have adopted that rule.[112]

Penry and *Stanford* proved to be short-lived. In 2002, the Court decided *Atkins v Virginia*,[113] holding, by a 6-to-3 vote, that the Eighth Amendment categorically prohibited the execution of the mentally retarded.[114] Three years later, in *Roper*, the Court held, by a 5-to-4 vote, that the Cruel and Unusual Punishments Clause prohibited the execution of persons whose offenses were committed before the age of eighteen.[115]

In *Atkins*, the Court reconfirmed its two-step test for determining whether the Eighth Amendment categorically prohibits imposition of the death penalty for a particular kind of offense or class of offender. With regard to Step 1 of the test, the Court emphasized that "[p]roportionality review under . . . evolving standards [of decency] should be informed by objective factors to the maximum extent possible,"[116] and "the clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures."[117] Recent legislation and the trend of legislation are particularly important.[118] The Court also looked to other indicia of consensus, such as the frequency with which an authorized penalty has been used,[119] evidence of a "broader social and professional consensus,"[120] and the practice of other countries.[121] Once the Court determined that a consensus existed, the Court moved on to Step 2 of the test and brought its "own judgment . . . to bear on the acceptability of the death penalty under the Eighth Amendment."[122] The Court decided that executing the mentally retarded did not meet the goals of retribution

[111] Id at 380.

[112] Id at 382.

[113] 536 US 304 (2002).

[114] Id at 321.

[115] *Roper*, 543 US at 578.

[116] 536 US at 312 (citations omitted).

[117] Id, citing *Penry*, 492 US at 331.

[118] *Atkins*, 536 US at 313–16.

[119] Id at 316.

[120] Id at 316 n 21.

[121] Id ("[W]ithin the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.").

[122] Id at 312, quoting *Coker*, 433 US at 597 (1977).

and deterrence,[123] and that there was therefore no "reason to disagree with the judgment reached by the citizenry and its legislators."[124] Applying this analysis, the *Atkins* Court held that the Eighth Amendment categorically prohibits the execution of the mentally retarded.[125]

In *Roper*, the Court revisited the juvenile death penalty issue. Using the same two-step test, the Court, in an opinion by Justice Kennedy, held that the Eighth Amendment categorically precludes the imposition of the death penalty for any crime committed before the age of eighteen.[126] As in *Atkins*, the Court in *Roper* looked to "the opinion of the world community" as "not controlling [the] outcome" but "provid[ing] respected and significant confirmation of [the Court's] own conclusions."[127]

Finally, in 2008, the Court decided *Kennedy v Louisiana*,[128] in which the Court again applied its two-step test and held, by a 5-to-4 vote, that the Eighth Amendment categorically precludes the imposition of the death penalty for the rape of a child where the crime did not result, and was not intended to result, in the victim's death.[129] Effectively, the Court answered the question left open in *Coker* and thus expanded the prohibition against the imposition of capital punishment for rape to include all rape cases not resulting in the victim's death. Justice Kennedy, again writing for the majority, distinguished the crime of rape (including the rape of a child) from the crime of murder, holding that the Eighth

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[123] *Atkins*, 536 US at 321.

[124] Id at 313. See also id at 321.

[125] Id at 321.

[126] *Roper*, 543 US at 568. Justice O'Connor, one of the four dissenters, observed: "The Court's decision today establishes a categorical rule forbidding the execution of any offender for any crime committed before his eighteenth birthday, no matter how deliberate, wanton, or cruel the offense. Neither the objective evidence of contemporary societal values, nor the Court's moral proportionality analysis, nor the two in tandem suffice to justify this ruling." Id at 587 (O'Connor, J, dissenting).

[127] Although Justice Kennedy has been criticized for considering the international perspective in *Roper*, Erwin Chemerinsky believes that "the criticism is misplaced because Justice Kennedy did not base his decision on the law in other countries. Instead, he pointed to it as an indication of evolving standards of decency." Erwin Chemerinsky, *The Rehnquist Court and the Death Penalty*, 94 Georgetown L J 1367, 1372 (2006); see also Barry Sullivan, *The Irish Constitution: Some Reflections from Abroad*, in Oran Doyle and Eoin Carolan, eds, *The Irish Constitution: Governance and Values* (Thompson Round Hall, 2008) (discussing controversy regarding citation of foreign law).

[128] 554 US 407 (2008).

[129] Id at 413.

Amendment never permitted the imposition of the death penalty for rape.[130] However, Justice Kennedy specifically left open the possibility that other crimes—such as drug trafficking, treason, and terrorism—might well warrant the death penalty.[131]

Pre-*Graham* precedent thus demonstrates that the Court has historically applied the two-stage balancing test in noncapital cases to determine, on a case-by-case basis, whether a given term-of-years punishment violates the Eighth Amendment, and has applied the two-step categorical test in capital cases to determine whether to categorically prohibit the imposition of the death penalty for a particular type of crime or class of offender.[132] Precedent also shows that defendants have fared far better in capital cases than in noncapital cases. While the Court has expanded categorical prohibitions on the death penalty for particular types of crimes and particular classes of defendants, the Court has narrowed the relief available to defendants challenging their noncapital sentences.

II. The Radical Result in Graham v Florida

A. the defendants' bold litigation strategy

The *Graham* and *Sullivan* defendants adopted a litigation strategy that appeared risky at first blush. Although the defendants were challenging a noncapital sentence rather than the imposition of the death penalty, they shied away from the traditional case-by-case balancing test used in noncapital cases and instead asked the Court to analogize their cases to the capital case of *Roper*, in which the Court had announced a categorical rule that imposing the death penalty on juveniles violated the Eighth Amendment.[133]

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[130] Id at 446.

[131] Id at 437.

[132] The case law also reflects a great deal of struggle within the Court over the legitimacy and application of the Eighth Amendment's proportionality principle, as well as strong disagreement over the legitimacy of limiting the discretion of the sentencing authority through constitutionally based, bright-line rules that require issues to be decided as a matter of law.

[133] See, for example, Brief for Petitioner, *Sullivan v Florida*, 08-7621, *5 (filed July 16, 2009) (available on Westlaw at 2009 WL 2159656) ("Sullivan Pet Brief") (stating from the outset of the summary of the argument: "The constitutional logic of *Roper v Simmons* controls this case."); Reply Brief, *Graham v Florida*, 08-7412, *2 (filed October 14, 2009) (available on Westlaw at 2009 WL 3340114) ("Graham Rep Brief") ("*Roper*'s rationale cannot be cabined solely to capital cases.").

Indeed, Sullivan articulated and applied only the categorical test from *Roper* and the other death penalty cases[134] and made no mention whatever of the traditional noncapital test. Graham paid slightly more attention to the noncapital test. He first articulated three "factors" that included only the threshold analysis portion of the noncapital test ("a comparison of the gravity of the offense with the harshness of the punishment imposed")[135] and then spent the bulk of his brief focusing on *Roper* and applying *Roper*'s categorical test to the facts of his case.[136] Only toward the end of the brief did Graham apply the traditional two-stage noncapital test and engage in intrajurisdictional and interjurisdictional analyses.[137] Clearly, the defendants thought it virtually impossible that they could prevail under the balancing test traditionally used in noncapital cases and therefore wanted the Court to abandon (or ignore) that test for purposes of evaluating their claims.

Given that the Court had applied some species of the balancing test for nearly thirty years in noncapital cases, it seemed unlikely that the Court would simply abandon that test, abandon the notion that "death is different," and apply the alternative test that the defendants proposed. On the other hand, if the Court used the traditional noncapital proportionality test, the defendants had virtually no chance of winning. The Court had not sustained a single Eighth Amendment challenge in a noncapital case since 1983, the year Helm convinced a bare majority of the Court that the imposition of a sentence of life imprisonment without parole was a constitutionally disproportionate punishment for the offense of issuing a "no account" check.

The defendants in *Graham* and *Sullivan* fortified their position by arguing that their cases fit into both subsets of prior jurisprudence subject to categorical rules. As discussed above, the Court's capital jurisprudence covers cases in which the death penalty is categorically prohibited based on the nature of the offense (Factor

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[134] Sullivan Pet Brief at *8–*11.

[135] Brief for Petitioner, *Graham v Florida*, 08-7412, *31 (filed July 16, 2009) (available on Westlaw at 2009 WL 2159655) ("Graham Pet Brief"). The other two "factors" Graham articulated came from the categorical test: "whether the particular sentence would serve a legitimate penological purpose" and "a comparison of the sentence imposed to evolving standards of decency as reflected in the laws and practices of the States and the international community." Id.

[136] Id at *36–*53. Part II of the brief applies the categorical test.

[137] Id at *56–*64.

1), as well as cases in which it is categorically prohibited based on the characteristics of the offender (Factor 2). Graham argued that he was part of a class defined by both factors: his crimes had not resulted in death (Factor 1), and his juvenile status constituted a constructive diminution of his culpability (Factor 2). The defendant also argued that Factor 3 (the harshness of the penalty) was especially salient for his particular class, because, after *Roper*, life without parole was the most severe penalty that any juvenile under the age of eighteen could face. Thus, Graham argued that because the Court had held in *Enmund* that the death penalty was disproportionate to nonhomicide crimes, "[i]t logically follows . . . that the harshest juvenile punishment (life without parole) is disproportionate when it is imposed on a juvenile offender, like Graham, who did not take life, attempt to take life, or intend to take life."[138] The defendants' primary argument in support of applying the categorical test hinged on the characteristics and culpability of juvenile offenders.[139] In essence, they argued that "youth is different"—so much so that it is a controlling factor analogous to "death," and thus one that justifies application of a categorical prohibition by analogy to the Court's capital jurisprudence.

B. THE REASONS BEHIND THE GRAHAM MAJORITY'S BREAK WITH PRECEDENT

Remarkably, the *Graham* majority accepted the defendants' argument, thereby breaking with the Court's prior Eighth Amendment jurisprudence, even as the Court feigned adherence to precedent. Although Chief Justice Roberts claimed in his concurrence

[138] Id at *55. One significant question raised in both the *Graham* and *Sullivan* cases was the precise age at which the Court should draw the line if it chose to formulate a categorical rule prohibiting the imposition of life-without-parole sentences on juveniles. In one sense, there was an easy solution, that is, for the Court simply to adopt the same age that it had adopted for purposes of the death penalty in *Roper*. On the other hand, perhaps there was a point below eighteen at which there was, as a general matter, sufficient culpability to warrant imposition of a sentence that was not entirely indistinguishable from death. The matter was discussed extensively at oral argument in both cases. Given his age at the time of his crimes, Graham was required to argue that the cutoff should be eighteen. Given his own circumstances, Sullivan would have been content with an earlier age being designated as the cutoff, but he offered no advice to the Court as to where the line should be drawn, except to say that it should be a line that included him within the protection of the rule. The Court ultimately drew the line at eighteen without any real explanation, but presumably because that is where it had drawn the line with respect to the death penalty in *Roper*.

[139] Graham Pet Brief at *32–*43; Sullivan Pet Brief at *11–*30. Part A of the Brief applies the categorical test.

that the Court would have reached the same result under the balancing test traditionally employed in noncapital cases, a closer analysis of the three principal opinions in *Graham* (Justice Kennedy's opinion for the majority, Chief Justice Roberts's concurrence, and Justice Thomas's dissent) shows that the Court's adoption of the defendants' proffered test was far from gratuitous in terms of the result it permitted the Court to reach. Indeed, the adoption of a categorical test prohibiting life-without-parole sentences for juveniles was essential if the Court was to ensure that Graham and other juvenile offenders who commit nonhomicide crimes would not be subject to a punishment that was thought to be unconstitutional by a majority of the Court.[140]

Justice Kennedy began his opinion for the Court by explaining that the Court's Eighth Amendment proportionality jurisprudence could be divided into "two general classifications," namely, challenges to sentences of imprisonment, which require an analysis of "all the circumstances of the case," and challenges to capital sentences, which require the application of "categorical restrictions."[141] After elaborating at some length on the legal test ap-

[140] Justice Thomas's dissent was joined in whole by Justice Scalia and in part by Justice Alito. In addition to the three principal opinions, there was a brief concurring opinion by Justice Stevens (joined by Justices Ginsburg and Sotomayor) and a brief dissenting opinion by Justice Alito. In his concurring opinion, Justice Stevens took issue with Justice Thomas's assertion that the majority opinion was in error because it was unfaithful to the Court's earlier decisions in *Lockyer*, *Ewing*, *Harmelin*, and *Rummel*. Justice Stevens responded that, "Given 'evolving standards of decency' have played a central role in our Eighth Amendment jurisprudence for at least a century, see *Weems v United States*, 217 US 349, 373–78 (1910), this argument suggests that the dissenting opinions in those cases more accurately describe the law today than does Justice Thomas' rigid interpretation of the Amendment." *Graham*, 130 S Ct at 2036 (Stevens, J, concurring). Justice Stevens concluded his opinion with the observation that "[w]hile Justice Thomas would apparently not rule out a death sentence for a $50 theft by a 7-year-old, . . . the Court wisely rejects his static approach to the law. Standards of decency have evolved since 1980. They will never stop doing so." Id. Justice Alito wrote separately to make three points. First, Justice Alito joined only in Parts I and III of Justice Thomas's opinion, and thus did not join in three other parts. Those were Part II, in which Justice Thomas argued that the Court's decision in *Weems*, as well as the Court's more recent jurisprudence, were unfaithful to the language and history of the Eighth Amendment; Part IV, in which Justice Thomas attempted to show that the result was not even warranted under *Solem* and would create serious problems of application; and Part V, in which Justice Thomas stated that the decision as to whether the punishment fit the crime was one for the Florida legislature, not the Supreme Court. Justice Alito made two other points: First, "Nothing in the Court's opinion affects the imposition of a sentence to a term of years without the possibility of parole." *Graham*, 130 S Ct at 2058 (Alito, J, dissenting). Second, "the question whether petitioner's sentence violates the narrow, as-applied proportionality principle that applies to noncapital sentences is not properly before us in this case," because Graham had not sufficiently preserved that issue. Id.

[141] *Graham*, 130 S Ct at 2021.

plicable to each class of cases, however, Justice Kennedy quickly and deftly abandoned that well-established distinction, and applied the test for capital cases to a noncapital case. He largely accomplished this sleight-of-hand in a single paragraph.[142] Justice Kennedy's opinion attempted to mask the Court's departure from precedent by (1) distinguishing *Graham* from the noncapital cases the Court previously had considered, and (2) claiming that the Court's prior jurisprudence left it with a legitimate choice between the categorical approach and the balancing approach in the context of life-without-parole sentences for juveniles, when, in fact, the Court had never previously recognized the categorical approach as an available option in the noncapital context.[143]

In a move that deeply troubled the dissenters, the Court first endorsed Graham's grounds for distinguishing his case from the noncapital cases previously considered by the Court, thus allowing the defendants, by pursuing a novel litigation strategy, to redefine the legal issue presented for the Court's decision: "The present case involves an issue the Court has not considered previously: a categorical challenge to a term-of-years sentence."[144] The majority explained that it was not using the case-by-case balancing approach it had used in the noncapital cases of *Harmelin* and *Ewing* because those defendants had simply challenged their own individual sentences under the traditional test. Graham, by contrast, was challenging the constitutionality of a sentence as applied to an entire class of persons, namely, to all juveniles who had committed nonhomicide offenses.[145] According to the majority, the Court's balancing approach was "suited [only] for considering a gross proportionality challenge to a particular defendant's sentence, but here a sentencing practice itself is in question. This case implicates a particular type of sentence as it applies to an entire class of offenders who have committed a range of crimes."[146] Without further analysis, the majority then held that because Graham's

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[142] Id at 2022–23.

[143] The Court's pretense of adherence to precedent calls to mind Justice Scalia's criticism of the majority in *Federal Election Commission v Wisconsin Right to Life*, 551 US 449 (2007), that the Court had "effectively overrule[d]" precedent while pretending its new test was compatible with its old test; Justice Scalia pronounced that "[t]his faux judicial restraint is judicial obfuscation." Id at 498.

[144] *Graham*, 130 S Ct at 2022.

[145] Id.

[146] Id at 2022–23.

challenge questioned the appropriateness of a particular penalty for a class of people who had committed various crimes, rather than for a particular individual who had committed a particular crime, Step 1 of the traditional noncapital test, which requires a threshold comparison of the severity of the penalty and the gravity of the offense, "does not advance the analysis."[147]

The majority's attempt to conceal its deviation from precedent is unpersuasive. First, it is unclear why a defendant's framing of the issue presented should ever be sufficient by itself to dictate the Court's approach to the substantive issues presented by a case, much less to persuade the Court to depart from precedent and abandon its customary mode of analysis.[148] Moreover, the challenges in *Harmelin* and *Ewing*, no less than the challenge mounted in *Graham*, could be said to "implicate[] a particular type of sentence as it applies to an entire class of offenders who have committed a range of crimes," even though they were not styled as categorical challenges. It could easily be said that *Harmelin* involved the "sentencing practice" of giving an entire class of offenders (adult defendants) life-without-parole sentences for fairly minor crimes. It could likewise be said that *Ewing* involved the sentencing practice of giving the class of adult defendants with prior criminal histories sentences of twenty-five years to life for even more minor crimes. While it is true that the Court had recently given juveniles class treatment in capital cases and had never treated adult defendants writ large as a class in such cases, that difference alone would not explain the Court's application of the categorical test to a noncapital case, especially considering the Court's repeated admonition that death is different.

The Court also attempted to mask its departure from relevant precedent by claiming that it was simply choosing between two equally legitimate tests when it decided to evaluate Graham's case under the categorical approach. But that was not the case. Notwithstanding the Court's failure to acknowledge it, the Court's prior jurisprudence recognized no such choice in the noncapital context. Instead of applying the balancing approach that the Court

[147] Id at 2023.

[148] Justice Thomas observed in dissent: "The Court asserts that categorical proportionality review is necessary here merely because Graham asks for a categorical rule and because the Court thinks clear lines are a good idea. I find those factors wholly insufficient to justify the Court's break from past practice." Id at 2047 (Thomas, J, dissenting) (citations omitted).

traditionally had applied in noncapital cases (or explaining its decision not to do so), the majority simply stated that "the appropriate analysis is the one used in cases that involved the categorical approach, specifically *Atkins*, *Roper*, and *Kennedy*."[149] By citing these three decisions in this way, the Court gave the impression that *Graham* followed naturally from established case law. But *Atkins*, *Roper*, and *Kennedy* were all capital cases, and, given the Court's "death is different" mantra, there was no basis for assuming that the approach used in those cases provided an available option in a noncapital case. Later in the opinion, the majority referred to the traditional balancing test for noncapital cases, stating: "Another possible approach would be to hold that the Eighth Amendment requires courts to take the offender's age into consideration as part of a case-specific gross disproportionality inquiry."[150] But of course that traditional balancing test was not merely "[a]nother possible approach"; it was the only approach that found support in the Court's noncapital jurisprudence. In sum, the majority attempted to mask the radical nature of its opinion by alternately pretending either to be responding to a new permutation of Eighth Amendment challenge or to be choosing between two relevant, established, equally available analytical tests. Notwithstanding the Court's protestations to the contrary, *Graham* marked a clear break with precedent.

Chief Justice Roberts, in a concurring opinion, twice called the categorical test that the Court announced in *Graham* "a new constitutional rule,"[151] adding in one instance that the new rule was "of dubious provenance."[152] He also accused the majority of "using this case as a vehicle for unsettling our established jurisprudence,"[153] and further observed that the Court's holding "is at odds with our longstanding view that 'the death penalty is different from other punishments in kind rather than degree.'"[154] Justice Thomas, in dissent, criticized the majority opinion on the more

[149] Id at 2023. Since *Atkins* and *Roper* belong to the subset of categorical cases that focuses on the characteristics of the offender, while *Kennedy* belongs to the subset that focuses on the nature of the offense, the majority thus acknowledged that *Graham* straddled both subsets.

[150] Id at 2031.

[151] Id at 2041 (Roberts, CJ, concurring).

[152] Id at 2037.

[153] Id at 2042.

[154] Id at 2038–39, citing *Solem*, 463 US at 294.

fundamental ground that the Court's gross disproportionality jurisprudence itself "lacks a principled foundation" in the Eighth Amendment, but he also criticized the Court for "remarkably expand[ing] [the] reach" of that standard.[155] In addition, Justice Thomas pointed out the unprecedented nature of the Court's decision to abandon the traditional balancing test in favor of a categorical rule: "For the first time in its history, the Court declares an entire class of offenders immune from a noncapital sentence using the categorical approach it previously reserved for death penalty cases alone. . . . 'Death is different' no longer."[156]

The *Graham* Court's decision to adopt a categorical test is especially noteworthy because that decision also deviated from the Court's recent tendency to favor the use of balancing tests, especially in criminal procedure cases. Although the Warren Court often decided constitutional issues by adopting categorical rules, the Court more recently has shifted its approach to favor the use of balancing tests, both in the constitutional criminal procedure arena and elsewhere.[157] As Jeffrey Fisher has suggested, "the Burger and Rehnquist Courts made the balancing revolution complete," particularly in the criminal procedure context.[158] Moreover, Fisher has observed that "modern balancing tends to work against individual rights in the realm of criminal procedure, where the consideration of governmental interests most often is used to create exceptions to previously firm protections for the accused."[159] Fisher points out that the Court has abandoned a balancing test in favor of a categorical test in only two criminal procedure cases in the past decade, namely, *Crawford* and *Blakely*.[160]

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[155] Id at 2046 (Thomas, J, dissenting).

[156] Id.

[157] Jeffrey L. Fisher, *Categorical Requirements in Constitutional Criminal Procedure*, 94 Georgetown L J 1493, 1498–1502 (2006). See generally Sullivan, 106 Harv L Rev at 22 (cited in note 11); T. A. Alenikoff, *Constitutional Law in the Age of Balancing*, 96 Yale L J 943 (1987).

[158] Fisher, 94 Georgetown L J at 1502 (cited in note 157).

[159] Id at 1505. See also Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U Colo L Rev 283, 307 (1992) ("[A]fter a period in which liberals have been using categorical approaches to favor rights and limit government, conservatives have advocated a shift to balancing approaches in order to limit rights and liberate government. A rich vein of examples may be found in contemporary criminal procedure law.").

[160] Fisher, 94 Georgetown L J at 1502 (cited in note 157) (discussing *Crawford v Washington*, 541 US 36 (2004) and *Blakely v Washington*, 542 US 961 (2005)).

The three principal opinions in *Graham* (the majority opinion, Chief Justice Roberts's concurrence, and Justice Thomas's dissent) provide significant insight into the reasons the Court departed from precedent, broke with the general trend identified by Fisher, and abandoned the traditional noncapital balancing test for a categorical formulation in the context of life-without-parole sentences for juveniles who commit nonhomicide crimes. If the Court's prior jurisprudence were truly controlling in *Graham*, the Court faced no "choice" of methodology; it was required to analyze Graham's claims under the traditional balancing test. Nonetheless, the majority perceived an alternative method of analysis and chose to adopt it.

The majority offered some insight into why it had exercised its "choice" in favor of the categorical approach by stating: "The [traditional] case-by-case approach to sentencing must . . . be confined by some boundaries."[161] The majority then provided three justifications for employing a categorical approach with respect to juveniles who are eligible for life-without-parole sentences. The majority's first justification rested on institutional competencies. The majority took from *Roper* the general proposition that juvenile offenders on the whole are less culpable and more capable of reform than adult offenders, and concluded that sentencing authorities lack the means for identifying "with sufficient accuracy" the "few incorrigible juvenile offenders" who might theoretically deserve the ultimate punishment a juvenile can receive.[162] The majority's second justification was that juveniles are generally less able than adults to assist their counsel to an extent that is "likely to impair the quality" of their representation, and that "a case-by-case approach . . . does not take account of [these] special difficulties encountered by counsel in juvenile representation."[163] The third justification was that "a categorical rule gives all juvenile nonhomicide offenders a chance to demonstrate maturity and reform."[164]

Underlying each of the majority's justifications for preferring a categorical rule over the traditional balancing approach is a normative judgment based on a factual conclusion: although a cate-

[161] *Graham*, 130 S Ct at 2031–32.

[162] Id at 2032.

[163] Id.

[164] Id.

gorical rule may allow a few truly culpable (and irredeemable) juvenile offenders to escape a life-without-parole sentence, the balancing test undoubtedly will impose life-without-parole sentences on other offenders who are not sufficiently culpable to warrant it, or who are at least capable of maturing and being rehabilitated—issues which, as a practical matter, are extremely difficult to predict.[165] The Court therefore concluded that it is better that those who do deserve the sentence should escape it than that those who do not deserve the sentence should have it imposed on them.[166] As a matter of constitutional policy, the Court's choice could be justified on the ground that an overinclusive rule provides more effective enforcement of Eighth Amendment values than an underinclusive balancing test.

The majority's justifications tell only part of the story. Scholars have identified a number of reasons to explain why courts might favor categorical tests over balancing tests.[167] Several of those reasons resonate here, specifically the reviewing courts' interest in formulating a test that is easy to administer and the desirability of reducing the possibility of bias on the part of the initial decision maker. Fisher has observed that "concerns regarding administrability . . . appear quite properly to propel various coalitions within the Court to favor categorical rules over balancing tests."[168] Fisher shows that the Court, both in *Crawford* and in *Blakely*, adopted a categorical approach based on the Court's stated view that such a rule would lead to more predictable outcomes.[169] Although the *Graham* majority did not explicitly cite predictability and administrative ease as justifications for its adoption of the bright-line rule, it seems clear that its sense of administrative convenience

[165] Id at 2029.

[166] Categorical tests are easier to administer because, as Kathleen Sullivan has observed, "When categorical formulas operate, all the important work in litigation is done at the outset. Once the relevant right and mode of infringement have been described, the outcome follows, without any explicit judicial balancing of the claimed right against the government's justification for the infringement." Sullivan, 63 U Colo L Rev at 293 (cited in note 159).

[167] For a discussion of why the Court should not have developed two different Eighth Amendment tests in the first place, see generally, Barkow, 107 Mich L Rev at 1145 (cited in note 6) (arguing that there is no justifiable reason for the Court to analyze death sentences differently than other sentences, and the Court's practice of doing so has produced regrettable consequences).

[168] Fisher, 94 Georgetown L J at 1521 (cited in note 157).

[169] Id at 1521–22.

was a driving force behind its departure from precedent in this context as well. The Eighth Amendment concern at issue in *Graham* will not arise as frequently as the Sixth Amendment jury trial issue in *Blakely* or the Confrontation Clause concern in *Crawford*, but it will certainly arise too frequently for the Court to "be reasonably confident it will have room on its docket to review [each problematic lower court] case and modify or reverse the decision."[170] Particularly given the present Court's apparent understanding of its role in the judicial system, as evidenced by the greatly reduced size of its merits docket, it seems unlikely that the Court would ever choose to take enough cases to afford relief to juveniles who have been erroneously sentenced to life without parole under the balancing test. Nor would that be a wise use of the Court's limited resources in any event.[171]

Kathleen Sullivan has observed that another reason courts might favor categorical tests is that they "reduce the danger of official arbitrariness or bias by preventing decisionmakers from factoring the parties' particular attractive or unattractive qualities into the decisionmaking calculus."[172] The *Graham* majority's adoption of a categorical approach likewise reflects this "distrust for the decisionmaker."[173] That distrust, which is one that goes beyond the question of institutional competencies, is evident from the majority's juxtaposition of its own stated concern, that courts might not be able to tell the difference between the corrigible and the incorrigible juvenile, with the *Roper* Court's observation that "the brutality or cold-blooded nature of any particular crime" might lead a judge to sentence to death a juvenile who is not sufficiently culpable to warrant that punishment.[174] That concern is also evident from the Court's conclusion that "this clear [categorical] 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."[175] In both of those statements the majority subtly acknowledged its concern

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[170] Id.

[171] See, for example, Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U Chi L Rev 1175 (1989).

[172] Sullivan, 106 Harv L Rev at 62 (cited in note 11).

[173] Id at 64.

[174] *Roper*, 543 US at 553.

[175] *Graham*, 130 S Ct at 2030.

that the traditional balancing test might lead certain sentencing judges astray in some cases, particularly at the all-important first stage of the test. If the sentencing judges were to engage in balancing in such cases, the nature of the offense (Factor 1) might impermissibly cloud the judge's analysis of the culpability of the offender (Factor 2), so that the judge would determine, erroneously, that the punishment of life without parole (Factor 3) was not grossly disproportionate to the gravity of the offense. Here, as elsewhere, "Law triumphs when the natural impulses aroused by a shocking crime yield to the safeguards which our civilization has evolved for an administration of criminal justice at once rational and effective."[176] The Court seemed to recognize that the need to overcome such "natural impulses" presents a challenge for overworked and overconditioned judges as well as for lay juries.

In "choosing" the categorical approach over the balancing approach, the *Graham* majority also rejected what it termed a second "alternative approach[]."[177] Florida raised that alternative by claiming that state criminal procedure took sufficient account of the age of juvenile offenders to satisfy any possible constitutional concern. The Court's rejection of that approach likewise reflects a distrust of the decision maker and a concern that the sentencing authority's natural inclination to overvalue Factor 1 in its calculus will lead to a substantial distortion in its application of the balancing test. The Court in *Graham* dismissed the state's argument, finding that Florida law did not meet Eighth Amendment requirements because it failed to prevent the state from "sentencing a juvenile nonhomicide offender to life without parole based on a subjective judgment that the defendant's crimes demonstrate an 'irretrievably depraved character.'"[178] To support that conclusion, the majority emphasized that the sentencing judges in both *Graham* and *Sullivan* had reached "discretionary, subjective judgment[s] that the offender[s] [were] irredeemably depraved," without fully considering the possibility that they "lack[ed] the moral culpability" to justify the imposition of life-without-parole sentences.[179]

Chief Justice Roberts's concurrence and Justice Thomas's dis-

[176] *Watts v Indiana*, 338 US 49, 55 (1949) (Frankfurter, J) (plurality).

[177] *Graham*, 130 S Ct at 2030.

[178] Id at 2031.

[179] See id.

sent both demonstrate the validity of the Court's concern that judges might overvalue the nature of the offense (Factor 1) and undervalue the degree to which an offender's youth lessened his culpability (Factor 2). Both show that the greatest flaw in the traditional balancing test is that it provides overworked and overconditioned criminal court judges with an easy way to rule against the defendant every time. To apply the test with ease and speed, judges simply need to rely on Factor 1, the nature of the offense, to trump Factor 2, the culpability of the offender. Not only is that route the easiest one, but it may also seem the most natural and even the most just result to a judge who is charged with sentencing a young offender for a truly horrific crime. Indeed, it seems natural to expect that the horror of a particular crime will always appear in more graphic detail to the sentencing judge than will the offender's more elusive characteristics—his culpability and possible amenability to rehabilitation. Those characteristics may not have been explored and developed fully by defense counsel, and in any event their details necessarily will lack the same tangibility and immediacy as those of the crime. Those details simply cannot be ascertained, communicated, or understood with the same degree of certainty.[180] That flaw is surely the central concern that caused the majority to depart from precedent.

In his concurrence, Chief Justice Roberts insisted that the Court could have ruled in favor of Graham under the traditional balancing test applicable to noncapital cases. According to the Chief Justice, "existing precedent already provides a sufficient framework for assessing the concerns outlined by the majority."[181] His argument depended on an amalgam of the traditional test and the Court's treatment of juveniles in *Roper*. The Chief Justice did not adopt the categorical rule articulated in *Roper*, but he relied on *Roper* to incorporate age into the traditional test, which he did in a very robust way that was aimed at showing that Graham could win. He viewed this approach as preferable to the Court's because it retained the case-by-case analysis, and thus provided the promise of a benefit only to deserving members of the class (those who actually lacked culpability by virtue of their youth and immaturity), while retaining the possibility of life-without-parole sentences for

[180] See id at 2032.

[181] Id at 2039.

those whose crimes were so heinous that their youth could not translate as a matter of fact into a lack of culpability.[182] In other words, the Chief Justice thought that Graham should prevail on the facts of his case, but the Chief Justice also wished to avoid formulating a categorical rule that he considered overbroad insofar as it would provide relief to both deserving and undeserving members of the class.

The Chief Justice's application of his more robust formulation of the balancing test to Graham's case proceeded as follows. He first conducted the threshold inquiry at Stage 1 of the balancing test, comparing the gravity of Graham's conduct to the harshness of the penalty. As discussed above, the "gravity of the conduct" prong requires an analysis of the nature of the offense (Factor 1) and the characteristics of the offender (Factor 2). With regard to Factor 1, the Chief Justice noted that Graham's crimes were serious, but less serious than murder or rape.

It was the Chief Justice's analysis of offender-focused Factor 2, however, that enabled Graham to prevail under his formulation, where the defendants in all Supreme Court cases since *Solem* had failed.[183] The Chief Justice first noted that the traditional balancing test "itself takes the personal 'culpability of the offender' into account in examining whether a given punishment is proportionate to the crime."[184] He then showed that Graham's status as a juvenile was relevant to the characteristics of the offender prong of the test in part because "*Roper*'s conclusion that juveniles are typically less culpable than adults has pertinence beyond capital cases."[185]

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[182] Id at 2041–42 (Roberts, CJ, concurring).

[183] See generally, *Gonzalez v Duncan*, 551 F3d 875 (9th Cir 2008) (reversing district court and awarding habeas relief to petitioner who was sentenced to twenty-eight years to life under California's three-strikes law for failing to update his annual sex offender registration within five days of his birthday); *Ramirez v Castro*, 365 F3d 755 (9th Cir 2004) (holding unconstitutional a mandatory life sentence for theft of a VCR under California's three-strikes law); *Henderson v Norris*, 258 F3d 710 (8th Cir 2001) (invalidating a life sentence for first-offense delivery because "the amount of drugs that Mr. Henderson sold was extraordinarily small: The three 'rocks' of cocaine base, or crack, weighed less than one-quarter of a gram, which is less than a hundredth of an ounce"); *State v Davis*, 79 P3d 64 (Ariz 2003) (holding unconstitutional a mandatory fifty-two-year sentence for a twenty-year-old convicted of four counts of sexual misconduct with a minor with two postpubescent teenage girls); *State v Bruegger*, 773 NW2d 862 (Iowa 2009) (finding twenty-five-year sentence for statutory rape violated the Eighth Amendment).

[184] *Graham*, 130 S Ct at 2039 (Roberts, CJ, concurring), citing *Solem*, 463 US at 292.

[185] *Graham*, 130 S Ct at 2039 (Roberts, CJ, concurring). See also id at 2040 (Graham "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

In addition to Graham's juvenile status, two other aspects of his history rendered him "markedly less culpable than a typical adult who commits the same offenses": (1) he had no prior convictions,[186] and (2) he had a difficult upbringing.[187] The Chief Justice then determined that the harshness of the penalty (Factor 3) also favored Graham, because a sentence of life imprisonment without parole is "the most severe sanction available for a nonhomicide offense."[188] Next, he concluded that a threshold comparison of the gravity of the offense (Factors 1 and 2) with the harshness of the penalty (Factor 3) created "a strong inference that Graham's sentence . . . was grossly disproportionate in violation of the Eighth Amendment."[189] Once the Chief Justice had enabled Graham to surmount the previously insurmountable threshold analysis, he made short work of the intra- and interjurisdictional analyses at Stage 2 of the test and found that those analyses also dictated an outcome in Graham's favor.[190] Despite Graham's apparent success under the Chief Justice's application of his modified balancing test, a close reading of the concurring opinion demonstrates that the Chief Justice did not support retention of the balancing test only out of respect for precedent; he clearly also wanted judges to retain the discretion to assess the particulars of the crime for which the defendant was convicted, and he was opposed to having a categorical rule that would apply regardless of the nature of the crime. The Chief Justice stated the true basis for his preference for a more robust application of the balancing test (as opposed to a categorical rule) when he emphasized, both at the outset and in closing, that "successful challenges to noncapital sentences under the Eighth Amendment have been—and, in my view, should continue to be—exceedingly rare."[191]

reason of youth and immaturity."); *Roper*, 543 US at 591 (holding that because juveniles are "typically less blameworthy than adults, . . . an offender's juvenile status can play a central role in the inquiry.").

[186] *Graham*, 130 S Ct at 2040.

[187] Id.

[188] Id.

[189] Id.

[190] For his intrajurisdictional analysis, the Chief Justice made these observations: "Graham's sentence was far more severe than that imposed for similar violations of Florida law . . . and more severe than the sentences typically imposed for murder." Id at 2041. Similarly, his interjurisdictional analysis consisted of the observation that "Florida is an outlier in its willingness to impose sentences of life without parole on juveniles convicted of nonhomicide crimes." Id.

[191] Id at 2042. See also id at 2037.

The Chief Justice evidently was more disturbed by what he perceived to be the practical consequences of the majority's holding than by the fact that the Court had deviated from precedent to reach that holding. In most cases involving juveniles, it is clear that the Chief Justice's application of Factors 1 and 2 of the traditional balancing test would result in a ruling adverse to the defendant. He repeatedly criticized the majority's adoption of a categorical test on the ground that it prevents judges from taking into account the relevant characteristics of the particular offender and the particular crime under Factors 1 and 2, and from determining based on those characteristics that the gravity of the offense justifies Factor 3, the harshness of the penalty of life without parole. One of his observations is especially telling: "Some crimes are so heinous [Factor 1], and some juvenile offenders so highly culpable [Factor 2], that a sentence of life without parole may be entirely justified under the Constitution."[192] In calling the majority's new test "unwise," he said: "Most importantly, it ignores the fact that some nonhomicide crimes . . . are especially heinous or grotesque [Factor 1], and thus may be deserving of more severe punishment [Factor 3]."[193] Moreover, the Chief Justice considered the new test to be "unnecessary" because "there is nothing *inherently* unconstitutional about imposing sentences of life without parole on juvenile offenders," as evidenced by the fact that the Court admits there is no constitutional problem with sentencing a juvenile who commits murder to life without parole. "[R]ather, the constitutionality of such sentences depends on the particular crimes for which they are imposed."[194]

Justice Thomas's dissent further demonstrates the ease with which a judge can rule against a defendant under the traditional balancing test. Applying the balancing test to the facts of Graham's case, Justice Thomas easily concluded that Graham's challenge to his sentence lacked merit and should be rejected. In addressing the threshold analysis at Stage 1, Justice Thomas determined that Factor 1, the nature of the offense, weighed against Graham; he

[192] Id at 2042.

[193] Id at 2041.

[194] Id. Presumably, the Chief Justice did not share the majority's skepticism about the judicial system's ability to distinguish those juveniles who were truly culpable and irredeemable from those who had done truly horrible things, but were less culpable and redeemable.

reasoned that Graham's "actual violent felony is surely more severe than" the nonviolent drug crime committed by the adult defendant in *Harmelin*.[195] The dissent next rejected the Chief Justice's robust formulation of Factor 2 for juveniles, contending that juveniles should not be afforded a "general presumption of diminished culpability."[196] If Factors 1 and 2, which together comprise the "gravity of the offense" element of the test, weigh against the offender, then the offender certainly will not satisfy the threshold first stage, and it will not be necessary to reach Stage 2. Sure enough, the dissent concluded that Graham had not established an "'inference' of gross disproportionality" as a threshold matter.[197]

Chief Justice Roberts's concurrence and Justice Thomas's dissent both demonstrate how easy it is for a judge to reject all juvenile nonhomicide offenders' Eighth Amendment claims under the traditional test. At a minimum, the judge would simply need to find, when conducting the threshold analysis, that offense-focused Factor 1 weighs against the defendant. The judge could do so by taking Chief Justice Roberts's approach and finding that the particular crime is "especially heinous and grotesque" in the abstract. Alternatively the judge could follow the dissent and compare the defendant's particular crime with the fairly minor and nonviolent crimes in *Harmelin*, *Ewing*, and *Andrade*. As the majority fears, it is always possible to overvalue—and thus give dispositive weight to—"the brutality or cold-blooded nature of any particular crime." The subjectivity and flexibility of the balancing test enables Factor 1 to trump Factor 2 and render the offense sufficiently grave that no inference of gross disproportionality can be established at Stage 1; thus, the defendant loses at that stage, obviating any need to proceed to the intra- and interjurisdictional analyses of Stage 2. Accordingly, it does not matter whether all juveniles are afforded a rebuttable presumption of diminished culpability under Factor 2, as the Chief Justice proposed, or that no such presumption applies, as the dissent preferred. If Factor 1 can cancel out Factor 2, a robust formulation of Factor 2 in the juvenile

[195] Id at 2056 (Thomas, J, dissenting).

[196] Id at 2056–57.

[197] The dissent then moved to the second and third steps of the test and concluded that the intra- and interjurisdictional analyses did not weigh in Graham's favor. The dissent again relied on post-*Solem* precedents in support of its conclusion, noting that Graham's sentence was "certainly less rare than the sentences upheld in" *Harmelin* and *Ewing*. Id at 2057.

context would not enable juvenile defendants to win any more frequently.

Because a sufficiently heinous or grotesque offense can always trump the generally diminished culpability of juveniles, maintaining the balancing test would result in a whole cadre of juvenile offenders being subjected to life-without-parole sentences despite a lessened culpability which (by the majority's lights) should have saved them from that fate. After all, in the nearly thirty years since *Solem*, no defendant until Graham had met the threshold aspect of the balancing test, let alone won a noncapital Eighth Amendment challenge, in the Supreme Court. During the same time, only a handful of the countless defendants who challenged their sentences as cruel and unusual in state and federal appellate courts won relief under the balancing test.[198] Moreover, the Supreme Court could never take a sufficient number of cases to grant relief to all of the juveniles who had been incorrectly sentenced to life without parole under the traditional test. Thus, the Court recognized that the only effective alternative to the balancing test (which was "fatal in fact" to the defendant's claim) was a categorical test which gave no discretion to sentencing authorities and required that everyone eighteen and under would win if the test were met.

While it is not surprising that four members of the Court did not want to subject juvenile offenders to a test that was fatal in fact, the outcome of *Graham* surely hinged on the fact that Justice Kennedy, the Court's lone remaining swing voter in the death penalty arena,[199] is troubled by punitive sentencing in general and by harsh sentencing of juveniles in particular.[200] Without Justice Kennedy, the Chief Justice's approach would have carried the day. Graham might still have won, but the future would look bleak for

[198] See note 185.

[199] See Joseph E. Kennedy, *Cautious Liberalism*, 94 Georgetown L J 1537, 1539 (2006) (identifying Justices Kennedy and O'Connor as issuing more "pro-defendant decisions" than their "fellow conservatives"); id at 1546–47 (discussing swing votes in "pro-defendant" cases during the Supreme Court's 2003–2004 Terms).

[200] Justice Kennedy has spoken out against mandatory minimum sentences. Anthony M. Kennedy, speech at the American Bar Association annual meeting (Aug 3, 2003) (transcript available at http://www.supremecourt.gov/publicinfo/speeches/viewspeeches.aspx?Filename=sp_08-09-03.html). See also Kennedy, 94 Georgetown L J at 1552 (cited in note 199) (discussing ABA speech). Joseph Kennedy has included Justice Kennedy among the Justices he believes have "a low regard for both the politics and policies of crime," citing the Justice's comments in *Roper* about "the general popularity of anti-crime legislation" and "the particular trend in recent years toward cracking down on juvenile crime." Id at 1551.

all other juvenile nonhomicide offenders sentenced to life without parole.

C. THE COURT'S APPLICATION OF THE CATEGORICAL TEST TO GRAHAM'S CASE

After the Court decided to import the categorical test for capital cases into the noncapital context, it applied the two steps of the test and determined that the punishment of life without parole was categorically unconstitutional as applied to the class of nonhomicide offenders under the age of eighteen.[201] First, at Step 1, the Court determined that there were "objective indicia of [a] national consensus"[202] against sentencing that particular class of offenders to life without parole. By itself, the state of legislation did not provide evidence of the national consensus the Court was seeking to prove, since the formal statute law of thirty-seven states and the federal government authorized the imposition of life-without-parole sentences on juvenile nonhomicide offenders.[203] The Court therefore focused instead on "actual sentencing practices."[204] With that focus, the Court was able to find evidence of a national consensus because the imposition of a sentence of life imprisonment without parole on juvenile nonhomicide offenders was "most infrequent" in practice.[205] In reaching its desired result at the first step of the test, however, the Court did concede that the challenged sentencing practice was both more common than other practices the Court had found to violate the Eighth Amendment[206] and was allowed by more states than were those other practices.[207]

Step 2 of the categorical analysis enabled the Court to reach a result in favor of Graham and the class to which he belonged. At the second step, the Court exercised its own "independent judg-

[201] *Graham*, 130 S Ct at 2023–30.

[202] Id at 2023.

[203] Id.

[204] Id.

[205] Id. The Court supplemented the data provided by the parties and amici with its own independent research to show that "there are 129 juvenile nonhomicide offenders serving life without parole sentences," and that "only 11 jurisdictions nationwide in fact impose" such sentences on the relevant class, while 28 jurisdictions do not. Id at 2024.

[206] Id at 2024–25, citing *Enmund*, 458 US at 794.

[207] *Graham*, 130 S Ct at 2025 (analogizing to *Thompson*).

ment"[208] to evaluate "the culpability of the offenders at issue in light of their crimes [Factor 1] and characteristics [Factor 2], along with the severity of the punishment in question [Factor 3]," and "also [to] consider whether the challenged sentencing practice serves legitimate penological goals."[209] The Court determined that Factor 1 favored Graham because "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."[210] Similarly, Factor 2 favored Graham based on *Roper*'s conclusion that "juveniles have lessened culpability."[211] Factor 3 also favored Graham in the Court's analysis, because life without parole is such a severe sentence, "alter[ing] the offender's life by a forfeiture that is irrevocable," and "an especially harsh punishment for a juvenile."[212] At the second step, the Court also concluded that "none of the goals of penal sanctions that have been recognized as legitimate—retribution, deterrence, incapacitation, and rehabilitation—provides an adequate justification" for sentencing juvenile nonhomicide offenders to life without parole.[213]

After conducting the two-step analysis, the Court engaged in what it termed its "longstanding practice [of] noting the global consensus against the sentencing practice in question" and found that "the United States is the only Nation that imposes life without parole sentences on juvenile nonhomicide offenders."[214] Although this finding was "not dispositive as to the meaning of the Eighth

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[208] Id at 2022.

[209] Id at 2026.

[210] Id at 2027.

[211] Id at 2026.

[212] Id at 2027–28.

[213] Id at 2028. See also id at 2028–30. The Court analogized the case to *Roper* to hold that retribution did not support life-without-parole sentences for offenders like Graham. Specifically, the Court reasoned: If retribution could not justify sentencing a juvenile offender to death, the most severe penalty available for people who commit homicides, it also could not justify sentencing a juvenile offender to life without parole, the most severe penalty available for people who commit nonhomicide crimes. Id at 2028. Deterrence likewise could not justify sentencing a juvenile to that punishment because the "diminished moral responsibility" of juveniles necessarily compromises the deterrent effect of punishment. Id at 2028–29. The Court likewise held that the incapacitation justification was insufficient for juveniles because it is impossible to say definitively that a specific juvenile offender will prove to be incorrigible. Id at 2029. Finally, the Court held that life without parole "forswears altogether the rehabilitative ideal" and ignores "a juvenile nonhomicide offender's capacity for change and limited moral culpability." Id at 2030.

[214] Id at 2033.

Amendment,"[215] it nevertheless supported the Court's conclusion that the punishment of life imprisonment for juvenile nonhomicide offenders was cruel and unusual.[216]

III. Some Predictions on the Future Direction of Cruel and Unusual Punishment Jurisprudence

Although the Court has opined that "[t]he case-by-case approach to sentencing must . . . be confined by some boundaries," the precise location of those boundaries remains unclear.[217] *Graham* enables us to make a few predictions and provides some lessons for future defendants seeking to establish that their respective sentences are cruel and unusual in violation of the Eighth Amendment.

Graham, and the Court's Eighth Amendment jurisprudence in general, demonstrate that defendants have a far greater chance of success if they can persuade the Court to apply the categorical framework rather than the balancing test. Given the Court's suggestion that the distinguishing feature of Graham's challenge was simply that he requested categorical treatment, while previous defendants challenging noncapital sentences had not, a defendant is most likely to be successful if he can begin his challenge by presenting himself as a member of a cognizable class.[218] He must argue that he should be treated as part of a class based either on Factor 1 (the nature of his crime) or Factor 2 (a diminished culpability based on specific characteristics). Specifically, the class must be defined either (1) by the fact that its members have committed a crime that is comparatively less serious, such as crimes that do not result in death, or (2) by diminished offender culpability, such that the members of the class are deemed to be categorically less culpable than others, regardless of the nature of their crimes. Theoretically, a defendant will have the best chance of receiving categorical treatment if he can show, as Graham did, that he and the members of his class are both categorically less culpable than others and have committed comparatively less serious crimes. That defendant can further bolster his request for

[215] Id at 2017.

[216] Id at 2034.

[217] Id at 2031–32.

[218] Id at 2022–23.

categorical treatment by showing that some or all of the reasons the Court articulated for abandoning the traditional case-by-case balancing test in *Graham* also apply to the class of defendants to which he belongs. Of course, this approach will not work for every definable class of offender or offense. The question is how far the Court would actually go in implementing this paradigm.

After *Graham*, members of the following classes of defendants will surely ask the Court to grant them categorical treatment and to deem their punishments unconstitutional: (1) juvenile offenders under life-without-parole sentences imposed for homicides, (2) mentally retarded defendants sentenced to life without parole, and (3) adult defendants sentenced to life without parole for committing nonhomicides.

Juvenile defendants who are sentenced to life without parole for committing homicides may well benefit from *Graham*. Significantly, the vast majority of juveniles who receive life-without-parole sentences in this country are given that punishment for crimes resulting in death; defendants like Graham, who receive life-without-parole sentences for nonhomicides, are fairly rare.[219] Again, the first question is whether this class of offenders will be able to convince the Court to consider granting them categorical treatment. Juveniles who commit nonhomicides have "a twice diminished moral culpability,"[220] because the nature of their crime (Factor 1) and their age (Factor 2) both contribute to diminished culpability, while juveniles who commit homicides have only a once-diminished culpability based on their age. Juveniles who kill might nevertheless merit categorical treatment, especially because all three of the "dilemma[s] of juvenile sentencing" that led the *Graham* Court to hold that "the case-by-case approach . . . must be confined by some boundaries"[221] apply equally to them. In addition, the strength of the Court's concern that sentencing judges may give excessive weight to the nature of the offense (Factor 1), and insufficient attention to the personal qualities of the offender (Factor 2), probably carries the greatest force when the offense is homicide.

If the Court uses a categorical analysis, it might well deem life

[219] Id at 2023.

[220] Id at 2027.

[221] Id at 2031–32.

without parole an unconstitutional punishment for the class of juveniles who kill. In his concurring opinion, the Chief Justice noted "the Court's apparent recognition that it is perfectly legitimate for a juvenile to receive a sentence of life without parole for committing murder."[222] Presumably he was referring to the fact that the Court's ruling specifically addresses the constitutionality of this penalty with respect to juveniles who commit nonhomicide crimes. The majority did not respond directly to the Chief Justice's assertion. However, there is no indication in the majority opinion that the Court specifically intended to limit its holding in the future to juveniles who had committed nonhomicide crimes, or that it specifically intended to exclude juveniles who commit homicides from benefiting from a possible future extension of its ruling. The closest the Court comes is its observation that "incapacitation may be a legitimate penological goal sufficient to justify life-without-parole in other contexts."[223] This observation is a far cry from stating that the penological aim of incapacitation would justify the imposition of a life-without-parole sentence on any juvenile who committed a homicide, let alone from demonstrating the constitutional validity of such sentences for the entire class of offender. Any fair reading of the majority opinion would suggest that the matter remains open.

Application of the categorical test gives rise to a strong argument that life-without-parole sentences for juveniles who commit homicides also violate the Eighth Amendment. First, application of the Step 1 analysis shows that there are objective indicia of a national consensus against sentencing juveniles who commit homicides to life without parole. The Court in *Graham* was interested in the "law in action" rather than the "law on the books": *Graham* holds that the crucial measure of national consensus is whether "an examination of actual sentencing practices in jurisdictions where the sentence in question is permitted by statute discloses a consensus against its use."[224] Although a survey of state legislative enactments shows that only six states categorically prohibit the practice,[225] a far different story is told by the frequency with which

[222] Id at 2041 (Roberts, CJ, concurring).

[223] Id at 2029.

[224] Id at 2023.

[225] The states that prohibit juvenile offenders convicted of homicides from receiving life without parole are Alaska, Colorado, Kansas, Kentucky, Montana, and Texas. See Alaska

the sentence is actually imposed.[226] Given that the *Graham* Court found a national consensus against imposing life without parole on juvenile nonhomicide offenders despite the fact that thirty-seven states authorize the sentence through legislation,[227] probably

Stat § 12.55.015(g) (2008); Colo Rev Stat Ann § 1-1.3-401(4)(b) (2009); Kan Stat Ann § 21-4622 (West 2007); Ky Rev Stat Ann § 640.040 (West 2008); Mont Code Ann § 46-18-222(1) (2009); Tex Penal Code Ann § 12.31 (West Supp 2009). See also *Shepherd v Commonwealth*, 251 SW3d 309, 320–21 (Ky 2008).

[226] Forty-four states and the federal government permit the imposition of life-without-parole sentences on juvenile offenders convicted of homicides. The states that allow juvenile offenders convicted of homicides to receive life without parole are Alabama, Arizona, Arkansas, California, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. See Ala Code Ann § 12-15-203 (Supp 2009); § 13A-6-2(c) (2005); Ariz Rev Stat Ann §§ 13-501, 13-1105 (West 2010); Ark Code Ann § 9-27-318(b) (2009); § 5-4-501(c) (Supp 2009); Cal Penal Code § 190 (West 1999); § 1170.17 (West 2004); Conn Gen Stat § 53a-35a (2009); Del Code Ann, Title 10, § 1010 (Supp 2008); id, Title 11, § 4209 (2003); Fla Stat §§ 782.04, 985.557 (2007); Georgia Code Ann § 15-11-30.2 (2008); § 16-5-1(d) (2007); Hawaii Rev Stat § 571-22(d) (2006); § 706-656(1) (2008 Supp Pamphlet); Idaho Code § 18-4004 (Lexis 2005); §§ 19-2513, 20-509 (Lexis Supp 2009); Ill Rev Stat, ch 705, §§ 405/5-805 (West 2008); id, ch 720, § 5/9-1(b-5) (West 2008); id, ch 730, § 5/3-3-3(d) (West 2008); Ind Code § 31-30-3-6(1); § 35-50-2-3(b)(2) (West 2004); Iowa Code §§ 232.45(6), 707.2, 902.1 (2009); La Child Code Ann, Arts 305, 857(A) (West Supp 2010); La Rev Stat Ann § 14:44 (West 2007); Me Rev Stat Ann, Tit 15, § 3101(4) (Supp 2009); id, Title 17-a, § 1251 (2006); Md Cts & Jud Proc Code Ann §§ 3-8A-03(d)(1), 3-8A-06(a)(2) (Lexis 2006); Md Crim Law Code Ann § 2-201(b)(1)(ii) (Lexis Supp 2009); Mass Gen Laws, ch 119, § 74; id, ch 265, § 2 (2008); Mich Comp Laws Ann § 712A.4 (West 2002); § 750.316(1) (West Supp 2009); §§ 769.1, 791.234(6)(a) (West 2000); Minn Stat §§ 260B.125(1), 609.106, 609.185 (2008); Miss Code Ann § 43-21-157 (2009); § 97-3-21 (2007); Mo Rev Stat §§ 211.071, 565.020 (2000); Neb Rev Stat §§ 28-105, 28-303, 43-247, 43-276 (2008); Nev Rev Stat §§ 62B.330, 200.030 (2009); NH Rev Stat Ann § 169-B:24; § 628:1 (Equity 2007); § 630:1-a (Supp 2009); NJ Stat Ann § 2A:4A-26 (West Supp 2009); § 2C:11-3(b)(2) (West Supp 2009); NM Stat Ann § 31-18-14 (Supp 2009); § 31-18-15.2(A) (Westlaw 2010); NY Penal Law §§ 30.00, 60.06 (West 2009); § 70.00 (West 2008); NC Gen Stat Ann §§ 7B-2200, 14–17 (Lexis 2009); ND Cent Code Ann § 12.1-04-01 (Lexis 1997); § 12.1-16-01 (Lexis Supp 2009); § 12.1-32-01 (Lexis 1997); Ohio Rev Code Ann § 2152.10 (Lexis 2007); §§ 2903.01, 2929.02 (Lexis 2006); § 2971.03 (2010 Lexis Supp); Okla Stat, Title 10A, §§ 2-5-204, 2-5-205, 2-5-206 (West Supp 2009); id, Title 21, § 701.9 (West Supp 2007); Ore Rev Code Ann §§ 137.707, 163.105(1)(a) (2009); 42 Pa Cons Stat § 6355(a) (Purdon 2000); 18 id, § 1102(a) (2008); 61 id, § 6137(a) (2009); RI Gen Laws §§ 14-1-7, 14-1-7.1, 11-23-2 (Lexis 2002); SC Code Ann § 63-19-1210 (Supp 2008); § 16-3-20 (Westlaw 2009); SD Cod Laws § 26-11-3.1 (Supp 2009); § 26-11-4 (2004); §§ 22-3-1, 22-16-12 (2006); § 24-15-4 (2004); Tenn Code Ann §§ 37-1-134, 39-13-204 (Westlaw 2010); Utah Code Ann §§ 78A-6-602, 78A-6-703, 76-3-207.7 (Lexis 2008); Vt Stat Ann, Title 33, § 5204 (Cum Supp 2009); id, Title 13, § 2303 (Equity 2009); Va Code Ann §§ 16.1-269.1, 18.2-10, 53.1-151(B1) (2009); Wash Rev Code § 13.40.110 (2009 Supp); §§ 9A.04.050, 9.32.040, 9.94A.570 (2008); W Va Code § 49-5-10 (Lexis 2009); §§ 61-2-2, 61-11-18(b) (Lexis 2005); Wis Stat §§ 938.18, 938.183 (2007–08); §§ 939.50(3)(a), 973.014 (Westlaw 2005); Wyo Stat Ann §§ 6-2-101(c), 14-6-203 (2009); 18 USC § 1111 (2006 ed and Supp II); § 5032 (2006 ed). See also DC Code § 16-2307 (Supp 2009); § 22-2104 (Supp 2007).

[227] *Graham*, 130 S Ct at 2025–26.

the fact that an additional seven states authorize that penalty for juvenile homicide offenders would not preclude the Court from finding a national consensus against imposing that sentence on juveniles who kill.

Graham also emphasizes the importance, in measuring the relative rarity of life-without-parole sentences, of examining "the base number" of the relevant type of offense to assess "the opportunities for [the sentence's] imposition," and of then comparing that base number to the number of individuals actually serving the sentence.[228] In the past twenty-five years, juvenile offenders committed 42,000 homicides.[229] As of 2010, there were 2,445 juveniles serving life-without-parole sentences for homicides.[230] As in *Graham*, this comparison suggests that life-without-parole sentences for juveniles convicted of homicide crimes are uncommon. The *Graham* Court also took into account both the number of jurisdictions that actually impose the particular sentence on the particular class of offender and the number of offenders actually serving that sentence in each jurisdiction. Of the forty-four states which authorize life-without-parole sentences for juvenile homicide offenders, twenty-eight jurisdictions (twenty-seven states and the District of Columbia) have ten or fewer persons sentenced for homicides committed as juveniles serving that sentence,[231] while only seven states have one hundred or more persons who are serving such terms imposed for crimes committed as juveniles.[232]

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[228] Id at 2025.

[229] According to one source, between 1980 and 2006, juvenile offenders committed 42,023 homicides. Charles Puzzanchera and Wei Kang, *Easy Access to the FBI's Supplementary Homicide Reports: 1980–2006* (National Center for Juvenile Justice 2008), online at http://ojjdp.ncjrs.gov/ojstatbb/ezashr. It is important to look at the total number of defendants convicted over an extended period of time because, as in *Graham*, the statistics regarding the number of juveniles currently serving life without parole for homicides "likely reflect nearly all juvenile []homicide offenders who have received a life without parole sentence stretching back many years." *Graham*, 130 S Ct at 2024.

[230] There are 2,574 juveniles serving life without parole for any offense. National Conference of State Legislatures, *Juvenile Life Without Parole* (*JLWOP*) 16 (2010), online at http://www.ncsl.org/documents/cj/jlwopchart.pdf. Of these, there are 129 juveniles serving life without parole for nonhomicide offenses. *Graham*, 130 S Ct at 2024.

[231] Those states are Alaska, Connecticut, Delaware, Georgia, Hawaii, Idaho, Indiana, Kansas, Kentucky, Maine, Minnesota, Montana, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, West Virginia, and Wyoming. National Conference of State Legislatures, *Juvenile Life Without Parole* (*JLWOP*) at 16 (cited in note 230).

[232] Those states are California, Florida, Illinois, Louisiana, Michigan, Missouri, and Pennsylvania. Id at 16. Notably, "the differences in the state rates of life without parole for youth do not correlate directly to differences in rates of violent crime by youth."

Taken together, the available data suggest that life-without-parole sentences for juvenile homicide offenders are rare, even if that sentence is less rare than for juvenile *non*homicide offenders.

The Court, in exercising its independent judgment at Step 2 of the categorical test and analyzing the three factors, might well determine that life without parole is a cruel and unusual punishment for juveniles who commit homicides. Both *Graham* and *Roper* establish that juveniles are generally less culpable than fully capable adults (Factor 2); *Graham* also establishes that "[l]ife without parole is an especially harsh punishment for a juvenile" (Factor 3).[233] Even Factor 1, the nature of the crime, does not automatically weigh against the defendant simply because the crime is homicide. Not all criminal homicides will be equally worthy of condemnation from a moral point of view. Moreover, not all homicides will be more morally blameworthy than all nonhomicides. The Chief Justice suggested that there is little difference, in terms of culpability, between the juvenile who kills his victim and the juvenile who simply leaves his victim for dead.[234] By the same token, the juvenile whose victim happens to die may not be sufficiently more culpable than the juvenile who leaves his victim for dead to warrant a life-without-parole sentence for the former if it is prohibited for the latter.

As part of Step 2, the Court would next examine the penological justifications for sentencing juvenile homicide offenders to life without parole, and might well conclude that none of the purposes of punishment supported such a sentence. After all, the *Graham* Court rejected the sufficiency of three of the four penological justifications for reasons that relate only to the culpability of juveniles and not to the nature of their crimes. Because those reasons relate only to the culpability of juveniles, they apply with equal force to juveniles who commit homicides. Specifically, the *Graham* Court rejected the incapacitation justification because (1) "the characteristics of juveniles make [any judgment that an individual juvenile is incorrigible] questionable,"[235] and (2) "[a] life without parole sentence improperly denies the juvenile offender a chance

Human Rights Watch/Amnesty International, *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States* 36 (2005), online at http://www.amnestyusa.org/us/clwop/report.pdf.

[233] *Graham*, 130 S Ct at 2028.

[234] Id at 2042 (Roberts, CJ, concurring).

[235] Id at 2029.

to demonstrate growth and maturity."[236] The Court likewise focused on offender culpability in its deterrence and rehabilitation analyses. The Court found that deterrence does not justify the penalty because juveniles "are less likely to take a possible punishment into consideration when making decisions" and because they possess "diminished moral responsibility."[237] According to the Court, a juvenile offender's "capacity for change and limited moral culpability"[238] also make life without parole inconsistent with rehabilitation. These rationales likewise apply to juveniles who commit homicides. Thus, only retribution could possibly provide a legitimate penological justification for sentencing juvenile homicide offenders to life without parole. But that line of analysis is foreclosed as well. The Court held in *Roper* and reiterated in *Graham* that "the case for retribution is not as strong with a minor as with an adult,"[239] and thus emphasized that retribution, like the other penological justifications, "must be directly related to personal culpability."[240] The *Graham* Court's emphasis on offender culpability rather than on the nature of the crime suggests that the Court might well conclude at Step 2 that the purposes of punishment also render the punishment of life without parole disproportionate for juveniles who commit homicides.

After analyzing the two steps of the categorical test, the Court would likely conclude that there is also an international consensus against sentencing juveniles who commit homicides to life without parole. The two measures the Court has identified as providing "objective indicia of . . . consensus"[241]—legislation and actual sentencing practices—both lead to that conclusion. Apart from the United States, only ten countries authorize the imposition of a life-without-parole sentence on juveniles "under any circumstances."[242] Moreover, only Israel "ever impose[s] the punishment in practice," and only seven Israeli prisoners are currently serving

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[236] Id.

[237] Id at 2028–29.

[238] Id at 2030.

[239] Id at 2028, citing *Roper v Simmons*, 543 US at 551, 571 (2005).

[240] *Graham*, 130 S Ct at 2028, quoting *Tison v Arizona*, 481 US 137, 149 (1987).

[241] *Graham*, 130 S Ct at 2023.

[242] Id at 2033.

the equivalent of life-without-parole sentences for juvenile crimes.[243]

The Court's holding in *Graham* all but ensures that another category of offenders, mentally retarded defendants who commit nonhomicides, will be given categorical treatment. As with youthful offenders like Graham, mentally retarded defendants whose crimes do not result in death fit into both the first category of defendants meriting class treatment (because they have committed a comparatively less serious crime) and the second category (because the Court in *Atkins* deemed them categorically less culpable than defendants who are not mentally retarded).[244] In addition, one of the three concerns that led the *Graham* Court to reject the case-by-case balancing test was derived directly from *Atkins*: both juveniles and the mentally retarded have less ability to assist their counsel.[245] Moreover, to the degree that the *Graham* Court refused to apply the balancing test out of a concern that judges could easily use the seriousness of the offense (Factor 1) to trump the culpability of the offender (Factor 2) in any given case, that concern is just as salient in the context of mentally retarded offenders sentenced for heinous crimes.

If the Court were to apply the categorical test to mentally retarded defendants who commit nonhomicides and receive life-without-parole sentences, it would have to determine using objective measures if there is a national consensus against the practice (Step 1), and exercise its own independent judgment (Step 2). With regard to Step 1, the data about legislation and actual sentencing practices in this area are unclear. At Step 2, however, *Graham* and *Atkins* together dictate that the Court would have little choice but to side with the defendants. At this step of the test, the Court considers the three factors, all of which favor this class of defendants. Factors 1 and 2 are discussed in the previous paragraph. Factor 3 (the harshness of the penalty) weighs in favor of mentally retarded defendants because, as with juveniles, life without parole is the most severe penalty they can face. At Step 2 of the analysis, the Court would also decide whether imposing life-without-parole sentences on mentally retarded offenders "serves legitimate pe-

[243] Id.

[244] *Atkins*, 536 US at 318 ("Their deficiencies . . . diminish their personal culpability.").

[245] *Graham*, 130 S Ct at 2032, quoting *Atkins*, 536 US at 320.

nological goals."[246] The Court already held in *Atkins* that the mentally retarded offender's lesser culpability means that sentencing him to death does not serve the goals of retribution and deterrence.[247] Just as the lesser culpability of juveniles diminishes the probability that they will actually be deterred by a given punishment, "the same cognitive and behavioral impairments that make [mentally retarded] defendants less morally culpable . . . also make it less likely that they can process the information of the possibility" of a given penalty and "control their conduct based upon that information."[248] This analysis applies equally whether the punishment at issue is death or life without parole.

The final class of defendants who might benefit from *Graham* consists of adults sentenced to life without parole for committing nonhomicide crimes. It is extremely unlikely that this class of offenders would be able to convince the Court to grant them categorical treatment. Offenders in this group have only a once-diminished culpability based on the nature of their crimes (Factor 1) and are thus "categorically less deserving of the most serious forms of punishment than are murderers."[249] They do not partake of any individual characteristics (such as youth or mental retardation) that would give them a "twice diminished moral culpability."[250] Moreover, it is a considerable stretch to consider this group of offenders as a discrete "class." This group of offenders is the subject of all of the Court's prior jurisprudence in the noncapital context; granting them categorical treatment would essentially mean abandoning the case-by-case balancing test. Nothing in *Graham* (or any other precedent) suggests that the Court would be inclined to take that step.

A defendant sentenced to life without parole for a nonhomicide might do best to take a different tack and hold the Court to the promise made in the Chief Justice's concurrence, namely, that the traditional balancing test has teeth and provides a viable vehicle for defendants to win Eighth Amendment challenges. In approaching the threshold analysis portion of the traditional test, a defendant could argue that Factors 1 and 3 favor him to the same

[246] *Graham*, 130 S Ct at 2026.

[247] *Atkins*, 536 US at 318–20.

[248] Id at 319.

[249] *Graham*, 130 S Ct at 2027.

[250] Id.

degree that they weighed in Graham's favor under Chief Justice Roberts's analysis: His crime is less serious than murder, and life without parole is the harshest penalty he can face for that crime.[251] He could then use the Chief Justice's robust interpretation of the characteristics of the offender (Factor 2) to highlight particular facts that diminish his "personal culpability."[252] Because the concurrence deems a defendant's "mental state and motive in committing the crime"[253] to be relevant to Factor 2, the defendant could show a diminished personal culpability by presenting evidence that he suffered from psychological or psychiatric disorders that related to his commission of the crime, or by focusing on his motive for committing the crime. The defendant could also use a minimal criminal history or a difficult upbringing to establish diminished culpability.[254]

While the Chief Justice's opinion gives these adult defendants a potentially more effective way of arguing that their sentences violate the Eighth Amendment, it is unlikely that those new arguments will lead to defense victories. In the final analysis, because the balancing test allows Factor 1 to trump Factor 2, a court can deny any challenge under the Cruel and Unusual Punishments Clause by determining that the defendant's crime is sufficiently heinous to outweigh any diminished personal culpability and to justify the most severe sentence available. Just as this aspect of the balancing test surely was the pivotal reason the Court rejected that test in the juvenile context, it will continue to preclude the possibility of relief for adult defendants sentenced to life without parole for committing the same crime.

IV. Conclusion

Justice Stevens, in a brief, elegantly crafted concurrence, responded directly to Justice Thomas's charge that the majority opinion was unfaithful to the Court's own case law. Given the central role played by "evolving standards of decency" in the Court's Eighth Amendment jurisprudence, Justice Stevens did not find it surprising that the dissenting opinions in certain Eighth

[251] Id at 2039–40 (Roberts, CJ, concurring).

[252] Id.

[253] Id at 2037.

[254] Id at 2040.

Amendment cases decided in 1980, 1991, and 2003 should "more accurately describe the law today than does Justice Thomas's rigid interpretation of the Amendment."[255]

Justice Stevens's brief opinion is a spirited defense of the Whiggish view of the Eighth Amendment that guides our jurisprudence. But there is another, more profound truth expressed in Justice Stevens's concurrence. Justice Stevens specifically notes that, "Society changes. Knowledge accumulates. We learn, sometimes, from our mistakes."[256] Whatever one might think of the "evolving standards of decency" paradigm, the fact is that Justice Stevens is right about change and growth. Circumstances do change; knowledge does grow; and sometimes we do learn from our mistakes, both individually and as a society. Of course, new problems develop, become more acute, mutate, and fester. If we are lucky, our knowledge grows faster than our problems, but that is far from certain. What we do know is that the approach we take to our problems must change as circumstances change and knowledge accumulates. What seemed yesterday to be an effective response to the problem of enforcing particular constitutional values will be proved inadequate today; we must look for new ways to give traction to those values today.

For example, in the years following the Court's decision in *Swain v Alabama*,[257] as one after another black criminal defendant was tried and convicted by all-white juries, despite the statistical improbability that all-white juries could be constituted from the populations from which they were drawn absent invidious discrimination, it became clear that the test articulated in *Swain* was simply ineffectual. It became clear that a new approach was needed to honor effectively the nation's commitments to racial equality and the rule of law. Thus, in *Batson v Kentucky*,[258] the Court acknowledged that the *Swain* test was unworkable and struck off in a new direction.[259] Similarly, the Court recognized in *Graham* that the rule that it had previously applied in noncapital cases was not effective in making sure that only juveniles who met a certain threshold culpability requirement would be sentenced to life with-

[255] Id at 2036 (Stevens, J, concurring).

[256] Id.

[257] 380 US 202 (1965).

[258] 476 US 79 (1986).

[259] Id at 92–93.

out parole in noncapital cases. Thus, the *Graham* Court also struck off in a different direction.

But the cases are not exactly similar. Whereas the Court in *Batson* acknowledged that its prior test had not worked in practice, and candidly announced the new direction it was taking, the Court in *Graham* declined to acknowledge the imperfections of its existing approach or the fact that it was heading in a new direction. In *Graham*, the Court simply pretended that it had a range of tools at its disposal, and that it was choosing to work with one of those already-available tools rather than another. While the Court's decision in *Graham* was necessary and desirable from the viewpoint of effective enforcement of the Eighth Amendment, the reasons the Court gave for its departure from precedent simply were not true. The holding in *Graham* was not the result, as the majority implied, of "business as usual." The holding in *Graham*, while undoubtedly correct, marked a significant break with past practice.

It might seem that this is a slight objection. It might even seem churlish to object to a result that we believe to be plainly correct as a matter of constitutional policy, simply because the Court did not want to acknowledge that it was doing something new and adventurous. That might seem particularly to be the case where, as here, the change not only provided a better solution to the problem at hand—fair treatment for juveniles convicted of noncapital offenses—but also opened new possibilities for other groups of defendants who might also suffer excessive punishment because of their particular characteristics. But there is more to the objection than that. Judge McCree suggested that the judicial mind requires reasons to decide anything with "spiritual quiet."[260] One might go a step further and suggest that the assignment and statement of reasons by judges is not simply a matter internal to the "spiritual quiet" of judges, but an essential condition for the legitimacy of adjudication in a democratic society. Indeed, it is essential to our system of judicial review that judges not just give reasons for their decisions, but that the reasons they give be the true reasons for their decisions. Otherwise, it is not just the "judicial mind" but the "democratic mind" that will lack the "spiritual

[260] Wade H. McCree, Jr., *Bureaucratic Justice*, 129 U Pa L Rev 777, 787 (1981), quoting *United States Asphalt Refining Co. v Trinidad Lake Petroleum Co.*, 222 F 1006, 1008 (SDNY 1915).

quiet" upon which the legitimacy of judicial review in a democracy depends. A mature and nonpolemical view of the Constitution recognizes that the text of the Constitution has not—and cannot—settle everything.[261] Much remains to be settled; some will be settled in the fullness of time; and some may never be settled. That means that judges necessarily have choices to make, and, at the end of the day, it is how those choices are made, and how they are explained, that matters.

H. Jefferson Powell, with his customary sensitivity to the nuance that characterizes constitutional adjudication in a democratic society, recently put the matter well:

> Because of the inescapability of judgment in the interpretation and application of the Constitution, candor is essential if the justices, or whoever is purporting to speak in the voice of the Constitution, are to ask the rest of us to take them seriously when they cannot claim their judgments are beyond dispute. Only if you and I understand the true grounds of a decision can we assent to its correctness or (and this is the point of the greatest moment) to its validity as the outcome of our system even though we think it wrong in substance.[262]

In other words, Justice Thomas was wrong on the merits, but he had a good point to make. The Court never did tell us why death was no longer different.

[261] Herbert Storing, *What the Anti-Federalists Were For: The Political Thought of the Opponents of the Constitution* 3 (Chicago, 1981).

[262] H. Jefferson Powell, *Constitutional Conscience* 90 (Chicago, 2008).