Evolving Away From Evolving Standards of Decency

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In *Graham v. Florida*,¹ the Supreme Court held that imposing a life sentence without possibility of parole on a juvenile nonhomicide offender violates the Cruel and Unusual Punishments Clause. To support this conclusion, the Court found that there was a societal consensus against the punishment, despite the fact that such punishment was authorized in the federal system, thirty-seven states, and the District of Columbia, and despite the lack of any apparent trend toward abolition of the punishment.² *Graham* represents the fourth time in the last eight years that the Supreme Court has found a societal consensus against a punishment that appeared to enjoy significant public support.³ *Graham* is the second case in the last two years in which the Court found a societal consensus against a punishment that appeared to be increasing, rather than decreasing, in popularity.⁴

The Supreme Court’s decision to invalidate punishments despite their popularity seems fine at first blush. The Bill of Rights was designed largely to protect unpopular minorities from the tyranny of the majority. And what minority group is more unpopular, and thus in need of protection, than convicted criminals?

But there’s a deeper problem here. Since 1958, the Supreme Court has used the “evolving standards of decency test” as the primary standard for determining whether a punishment is cruel and unusual.⁵ This test holds that a punishment is unconstitutional if it no longer comports with societal moral standards, measured primarily in terms of legislative enactments and jury verdicts. But in *Graham* and several other recent cases, the Court has found certain punishments to violate current standards of decency despite the fact that many legislatures approved them and that juries continued to impose them.

These cases reveal that the Supreme Court’s Eighth Amendment jurisprudence is evolving away from any real reliance on the evolving standards of decency test. Although the
Court gives lip service to the idea that there must be a societal consensus against the punishments it strikes down, it no longer uses the test as a true ground for its decisions.

This change in the Court’s approach is not necessarily a bad thing. The evolving standards of decency test is inherently majoritarian, and is thus a poor protection for criminal offenders when public opinion turns against them. Unfortunately, the Supreme Court has effectively replaced this test with an unfettered reliance on its own “independent judgment,” with no external constitutional standard to guide its decisions. This approach to constitutional jurisprudence runs contrary to basic principles of separation of powers, and does not appear to be sustainable over the long run.

As the Supreme Court prepares to leave the evolving standards of decency test behind, it is a good time to reexamine the original meaning of the Cruel and Unusual Punishments Clause. In a prior article, I have shown that the word *unusual* originally meant “contrary to long usage,” and that the Cruel and Unusual Punishments Clause was originally meant to prevent legislatures and courts from ratcheting up the severity of punishment significantly beyond what prior practice would allow. I will suggest in this article that the Supreme Court could probably have reached substantially the same result it did in *Graham* by relying on the original meaning of the Cruel and Unusual Punishments Clause. Had the Court done so, the result would have been more plausible and the Court’s jurisprudence in this area more sustainable.

### I. *Graham* and the Evolving Standards of Decency Test

All punishment involves the infliction of pain. The central problem underlying the Cruel and Unusual Punishments Clause has been finding the line between punishments that inflict an acceptable amount of pain and those that are unacceptably cruel.
One way to solve this problem would be to judge punishments according to the standards of 1790, approving any that were permitted at the time the Eighth Amendment was adopted. But this option is not attractive in practice. In 1790, it was acceptable to subject criminal offenders to flogging and public humiliation, to branding and mutilation. Under the penal statute adopted by the First Congress, a person could be executed for stealing a “ship or vessel, or any goods or merchandise to the value of fifty dollars” These punishments are so harsh by modern standards that even Justice Scalia has announced that he would strike some of them down under the Cruel and Unusual Punishments Clause if a legislature tried to reintroduce them.

A plurality of the Supreme Court in *Trop v. Dulles* sought to solve this problem by adopting the evolving standards of decency test. In *Trop*, the plurality opinion (written by Chief Justice Warren) held that revocation of a soldier’s citizenship for wartime desertion violated the Cruel and Unusual Punishments Clause, despite the fact that this punishment had been used in America since at least the 1860s. The meaning of the Clause was not dependent on traditional standards, the plurality asserted, but on the “evolving standards of decency that mark the progress of a maturing society.” Because society had evolved to the point where denaturalization was no longer acceptable, this punishment was now cruel and unusual.

The evolving standards of decency test reflected the Warren Court’s faith in the inherently progressive nature of history. When it was adopted, the test seemed to promise to free the Court from the constraints of an earlier and more vengeful past. As society evolved and became more mature, the Court would be empowered to interpret the Clause in a manner that kept up with society’s increasingly humane standards. For example, in two early cases—*Coker v. Georgia* and *Enmund v. Florida*—the Court was able to strike down the death penalty for
rape and for felony murder because the punishments had come to be rejected by virtually every state legislature and were almost never imposed by juries.

Over the long run, however, the promise of the evolving standards of decency test was not fulfilled. This test permits the Court to strike down a punishment only when the evidence shows that society as a whole has already rejected it as excessively cruel. If societal opinion takes a turn toward the punitive, however, and legislatures respond by enacting new forms of penal cruelty, the evolving standards of decency test will not enable the courts to stop them—because the popularity of the punishments will show that they comport with current standards of decency.

This problem has materialized with a vengeance over the past forty years. With the upheavals of the 1960s and the increased crime rate of the 1970s and 1980s, societal opinion has taken a decided turn toward the punitive. Rather than replacing the vengeful punishments of the past with kinder and more humane ones, legislatures have ratcheted up the severity of criminal punishment. Sentences have been drastically increased, especially for drug offenders and recidivists. Sex offenders have been hit with numerous new forms of state coercion, including longer prison sentences, the death penalty for certain sex offenses, civil commitment, registration laws, residency restrictions, and novel punishments such as chemical castration. Juveniles have increasingly been moved into the adult system and punished to the same degree as adults. By its own terms, the evolving standards of decency test will not enable the Supreme Court to strike down any of these new punishments, so long as they enjoy strong majoritarian support.

The Supreme Court has sought to counterbalance the majoritarian implications of the evolving standards of decency test by emphasizing its right to exercise its own judgment independently of current societal opinion. The Court has never used its independent judgment
as the sole basis for striking down a punishment as cruel and unusual, however, because to do so
would be to claim a power to invalidate legislative enactments with no external constitutional
standard to guide the decision. In every case in which the Court has declared a punishment cruel
and unusual in its own judgment, it has claimed that the decision was also supported by current
standards of decency.

As societal attitudes have become more punitive, the Supreme Court’s reliance on
evolving standards of decency has become increasingly problematic. For example, in *Roper v.
Simmons*, the Court claimed to find a societal consensus against the death penalty for juvenile
offenders, despite the fact that the punishment was permitted in twenty states and was
consistently (but rarely) imposed by juries. The Court justified this conclusion primarily on the
basis that five states had eliminated the punishment in the previous sixteen years.\(^22\) The Court
stated that the absolute number of states approving the punishment was less important than the
trend toward abolition—because this trend showed that societal standards were evolving away
from this punishment.

The Supreme Court’s reliance on the evolving standards of decency test was strained
further in *Kennedy v. Louisiana*. In that case, the Court claimed to find a societal consensus
against imposition of the death penalty for aggravated rape of a child. In the thirteen-year period
prior to *Kennedy*, six states enacted statutes authorizing this punishment, and several other states
were considering it at the time *Kennedy* was decided.\(^23\) Thus, it appeared that societal standards
were evolving rapidly toward acceptance of this punishment. Nonetheless, the Court held that
there was a societal consensus against the punishment because it was approved in only a small
number of states.
With *Graham v. Florida*, the Supreme Court’s renunciation of the evolving standards of decency test seems almost complete. The question in *Graham* was whether it was unconstitutional to impose a life sentence with no possibility of parole on a juvenile offender who had committed a nonhomicide offense. The Court felt a firm conviction that this punishment was not justified, because juveniles are generally less culpable than adults, less likely to be deterred by a life sentence, and more likely to be successfully rehabilitated. But the objective indicia of current standards of decency pointed in the other direction. The punishment was approved in the federal system, in thirty-seven states, and in the District of Columbia. There was no evidence of a trend away from imposition of this punishment. In fact, the limited evidence presented to the Court seemed to show a continuing trend toward approval of the punishment.

The only evidence that supported the claim that there is a societal consensus in America against sentences of life without parole for juvenile nonhomicide cases was the fact that these sentences are rarely imposed. At the time the *Graham* decision was handed down, only 129 offenders were serving such sentences. These sentences had been imposed in the federal system and in eleven states, and the majority had been imposed in the state of Florida. Thus, the Court concluded that there was a societal consensus against sentences of life without possibility of parole for juvenile nonhomicide offenses because such sentences were “exceedingly rare.”

The *Graham* Court’s decision that a punishment can be found to violate current standards of decency solely on the basis that it is rarely imposed runs contrary to the Court’s own precedents. Before *Graham*, rarity of imposition was held to demonstrate a societal consensus against a punishment only when the punishment was also disapproved by most legislatures, or where there was at least a trend toward such disapproval. Rarity of imposition was not
considered sufficient, in itself, to show that society condemns the punishment—because such rarity might simply indicate that juries feel the punishment should be reserved to a small number of cases in which the defendant is particularly culpable.29

After *Roper*, *Kennedy*, and *Graham*, it is hard to make sense of the evolving standards of decency test. In all three cases, the Supreme Court struck down a punishment that appeared to enjoy significant public support. In *Roper*, the Court treated the absolute number of states that approved the punishment as unimportant; all that mattered was the trend toward abolition. In *Kennedy*, the Court treated the trend as unimportant; all that mattered was the absolute number of states. In *Graham*, the Court treated both the absolute number of states and the trend as unimportant; all that mattered was rarity of imposition.

In fact, the only common aspect of the reasoning in these cases was the fact that the Court itself considered each punishment to be cruelly excessive in light of the offender’s culpability. In other words, the Court’s own judgment drove the decision in all three cases. In order to effectuate this judgment, the Court stretched the evolving standards of decency test to its limits and beyond. The test no longer has any coherent core.

Going forward, the Supreme Court appears set to rely primarily on its own judgment in all cases arising under the Cruel and Unusual Punishments Clause and to use the evolving standards of decency test as little more than a prop. This approach is problematic, because constitutional decisions that are based solely on the Court’s subjective judgment, with no external constitutional standard to guide them, threaten basic principles of separation of powers. Paradoxically, this fact may cause the Supreme Court to be unduly timid in determining the constitutionality of legislatively authorized punishments, for fear of appearing to overreach. Already, the Court has almost completely abdicated its role in determining the constitutionality
of prison sentences for adult offenders. It is not tenable for the Court to continue down this road.

II. *Graham* and Original Meaning

In order to understand the original meaning of the Cruel and Unusual Punishments Clause, one must know the original meaning of the word *unusual*. As used in the Cruel and Unusual Punishments Clause, unusual did not mean rare or out of the ordinary. Rather, it meant “contrary to long usage.” Governmental practices that enjoyed long usage were considered presumptively just and reasonable, because if they did not have these characteristics, they would have fallen out of usage.

By contrast, governmental practices that were contrary to long usage—that is, new or innovative practices—were considered presumptively unjust, particularly when they impinged on longstanding, fundamental common law rights. Common law writers from the fifteenth through the seventeenth centuries asserted that such innovations as the use of torture were illegal, because they were contrary to fundamental rights developed through long usage. Similarly, at the time of the Revolutionary War, Americans described Parliament’s violations of their rights as “unusual” because they were contrary to the long usage of the common law. At the time the Constitution was ratified, the Antifederalists who pushed for adoption of the Cruel and Unusual Punishments Clause emphasized the need to prevent Congress from imposing “unusual punishments” that were harsher than the common law would permit.

The fact that a punishment is unusual does not mean that it is necessarily also cruel. In order to be both cruel and unusual, a punishment must be not only new or innovative but also unduly harsh in comparison with the traditional punishment practices it has replaced. In the late
eighteenth and early nineteenth centuries, American courts struck down punishments as cruel and unusual when they were significantly harsher than prior practice would permit.\textsuperscript{37}

The focus of the Cruel and Unusual Punishments Clause on prior practice does not require courts to use the standards of the eighteenth century to determine the constitutionality of a punishment. Under the common law, if a given punishment fell out of usage, it lost its status as a “usual” punishment, and also lost any presumption of validity.\textsuperscript{38} If the legislature later sought to reintroduce such a punishment, it would be treated as a new or unusual punishment. Thus, in comparing a challenged punishment with prior practice, the Court should compare the practice with those that came immediately before it, not those that fell out of usage in the eighteenth or nineteenth centuries.

Now, back to \textit{Graham}. As noted previously, the claim that societal standards have evolved into a consensus against life sentences without possibility of parole for juvenile nonhomicide offenders does not appear to be plausible. At the time \textit{Graham} was decided, the punishment was authorized in the federal system and a supermajority of states. The evidence showed a trend toward increased, rather than decreased, imposition of the punishment. Although the punishment was rarely imposed, this factor alone had never previously served as the primary basis for finding that a punishment violated current standards of decency.

On the other hand, there is a strong prima facie argument that this punishment constitutes the kind of cruel innovation forbidden under the original meaning of the Cruel and Unusual Punishments Clause. From the 1920s through the 1970s, juvenile courts generally had exclusive original jurisdiction over all criminal matters involving defendants under 18 years of age.\textsuperscript{39} The focus of juvenile courts was primarily rehabilitative rather than punitive, and even in cases where the juvenile offender was ordered to be confined, this confinement would end when the offender
reached 21 years of age.\textsuperscript{40} Juvenile courts did have the power to waive jurisdiction and allow the offender to be transferred into the adult system, but such waivers were made on an individualized basis, using a “best interest of the child and public standard.”\textsuperscript{41}

Starting in the 1980s, public concern about juvenile crime led to increasingly punitive treatment of juvenile offenders.\textsuperscript{42} In the 1990s, this concern exploded into a full-scale panic centering on the belief that an arising generation of “superpredators” would tear apart the very fabric of society.\textsuperscript{43} As a result, legislatures engaged in an “unprecedented . . . crackdown” on juvenile crime.\textsuperscript{44} Between 1992 and 1997, forty-five states changed their laws to make it easier to transfer juveniles into adult court and thus make them potentially subject to such sentences as life without parole for nonhomicide offenses.\textsuperscript{45} The superpredator scare turned out to be wildly exaggerated, and the rates of juvenile crime have significantly dropped since the 1990s.\textsuperscript{46} The laws calling for punitive treatment of juveniles remain on the books, however.

These facts appear to support a strong prima facie argument that imposing a life sentence without parole on juvenile nonhomicide offenders is cruel and unusual under the original meaning of the Eighth Amendment, at least in most cases. The current wholesale treatment of many juvenile offenders as adults is new and, in many instances, leads to much harsher punishment than would have been available prior to the 1990s. One would need to examine the contrast between prior practice and current practice much more closely to reach a firm conclusion—and the final result would probably be more nuanced than the \textit{Graham} Court’s categorical approach to the issue. But there appears to be a prima facie case that many, if not all, life sentences without possibility of parole for juvenile nonhomicide offenders constitute the kind of cruel innovation forbidden by the Cruel and Unusual Punishments Clause. Such a decision
would be based on firmer constitutional footing than the Court’s current unguided reliance on its own judgment.

Notes

1 560 U.S. __ (2010).

2 Id., slip op. at 11.


4 See Kennedy, 128 S. Ct. at 2641.


6 See, e.g., Graham, 560 U.S. __, slip op. at 16.


8 See LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 40 (1993).

9 An Act for the Punishment of Certain Crimes against the United States, 1 Stat 114 (1790).


12 Id.

13 Id. at 126 (Frankfurter, J., dissenting).

14 Id. at 101.


21 See, e.g., Graham, 560 U.S. __, slip op. at 16.

22 543 U.S. at 567.

23 128 S. Ct. at 2651–52.

24 Graham, 560 U.S. __, slip op. at 21–23.

25 Id., slip op. at 11.

26 Id., slip op. at 13 (noting that Oklahoma had imposed this sentence while Graham was pending).

27 Id.

28 Id., slip op. at 16. The Court also observed that this punishment has been rejected by most, if not all, other countries, but left the constitutional significance of this fact ambiguous. See id., slip op. at 29 (noting that international opinion is “not dispositive” but “not irrelevant”).

29 See, e.g., Gregg v. Georgia, 428 U.S. 153, 182 (1976) (“[T]he relative infrequency of jury verdicts imposing the death sentence does not indicate rejection of capital punishment per se. Rather, the reluctance of juries in many cases to impose the sentence may well reflect the humane feeling that this most irrevocable of sanctions should be reserved for a small number of extreme cases.”).

30 See, e.g., Ewing v. California, 538 U.S. 11 (2003) (upholding sentence of twenty-five years to life for recidivist who was caught shoplifting three golf clubs).

31 See generally Stinneford, supra note 7.

32 See, e.g., 1 Blackstone 70, 74; 1 Edward Coke, Institutes § 138, reprinted in 2 Selected Writings 701. See generally Stinneford, supra note 7, at 1771–92.

33 See Stinneford, supra note 7, at 1773–77, 1788, and sources cited therein.

34 See Sir John Fortescue, De Laudibus Legum Angliae (1470); Edward Coke, 3 Institutes ch.2, reprinted in 2 Selected Writings 1025.

35 For example, the Virginia House of Burgesses described a British plan to try American protesters in England, rather than in the vicinage of the offense as “new, unusual, unconstitutional and illegal.” Journals of the House of Burgesses, 1766–1769, at 215 (May 17, 1769) (John Pendleton Kennedy ed., 1906). Similarly, the Declaration of Independence complained about Britain’s effort to disrupt legislative assemblies by calling them to meet at
“places unusual.” THE DECLARATION OF INDEPENDENCE ¶ 6 (U.S. 1776). The practice of convening tribunals and legislative assemblies at “unusual” or noncustomary locations was itself contrary to the common law. See 2


36 See Stinneford, supra note 7, at 1800–10.

37 See id. at 1810–15.


39 See 1999 DOJ Report, supra note 20, at 86.

40 See id. at 86–87.

41 See id. at 86.

42 See id. at 88.


44 See 1999 DOJ Report, supra note 20, at 89.

45 See id.