Categorizing *Graham*

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It would be hard to overstate the significance of the Supreme Court's decision in *Graham v. Florida*. Before *Graham*, it had been almost three decades since the Court had found a noncapital sentence unconstitutional, and in *Graham* the Court did so in sweeping terms. The Court held that life without parole (LWOP) sentences for all nonhomicide offenses committed by anyone under the age of 18 are unconstitutional under the Eighth Amendment. Even more critically, the Court reached that result by applying to a noncapital sentence, for the first time, the test for proportionality used in capital cases. Both the result and the methodology of the decision are historic and certainly of great significance to the offenders who fall within its terms.

But a critical question remains: What will the case mean to Eighth Amendment jurisprudence going forward? In answering this question, it is helpful to think about not only what the future holds under the majority's opinion but also what Eighth Amendment jurisprudence would look like under the frameworks set out in Chief Justice Roberts's concurrence and Justice Thomas's dissent.

I. The Majority's Categorical Approach from Capital Cases

As Justice Kennedy's majority opinion for the Court acknowledges,[1] until *Graham* was decided, the Court's Eighth Amendment jurisprudence followed two tracks.[2] In a relatively robust line of cases,[3] the Court categorically eliminated a number of offenses and offenders from eligibility for capital punishment. In making those decisions, the Court used a proportionality test that considers "objective indicia of society's standards, as expressed in legislative enactments and state practice,"[4] as well as the Court's "own independent judgment"[5] of the crime and the type of offender, to determine whether a death sentence applied to that particular category violates the Eighth Amendment. In noncapital cases, in contrast, the Court applied an exceedingly deferential proportionality test taken from Justice Kennedy's concurring opinion in *Harmelin* that asks as a threshold matter whether the sentence is "grossly disproportionate" to the crime.[6] As long as the state has a "reasonable basis for believing" that the noncapital sentence would serve deterrent, retributive, rehabilitative, or incapacitative goals, the Court will not find it grossly disproportionate and thus will not even consider whether there is a national consensus against the sentence.[7]

Even though neither the text nor history of the Eighth Amendment suggest using a different proportionality standard depending on whether capital or noncapital punishment is at issue,[8] the Court maintained these two tracks because of its view that "death is different" than all other punishments.[9]

Graham asked the Court to reconsider its bifurcated approach to proportionality jurisprudence, at least with respect to LWOP sentences for juveniles, and employ the test it had exclusively reserved for capital sentences.[10] This request was a fundamental challenge to three decades of Eighth Amendment case law.

Despite the depth of the challenge, the Court's response was shallow. The Court offered just four sentences to justify its use of the capital proportionality test in Graham's case. According to the Court, the narrow proportionality test from *Harmelin* that it previously employed in noncapital cases was "suited for considering a gross proportionality challenge to a particular defendant's sentence."[11] Although Graham also challenged a noncapital sentence, the Court said this case was distinguishable because Graham raised a challenge to "a sentencing practice itself" "as it applies to an entire class of offenders who have committed a range of crimes."[12] In the face of such a categorical challenge, the Court concluded that *Harmelin*'s threshold test that required a finding of gross disproportionality between the gravity of the offense and the severity of the penalty "does not advance the analysis."[13] Instead, said the Court summarily, "the appropriate analysis is the one used in cases that involved the categorical approach."[14]

So much for the Court's death-is-different philosophy. Even though the Court had previously justified the two tracks as resting on the fact that "a sentence of death differs in kind from any sentence of imprisonment, no matter how long,"[15] the Court in *Graham* offered a new dividing line for the two tracks. From now on, instead of splitting death cases from all others, it now appears that whether the stringent threshold test from *Harmelin* is

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applied will depend on whether a defendant frames his challenge in categorical or case-specific terms.

This shift in the Court's proportionality jurisprudence is monumental, and one that creates the possibility for more Eighth Amendment challenges in noncapital cases. This possibility is what prompted the dissent to note with alarm that there is "[n]o reliable limiting principle" to stop the Court from applying categorical prohibitions to other penalties.[16] Certainly the dissent is correct that a case-specific challenge can be rephrased into a categorical one with relative ease, thus opening the door to many more Eighth Amendment challenges in noncapital cases using the more relaxed standard applied in *Graham*.

But just because challenges to noncapital sentences can be raised that will evade the strict threshold test from *Harmelin* does not mean that they will be successful. Graham's case rested at the intersection of two lines of authority from the capital context: It involved a juvenile offender and a crime short of homicide. In *Roper*, the Court cited a wealth of data to conclude that juveniles were less culpable.[17] In *Coker*[18] and *Kennedy*,[19] the Court emphasized that homicide was categorically more serious than other crimes, including even the rape of a child. Graham was thus able to build his case by relying on established precedent that he was a less culpable offender and that he had committed a less culpable act.

The Court relied heavily on these cases in reaching its so-called independent judgment that the sentence of LWOP for a juvenile who commits a nonhomicide violates the Eighth Amendment.[20] *Roper* in particular was critical to the Court's conclusion that Graham's sentence served no legitimate purpose of punishment. In the Court's view, the "considerations underlying" *Roper*'s holding "support as well the conclusion that retribution does not justify imposing the second most severe penalty on the less culpable juvenile nonhomicide offender."[21] Similarly, the Court relied on *Roper* to reject deterrence as the animating goal of the sentence because "juveniles will be less susceptible to deterrence."[22] The Court dismissed incapacitation as a legitimate justification for a LWOP sentence because in the case of juveniles, it "requires the sentencer to make a judgment that the juvenile is incorrigible" and to do so "at the outset."[23] The Court thought that would "improperly den[y] the juvenile offender a chance to demonstrate growth and maturity" and would allow incapacitation to render the Eighth Amendment "a nullity."[24] Finally, the Court rejected rehabilitation as a legitimate goal because LWOP "forswears altogether the rehabilitative ideal."[25]

The particular sentence of LWOP was also a critical factor. The Court observed that Graham's penalty was "the second most severe penalty permitted by law"[26] and took pains to note that LWOP shares critical characteristics with death sentences "that are shared by no other sentences."[27] Thus, it was not the length of an LWOP sentence that the Court found troubling; it was the fact that such a sentence "deprives the convict of the most basic liberties without giving hope of restoration."[28] This language is tailor-made for distinguishing any future challenges to noncapital sentences other than LWOP.[29] Even if other sentences subject a defendant to spending his or her natural life behind bars, if there is a possibility for release by parole at any point during that time, no matter how remote, one could see the Court drawing a distinction because the defendant still has hope of restoration.

In *Graham*, then, the offender, the crime, and the sentence all raised red flags of disproportionality. If these three factors must all be present to challenge a noncapital sentence successfully, it is hard to envision many candidates likely to win under this framework. The next category that seems likely to meet the Court's test would be one that taps into the Court's death penalty jurisprudence in the same way; thus it would seem, in light of *Atkins*, that an individual with mental retardation who receives an LWOP sentence for a crime other than a homicide is a strong candidate for a successful Eighth Amendment challenge. Even in that context, however, it is not clear that the Court would treat mental retardation and juvenile status the same. *Graham* rested on the fact that juveniles have a capacity for and a likelihood of change; if the Court were to conclude that those with mental retardation do not have a similar capacity for reform because of their intellectual disability, the Court may opt not to allow a categorical challenge even though the disability makes such offenders less culpable.

The odds are likely even longer for defendants who do not check all three boxes of a less culpable offender, a less culpable offense, and LWOP. Even two out of three may not be enough for juveniles. For example, what is to become of juveniles who commit homicides and are sentenced to LWOP? Because so much of the decision in *Graham* rests on *Roper* and the diminished culpability of juveniles, it is possible that the Court will strike down LWOP for homicides committed by juveniles.[30] But there is also room for the Court to make a distinction. The national consensus numbers are quite different. Although only about 129 inmates in the United States are serving a sentence of life without parole for juvenile nonhomicide offenses, approximately 2,460 inmates—or nineteen times the number of nonhomicide offenders—are serving a sentence of life without parole for a homicide offense.[31] In addition, the Court's independent judgment may change, because much of the decision in *Graham* rested on *Kennedy* and other cases pointing out that nonhomicides are less serious. Justice Kennedy, the crucial swing vote, wrote in *Harmelin* that "no sentence of imprisonment would be disproportionate"[32] for the crime of felony murder without a specific intent to kill, let alone other types of homicide.

It would be an even steeper uphill battle for a defendant who wants to challenge a sentence that provides for the possibility of parole—even if the defendant is a juvenile who has committed a nonviolent offense. The Court emphasized that the deficiency with Graham's sentence

was that it did not give him a "meaningful" or "realistic" opportunity to obtain release before the end of his prison term "based on demonstrated maturity and rehabilitation."[33] The Court's use of *meaningful* and *realistic* as adjectives suggests that the Court may be willing to scrutinize life sentences if parole is available only in theory but not in reality. But if the state grants parole to even a single offender, is the Court going to be prepared to second-guess all the other decisions? The approach of the federal courts to parole oversight suggests not.[34]

It is even harder to imagine the Court going far with *Graham* when it comes to adults. What tipped the scales for the Court in *Graham* was the social science data about the reduced culpability of juveniles.[35] That data suggested a capacity for change in juveniles based on brain development that, in the Court's view, required reevaluation. Without similar data about the capacity for change in adults, it is unlikely that the Court will want to take the same categorical leap and effectively require parole for a category of nonhomicides that will include violent and brutal cases. Instead, the Court is likely to inform defendants that their only hope would be to challenge particular sentences as excessive under the *Harmelin* framework.

That brings us to the biggest limit on the reach of the majority's opinion in *Graham*. Nothing in the *Graham* decision suggests a willingness to find a particular sentence—as opposed to a whole category of sentences—unconstitutional under *Harmelin*.[36] Thus, for the overwhelming number of cases in which a defendant cannot create the same powerful categorical case that Graham did, the Court's decision in *Graham* is unlikely to change its stringent views about Eighth Amendment proportionality limits in noncapital cases.

II. Roberts's Noncapital Proportionality Review Under *Harmelin*

Since the Court's decision in *Solem* almost three decades ago, the Court has not found a single sentence to be disproportionate under the Eighth Amendment—and it was hardly for lack of strong candidates. In *Harmelin*, the Court accepted as constitutional an LWOP sentence for a first-time offender who possessed 672 grams of cocaine.[37] The Court also approved a fifty-years-to-life sentence for the petty theft of nine videotapes and a twenty-five-years-to-life sentence for the theft of three golf clubs, both under California's Three Strikes Law.[38]

Chief Justice Roberts's concurring opinion finding that Graham's sentence failed the *Harmelin* test for proportionality is potentially a significant break from these decisions, for two reasons. The first is the way in which the Chief Justice applied *Harmelin*. While engaging in the threshold inquiry to determine whether the sentence was grossly disproportionate to the crime, the Chief Justice focused on Graham's "youth and immaturity," his "lack of prior criminal convictions," and "the difficult circumstances of his upbringing" as showing his diminished culpability.[39] This focus on a defendant's particular mitigating circumstances suggests that lower courts should do the same when they apply the test. In addition, and perhaps even more significantly, the Chief Justice did not even bother to analyze whether the state had "a reasonable basis for believing" that the sentence nonetheless served deterrent, retributive, rehabilitative, or incapacitative goals before going on to engage in intrajurisdictional and interjurisdictional analyses.[40] If lower courts no longer need to engage in that inquiry as a threshold matter, undoubtedly more punishments will fail the Eighth Amendment test.

The second reason why the Chief Justice's concurrence may be significant is the mere fact that he was the one who wrote it. In *Ewing* and *Andrade*, the Court's four liberal Justices also recognized sentences that violated the proportionality principle of *Harmelin*, but they could not get a fifth vote.[41] Assuming that Justice Sotomayor's decision to join Justice Stevens's concurrence in *Graham* indicates that she would also be willing to find particular sentences that violate *Harmelin*, there may be five Justices willing to give *Harmelin* more bite in practice.[42] Certainly, having one of the Court's more conservative voices find such a violation is a step in that direction.

But one must be careful not to read too much into Chief Justice Roberts's concurrence. First, his opinion rests on *Roper* as much as it does on an application of the test for noncapital sentences.[43] In his view, "an offender's juvenile status plays a central role" in the inquiry regarding whether a sentence is proportionate given the culpability of the offender.[44] Indeed, he pointed out that "Graham's age places him in a significantly different category from" the defendants in the Court's other noncapital proportionality cases.[45] Second, Chief Justice Roberts did not foreclose the possibility that he would ultimately agree with Justices Scalia and Thomas that the Eighth Amendment does not prohibit disproportionate noncapital sentences.[46]

Despite these signposts indicating that the Chief Justice himself is hardly ready to strike down many, if any, further sentences under the Eighth Amendment, the opinion nevertheless stands as a model to lower courts looking for guidance on how to apply *Harmelin*. The dissent seems to recognize as much, noting that the Chief Justice's willingness to find a sentence unconstitutional under *Harmelin* could "breathe[] new life into the case-by-case proportionality approach."[47] If lower courts follow the Chief Justice's lead and pay more attention to a defendant's mitigating circumstances and less attention to whether a state has a basis for imposing the sentence to achieve incapacitation, it would seem that more sentences will fall even when they do not fit into the categorical box of the majority. If this scenario occurs—and that is a big *if* considering that no other Justice joined the opinion and the majority took a different tack—a much larger pool of sentences could be held unconstitutional because the inquiry is so fact specific and contextual.

Thus, although Roberts's rejection of the categorical approach might seem to cabin more Eighth Amendment

claims in the specific context of juvenile offenders, his methodology could lead to more significant review of noncapital sentences overall.

III. The Dissent's Federal Sentencing Safe Harbor

Justice Thomas, joined by Justices Scalia and Alito, rejected the majority's particular categorical approach as unprecedented and overbroad[48] but took an equally sweeping approach. In the view of these three Justices, "The sole fact that federal law authorizes [LWOP for juveniles for nonhomicide offenses] *singlehandedly* refutes the claim that our Nation finds it morally repugnant."[49] For these Justices, if a federal law authorizes a punishment and the federal government uses it, "[t]hat should be all the evidence necessary to refute the claim of a national consensus against this penalty."[50]

This view essentially removes any federal sentence from challenge under the Eighth Amendment and gives the federal government the power to immunize any state sentence from Eighth Amendment challenge even if every other state has rejected it as excessive.

A full analysis of the legal merits of this claim requires more than the limited space I have here. For now, I want to flag just three problems that this approach poses for effective proportionality review. First, simply because a law passes at the national level does not mean that there is no national consensus against it. Numerous studies covering a wide range of policy issues have shown that voting in Congress is significantly influenced by the lobbying of special interest groups, whose views often conflict with those of the general public.[51]

Second, given the Framers' overwhelming concern with excessive federal overreaching and with the exercise of its criminal powers in particular,[52] they would undoubtedly be shocked to learn that Congress itself is the one legislative body exempted from Eighth Amendment scrutiny.

Third, this categorical free pass ignores the fact that the politics of crime are particularly pathological at the federal level and prone to produce unusually cruel sentences.[53] The states are responsible for the entire range of criminal conduct—most of which is local—so they are more likely to pay attention to how a particular sentence stacks up against the sentences for other crimes. The federal government, in contrast, is responsible for only a subset of crimes and lacks the perspective of how a sentence for a federal crime compares with the crimes handled exclusively or predominantly by the states—particularly the most violent crimes, such as rape and murder.[54] This approach is precisely the kind of comparison that lies at the core of the Supreme Court's Eighth Amendment jurisprudence, yet Congress lacks the incentive or the willingness to engage in it.

Furthermore, the federal government does not maintain a large police force because states are primarily responsible for order on the streets; as a result, in the pursuit of cheaper deterrence, the federal government is more likely to increase sentences as opposed to upping its police force to increase the likelihood that offenders get caught. That strategy increases the risk that the sentence itself is disproportionate to the offense or the offender. Finally, the federal government lacks budgetary pressure to pay close attention to sentences, meaning that almost no checks exist for legislative excess or irrationality.

The fact that Justices Scalia and Thomas signed on to this view is not particularly consequential because, in their view, there is no proportionality component to the Eighth Amendment for sentences other than death.[55] But Justice Alito's endorsement of this approach signifies that there are now three Justices on the Court who will accept any sentence by the federal government and any state sentence that has a federal counterpart.

IV. Conclusion

Justice Stevens wrote separately in *Graham* to point out that "[s]tandards of decency have evolved since 1980," when the Court decided *Rummel v. Estelle* and accepted a life sentence for a defendant who committed three separate theft offenses that resulted in losses worth less than $230.[56] Regardless of which of the three major paths from *Graham* ultimately commands future majorities of the Court, the case makes clear that not only do the standards of decency change over time but so, too, do the Court's tests for deriving those standards.

Notes

* Thanks to Jonathan Grossman and David Lin for excellent research assistance.

1 130 S. Ct. 2011, 2021–22 (2010).

2 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 (2009).

3 *See, e.g.*, Roper v. Simmons, 543 U.S. 551 (2005); Atkins v. Virginia, 536 U.S. 304 (2002); Kennedy v. Louisiana, 128 S. Ct. 2641 (2008).

4 *Roper*, 543 U.S. at 563.

5 *Id.* at 564.

6 Ewing v. California, 538 U.S. 11, 20 (2003) (plurality opinion) (quoting Harmelin v. Michigan, 501 U.S. 957, 996–97 (1991) (Kennedy, J., concurring in part and concurring in the judgment)).

7 Ewing v. California, 538 U.S. 11, 28 (2003) (plurality opinion). For a persuasive criticism of this approach, *see* Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 Va. L. Rev. 677, 682–83, 706 (2005).

8 Brief for the Center on the Administration of Criminal Law as Amici Curiae Supporting Petitioner at 6-18, Graham v. Florida, No. 08-7412 (May 17, 2010); Harmelin, 501 U.S. at 1014 (White, J., dissenting).

9 For critiques of the Court's "death is different" rationale as a justification for abandoning significant proportionality in noncapital cases, *see* Barkow, *supra* note 2, at 1164–75, 1178–82; Lee, *supra* note 7, at 697.

10 Brief for the Petitioner at 33, Graham v. Florida, No. 08-7412 (May 17, 2010) (citations omitted).

11 *Graham*, 130 S. Ct. 2011, 2022 (2010).

12 *Id.* at 2022–23.

13 *Id.* at 2023.

14 *Id.*

15 Rummel v. Estelle, 445 U.S. 263, 272 (1980); *id.* (noting that "our decisions applying the prohibition of cruel and unusual

punishments to capital cases are of limited assistance" in noncapital cases); Roper v. Simmons, 543 U.S. 551, 568 (2005) (noting that "the Eighth Amendment applies to [the death penalty] with special force"). The dissent and Chief Justice Roberts's concurrence call out the majority on this switch in approach. *Graham*, 130 S. Ct. at 2046 (Thomas, J., dissenting) ("For the first time in 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."); *id.* at 2038–39 (Roberts, C.J., concurring in judgment) ("Treating juvenile life sentences as analogous to capital punishment is at odds with our longstanding view that 'the death penalty is different from other punishments in kind rather than degree'" (quoting *Solem*)).

16 130 S. Ct. at 2046 (Thomas, J., dissenting).

17 *Roper*, 543 U.S. at 569–71.

18 Coker v. Georgia, 433 U.S. 584, 592 (1977) (holding that the Eighth Amendment prohibits the death penalty for the rape of an adult woman).

19 *Kennedy*, 128 S.Ct. at 2646 (holding that the Eighth Amendment prohibits the death penalty for the rape of a child where the crime did not result, and was not intended to result, in death of the victim).

20 130 S. Ct. at 2026–30 (citing *Roper*, *Kennedy*, *Tison*, and *Coker* and noting that "[t]he age of the offender and the nature of the crime each bear on the analysis").

21 *Id*. at 2028.

22 *Id*. at 2028–29.

23 *Id*. at 2029.

24 *Id*.

25 *Id*. at 2029–30.

26 *Id*. at 2027. (quoting *Harmelin*, 501 U.S. at 1001).

27 *Id*.

28 *Id*.

29 *Cf. id*. at 2052 n.10 (Thomas, J., dissenting) (noting that "it seems odd that the Court counts only those juveniles sentenced to life without parole and excludes from its analysis all juveniles sentenced to lengthy terms-of-years sentences" because those sentences "effectively den[y] the offender any material opportunity for parole").

30 In addition, world opinion is against LWOP for juveniles even in homicide cases. *Id*. at 2033–34.

31 *Id*. at 2024 (acknowledging 129 juvenile nonhomicide offenders); *State Distribution of Youth Offenders Serving Juvenile Life Without Parole (JLWOP)*, Human Rights Watch (Oct. 2, 2009), http://www.hrw.org/en/news/2009/10/02/state-distribution-juvenile-offenders-serving-juvenile-life-without-parole (finding 2,589 juvenile LWOP offenders overall).

32 *Harmelin*, 501 U.S. at 1004 (Kennedy, J., concurring in part and concurring in the judgment) (quoting *Solem*, 463 U.S. at, 290 n.15).

33 130 S. Ct. at 2030, 2034.

34 *See, e.g.*, Greenholz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1 (1979); Schuemann v. Colo. State Bd. of Adult Parole, 624 F.2d 172, 173 (10th Cir. 1980); Paine v. Baker, 595 F.2d 197, 200 (4th Cir. 1979); Williams v. Ward, 556 F.2d 1143, 1160 (2d Cir. 1977).

35 130 S. Ct. at 2026–30.

36 Justice Stevens's concurrence suggests that perhaps the dissenting opinions in *Harmelin*, *Ewing*, and *Andrade* "more accurately describe the law today," at least as compared with the dissent's reading of the cases. *Id*. at 2036 (Stevens, J., dissenting). But there is nothing in the majority opinion itself to suggest that the dissenting opinions in those cases hold greater weight or that the *Harmelin* test from Justice Kennedy's concurrence is any less difficult to satisfy to demonstrate an Eighth Amendment violation.

37 Harmelin v. Michigan, 501 U.S. 957 (1991).

38 Ewing v. California, 538 U.S. 11 (2003); Lockyer v. Andrade, 538 U.S. 63 (2003).

39 *Id.* at 8.

40 *Ewing*, 538 U.S. at 28 (plurality opinion).

41 *Ewing*, 538 U.S. at 36 (Breyer, J., dissenting); *Andrade*, 538 U.S. at 78 (Souter, J., dissenting).

42 Justice Stevens's retirement complicates this prediction, but given that the Court's more liberal members seem to hold this view and his successor is a Democrat appointed by a Democratic president, there is reason to believe she may share this view also.

43 130 S. Ct. at 2036, 2039 (Roberts, C.J., concurring in the judgment).

44 *Id*. at 2039 (Roberts, C.J., concurring in the judgment).

45 *Id.* at 2040 (Roberts, C.J., concurring in the judgment).

46 *Id.* at 2036–37 (Roberts, C.J., concurring in the judgment) (noting that his colleagues have raised "serious and thoughtful questions" about this and that he does not answer them in *Graham* because neither party asked the Court to reconsider its precedents finding a proportionality requirement in the Eighth Amendment).

47 *Id*. at 2044 n.1 (Thomas, J., dissenting).

48 *Id*. at 2047–48 (Thomas, J., dissenting).

49 *Id.* at 2049 (Thomas, J., dissenting) (emphasis added).

50 *Id.* at 2051 (Thomas, J., dissenting).

51 *See* Douglas D. Roscoe & Shannon Jenkins, *A Meta-Analysis of Campaign Contributions' Impact on Roll Call Voting*, 86 Soc. Sci. Q. 52 (2005) (analyzing thirty-three studies on this issue and concluding that one third of all roll-call votes are affected by political contributions); William P. Welch, *Allocation of Political Monies: Economic Interest Groups*, 20 Pub. Choice 83 (1980) (noting a positive influence of special interest group contributions on voting behavior); Durden et al., *The Effects of Interest Group Pressure on Coal Strip-Mining Legislation*, 72 Soc. Sci. Q. 237 (1991); Richard Fleisher, *PAC Contributions and Congressional Voting on National Defense*, 18 Leg. Stud. Q. 391 (1993).

52 Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 Stan. L. Rev. 989, 1012–17 (2006) (describing the Constitution's extensive regulation of federal criminal power).

53 Rachel E. Barkow, *The Political Market for Criminal Justice*, 104 Mich. L. Rev. 1720–23 (2006).

54 *Id.* at 1722.

55 In a portion of the dissent joined only by Justice Scalia, Justice Thomas repeated his view that the Cruel and Unusual Punishments Clause bars only methods of punishment that are cruel and unusual, not grossly disproportionate punishments. 130 S. Ct. at 2044–46 (Thomas, J., dissenting).

56 445 U.S. 263 (1980).