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## They're Just Kids

The Supreme Court rules that juveniles can't be sentenced to life without parole.

By Emily Bazelon

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Appearing before the Supreme Court, a lawyer with a client on death row will almost always use the "death is different" argument—that, because capital punishment is irrevocable, people sentenced to die deserve extra protection from the law. After today, thanks to a new Supreme Court decision, lawyers with clients under 18 sentenced to life without parole—and surely other harsh punishments—will argue that juveniles are different, too.

In a majority opinion by Justice Anthony Kennedy, the court ruled Monday that under the Eighth Amendment's bar against cruel and unusual punishment, states may no longer sentence juveniles to life without parole. The decision came in the case of Terrance Graham, who was already serving probation for robbery when, at age 17, he went into a house with two 20-year-old men and robbed a man at gunpoint. The court's 6-to-3 decision makes it seem as if striking down the sentence of life without parole—for Graham and all the offenders like him—was relatively easy. With Kennedy, at first glance, is Chief Justice John Roberts, along with the court's four liberal-moderates: Steven Breyer, Ruth

Bader Ginsburg, Sonia Sotomayor, and John Paul Stevens.

But, in fact, Roberts is not onboard with Kennedy's sweeping decision. He agreed only to find the life-without-parole sentence (commonly referred to as LWOP) constitutionally disproportionate only for Terrance Graham, not for all teenagers who haven't murdered anyone. This doesn't matter for the outcome, since Kennedy still has five votes for his opinion. But in the interchange between Roberts and Kennedy, you can see the sticking points in this case.

The important precedent here is *Roper v. Simmons* in 2005, in which Kennedy, for a 5-to-4 majority, held that the death penalty for juveniles was unconstitutional. In that ruling, Kennedy laid out the neurological argument for

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treating teenagers as less culpable than adults—their brains are still developing, and one of the big things they lack is impulse control. And so they should not be put to death for the crimes they committed as adolescents.

It may seem like a relatively small step from this logic to the result in today's case. But, in fact, as Roberts points out, "*Roper* explicitly relied on the possible imposition of life without parole on some juvenile offenders." *Roper* extended the court's ban against the execution of mentally retarded people. It was about the developmental weakness of teenagers only in the context of the death penalty. In other words, Kennedy stuck with "death is different" when he said that juveniles couldn't be executed.

That's why Monday's categorical ban against LWOP for juveniles is a big deal. The court has never before prohibited a particular kind of sentence in modern use, other than the death penalty. For Roberts, as well as the three other conservative dissenters, it must be intensely frustrating to watch Kennedy walk down this road. You can practically hear Roberts hollering after him: "A life sentence is of course far less severe than a death sentence, and we have never required that it be imposed only on the very worst offenders, as we have with capital punishment." But Kennedy

doesn't care. LWOP sentences "share some characteristics" with death sentences, he says. And "when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has twice diminished moral culpability."

That's the headline of the decision, according to Bryan Stevenson, executive director of the Equal Justice Initiative, which represents Joe Sullivan, the other LWOP juvenile whose case was before the court. "We have all these protections for kids in virtually every area of law except the criminal justice system," Stevenson said. "Kennedy's opinion begins to reconcile that." The court didn't rule in Sullivan's case (dismissing cert as improvidently granted.) But the ruling for Graham presumably applies to Sullivan and the 129 juveniles in the United States the court counts as serving LWOP for crimes less than murder. Stevenson points out that the harsh treatment of

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kids who commit crimes makes the United States an anomaly—a point that Kennedy echoes when he says that LWOP for juveniles is "rejected the world over" (though he immediately notes, lest anyone get the wrong idea, that "this observation does not control our decision").

More relevant to Kennedy's analysis is the bean-counting of state laws. This is how the court does the "unusual" part of "cruel and unusual": It looks at how many states engage in the punishment under scrutiny. And here we see that the majority was willing to go out on a limb. The number of states in which a juvenile can be sentenced to LWOP is 37, plus the District of Columbia and the federal government. This makes Justice Clarence Thomas, in his dissent, protest that standards have "evolved" such that LWOP is considered cruel and unusual. "The news of this evolution will, I think, come as a surprise to the American people," he argues.

In response, Kennedy presents another number: 12. That's 11 states, plus the federal system, in which juveniles are actually serving LWOP sentences. Seventy-seven of the 129 American juveniles sentenced to LWOP are in Florida, Graham's home state. Kennedy has to admit that 129 sentences in 12 jurisdictions is more than what counted

for "unusual" in other Eighth Amendment cases. But he holds his ground by talking about how relatively unusual LWOP is in the context of the tens of thousands of teenage arrests for serious crimes.

Where will the decision in *Graham* lead? Bryan Stevenson hopes that it brings the United States a step closer to ratifying the U.N. Convention on the Rights of the Child, which every nation in the world has ratified except the United States and Somalia. If the United States ratified the treaty, it would have more credibility in the fight against trafficking and other kinds of child exploitation, Stevenson said. This could be another branch of the juveniles-are-different tree.

What about other terribly long—but not lifelong—prison terms for teenagers? Or even for adults? Kennedy doesn't go here, of course. But he doesn't foreclose it,

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either. Terrance Graham, he writes, deserved to be in prison for some time, "but it does not follow that he would be a risk to society for the rest of his life." It's a line that will resonate for a lot of criminals who say they've rehabilitated themselves.

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*Emily Bazelon is a **Slate** senior editor and an editor of **DoubleX**.*

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