

2011

Out of the Strike Zone: Why *Graham v. Florida* Makes It Unconstitutional to Use Juvenile-Age Convictions as Strikes to Mandate Life Without Parole Under § 841(b)(1)(A)

Christopher J. Walsh

Follow this and additional works at: <http://digitalcommons.wcl.american.edu/aulr>



Part of the [Criminal Procedure Commons](#), and the [Juveniles Commons](#)

Recommended Citation

Walsh, Christopher J. (2011) "Out of the Strike Zone: Why *Graham v. Florida* Makes It Unconstitutional to Use Juvenile-Age Convictions as Strikes to Mandate Life Without Parole Under § 841(b)(1)(A)," *American University Law Review*: Vol. 61: Iss. 1, Article 3.

Available at: <http://digitalcommons.wcl.american.edu/aulr/vol61/iss1/3>

This Comment is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in American University Law Review by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact fbrown@wcl.american.edu.

Out of the Strike Zone: Why *Graham v. Florida* Makes It Unconstitutional to Use Juvenile-Age Convictions as Strikes to Mandate Life Without Parole Under § 841(b)(1)(A)

OUT OF THE STRIKE ZONE: WHY *GRAHAM*
V. FLORIDA MAKES IT UNCONSTITUTIONAL
TO USE JUVENILE-AGE CONVICTIONS AS
STRIKES TO MANDATE LIFE WITHOUT
PAROLE UNDER § 841(b)(1)(A)

CHRISTOPHER J. WALSH*

Life without parole is an incredibly harsh sentence. Recognizing this fact, the Supreme Court's 2010 decision in Graham v. Florida held that life without parole is an unconstitutional cruel and unusual punishment for any juvenile convicted of a nonhomicide crime. This Comment takes the rule from Graham v. Florida and applies it to another context: sentencing defendants who have been convicted of drug trafficking in violation of 21 U.S.C. § 841. Under the sentencing scheme of § 841(b)(1)(A), a defendant on his third strike—having two prior “felony drug offense” convictions—must be sentenced to life without parole.

This Comment argues that counting juvenile-age prior convictions as strikes under § 841(b)(1)(A) to trigger mandatory life without parole is unconstitutional. Counting juvenile-age prior convictions as strikes effectively results in what Graham v. Florida forbids: life without parole based on the defendant's actions as a juvenile.

* Managing Editor, *American University Law Review*, Volume 61; J.D. Candidate, May 2012, *American University, Washington College of Law*; B.A., History, 2009, *Yale University*. I am indebted to Peter Tran, my Note & Comment Editor, whose guidance was instrumental in shaping this Comment; to Lauren Marsh and the Volume 60 Note & Comment Board; and to Professor Cynthia Jones. A big thank you to all members of the *American University Law Review* for your tireless efforts on every piece; and special thanks to Hillary Boroian, Gabe Carrera, Mary Gardner, Chantal Hernandez, Nick Milonas, Kat Nakazono, Seth Ogden, Brett Shields, Pasha Sternberg, and Brian Westley for your work on my Comment. Thank you to my friends and family, especially Connor, Ryan, Mike, LWay, and Schroppey, for your constant love and support. Also, Dad, thank you for always shoveling the snow off the mound. And Mom, thank you for putting the note cards up in the kitchen.

TABLE OF CONTENTS

Introduction	167
I. Background.....	169
A. The Eighth Amendment.....	169
1. Cruel and Unusual Punishments Clause jurisprudence prior to <i>Graham v. Florida</i>	170
2. <i>Graham v. Florida</i> : The Supreme Court's new categorical proportionality rule.....	173
B. Sentencing Drug Traffickers in the Federal System.....	176
C. The Penological Goals of Sentencing.....	179
1. Retribution.....	179
2. Deterrence.....	180
3. Incapacitation.....	181
4. Rehabilitation.....	182
D. Two post- <i>Graham v. Florida</i> Circuit Court Decisions on § 841(b)(1)(A) Life-Without-Parole Sentences.....	183
1. <i>United States v. Scott</i>	183
2. <i>United States v. Graham</i>	185
II. Life Without Parole Under § 841(b)(1)(A) due to Juvenile-Age Strikes is Unconstitutional Based on <i>Graham v. Florida</i>	186
A. Objective Indicia Show the United States Lacks a Clear Societal Consensus Regarding this Sentencing Practice	187
B. Life Without Parole Under § 841(b)(1)(A) is Too Severe for These Offenders Because of Their Diminished Culpability and Because this Sentence Lacks a Sufficient Penological Justification.....	189
1. Life without parole is unduly severe in light of the lessened culpability of this class of offenders	190
2. No legitimate penological goal adequately justifies counting juvenile-age convictions as strikes.....	193
a. Retribution.....	194
b. General deterrence.....	195
c. Specific deterrence and incapacitation	197
d. Rehabilitation	199
C. International Standards Relating to Juvenile Criminal Conduct and Drug Trafficking Offenses Confirm this Sentencing Practice Is Cruel and Unusual.....	199
III. Section 3553(a) is the Proper Place for Judges to Consider a Defendant's Juvenile Criminal History	202
Conclusion	203

*My object all sublime
I shall achieve in time—
To let the punishment fit the crime—
The punishment fit the crime.¹*

INTRODUCTION

The Eighth Amendment to the United States Constitution² represents an inherently moral judgment.³ By prohibiting “cruel and unusual punishments,” this constitutional provision embodies a humane ideal of American society.⁴ In 2010, the Supreme Court held in *Graham v. Florida*⁵ that juveniles cannot be sentenced to life without parole for nonhomicide crimes.⁶ This holding was the first time—outside of the death penalty context—that the Court categorically declared a particular sentencing practice “cruel and unusual” because it was disproportionate to the crime committed and the class of offenders.⁷ Although the full implications of this new Eighth Amendment rule are far from clear,⁸ *Graham v. Florida* should motivate American society to reassess many other sentencing practices underlying the criminal justice system.

Sentencing drug traffickers under 21 U.S.C. § 841(b)(1)(A) is one such practice that needs to be reexamined after *Graham v. Florida*. Part of the Controlled Substances Act,⁹ § 841 is one of the federal government’s chief statutes for prosecuting drug trafficking.¹⁰ When a defendant has been convicted of trafficking certain large quantities of drugs, § 841(b)(1)(A) governs his sentence.¹¹ Section 841(b)(1)(A) uses a “three strike” scheme

1. W.S. GILBERT, *THE MIKADO* 68 (MacMillan & Co. 1928) (1885).

2. U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

3. See *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968) (asserting that the Eighth Amendment encompasses “broad and idealistic concepts of dignity, civilized standards, humanity, and decency”).

4. See *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion) (emphasizing “[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man”).

5. 130 S. Ct. 2011 (2010).

6. *Id.* at 2030 (interpreting the Cruel and Unusual Punishments Clause to mean that juveniles convicted of nonhomicide offenses cannot be sentenced to life without parole because they must be afforded “some meaningful opportunity to obtain release [in the future] based on demonstrated maturity and rehabilitation”).

7. See *id.* at 2022–23 (explaining that this context, “a categorical challenge to a term-of-years sentence,” was one “the Court ha[d] not considered previously”).

8. See *infra* notes 78–79 and accompanying text (detailing some of the post-*Graham v. Florida* legal developments).

9. Pub. L. No. 91–513, 84 Stat. 1242 (1970) (codified as amended in scattered sections of 21 U.S.C.).

10. See 21 U.S.C. § 841 (2006) (creating a comprehensive statutory structure for prosecuting and sentencing certain drug trafficking crimes).

11. See *id.* § 841(b)(1)(A) (governing sentencing for specific amounts of heroin, cocaine, PCP, methamphetamines, and other controlled substances).

where any prior “felony drug offense”¹² convictions—which do not have to be prior convictions under this statute—count as strikes to enhance the defendant’s sentence.¹³ Under this structure, a defendant is subject to a ten-year mandatory minimum on his first strike, a twenty-year mandatory minimum on his second strike, and mandatory life without parole on his third strike.¹⁴

In the wake of *Graham v. Florida*, two federal circuit courts of appeals decided cases where the defendants challenged their § 841(b)(1)(A) life-without-parole sentences.¹⁵ In one, *United States v. Scott*,¹⁶ Angelo Scott had been sentenced to life without parole even though his first two strikes were drug possession convictions when he was sixteen-years-old and seventeen-years-old.¹⁷ In the other, *United States v. Graham*,¹⁸ Donald Graham had been sentenced to life without parole even though his first strike resulted from a guilty plea to drug trafficking charges when he was seventeen-years-old.¹⁹ Despite the Supreme Court’s holding in *Graham v. Florida*, both circuits upheld the defendants’ life-without-parole sentences.²⁰

This Comment argues that counting a defendant’s juvenile-age convictions as strikes to trigger mandatory life without parole under § 841(b)(1)(A) violates the Eighth Amendment’s Cruel and Unusual Punishments Clause. Using juvenile-age convictions under § 841(b)(1)(A) effectively results in what *Graham v. Florida* categorically deemed unconstitutional: life without parole because of the defendant’s actions when he was under eighteen-years-old. To reach such a conclusion, this Comment utilizes the Eighth Amendment categorical challenge framework that the Supreme Court employed in *Graham v. Florida*.

Still, this Comment argues that juvenile-age convictions need not be completely ignored at sentencing. Although it is unconstitutional to use

12. See *infra* note 85 (providing the definition of “felony drug offense” for purposes of § 841(b)).

13. See *infra* notes 89–94 and accompanying text (reviewing § 841(b)(1)(A)’s three strike system).

14. § 841(b)(1)(A).

15. *United States v. Graham*, 622 F.3d 445 (6th Cir. 2010), *cert. denied*, 131 S. Ct. 2962 (2011); *United States v. Scott*, 610 F.3d 1009 (8th Cir. 2010), *cert. denied*, 131 S. Ct. 964 (2011). At the time these defendants were prosecuted, the minimum amount of crack cocaine that placed an offender within § 841(b)(1)(A) was fifty grams, an amount which these defendants were convicted of trafficking. *United States v. Graham*, 622 F.3d at 448; *United States v. Scott*, 610 F.3d at 1011–12. Congress has since raised the amount of crack cocaine for a defendant to reach § 841(b)(1)(A). See *infra* note 88 (detailing the Fair Sentencing Act of 2010).

16. 610 F.3d 1009 (8th Cir. 2010), *cert. denied*, 131 S. Ct. 964 (2011).

17. *Id.* at 1011–13.

18. 622 F.3d 445 (6th Cir. 2010), *cert. denied*, 131 S. Ct. 2962 (2011).

19. *Id.* at 454.

20. *Id.* at 465; *United States v. Scott*, 610 F.3d at 1018.

juvenile-age convictions as strikes under § 841(b)(1)(A), judges should consider a defendant's juvenile criminal history under 18 U.S.C. § 3553. Section 3553(a) is designed to give judges broad discretion in sentencing, allowing them to consider the defendant as an individual. As such, § 3553(a) is the proper place for juvenile-age convictions to become a factor in sentencing.

Part I of this Comment briefly overviews the Supreme Court's Cruel and Unusual Punishments Clause jurisprudence and the Court's analysis in *Graham v. Florida*. Part I also examines § 841(b)(1)(A) and § 3553, and it explores the four legitimate penological goals of sentencing: retribution, deterrence, incapacitation, and rehabilitation. Last, Part I details the courts' decisions in *United States v. Scott* and *United States v. Graham*.

Part II uses the analytical framework that the Supreme Court employed in *Graham v. Florida* to argue that life without parole under § 841(b)(1)(A) due to juvenile-age strikes is unconstitutional. Part II first argues that objective indicia show jurisdictions vary tremendously in how they view this sentencing practice. Part II next asserts that defendants prosecuted under § 841 with juvenile-age prior convictions are not sufficiently culpable to deserve life without parole, and no penal theory adequately justifies life without parole for this class of offenders. Finally, Part II claims that international norms surrounding juvenile criminal conduct and drug offenses support the conclusion that this sentencing practice is cruel and unusual. Part III recommends, however, that judges should still consider a defendant's prior juvenile-age convictions at sentencing under § 3553(a).

I. BACKGROUND

A. *The Eighth Amendment*

The Eighth Amendment provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”²¹ The Cruel and Unusual Punishments Clause is the best-known and most-litigated component of the Eighth Amendment; the Excessive Bail and Excessive Fines Clauses have proven far less controversial.²²

21. U.S. CONST. amend. VIII. For the history of the concept of “cruel and unusual” punishments in English common law and how the American Framers incorporated that concept into the Eighth Amendment, see generally Anthony F. Granucci, “*Nor Cruel and Unusual Punishments Inflicted:*” *The Original Meaning*, 57 CALIF. L. REV. 839 (1969).

22. See *United States v. Bajakajian*, 524 U.S. 321, 327 (1998) (noting that the Supreme Court “had little occasion to interpret, and ha[d] never actually applied, the Excessive Fines Clause” prior to that case); *id.* at 344 (Kennedy, J., dissenting) (“For the first time in its history, the Court strikes down a fine as excessive under the Eighth Amendment.”); *Stack v. Boyle*, 342 U.S. 1, 12–13 (1951) (Jackson, J., concurring) (asserting that a trial court’s determination in fixing reasonable bail necessitates discretion and thus an “[a]ppellate

1. *Cruel and Unusual Punishments Clause jurisprudence prior to Graham v. Florida*

Through the Cruel and Unusual Punishments Clause, the Framers intended to unconditionally prohibit certain methods of inherently barbaric punishments,²³ like torture.²⁴ In view of the “open-ended quality”²⁵ of the amendment’s text, however, Chief Justice Warren recognized the dynamic nature of the Cruel and Unusual Punishments Clause and declared that this provision must be interpreted in light of “evolving standards of decency that mark the progress of a maturing society.”²⁶ While some members of the Court have attempted to define a workable set of Eighth Amendment parameters,²⁷ Justice Murphy’s passage in an unpublished draft of a dissenting opinion in *Louisiana ex rel. Francis v. Resweber*²⁸ illustrates the difficulty of this task:

More than any other provision in the Constitution, the prohibition of cruel and unusual punishment depends largely, if not entirely, upon the humanitarian instincts of the judiciary. We have nothing to guide us in defining what is cruel and unusual apart from our consciences. A punishment which is considered fair today may be considered cruel tomorrow. And so we are not dealing here with a set of absolutes. Our

[c]ourt should only reverse for clear abuse of discretion or other mistake of law”).

23. See Granucci, *supra* note 21, at 860–65 (arguing that the Framers’ intention was to bar tortuous punishments, but that such a reading was inconsistent with the English prohibition on cruel and unusual punishments, which was meant to proscribe excessive punishments); see also *Wilkerson v. Utah*, 99 U.S. 130, 135–36 (1878) (declaring the punishments of drawing and quartering, public dissecting, burning alive, and disemboweling to always be cruel and unusual, regardless of crime).

24. See *In re Kemmler*, 136 U.S. 436, 447 (1890) (establishing that “[p]unishments are cruel when they involve torture or a lingering death”); *Wilkerson*, 99 U.S. at 136 (stating “it is safe to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden” under the Eighth Amendment).

25. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 13–14 (1980) (“It is possible to construe [the Eighth Amendment] as covering only those punishments that would have been regarded as ‘cruel and unusual’ in 1791, but that construction seems untrue to the open-ended quality of the language.”).

26. *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion); *accord Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (including *Trop*’s “evolving standards of decency that mark the progress of a maturing society” language in the majority opinion); see also *Furman v. Georgia*, 408 U.S. 238, 382 (1972) (Burger, C.J., dissenting) (claiming “[t]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment . . . [because] [t]he standard itself remains the same, but its applicability must change as the basic mores of society change”).

27. In *Furman v. Georgia*, 408 U.S. 238 (1972), for example, Justice Brennan detailed “four principles by which we may determine whether a punishment is cruel and unusual.” *Id.* at 281 (Brennan, J., concurring) (internal quotation marks omitted). According to Justice Brennan, a punishment is cruel and unusual if it is: (1) degrading to human dignity; (2) arbitrarily inflicted; (3) unanimously rejected by society; or (4) completely unnecessary. *Id.* Justice Brennan presumed, however, no state would pass a law that obviously violated any one of these four principles, so the convergence of these principles would ultimately determine if a punishment is cruel and unusual. *Id.* at 282.

28. 329 U.S. 459 (1947). In *Resweber*, the Court upheld the execution of a black teenager even though the state’s first attempt at electrocution had failed. *Id.* at 466.

decision must necessarily spring from the mosaic of our beliefs, our backgrounds and the degree of our faith in the dignity of the human personality.²⁹

In addition to forbidding certain modes of punishment altogether, the Cruel and Unusual Punishments Clause embodies the principle of proportionality. In 1910, the Supreme Court in *Weems v. United States*³⁰ first invalidated a sentence because it was disproportionate to the underlying crime, reasoning “it is a precept of justice that punishment for crime should be graduated and proportioned to offense.”³¹ The Court has since explained this principle by asserting that “[e]ven one day in prison would be a cruel and unusual punishment for the ‘crime’ of having a common cold.”³² More recently, the Supreme Court refined its proportionality doctrine for term-of-years sentences, asserting that the Cruel and Unusual Punishments Clause contains a “narrow proportionality principle” that only forbids “grossly disproportionate” sentences rather than requiring “strict proportionality.”³³ Under this narrow proportionality

29. Frank Murphy, Unpublished draft opinion for *Louisiana ex rel. Francis v. Resweber* (1946) (Box 150, Folder 4, Harold Hitz Burton Papers, Library of Congress), as reprinted in David J. Danelski, *The Riddle of Frank Murphy's Personality and Jurisprudence*, 13 LAW & SOC. INQUIRY 189, 196 (1988).

30. 217 U.S. 349 (1910).

31. *Id.* at 367. The *Weems* Court held a fifteen-year prison sentence, which included being chained from wrist to ankle and compelled to work “hard and painful labor,” was an unconstitutional punishment for the crime of falsifying an official public document. *Id.* at 381–82. Although *Weems* was the first case in which the Supreme Court struck down a sentence for being disproportionate, Justice Field had laid the groundwork for this idea eighteen years earlier. See *O'Neil v. Vermont*, 144 U.S. 323, 339–40 (1892) (Field, J., dissenting) (arguing the Cruel and Unusual Punishments Clause is directed “against all punishments which by their excessive length or severity are greatly disproportioned to the offences charged”).

32. *Robinson v. California*, 370 U.S. 660, 667 (1962) (holding the Cruel and Unusual Punishments Clause, as applied through the Fourteenth Amendment’s Due Process Clause, invalidated a California statute that made the “status” of narcotics addiction a crime for which an offender could be prosecuted and jailed for ninety days). Justice Field, in his *O'Neil* dissent, also offered analogies, like the one below, to demonstrate why the Cruel and Unusual Punishments Clause must contain a proportionality component:

The state may, indeed, make the drinking of one drop of liquor an offence to be punished by imprisonment, but it would be an unheard-of cruelty if it should count the drops in a single glass, and make thereby a thousand offences, and thus extend the punishment for drinking the single glass of liquor to an imprisonment of almost indefinite duration.

O'Neil, 144 U.S. at 340 (Field, J., dissenting).

33. *Harmelin v. Michigan*, 501 U.S. 957, 997, 1001 (1991) (Kennedy, J., concurring in part and concurring in judgment) (internal quotation marks omitted). Justice Kennedy’s *Harmelin* opinion also sets the current analytical model by which the Supreme Court evaluates whether a particular term-of-years sentence is grossly disproportionate to the underlying crime. First, the Court compares the gravity of the offense and the severity of the sentence imposed. *Id.* at 1005. “[I]n the rare case in which [this] threshold comparison . . . leads to an inference of gross disproportionality,” the Court then evaluates the defendant’s sentence as compared to sentences received by other offenders in the same jurisdiction and to sentences for the same crime in other jurisdictions. *Id.* If these intrajurisdictional and interjurisdictional analyses “validate an initial judgment that [the]

principle, the Supreme Court has controversially upheld such sentences as life without parole for possessing 672 grams of cocaine,³⁴ twenty-five years to life for felony grand theft of three golf clubs,³⁵ and fifty years to life for shoplifting videotapes.³⁶

Capital punishment has presented the Court with difficulties in its proportionality doctrine. Despite many persuasive arguments to abolish the death penalty,³⁷ American society has not outlawed capital punishment. Still, the Supreme Court has carved out a number of categorical death penalty rules to define Eighth Amendment proportionality standards because “death is different.”³⁸ The Court in *Atkins v. Virginia*,³⁹ for example, held the mentally-disabled can never be death-eligible.⁴⁰ Also, *Roper v. Simmons*⁴¹ declared capital punishment to be completely off-limits for anyone under the age of eighteen.⁴² Further, *Kennedy v. Louisiana*⁴³ established the bright line that the death penalty is unconstitutional for all nonhomicide crimes against individual persons.⁴⁴ In these categorical death penalty cases, the Supreme Court used a two-step analytical framework that differed from its term-of-years narrow proportionality approach.⁴⁵

sentence is grossly disproportionate,” the sentence is unconstitutional. *Id.*

34. *Id.* at 961, 996 (majority opinion). Interestingly, just one year later, the state statute at issue in *Harmelin* was invalidated by the Michigan Supreme Court under the state’s constitution. *See* *People v. Bullock*, 485 N.W.2d 866, 870–74 (Mich. 1992) (holding the state constitution’s ban on “cruel or unusual” punishments reached broader than the Eighth Amendment’s prohibition of “cruel and unusual” punishments).

35. *Ewing v. California*, 538 U.S. 11, 17–18, 30–31 (2003).

36. *Lockyer v. Andrade*, 538 U.S. 63, 66, 77 (2003).

37. *See, e.g., Baze v. Rees*, 553 U.S. 35, 78–81 (2008) (Stevens, J., concurring in judgment) (outlining a number of arguments that undermine the three prominent justifications—incapacitation, deterrence, and retribution—advanced in favor of capital punishment).

38. *Ford v. Wainwright*, 477 U.S. 399, 411 (1986) (opinion of Marshall, J.); *accord Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008) (“When the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint.”).

39. 536 U.S. 304 (2002).

40. *Id.* at 314–16, 321 (overruling *Penry v. Lynaugh*, 492 U.S. 302 (1989)).

41. 543 U.S. 551 (2005).

42. *Id.* at 574 (holding eighteen is “the age at which the line for death eligibility ought to rest” since society frequently uses that age to distinguish youth from adulthood). In coming to this conclusion, the *Roper* Court relied on three general differences between juveniles and adults: (1) juveniles are less mature and responsible, characteristics which produce “impetuous and ill-considered actions and decisions”; (2) juveniles are more susceptible to “negative influences and outside pressures”; and (3) a juvenile’s character is not as well developed as that of an adult. *Id.* at 569–70.

43. 554 U.S. 407 (2008).

44. *Id.* at 438 (holding that the defendant, a child rapist, could not be sentenced to death).

45. In the categorical rule context, the Court first considered “objective indicia of society’s standards, as expressed in legislative enactments and state practice,” to see if a national consensus existed either for or against the challenged sentence. *Roper*, 543 U.S. at 563. If a consensus were found, it was “entitled to great weight,” *Kennedy*, 554 U.S. at 434,

2. *Graham v. Florida: The Supreme Court's new categorical proportionality rule*

When the Supreme Court granted certiorari in both *Graham v. Florida*⁴⁶ and *Sullivan v. Florida*,⁴⁷ many commentators believed the Court would issue two major Eighth Amendment opinions about sentencing juveniles.⁴⁸ In the end, however, the Court's new rule announced in *Graham v. Florida* mooted *Sullivan*.⁴⁹

Terrence Graham was sixteen-years-old when he was charged with attempted armed robbery, pleaded guilty, and was thus sentenced to three years probation.⁵⁰ Soon after Graham was out of jail, though, police again arrested him in connection with another series of armed robberies.⁵¹ Because Graham had violated the terms of his probation, he was subject to a minimum sentence of five years and a maximum sentence of life in prison.⁵² The state recommended that Graham, still a juvenile, should receive thirty years imprisonment.⁵³ The trial judge sentenced him to the statutory maximum of life without parole.⁵⁴ Florida's intermediate appellate court affirmed Graham's sentence,⁵⁵ and the Florida Supreme Court denied review.⁵⁶ Upon Graham's petition, the Supreme Court granted certiorari.⁵⁷

Justice Kennedy wrote for a five-member majority in *Graham v.*

but such consensus was never determinative of Eighth Amendment standards by itself. Instead, the Court then “determine[d], in the exercise of [its] own independent judgment, whether the [sentence was] disproportionate punishment.” *Roper*, 543 U.S. at 564. At this second stage of the analysis, the Court turned to “standards elaborated by controlling precedents and by the Court’s own understanding and interpretation of the Eighth Amendment’s text, history, meaning, and purpose.” *Kennedy*, 554 U.S. at 421. Lastly, the Court often considered standards set by the international community to be persuasive. *E.g.*, *Roper*, 543 U.S. at 575 (looking to various international sources as “instructive” in interpreting the Cruel and Unusual Punishments Clause).

46. 129 S. Ct. 2157, 2157 (2009) (granting certiorari).

47. 129 S. Ct. 2157, 2157 (2009) (granting certiorari). In *Sullivan*, the defendant challenged the life-without-parole sentence he received as a thirteen-year-old. Brief for Petitioner at 2–5, *Sullivan v. Florida*, 130 S. Ct. 2059 (2010) (per curiam) (No. 08-7621).

48. *E.g.*, Lyle Denniston, *Analysis: Why Two Juvenile Sentence Cases?*, SCOTUSBLOG (May 4, 2009, 5:39 PM), <http://www.scotusblog.com/?p=9424> (observing that the Supreme Court “set[] the stage for two rulings, perhaps with different potential outcomes,” when it took both *Graham v. Florida* and *Sullivan*).

49. *See Sullivan*, 130 S. Ct. at 2059 (dismissing the writ of certiorari as having been improvidently granted).

50. *Graham v. Florida*, 130 S. Ct. 2011, 2018 (2010).

51. *Id.* at 2018–19.

52. *Id.* at 2019.

53. *Id.*

54. *Id.* at 2019–20. Because Florida did not have a parole system available for Graham, his life sentence was effectively life without parole. *Id.* at 2020.

55. *Id.*

56. *Id.*

57. *Graham v. Florida*, 129 S. Ct. 2157, 2157 (2009).

Florida.⁵⁸ Since Graham's case presented "a *categorical challenge* to a term-of-years sentence," the majority employed the two-step analytical approach used in *Atkins*, *Roper*, and *Kennedy*.⁵⁹

Under this framework, the Court first examined the "objective indicia" of how various jurisdictions viewed the sentencing practice at issue.⁶⁰ Objective indicia include both legislative enactments and how frequently the sentence is actually imposed.⁶¹ At this first step, the Court found a national consensus against life without parole for juvenile nonhomicide offenders.⁶² Even though many jurisdictions allowed such sentences by statute, few imposed them in practice.⁶³ This national consensus was thus "entitled to great weight," but it was not dispositive; the Court needed to proceed to the second analytical step.⁶⁴

At the second step, the Court considered a number of factors in exercising its "independent judgment."⁶⁵ To start, the Court evaluated "the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question."⁶⁶ On this point, the Court asserted that juvenile nonhomicide offenders have diminished culpability and thus do not deserve life without parole.⁶⁷ Next, the analysis turned to whether the sentence served the penological goals of retribution, deterrence, incapacitation, or rehabilitation.⁶⁸ The Court concluded that none of these four goals supported life without parole for juveniles who did not commit homicide because of the unique characteristics of this class of offenders.⁶⁹

The Court's own reasoning, therefore, confirmed the national consensus

58. Justices Stevens, Ginsburg, Breyer, and Sotomayor fully joined Justice Kennedy's majority opinion in *Graham v. Florida*. 130 S. Ct. at 2017. Chief Justice Roberts, although agreeing with the majority that Graham's sentence violated the Eighth Amendment, concurred separately because he would have relied solely on the Court's narrow proportionality methodology and the reasoning of *Roper* to come to this conclusion. *See id.* at 2036 (Roberts, C.J., concurring in judgment) (believing there was "no need to invent a new constitutional rule of dubious provenance").

59. *Id.* at 2022–23 (majority opinion) (emphasis added); *see also id.* at 2046 (Thomas, J., dissenting) ("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.").

60. *Id.* at 2023 (majority opinion).

61. *Id.* (citing *Atkins v. Virginia*, 536 U.S. 304, 312 (2002)).

62. *Id.* at 2023–26 (concluding that this sentencing practice was "exceedingly rare").

63. *Id.*

64. *Id.* at 2026 (quoting *Kennedy v. Louisiana*, 554 U.S. 407, 434 (2008)) (internal quotation marks omitted).

65. *Id.*

66. *Id.*

67. *Id.* at 2026–28.

68. *Id.* at 2026, 2028 (citing *Ewing v. California*, 538 U.S. 11, 25 (2003) (plurality opinion)).

69. *Id.* at 2028–30 (discussing juveniles' lack of maturity, ability to change, and other similar traits).

that this sentencing practice was cruel and unusual.⁷⁰ As a result, the Court declared that juveniles convicted of nonhomicide offenses cannot receive life without parole, for they must be given “some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.”⁷¹ The majority elaborated, “[t]he Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life,” but this amendment “does forbid States from making the judgment at the outset that those offenders never will be fit to reenter society.”⁷² Last, the Court verified its conclusion by turning to international standards, which confirmed that this sentencing practice had been “rejected the world over.”⁷³

Dissenting, Justice Thomas opined that Graham’s life-without-parole sentence would not have been cruel and unusual at the time of the Founding and that the judgments of modern legislatures, judges, and juries on this question showed that society had not evolved to thinking the practice was cruel and unusual.⁷⁴ In a concurring opinion,⁷⁵ Justice Stevens responded to Justice Thomas’ view of the Eighth Amendment as too “rigid” and asserted: “Society changes. Knowledge accumulates. We learn, sometimes, from our mistakes.”⁷⁶ To Justice Stevens, “[s]tandards of decency . . . will never stop [evolving].”⁷⁷

Most legal developments after *Graham v. Florida* have focused on the practicalities of how to implement this new rule, especially in jurisdictions, like Florida, that had previously abolished their parole systems.⁷⁸ In

70. *Id.* at 2030.

71. *Id.*

72. *Id.*

73. *Id.* at 2033–34.

74. *Id.* at 2044–53 (Thomas, J., dissenting). Justice Scalia joined Justice Thomas’ dissent in full, and Justice Alito joined in part because he did not believe the record warranted addressing some of the issues that Justice Thomas argued. *See id.* at 2058–59 (Alito, J., dissenting) (maintaining that since Graham had abandoned his as-applied challenge under the Court’s narrow proportionality framework, he would not reach that issue which was not properly preserved).

75. Justices Ginsburg and Sotomayor joined Justice Stevens’ concurrence as well as the opinion of the Court. *Id.* at 2036 (Stevens, J., concurring).

76. *Id.* Justice Stevens’ language cannot help but remind a reader of Justice Holmes’ famous passage declaring:

The life of the law has not been logic: it has been experience The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past.

O.W. HOLMES, JR., *THE COMMON LAW* 1–2 (1881).

77. *Graham v. Florida*, 130 S. Ct. at 2036 (Stevens, J., concurring).

78. *E.g.*, David Ovalle, *Ruling on Young, Violent Lifers Puts Florida Justice on the Spot*, *MIAMI HERALD*, Sept. 26, 2010, (on file with *Law Review*), <http://www.miamiherald.com/2010/09/25/v-fullstory/1842695/ruling-on-young-violent-lifers.html> (discussing two possible solutions for how Florida could comply with *Graham v. Florida*’s mandate, with both solutions calling for long-term prison sentences with the possibility of parole).

addition, state courts continue to assert that *Graham v. Florida* should not be further expanded, holding that juveniles who do commit homicide may be subject to life without parole.⁷⁹ While *Graham v. Florida*'s holding reached broadly, many questions regarding the expansiveness of its analysis remain.

B. Sentencing Drug Traffickers in the Federal System

In response to the escalating problems of illegal drug use during the 1960's,⁸⁰ Congress enacted the Controlled Substances Act (CSA) as part of the Comprehensive Drug Abuse Prevention and Control Act of 1970.⁸¹ Within the CSA, one of the federal government's main statutes for prosecuting drug traffickers is 21 U.S.C. § 841.⁸² This statute's first subsection, § 841(a), makes it a federal crime to "knowingly or intentionally . . . manufacture, distribute, dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance."⁸³

The statute's next subsection, § 841(b), creates the sentencing scheme for defendants convicted under § 841(a).⁸⁴ A defendant's sentence under § 841(b) is largely based on two factors: (1) the quantity of drugs he was trafficking and (2) the number of prior "felony drug offense"⁸⁵ convictions

79. See, e.g., Jackson v. Norris, 2011 Ark. 49, 53–54 (2011) (holding life without parole for a juvenile convicted of homicide does not violate the Eighth Amendment); State v. Andrews, 329 S.W.3d 369, 376–78 (Mo. 2010) (en banc) (same), cert. denied, 131 S. Ct. 3070 (2011); State v. Golka, 796 N.W.2d 198, 215–16 (Neb. 2011) (same).

80. See H.R. REP. NO. 91-1444, pt. 1, at 6 (1970) (emphasizing the 322% increase in the number of drug-related arrests in 1968 compared to those made in 1960); see also 21 U.S.C. § 801(2) (2006) (noting the substantial negative impact of unlawful drug activity on the American public's health and general welfare).

81. Pub. L. No. 91-513, 84 Stat. 1236 (codified as amended in scattered sections of 21 U.S.C.).

82. While § 841(a) criminalizes the actual commission of drug trafficking, federal prosecutors also regularly use this statute's conspiracy analog, 21 U.S.C. § 846, to go after drug traffickers. See Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 205–07 (1993) (detailing prosecutorial strategy in charging drug traffickers); cf. David Marusz, Note, *Never Hanging Defendants Out to Dry: Preserving the Policy Behind the Statute of Limitations in Money Laundering Conspiracies*, 45 VAL. U. L. REV. 253, 266 & n.59 (2010) (citing J. KELLY STRADER, UNDERSTANDING WHITE COLLAR CRIME 31 (2d ed. 2006)) (explaining why prosecutors also frequently bring conspiracy charges in white collar crime prosecutions). When a defendant is convicted for conspiracy to traffic controlled substances under § 846, he is subject to the sentencing scheme of § 841(b). See § 846 ("Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.").

83. *Id.* § 841(a). "Controlled substance" is a term of art for purposes of this law and is defined in § 802. *Id.* § 802(6).

84. *Id.* § 841(b).

85. The term "felony drug offense" is defined as "an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances." *Id.* § 802(44). In a case with § 841(b)(1)(A) specifically at issue, the Supreme Court held the term "felony drug offense" is

on his record.⁸⁶ Regarding the first factor, § 841(b) creates different tiers of mandatory minimum sentences based on the quantity of drugs at issue.⁸⁷ Of the various tiers, § 841(b)(1)(A) governs the highest quantities of drugs.⁸⁸

Once a defendant qualifies for sentencing under § 841(b)(1)(A), the second factor—his number of prior “felony drug offense” convictions—becomes relevant.⁸⁹ Congress utilized this “strike” system in § 841(b) primarily to deter recidivism and incapacitate repeat-offenders.⁹⁰ A prior conviction under any number of federal and state drug laws, not just § 841(a), can qualify as a “felony drug offense” for purposes of this subsection.⁹¹ Under § 841(b)(1)(A), a defendant who has no prior “felony drug offense” convictions is subject to a ten-year mandatory minimum sentence.⁹² A defendant with one prior “felony drug offense” conviction is subject to a twenty-year mandatory minimum.⁹³ And a defendant within § 841(b)(1)(A) on his third strike—meaning he has “two or more prior convictions for a felony drug offense”—must be sentenced to a “mandatory

defined exclusively by § 802(44) and does not incorporate the definition of “felony” found in § 802(13). *See Burgess v. United States*, 553 U.S. 124, 130 (2008) (ruling “felony drug offense” to be a term of art under the CSA); *see also Stenberg v. Carhart*, 530 U.S. 914, 942 (2000) (stating that courts must follow an explicit definition when included in a statute).

86. *See* § 841(b) (setting unlawful quantities for various controlled substances and using increased penalties based on prior convictions).

87. *Id.*

88. *Id.* § 841(b)(1)(A) (covering such drug quantities as “1 kilogram or more of a mixture of substance containing a detectable amount of heroin,” “50 grams or more of a mixture or substance . . . which contains cocaine base,” “100 grams or more of phencyclidine (PCP),” “50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers,” and others). In the summer of 2010, Congress raised the § 841(b)(1)(A) floor to 280 grams of crack cocaine. *See Fair Sentencing Act of 2010*, Pub. L. No. 111-220, § 2(a)(1), 124 Stat. 2372, 2372 (to be codified at 21 U.S.C. § 841(b)(1)(A)(iii)) (increasing the minimum threshold of crack cocaine to 280 grams partly to alleviate the perceived racial bias between crack cocaine and powder cocaine quantities).

89. § 841(b)(1)(A).

90. *See* H.R. REP. NO. 91-1444, pt. 1, at 10 (1970) (intending the escalating mandatory minimum sentencing scheme “to serve as a strong deterrent to those who otherwise might wish to engage in the illicit traffic, while also providing a means for keeping those found guilty of violations out of circulation”). The second-highest tier of sentences, § 841(b)(1)(B), covers lesser quantities of controlled substances and also uses a strike system. § 841(b)(1)(B). A defendant falling within § 841(b)(1)(B) who does not have a prior “felony drug offense” conviction is subject to a five-year mandatory minimum sentence and a maximum sentence of forty years. *Id.* A defendant subject to § 841(b)(1)(B) with “a prior conviction for a felony drug offense,” however, must receive a mandatory minimum of ten years and faces a maximum term of life without parole. *Id.* Thus, this Comment’s arguments about the unconstitutionality of sentencing a defendant to life without parole based on juvenile-age prior convictions could also apply to § 841(b)(1)(B), but this Comment focuses on § 841(b)(1)(A) because § 841(b)(1)(A) mandates a life without parole sentence on the defendant’s third strike and because judges rarely impose a maximum sentence available by statute.

91. *See supra* note 85 (providing the expansive definition of “felony drug offense”).

92. § 841(b)(1)(A).

93. *Id.*

term of life imprisonment without release.”⁹⁴

For example, a defendant convicted of trafficking sixty grams of methamphetamine falls into § 841(b)(1)(A).⁹⁵ If the defendant does not have a prior “felony drug offense” conviction on his record, he faces a minimum sentence of ten years in prison.⁹⁶ If the defendant is on his second strike because he was previously convicted of possessing crack cocaine, he is subject to a sentence of at least twenty years.⁹⁷ And if that defendant is on his third strike, having been convicted of possessing crack cocaine on two prior occasions, he must be sentenced to life without parole.⁹⁸

In addition, 18 U.S.C. § 3553 addresses the “imposition of a sentence” generally, and this statute overlays all criminal sentencing in the federal system, including sentencing under § 841(b).⁹⁹ The basic command of § 3553(a) is that a defendant should receive “a sentence sufficient, but not greater than necessary” to comply with certain sentencing goals in the particular case.¹⁰⁰ Section 3553(a) delineates a host of factors for federal judges to consider when sentencing a defendant, including: the nature and circumstances of the offense,¹⁰¹ the defendant’s history and characteristics,¹⁰² the deterrent value of the sentence,¹⁰³ the need to provide the defendant with educational or vocational training,¹⁰⁴ the types of sentences available,¹⁰⁵ any recommended sentencing range in the U.S. Sentencing Guidelines,¹⁰⁶ the need to avoid unwarranted sentencing disparities among like defendants,¹⁰⁷ and the need to provide restitution to any victims.¹⁰⁸ As such, § 3553(a) grants judges broad discretion to sentence the defendant as an individual, based on the specific facts of the case.¹⁰⁹

94. *Id.*

95. *See id.* § 841(b)(1)(A)(viii) (covering “50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers”).

96. *Id.* § 841(b)(1)(A).

97. *Id.*

98. *Id.*

99. 18 U.S.C. § 3553 (2006).

100. *Id.* § 3553(a). *See generally* George L. Blum, Annotation, *Construction and Application of “Parsimony Clause” of 18 U.S.C.A. § 3553(a), Providing that District Court Shall Impose Sentence Sufficient, but Not Greater Than Necessary, to Comply with § 3553(a)(2)*, 38 A.L.R. FED. 2D 147, 147–200 (2009) (outlining how courts have treated this “parsimony clause”).

101. § 3553(a)(1).

102. *Id.*

103. *Id.* § 3553(a)(2)(B).

104. *Id.* § 3553(a)(2)(D).

105. *Id.* § 3553(a)(3).

106. *Id.* § 3553(a)(4).

107. *Id.* § 3553(a)(6).

108. *Id.* § 3553(a)(7).

109. *See Koon v. United States*, 518 U.S. 81, 113 (1996) (promoting a theory of

C. *The Penological Goals of Sentencing*

The Supreme Court has only explicitly recognized four penological goals as legitimate: retribution, deterrence, incapacitation, and rehabilitation.¹¹⁰ Of these four, legislatures have flexibility in choosing why to punish criminals, for “the Eighth Amendment does not mandate adoption of any one penological theory.”¹¹¹

1. *Retribution*

The penological goal of retribution aims to punish the defendant as repayment for his past crime.¹¹² Retribution has been termed “the oldest theory of punishment,”¹¹³ for human impulses seem to naturally desire that an individual who commits a prohibited act should be punished.¹¹⁴ As Justice Marshall noted, however, the Cruel and Unusual Punishments Clause serves as “insulation from our baser selves” since it “limits the avenues through which vengeance can be channeled.”¹¹⁵ Thus, modern retributivists usually justify punishment because “it tends to ‘restore an order of fairness which was disrupted by the criminal’s criminal act.’”¹¹⁶

Supporters of the retributive penal theory can be generally divided into two camps: harm-based retributivists and intent-based retributivists.¹¹⁷ Harm-based retributivists focus on the external consequences of crime,

individualized sentencing for every defendant convicted of a crime).

110. *Graham v. Florida*, 130 S. Ct. 2011, 2028 (2010) (citing *Ewing v. California*, 538 U.S. 11, 25 (2003) (plurality opinion)).

111. *Harmelin v. Michigan*, 501 U.S. 957, 999 (1991) (Kennedy, J., concurring in part and concurring in judgment); accord *Graham v. Florida*, 130 S. Ct. at 2028 (acknowledging the legislature’s discretion to identify the goals of criminal punishment).

112. See BLACK’S LAW DICTIONARY 1431 (9th ed. 2009) (defining retribution as “[p]unishment imposed as repayment or revenge for the offense committed; requital”). Immanuel Kant’s work laid the basis for the retributivist theory of punishment. See generally IMMANUEL KANT, METAPHYSICAL ELEMENTS OF JUSTICE: PART I OF THE METAPHYSICS OF MORALS (John Ladd trans., Hackett Publ’g Co. 2d ed. 1999) (1797) (rationalizing that punishment is only legitimate when a person deserves it because of his past wrongdoing).

113. WAYNE R. LAFAVE, CRIMINAL LAW § 1.5(a)(6), at 29 (4th ed. 2003).

114. Jeremy Bentham, a pioneer in the Anglo-American philosophy of law who is best-known for setting the modern foundation of utilitarianism, observed that “[t]he great merit of the law of retaliation is its simplicity,” for “[n]o other imaginable plan can for its extent find so easy an entrance into the apprehension, or sit so easy on the memory.” JEREMY BENTHAM, THE RATIONALE OF PUNISHMENT 93 (James T. McHugh ed., Prometheus Books 2009) (1775). At the same time, however, Bentham recognized the “variety of objections” to purely retributive punishment, so he asserted that only offenses against the person can justify retribution as a rationale for punishment. *Id.* at 93–94.

115. *Furman v. Georgia*, 408 U.S. 238, 345 (1972) (Marshall, J., concurring) (elaborating that “[w]ere this not so, the [Eighth Amendment’s] language would be empty and a return to the rack and other tortures would be possible in a given case”).

116. Andrew Ashworth, *Criminal Attempts and the Role of Resulting Harm Under the Code, and in the Common Law*, 19 RUTGERS L.J. 725, 735 (1988) (quoting JOHN M. FINNIS, FUNDAMENTALS OF ETHICS 128 (1983)).

117. *Id.* at 735–36.

believing punishment is justified by, and measured in relation to, “the culpable causing of a prohibited harm.”¹¹⁸ Intent-based retributivists, on the other hand, emphasize “what [the defendant] was trying to do, intended to do and believed he was doing, rather than upon the actual consequences of his conduct.”¹¹⁹ The Supreme Court has generally favored an intent-based retributivist model,¹²⁰ demonstrated by Justice O’Connor’s often-cited language in *Tison v. Arizona*¹²¹: “The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender.”¹²²

2. *Deterrence*

While the Supreme Court has sanctioned the theory of deterrence generally,¹²³ this overarching penological goal actually breaks down into two concepts: general deterrence and specific deterrence.¹²⁴ General deterrence is the notion that punishing a criminal for his illegal conduct will stop others from committing future crimes because they will fear being punished in a similar manner.¹²⁵ As Justice Holmes explained this idea, “[p]ublic policy sacrifices the individual to the general good.”¹²⁶ General deterrence, thus, is an outward-focused doctrine.¹²⁷ This penological theory has had many supporters—most notably Jeremy Bentham, who

118. *Id.* at 735.

119. *Id.* at 736.

120. See Meghan J. Ryan, *Judging Cruelty*, 44 U.C. DAVIS. L. REV. 81, 106–07 (2010) (claiming that the Supreme Court took an uncharacteristic approach with its “harm-based retributivist turn” in *Kennedy v. Louisiana*).

121. 481 U.S. 137 (1987).

122. *Id.* at 149, 158 (reasoning that capital punishment is not cruel and unusual for a felony-murder conviction when the defendant was significantly involved in committing the felony and exhibited “reckless indifference to human life”); *accord id.* at 180–81 (Brennan, J., dissenting) (noting that retribution can only be a constitutionally valid basis for punishment when it involves the criminal justice system channeling the public’s instinct of an “eye for an eye”).

123. See *supra* note 110 and accompanying text (including deterrence as one of the four legitimate penological theories).

124. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 2.03, at 15 (5th ed. 2009) (distinguishing general from specific deterrence).

125. See LAFAVE, *supra* note 113, § 1.5(a)(4), at 28–29 (summarizing the concept of deterrence and the major scholarship surrounding this doctrine); FRANKLIN E. ZIMRING, PERSPECTIVES ON DETERRENCE 3 (1971) (describing general deterrence as effective because “threats can reduce crime by causing a change of heart, induced by the unpleasantness of the specific consequences threatened”).

126. HOLMES, *supra* note 76, at 48.

127. See PRINCIPLED SENTENCING 53–54 (Andrew von Hirsch & Andrew Ashworth eds., 1992) (“General deterrence seeks to further the aim of crime prevention by setting it so as to induce *other citizens* who might be tempted to commit crime to desist out of fear of the penalty.” (emphasis added)); Isaac Ehrlich, *The Deterrent Effect of Criminal Law Enforcement*, 1 J. LEGAL STUD. 259, 259–60 (1972) (noting that the idea of using law enforcement to deter people, other than the person apprehended, has always been a basic component of crime control).

argued that general deterrence “ought to be the chief end of punishment.”¹²⁸

Specific deterrence, by contrast, focuses on reducing the threat of future crime from a particular defendant.¹²⁹ According to this penological model, punishment is warranted to deter the criminal “by giving him an unpleasant experience he will not want to endure again.”¹³⁰ The idea is that a criminal will learn his lesson while incarcerated and, therefore, will steer clear of future crime upon reentering society.¹³¹

3. Incapacitation

Like specific deterrence, incapacitation focuses on the individual offender.¹³² Under this theory, imprisonment (and sometimes capital punishment) is justified because it removes the offender from society so that he cannot commit more crimes.¹³³ As Professor Packer explained, incapacitation is “[t]he simplest justification for any punishment that involves the use of physical restraint [because,] for its duration[,] the person on whom it is being inflicted loses entirely or nearly so the capacity to commit further crimes.”¹³⁴ At its base, then, the penological theory of incapacitation relies on the criminal justice system’s ability to predict who is likely to commit future crimes.¹³⁵

In recent decades, the United States has increasingly turned to the strategy of incapacitation.¹³⁶ The United States currently has the highest

128. BENTHAM, *supra* note 114, at 62. Bentham explained the rationale of general deterrence as follows:

If we could consider an offence which has been committed as an isolated fact, the like of which would never recur, punishment would be useless. It would be only adding one evil to another. But when we consider that an unpunished crime leaves the path of crime open not only to the same delinquent, but also to all those who may have the same motives and opportunities for entering upon it, we perceive that the punishment inflicted on the individual becomes a source of security to all.

Id.

129. See PRINCIPLED SENTENCING, *supra* note 127, at 53 (stating that individual deterrence aims to establish a punishment that is sufficient to prevent the offender from reoffending).

130. LAFAYE, *supra* note 113, § 1.5(a)(1), at 26–27.

131. See DRESSLER, *supra* note 124, § 2.03, at 15 (explaining specific deterrence as “intimidation” because the defendant’s “punishment reminds him that if he returns to a life of crime, he will experience more pain”).

132. As Professor Ryan noted, scholars often link the theories of incapacitation and specific deterrence because specific deterrence, in its broadest form, can be thought of as encompassing incapacitation. See Ryan, *supra* note 120, at 109 n.153 (providing sources that tie the concepts of incapacitation and specific deterrence).

133. *Id.* at 109–10. *But see id.* at 110 n.154 (noting the reality that a “prisoner does have the opportunity to commit future crimes in prison”).

134. HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 48 (1968).

135. See *id.* at 49 (suggesting that the theory of incapacitation bases its assessment of an individual’s personality on the particular crime he committed and then predicts that he will commit similar crimes in the future).

136. See THE PEW CTR. ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008, at 3 (2008), available at http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison08_FINAL_2-1-1_FORWEB.pdf (describing how the United States prison population

incarceration rate in the world,¹³⁷ and in 2008, for the first time in the nation's history, more than one in every 100 American adults was incarcerated.¹³⁸ According to the Department of Justice (DOJ), the United States had 1,613,740 prisoners in federal and state custody by the end of 2009.¹³⁹ The DOJ's statistics also detail larger incarceration trends. From 2000–2009, for example, the United States' total prison population grew by 222,479 inmates, a 6.2% increase.¹⁴⁰ Also, more broadly, the federal imprisonment rate rose from 21 per 100,000 U.S. residents in 1990 to 61 per 100,000 U.S. residents in 2009.¹⁴¹

4. *Rehabilitation*

Rehabilitation is “[t]he process of seeking to improve a criminal’s character and outlook so that he or she can function in society without committing other crimes.”¹⁴² The goal of rehabilitation looks at the present and future.¹⁴³ The “rehabilitative ideal” has long been a part of the American criminal justice system, emerging alongside the first United States penitentiaries in the early 1800’s.¹⁴⁴ In fact, rehabilitation was the preferred penological theory in the United States for much of the twentieth

has increased over the past three decades).

137. See Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 472 & n.60 (2010) (noting how the United States is the country with the world’s highest incarceration rate and the extensive media coverage this fact has received).

138. THE PEW CTR. ON THE STATES, *supra* note 136, at 3 (providing statistics and asserting that growing prison populations in recent years have “saddl[ed] cash-strapped states with soaring costs they can ill afford [while] failing to have a clear impact either on recidivism or overall crime”).

139. U.S. DEP’T OF JUSTICE, PRISONERS IN 2009, at 1 (2009) [hereinafter DOJ 2009 PRISON REPORT], available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/p09.pdf>. In addition to these inmates in the federal and state systems, several hundred thousand prisoners are also in local jails every year. See THE PEW CTR. ON THE STATES, *supra* note 136, at 5 (pointing out the number of inmates in local jails during 2008).

140. DOJ 2009 PRISON REPORT, *supra* note 139, at 2 tbl.1.

141. *Id.* at 3 fig.3.

142. BLACK’S LAW DICTIONARY 1398–99 (9th ed. 2009).

143. Professor Morris’ description of therapy illustrates the nature of this penological goal:

Therapy is not a response to a person who is at fault. We respond to an individual, not because of what he has done, but because of some condition from which he is suffering. If he is no longer suffering from the condition, treatment no longer has a point. Punishment, then, focuses on the past; therapy, on the present. Therapy is normally associated with compassion for what one undergoes, not resentment for what one has illegitimately done.

Herbert Morris, *Persons and Punishment*, 52 MONIST 475 (1968), as reprinted in PRINCIPLED SENTENCING, *supra* note 127, at 18.

144. Francis T. Cullen & Paul Gendreau, *Assessing Correctional Rehabilitation: Policy, Practice, and Prospects*, 3 CRIM. JUST. 2000 111, 114 (2000) (citing GUSTAVE DE BEAUMONT & ALEXIS DE TOCQUEVILLE, ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION IN FRANCE (S. Ill. Univ. Press 1964) (1833); DAVID J. ROTHMAN, DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC (1971)).

century.¹⁴⁵ As the Supreme Court noted, the justification for rehabilitation was rooted in “a view that it was realistic to attempt to rehabilitate the inmate and thereby to minimize the risk that he would resume criminal activity upon his return to society.”¹⁴⁶

Starting in the 1970’s, however, many scholars began to question the plausibility of rehabilitation.¹⁴⁷ In 1974, sociologist Robert Martinson famously summarized his findings after studying the effectiveness of rehabilitation by declaring, “[w]ith few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism.”¹⁴⁸ From the 1970’s until today, the American criminal justice system—to the delight of some and to the dismay of others¹⁴⁹—has significantly turned away from rehabilitation as a primary goal.¹⁵⁰ Nonetheless, rehabilitation remains a penological theory that the Supreme Court allows legislatures to endorse.¹⁵¹

*D. Two post-Graham v. Florida Circuit Court Decisions on
§ 841(b)(1)(A) Life-Without-Parole Sentences*

I. United States v. Scott

Angelo Scott and his two co-conspirators were crack cocaine dealers in Iowa City, Iowa.¹⁵² After the police uncovered their operation and arrested them, federal prosecutors charged Scott with conspiracy to distribute an excess of fifty grams of crack cocaine under 21 U.S.C § 846.¹⁵³ The jury convicted Scott on this charge, subjecting him to the penalty scheme of § 841(b)(1)(A).¹⁵⁴ At sentencing, the district court found that Scott had two

145. See *id.* at 116–18 (describing the evolution of the “rehabilitative ideal” and its popularity during the early-twentieth century).

146. *Mistretta v. United States*, 488 U.S. 361, 363 (1989).

147. See Cullen & Gendreau, *supra* note 144, at 119–24 (summarizing the scholarship which reviewed the practice of rehabilitation and concluded that rehabilitative efforts had been largely ineffective to that point).

148. Robert Martinson, *What Works?—Questions and Answers About Prison Reform*, 35 PUB. INTEREST 22, 25 (1974) (italics in original omitted), available at NAT’L AFFAIRS, http://www.nationalaffairs.com/public_interest/detail/what-worksquestions-and-answers-about-prison-reform.

149. Compare FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE (1981), as reprinted in PRINCIPLED SENTENCING, *supra* note 127, at 23–30 (detailing the primary modern criticisms of the goal of rehabilitation), with FRANCIS T. CULLEN & KAREN E. GILBERT, REAFFIRMING REHABILITATION (1982), as reprinted in PRINCIPLED SENTENCING, *supra* note 127, at 31–32 (advocating for a return to more expansive rehabilitative efforts).

150. Cullen & Gendreau, *supra* note 144, at 119–24.

151. See *supra* note 110 and accompanying text (including rehabilitation as one of the four penological goals which the Supreme Court regards as legitimate).

152. *United States v. Scott*, 610 F.3d 1009, 1011–12 (8th Cir. 2010), *cert. denied*, 131 S. Ct. 964 (2011).

153. *Id.*

154. *Id.* at 1012.

prior felony drug offense convictions, triggering a mandatory life-without-parole sentence.¹⁵⁵ Significantly, Scott's first strike was the result of a conviction for possessing heroin when he was sixteen-years-old,¹⁵⁶ and his second strike came at age seventeen when he was convicted for possessing crack cocaine.¹⁵⁷ Scott appealed on three issues, including the constitutionality of his sentence under the Eighth Amendment.¹⁵⁸

Two months after the Supreme Court decided *Graham v. Florida*, the Eighth Circuit affirmed Scott's conviction and sentence.¹⁵⁹ With respect to the Eighth Amendment issue, the court held Scott's sentence was not cruel and unusual even though his first two strikes were the result of his actions as a juvenile.¹⁶⁰ The Eighth Circuit noted that Scott had been charged, tried, and convicted as an adult for both of his predicate offenses.¹⁶¹ Even if Scott had been convicted as a juvenile, the court explained it would nonetheless permit "the use of juvenile court adjudications to enhance subsequent sentences for adult convictions."¹⁶²

The Eighth Circuit asserted *Graham v. Florida* did not affect this outcome because Scott was twenty-five-years-old when police arrested him for the conspiracy charge that was his third strike.¹⁶³ According to the court, *Graham v. Florida* was only applicable to "defendants sentenced to life in prison without parole for crimes committed as juveniles."¹⁶⁴ The Eighth Circuit did not believe *Graham v. Florida* implicated the constitutionality of using prior juvenile convictions to enhance a convicted adult's sentence.¹⁶⁵

155. *Id.* (clarifying that "[w]hile the prior convictions were under aliases, the district court found that the Government proved that the person convicted of each crime was actually Scott").

156. *Id.*

157. *Id.*

158. *Id.* at 1013.

159. *Id.* at 1018.

160. *Id.* The Eighth Circuit also rejected Scott's other Eighth Amendment argument—that his life-without-parole sentence was grossly disproportionate to the crime he committed—based on existing circuit precedent. *See id.* at 1017–18 (citing *United States v. Williams*, 534 F.3d 980, 986 (8th Cir. 2008); *United States v. Whiting*, 528 F.3d 595, 597 (8th Cir. 2008) (per curiam); *United States v. Whitehead*, 487 F.3d 1068, 1070–71 (8th Cir. 2007); *United States v. Collins*, 340 F.3d 672, 679–80 (8th Cir. 2003)).

161. *Id.* at 1018.

162. *Id.* (citing *United States v. Smalley*, 294 F.3d 1030, 1032–33 (8th Cir. 2002)).

163. *Id.* Likewise, the Eighth Circuit dismissed Scott's argument based on *Roper v. Simmons*, 543 U.S. 551 (2005), characterizing *Roper* as reaching no further than "address[ing] the constitutionality of imposing the death penalty for a murder committed by a juvenile." *United States v. Scott*, 610 F.3d at 1018.

164. *Id.*

165. *Id.*; *accord* *United States v. Cole-Jackson*, No. 10-6156, 2011 WL 310518, at *3 (10th Cir. Feb. 2, 2011) (announcing that "this court has no doubt it is proper under the Eighth Amendment to consider adult criminal convictions, even though the defendant was under the age of eighteen at the time of the commission of the crime, in arriving at an appropriate sentence for a recidivist offender who continues to commit crimes into adulthood").

2. United States v. Graham

Donald Graham was also a crack cocaine dealer.¹⁶⁶ Police arrested Graham as part of a drug investigation in northern Kentucky, and federal prosecutors charged him with a multiple-count indictment for crack cocaine offenses.¹⁶⁷ After a three-day trial, the jury convicted Graham of, among other things, conspiracy to distribute an excess of fifty grams of crack cocaine.¹⁶⁸ At sentencing, the district court found Graham was on his third strike, having two prior felony drug offense convictions.¹⁶⁹ Graham's first strike was the result of a guilty plea to aggravated drug trafficking when he was seventeen-years-old, and his second strike was for a cocaine trafficking conviction when he was nineteen-years-old.¹⁷⁰ Consequently, the district court sentenced Graham to the mandatory term of life imprisonment without the possibility of parole under § 841(b)(1)(A).¹⁷¹ Graham then appealed his sentence.¹⁷²

In *United States v. Graham*, the Sixth Circuit affirmed Donald Graham's sentence four months after the Supreme Court ruled in *Graham v. Florida*.¹⁷³ With regard to his Eighth Amendment challenge, the Sixth Circuit stressed that Graham was convicted and sentenced as an adult for his first predicate offense even though he was younger than eighteen-years-old at that time.¹⁷⁴ Unlike the Eighth Circuit in *United States v. Scott*, though, the Sixth Circuit "decline[d] to express any opinion on whether a juvenile-delinquency adjudication should qualify as a 'felony drug offense' for § 841(b)(1)(A) mandatory-minimum purposes."¹⁷⁵ Nevertheless, like the Eighth Circuit, the Sixth Circuit did not believe *Graham v. Florida* governed because the defendant received mandatory life without parole for a conviction when he was an adult.¹⁷⁶ Thus, the court held Graham's sentence was not cruel and unusual in violation of the Eighth Amendment.¹⁷⁷

Judge Merritt dissented in *United States v. Graham*.¹⁷⁸ In addition to a variety of statutory arguments, Judge Merritt briefly discussed the

166. *United States v. Graham*, 622 F.3d 445, 447 (6th Cir. 2010), *cert. denied*, 131 S. Ct. 2962 (2011).

167. *Id.* at 447–48.

168. *Id.*

169. *Id.* at 454.

170. *Id.*

171. *Id.* at 448.

172. *Id.*

173. *Id.* at 465.

174. *Id.* at 454–64.

175. *Id.* at 460.

176. *Id.* at 462.

177. *Id.* at 463–64.

178. *Id.* at 465–70 (Merritt, J., dissenting).

implications of the recent *Graham v. Florida* decision.¹⁷⁹ He contended that “sentencing this nonviolent, 30-year-old petty drug trafficker to life imprisonment by using a juvenile conviction as a necessary third strike . . . violate[d] the sound principles of penological policy based on the Eighth Amendment values recently outlined by the Supreme Court in *Graham v. Florida*.”¹⁸⁰ Although he recognized that the holding in *Graham v. Florida* was “technically speaking, probably not binding,”¹⁸¹ Judge Merritt opined that *Graham v. Florida* “should at least make our court and the court system more sensitive to the important distinction between juvenile and adult criminal conduct.”¹⁸²

II. LIFE WITHOUT PAROLE UNDER § 841(b)(1)(A) DUE TO JUVENILE-AGE STRIKES IS UNCONSTITUTIONAL BASED ON *GRAHAM V. FLORIDA*

Based on the analytical framework of *Graham v. Florida*, using juvenile-age prior convictions to trigger life without parole under § 841(b)(1)(A) violates the Cruel and Unusual Punishments Clause. *Graham v. Florida*'s first step, examining the objective indicia of how society views this sentencing practice, demonstrates the lack of a national consensus on this issue.¹⁸³ This sentencing practice is unconstitutional, however, based on *Graham v. Florida*'s second step. Defendants who are sentenced to life without parole under § 841(b)(1)(A) due to juvenile-age strikes are not sufficiently culpable to deserve this sentence, the second-harsh punishment in the American criminal justice system.¹⁸⁴ Moreover, no legitimate penological goal adequately justifies life without parole for these defendants.¹⁸⁵ Finally, as in *Graham v. Florida*, international norms regarding juvenile criminal conduct and drug offenses support the conclusion that § 841(b)(1)(A) life without parole for defendants with juvenile-age strikes is cruel and unusual.¹⁸⁶

As a result, Angelo Scott should have been subject to a ten-year mandatory minimum because his two prior “felony drug offense” convictions occurred when he was under eighteen-years-old.¹⁸⁷ Likewise, Donald Graham should have been subject to a twenty-year mandatory

179. *Id.* at 465.

180. *Id.*

181. *Id.* at 470.

182. *Id.* at 469.

183. *Infra* Part II.A.

184. *Infra* Part II.B.1.

185. *Infra* Part II.B.2.

186. *Infra* Part II.C.

187. *United States v. Scott*, 610 F.3d 1009, 1012 (8th Cir. 2010), *cert. denied*, 131 S. Ct. 964 (2011).

minimum because his first prior “felony drug offense” conviction occurred when he was a juvenile.¹⁸⁸

A. *Objective Indicia Show the United States Lacks a Clear Societal Consensus Regarding this Sentencing Practice*

Examining the objective indicia of how American society views this sentencing practice, as *Graham v. Florida* did,¹⁸⁹ reveals the absence of a national consensus because the nation’s jurisdictions vary widely in how they treat criminal defendants under eighteen-years-old. *Atkins* insisted that “the clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures.”¹⁹⁰ Yet it is nearly impossible to simply examine legislation for a definitive conclusion in this instance. For example, sometimes the defendant’s age automatically determines whether an adult criminal court or the juvenile adjudicatory system will process him.¹⁹¹ Other times, however, prosecutors have discretion concerning how to charge a defendant.¹⁹² Also, some jurisdictions only allow juvenile-age defendants to be charged in the adult system when they have committed certain enumerated crimes.¹⁹³ These differences illustrate the complexity inherent in attempting to find a national consensus regarding this sentencing practice.¹⁹⁴

Though an imperfect analogy, the manner in which jurisdictions treat adult defendants with criminal histories in the juvenile system can be informative. Currently, almost every American jurisdiction has at least one

188. *United States v. Graham*, 622 F.3d 445, 454 (6th Cir. 2010), *cert. denied*, 131 S. Ct. 2962 (2011).

189. *See supra* notes 60–61 and accompanying text (detailing *Graham v. Florida*’s first step of analysis).

190. *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (citation omitted) (internal quotation marks omitted).

191. *See, e.g.*, D.C. CODE § 16-2307 (2011) (mandating that the defendant be at least fifteen-years-old to be prosecuted in the adult criminal system, with one exception of no minimum age requirement for the crime of possessing a firearm within one-thousand feet of a school or day care center); WASH. REV. CODE § 13.40.110 (2011) (allowing juveniles to be prosecuted in adult court only if they are at least sixteen-years-old).

192. *See, e.g.*, FLA. STAT. § 985.557(1)–(2) (2010) (providing a detailed, complicated set of criteria for either discretionary or mandatory filing of an information); Paul Duggan, *Juvenile Charged in D.C. Shootings Can’t be Tried as Adult*, WASH. POST, Apr. 2, 2010, <http://voices.washingtonpost.com/crime-scene/paul-duggan/juvenile-charged-in-dc-shootin.html> (noting how the U.S. Attorney’s Office in Washington, D.C. “has the discretion to prosecute a 16- or 17-year-old suspect as an adult if the youth is charged with murder, armed robbery, rape, or first-degree burglary”).

193. *See, e.g.*, TENN. CODE ANN. § 37-1-134 (2010) (permitting defendants under sixteen-years-old to be prosecuted in adult criminal court if charged with “first degree murder, second degree murder, rape, aggravated rape, rape of a child, aggravated rape of a child, aggravated robbery, especially aggravated robbery, kidnapping, aggravated kidnapping or especially aggravated kidnapping or an attempt to commit any such offenses”).

194. *See also* Paul H. Robinson et al., *The Disutility of Injustice*, 85 N.Y.U. L. REV. 1940, 1953–54 (2010) (discussing further variables that complicate this issue).

juvenile court statute allowing juvenile records to be used at sentencing in adult criminal court.¹⁹⁵ In addition, many jurisdictions have various criminal court provisions, such as sentencing statutes, guidelines, and presentence reports, which authorize the use of juvenile records at sentencing.¹⁹⁶

Even though this plethora of statutory provisions demonstrates that American society favors enhanced sentences because of prior juvenile adjudications, *Graham v. Florida* establishes that the jurisdictions' actual sentencing practices are crucial.¹⁹⁷ Thus, the real question is how juvenile adjudications actually affect adult sentencing in practice. On this point, appellate courts in nineteen jurisdictions have allowed juvenile adjudications to have an outright recidivist impact, meaning the specific number of years added to the sentence because of juvenile adjudications can be calculated.¹⁹⁸ These jurisdictions principally reasoned that true first-time adult offenders need to be separated from adult defendants with juvenile criminal records.¹⁹⁹ Of these nineteen jurisdictions, only three explicitly permit juvenile adjudications to count as strikes for purposes of

195. See Joseph B. Sanborn, Jr., *Striking Out on the First Pitch in Criminal Court*, 1 BARRY L. REV. 7, 18–20 tbl.2 (2000) (listing forty-five jurisdictions with explicit juvenile court laws to this effect).

196. See *id.* (listing thirty-five jurisdictions that have criminal court provisions allowing for the use of juvenile adjudications at sentencing in criminal court).

197. See *Graham v. Florida*, 130 S. Ct. 2011, 2023–27 (2010) (exploring actual sentencing practices in jurisdictions that had legislation allowing the sentence at issue); *Kennedy v. Louisiana*, 544 U.S. 407, 433 (2008) (same).

198. See *United States v. Torres*, 217 F. App'x 540, 543 (7th Cir. 2007) (allowing juvenile adjudications to be considered to some extent for purposes of determining recidivism); *Andrews v. State*, 967 P.2d 1016, 1019 (Alaska Ct. App. 1998) (same); *People v. Davis*, 938 P.2d 938, 940–42 (Cal. 1997) (same); *People v. Abbott*, 690 P.2d 1263, 1271 (Colo. 1984) (en banc) (same); *Williams v. State*, 994 So. 2d 337, 339–40 (Fla. Dist. Ct. App. 2008) (same); *People v. Forrest*, 595 N.E.2d 192, 194 (Ill. App. Ct. 1992) (same); *Sauerheber v. State*, 698 N.E.2d 796, 806 (Ind. 1998) (same); *State v. Haskins*, 942 P.2d 16, 19 (Kan. 1997) (same); *State v. Tucker*, 354 So. 2d 521, 524–25 (La. 1978) (same); *People v. Smith*, 470 N.W.2d 70, 74–75 (Mich. 1991) (same); *State v. McFee*, 721 N.W.2d 607, 614–15 (Minn. 2006) (same); *State v. Bieniek*, 985 A.2d 1251, 1256 (N.J. 2010) (per curiam) (same); *State v. Wiley*, 565 S.E.2d 22, 44–46 (N.C. 2002) (same); *State v. Stewart*, 892 P.2d 1013, 1016–17 (Or. 1995) (same); *Commonwealth v. Myers*, 536 A.2d 428, 429–30 (Pa. Super. Ct. 1988) (same); *State v. Jackson*, 60 S.W.3d 738, 741–43 (Tenn. 2001) (same); *Lindsay v. State*, 102 S.W.3d 223, 226–27 (Tex. App. 2003) (same); *Harris v. Commonwealth*, 497 S.E.2d 165, 171–72 (Va. Ct. App. 1998) (same); *State v. McAlpin*, 740 P.2d 824, 826–27 (Wash. 1987) (en banc) (same).

199. See, e.g., *Smith*, 470 N.W.2d at 75 (stating that “[t]he law contemplates a differentiation in sentencing between first-time offenders and recidivists, juvenile or adult”); *State v. Peterson*, 331 N.W.2d 483, 484 (Minn. 1983) (en banc) (“The juvenile history item is included in the criminal history index to identify those young adult felons whose criminal careers were preceded by repeated felony-type offenses committed as a juvenile.” (citation omitted)); *Commonwealth v. Krum*, 533 A.2d 134, 139 (Pa. Super. Ct. 1987) (concluding that “a child who continues his pattern of serious and violent anti-social activity into adulthood should not receive the benefit of a cloak of immunity regarding that behavior” (citation omitted) (internal quotation marks omitted)).

their three strikes laws.²⁰⁰ At the other end of the spectrum, two states categorically forbid judges from using juvenile adjudications to enhance an adult sentence.²⁰¹

In the majority of jurisdictions, on the other hand, “it is impossible to determine the precise impact juvenile records can or will have on criminal court sentencing.”²⁰² A history in the juvenile justice system can matter in these jurisdictions, but juvenile adjudications seem to be one flexible factor among many others when sentencing the defendant, thus promoting the idea of sentencing on an individualized basis.²⁰³ In the end, the mixed-bag of jurisdictions’ policies and practices on using juvenile-age convictions for recidivism purposes demonstrates the lack of a national consensus regarding this particular sentencing regime.

B. Life Without Parole Under § 841(b)(1)(A) is Too Severe for These Offenders Because of Their Diminished Culpability and Because this Sentence Lacks a Sufficient Penological Justification

Although the United States lacks a national consensus on how to treat juvenile-age convictions when sentencing adult offenders, the second step of *Graham v. Florida*’s analysis shows this sentencing practice is cruel and unusual. At the second step in *Graham v. Florida*, the Court exercised its “independent judgment” to conclude life without parole was disproportionate for juvenile defendants convicted of nonhomicide crimes and would not serve any legitimate penological goal.²⁰⁴ Likewise, under the *Graham v. Florida* framework, sentencing defendants like Angelo Scott and Donald Graham to § 841(b)(1)(A) life without parole is unconstitutional under the Cruel and Unusual Punishments Clause.

200. See *Davis*, 938 P.2d at 940–42 (California Supreme Court allowing juvenile adjudications to count as strikes under the state’s three strikes law); *Williams*, 994 So. 2d at 339–40 (Florida District Court of Appeals permitting juvenile adjudication to be a strike); *Lindsay*, 102 S.W.3d at 226–27 (Texas Court of Appeals letting juvenile adjudication count as a strike). But see *Vanesch v. State*, 37 S.W.3d 196, 200–01 (Ark. 2001) (disallowing juvenile adjudications as predicate offenses for state’s three strikes law); *Fletcher v. State*, 409 A.2d 1254, 1256 (Del. 1979) (same); *Paige v. Gaffney*, 483 P.2d 494, 495 (Kan. 1971) (same); *State v. Brown*, 879 So. 2d 1276, 1288–90 (La. 2004) (same); *Commonwealth v. Thomas*, 743 A.2d 460, 461 (Pa. Super. Ct. 1999) (same); *State v. Ellis*, 547 S.E.2d 490, 492 (S.C. 2001) (same); *State v. Maxey*, 663 N.W.2d 811, 814 (Wis. Ct. App. 2003) (same).

201. See Sanborn, *supra* note 195, at 21 (noting how Arizona and Georgia “clearly prevent juvenile adjudications from enhancing criminal court sentences”).

202. See *id.* (contending that, in twenty-six jurisdictions, “the exact difference juvenile records will have in this context is immeasurable”).

203. *Id.* (explaining that a defendant’s sentence can be influenced by prior offenses, “but no definitive impact [of prior offenses] has been allotted”).

204. *Graham v. Florida*, 130 S. Ct. 2011, 2026–30 (2010).

1. *Life without parole is unduly severe in light of the lessened culpability of this class of offenders*

The second step in *Graham v. Florida* initially compared the gravity of the sentence with the culpability of the defendants.²⁰⁵ As in *Graham v. Florida*, life without parole—the second-most severe punishment permitted by the American criminal justice system²⁰⁶—is too harsh for defendants like Angelo Scott and Donald Graham. Because they were nonviolent drug traffickers with juvenile-age strikes, these defendants had diminished culpability. This punishment is unconstitutionally excessive for them.

Life without parole is a drastic sentence. Even though the death penalty is “unique in its severity and irrevocability,”²⁰⁷ the Supreme Court has recognized that life without parole is similar to the death penalty in important respects.²⁰⁸ A sentence of life without parole “alters the offender’s life by a forfeiture that is irrevocable” because it “deprives the convict of the most basic liberties without giving hope of restoration.”²⁰⁹ Although a prisoner can potentially obtain relief through executive clemency, such a remote possibility does not overcome the severity of this sentence.²¹⁰

The Nevada Supreme Court illustrated the exceptional nature of life without parole in declaring:

All but the deadliest and most unsalvageable of prisoners have the right to appear before the board of parole to try and show that they have behaved well in prison confines and that their moral and spiritual betterment merits consideration of some adjustment of their sentences. Denial of this vital opportunity means *denial of hope*; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the prisoner], he will remain in prison for the rest of his days.²¹¹

The Ninth Circuit recently echoed these sentiments, noting that a life without parole sentence “condemn[s] [the prisoner] to die in a living tomb, there to linger out what may be a long life . . . without any of its alleviation

205. *Id.* at 2026–28.

206. *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring in part and concurring in judgment); *see also* *Roper v. Simmons*, 543 U.S. 551, 572 (2005) (acknowledging that life without parole “is itself a severe sanction”).

207. *Gregg v. Georgia*, 428 U.S. 153, 187 (1976).

208. *See Graham v. Florida*, 130 S. Ct. at 2027 (asserting that “life without parole sentences share some characteristics with death sentences that are shared by no other sentences”).

209. *Id.*

210. *Id.* (citing *Solem v. Helm*, 463 U.S. 277, 300–01 (1983)); *accord* *Naovarath v. State*, 779 P.2d 944, 944 n.1 (Nev. 1989) (“We suppose that in light of this remote possibility Dante’s fancied inscription on the gates of hell, ‘Abandon Hope All Ye Who Enter Here,’ may not be properly fastened above [the prisoner’s] cell; nevertheless, for now, the sentence is unequivocal: life imprisonment, without parole—life ends in prison.”).

211. *Naovarath*, 779 P.2d at 944 (emphasis added).

or rewards—debarred from all pleasant sights and sounds, and cut off from all earthly hope.”²¹² Since life without parole is so harsh, only severely-culpable criminals deserve this punishment.²¹³

Defendants like Angelo Scott and Donald Graham are not such severely-culpable criminals. The culpability of a class of offenders is partly determined by the offenders’ characteristics.²¹⁴ One of these defendants’ chief characteristics is that they were juveniles when they committed at least one of their predicate offenses.²¹⁵ The Supreme Court has explicitly stated that juvenile crime is not as morally-offensive as adult criminal conduct.²¹⁶ As *Roper* demonstrated and *Graham v. Florida* reaffirmed, this lesser moral blameworthiness is based on scientific conclusions that the juvenile brain is still developing.²¹⁷ In light of these physiological circumstances, the Supreme Court has understood that “youth is more than a chronological fact”—it is a distinct “time and condition of life.”²¹⁸ Juveniles are often immature, irresponsible, more vulnerable to negative pressures in their environment, and, frequently, they do not fully consider the consequences of their actions.²¹⁹ The Eighth and Sixth Circuits recognized that Angelo Scott and Donald Graham were adults when they were sentenced to § 841(b)(1)(A) life without parole,²²⁰ yet their prior convictions that triggered these mandatory sentences were committed while they were juveniles and thus were the product of these characteristics.²²¹

Further, the Eighth and Sixth Circuits were wrong to rely on the fact that Angelo Scott and Donald Graham were charged, tried, and convicted as

212. *Norris v. Morgan*, 622 F.3d 1276, 1291 (9th Cir. 2010) (citation omitted) (internal quotation marks omitted).

213. *See, e.g.*, *Graham v. Florida*, 130 S. Ct. at 2026–28 (analyzing the severity of life without parole and concluding juvenile nonhomicide offenders are not culpable enough to deserve this sentence).

214. *See supra* note 66 and accompanying text (explaining that culpability is measured by (1) the offenders’ characteristics and (2) the crimes they committed).

215. *See supra* notes 156–157, 170 and accompanying text (detailing the defendants’ earlier strikes for purposes of § 841(b)).

216. *Graham v. Florida*, 130 S. Ct. at 2026; *Roper v. Simmons*, 543 U.S. 551, 569 (2005); *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988) (plurality opinion).

217. *See Graham v. Florida*, 130 S. Ct. at 2026–27 (citing various amici and other scientific authorities); *Roper*, 543 U.S. at 569–76 (same).

218. *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982).

219. *Roper*, 543 U.S. at 569–70; *accord Bellotti v. Baird*, 443 U.S. 622, 635 (1979) (plurality opinion) (observing that juveniles “often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them”).

220. *See supra* notes 165, 176 and accompanying text (providing the circuit courts’ reasoning).

221. *Cf. J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2402–06 (2011) (detailing why “children cannot be viewed simply as miniature adults” and thus holding that a child’s age properly informs the custody analysis under *Miranda v. Arizona*, 384 U.S. 436 (1966)); *Graham v. Florida*, 130 S. Ct. at 2026–27 (covering those characteristics of juveniles that make them a unique class of defendants); *Roper*, 543 U.S. at 569–71 (noting juveniles’ distinctive features).

adults for their predicate offenses.²²² Indeed, the juvenile defendants in both *Roper* and *Graham v. Florida* had also been charged, tried, and convicted as adults.²²³ In both cases, however, the Supreme Court invalidated those sentences and fashioned categorical rules for defendants under eighteen-years-old because of the inherent differences between adults and juveniles.²²⁴ Regardless of whether they were prosecuted as adults, defendants who were juveniles at the time of their predicate offenses are less culpable than defendants whose three strikes were entirely the product of their adult criminal conduct.

A defendant's culpability also depends on the nature of the crime he committed.²²⁵ Angelo Scott and Donald Graham had diminished culpability because they committed nonviolent offenses.²²⁶ In a seminal Eighth Amendment case, the Supreme Court asserted that nonviolent crimes are less serious than violent or threatening crimes.²²⁷ Defendants falling within the purview of § 841(b)(1)(A) deserve significant punishment. But nonviolent drug traffickers should not be classified among the second-worst offenders in the American criminal justice system.²²⁸ The defendant in *Kennedy* heinously raped his eight-year-old stepdaughter, yet the Supreme Court held the maximum sentence he could

222. See *supra* notes 161, 174 and accompanying text (referring to the circuit courts' emphasis on Angelo Scott and Donald Graham having been prosecuted in the adult criminal system for their prior convictions).

223. See *Graham v. Florida*, 130 S. Ct. at 2018 ("Graham's prosecutor elected to charge Graham as an adult."); *Roper*, 543 U.S. at 557 ("[Simmons] was tried as an adult.").

224. *Graham v. Florida*, 130 S. Ct. at 2026–27; *Roper*, 543 U.S. at 569–71.

225. See *supra* note 66 and accompanying text (noting that culpability is determined by both (1) the offender's characteristics and (2) the type of crime he committed).

226. See J. Richard Broughton, *Kennedy and the Tail of Minos*, 69 LA. L. REV. 593, 625 (2009) ("Indeed, there is a compelling argument to be made that where the crimes involved are nonviolent and result in minimal harm, courts ought to be more robust in reviewing facially harsh sentences and in enforcing limits on political actors."); see also Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 680 (1995) (urging juries to acquit nonviolent drug offenders, especially black offenders in urban locations); Ed Burns et al., *Saving Cities, and Souls*, TIME, Mar. 17, 2008, at 50 (supporting petit grand jury nullification when prosecutors try to charge nonviolent drug offenders).

227. *Solem v. Helm*, 463 U.S. 277, 292–93 (1983) (noting that criminal laws are more protective of people than property); *accord* *BMW v. Gore*, 517 U.S. 559, 575–76 (1996) (recognizing "the accepted view that some wrongs are more blameworthy than others," such as violent versus nonviolent crimes). The idea that crimes of violence should be punished more severely than nonviolent crimes is expressed throughout American criminal law doctrines, such as the limitations that legislatures and courts place on the felony-murder rule. See, e.g., CAL. PENAL CODE § 189 (West 2010) (enumerating specific violent felonies, like torture, rape, arson, and kidnapping, that a defendant must commit to be subject to first degree felony-murder); *People v. Howard*, 104 P.3d 107, 110–11 (Cal. 2005) (articulating that a defendant must commit a felony "inherently dangerous to human life" to qualify for second degree felony-murder (internal quotation marks omitted)); see also *Robinson et al.*, *supra* note 194, at 1959 n.73 (listing forty jurisdictions that only allow inherently dangerous felonies to trigger the felony-murder rule).

228. See *supra* notes 206–212 and accompanying text (explaining that life without parole is the second-harsh punishment in the United States and thus is extremely severe).

receive was life without parole.²²⁹ Even defendants involved in the September 11 terrorist attacks and al Qaeda's war against the United States have only been sentenced to life without parole.²³⁰ Nonviolent drug traffickers are not as morally reprehensible as violent criminals who truly deserve life without parole.²³¹ Just as the *Graham v. Florida* Court concluded that life without parole was categorically disproportionate for juvenile nonhomicide offenders,²³² Angelo Scott and Donald Graham were not sufficiently culpable to warrant mandatory § 841(b)(1)(A) life without parole due to their prior juvenile-age convictions. Their sentences were unconstitutional under the Cruel and Unusual Punishments Clause.

2. *No legitimate penological goal adequately justifies counting juvenile-age convictions as strikes*

The second analytical step in *Graham v. Florida* next required the Court to consider potential penological justifications for the sentence.²³³ A sentence is unconstitutional if it does not sufficiently further any of the four accepted goals of punishment: retribution, deterrence, incapacitation, and rehabilitation.²³⁴ The government must show more than some marginal promotion of a penological goal; each penological justification is limited by the principle that the punishment must not be “grossly disproportionate in light of the justification offered.”²³⁵ As demonstrated below, none of these four penological theories adequately justifies § 841(b)(1)(A) life without parole for a defendant who is on his third strike due to juvenile-age predicate offenses.

229. *Kennedy v. Louisiana*, 554 U.S. 407, 412–15, 438 (2008).

230. *See, e.g., United States v. Abu Ali*, 410 F. App'x 673, 675 (4th Cir. 2011) (per curiam) (affirming a life sentence for Ahmed Omar Abu Ali, who was affiliated with an al Qaeda cell in Saudi Arabia and planned to carry out terrorist attacks in the United States); *United States v. Moussaoui*, 591 F.3d 263, 307 (4th Cir. 2010) (upholding Zacarias Moussaoui's life without parole sentence after he pled guilty to conspiracy charges connected to the September 11 attacks).

231. *See United States v. Williams*, 299 F.3d 250, 258–59 (3d Cir. 2002) (explaining that a drug offender must not have used violence or the threat of violence in connection with his offense to be eligible for the 18 U.S.C. § 3553(f) safety valve, which pardons a defendant from the mandatory minimum); *United States v. Byers*, No. 3:00-CR-137-6-FDW, 2008 WL 7994962, at *1 (W.D.N.C. Sept. 5, 2008) (stating that typical, nonviolent crack cocaine offenders are less culpable than the defendant, who had “participated in an extremely violent drug conspiracy and was himself an accessory to felony murder”); *United States v. Cherry*, 366 F. Supp. 2d 372, 376 (E.D. Va. 2005) (recognizing that the defendant qualified for the § 3553(f) safety valve, in part, because she “did not use any violence, threats of violence, a firearm, or any other dangerous weapon, nor did she encourage anyone else to do so”).

232. *Graham v. Florida*, 130 S. Ct. 2011, 2030–33 (2010).

233. *Id.* at 2028.

234. *See id.* (declaring that a “sentence lacking any legitimate penological justification is by its nature disproportionate to the offense”).

235. *Id.* at 2029.

a. *Retribution*

The goal of retribution, whether adopting a harm-based retributivist or an intent-based retributivist approach, does not support the use of juvenile-age convictions to reach life without parole under § 841(b)(1)(A). The Supreme Court does not normally endorse harm-based retributivism,²³⁶ yet harm-based retributivists argue that drug traffickers deserve harsh punishment because of the potential far-reaching consequences of their illegal activities.²³⁷ But drug trafficking is neither a crime against the person nor, by definition, a violent offense.²³⁸ The only criterion for a defendant to fall within the purview of § 841(b)(1)(A) is the quantity of drugs he trafficked.²³⁹ Although drug quantity can potentially relate to the amount of harm a drug trafficker causes, only the specific facts of a case can accurately demonstrate the defendant's culpability.²⁴⁰

Nor does intent-based retributivism, based exclusively on the personal

236. See *supra* notes 118, 120–122 and accompanying text (defining harm-based retributivism and the rarity of the Supreme Court adopting this theory).

237. See DRUG ENFORCEMENT ADMIN., SPEAKING OUT AGAINST DRUG LEGALIZATION 50–53 (2010), available at http://www.justice.gov/dea/demand/speakout/speak_out_101210.pdf (asserting that “[d]rug use, crime, and violence go hand-in-hand”); see also Tracey L. Meares et al., *Updating the Study of Punishment*, 56 STAN. L. REV. 1171, 1178–79 (2004) (noting that modern prosecutors regularly “justify their aggressive prosecutions of narcotics traffickers on the ground that drug traffickers are likely to engage in violence” and that prosecutors think “drug dealing has a complementary relationship to violence, and even if drug dealing is not a terrible evil, punishing that dealing can avert greater harm to society” (citation omitted)).

238. See *United States v. Phinazee*, 515 F.3d 511, 522 (6th Cir. 2008) (Merritt, J., dissenting) (recognizing that many drug trafficking crimes are “victimless” and thus do not warrant a severe prison sentence); *United States v. Boos*, 127 F.3d 1207, 1210 (9th Cir. 1997) (distinguishing between the crime of distributing child pornography, where a victim is directly harmed, and the crimes of “drug and immigration offenses,” which do not have a concrete victim); *Llach v. United States*, 739 F.2d 1322, 1333 (8th Cir. 1984) (referring to the drug trafficking charge against the defendant as a “victimless crime”); U.S. SENTENCING GUIDELINES MANUAL § 3D1.2 cmt. 2 (2010) (giving the examples of “drug [and] immigration offenses” as “offenses in which there are no identifiable victims”). But see *Harmelin v. Michigan*, 501 U.S. 957, 1002 (1991) (Kennedy, J., concurring in part and concurring in judgment) (arguing that trying to label the massive quantity of drug trafficking in this case a “victimless” crime was “false to the point of absurdity”).

239. See 21 U.S.C. § 841(b)(1)(A) (2006) (failing to provide any factor other than quantities of drugs as placing a defendant within this subsection).

240. See, e.g., *United States v. Nagel*, 559 F.3d 756, 761 (7th Cir. 2009) (stressing that “particular drug offenders present varying degrees of risk to the community depending upon the circumstances”); *United States v. Moore*, 212 F.3d 441, 447 (8th Cir. 2000) (“Merely purchasing drugs from someone for resale does not demonstrate that the sale of all drugs remaining in the seller’s possession is an activity undertaken between the seller and the buyer.”); *United States v. Martinez*, 987 F.2d 920, 926 (2d Cir. 1993) (reversing the district court’s sentence because the government had not proven whether the defendant could have reasonably foreseen his codefendant’s larger drug trafficking operations); *United States v. Jones*, 965 F.2d 1507, 1517 (8th Cir. 1992) (holding that one of the small-scale defendants in a drug ring could not be sentenced to the mandatory minimum for conspiracy to distribute at least fifty grams of crack cocaine because his co-conspirator’s massive sales were not reasonably foreseeable).

culpability of the offender,²⁴¹ justify this sentencing practice.²⁴² As explained above, defendants like Angelo Scott and Donald Graham have diminished culpability for two reasons. First, they were juveniles at the time of at least one of their underlying offenses.²⁴³ Second, they were convicted of nonviolent drug trafficking charges, so they should not be classified among the second-worst class of criminal defendants.²⁴⁴ Thus, mandatory § 841(b)(1)(A) life without parole for these offenders is not warranted under either a harm-based or intent-based retributivist theory.

b. General deterrence

The penological goal of general deterrence does not legitimize using juvenile-age convictions as strikes to reach a § 841(b)(1)(A) life-without-parole sentence. Three strikes laws and other recidivism-based sentencing schemes may further general deterrence to some extent.²⁴⁵ Still, life without parole is unconstitutional here because of this rationale's limits as applied to defendants like Angelo Scott and Donald Graham.

Many studies conclude a justice system that increases the severity of penalties is less effective than a justice system that increases the chances of detection and conviction.²⁴⁶ As economist Steven E. Landsburg explains, “[f]or the most part, criminals prefer a small chance of a big punishment to a big chance of a small punishment.”²⁴⁷ This preference stems from the fact that criminals are typically risk-loving people.²⁴⁸ Most scholarship, therefore, “point[s] to large deterrent effects emanating from increased certainty of punishment, and much smaller, and generally insignificant,

241. See *supra* notes 119–122 and accompanying text (explaining intent-based retributivism).

242. See Michael Vitiello, *Three Strikes: Can We Return to Rationality?*, 87 J. CRIM. L. & CRIMINOLOGY 395, 427 (1997) (asserting that all “[h]abitual offender statutes are not retributive” because the term of imprisonment is “imposed without regard to the culpability of the offender”).

243. See *supra* notes 216–223 and accompanying text (arguing that defendants like Angelo Scott and Donald Graham have diminished culpability based on their juvenile-age convictions because juvenile crime is not as morally reprehensible as similar adult crime).

244. See *supra* notes 226–231 and accompanying text (claiming nonviolent drug traffickers have lesser culpability than violent criminals).

245. See, e.g., H.R. REP. NO. 91-1444, pt. 1, at 10 (1970) (characterizing § 841(b)'s sentencing scheme as a “deterrent to those who otherwise might wish to engage in the illicit traffic”).

246. E.g., JONATHAN P. CAULKINS ET AL., RAND DRUG POLICY RESEARCH CTR., MANDATORY MINIMUM DRUG SENTENCES: THROWING AWAY THE KEY OR THE TAXPAYERS' MONEY? 75 (1997); Jeffrey Grogger, *Certainty vs. Severity of Punishment*, 29 ECON. INQUIRY 297, 297, 308 (1991).

247. Steven E. Landsburg, *Does Crime Pay?*, SLATE (Dec. 9, 1999, 3:30 AM), <http://www.slate.com/id/57573>.

248. See *id.* (contrasting people who prefer a big chance of a small punishment, such as those who go into “punishing careers” like construction work or coal mining, with criminals, who prefer a small chance of big punishment).

effects stemming from increased severity of sanction.”²⁴⁹ As a theory, general deterrence only justifies punishment to a certain degree.²⁵⁰ Thus, a system that imposes drastic penalties for recidivism should be viewed as inherently less credible than a system that more frequently detects and punishes criminal conduct.

Because the current criminal justice system focuses on harsh punishments instead of increased detection and conviction, particularly for drug offenses, significant questions remain about the rationale of general deterrence as applied to drug traffickers.²⁵¹ Drug traffickers “probably *do* calculate the risks and rewards [of their crimes] in a fairly sophisticated way.”²⁵² And the American law enforcement system does not detect and convict drug traffickers to nearly the same extent as other types of criminals.²⁵³ Therefore, the cost-benefit analysis favors criminals who traffic drugs.²⁵⁴ Consequently, as Professor Leibold concluded, “if deterrence of drug use through the criminal law is our goal, we appear to be tinkering at the margins” instead of attacking the heart of the problem by increasing detection and conviction rates.²⁵⁵

Moreover, the rationale of general deterrence can never fully apply to juvenile criminal conduct. As the *Roper* Court observed, “the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence.”²⁵⁶ Simply put, juveniles often fail to recognize many consequences of their actions.²⁵⁷ As a result, a defendant with juvenile-age strikes should not be subject to the same level of punishment as a defendant whose entire criminal career was

249. Grogger, *supra* note 246, at 308; *accord* Landsburg, *supra* note 247 (claiming “if you want to make crime less attractive to criminals, it’s better to double the odds of conviction than to double the severity of the punishment”).

250. See Herbert L. Packer, *Making the Punishment Fit the Crime*, 77 HARV. L. REV. 1071, 1076 (1964) (suggesting that it would be inappropriate to rely on general deterrence too heavily because “boiling people in oil [for] a slow and painful death may be thought more of a deterrent to crime than a quick and painless one”).

251. See generally Andrew D. Leibold, *The War on Drugs and the Puzzle of Deterrence*, 6 J. GENDER RACE & JUST. 111, 112–22 (2002) (exploring why deterrence has failed in the war on drugs).

252. *Id.* at 115.

253. See *id.* at 120–21 (examining “clearance rate” statistics, which show “the percentage of crimes committed that result in an arrest and the filing of criminal charges,” for various crimes).

254. See *id.* at 115 (observing “that there seems to be no end to the rational (if immoral) [drug traffickers] who are willing to give it a try” (citation omitted)).

255. *Id.* at 121 (“More pointedly, if we want to get a deterrence effect in [drug] crimes comparable to other offenses, we have to escalate the drug war considerably.”).

256. *Roper v. Simmons*, 543 U.S. 551, 571 (2005).

257. See *Graham v. Florida*, 130 S. Ct. 2011, 2028–29 (2010) (analyzing why deterrence did not serve as an adequate theory to support the sentencing practice at issue); *Thompson v. Oklahoma*, 487 U.S. 815, 837 (1988) (plurality opinion) (“The likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of [severe punishment] is so remote as to be virtually nonexistent.”).

the product of his adult decisions because general deterrence affects each of these individuals differently. For these reasons, the penological theory of general deterrence does not adequately justify § 841(b)(1)(A) life without parole due to juvenile-age strikes.

c. Specific deterrence and incapacitation

Although specific deterrence and incapacitation are often the main rationales cited by proponents of recidivist sentencing schemes,²⁵⁸ these theories do not validate § 841(b)(1)(A) life without parole for defendants with juvenile-age strikes. These two concepts are best analyzed together because both are based on the justice system's ability to accurately predict who is likely to engage in future criminal activity.

Before evaluating the faults of specific deterrence and incapacitation as applied to defendants like Angelo Scott and Donald Graham, it is worth noting that imprisonment—for any length of time—is an imperfect means of implementing these penological goals. Crime does not stop at the jailhouse doors.²⁵⁹ Gangs are present and growing throughout the American penal system,²⁶⁰ and prisons are the sites of a great deal of illegal activity.²⁶¹ Thus, incarcerating criminals does not completely stop them from committing more crimes; imprisonment only prevents some crimes from happening outside of jail.

Even if the goal is to deter and incapacitate ex-convicts so they do not commit crimes within the general population, these penological theories are of limited use for defendants like Angelo Scott and Donald Graham. To sufficiently justify life without parole with these two rationales, the criminal justice system would have to accurately predict who will pose a

258. In *Ewing v. California*, 538 U.S. 11 (2003), the Court observed, “a recidivist statute[s] . . . primary goals are to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time.” *Id.* at 27 (plurality opinion) (quoting *Rummel v. Estelle*, 445 U.S. 263, 284 (1980)) (internal quotation marks omitted); see also *Parke v. Raley*, 506 U.S. 20, 27 (1992) (arguing that “[s]tates have a valid interest in deterring and segregating habitual criminals”); *Robinson et al.*, *supra* note 194, at 1950 (reiterating that “[t]he underlying rationale for [habitual offender] statutes is typically incapacitative” (citation omitted)).

259. See, e.g., *Schlup v. Delo*, 513 U.S. 298, 301–05 (1995) (providing the underlying facts of the case, which were that a black inmate had been stabbed to death in the Missouri State Penitentiary); *Ryan*, *supra* note 120, at 110 n.154 (citing statistics about the number of homicides that occurred in state prisons from 2001–2006).

260. See generally *Geoffrey Hunt et al., Changes in Prison Culture: Prison Gangs & the Case of the “Pepsi Generation,”* 40 SOC. PROBS. 398, 398–409 (1993) (studying California prison gangs and noting that “although all five of the older gangs still exist . . . a new crop of gangs has taken center stage”).

261. See, e.g., VICTOR HASSINE, *LIFE WITHOUT PAROLE: LIVING AND DYING IN PRISON TODAY* 33–39 (Robert Johnson & Sonia Tabriz eds., 5th ed. 2011) (describing the realities of life in jail, including prison subcultures and the regularity of in-prison violence); *id.* at 80–84 (providing details about different types of prison rape).

continuing threat to society.²⁶² As the *Graham v. Florida* Court declared, “[t]o justify life without parole on the assumption that the [defendant] forever will be a danger to society requires the sentencer to make a judgment that the [defendant] is incorrigible.”²⁶³ As one state court aptly stated, however, “incorrigibility is inconsistent with youth.”²⁶⁴ Since a juvenile’s character is more malleable than that of an adult and his “personality traits . . . are more transitory [and] less fixed [than those of an adult],”²⁶⁵ juvenile criminal conduct is not necessarily indicative of how an offender will behave in the future. Likewise, defendants with prior juvenile-age convictions who are subject to the sentencing scheme of § 841(b)(1)(A) cannot be definitively categorized as posing a perpetual danger to society.²⁶⁶

In addition, these two penological goals do not wholly apply to defendants like Angelo Scott and Donald Graham because of the nature of their crimes. According to government-conducted studies, nonviolent drug traffickers have one of the lowest recidivism rates of any class of offenders.²⁶⁷ Although a defendant on his third strike can already be thought of as a recidivist to some extent, only the particular facts of his case can reveal whether he is a true drug trafficking recidivist or if his strikes were the result of other, less severe drug offenses that fit within § 841(b)(1)(A)’s expansive definition of “felony drug offense.”²⁶⁸ With such uncertainty in accurately predicting these defendants’ potential for future

262. See *supra* notes 129–135 and accompanying text (examining the implications of specific deterrence and incapacitation as penological theories).

263. *Graham v. Florida*, 130 S. Ct. 2011, 2029 (2010).

264. *Workman v. Commonwealth*, 429 S.W.2d 374, 378 (Ky. 1968); accord *Roper v. Simmons*, 543 U.S. 551, 573 (2005) (insisting that “[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption”).

265. *Roper*, 543 U.S. at 570 (citing ERIK ERIKSON, *IDENTITY: YOUTH AND CRISIS* (1968)). The *Roper* Court elaborated from this point, stating that “[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed.” *Id.*

266. Cf. *Graham v. Florida*, 130 S. Ct. at 2030 (commanding that the Cruel and Unusual Punishments Clause “forbid[s] States from making the judgment at the outset that [juvenile nonhomicide] offenders never will be fit to reenter society”).

267. See *United States v. Kriesel*, 508 F.3d 941, 951 (9th Cir. 2007) (Fletcher, J., dissenting) (citing U.S. SENTENCING COMM’N, *MEASURING RECIDIVISM: THE CRIMINAL HISTORY COMPUTATION OF THE FEDERAL SENTENCING GUIDELINES* 13 (2004) (observing that drug trafficking offenders are within the group of offenders that “are overall the least likely to recidivate”); U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *OFFENDERS RETURNING TO FEDERAL PRISON, 1986-97*, at 1, 3 (2000) (observing that drug offenders had a lower recidivism rate than property and public-order offenders)).

268. Compare *United States v. Scott*, 610 F.3d 1009, 1012 (8th Cir. 2010) (revealing that the defendant’s first two strikes were only convictions for drug possession charges), *cert. denied*, 131 S. Ct. 964 (2011), with *United States v. Graham*, 622 F.3d 445, 454 (6th Cir. 2010) (showing how the defendant’s first two strikes were related to previous instances of drug trafficking), *cert. denied*, 131 S. Ct. 2962 (2011).

crime, specific deterrence and incapacitation fail to sufficiently justify § 841(b)(1)(A) life without parole.

d. Rehabilitation

The penological goal of rehabilitation cannot justify life without parole under § 841(b)(1)(A) due to juvenile-age strikes. Through rehabilitation, the state seeks to reform and improve a criminal's character so he can become a productive member of society.²⁶⁹ In *Graham v. Florida*, the Court stated why the theory of rehabilitation can never justify life without parole: “The penalty forswears altogether the rehabilitative ideal [because] . . . the [government] makes an irrevocable judgment about that person's value and place in society.”²⁷⁰ Further, beyond “expressive judgment” about the individual's worth, a life without parole sentence carries practical consequences for the convict when in prison.²⁷¹ For example, states often refuse access to educational and vocational training programs for inmates sentenced to life without parole.²⁷² For these reasons, life without parole is inherently contrary to the goal of rehabilitation.

C. International Standards Relating to Juvenile Criminal Conduct and Drug Trafficking Offenses Confirm this Sentencing Practice Is Cruel and Unusual

Just as international sources supported *Graham v. Florida's* holding,²⁷³ international norms also show that using juvenile-age convictions as strikes under § 841(b)(1)(A) is cruel and unusual. The Supreme Court has repeatedly looked beyond the United States' borders in Eighth Amendment cases.²⁷⁴ While international standards are not controlling,²⁷⁵ the Court has

269. See *supra* notes 142–146 and accompanying text (defining rehabilitation).

270. *Graham v. Florida*, 130 S. Ct. at 2029–30; *accord Harmelin v. Michigan*, 501 U.S. 957, 1028 (1991) (Stevens, J., dissenting) (reasoning that since “a mandatory sentence of life imprisonment without the possibility of parole . . . [means] [t]he offender will never regain his freedom,” the punishment “does not even purport to serve a rehabilitative function”).

271. *Graham v. Florida*, 130 S. Ct. at 2030.

272. See *id.* (citing Brief of the Sentencing Project as Amicus Curiae in Support of Petitioners at 11–13, *Graham v. Florida*, 130 S. Ct. 2011 (No. 08-7412) & *Sullivan v. Florida*, 130 S. Ct. 2059 (2010) (per curiam) (No. 08-7621)).

273. See *id.* at 2033 (emphasizing that the Court's conclusion was supported by the fact that “the world over” rejected sentencing juvenile nonhomicide offenders to life without parole).

274. See *id.* (citing *Roper v. Simmons*, 543 U.S. 551, 575–78 (2005); *Atkins v. Virginia*, 536 U.S. 304, 316–17 n.21 (2002); *Thompson v. Oklahoma*, 487 U.S. 815, 830–31 (1988) (plurality opinion); *Enmund v. Florida*, 458 U.S. 782, 796–97 & n.22 (1982) (plurality opinion); *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1977) (plurality opinion); *Trop v. Dulles*, 356 U.S. 86, 102–03 (1958) (plurality opinion)). But see *Sosa v. Alvarez-Machain*, 542 U.S. 692, 739–51 (2004) (Scalia, J., concurring in part and concurring in judgment) (criticizing the practice of using foreign legal sources when interpreting the United States Constitution).

recognized “‘the climate of international opinion concerning the acceptability of a particular punishment’ is an additional consideration which is ‘not irrelevant.’”²⁷⁶ Thus, this portion of the analysis does not turn on the mandatory or permissive nature of the United States’ international obligations; international standards merely inform Eighth Amendment values.

Even though most American defendants, like Angelo Scott and Donald Graham, are adults when they are subject to mandatory § 841(b)(1)(A) life without parole, well-recognized principles of international human rights law should generate concern about the ramifications of using juvenile-age convictions to reach that sentence.²⁷⁷ The international community is often more sensitive to the consequences of juvenile crime, demonstrated by the United States standing as the world’s only nation with a functioning government that is not a party to the United Nations Convention on the Rights of the Child.²⁷⁸ Article 37(a) of this Convention provides, in part, “life imprisonment without possibility of release shall [not] be imposed for offences committed by persons below eighteen years of age.”²⁷⁹ Further, Article 40(1) of this Convention directly advances a rehabilitative theory by stressing that juveniles should “be treated in a manner consistent with . . . promoting the child’s reintegration and the child’s assuming a constructive role in society.”²⁸⁰ As Amnesty International has noted, “[m]ost [foreign] governments either have expressly prohibited, never allowed, or do not impose [life without parole] sentences on child offenders, because it violates the principles of child development and

275. See *Graham v. Florida*, 130 S. Ct. at 2033 (“The judgments of other nations and the international community are not dispositive as to the meaning of the Eighth Amendment.”).

276. *Enmund*, 458 U.S. at 796 n.22 (quoting *Coker*, 433 U.S. at 596 n.10).

277. See Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3; United Nations Standard Minimum Rules for the Administration of Juvenile Justice, G.A. Res. 40/33, U.N. GAOR, 40th Sess., Supp. No. 53, U.N. Doc. A/RES/40/33 (Nov. 29, 1985).

278. See Brief for Amnesty International et al. as Amici Curiae in Support of Petitioners at 15, *Graham v. Florida*, 130 S. Ct. 2011 (No. 08-7412) & *Sullivan v. Florida*, 130 S. Ct. 2059 (2010) (per curiam) (No. 08-7621) [hereinafter Amnesty International Brief] (detailing how the United States and Somalia, which does not have a functioning government, are the only two countries that have not ratified the Convention on the Rights of the Child).

279. Convention on the Rights of the Child art. 37(a), Nov. 20, 1989, 1577 U.N.T.S. 3.

280. *Id.* art. 40(1); accord United Nations Standard Minimum Rules for the Administration of Juvenile Justice, G.A. Res. 40/33, U.N. GAOR, 40th Sess., Supp. No. 53, U.N. Doc. A/RES/40/33, at 212 (Nov. 29, 1985) (“The objective of training and treatment of juveniles placed in institutions is to provide care, protection, education and vocations skills, with a view to assisting them to assume socially constructive and productive roles in society.”). Various other international sources also highlight the primacy that rehabilitation should have whenever any criminal, juvenile or adult, is imprisoned. See DIRK VAN ZYL SMIT, *TAKING LIFE IMPRISONMENT SERIOUSLY IN NATIONAL AND INTERNATIONAL LAW* 13 (2002) (discussing the International Covenant on Civil and Political Rights, the American Convention on Human Rights, the Constitution of Spain, and the Constitution of Italy as all stressing the importance of rehabilitation).

protection established through . . . international human rights law.”²⁸¹ In Germany, for instance, juvenile defendants cannot receive a prison sentence over ten years for any crime they commit.²⁸² Thus, using juvenile-age convictions as strikes under § 841(b)(1)(A) defies the normal international practice of limiting the consequences of juvenile crime.

Further, many countries do not punish drug offenses as harshly as the United States does, supporting the idea that mandatory § 841(b)(1)(A) life without parole due to juvenile-age strikes is cruel and unusual. In one Canadian case, for example, the defendant was convicted of importing seven and a half ounces of cocaine, subjecting him to a mandatory minimum of seven years imprisonment.²⁸³ Interpreting section 12 of the Canadian Charter of Rights and Freedoms, which also prohibits “cruel and unusual” punishments,²⁸⁴ the Supreme Court of Canada held the statute was unlawful.²⁸⁵ In reaching this conclusion, the court evaluated the mandatory punishment as it would have applied to the least culpable offender.²⁸⁶ Significantly, the court overlooked the defendant’s known history of drug smuggling and the nature of the imported drug, showing a level of leniency atypical in American drug trafficking cases.²⁸⁷ This case demonstrates Canada’s commitment to ensuring that only the worst criminal offenders receive the worst criminal sentences.²⁸⁸

Angelo Scott and Donald Graham are not among the worst American criminals, and no penological goal adequately justifies life without parole for them.²⁸⁹ Declaring their sentences unconstitutional would be consistent with international norms.

281. Amnesty International Brief, *supra* note 278, at 17 (citing Connie de la Vega & Michelle Leighton, *Sentencing Our Children to Die in Prison*, 42 U.S.F. L. REV. 983, 989–90 (2008)).

282. *Id.* at 16.

283. *See R. v. Smith*, [1987] 1 S.C.R. 1045, paras. 36–38 (Can.) (laying out the facts of the case and the statutory provision at issue). While the mandatory minimum was only seven years, the defendant, in fact, had received an eight-year sentence. *Id.* paras. 14, 18.

284. *See* Canadian Charter of Rights and Freedoms, § 12, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.) (“Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.”).

285. *See Smith*, 1 S.C.R. para. 107.

286. As Justice Lamer stated,

[A] judge who would sentence to seven years in a penitentiary a young person who, while driving back into Canada from a winter break in the U.S.A., is caught with only one, indeed, let’s postulate, his or her first “joint of grass,” would certainly be considered by most Canadians to be a cruel and, all would hope, a very unusual judge.

Id. para. 34.

287. *See id.* paras. 65–69 (evaluating the law at issue in the abstract rather than as applied to the particular defendant).

288. *See id.* para. 73 (stating that “[w]e do not need to sentence the small offenders to seven years in prison in order to deter the serious offender,” and thus concluding that “the net cast by [the statute at issue] for sentencing purposes need not be so wide”).

289. *See supra* Part II.B (arguing that life without parole is unconstitutional, as it is too

III. SECTION 3553(a) IS THE PROPER PLACE FOR JUDGES TO CONSIDER A DEFENDANT'S JUVENILE CRIMINAL HISTORY

Although using juvenile-age convictions as strikes under § 841(b)(1)(A) to reach life without parole is unconstitutional under *Graham v. Florida*, a defendant's juvenile criminal history need not be completely excluded at sentencing. Regardless of any other sentencing provision related to a particular crime, 18 U.S.C. § 3553 overlays the imposition of all criminal sentences.²⁹⁰ Under § 3553, all federal district court judges must first calculate the proper Sentencing Guidelines range.²⁹¹ From that point, the judge must consider an appropriate sentence for the defendant in view of the factors outlined in § 3553(a).²⁹² Section 3553(a)(1) specifically directs the sentencing judge to consider "the history and characteristics of the defendant."²⁹³ If a defendant has exhibited an elevated pattern of criminal conduct and the prosecution has adequately demonstrated that the defendant deserves more than the mandatory minimum, the judge can sentence him to a longer term.²⁹⁴

In recent years, the Supreme Court has strived to advance the notion of sentencing defendants on an individual basis.²⁹⁵ The landmark 2005 decision *United States v. Booker*,²⁹⁶ which held the mandatory nature of the federal Sentencing Guidelines was unconstitutional,²⁹⁷ dramatically illustrates the Court's willingness to ensure defendants are sentenced as individuals. As the Court has recognized, "[i]t has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime

severe for these defendants because of their diminished culpability and because it does not sufficiently further any legitimate penological goal).

290. 18 U.S.C. § 3553 (2006).

291. *Nelson v. United States*, 129 S. Ct. 890, 891–92 (2009) (per curiam).

292. *Id.*

293. § 3553(a)(1); *cf.* FED. R. CRIM. P. 32(f) (providing the means for a defendant's counsel to object to a presentence report based on that defendant's individual traits).

294. *See* *Gall v. United States*, 552 U.S. 38, 51 (2007) (acknowledging a district court judge's broad discretion in sentencing); *Williams v. New York*, 337 U.S. 241, 247 (1949) (asserting that "the punishment should fit the offender and not merely the crime"); *see also* *Wasman v. United States*, 468 U.S. 559, 564 (1984) (advancing the view that considering a broad range of evidence about the defendant "ensures that the punishment will suit not merely the offense but the individual defendant").

295. *See, e.g.*, *Pepper v. United States*, 131 S. Ct. 1229, 1239–50 (2011) (emphasizing the broad range of evidence about the individual that trial courts may consider when imposing a sentence); *United States v. Booker*, 543 U.S. 220, 245 (2005) (holding resulting in the federal Sentencing Guidelines becoming advisory, rather than mandatory); *Blakely v. Washington*, 542 U.S. 296, 308 (2004) (holding the state's implementation of a determinate sentencing scheme unconstitutional, effectively making the state guidelines advisory instead of mandatory).

296. 543 U.S. 220 (2005).

297. *Id.* at 245.

and the punishment to ensue.”²⁹⁸

Federal district court judges are constantly sentencing individual defendants; these judges are appropriately situated and experienced in this area. Not only do federal district court judges have an “institutional advantage” over federal appellate judges,²⁹⁹ district court judges occupy a uniquely different position from legislators. Most district court judges sentence over 100 defendants every year.³⁰⁰ Rather than creating policy of general applicability, a “judge sees and hears the evidence, makes credibility determinations, has full knowledge of the facts and gains insights” in every case he decides.³⁰¹

Since the sentencing judge is the most familiar with the defendant,³⁰² he should receive discretion. By allowing sentencing judges to address juvenile-age convictions as one consideration under § 3553(a), rather than as rigid predicate offenses that trigger heightened penalties under § 841(b)(1)(A), the criminal justice system will stay true to the ideal of individualized sentencing.

CONCLUSION

The Supreme Court’s analysis in *Graham v. Florida* demands that the American criminal justice system critically reexamine a number of its underlying doctrines and sentencing practices. Based on *Graham v. Florida*, the Cruel and Unusual Punishments Clause forbids using juvenile-age convictions as strikes to trigger mandatory § 841(b)(1)(A) life without parole. In view of jurisdictions’ legislation and actual sentencing practices, the United States lacks a clear national consensus on how to view this type of sentencing practice. Yet drug traffickers who have juvenile-age strikes are not culpable enough to deserve the extreme punishment of life without parole. Also, this sentence does not definitively serve any legitimate penological goal for this class of offenders. Further, the manner in which the international community views juvenile criminal conduct and drug offenses confirms that life without parole is cruel and unusual in this instance.

As a result, under § 841(b)(1)(A), Angelo Scott should have been subject to a ten-year mandatory minimum, and Donald Graham should have been

298. *Koon v. United States*, 518 U.S. 81, 113 (1996); accord *Pennsylvania ex rel. Sullivan v. Ashe*, 302 U.S. 51, 55 (1937) (“For the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender.”).

299. *Koon*, 518 U.S. at 98.

300. See *Gall v. United States*, 552 U.S. 38, 52 n.7 (2007) (examining the average number of defendants the district court judge had sentenced in a given year).

301. *Id.* at 51 (citation omitted) (internal quotation marks omitted).

302. *Rita v. United States*, 551 U.S. 338, 357 (2007).

subject to a twenty-year mandatory minimum. Each defendant could have received a sentence longer than the mandatory minimum, though, because sentencing judges can—and should—consider juvenile-age convictions under § 3553(a). Section 3553(a) ensures that all criminal defendants are evaluated on an individual basis. As such, the Eighth Amendment commands that Angelo Scott and Donald Graham receive individualized treatment. They should not spend the rest of their lives in jail due to the rigidity of § 841(b)(1)(A)'s three-strike sentencing scheme.