Articles

Twenty-Five to Life for Adolescent Mistakes: Juvenile Strikes as Cruel and Unusual Punishment

By BETH CALDWELL*

Introduction

FACED WITH THE OPTION OF ADMITTING A STRIKE[1] in order to be released from juvenile hall that day or agreeing to spend thirty days in custody in exchange for a reduction to a non-strike offense, Jesse felt that it was an easy decision.[2] He had been in juvenile hall for two weeks, and he hated everything about it. He was ecstatic about the opportunity to go home that day. As his attorney, I sat in the client interview area for a long time, trying to convince him to think through the potential long-term consequences of this decision. He told me, as did most clients, that he did not plan to get in trouble again, so having a strike on his record would not be a problem. In the courtroom, I cringed while he smiled as the judge found that he had committed a robbery when he grabbed a man's cell phone and threatened to hit him. He was released that day but was re-arrested within six months. This time he was charged with a second strike offense for writing gang-related graffiti, and the prosecutor would not negotiate for a non-strike charge. The prosecutor reasoned that he did not deserve a break in the new case because he already had a strike on his record. Jesse lost the adjudication for the vandalism

* J.D., M.S.W., UCLA. Faculty Fellow, Thomas Jefferson School of Law. I would like to thank Linda Keller for her guidance and input, Galit Lipa for sharing her research, and the USF Board of Editors for their tremendous work in editing this piece.

1. The term "strike" refers to an offense that can be used as a prior conviction for future sentencing enhancements under California's three strikes law. CAL. PENAL CODE §§ 667, 667.5(c) (West 2010 & Supp. 2011); § 1192.7(c) (West 2004 & Supp. 2011).

2. This narrative example is drawn from the author's experience practicing law as a public defender in a juvenile court in Los Angeles County.

charge; at the age of seventeen, he had two strikes on his record. Under California's three strikes law, if Jesse is convicted of any felony offense at any point in the rest of his life, he will be sentenced to twenty-five years to life in prison.[3]

I am haunted by the number of young men and women I have met who are entering adulthood with permanent strikes on their records. The types of cases that lead to juvenile strike convictions often do not involve any injuries to victims. The behavior underlying strike charges is often deeply connected to the developmental stage of adolescence, when it is typical for people to engage in risk-taking and impulsive behavior without considering the consequences of their actions. The fact that children are fundamentally different from adults may seem like common sense. However, differences between children and adults are deliberately ignored in many criminal justice policies in the United States.[4] Emerging research in the fields of social science and neuroscience demonstrates that many of these distinct characteristics are "integrally linked to adolescent development."[5] Over the past six years, the United States Supreme Court has analyzed the constitutional rights of juveniles in a series of decisions that have recognized the legal significance of key differences between adolescents and adults.[6]

Specifically, the Court has incorporated research about the nature of adolescent behavior and brain development into its decisions to ban the imposition of capital punishment for juvenile offenders

3. CAL. PENAL CODE § 667(e)(2)(A)(ii).

4. For example, most states allow juveniles to be prosecuted in adult criminal courts under a wide range of circumstances. Juvenile offenders are routinely housed with adult offenders in adult prisons and are subject to the same sentences as adult offenders. *See* THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT (Jeffery Fagan & Franklin E. Zimring eds., 2000) [hereinafter THE CHANGING BORDERS OF JUVENILE JUSTICE]. Throughout this Article, the term "juvenile" is defined as a person under the age of eighteen.

5. ELIZABETH S. SCOTT & LAURENCE STEINBERG, RETHINKING JUVENILE JUSTICE 30 (2008).

6. J.D.B. v. North Carolina, 131 S. Ct. 2394, 2397 (2011) ("A child's age is far 'more than a chronological fact.' Eddings v. Oklahoma, 455 U.S. 104, 115 [(1982)]. It is a fact that 'generates common-sense conclusions about behavior and perception,' [Yarborough v.] Alvarado, 541 U.S. [652, 667 (2004)], that apply broadly to children as a class."); Graham v. Florida, 130 S. Ct. 2011 (2010); Roper v. Simmons, 543 U.S. 551 (2005); *see also* Tamar R. Birckhead, *Juvenile Justice Reform 2.0*, 20 J.L. & POL'Y 15 (2011); Marsha Levick, *Kids Really Are Different: Looking Past* Graham v. Florida, CRIM. L. REP., July 14, 2010, at 2–3 ("Kennedy's opinion in *Graham* is an expansive statement about the limitations under the Constitution of applying adult sentencing principles and practices to juvenile offenders whose personal and developmental attributes remain sharply distinct from their adult counterparts.").

and to outlaw the punishment of life without the possibility of parole for juvenile offenders who have not been convicted of homicide.[7] Most recently, the Court relied upon these findings to determine that age is a relevant factor for courts to consider when assessing whether a juvenile is "in custody" for the purposes of determining whether *Miranda* warnings are required.[8] The reasoning in this string of decisions is groundbreaking because the Court has shifted away from years of jurisprudence that has ignored the differences between youth and adults by applying criminal laws without regard to a defendant's age. Overlooking these important distinctions has led to the application of laws designed for adults to the cases of children as young as seven or eight years old.[9]

In the 1990s, states throughout the country enacted legislation that subjected more juveniles to the procedures and punishments of the adult criminal justice system.[10] Although there are indications that this trend may be reversing, many punitive laws that ignore the differences between adolescents and adults remain on the books.[11] On average, 7500 juveniles are incarcerated in adult jails every day in the United States.[12] Many others experience long-term consequences of their treatment as adults, including trauma resulting from being incarcerated in adult facilities as juveniles,[13] permanent deportation from the United States,[14] and the requirement to register as sex offenders for the rest of their lives.[15] Laws that have historically ignored

7. *See, e.g.*, *Graham v. Florida*, 130 S. Ct. 2011; *Roper*, 543 U.S. 551.

8. *J.D.B.*, 131 S. Ct. at 2408 ("To hold, as the State requests, that a child's age is never relevant to whether a suspect has been taken into custody—and thus to ignore the very real differences between children and adults—would be to deny children the full scope of the procedural safeguards that *Miranda* guarantees to adults.").

9. HUMAN RIGHTS WATCH & AMNESTY INT'L, THE REST OF THEIR LIVES 18 (2005) (summarizing the minimum age each state has set at which a child may be prosecuted in adult court or sentenced to life without the possibility of parole).

10. THE CHANGING BORDERS OF JUVENILE JUSTICE, *supra* note 4. **R**

11. *See* NEELUM ARYA, CAMPAIGN FOR YOUTH JUSTICE, STATE TRENDS: LEGISLATIVE VICTORIES FROM 2005 TO 2010 REMOVING YOUTH FROM THE ADULT CRIMINAL JUSTICE SYSTEM (2011).

12. CAMPAIGN FOR YOUTH JUSTICE, JAILING JUVENILES: THE DANGERS OF INCARCERATING YOUTH IN ADULT JAILS IN AMERICA 4 (2007). On an annual basis, researchers estimate ten to twenty times this number of youth are detained in adult jails. *Id.*

13. *See* VINCENT SCHIRALDI & JASON ZEIDENBERG, JUSTICE POLICY INST., THE RISKS JUVENILES FACE WHEN THEY ARE INCARCERATED WITH ADULTS (1997) (summarizing research regarding victimization of juveniles in adult prisons).

14. *See* Joel Medina, *Exiled*, 8 LATINO STUD. 411 (2010).

15. Under federal law, juvenile adjudications may trigger sex offender registration requirements when the offender is at least fourteen years of age. 42 U.S.C. § 16911(8) (2006). In some cases, lifetime registration is required. § 16915(b)(3).

the fundamental differences between youth and adults, particularly those that impose life-long consequences for young offenders, are ripe for reconsideration in light of the Supreme Court's recent decisions. This Article focuses on one such policy: California's three strikes law as it applies to juvenile offenders.

Thirty-one jurisdictions (including the District of Columbia and the federal government) have passed legislation that follows a "three strikes and you're out" model, imposing mandatory lengthy or life sentences for "habitual" or "repeat" offenders previously convicted of a specified number and type of crimes.[16] These laws vary widely from state to state, and California's three strikes law is one of the harshest in the country.[17] Notably, California is the only state in the nation that defines juvenile court adjudications as prior convictions under its three strikes law.[18]

The constitutionality of California's policy of using juvenile adjudications as prior convictions for sentencing enhancement under its three strikes law was challenged in 2010 on due process grounds because the accused do not have a right to a jury trial in juvenile court.[19] However, the California Supreme Court held that the lack of jury trials in juvenile courts does not preclude the use of juvenile adjudica-

16. Walter J. Dickey & Pam Hollenhorst, *"Three Strikes" Laws: Five Years Later*, CORRECTIONS MGMT. Q., Summer 1999, at 1.

17. *See* RUTH WILSON GILMORE, GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA 108 (2007); Michael Romano, *Divining the Spirit of California's Three Strikes Law*, 22 FED. SENT'G REP. 171 (2010); Franklin E. Zimring, *Populism, Democratic Government, and the Decline of Expert Authority: Some Reflections on "Three Strikes" in California*, 28 PAC. L.J. 243 (1996).

18. California's statute limits these to juvenile adjudications committed by youth at least sixteen years-old who commit specified offenses. CAL. PENAL CODE § 667(d)(3)(A) (West 2010 & Supp. 2011). Other authors have concluded that Texas' three strikes statute explicitly defines juvenile adjudications as prior convictions. However, the statutory definition of juvenile adjudications as "final felony convictions" applies to sentencing enhancements other than the three strikes enhancement. *See* TEX. PENAL CODE ANN. § 12.42(d) (West 2011 & Supp. 2011) (setting forth the sentencing provisions of the habitual offender three strikes law); § 12.42(f) (defining juvenile adjudications as prior convictions for subsections (a), (b), (c)(1), and (e) but excluding (d)). A recent unreported case reinforces the inapplicability of subdivision (f) to the habitual offender sentencing provision listed under subdivision (d). Vaughns v. State, No. 04-10-00364-CR, 2011 WL 915700 (Tex. App. Mar. 16, 2011).

19. Youth who are processed in the juvenile court are not entitled to jury trials but are instead entitled to trials in front of a judge. *See* People v. Nguyen, 209 P.3d 946, 953 (Cal. 2009). The United States Supreme Court has held that juveniles are not entitled to jury trials. McKeiver v. Pennsylvania (*In re* Burrus), 403 U.S. 528, 550 (1971) (plurality opinion). Juveniles who are transferred to adult court are entitled to the same procedural protections as adults, including jury trials.

tions as prior convictions under the three strikes law.[20] Similarly, legal scholarship has focused on the potential due process violations raised by California's use of juvenile adjudications as strike priors in the absence of jury trials.[21] This Article examines the use of "juvenile strikes"[22] through a different lens. Rather than focus on the violation of due process rights, this Article argues that using crimes committed by juveniles as prior convictions to enhance sentences under three strikes statutes constitutes cruel and unusual punishment in violation of the Eighth Amendment, according to the analytical framework set forth by the Supreme Court in *Graham v. Florida*.[23]

Part I provides an overview of three strikes laws, including the basics of California's law. This Part also reviews the Supreme Court's Eighth Amendment jurisprudence on punishments imposed under habitual offender sentencing statutes, including California's. Part II summarizes California's law regarding juvenile strikes and reviews the two California Supreme Court cases that have upheld the legality of juvenile strikes. Part III discusses the *Graham v. Florida* decision, setting forth the analytical framework employed in that case. Part IV considers the ways in which *Graham* has been interpreted and applied by lower courts since 2010. Part V argues that the *Graham* framework should be used to analyze the constitutionality of juvenile strike cases. Finally, Part VI uses the analytical framework of *Graham* to show that the use of juvenile strikes to enhance sentences under California's three strikes law constitutes cruel and unusual punishment in violation of the Eighth Amendment. This is the heart of the analysis and incorporates extensive comparative research on three strikes laws of

20. *Nguyen*, 209 P.3d at 953.

21. *See* Joseph I. Goldstein-Breyer, *Calling Strikes Before He Stepped to the Plate: Why Juvenile Adjudications Should Not Be Used to Enhance Subsequent Adult Sentences*, 15 BERKELEY J. CRIM. L. 65 (2010); Courtney P. Fain, Note, *What's in a Name? The Worrisome Interchange of Juvenile "Adjudications" with Criminal "Convictions,"* 49 B.C. L. REV. 495 (2008); Douglas M. Schneider, Note, *But I Was Just a Kid!: Does Using Juvenile Adjudications to Enhance Adult Sentences Run Afoul of* Apprendi v. New Jersey*?*, 26 CARDOZO L. REV. 837 (2005).

22. In this Article, the term "juvenile strikes" is used to refer to both juvenile adjudications where a petition is found to be true in juvenile court and convictions of juvenile offenders in adult courts. California allows both categories to be used as "prior convictions" for sentencing enhancement under the state's three strikes law. *See infra* notes 91–92. R

23. Graham v. Florida, 130 S. Ct. 2011 (2010). Several federal circuit courts have addressed the constitutionality of using convictions of juvenile offenders in adult courts as prior convictions for habitual offender sentencing enhancements in light of the *Graham* decision and have concluded that the practice does not violate the Eighth Amendment. However, there are no published cases that address whether using adjudications from juvenile court as strikes violates the Eighth Amendment under *Graham*.

other states and countries. The Article concludes that using juvenile cases to enhance sentences under California's three strikes law violates the Eighth Amendment because it is inconsistent with both the practices of other states and the principles of adolescent development that the Supreme Court relied on in *Graham*.

I. Three Strikes Laws

A. Overview of California's Three Strikes Law

Passed in 1994, California's three strikes law is widely recognized as one of the most punitive three strikes laws in the United States.[24] Several features of California's law set it apart from three strikes laws in other states. First, California's law is not limited to sentencing third strike offenders; it also requires mandatory sentencing enhancements for individuals convicted of a second offense.[25] Under the California law, anyone who has a first strike offense on his or her record will receive a doubled prison sentence for a subsequent conviction.[26] This provision of the law has had a major impact on the state's prison population. As of March 2011, 32,392 people were incarcerated for second strike offenses in California prisons.[27]

Another distinguishing feature of California's three strikes law is that a wide range of crimes are defined as first and second strikes, including some crimes that are not violent.[28] A first or second strike

24. Two virtually identical versions of the law were passed in 1994, one through a voter initiative and the other through the state legislature. FRANKLIN E. ZIMRING, GORDON HAWKINS & SAM KAMIN, PUNISHMENT & DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA 4–7 (2001). The authors attribute this unusual occurrence to political positioning for the impending gubernatorial campaign, along with an appeal to public fear through the campaign's use of the story of Polly Klaas, a young girl who was kidnapped, sexually assaulted, and killed. *Id.* at 6; *see also* Beth Caldwell & Ellen C. Caldwell, "*Superpredators" and "Animals" — Images and California's "Get Tough on Crime" Initiatives*, 11 J. INST. JUST. & INT'L STUD. 61 (2011) (examining the importance of the use of Polly Klaas' image in gaining popular support for the three strikes law).

25. CAL. PENAL CODE § 667(e)(1) (West 2010 & Supp. 2011) ("If a defendant has one prior felony conviction that has been pled and proved, the determinate term or minimum term for an indeterminate term shall be twice the term otherwise provided as punishment for the current felony conviction."). This sentencing increase for a second strike conviction is unique; most other states with "three strikes" type laws do not impose similar sentencing increases for "second strike" offenses. ZIMRING, HAWKINS & KAMIN, *supra* note 24, at 19. R

26. CAL. PENAL CODE § 667(e)(1); *see also* ZIMRING, HAWKINS & KAMIN, *supra* note 24, at 19. R

27. CAL. DEP'T OF CORRECTIONS & REHABILITATION, SECOND AND THIRD STRIKER FELONS IN THE ADULT INSTITUTION POPULATION (2011).

28. CAL. PENAL CODE § 667(d)(1); CAL. STATE AUDITOR, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION: INMATES SENTENCED UNDER THE THREE STRIKES LAW AND

must be *either* "serious" or "violent" as defined by the California Penal Code.[29] In other words, there is no requirement that a first or second strike be violent as long as it is defined as "serious" under the law. For example, residential burglary is a strike even though the crime contains no element of violence.[30] Similarly, selling drugs to minors is not a violent offense, but it is categorized as a "serious felony" and is therefore a strike.[31] The list of offenses that qualify as strikes is so broad that it encompasses conduct that, to an ordinary person, may not seem to rise to the level of a serious crime. Making criminal threats qualifies as a "serious felony" and is therefore a strike. Under this code section, an individual who tells someone, "I'm going to beat you up," or "I'm going to kill you," may sustain a strike conviction even if he

A SMALL NUMBER OF INMATES RECEIVING SPECIALTY HEALTH CARE REPRESENT SIGNIFICANT COSTS 10–11 (2010).

29. California Penal Code section 667(d)(1) provides that the three strikes sentencing scheme applies to prior convictions of a "violent felony" as defined in section 667.5(c) or a "serious felony" as defined in section 1192.7(c). *See* CAL. PENAL CODE § 667.5(c) (West 2010 & Supp. 2011) (defining "violent felony" as murder or voluntary manslaughter, mayhem, rape, sodomy, forcible penetration, or oral copulation by force, violence, duress, menace, or fear of immediate and unlawful bodily injury, lewd acts on a child under the age of fourteen years old, any felony punishable by death or imprisonment in the state prison for life, any felony in which a defendant inflicts great bodily injury, any felony in which defendant uses a firearm, robbery, arson, attempted murder, igniting an explosive device as specified in Penal Code sections 18745, 18750, and 18755, kidnapping, assault with intent to commit mayhem, rape, sodomy, or oral copulation, continuous sexual abuse of a child, carjacking, rape or penetration by force acting in concert, extortion, threatening victims or witnesses, first degree burglary when another person was present in the residence during the burglary, additional crimes where defendant either personally used or discharged a firearm as defined in Penal Code section 12022.53, and possession, transfer or use of weapons of mass destruction); *see also* § 1192.7(c) (West 2004 & Supp. 2011) (defining "serious felony" and including the following crimes to the list of strike offenses: assault with intent to commit robbery, assault with a deadly weapon or instrument on a peace officer, assault by a life prisoner on a noninmate, assault with a deadly weapon by an inmate, any burglary of the first degree, bank robbery, holding of a hostage by a person confined in a state prison, attempt to commit a felony punishable by death or imprisonment in the state prison of life, any felony in which the defendant personally used a dangerous or deadly weapon; selling or offering to sell, furnish, administer, or give heroin, cocaine, PCP, or methamphetamines to a minor; grand theft involving a firearm, any felony offense that constitutes a violation of Penal Code section 186.22, which relates to conduct done for the benefit of a gang; throwing acid or flammable substances with the intent to injure, assault with a deadly weapon or firearm, assault on a peace officer or firefighter, assault with a deadly weapon against a public transit employee, custodial officer, or school employee, discharge of a firearm at an inhabited dwelling, vehicle, or aircraft, shooting from a vehicle, criminal threats, attempt to commit any crime listed above other than assault, and conspiracy to commit an offense described in this subdivision).

30. CAL. PENAL CODE § 1192.7(c)(18) (listing first degree burglary as a strike offense); § 460 (defining first degree burglary as residential burglary); § 667.5(a)(21).

31. *Id.* § 1192.7(c)(24).

had no intention of carrying out the threatened action.[32] California also defines any offense that is committed for the benefit of or at the direction of a gang as a strike.[33] Nonviolent conduct, such as writing graffiti, thus qualifies as a strike under this provision if it is done for the benefit of or at the direction of a gang.[34] This provision considerably widens the net of conduct that falls under the statute and is particularly problematic because of the disproportionate application of such "gang enhancements" to people of color.[35]

One of the most criticized and distinct aspects of California's three strikes law is the requirement that an individual with two strike priors be sentenced to twenty-five years to life for the conviction of any third felony offense.[36] California does not require the third strike of-

32. California Penal Code section 422 provides, in relevant part:

> Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison.

Id. § 422 (West 2010 & Supp. 2012).

33. *Id.* § 1192.7(c)(28); § 186.22 (West 1999 & Supp. 2012).

34. Graffiti constitutes vandalism when it damages the property of another and is a violation of California Penal Code section 594. *Id.* § 594 (West 2010 & Supp. 2012). It is converted to a felony strike offense if it is committed for the benefit of a gang under Penal Code section 186.22(d). *See* § 1192.7(c)(28) (defining any felony conviction under Penal Code section 186.22 as a strike).

35. *See* Marjorie S. Zatz & Richard P. Krecker, Jr., *Anti-gang Initiatives as Racialized Policy*, *in* CRIME CONTROL & SOCIAL JUSTICE: THE DELICATE BALANCE 173, 192 (Darnell F. Hawkins, Samuel L. Myers, Jr. & Randolph N. Stone eds., 2003) ("[In Arizona,] Latino boys and girls are likely to be identified as gang members, gang membership is in turn assumed to be a Latino phenomenon, and being identified as a gang member increases the severity of the sanctions."); Erin R. Yoshino, Note, *California's Criminal Gang Enhancements: Lessons from Interviews with Practitioners*, 18 S. CAL. REV. L. & SOC. JUST. 117, 128 (2008) (reporting that nearly ninety percent of Field Investigation cards, which are used to support gang enhancements in court, are for "minority youths" and that the CalGang database, which is also used by prosecutors to support gang enhancements, was comprised almost entirely of Latino and African Americans for Los Angeles).

36. CAL. PENAL CODE § 667(e)(2)(A) (West 2010 & Supp. 2011); ZIMRING, HAWKINS & KAMIN, *supra* note 24; CAL. STATE AUDITOR, *supra* note 28, at 11 (reporting that selling drugs to minors is a strike under California law but not under Arkansas or New Jersey law). Under *People v. Superior Court* (*Romero*), judges have the discretion to dismiss a strike prior so that the mandatory sentence is no longer required. 917 P.2d 628, 647 (Cal. 1996). However, the court may only do so if it finds the dismissal necessary in the interest of justice. *Id.* at 640. R

fense to be violent or serious, and it does not impose any time limitations regarding the proximity of prior convictions to the third strike conviction.[37] Thus, California mandates sentences of twenty-five years to life in prison for relatively minor crimes such as petty theft with a prior conviction for a theft-related offense, driving a vehicle without an owner's consent, or drug possession (as long as the individual is convicted of the offense as a felony and has two strikes on her record).[38] In contrast, other states require third strike offenses to be violent, or otherwise limit the crimes that trigger third strike sentences.[39] Others impose time limits, requiring, for example, that a prior conviction occur within five or ten years of the subsequent conviction in order to qualify for sentencing under a three strikes statute.[40] The United States Supreme Court addressed this provision of California's law in *People v. Ewing*, holding that a sentence of twenty-five years to life for a nonviolent third strike theft offense did not violate the Eighth Amendment's prohibition against cruel and unusual punishment.[41] Although a ballot initiative to reform the law to require that a third strike be serious or violent was narrowly defeated in 2004,[42] recent public opinion polls indicate that public discontent with this aspect of the law is mounting in light of California's budget crisis and the rising costs of incarcerating third strike offenders.[43] California's three strikes law has been widely implemented and has made a tremendous impact on the state's prison population. As of 2009, a quarter of California prison inmates were incarcerated under sentences that were enhanced under the state's three strikes law.[44]

In addition to categorizing less serious offenses as strikes, California's law is also more punitive than many other states because it allows

37. *See* CAL. PENAL CODE § 667(e)(2).

38. *See supra* note 29. R

39. For example, New Mexico specifically limits the imposition of a third strike sentence to cases where an individual has sustained three violent felony convictions. N.M. STAT. ANN. § 31-18-23 (2010).

40. Florida, for example, requires the most recent prior conviction (or the defendant's release from prison as a result of that conviction) to have occurred within five years of the commission of the third strike crime. FLA. STAT. ANN. § 775.084(1)(d)(3)(b) (West 2010). Alternatively, an offense may be used as a prior if the defendant was serving a prison sentence for that crime at the time of the commission of the third strike offense. § 775.084(1)(d)(3)(a).

41. Ewing v. California, 538 U.S. 11, 30–31 (2003).

42. *See* Caldwell & Caldwell, *supra* note 24, at 69. R

43. Jack Dolan, *Californians Would Rather Ease Penalties than Pay More for Prisons*, L.A. TIMES (July 21, 2011), http://articles.latimes.com/2011/jul/21/local/la-me-poll-prisons-20110721.

44. CAL. STATE AUDITOR, *supra* note 28, at 1. R

individuals to obtain two strikes from conduct that occurred during one incident.[45] Prosecuting agencies often charge violations of multiple sections of the penal code for circumstances arising from one course of conduct.[46] For instance, if an individual engages in a fight using a weapon and also makes threatening remarks during the fight, she may be charged and convicted of two felony offenses: (1) making criminal threats; and (2) committing assault with a deadly weapon, both of which are strike offenses.[47] Under California law, two convictions arising out of one incident constitute two separate strike convictions.[48] Thus, a person who has only engaged in one prior criminal incident has the potential to be sentenced to twenty-five years to life for any subsequent felony conviction.[49]

B. Three Strikes and Proportionality Review Under the Eighth Amendment

The Eighth Amendment prohibits the infliction of cruel and unusual punishment, and it is well established that this prohibition applies to term-of-years prison sentences.[50] Generally, in order to assess whether prison sentences constitute cruel and unusual punishment in violation of the Eighth Amendment, courts engage in a proportionality analysis, weighing the severity of the punishment in relation to the offense.[51] However, the Supreme Court has applied this proportionality analysis differently in the major cases involving Eighth Amendment

45. *See* People v. Fuhrman, 941 P.2d 1189 (Cal. 1997).

46. *See* CAL. STATE AUDITOR, *supra* note 28, at 23 (reporting that 13,397 California inmates incarcerated for sentences enhanced under three strikes had obtained multiple prior strike convictions for offenses that occurred on the same day). R

47. Unless otherwise specified, subsequent references are to California law.

48. People v. Benson, 954 P.2d 557 (Cal. 1998).

49. In contrast, other states such as Georgia, Tennessee, Kentucky, Ohio, and New Jersey statutorily limit strike priors such that only one conviction arising out of a single course of conduct may be used as a strike for future sentencing enhancements under three strikes sentencing laws. GA. CODE ANN. § 17-10-7 (2008); TENN. CODE ANN. § 40-35-120(e)(1) (2010) (each "prior conviction" must have resulted in a separate period of incarceration in order to qualify); KY. REV. STAT. ANN. § 532.080(4) (West 2006 & Supp. 2011) ("[T]wo (2) or more convictions of crime for which that person served concurrent or uninterrupted consecutive terms of imprisonment shall be deemed to be only one (1) conviction, unless one (1) of the convictions was for an offense committed while that person was imprisoned."); OHIO REV. CODE ANN. § 2929.14(B)(2)(c) (LexisNexis 2010); N.J. STAT. ANN. § 2C:44-3 (West 2005 & Supp. 2011).

50. U.S. CONST. amend. VIII; Robinson v. California, 370 U.S. 660 (1982); Weems v. United States, 217 U.S. 349 (1910).

51. This test was first articulated in 1910 in *Weems*. *See Weems*, 217 U.S. at 380–82.

challenges to habitual offender statutes, developing an inconsistent framework for analyzing these types of cases.[52]

In *Rummel v. Estelle*, the Court held that imposing a mandatory sentence of life in prison for obtaining $120.36 by false pretenses was not grossly disproportionate when the defendant had two prior convictions for nonviolent theft offenses, and thus did not violate the Eighth Amendment.[53] In assessing whether the sentence was grossly disproportionate, the Court reasoned that recent Supreme Court cases regarding disproportionality addressed death penalty sentences and were therefore "of limited assistance in deciding the constitutionality of the punishment meted out to Rummel."[54] The Court compared Rummel's sentence under the habitual offender statute to the prison sentence he could have received under Texas law in the absence of the sentence enhancement.[55] It also considered habitual offender statutes in other states.[56] However, the Court concluded that even if Texas' habitual offender statute was more punitive than those of other states, that fact did not render Rummel's sentence disproportionate.[57]

Three years after *Rummel*, the Supreme Court reached a different conclusion in the case of *Solem v. Helm*.[58] In that case, Jerry Helm was sentenced to life without the possibility of parole for writing a false check in the amount of $100, due to the fact that he had six prior felony convictions, all of which were nonviolent.[59] The Court applied the following analysis to determine that the sentence was disproportionate to the offense in violation of the Eighth Amendment: (1) comparing the gravity of the offense to the severity of the penalty, including a consideration of the harm caused by the offense and the culpability of the offender; (2) comparing the sentence to sentences imposed for other crimes within the same jurisdiction; and (3) com-

52. *See* Harmelin v. Michigan, 501 U.S. 957 (1991); Solem v. Helm, 463 U.S. 277, 288–90 (1983); Rummel v. Estelle, 445 U.S. 263 (1980). *See generally* THREE STRIKES AND YOU'RE OUT: VENGEANCE AS PUBLIC POLICY 8 (David Shichor & Dale K. Sechrest eds., 1996) (referring to the Supreme Court's holdings on proportionality review as "seemingly inconsistent").

53. *Rummel*, 445 U.S. at 285.

54. *Id.* at 272.

55. *Id.* at 276.

56. *Id.* at 279.

57. *Id.* at 281 ("Even were we to assume that the statute employed against Rummel was the most stringent found in the 50 States, that severity hardly would render Rummel's punishment 'grossly disproportionate' to his offenses . . . .").

58. THREE STRIKES AND YOU'RE OUT, *supra* note 52, at 12. **R**

59. *Id.*

paring the sentence to sentences imposed for the same crime in other jurisdictions.[60] The majority distinguished the facts of this case from *Rummel* by emphasizing that Helm was sentenced to life without the possibility of parole, whereas Rummel was merely sentenced to life in prison.[61] The Court concluded that Helm's sentence was "significantly disproportionate" to the crime and thus violated the Eighth Amendment.[62]

In the case of *Harmelin v. Michigan*, the Court held that sentencing Harmelin to life without the possibility of parole for possession of 672 grams of cocaine did not constitute cruel and unusual punishment even though he had no prior felony convictions.[63] This case addressed a mandatory life without parole prison sentence for drug possession, rather than a sentence imposed under a habitual offender statute.[64] In *Harmelin*, the Court reasoned that courts should make a "threshold comparison" of the gravity of the offense in relation to the severity of the sentence.[65] Only if the sentence appears "grossly disproportionate" should the court move forward with the second and third prongs of the test used in *Solem v. Helm*. The plurality determined in this threshold comparison that the life sentence did not appear to be "grossly disproportionate" to the crime.[66] Therefore, the Court did not move on to consider the sentence in relation to other sentences within the jurisdiction and from other jurisdictions.[67] The Court held that the "Eighth Amendment does not require strict proportionality between crime and sentence [but] forbids only extreme sentences that are 'grossly disproportionate' to the crime."[68]

As the divergent decisions in these cases illustrate, the question of whether imposing life sentences under three strikes statutes for relatively minor offenses constitutes cruel and unusual punishment is highly contested. *Rummel*, *Helm*, and *Harmelin* were all decided by a 5-4 majority, and each case included vehement dissents.[69] Although *Harmelin* did not specifically relate to a sentence imposed under a habitual offender statute, the Supreme Court followed the analytical

60. Solem v. Helm, 463 U.S. 277, 290–92 (1983).

61. *Id.* at 297 (reasoning that Rummel was likely to be eligible for parole after serving twelve years of the life sentence).

62. *Id.* at 303.

63. Harmelin v. Michigan, 501 U.S. 957, 994–96 (1991).

64. *Id.* at 961.

65. *Id.* at 1005.

66. *Id.*

67. *Id.*

68. *Id.* at 1001.

69. *Id.*; Solem v. Helm, 463 U.S. 277 (1983); Rummel v. Estelle, 445 U.S. 263 (1980).

framework set forth in this opinion when it considered the constitutionality of two sentences imposed under California's three strikes statute.

C. Eighth Amendment Challenges to California's Three Strikes Law

In addition to being widely recognized as one of the most punitive three strikes laws in the nation, California's law is more widely enforced than three strikes statutes in other states and, as such, has impacted many more people than the laws of other states.[70] Currently, at least 4438 California prisoners are serving sentences of twenty-five years to life for nonviolent third strikes.[71] In 2003, the United States Supreme Court decided two cases in which it considered whether sentences imposed for nonviolent third strikes under California's three strikes law violate the Eighth Amendment prohibition against cruel and unusual punishment.[72] The majority applied the threshold comparison test set forth by *Harmelin* to determine whether the sentences imposed in these cases were "grossly disproportionate" to the offenses.[73] In both cases, the Court concluded that the analysis need not proceed past this threshold comparison; thus, the second and third prongs of the traditional proportionality test were not considered.[74]

In *Ewing v. California*, Gary Ewing was charged with felony grand theft for shoplifting three golf clubs valued at $399 each.[75] He had three prior convictions for burglary and one conviction for robbery, constituting four strike priors under California law.[76] He was sentenced to twenty-five years to life under California's three strikes law.[77] The Supreme Court concluded that his punishment did not violate the Eighth Amendment's prohibition against cruel and unusual punishment.[78] The opinion quoted from *Rummel*, cautioning that "outside the context of capital punishment, successful challenges to the pro-

70. Dickey & Hollenhorst, *supra* note 16, at 5–9. R

71. CAL. DEP'T OF CORRECTIONS & REHABILITATION, *supra* note 27, tbl.1 (showing that 2529 inmates were serving third strike sentences for property offenses, 1350 for drug offenses, and additional prisoners were convicted of other nonviolent offenses including escape, driving under the influence, and possession of a weapon). R

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

73. *Ewing*, 538 U.S. at 23–24; *Lockyer*, 538 U.S. at 69–70.

74. *Ewing*, 538 U.S. at 23–24; *Lockyer*, 538 U.S. at 69–70.

75. *Ewing*, 538 U.S. at 18–19.

76. *Id.* at 20.

77. *Id.*

78. *Id.* at 30–31.

portionality of particular sentences have been exceedingly rare."[79] The decision was deferential to the California legislature, reasoning that it had made a rational decision to incapacitate and deter habitual offenders by enacting the three strikes statute.[80] In considering Ewing's offense in relation to the punishment, the Court stated, "we must place on the scales not only his current felony, but also his long history of felony recidivism."[81] Accordingly, the Court held that Ewing's sentence did not meet the threshold test of gross disproportionality and therefore did not violate the Eight Amendment.[82]

The Supreme Court considered the case of *Lockyer v. Andrade* at the same time as *Ewing*.[83] Leandro Andrade was convicted of stealing videotapes from Kmart on two separate occasions and challenged his sentence of fifty years to life through a writ of habeas corpus.[84] California law allowed misdemeanor petty theft charges to be converted to felonies if a defendant had previously been convicted of theft.[85] Thus, Andrade was convicted of two felony offenses for "petty theft with a prior conviction" rather than receiving misdemeanor convictions for mere petty theft.[86] Under the three strikes law, he was sentenced to fifty years to life based upon these two convictions.[87] The Court acknowledged, "[o]ur cases exhibit a lack of clarity regarding what factors may indicate gross disproportionality."[88] However, the Court concluded that "[t]he gross disproportionality principle reserves a constitutional violation for only the extraordinary case" and found that Andrade's sentence did not rise to this level.[89]

II. Juvenile Strikes in California

Part II.A provides an overview of California's three strikes law as applied to juvenile offenders, including a description of the relevant law and information about the impact of juvenile strikes in the state. Part II.B discusses cases that have challenged California's use of juvenile strikes.

79. *Id.* at 21 (quoting Rummel v. Estelle, 445 U.S. 263, 272 (1980)).
80. *Id.* at 26, 30.
81. *Id.* at 29.
82. *Id.* at 30.
83. Lockyer v. Andrade, 538 U.S. 63 (2003).
84. *Id.* at 66–69.
85. CAL. PENAL CODE § 666 (West 2010 & Supp. 2012).
86. *Lockyer*, 538 U.S. at 67–68.
87. *Id.* at 66.
88. *Id.* at 72.
89. *Id.* at 77.

A. Overview of Juvenile Strikes in California

California's three strikes law provides that sustained petitions from juvenile court constitute strikes if: (1) the minor is at least sixteen years old at the time of the commission of the offense; (2) the charge is a "serious" or "violent" felony according to the California Penal Code;[90] (3) the juvenile is found "fit" to remain in juvenile court; and (4) the juvenile is a ward of the court due to the commission of an offense listed under Welfare & Institutions Code section 707(b).[91] Juveniles who are processed through adult court are subject to the same punishments as adults.[92] Therefore, any conviction of a "serious" or "violent" felony in adult court constitutes a strike for a juvenile offender convicted in adult court. California processes approximately one thousand juveniles per year in adult court, many of whom likely receive strike convictions.[93]

While it is unclear exactly how many people in California have juvenile strikes on their records, a review of available data demonstrates that it is likely that this number could be in the tens of thousands. A 2010 report from the California State Auditor found that at least 2328 prisoners in California were serving second or third strike sentences as a result of at least one prior juvenile strike.[94] This number is thought to underestimate the number of prisoners with juvenile strikes because it does not include strike offenses from other

90. This includes all convictions that constitute strikes for adults. CAL. PENAL CODE § 1192.7(c) (West 2004 & Supp. 2011); § 667.5(a) (West 2010 & Supp. 2011).

91. *Id.* § 667(d)(3). The problem of defining juvenile adjudications as strikes has attracted attention from the California legislature, prompting the introduction of Assembly Bill 1751 in 2010. A.B. 1751, 2009–10 Assemb., Reg. Sess. (Cal. 2010). If passed, the bill would have excluded juvenile adjudications as strikes. *Id.* However, the bill was defeated in 2011. *Current Bill Status: A.B. No. 1751*, OFFICIAL CAL. LEGISLATIVE INFO., http://leginfo.ca.gov/pub/09-10/bill/asm/ab_1751-1800/ab_1751_bill_20100616_status.html (last visited Apr. 4, 2012). Due to the highly political nature of crime legislation and the pressure politicians feel to support "get tough on crime" legislation in the state, the bill faces significant challenges to passing.

92. *See* Graham v. Florida, 130 S. Ct. 2011, 2025 (2010) ("Once in adult court, a juvenile offender may receive the same sentence as would be given to an adult offender . . . .").

93. *See* KAMALA D. HARRIS, CAL. DEP'T OF JUSTICE, JUVENILE JUSTICE IN CALIFORNIA 2010, at 2, 21 tbl.13, 36 tbl.26 (2011) (finding that 716 cases involving juvenile offenders were filed directly in California adult courts in 2010 while an additional 260 youth were transferred to adult court after losing fitness hearings and noting that juvenile offenders may be transferred to adult court if they fail a juvenile court fitness hearing); *see also* PAC. JUVENILE DEFENDER CTR., JUVENILES TRIED IN ADULT COURT IN CALIFORNIA (2009), *available at* http://www.pjdc.org/wp/wp-content/uploads/2009/06/Fact-Sheet-for-Upload-Juveniles-in-Adult-Court.pdf (reporting that in 2008, 1198 juveniles were processed in California adult courts, 866 as a result of direct files, and 332 after losing fitness hearings).

94. CAL. STATE AUDITOR, *supra* note 28, at 23 tbl.2. R

jurisdictions and from years prior to 1988.[95] Of these prisoners, at least 521 are serving third strike sentences of twenty-five years to life as a result of a juvenile strike prior.[96] The actual number of people with juvenile strikes on their records is much higher because these estimates do not include people who have been incarcerated and released, or those who have juvenile strikes on their records but have not been subsequently incarcerated as a result of the strike conviction. Further, this data considers only those who were sentenced in juvenile courts; those juveniles sentenced in adult courts are not included in this estimate.[97]

Although data regarding the number of people with juvenile strikes in California is lacking,[98] the data that is available shows that strike offenses are regularly filed in juvenile court.[99] Thousands of petitions alleging strike offenses are filed in California juvenile courts each year. In 2010, 10,619 juvenile petitions were filed against youth between the ages of fifteen and twenty-four for violent offenses, including homicide, forcible rape, robbery, kidnapping, and assault.[100] Many of these petitions would constitute strikes if found to be true.[101] Additional petitions that are categorized as property offenses or other offenses may also qualify as strikes, leading to the inference that over 10,000 petitions for strike offenses are likely filed in California juvenile courts each year. Data on the number of these petitions that are sustained or found to be true is not available. However, information regarding convictions of juveniles in adult court for strike offenses is more readily available. In 2010, at least 223 youth were convicted of strike offenses in California adult courts.[102] This number, however,

95. *Id.* at 16, 26.

96. *Id.* at 29 (including only people who were incarcerated at the time data was collected).

97. *Id.* at 16 (indicating that the juvenile data is based upon juvenile court records).

98. This author contacted the Los Angeles County District Attorney's Office to ask whether the office tracked statistics regarding the number of juvenile adjudications that resulted in strikes and was informed that this information is not tracked.

99. *See* HARRIS, supra note 93. R

100. *Id.* at 25 tbl.17.

101. Any offense resulting from conduct committed by a minor who was under sixteen whose case was handled in juvenile court would not constitute a strike. CAL. PENAL CODE § 667(d)(3) (West 2010 & Supp. 2011). Similarly, some assault charges constitute strikes while others do not. *See* People v. Haykel, 116 Cal. Rptr. 2d 667 (Ct. App. 2002). Over four thousand of the charges included in this number are "assault," many of which would likely not be strikes. *See* HARRIS, supra note 93, at 28 tbl.20. R

102. HARRIS, supra note 93, at 42–44 tbl.31 (including the following convictions: 80 homicide, 4 forcible rape, 128 robbery, 1 kidnapping, 1 arson, and 9 lewd or lascivious acts). *See also* CAL. PENAL CODE § 1192.7(c). R

does not capture all of the juvenile strike convictions in adult court. For example, an additional 168 youth were convicted of "assault" in adult court; assault convictions qualify as strikes when the defendant used a deadly weapon or inflicts great bodily injury, so many of these convictions likely constitute strikes.[103] Given that strike convictions stay on people's records for the rest of their lives, this is clearly an issue that affects many people. Using juvenile convictions as strikes contributes to California's expanding prison population, even though the utility of this practice is questionable.

B. Challenges to Juvenile Strikes in California

The California Supreme Court has held that the state's use of juvenile adjudications as strikes is lawful. Several years after the three strikes law was passed, the California Supreme Court considered whether a juvenile must be explicitly "found to be a fit and proper subject to be dealt with under the juvenile court of law" in order for a juvenile adjudication to be used as a strike in future proceedings.[104] Although this finding of fitness is specifically required by the California Penal Code,[105] the court interpreted the statute to require only an "implied" finding of fitness.[106] The court reasoned that any case handled in juvenile court satisfies this requirement because the fact that the case is in juvenile court implies a finding that the juvenile is fit for juvenile court.[107] Three justices dissented, arguing that the statute clearly states that a finding of fitness is required.[108] The dissenting justices pointed out that such a finding is only made through the specific procedure of a fitness hearing, where a judge considers five factors to determine whether a juvenile is "a fit and proper subject" for the juvenile court or should be "transferred to adult court."[109] Justice Mosk was one of the dissenters, arguing that the statute "requires a

103. HARRIS, supra note 93, at 42 tbl.31. Assault with a deadly weapon is defined as a "serious felony" and therefore is a strike offense. *See* CAL. PENAL CODE § 1192.7(c)(31) (West 2004 & Supp. 2011). A felony assault that results in great bodily injury to the victim is also a strike because any felony where the defendant personally inflicts such injuries is defined as a strike. *Id.* § 1102.7(c)(8). R

104. CAL. PENAL CODE § 667(d)(3)(C); People v. Davis, 938 P.2d 938 (Cal. 1997).

105. CAL. PENAL CODE § 667(d)(3)(C).

106. *Davis*, 938 P.2d at 941.

107. *See id.* at 940–41.

108. *See id.* at 943 (Mosk, J., dissenting). Justice Kennard also filed a separate dissent. *See id.* at 945 (Kennard, J., dissenting). Justice Werdeger joined in both dissenting opinions. *Id.*

109. *Id.* at 946.

finding of fitness. That is what its words mean."[110] However, the majority's decision regarding "implied fitness" rendered this subdivision essentially meaningless.

The constitutionality of using charges from juvenile court as strike priors was most recently considered by the California Supreme Court in 2010 in *People v. Nguyen*.[111] In this case, Nguyen argued that using a juvenile adjudication as a prior conviction under California's three strikes law violates the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution because there is no right to a jury trial in juvenile court.[112] Vince Nguyen's juvenile adjudication for assault with a deadly weapon was used to double his sentence for his adult conviction of possession of a firearm by an ex-felon.[113] The California Supreme Court rejected his argument, finding that the due process guarantees afforded to minors in juvenile court are sufficient to ensure the reliability and fairness of juvenile adjudications, even in the absence of jury trials.[114] The court emphasized that a juvenile adjudication is "highly probative on the issue of recidivism" and constitutes a "rational basis for increased punishment on the basis of recidivism."[115]

The California Supreme Court has not addressed whether the use of juvenile adjudications as strikes violates the Eighth Amendment. Although Nguyen's constitutional challenge based upon the Fifth, Sixth, and Fourteenth Amendments was unsuccessful, the Supreme Court's decision in *Graham v. Florida* has set the stage for challenging the use of juvenile strikes on Eighth Amendment grounds. The following section discusses the *Graham* decision, to lay the foundation for the analysis of *Graham* in relation to an Eighth Amendment challenge to the use of juvenile strikes.

III. *Graham v. Florida*: A Groundbreaking Decision

In *Graham v. Florida*, the United States Supreme Court held that the Eighth Amendment prohibition against cruel and unusual punishment prohibits sentencing juveniles who have not been convicted of homicide to life without the possibility of parole.[116] The decision is

110. *Id.* at 943 (Mosk, J., dissenting).
111. People v. Nguyen, 209 P.3d 946 (Cal. 2009).
112. *Id.* at 949.
113. *Id.* at 949–50.
114. *Id.* at 955.
115. *Id.* at 957.
116. Graham v. Florida, 130 S. Ct. 2011 (2010).

groundbreaking for three major reasons. First, the Court's ruling prohibits a specific punishment for an entire class of people rather than addressing only the case of *Graham*.[117] Prior to this decision, the Court had used this "categorical" approach only to limit the application of the death penalty.[118] The dissent expressed concern that applying a categorical prohibition to a non–death penalty sentence would open the door to prohibiting a wider range of sentences.[119] Second, the Court relied heavily on research regarding adolescent development in its opinion, concluding that adolescents are fundamentally different than adults. The majority opinion references the research-based conclusions the Court reached in *Roper* when it ruled that sentencing juvenile offenders to death constitutes cruel and unusual punishment, thus reinforcing the relevance of this research to other sentencing practices involving juvenile offenders.[120] Third, the Court referenced international consensus against the practice of imposing life without the possibility of parole on juvenile offenders in the opinion, demonstrating a greater willingness to consider international human rights standards and practices when assessing sentencing practices within the United States.[121]

The Court's analysis in *Graham* departed from the way in which it had previously considered potential Eighth Amendment violations in non–death penalty cases.[122] Prior to *Graham*, cases arguing that prison sentences were cruel and unusual were generally reviewed on a case-by-case basis; the Court addressed the specific facts of an individual's case rather than addressing the sentence more generally.[123] For example, when analyzing whether the three strikes sentences in *Ewing* and

117. *Id.*

118. *See* Alison Siegler & Barry Sullivan, *"'Death is Different' No Longer":* Graham v Florida *and the Future of Eighth Amendment Challenges to Noncapital Sentences*, 2010 SUP. CT. REV. 327.

119. *Graham v. Florida*, 130 S. Ct. at 2046 (Thomas, J., dissenting) ("No reliable limiting principle remains to prevent the Court from immunizing any class of offenders from the law's third, fourth, fifth, or fiftieth most severe penalties as well."). Scholars similarly posit that the Court's prohibition of a particular sentence to an entire class of offenders may be extended to other categories of people who are not sentenced to death but are nonetheless sentenced to punishments that are arguably "cruel and unusual." *See* Robert Smith & G. Ben Cohen, *Redemption Song:* Graham v. Florida *and the Evolving Eighth Amendment Jurisprudence*, 108 MICH. L. REV. FIRST IMPRESSIONS 86 (2010), *available at* http://www.michiganlawreview.org/assets/fi/108/smithcohen.pdf.

120. *Graham v. Florida*, 130 S. Ct. at 2026.

121. *Id.* at 2033–34.

122. *Id.* at 2022 ("The present case involves an issue the Court has not considered previously: a categorical challenge to a term-of-years sentence.").

123. *See* Solem v. Helm, 463 U.S. 277 (1983).

Andrade violated the Eighth Amendment, the Court followed the analysis set forth in *Harmelin*, beginning with a threshold comparison of the offense to the sentence to determine whether the sentence was grossly disproportionate.[124]

In contrast, in assessing whether death penalty sentences violate the Eighth Amendment, the Court has frequently applied a categorical analysis, considering whether the imposition of the death penalty upon an entire class of offenders constitutes cruel and unusual punishment.[125] Recent Supreme Court decisions have held that applying the death penalty to juveniles and mentally retarded adults violates the Eighth Amendment.[126] In the categorical analysis, the Court considers the national consensus regarding the sentencing practice as well as its own judgment regarding whether the practice violates evolving standards of decency.[127]

A. National Consensus

In *Graham*, the Court used this categorical approach to analyze whether sentencing juveniles to life without the possibility of parole violates the Eighth Amendment. It first considered "objective indicia of national consensus" and determined there was a national consensus against sentencing juveniles to life without parole for non-homicide offenses.[128] In doing so, the Court considered state and federal legislation, finding that six jurisdictions did not allow juveniles to be sentenced to life without the possibility of parole under any circumstances, and seven states allowed the sentence of life without parole only for juveniles convicted of homicide.[129] According to a review of statutory authority, thirty-seven states and the District of Columbia allowed sentencing juvenile non-homicide offenders to life without parole "in some circumstances," and federal law allowed the sentencing practice "for offenders as young as 13."[130]

The Court's reasoning in *Graham* followed from *Roper v. Simmons*, where the Court similarly analyzed state legislation regarding the im-

124. Ewing v. California, 538 U.S. 11 (2003).

125. *See* Atkins v. Virginia, 536 U.S. 304 (2002) (holding that sentencing mentally retarded adults to death constitutes cruel and unusual punishment); Coker v. Georgia, 433 U.S. 584 (1977) (imposing the death penalty for rape convictions is grossly disproportionate in violation of the Eighth Amendment).

126. *Atkins*, 536 U.S. 304; Roper v. Simmons, 543 U.S. 551 (2005).

127. *See Atkins*, 536 U.S. 304; *Roper*, 543 U.S. 551.

128. Graham v. Florida, 130 S. Ct. 2011, 2023–25 (2010).

129. *Id.* at 2023.

130. *Id.*

position of the death penalty upon juvenile offenders, in order to assess whether there was "objective indicia of consensus" regarding the practice.[131] In *Roper*, the Court determined that thirty states prohibited the juvenile death penalty,[132] including twelve states that prohibited the death penalty in general and eighteen states that excluded juveniles from the death penalty either through statutory authority or case law.[133]

In addition to considering written laws, the Court in *Graham* also investigated the actual sentencing practices of the states in order to assess how many states sentenced juvenile offenders to life without parole in practice.[134] It found that only eleven jurisdictions actually sentenced juvenile offenders who had not committed homicide to life without the possibility of parole.[135] The Court had engaged in a similar analysis in *Roper*, concluding, "even in the 20 States without a formal prohibition on executing juveniles, the practice is infrequent."[136] The *Roper* Court noted that in the past ten years, only three states had executed people for offenses they had committed as juveniles.[137]

In assessing the evidence of national consensus in *Roper*, the Court also considered emerging trends.[138] At the time of the *Roper* decision, five states had abandoned the use of the juvenile death penalty since *Stanford v. Kentucky*, which the *Roper* Court ultimately overruled.[139] The Court noted that this was significant, indicating, "[i]t is not so much the number of these States that is significant, but the consistency of the direction of change."[140] In *Graham*, the Court did not consider the direction of trends in its analysis regarding national consensus but focused more on the fact that only eleven jurisdictions actually impose the sentencing practice.[141] It concluded that this evidenced a national consensus against sentencing juveniles convicted of non-homicide offenses to life without the possibility of parole.[142]

131. *Roper*, 543 U.S. at 564.
132. *Id.*
133. *Id.*
134. *See Graham v. Florida*, 130 S. Ct. at 2023–26.
135. *Id.*
136. *Roper*, 543 U.S. at 564.
137. *Id.* at 565.
138. *Id.* at 566.
139. *Id.*
140. *Id.* (quoting Atkins v. Virginia, 536 U.S. 304, 315 (2002)).
141. Graham v. Florida, 130 S. Ct. 2011, 2024 (2010) ("Thus, only 11 jurisdictions nationwide in fact impose life without parole sentences on juvenile nonhomicide offenders—and most do so quite rarely—while 26 States, the District of Columbia, and the Federal Government do not impose them despite apparent statutory authorization.").
142. *Id.* at 2026.

B. Penological Goals

After concluding that there was a national consensus against the sentencing practice at issue in *Graham*, the Court engaged in an analysis focused on applying its own judgment to consider whether the sentencing practice served legitimate penological goals.[143] The Court found that juveniles have lessened culpability because they lack maturity, have an underdeveloped sense of responsibility, and are more vulnerable to negative influences.[144] Their characters are "not as well formed" as adults, and their crimes may reflect a state of "transient immaturity."[145] The Court also considered research regarding adolescent brain development and concluded that it would be morally "misguided" to equate a juvenile with an adult because of the greater possibility that the youth will be reformed.[146] Reasoning that nonhomicide offenses are less deserving of punishment than homicide offenses, the Court concluded that "a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability" in relation to an adult convicted of murder.[147] The decision characterized life without the possibility of parole as similar to the death penalty because it alters a defendant's life "by a forfeiture that is irrevocable" and deprives him of basic liberties without the hope of restoration.[148] The Court considered the fact that this sentence is harsher for juveniles because they will serve more years in prison than an adult, given their youth at the time of sentencing.[149]

According to the majority, the penological justifications for the sentence did not justify the imposition of such a punitive sentence upon a juvenile offender who had not been convicted of homicide.[150] The Court indicated, "[a] sentence lacking any legitimate penological justification is by its nature disproportionate to the offense."[151] It analyzed the traditional goals of the criminal justice system, incorporating research regarding adolescents into its assessment.[152]

The majority determined that retribution is not justifiable in the case of juveniles because they are less culpable than adults as a result

143. *Id.*
144. *Id.*
145. *Id.* (internal quotation marks omitted) (citing *Roper*, 543 U.S. at 569–70, 573).
146. *Id.* at 2026.
147. *Id.* at 2027.
148. *Id.*
149. *Id.* at 2028.
150. *Id.* at 2028–30.
151. *Id.* at 2028.
152. *Id.* at 2026–30.

of their youth.[153] Accordingly, the Court concluded that society's interest in retribution does not justify life without the possibility of parole for juveniles who have not committed homicide.[154] Similarly, the Court found that juveniles are less susceptible to deterrence due to their tendency to make impulsive decisions, and therefore the goal of deterrence does not justify sentencing this category of offenders to life without the possibility of parole.[155] Incapacitation does not justify the sentencing practice because removing a juvenile from society for the rest of his life is unnecessary, given that most juvenile offenders are not "incorrigible" and will not present risks to society for the rest of their lives.[156] As such, their incapacitation would not be necessary in the future. Finally, the Court found that rehabilitation does not justify the practice because life without parole "forswears altogether the rehabilitative ideal."[157]

Neelum Arya argues that the Court makes several "collateral holdings" in *Graham* that are "essential to the judgment, and therefore should be interpreted by lower courts as binding and relevant to transfer decisions."[158] Specifically, Arya argues that the Court established a right to rehabilitation for juveniles and the necessity of categorical rules to ensure for adequate legal representation of youth.[159]

C. Categorical Approach

The Court opted to address the sentencing practice as applied to an entire category of offenders because of a concern that individual courts may mistakenly categorize youth who are capable of change as irredeemable. The Court determined that it is nearly impossible for courts to distinguish "the few incorrigible juvenile offenders from the many that have the capacity for change."[160] It was specifically concerned about the disadvantages facing juvenile offenders in terms of their difficulty weighing out long-term consequences in order to make

153. *Id.*

154. *Id.*

155. *Id.* at 2028–29.

156. *See id.* at 2029 ("To justify life without parole on the assumption that the juvenile offender forever will be a danger to society requires the sentencer to make a judgment that the juvenile is incorrigible. The characteristics of juveniles make that judgment questionable. . . . A life without parole sentence improperly denies the juvenile offender a chance to demonstrate growth and maturity.").

157. *Id.* at 2029–30.

158. Neelum Arya, *Using* Graham v. Florida *to Challenge Juvenile Transfer Laws*, 71 La. L. Rev. 99, 123 (2010).

159. *Id.* at 124, 129–33.

160. *Graham v. Florida*, 130 S. Ct. at 2032.

good decisions and their challenges to communicating effectively with counsel.[161]

D. International Standards

Finally, the Court considered the international rejection of the practice in support of its determination that imposing this punishment upon this class of offenders violates "basic principles of decency."[162] In doing so, the Court emphasized that international opinion confirmed rather than controlled the Court's determination regarding the cruel and unusual nature of sentencing non-homicide juvenile offenders to life without parole.[163] It considered the fact that "the United States is the only Nation that imposes life without parole sentences" on this population and that the United Nations Convention on the Rights of the Child prohibits the sentencing practice.[164]

E. Recognition of Developmental Differences Between Youth and Adults

The *Graham* decision has the potential to bring about systemic changes to criminal laws that ignore the developmental differences between youth and adults. The analysis in *Graham* is founded upon conclusions drawn by the Court in *Roper* regarding fundamental characteristics of adolescents. In *Graham*, the Court specifically stated that it found no reason to reconsider its conclusions in *Roper* regarding adolescent responsibility and decision-making capacity.[165] The Court's recognition of these fundamental differences cannot logically be limited to the analysis of some legal issues but not others because these are fixed characteristics of adolescence. The Court's findings should not, therefore, be applied to some situations and not to others, because they are relevant across the board.

The Supreme Court has found social science and neuroscience research on the characteristics of the developmental stage of adolescence to be relevant to its legal analysis of cruel and unusual punishment as it applies to this population. The Court demonstrated a willingness to apply these findings to other legal issues in the recent case of *In re J.D.B.*[166] It relied upon its previous conclusions regarding

161. *Id.*
162. *Id.* at 2034.
163. *Id.* at 2033–34.
164. *Id.* at 2034.
165. *Id.* at 2026.
166. J.D.B. v. North Carolina, 131 S. Ct. 2394 (2011).

adolescents when it addressed the relevance of age in determining whether a youth is in custody such that *Miranda* warnings are required. Reiterating its prior observations that children lack maturity, responsibility, experience, and judgment in relation to adults,[167] the Court specifically referenced the *Graham* decision, quoting its conclusion that there was no reason to "'reconsider' these observations about the common 'nature of juveniles.'"[168] In *J.D.B.* the Court concluded that given the widely recognized limitations on children's "capacity to exercise mature judgment" and to understand the world around them, a child's age is relevant to the determination of whether the child is in custody such that *Miranda* warnings are required.[169] The Court's decision in *J.D.B.* reflects a commitment to its conclusions regarding the nature of adolescence and a willingness to apply research regarding characteristics of adolescents to constitutional legal issues impacting this population. Through this decision, the Court relied upon its conclusions in *Roper* and *Graham* in an analysis regarding a separate area of the law. It would therefore be inconsistent to ignore these conclusions in the legal analysis of the constitutionality of using juvenile strikes.

IV. *Graham*'s Application to Other Sentencing Practices

While the Supreme Court applied *Graham*'s reasoning broadly in *J.D.B.*, the majority of the appellate courts that have considered how *Graham* applies to other sentencing practices have interpreted the decision narrowly, focusing on the Court's literal holding and limiting its application to cases where juvenile offenders are sentenced to life without the possibility of parole for convictions of non-homicide offenses.[170] However, some courts have interpreted *Graham* to have a

167. *Id.* at 2403 ("We have observed that children 'generally are less mature and responsible than adults,' Eddings[v. Oklahoma], 455 U.S. [104,] 115–16 [(1982)]; that they 'often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them,' Bellotti v. Baird, 443 U.S. 622, 635 (1979) (plurality opinion); that they 'are more vulnerable or susceptible to . . . outside pressures' than adults, Roper[v. Simmons], 543 U.S. [551,] 569 [(2005)]; and so on." (italics omitted)).

168. *Id.* (citing *Graham v. Florida*, 130 S. Ct. at 2026).

169. *Id.* at 2403, 2406, 2408.

170. *See, e.g.*, Fong v. Ryan, No. CV 04-68-TUC-DCB, 2011 WL 3439237 (D. Ariz. Aug. 5, 2011) (declining to apply *Graham* to a sentence where a juvenile was convicted of a homicide); Jackson v. Norris, 2011 Ark. 49, 2011 WL 478600, *cert. granted sub nom.* Jackson v. Hobbs, 132 S. Ct. 548 (2011); Cunningham v. State, 54 So. 3d 1045 (Fla. Dist. Ct. App. 2011) (holding that sentencing a juvenile offender to life in prison for a non-homicide offense does not violate the Eighth Amendment because he will be considered for parole); Uribe v. State, No. 57422, 2011 WL 2803098 (Nev. July 15, 2011) (holding that transferring a juvenile to adult court does not violate the Eighth Amendment in light of *Graham*); War-

broader application, holding that juveniles must have a meaningful opportunity for release and that sentences exceeding their life expectancies violate the Eighth Amendment.[171] The application of *Graham* to issues other than life without parole for non-homicide offenses has generated division and debate, as reflected in the vehement dissenting opinions accompanying many of the recent court opinions interpreting *Graham*. However, a narrow application of *Graham* appears to be inconsistent with the Supreme Court's analysis and understanding regarding the nature of juvenile offenders.

The Arkansas and Alabama Supreme Courts have interpreted *Graham* narrowly, holding that sentencing juvenile offenders convicted of homicide offenses to life without the possibility of parole does not violate the Eighth Amendment.[172] The Supreme Court is currently considering these cases.[173] The state court decisions in both of these cases are similar to those of other states.[174] At least ten courts

ren v. Smith, No. 1:09 CV 1064, 2010 WL 2837002 (N.D. Ohio July 19, 2010) (affirming a life sentence for a juvenile convicted of rape and kidnap); Angel v. Commonwealth, 704 S.E.2d 386 (Va. 2011) (holding that *Graham* does not render sentencing a juvenile convicted of a non-homicide offense to consecutive life terms in prison because there is a state statute that allows prisoners to petition the parole board for release when the prisoner is sixty years old and that this satisfies *Graham*'s requirement for a meaningful opportunity for release); State v. Ninham, 797 N.W.2d 451 (Wis. 2011).

171. *See* People v. Mendez, 114 Cal. Rptr. 3d 870 (Ct. App. 2010) (applying *Graham*'s reasoning beyond its explicit holding). The California Supreme Court is currently considering whether *Graham* prohibits imposing term-of-years sentences that exceed a defendant's life expectancy for non-homicide juvenile offenders. People v. Nuñez, 125 Cal. Rptr. 3d 616 (Ct. App. 2011), *review granted*, 255 P.3d 951 (Cal. 2011); People v. Caballero, 119 Cal. Rptr. 3d 920 (Ct. App. 2011), *review granted*, 250 P.3d 179 (Cal. 2011).

172. *Jackson v. Norris*, 2011 Ark. 49, at 4; Miller v. State, 63 So. 3d 676 (Ala. Crim. App. 2010), *cert. granted*, 132 S. Ct. 548 (2011).

173. *See Jackson v. Hobbs*, 132 S. Ct. 548; *Miller*, 132 S. Ct. 548.

174. In *State v. Ninham*, for example, the Wisconsin Supreme Court similarly emphasized *Graham*'s rationale that juvenile offenders convicted of non-homicide offenses have "twice [the] diminished moral culpability" of other juvenile offenders because there is an important distinction between homicide and non-homicide offenses. *Ninham*, 797 N.W.2d at 473. The majority opinion distinguished Ninham's case from Graham's, emphasizing that Ninham was more culpable because he was convicted of an intentional homicide. *Id.* at 474. Two justices dissented, interpreting *Graham* more broadly, and emphasized that "the differences between juveniles and adults mean that juvenile offenders 'cannot with reliability be classified among the worst offenders.'" *Id.* at 479 (Abrahamson, C.J., dissenting) (quoting Roper v. Simmons, 543 U.S. 551, 569 (2005)). While the majority emphasized juvenile offenders convicted of homicide offenses are more culpable than those convicted of non-homicide offenses, the dissent focused on the language in *Graham* addressing the diminished culpability of juvenile offenders more generally. *Id.* at 484 ("My conclusion is buttressed by the same kind of research-based evidence that the United States Supreme Court has relied upon to declare: (1) juveniles categorically have lessened culpability; (2) juveniles are more capable of change than adults and their actions are less likely to evidence 'irretrievably depraved character' such that a decision at sentencing could be

have declined to follow *Graham* in juvenile homicide cases, while seven others have similarly found *Graham* inapplicable to juvenile accomplices to homicide offenses.[175]

In *Jackson v. Norris*, a fourteen-year-old was convicted of homicide under a felony murder theory; he was sentenced to life without the possibility of parole.[176] The Arkansas court focused on *Graham*'s reasoning regarding the important distinction between homicide and non-homicide offenses and the resulting lesser culpability of non-homicide offenders.[177] As such, the Arkansas court interpreted the holdings of *Roper* and *Graham* as "very narrowly tailored" and therefore declined to apply *Graham*'s holding to this case because Norris had been convicted of a homicide, unlike Graham.[178] Two justices dissented, finding that the facts of *Norris* were very similar to the facts of *Graham*.[179] The dissent emphasized the *Graham* opinion's reasoning regarding the diminished culpability of juvenile offenders and the potential of juveniles to mature and change.[180]

The majority of the courts applying *Graham* to other contexts have followed this narrow approach.[181] However, some courts have followed the analytical approach of the dissenting opinions in the aforementioned cases and have interpreted *Graham* more broadly. There is currently a split of authority among California appellate courts regarding the application of *Graham* to sentences that do not

made that they are incapable of reconciliation with society; (3) penological justifications do not support a sentence that denies all hope for reconciliation with society; and (4) the sentence of death in prison is especially harsh on young juveniles.").

175. Adam Liptak & Lisa Faye Petak, *Juvenile Killers in Jail for Life Seek a Reprieve*, N.Y. TIMES (Apr. 20, 2011), http://www.nytimes.com/2011/04/21/us/21juvenile.html?_r=1&hpw (discussing a study on the application of *Graham* by lower courts).

176. *Jackson v. Norris*, 2011 Ark. 49, at 1. Under the felony murder doctrine, an individual can be convicted of murder even if he did not plan to commit homicide and did not commit the homicide personally so long as he intended to participate in any felony that ultimately leads to someone's death. An individual can be convicted of felony murder, for example, if he intends to commit a robbery, and a co-defendant kills someone in the course of the robbery, even if the individual in question had no knowledge that the co-defendant would kill. This is one of the more controversial types of cases. *See id.* at 6–7.

177. *Id.* at 4–5.

178. *Id.* at 5.

179. *Id.* at 8–9.

180. *Id.*

181. Craig S. Lerner, *Juvenile Criminal Responsibility: Can Malice Supply the Want of Years?*, 86 TUL. L. REV. 309, 364–84 (2011) (summarizing the decisions of various courts after Graham and concluding that most lower courts are hostile to the Court's decision and interpret the case narrowly to minimize its impact); *see, e.g.*, Uribe v. State, No. 57422, 2011 WL 2803098 (Nev. July 15, 2011) (rejecting the argument that transfer of a juvenile to adult court violates the Eighth Amendment based upon *Graham*).

offer the chance of parole within the offender's lifetime, but are not technically sentences of life without the possibility of parole.

Three California appellate decisions have interpreted *Graham* more broadly than courts in other states.[182] In *People v. Mendez*, a California court applied *Graham*'s rationale to reverse an eighty-four-year prison sentence of a juvenile sentenced in adult court.[183] The court conceded that *Graham*'s holding was not binding because it specifically addressed the sentence of life without the possibility of parole.[184] However, the court reasoned that a sentence of a term of years exceeding the life expectancy of an offender is essentially the same as a life without parole sentence.[185] Accordingly, the court applied the reasoning of *Graham* and reached the conclusion that the sentence violated the Eighth Amendment.[186]

Another California appellate court similarly held that the imposition of a 175-year prison sentence denied the offender the possibility of parole and, as such, there was "no sound basis to distinguish *Graham*'s reasoning where a term of years beyond the juvenile's life expectancy is tantamount to an LWOP term."[187] In this case, the court reversed the sentence, finding that it violated the Eighth Amendment under *Graham*.[188] Similarly, in the case of *In re J.I.A.*, a California court of appeals held that a sentence of fifty-years to life plus two consecutive life terms constitutes cruel and unusual punishment for a juvenile offender convicted of a non-homicide offense.[189]

In contrast, in the case of *People v. Ramirez*, a different California court of appeals concluded that three consecutive life sentences, which offered a juvenile offender the opportunity of parole after 120 years, does not violate the Eighth Amendment.[190] The *Ramirez* decision narrowed the *Graham* holding to apply only to juveniles specifi- **R**

182. *See* Lerner, *supra* note 181, at 366 n.206.

183. People v. Mendez, 114 Cal. Rptr. 3d 870, 882–83 (Ct. App. 2010).

184. *Id.* ("*Graham* expressly limited its holding to juveniles actually sentenced to LWOP [life without the possibility of parole].").

185. *Id.* at 883 ("Mendez's sentence is not technically an LWOP sentence, and therefore not controlled by *Graham*. We are nevertheless guided by the principles set forth in *Graham* in evaluating Mendez's claim that his sentence is cruel and unusual.").

186. *Id.*

187. People v. Nuñez, 125 Cal. Rptr. 3d 616, 618 (Ct. App. 2011), *review granted*, 255 P.3d 951 (Cal. 2011).

188. *Id.*

189. People v. J.I.A., 127 Cal. Rptr. 3d 141, 149–50 (Ct. App. 2011), *review granted*, 260 P.3d 283 (Cal. 2011).

190. People v. Ramirez, 123 Cal. Rptr. 3d 155, 165 (Ct. App. 2011), *review granted*, 255 P.2d 948 (Cal. 2011).

cally sentenced to life without parole, concluding that it "did not apply to a juvenile offender who receives a term-of-years sentence that results in the functional equivalent of a life sentence without the possibility of parole."[191] Similarly, another California appellate court decision held that Graham did not apply to sentences of terms of years, even when the sentence was for 110 years and exceeded the offender's life expectancy.[192] The California Supreme Court has granted review on this case.[193]

Although trial and appellate courts throughout the country have generally interpreted *Graham*'s holding narrowly by declining to apply its reasoning to other sentencing practices, the Supreme Court has relied on its conclusions in *Roper* and *Graham* in a more far-reaching manner. As previously discussed, the Court referenced its findings in *Graham* in reaching the decision that "a child's age properly informs the *Miranda* custody analysis," and that age should be considered in determining whether a child would feel free to leave under the circumstances.[194] In its analysis, the Court relied upon *Roper*, *Graham*, and a string of other cases to reiterate its conclusion that children are different than adults in terms of their maturity, responsibility, decision-making, and vulnerability to peer pressure.[195] Given the broader approach the Supreme Court has taken, it seems likely that the Court would respond favorably to extending *Graham* to apply to other sentencing practices involving juveniles. In fact, the Supreme Court appears to have anticipated resistance among lower courts to its conclusions regarding the diminished culpability of adolescents, as evidenced by its decision to create a categorical rule in *Graham*.[196]

191. *Id.* (citing People v. Caballero, 119 Cal. Rptr. 3d 920 (Ct. App. 2011), *review granted*, 250 P.3d 179 (Cal. 2011)).

192. *Caballero*, 119 Cal. Rptr. 3d at 925.

193. People v. Caballero, 250 P.3d 179 (Cal. 2011).

194. J.D.B. v. North Carolina, 131 S. Ct. 2394, 2398–99, 2403 (2011).

195. *Id.* at 2403–04.

196. The Court rejected taking a case-by-case approach in *Graham* due to a concern that "an 'unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death'" or, in the case of Graham, "a sentence of life without parole for a nonhomicide crime 'despite insufficient culpability.'" Graham v. Florida, 130 S. Ct. 2011, 2032 (2010) (quoting Roper v. Simmons, 543 U.S. 551, 572–73 (2005)).

V. *Graham*'s Application to the Strike Context

A. The *Graham* Framework Should Apply to Juvenile Strikes

The adolescent characteristics the Court was concerned with in cases such as *Graham* and *Roper* raise serious issues with the use of juvenile strikes to enhance future sentences. As in the case of Jesse, discussed in the beginning of this Article, many youth decide to accept strikes on their records because of a desire for the more immediate gratification of being released from custody. Their limited capacity to engage in rational decision-making becomes particularly problematic when they are faced with decisions regarding plea bargains in strike cases. Similarly, the conduct underlying many juvenile strike offenses is informed by young people's susceptibility to peer pressure and tendencies to engage in risk-taking or impulsive behavior. Many juvenile strike offenses involve unplanned behaviors such as robberies or fights that occur in the context of peer groups.[197] Furthermore, imposing permanent consequences like strikes based upon adolescent behavior is not justifiable because most youth will grow out of their delinquent behavior.[198] The practice is particularly problematic because it disproportionately imposes lifetime consequences on African American and Latino youth for adolescent mistakes, as evidenced by the fact that African Americans and Latinos are imprisoned under California's three strikes law at far higher rates than white offenders.[199] For instance, while African Americans comprise 6.5% of California's population, they comprise 45% of those serving third strike sentences.[200]

Given the relationship between normative adolescent characteristics and juvenile strikes, the framework of *Graham* is particularly applicable to the issue. The reasoning in *Graham* and *Roper* applies to determining whether specific sentencing practices imposed upon categories or classes of individuals constitute cruel and unusual punishment. As previously discussed, courts have reached diverging conclusions regarding which sentencing practices *Graham*'s reasoning

197. This observation is derived from the author's experience as a practicing attorney.

198. SCOTT & STEINBERG, *supra* note 5, at 16 ("Predictably, as normative adolescents move into adulthood, they mature in all areas of psychological development, and, of particular importance for our purposes, most of them also desist from criminal activity."). R

199. SCOTT EHLERS, VINCENT SCHIRALDI & ERIC LOTKE, JUSTICE POLICY INST., RACIAL DIVIDE: AN EXAMINATION OF THE IMPACT OF CALIFORNIA'S THREE STRIKES LAW ON AFRICAN-AMERICANS AND LATINOS 2 (2004), *available at* http://www.justicepolicy.org/images/upload/04-10_tac_caracialdivide_ac-rd.pdf.

200. *Id.*

applies to. This section considers the Court's reasoning in *Graham* in relation to juvenile strikes, and concludes that *Graham*'s method of analysis should be applied to cases considering whether using juvenile strikes to enhance future sentences constitutes cruel and unusual punishment.

Challenges to the use of juvenile strikes as cruel and unusual punishment generally arise when an individual is later sentenced to a prison term that has been enhanced on the basis of one or two prior juvenile adjudications or convictions. Typically, these claims arise when an adult is sentenced under the three strikes statute for a third strike offense committed as an adult but subject to enhancement based upon one or more juvenile strikes. Nonetheless, the constitutionality of the use of a juvenile strike to enhance an adult's sentence can be challenged because the prior conviction is deemed part of the present offense. Courts have regularly considered Eighth Amendment challenges to sentences imposed under habitual offender sentencing statutes,[201] and under such challenges, the Supreme Court has defined the offense to include both the most recent offense and the prior strike convictions that form the basis for the enhanced sentence.[202] Thus, when courts analyze whether a sentence constitutes cruel and unusual punishment, a juvenile conviction or adjudication that was used to enhance the sentence is defined as part of the offense, and its use is reviewable by the court.[203] Accordingly, although this type of legal challenge would relate to the conviction and sentence of an adult offender, the juvenile conduct lies at the core of the analysis.[204] Because of this, *Graham*'s reasoning is applicable.

B. Decisions Applying *Graham* in the Strike Context

Some may question whether *Graham* is applicable to the analysis of juvenile strikes, given that its holding addressed life without parole sentences. Numerous federal courts have already considered the issue.

201. Solem v. Helm, 463 U.S. 277 (1983); Rummel v. Estelle, 445 U.S. 263 (1980).

202. For example, the Court analyzed whether a life sentence was disproportionate when Rummel had been convicted of three nonviolent felony offenses. As such, the case incorporated the prior convictions into its construction of the offense. *Rummel*, 445 U.S. at 275–76.

203. *See, e.g.*, United States v. Scott, 610 F.3d 1009 (8th Cir. 2010); United States v. Graham, 622 F.3d 445 (6th Cir. 2010); State v. Bruegger, 773 N.W.2d 862 (Iowa 2009).

204. *Graham*'s analytical framework is applicable in these cases because of the nexus between the adult sentence and the juvenile conduct, in contrast to cases such as *United States v. Farley*, 607 F.3d 1294, 1342 n.34 (11th Cir. 2010), which have rejected applying the *Graham* framework to the analysis of cruel and unusual punishment for adults.

Graham has been considered in Eighth Amendment challenges to sentences imposed under federal habitual offender sentencing statutes that share similarities with three strikes laws. So far, the use of juvenile convictions from adult court to enhance future sentences has been found to be constitutional under *Graham*, but adjudications from juvenile court have not been considered. However, only federal courts have addressed the question of the constitutionality of using juvenile convictions from adult courts as strikes, rendering the outcome of similar challenges in state courts unclear.

1. Juvenile Convictions in Adult Courts

Prior to *Graham*, many courts held that convictions of juveniles in adult court could be used as "strikes" for the purpose of enhancing future sentences.[205] In light of the *Graham* decision, three federal cases have held that using a conviction of a juvenile from adult court as a prior conviction to impose a life sentence under a habitual offender statute does not constitute cruel and unusual punishment.[206] These cases have distinguished *Graham* and have found that its analytical framework only applies to crimes committed by juveniles. Reasoning that the third strike convictions were committed at the time the defendants were adults, these federal appellate courts have declined to follow *Graham*.

In *United States v. Graham*,[207] the Sixth Circuit Court of Appeals held that using a conviction of a juvenile offender in adult court to enhance a sentence under the Controlled Substances Act ("CSA")[208] does not violate the Eighth Amendment.[209] In that case, Graham was sentenced to life without parole for a third strike offense that he committed as an adult.[210] One of the prior convictions used to enhance his sentence under the statute occurred when he was a juvenile, but he had been convicted in an adult criminal court.[211] The court distinguished this case from *Graham v. Florida* because the defendant was an

205. *See, e.g.*, United States v. Tighe, 266 F.3d 1187 (9th Cir. 2001); United States v. Mays, 466 F.3d 335 (5th Cir. 2006); People v. Banks, 569 N.E.2d 1388, 1390–91 (Ill. App. Ct. 1991); State v. Mainwaring, 151 P.3d 53 (Mont. 2007); State v. Moore, 596 S.W.2d 841 (Tenn. Crim. App. 1980); State v. Rideout, 933 A.2d 706 (Vt. 2007).

206. United States v. Drummond, 416 Fed. App'x 284, 287 (4th Cir. 2011); *Scott*, 610 F.3d 1009; *United States v. Graham*, 622 F.3d 445.

207. This case addressed a different defendant with the last name of Graham.

208. Controlled Substances Act, 21 U.S.C. § 841(b)(1)(A) (2006).

209. *United States v. Graham*, 622 F.3d 445.

210. *Id.*

211. *Id.*

adult at the time of the commission of the third strike offense.[212] Because of this distinction, the circuit court declined to follow the analytical framework set forth in *Graham v. Florida* and instead applied the test set forth in *Harmelin* for determining whether a sentence is cruel and unusual.[213] In its reasoning, the court emphasized the distinction between convictions of juvenile offenders in adult court and cases that remain in juvenile court, expressly declining to rule on the significance of the statute's silence as to whether juvenile delinquency adjudications qualify as prior convictions, because "Graham's 1995 conviction was an adult conviction, not a juvenile-delinquency adjudication."[214]

The court reasoned that the age of the defendant at the time of conviction is not relevant to the determination of whether the prior conviction should be used for sentencing enhancement purposes.[215] Rather, the relevant inquiry is a procedural question of whether the juvenile was sentenced in juvenile or adult court.[216] The dissent argued that the decision "violates sound principles of penological policy based on the Eighth Amendment values recently outlined by the Supreme Court in *Graham v. Florida*,"[217] and that *Graham* "should at least make our court and the court system more sensitive to the important distinction between juvenile and adult criminal conduct."[218]

Similarly, in *United States v. Scott*, the Eighth Circuit Court of Appeals held that two convictions of a juvenile offender in adult court were properly used to trigger a life sentence under the Controlled Substances Act based upon an adult conviction of conspiracy to distribute fifty grams or more of cocaine base.[219] The court determined that the *Graham* framework was not applicable to this case because the defendant was an adult when he committed the third strike offense.[220]

212. *Id.*

213. *Id.* at 462. The court thus limited *Graham v. Florida*'s approach to analyzing whether a sentence constitutes cruel and unusual punishment to cases where the offender was a juvenile at the time of the commission of the most recent offense.

214. *United States v. Graham*, 622 F.3d at 458–60 ("Unlike the defendants in our sister circuits' cases addressing this issue, Graham was not adjudicated in the juvenile system.").

215. *Id.* at 457.

216. *Id.*

217. *Id.* at 465 (Merritt, J., dissenting).

218. *Id.* at 469.

219. United States v. Scott, 610 F.3d 1009 (8th Cir. 2010).

220. *Id.* at 1017 ("[*Roper* and *Graham*] established constitutional limits on certain sentences for offenses committed by juveniles. However, Scott was twenty-five years old at the time he committed the conspiracy offense in this case. Neither *Roper* nor *Graham* involved the use of prior offenses committed as a juvenile to enhance an adult conviction, as here.").

The Fourth Circuit has reached the same conclusion.[221] This Article argues that these decisions are wrong and that *Graham*'s framework should apply in assessing the constitutionality of third strike sentences enhanced on the basis of juvenile strikes because of the nexus between the juvenile conduct underlying the strike convictions and the sentence imposed for the third strike offense.

Even prior to *Graham*, courts recognized the applicability of the *Roper* framework to addressing the constitutionality of third strike sentences of adult offenders that were enhanced as a result of juvenile convictions from adult courts.[222] In *United States v. Mays*, the Fifth Circuit Court of Appeals considered whether the use of a prior felony conviction of a juvenile in adult court to enhance a sentence to life without parole for possession of cocaine with intent to distribute constituted cruel and unusual punishment.[223] The court applied the framework set forth in *Roper*, taking a similar analytical approach to *Graham* to determine whether a punishment is cruel and unusual.[224] In *Mays*, the court held that the punishment did not violate the Eighth Amendment because the defense did not present evidence of a national consensus against using juvenile convictions to impose life sentences under enhancement statutes.[225] Although the court concluded that the practice did not violate the Eighth Amendment, the decision rested upon a lack of evidence.[226] By considering national consensus, the court followed *Roper*'s analytical framework to consider the constitutionality of using a juvenile conviction as a strike, indicating that *Graham*'s analytical framework is applicable to this issue.[227]

This Article suggests that using the *Graham* framework to analyze this issue—as the Fifth Circuit did in *Mays*—is the better approach. The federal cases holding that *Graham* is inapplicable to adult sentences that are enhanced by juvenile convictions fail to properly apply the spirit of *Graham*. The Supreme Court's recognition of the limitations of adolescent decision-making and the diminished culpability of juvenile offenders impact the validity of third strike sentences

221. United States v. Drummond, 416 Fed. App'x 284, 287 (4th Cir. 2011).

222. *See, e.g.*, Justice v. Hedrick, 350 S.E.2d 565, 568 (W. Va. 1986); State v. Geary, 289 N.W.2d 375 (Wis. Ct. App. 1980).

223. United States v. Mays, 466 F.3d 335 (5th Cir. 2006).

224. *Id.* at 339–40.

225. *Id.* at 340.

226. *Id.* ("Mays, however, has not proffered evidence of a national consensus that sentencing enhancements to life imprisonment based, in part, on juvenile convictions contravene modern standards of decency.").

227. *Id.*

that are imposed as a result of past juvenile strike convictions. Accordingly, *Graham*'s framework should structure the analysis of this issue.

2. Juvenile Adjudications Under *Graham*

Although the decisions previously discussed have held that *Graham* does not render the use of juvenile convictions in adult court unconstitutional, no published court decisions have addressed whether using juvenile adjudications (from juvenile court) as prior convictions to enhance sentences under three strikes statutes violates the Eighth Amendment under *Graham*. However, prior to the *Graham* decision, some courts considered this issue using a similar framework. For example, in *State v. Bruegger*, the Iowa Supreme Court considered the constitutionality of using a juvenile adjudication to enhance a sentence under a habitual offender sentencing statute using key reasoning from the *Roper* decision, which is the model followed by *Graham*.[228] The court reasoned that while *Roper*'s holding was limited to the death penalty, "the reasoning in *Roper*, namely, that psychosocial and neurological studies show that juvenile brains are less developed and that, as a result, they are less culpable than adult offenders, has applicability outside the death penalty context."[229] Using the test set forth in *Harmelin*, the court concluded that there was a risk of potential gross disproportionality such that further inquiry was required, in part because of the use of a juvenile adjudication to enhance the sentence.[230] The court vacated the defendant's twenty-five year prison sentence for statutory rape and remanded it for a new sentencing hearing to determine whether the use of a juvenile adjudication to enhance the sentence to twenty-five years in prison constituted cruel and unusual punishment, relying in part upon the findings set forth in *Roper* regarding the nature of juvenile offenders.[231] The reasoning employed in *Bruegger* is bolstered by the *Graham* decision, which extended *Roper* to a non-death penalty case.

228. State v. Bruegger, 773 N.W.2d 862 (Iowa 2009).

229. *Id.* at 883.

230. *Id.* at 884.

231. After determining that Bruegger properly brought a cruel and unusual punishment challenge to the statute that allowed for the use of juvenile adjudications to increase a sentence, the Iowa Supreme Court indicated that the record did not include sufficient information to assess whether the sentence constituted cruel and unusual punishment in this case. *Id.* at 885–86. Accordingly, the court vacated the sentence and remanded it for a new sentencing hearing where the court would address the constitutionality of using the juvenile adjudication to enhance his sentence. *Id.* at 886.

Graham's method of analysis has been employed by various courts to address questions relating to the constitutionality of using juvenile strikes. Although some courts have rejected its applicability to adults subject to sentence enhancements as a result of prior juvenile convictions, other courts have applied *Graham*'s analytical framework to the question of whether using juvenile strikes violates the Eighth Amendment. In *Graham*, the Supreme Court demonstrated concern about adolescent deficiencies in decision-making and concluded that they are less culpable than adults. Subjecting juveniles to permanent consequences as a result of juvenile strikes holds juveniles to the same standard as adults and forces them to make decisions carrying life-long consequences that they are not capable of making. *Graham*'s framework, including its reliance on adolescent development research, is well-suited to address the issues inherent to the use of juvenile strikes.

VI. Juvenile Strikes as Cruel and Unusual Punishment: A Categorical Challenge

A review of the Supreme Court's reasoning in *Graham* demonstrates that using juvenile strikes under three strikes sentencing statutes constitutes cruel and unusual punishment. This Part applies *Graham*'s analysis to California's three strikes law and challenges a particular sentence—twenty-five years to life—as applied to a particular class of offenders—habitual offenders who have been so defined due to a prior conviction as a juvenile. This Part follows the reasoning utilized by the Court in *Graham* and *Roper* and applies it to the question of whether the use of juvenile strikes violates the Eighth Amendment. Although the focus of this section is on California's law, similar reasoning would apply to the use of juvenile strikes under other states' three strikes statutes.

This Part first considers California's use of juvenile strikes in comparison to other states and analyzes whether there is a national consensus against the practice. As previously discussed, there is a distinction between juvenile adjudications in juvenile courts and criminal convictions of juvenile offenders in adult courts. Due to significant differences in state practices with regards to these distinct categories, juvenile adjudications (from juvenile court) and juvenile convictions from adult court are considered separately. Following the discussion of national consensus, this Part explores the penological justifications of three strikes, concluding that using juvenile adjudications and convictions as strikes does not support the goals of incapacitation, deterrence, retribution, and rehabilitation. This Part then

addresses the challenges to effective representation of counsel posed by charging juveniles with strikes. Finally, international law relating to juvenile strikes is considered.

A. Objective Indicia of National Consensus

A review of the laws of other states demonstrates that there is a national consensus against using juvenile adjudications as prior convictions for enhancing sentences under three strikes statutes that proscribe life sentences, as in the case of California's three strikes law. Although fewer states prohibit the use of adult court convictions of juveniles as prior convictions for three strikes sentencing, there may be an emerging national consensus against using such convictions as well.

1. Juvenile Adjudications

Although many jurisdictions allow juvenile adjudications to enhance adult court sentences under some circumstances, California is the only state that statutorily authorizes juvenile adjudications to be used as "prior convictions" for the purpose of sentencing enhancement under a three strikes law that imposes a mandatory life sentence.[232] Texas allows juvenile adjudications to enhance a sentence under limited subdivisions of its habitual offender sentencing statute.[233] However, it does not allow juvenile adjudications to count as prior convictions under its habitual offender provision that most closely parallels California's three strikes law.[234] One other state—

232. Brief of Amicus Curiae Criminal Defense Clinic, Mills Legal Clinic of Stanford Law School on Behalf of Respondent at 3, People v. Nguyen, 209 P.3d 946 (Cal. 2009) (No. S154847); *see* CAL. PENAL CODE § 667(d)(3) (West 2010 & Supp. 2011). Louisiana used to include juvenile adjudications, but a legislative amendment in 2010 deleted them, thus changing Louisiana's law. LA. REV. STAT. ANN. § 15:529.1 (2005 & Supp. 2012); *see also* Goldstein-Breyer, *supra* note 21, at 88 ("[In 2009,] California and Texas were the only states which permitted a juvenile adjudication to qualify as a strike."); Melanie Deutsch, Comment, *Minor League Offenders Strike Out in the Major League: California's Improper Use of Juvenile Adjudications as Strikes*, 37 SW. U. L. REV. 375, 389 (2008) ("California and Texas are the only states, along with the federal government, with express statutory language permitting the use of a juvenile adjudication in the habitual offender situation."). R

233. TEX. PENAL CODE ANN. § 12.42(f) (West 2011 & Supp. 2011).

234. *Id.* (defining a juvenile court adjudication as a "final felony conviction" for purposes of subsections (a), (b), (c)(1), and (e) of this section). Subsection (a) provides for sentences to be enhanced from the range of 180 days to two years up to the range of two years to twenty years based upon prior convictions. *See* §§ 12.42(a), 12.35(a). Judges have significant discretion to determine the appropriate sentence within these ranges, rendering the statute substantially different from California's three strikes law. Subsection (b) imposes an enhancement to the range of five to ninety-nine years, similarly leaving substan-

Massachusetts—allows juvenile adjudications to be used to enhance sentences under its habitual offender sentencing law if a deadly weapon was used in the juvenile offense.[235] However, the Massachusetts law imposes a significantly less severe punishment than California's three strikes law. In contrast to California's twenty-five years to life sentence, Massachusetts requires a sentence of ten to fifteen years in prison.[236] Massachusetts' defining juvenile adjudications as prior convictions appears to be related to the less severe sentences proscribed by current law because pending state legislation that would impose mandatory sentences more similar in severity to California's three strikes law specifically excludes juvenile adjudications as strikes.[237]

Recidivist sentencing statutes vary dramatically from state to state. Many impose mandatory prison sentences ranging from fifteen years to life;[238] I categorize these statutes as similar to California's three strikes statutes for purposes of this analysis. Others allow for enhanced sentences but grant judges substantial discretion, or impose enhanced prison sentences of under fifteen years. These statutes are fundamentally different from California's law due to their decreased severity and enhanced judicial discretion. Although many states allow juvenile adjudications to contribute to sentencing enhancements under some circumstances,[239] their use is widely prohibited to enhance sentences under three strikes sentencing statutes. Based upon an extensive re-

tial discretion in the hands of the judge. *See* §§ 12.42(b), 12.32(a). Subsection (c)(1) imposes an enhanced range of fifteen to ninety-nine years, or up to life. § 12.42(c). This statute also allows for judicial discretion within the sentencing range. Subsection (d) is most similar to California's three strikes law because it requires a minimum sentence of twenty-five years and allows for a sentence of up to ninety-nine years or life. § 12.42(d). Given that California's three strikes law imposes a mandatory sentence of twenty-five years to life, subsection (d) most closely parallels the California law. *See supra* Part I.A.

235. *See* MASS. GEN. LAWS ANN. ch. 140, § 121 (West 2008). Minnesota also allows courts to consider juvenile adjudications in determining whether a defendant is a danger to public safety such that a departure from the presumptive sentence recommended by the Sentencing Guidelines is warranted under one of the state's habitual offender sentencing provisions. MINN. STAT. ANN. § 609.1095(2) (West 2009). However, in order to depart from the guidelines to impose an enhanced sentence, the court must also determine "that the offender has two or more prior convictions for violent crimes." *Id.* The statute does not define juvenile adjudications as prior convictions. *Id.*

236. MASS. GEN. LAWS ANN. ch. 269, § 10G(b).

237. *See* H.B. 3818, 187th Gen. Court (Mass. 2012); S.B. 2080, 187th Gen. Court (Mass. 2012).

238. *See infra* Appendix A.

239. *See* Joseph B. Sanborn, Jr., *Striking Out on the First Pitch in Criminal Court*, 1 BARRY L. REV. 7, 18 tbl.2 (2000) (providing an overview of the use of juvenile records in sentencing juvenile offenders across the United States).

view of habitual offender sentencing statutes throughout the United States, I conclude that juvenile adjudications may not be used as prior convictions for sentencing enhancement under any three strikes statute that is substantially similar to California's.

Ten states explicitly statutorily exclude juvenile adjudications from being used as prior convictions for three strikes sentencing.[240] A review of the language and legislative history of other state statutes reveals that ten additional jurisdictions most likely prohibit the use of juvenile adjudications as strikes.[241] For example, Louisiana's legisla-

240. These states are: Florida, Kentucky, New Jersey, New Mexico, North Dakota, Ohio, Tennessee, Utah, Washington, and Wisconsin. FLA. STAT. ANN. § 775.084(1)(a)–(d) (West 2010) (allowing the use of any felony for a finding that a defendant is a "habitual felony offender" or "habitual violent felony offender," but requiring that the predicate felonies for a finding of "three-time violent felony offender" and "violent career criminal" status have been committed as an adult); KY. REV. STAT ANN. § 532.080 (West 2006 & Supp. 2011) (requiring prior convictions to be committed when a defendant is at least eighteen years old); N.J. STAT. ANN. § 2C:44-3(a) (West 2005 & Supp. 2011) ("A persistent offender is a person who at the time of the commission of the crime is 21 years of age or over, who has been previously convicted on at least two separate occasions of two crimes, committed at different times, when he was at least 18 years of age, if the latest in time of these crimes or the date of the defendant's last release from confinement, whichever is later, is within 10 years of the date of the crime for which the defendant is being sentenced."); N.M. STAT. ANN. § 31-18-23(C) (2010) ("For the purpose of this section, a violent felony conviction incurred by a defendant before the defendant reaches the age of eighteen shall not count as a violent felony conviction."); N.D. CENT. CODE § 12.1-32-09 (1997 & Supp. 2011) ("1. A court may sentence a convicted offender to an extended sentence as a dangerous special offender or a habitual offender in accordance with this section upon a finding of any one or more of the following: . . . c. The convicted offender is a habitual offender. The court may not make such a finding unless the offender is an adult and has previously been convicted in any state or states or by the United States of two felonies of class C or above committed at different times when the offender was an adult."); OHIO REV. CODE ANN. § 2901.08(B) (LexisNexis 2010) (amended in 2011 to exclude juvenile adjudications as prior convictions for purposes of the repeat violent offender sentencing statute); TENN. CODE ANN. § 40-35-120 (2010) ("A finding or adjudication that a defendant committed an act as a juvenile that is designated a predicate offense under subsection (b), (c) or (d) if committed by an adult, and that resulted in a transfer of the juvenile to criminal court pursuant to § 37-1-134, or similar statutes of other states or jurisdictions, shall not be considered a prior conviction for the purposes of this section unless the juvenile was convicted of the predicate offense in a criminal court and sentenced to confinement in the department of correction."); UTAH CODE ANN. § 78A-6-116 (LexisNexis 2008 & Supp. 2011); WASH. REV. CODE ANN. § 9.94A.030 (West 2010) (defining "offender" as a person who has committed a felony and is eighteen years old or whose case is tried in adult court and specifying that prior convictions must be of "as an offender" to prove that an individual is a "persistent offender"); State v. Knippling, 206 P.3d 332, 335–36 (Wash. 2009) (en banc) (holding that juvenile court adjudications are not "offenses" that constitute prior convictions); WIS. STAT. ANN. § 939.62(3)(a) (West 2005 & Supp. 2011) (excluding juvenile court proceedings from the definition of "felony" and "misdemeanor" for purposes of the habitual criminality statute).

241. These jurisdictions are: Louisiana, Maryland, Minnesota, Mississippi, Montana, Oregon, Rhode Island, Texas, and Washington, D.C. Maryland and Rhode Island refer to

tive history demonstrates a statutory exclusion of juvenile adjudications as prior convictions, because the portion of the statute that previously authorized the use of juvenile adjudications as strikes was repealed in 2010.[242] Texas' explicit statutory authority to use juvenile adjudications under other sentencing enhancement provisions seems to demonstrate an intent to exclude their use under the state's most severe habitual offender sentencing statute.[243] Thirteen additional states seem to prohibit the use of juvenile adjudications as strikes through case law.[244] In the remaining states with habitual offender

"prior convictions" as those that result in (or would be eligible for) a sentence in a prison or correctional facility. MD. CODE ANN., CRIM. LAW § 14-101 (LexisNexis Supp. 2011) (requiring confinement in a correction facility for some prior convictions); R.I. GEN. LAWS § 12-19-21 (2002). As previously discussed, Texas' code specifically authorizes juvenile adjudications to be used as prior convictions for some purposes but excludes the three strikes sentencing statute for this purpose. TEX. PENAL CODE ANN. § 12.42(d) (West 2011 & Supp. 2011) (setting forth the sentencing provisions of the habitual offender three strikes law); § 12.42(f) (defining juvenile adjudications as prior convictions for subsections (a), (b), (c)(1), and (e) but excluding (d)); Vaughns v. State, No. 04-10-00364-CR, 2011 WL 915700, at *4 (Tex. App. Mar. 16, 2011). For other similar states, see also MONT. CODE ANN. § 41-5-106 (2011) ("No adjudication upon the status of any youth in the jurisdiction of the court shall operate to impose any of the civil disability imposed on a person by reason of conviction of a criminal offense, nor shall such adjudication be deemed a criminal conviction, nor shall any youth be charged with or convicted of any crime in any court except as provided in this chapter. Neither the disposition of a youth under this chapter nor evidence given in youth court proceedings under this chapter shall be admissible in evidence except as otherwise provided in this chapter."); LA. REV. STAT. ANN. § 15:529.1 (2005 & Supp. 2012) (amended in 2010 to eliminate definition of juvenile adjudications as prior convictions for habitual offender sentencing statute); OR. REV. STAT. ANN. § 419C.400(5) (2011); MISS. CODE ANN. § 43-21-561(5) (2009 & Supp. 2011); D.C. CODE § 22-1804a (LexisNexis 2010). Although New York does not directly address the issue, the law does provide that convictions of youth sentenced in adult court under the youthful offender act cannot be used to enhance future sentences under the habitual offender sentencing statutes. Thus, it can be inferred that New York would similarly exclude juvenile adjudications for such purposes. N.Y. PENAL LAW § 60.10 (McKinney 2009). Minnesota's statute allows for juvenile adjudications to be considered in determining whether an offender is dangerous but does not seem to equate juvenile adjudications with prior convictions. MINN. STAT. ANN. § 609.1095(2) (West 2009).

242. Louisiana's habitual offender sentencing statute used to apply to "[a]ny person . . . convicted . . . of a felony or adjudicated a delinquent" who commits a subsequent felony. LA. REV. STAT. ANN. § 15:529.1 (2005 & Supp. 2012). The statute was modified by legislative amendment in 2010 to delete "adjudicated a delinquent." *See id.*; *see also* State v. Brown, 879 So. 2d 1276, 1289–90 (La. 2004) (holding that juvenile adjudications cannot be used to enhance sentence under habitual offender statute because they do not have the right to a jury trial).

243. *Vaughns*, 2011 WL 915700, at *4.

244. These states are: Alabama, Arizona, Arkansas, Delaware, Georgia, Kansas, Nebraska, North Carolina, Pennsylvania, South Carolina, Vermont, Virginia, and West Virginia. Arkansas ruled against the use of juvenile adjudications as strikes in *Vanesch v. State*, 16 S.W.3d 196, 306 (Ark. 2000) ("The Arkansas Code clearly permits the introduction of evidence of juvenile adjudications in the sentencing phase of trial when the requirements

sentencing statutes similar to California's, juvenile adjudications are categorically distinct from criminal convictions and therefore would not generally constitute "prior convictions."[245] In these states, even

of Ark. Code Ann. § 16-97-103(3) are satisfied. However, a juvenile adjudication is not a felony conviction, and thus cannot be used for sentence enhancement under the habitual offender law."). Delaware addressed the issue in *Fletcher v. State*, 409 A.2d 1254, 1256 (Del. 1979) ("We agree with the defendant that, with some exceptions, 10 *Del.C.* § 921 and § 931 evidence an intent on the part of the legislature to treat juvenile offenders in a different manner than adult offenders. We conclude that it would be inconsistent with that purpose to allow the use of convictions from other jurisdictions that would have been juvenile offenses in Delaware, and thus not felonies, to support enhanced punishment as an habitual offender under 11 *Del.C.* § 4214."). South Carolina ruled against the practice in *State v. Ellis*, 547 S.E.2d 490, 492 (S.C. 2001) ("Appellant objected to the applicability of the recidivist statute, arguing that a prior juvenile adjudication was not a conviction for purposes of the statute. We agree. The statute itself defines conviction as 'any conviction, guilty plea, or plea of nolo contendere.' § 17-25-45(C)(3). Since this criminal statute must be given a strict construction in favor of the defendant, and since juvenile adjudications are not among the list of qualifying events, appellant's voluntary manslaughter adjudication cannot be used to invoke the mandatory LWOP provisions of the recidivist statute."). Annotations to West Virginia's code provide, "[a]djudication of offense committed by a child under eighteen years of age, with the exception of convictions under §§ 49-5-3 and 49-5-14(3) (see now [§] 49-5-11), cannot be used against him under the Habitual Criminal Act nor by the parole board." W. VA. CODE ANN. § 61-11-18 (LexisNexis 2010). For other state cases also supporting this notion, see also Gordon v. Nagle, 647 So. 2d 91, 95 (Ala. 1994); *In re* Casey G., 224 P.3d 1016 (Ariz. Ct. App. 2010) (holding that juvenile adjudication cannot serve as a predicate felony under dangerous crimes against children statute because it is not a conviction); *In re* Maricopa Cnty., 514 P.2d 738, 739 (Ariz. Ct. App. 1973) (holding that an adjudication hearing is not a judgment of guilt); Smith v. State, 596 S.E.2d 230, 231 (Ga. Ct. App. 2004) (holding that the defendant's prior conviction does not constitute prior conviction for recidivist sentencing purposes because defendant was a juvenile when the crime was committed); *see* State v. Tucker, 573 S.E.2d 197, 201 (N.C. Ct. App. 2002) (holding that juvenile adjudications are not convictions and therefore cannot be used in sentencing classification); Commonwealth v. Thomas, 743 A.2d 460, 461 (Pa. Super. Ct. 1999) (holding that section 9714(a)(2) applies to criminal convictions and not to juvenile adjudications); Conkling v. Commonwealth, 612 S.E.2d 235, 238–39 (Va. Ct. App. 2005) (holding that juvenile adjudications are not predicate offenses for sentence enhancement purposes unless the legislation specifies juvenile adjudications are included); State v. Rideout, 933 A.2d 706, 715 (Vt. 2007). Although *Kennedy v. Sigler* did not specifically address the validity of using a juvenile court adjudication as a prior conviction, the reasoning seems to imply that a juvenile adjudication would not be properly used for sentencing enhancement given that it would not be a conviction. Kennedy v. Sigler, 397 F.2d 556, 561 (8th Cir. 1968) (holding a juvenile conviction from adult court to be properly used to enhance a sentence under Nebraska's habitual criminal statute). Before revising its code and eliminating its habitual offender sentencing provisions, Kansas prohibited the practice in *Paige v. Gaffney*, 483 P.2d 494, 494 (Kan. 1971) ("[A]n adjudication of delinquency against a juvenile does not constitute a conviction of a felony within the purview of the Habitual Criminal Act and such an adjudication may not be used as a basis for enhancing the punishment imposed against the accused."). Although Kansas changed its law such that this case is no longer relevant, it is still instructive in assessing the national consensus on the issue.

245. Many other states, including Alaska, Colorado, Illinois, Nevada, Oklahoma, South Dakota, and Wyoming do not specifically address juvenile adjudications in relation to ha-

though courts have not specifically addressed the issue, it is reasonable to conclude that juvenile adjudications do not qualify to enhance sentences. The absence of appellate court decisions addressing the issue in these states implies that no attempts to use juvenile adjudications to enhance sentences under habitual offender sentencing statutes have been made; an appeal would be almost certain if this had been attempted because of the widely accepted distinction between juvenile adjudications and criminal convictions.

Thus, California is the only state that authorizes juvenile adjudications to be used to impose life sentences under its three strikes statute while at least thirty-two states and the District of Columbia appear to prohibit this practice.[246] This number does not include those states that do not specifically address the issue of juvenile strikes but categorize juvenile adjudications as distinct from criminal. As previously discussed, silence likely indicates that juvenile adjudications are not used as strikes because one would otherwise expect to find cases that have challenged the practice. Massachusetts, Florida, and Texas expressly allow juvenile adjudications to be used to enhance sentences under some habitual offender laws, but each of these states demonstrate a reluctance to use juvenile adjudications to enhance sentences under provisions that impose mandatory penalties of similar severity to California's three strikes law.[247] While many states allow juvenile adjudications to be used for some sentencing enhancements,[248] there appears

bitual offender sentencing statutes. However, their statutory provisions generally distinguish juvenile court adjudications from convictions in adult courts and specify, in some capacity, limitations on the use of juvenile court adjudications in adult courts. *See, e.g.*, S.G.W. v. People, 752 P.2d 86, 90–91 (Colo. 1998) (en banc).

246. These thirty-two states are: Alabama, Arizona, Arkansas, Delaware, Florida, Georgia, Kansas, Kentucky, Louisiana, Maryland, Minnesota, Mississippi, Montana, Nebraska, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wisconsin. *See supra* notes 240–41, 244.

247. *See supra* notes 233–40; MASS. GEN. LAWS ANN. ch. 269, § 10G (West 2008). As previously discussed, Texas also allows juvenile adjudications to be used to enhance sentences under its habitual offender sentencing statutes. TEX. PENAL CODE ANN. § 12.42 (West 2011 & Supp. 2011). However, Texas does not allow juvenile adjudications to be used to enhance sentences under the habitual offender sentencing statute that most closely parallels California's three strikes law. *Id.* § 12.42(f). Florida specifies that predicate felonies must be adult court convictions for sentencing enhancement under its most severe habitual offender sentencing statutes. FLA. STAT. ANN. § 775.084(1)(a)–(d).

248. *See, e.g.*, Ryle v. State, 842 N.E.2d 320, 325 (Ind. 2005) (determining that non-jury juvenile adjudications could be used for a sentencing enhancement unlike three strikes); State v. Hitt, 42 P.3d 732, 740 (Kan. 2002) (similarly finding no due process violation for using juvenile adjudication to increase a defendant's criminal history score). The decisions in these cases did not address Eighth Amendment arguments but instead focused on due

to be a virtually unanimous national consensus against using juvenile adjudications as sentencing enhancements under three strikes statutes that impose mandatory prison sentences of life or a very long term of years.

An alternative way to engage in this comparative analysis could exclude the nineteen states that either do not have habitual offender statutes or whose statutes are substantially different from California's because they allow for significant judicial discretion or impose sentences far less severe than twenty-five years to life.[249] Considering only the thirty-one other jurisdictions (excluding the federal government) that have three strikes sentencing schemes substantially similar to California's, nineteen states expressly prohibit the practice either by statute or judicial decisions.[250] The remaining eleven states and the District of Columbia impliedly prohibit the practice by virtue of language in their statutory schemes that specifically defines juvenile court adjudications as distinct from criminal convictions or by reasoning in judicial decisions that address the use of juvenile convictions in adult court as strikes.[251]

A comparative analysis of the use of juvenile adjudications as prior convictions under habitual offender sentencing statutes must also consider the practices of federal courts. Under federal law, there is a split of authority as to whether juvenile adjudications may be used to impose life sentences on the basis of prior convictions. The federal government allows the use of juvenile adjudications as prior convictions under some circumstances but not others. The Federal Sentencing Guidelines state that "convictions" from juvenile court are not "prior offenses," whereas convictions committed prior to the age of eighteen are considered in subsequent sentencing if the minor was convicted as an adult and received a prison sentence over one year

process issues under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), because the juveniles in these cases were not entitled to jury trials.

249. These states include: Connecticut, Hawaii, Idaho, Indiana, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New York, North Dakota, Ohio, Oregon, Rhode Island, Utah, and Vermont. Although each state statute is different, they vary from California's three strikes law in significant ways. Many of these statutes allow the judge to have discretion in setting the sentence and proscribe sentencing ranges or mandatory minimums that are less severe than California's mandatory twenty-five to life sentence. For more details regarding each state's law, see *infra* Appendix A.

250. These states are: Alabama, Arizona, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, New Jersey, New Mexico, North Dakota, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, Washington, West Virginia, and Wisconsin.

251. These states include: Alaska, Colorado, Illinois, Maryland, Mississippi, Nebraska, Nevada, North Carolina, Oklahoma, South Dakota, and Wyoming.

and one month.[252] On the other hand, for the purpose of criminal history calculations, prior convictions that occurred prior to a defendant's eighteenth birthday are usually not considered in the criminal history calculations, regardless of whether it was "an adult or juvenile sentence."[253]

There are two federal sentencing statutes that could be construed as following the three strikes model. The first is the Armed Career Criminal Act ("ACCA"), which provides for a mandatory minimum sentence of fifteen years in prison for an individual convicted of being a felon in possession of a firearm when that person has at least three prior convictions of violent felonies or "serious drug offense[s]."[254] This statute specifically provides that "the term 'conviction' includes a finding that a person has committed an act of juvenile delinquency involving a violent felony."[255] Federal courts have consistently held that it does not violate the Eighth Amendment to use juvenile adjudications as prior convictions to qualify for the sentencing enhancements proscribed by this statute.[256] However, the mandatory minimum fifteen-year sentence is distinguishable from the life sentences required by most three strikes statutes and is not nearly as severe as California's mandatory third strike sentence of twenty-five years to life.

The Controlled Substance Act ("CSA") is the second federal statute that follows a three strikes model; it requires a sentence of life in prison for an individual convicted of particular drug offenses when he or she has two prior drug convictions.[257] This statute was modified at the same time as the ACCA, yet there is no corollary provision under the CSA defining juvenile adjudications as prior convictions.[258] There is a split of authority between federal circuit courts regarding whether juvenile delinquency adjudications may be used as prior convictions under this statute for purposes of imposing mandatory life

252. U.S. SENTENCING GUIDELINES MANUAL § 4A1.2(c) (2010) [hereinafter USSG]; *id.* § 4A1.2(d).

253. *Id.* § 4A1.1(b) (providing that sentences imposed for offenses committed before a defendant's eighteenth birthday may only be counted "if confinement resulting from such sentence extended into the five-year period preceding the defendant's commencement of the instant offense").

254. Armed Career Criminal Act, 18 U.S.C. § 924(e) (2006).

255. *Id.* § 924(e)(2)(C).

256. United States v. Jones, 574 F.3d 546, 552–53 (8th Cir. 2009); United States v. Salahuddin, 509 F.3d 858, 863–64 (7th Cir. 2007); United States v. Wilks, 464 F.3d 1240, 1243 (11th Cir. 2006).

257. Controlled Substances Act, 21 U.S.C. § 841(b)(1)(A) (2006).

258. *See* United States v. Graham, 622 F.3d 445 (6th Cir. 2010).

sentences.[259] This split of authority indicates that there is no consensus among federal courts regarding whether using juvenile court adjudications to enhance sentences under three strikes statutes resulting in life sentences is an acceptable practice.

Considered as a whole, these numbers demonstrate a national consensus against using juvenile adjudications as strikes when considered in relation to previous Supreme Court decisions. The Court applied this type of analysis in *Atkins*, determining that there was a national consensus against imposing the death penalty upon mentally retarded offenders.[260] In *Atkins*, the Court found that nineteen states and the federal government had passed laws specifically prohibiting the execution of mentally retarded individuals.[261] In *Roper*, the Court found that thirty states prohibited the execution of juvenile offenders, either by expressly excluding juveniles from capital punishment or by prohibiting the death penalty in its entirety.[262] California is the only state to allow juvenile adjudications to enhance sentences under a three strikes law that imposes a mandatory life sentence while thirty-three jurisdictions appear to prohibit this practice. These numbers are consistent with those the Court found in both *Atkins* and *Roper* to constitute an objective indicia of national consensus that the sentencing practice is rejected.

In *Graham*, even fewer states prohibited the sentencing practice at issue. Thirteen states prohibited the imposition of life without parole upon juvenile offenders for non-homicide offenses.[263] However, the Court also examined the frequency with which individual states applied the sentence and was impressed by the fact that only eleven jurisdictions actually sentenced youth to life without the possibility of parole for non-homicide offenses.[264]

Examining the actual sentencing practices of other states with regard to juvenile strikes is not necessary because California is the only state that uses juvenile adjudications as strike priors to trigger mandatory third strike sentences of twenty-five years to life. As such,

259. For example, the Third Circuit held that a juvenile delinquency adjudication from Pennsylvania did not constitute a prior conviction for the purposes of imposing a ten-year mandatory minimum sentenced under 21 U.S.C. § 841(b)(1)(B). United States v. Huggins, 467 F.3d 359 (3d Cir. 2006).

260. Atkins v. Virginia, 536 U.S. 304 (2002).

261. *Id.* at 313–15.

262. Roper v. Simmons, 543 U.S. 551, 564 (2005).

263. Graham v. Florida, 130 S. Ct. 2011, 2023 (2010). These thirteen jurisdictions included six that prohibited life without parole for all juvenile offenders and seven that only allowed it for juveniles convicted of homicide offenses. *Id.*

264. *Id.* at 2024.

this sentencing practice is clearly unique. In *Graham*, the Court found that the fact that only eleven states implemented the sentencing practice demonstrated a national consensus against it. The evidence is even more compelling in the case of using juvenile adjudications as strikes. The fact that California is the only state to allow this practice is strong evidence of a national consensus against using juvenile adjudications as prior convictions for habitual offender sentencing enhancements that impose mandatory life sentences.[265]

The Court also considers the direction of national trends in its analysis regarding national consensus, and this consideration is relevant here as well.[266] In *Roper*, the Court indicated that even though only five states had outlawed the execution of juveniles in the past fifteen years, this change was still significant.[267] The Court noted that it is more interested in "'the consistency of the direction of change'" than in the actual number of states that have imposed changes to the sentencing practice.[268] There appears to be a national trend towards eliminating the use of juvenile adjudications as strike priors. Louisiana, for example, previously authorized the use of juvenile adjudications as prior convictions for the purpose of the state's habitual offender sentencing statute.[269] However, in 2010 the state changed the law to eliminate the inclusion of juvenile adjudications as prior convictions.[270] Similarly, Ohio amended its code in 2006 to insert a provision that states:

> A previous adjudication of a person as a delinquent child or juvenile traffic offender for a violation of a law or ordinance is not a conviction for a violation of the law or ordinance for purposes of determining whether the person is a repeat violent offender . . . or whether the person should be sentenced as a repeat violent offender . . . .[271]

In assessing the "consistency of the direction of change" in *Roper*, the Court was impressed by the fact that no state had enacted legislation that reinstated capital punishment for juvenile offenders.[272] Spe-

265. *See supra* notes 247–51.

266. In *Atkins*, sixteen states had prohibited the execution of mentally retarded people while five states had abandoned the use of the juvenile death penalty at the time of the *Roper* decision. *Roper*, 543 U.S. at 565.

267. *Id.* at 567.

268. *Id.* at 566 (quoting Atkins v. Virginia, 536 U.S. 304, 315 (2002)).

269. LA. REV. STAT. ANN. § 15:529.1 (2005 & Supp. 2012).

270. *Id.*

271. *See* OHIO REV. CODE ANN. § 2901.08 (LexisNexis 2010); *see also* Amended Substitute H.B. 95, 126th Gen. Assemb., Reg. Sess. (Ohio 2006).

272. Roper v. Simmons, 543 U.S. 551, 566, 596 (2005).

cifically, the Court found that this "carries special force in light of the general popularity of anticrime legislation, and in light of the particular trend in recent years toward cracking down on juvenile crime in other respects."[273] This is similarly relevant in the juvenile strike context. While several states have passed legislation to prohibit the use of juvenile adjudications as prior convictions under three strikes statutes, no state has passed legislation to allow juvenile adjudications to be used in this way.

2. Convictions of Juveniles in Adult Court

Nationwide, over 200,000 juvenile offenders are processed through adult criminal courts each year.[274] Youth who are tried in adult court receive adult convictions even though they are juvenile offenders.[275] Many states do not specifically address whether convictions of juvenile offenders in adult court constitute strikes. However, in the absence of a statute that excludes such convictions as strikes, they may be used in the same way as adult convictions.

Several states have expressly carved out exceptions that prohibit convictions of young offenders in adult court from qualifying as "prior convictions" for the purpose of sentence enhancement under the state's habitual offender sentencing scheme. Kentucky, for example, requires that a defendant was eighteen years old at the time of the commission of a prior offense in order for it to qualify as a prior conviction under the state's equivalent to a three strikes law.[276] New Mexico, North Dakota, and New Jersey also prohibit the use of prior adult court convictions of juvenile offenders for the purpose of sentencing enhancements under their three strikes statutes.[277] This stands in contrast to California law, which treats any conviction of a strike offense from adult court as a strike, even if the defendant is only fourteen years old.[278] Oregon limits the use of juvenile convictions in adult court as prior convictions for its habitual offender sentencing stat-

273. *Id.* at 566 (citations omitted).

274. SMART ON CRIME COAL., SMART ON CRIME: RECOMMENDATIONS FOR THE ADMINISTRATION AND CONGRESS 97 (2011), *available at* http://besmartoncrime.org/pdf/Complete.pdf.

275. THE CHANGING BORDERS OF JUVENILE JUSTICE, *supra* note 4. R

276. KY. REV. STAT. ANN. § 532.080 (West 2006 & Supp. 2011).

277. N.J. STAT. ANN. § 2C:44-7 (West 2005); N.M. STAT. ANN. § 31-18-23(C) (2010); N.D. CENT. CODE § 12.1-32-09 (1997 & Supp. 2011).

278. Nothing in California's three strikes law specifies that juvenile convictions in adult courts are exempt from the definition of serious or violent offenses that constitute strikes. *See* CAL. PENAL CODE § 667.5 (West 2010 & Supp. 2011); § 1192.7 (West 2004 & Supp. 2011).

ute.[279] In addition, several states have "youthful offender statutes" which proscribe a more rehabilitative treatment of young adult offenders who are convicted in adult courts.[280] Three states prohibit the use of cases sentenced under youthful offender statutes as prior convictions for habitual offender sentencing enhancements.[281]

Collectively, at least eight states prohibit or limit the circumstances under which convictions of juvenile offenders in adult court may be used for future sentencing enhancement under three strikes laws.[282] This sentencing practice is not as clearly rejected as in the case of juvenile adjudications. Nonetheless, the fact that eight states limit the use of juvenile convictions in adult court as strikes is significant. In *Graham*, for instance, only eleven states prohibited the sentencing practice at issue.[283] There may be an emerging national consensus against the practice of using juvenile convictions as strikes, particularly given that nineteen states do not have habitual offender sentencing laws that parallel California's three strike sentencing structure.[284] When considered together with the eight states that specifically limit the practice, at least twenty-five states either limit or do not use juvenile convictions from adult court to impose mandatory sentences similar to those imposed under California's three strikes law.[285]

3. Implementation of Three Strikes Laws Across the Country

In *Graham*, the Court considered actual sentencing practices in determining whether a national consensus against the sentencing practice existed, concluding that the fact that only eleven jurisdictions actually sentence juvenile non-homicide offenders to life without parole demonstrated a national consensus against the practice.[286] National data on the number of people sentenced to enhanced prison terms due to juvenile strikes is not available. In general, many states

279. OR. REV. STAT. ANN. § 161.725 (2011).

280. *See generally* 43 C.J.S *Infants* § 294 (2004).

281. These states are: Alabama, New York, and Wisconsin. N.Y. PENAL LAW § 60.10 (McKinney 2009); Phillips v. State, 462 So. 2d 981, 986 (Ala. Crim. App. 2004); State v. Geary, 289 N.W.2d 375 (Wis. 1980).

282. This includes the states that expressly limit or exclude the use of juvenile convictions as strikes: Kentucky, New Jersey, New Mexico, North Dakota, and Oregon. *See supra* notes 276–77, 279. It also includes the three states that do not allow the use of "youthful offender" convictions of juveniles in adult court as strikes. *See supra* note 281.

283. Graham v. Florida, 130 S. Ct. 2011, 2024 (2010).

284. *See supra* note 249. R

285. Oregon and New York limit the use of juvenile convictions as strikes and are included in the nineteen states whose three strikes laws substantially differ from California's.

286. *Graham v. Florida*, 130 S. Ct. at 2023–24.

with three strikes laws on the books do not actively enforce these statutes. A 2004 study revealed that most states with three strikes statutes incarcerated fewer than one hundred people under these laws at the time of the study.[287] Aside from California, Florida and Georgia were the only states where over 400 people were incarcerated under three strikes laws.[288] In contrast, during the same time period, over 42,000 people were serving prison sentences in California for second or third strike sentences.[289] As of 2011, 8764 people were serving twenty-five years to life under California's three strikes law.[290]

The widespread implementation of the law in California in contrast to other states reveals that California's practice is "unusual" in the national context and supports a finding of a national consensus against juvenile strikes. The unusual nature of California's implementation of three strikes must be considered in order to contextualize the state's practices with regards to juvenile strikes. According to the Justice Policy Institute, "[i]t would be difficult to overstate how much California has been out of step with the other Three Strikes states" in terms of the number of people incarcerated under the statute.[291] While California sentences thousands of people under its three strikes law, "strikes laws are rarely used in most states."[292] This is an important aspect of the national consensus analysis that deserves further research in order to calculate how many people in other states, for example, are serving third strike sentences based upon juvenile strikes.

C. Court's Independent Analysis

While the determination of national consensus is important, it "is not itself determinative of whether a punishment is cruel and unusual."[293] The Court's independent analysis of the proportionality of the punishment in relation to the crime, including an evaluation of the culpability of the offenders in question, is also an important part

287. VINCENT SCHIRALDI, JASON COLBURN & ERIC LOTKE, JUSTICE POLICY INST., THREE STRIKES & YOU'RE OUT: AN EXAMINATION OF THE IMPACT OF 3-STRIKES LAWS 10 YEARS AFTER THEIR ENACTMENT 4 (2004).

288. *Id.*

289. *Id.* at 13. As of 2011, over 41,000 people are serving prison sentences for second or third strike offenses in California. CAL. DEP'T OF CORRECTIONS & REHABILITATION, *supra* note 27. R

290. CAL. DEP'T OF CORRECTIONS & REHABILITATION, *supra* note 27, tbl.1. R

291. SCHIRALDI, COLBURN & LOTKE, *supra* note 287.

292. *Id.* at 12.

293. Graham v. Florida, 130 S. Ct. 2011, 2026 (2010).

of the consideration.[294] This proportionality review considers whether the sentencing practice serves legitimate penological goals and, in the case of juvenile offenders, gives weight to the "developments in psychology and brain science [that] continue to show fundamental differences between juvenile and adult minds."[295]

1. Does the Sentencing Practice Serve Legitimate Penological Goals?

According to the Court, "[a] sentence lacking any legitimate penological justification is by its nature disproportionate to the offense."[296] In analyzing the relationship between the sentence and penological goals in the context of juvenile offenders, the Court has rested its analysis on the lessened culpability of juveniles, as demonstrated by their lack of maturity, underdeveloped sense of responsibility, vulnerability to peer pressure, and their capacity for change.[297] The primary penological justifications of three strikes laws are incapacitation and deterrence.[298]

a. Incapacitation

At their core, three strikes laws aim to incapacitate habitual criminals, removing them from society so they cannot continue to commit crimes that endanger others.[299] However, data indicates that California's three strikes law has not had a significant impact on crime through incapacitation.[300] National studies of three strikes laws similarly indicate that three strikes laws "either have minimal impact on

294. *Id.*

295. *Id.* ("For example, parts of the brain involved in behavior control continue to mature through late adolescence . . . .").

296. *Id.* at 2028.

297. *Id.* at 2026.

298. BRIAN BROWN & GREG JOLIVETTE, CAL. CALIFORNIA LEGISLATIVE ANALYST'S OFFICE, A PRIMER: THREE STRIKES: THE IMPACT AFTER MORE THAN A DECADE 9 (2005), *available at* http://www.lao.ca.gov/2005/3_Strikes/3_strikes_102005.pdf.

299. ZIMRING, HAWKINS & KAMIN, *supra* note 24, at 91; *see also* Tomislav V. Kovandzic, John J. Sloan, III & Lynne M. Vieraitis, *"Striking Out" as Crime Reduction Policy: The Impact of "Three Strikes" Laws on Crime Rates in U.S. Cities*, 21 JUST. Q. 207, 207–08 (2004) (explaining that twenty-five states passed three strikes laws between 1993 and 1996, "intend[ing] to both deter and incapacitate recidivists"). R

300. ZIMRING, HAWKINS & KAMIN, *supra* note 24, at 93–94 (noting that California's three strikes law "did not have the kind of discrete impact on secure confinement that would be consistent with significant change in crime prevention through incapacitation"); SCHIRALDI, COLBURN & LOTKE, *supra* note 287, at 7–9 (summarizing studies that indicate California's three strikes law has not impacted crime rates and presenting an analysis of FBI data that demonstrates marginally greater declines in violent crime and homicides in states without three strikes statutes); Kovandzic, Sloan & Vieraitis, *supra* note 299, at R

crime or may 'backfire' and cause an increase in homicide."[301] A 2004 study using data from 188 U.S. cities between 1980 and 2000 concluded that three strikes laws do not reduce crime through incapacitation.[302] Further, research on California's youth incarceration rates indicates that crime rates have not decreased in relation to incapacitation of juvenile offenders.[303] In *Graham*, the Supreme Court reasoned that it was unnecessary to remove juvenile offenders from society forever because "[j]uveniles are more capable of change than are adults, and their actions are less likely to be evidence of 'irretrievably depraved character' than are the actions of adults."[304] In the case of strikes, the same reasoning applies. Committing a crime as a juvenile does not predict future criminality, particularly in the case of relatively minor crimes, many of which are classified as strikes in California. It is widely recognized that adolescence is a time characterized by risk-taking behavior, and most adolescents commit crimes of some sort. Much of the behavior that leads to juvenile strike convictions arises out of the risk-taking behavior that is typical of this developmental stage.

Common strike offenses alleged in California juvenile courts include robbery, assault, and vandalism.[305] Although the criminal labels attached to these crimes sound serious, an examination of the underlying behavior reveals the adolescent nature of the acts. Under California law, a robbery is defined as taking an object using force or fear.[306] Any threat or use of force is sufficient to meet the fear element.[307] Typical adolescent robberies include grabbing a cell phone or an iPod from someone else while using a threat or a small amount of force. These acts are often impulsive and typically result from childlike desires for material possessions. Other typical robbery offenses committed by juveniles are incidents of shoplifting that result in a struggle of any kind with store security. A "beer run" where someone attempts to run out of a grocery store with beer and is stopped by a security guard becomes a robbery if the suspect struggles to get away

210–13 (summarizing studies measuring the impact of California's three strikes law, concluding that the policy has not demonstrated that it is effective).

301. Kovandzic, Sloan & Vieraitis, *supra* note 299, at 213.

302. *Id.* at 214, 234.

303. *See* Christina Stahlkopf, Mike Males & Daniel Macalair, *Testing Incapacitation Theory: Youth Crime and Incarceration in California*, 56 CRIME & DELINQUENCY 253, 260 (2010).

304. Graham v. Florida, 130 S. Ct. 2011, 2026 (2010).

305. HARRIS, *supra* note 93. **R**

306. CAL. PENAL CODE § 211 (West 2008).

307. *See id.* § 212.

from the grasp of a security guard.[308] The facts of these cases often indicate an impulsive, youthful desire to experiment with alcohol rather than presenting an indication of future criminality. Nonetheless, they are defined as strikes under the law.

Assault with a deadly weapon or assault that results in "great bodily injury" is also frequently charged in juvenile court. These charges are filed when a fight occurs and someone is injured or if any weapon is used in the fight. A wide range of adolescent behavior falls under the definition of this offense. A schoolyard fight, for example, meets the elements of the offense if someone gets a black eye or if a weapon is used.

Crimes committed for the benefit of or at the direction of a criminal street gang are also converted to a strike offense.[309] Thus, graffiti or vandalism that is committed for the benefit of a gang is a strike offense under this provision. Other non-strike offenses are similarly converted into strike offenses under this provision of the law.

Juvenile offenders may rack up strike adjudications in juvenile courts for behavior resulting from common characteristics of their developmental stage. Engaging in much of this activity does not predict future criminality.[310] When the behavior underlying juvenile strike offenses is examined, it becomes clear that long-term incapacitation of these offenders is not necessary.

Despite the fact that most juveniles who engage in delinquent activity grow up to be law-abiding citizens, those juvenile offenders who are sentenced under three strikes statutes have necessarily been convicted of another crime as an adult. However, the causal connection between juvenile adjudications and the need for lifetime incapacitation on the basis of any future felony offense is weak. Furthermore, the commission of a strike offense as a juvenile does not mean that the individual will present a danger to society as an adult, even if he or she is convicted of a third felony offense in the future. Particularly given California's provision that any felony offense qualifies as a third strike, enhancing a sentence to twenty-five years to life on the basis of adolescent behavior is nonsensical. There is no reason to incarcerate

308. *See* People v. Estes, 194 Cal. Rptr. 909 (Ct. App. 1983) (stealing merchandise became a robbery where defendant resisted a security guard's efforts to reclaim the items outside the store).

309. CAL. PENAL CODE § 1192.7(c)(28) (West 2004 & Supp. 2011); § 186.22 (West 1999 & Supp. 2012).

310. RANDALL G. SHELDEN, DELINQUENCY AND JUVENILE JUSTICE IN AMERICAN SOCIETY (2005).

an adult who commits a nonviolent theft offense, for example, for twenty-five years to life because he broke the law as a teenage boy.

b. Deterrence

Three strikes statutes also aim to deter future criminality, thus serving the goal of deterrence. Deterrence theory posits that people will be less likely to engage in crime if the consequences or costs outweigh the benefits of committing the crime.[311] Experts generally agree that harsh criminal sanctions do not have a deterrent effect on offenders.[312] Specifically, research indicates that three strikes has not had a deterrent effect in California.[313] National studies similarly "find[ ] no credible statistical evidence that passage of three strikes laws reduces crime by deterring potential criminals."[314] Further, adolescents are much less susceptible to deterrence than adults. They tend to act impulsively, making impetuous decisions. They do not tend to engage in a cost-benefit analysis prior to deciding to commit a crime. In both *Roper* and *Graham*, the Supreme Court acknowledged that juveniles are less susceptible to deterrence than adults given this immaturity.[315] Classic deterrence theory emphasizes the importance of the punishment being proportional to the offense.[316] Three strikes is not in line with this fundamental aspect of deterrence theory.

Adolescent development experts Elizabeth Scott and Laurence Steinberg considered whether punitive sanctions towards juvenile offenders have a deterrent effect and concluded, "the research on the deterrent effect of legal regulation of juvenile crime is sparse and gives no clear answer to the question of whether legislative waiver laws and other punitive measures reduce juvenile crime."[317] In deciding whether to commit a crime, teenagers "may simply be less capable than adults, due to their psychosocial immaturity, of considering the sanctions they will face. Thus, the developmental influences on decision-making that mitigate culpability also may make adolescents less responsive to the threat of criminal sanctions."[318] The Supreme Court

311. *Id.*

312. *See* Dickey & Hollenhorst, *supra* note 16, at 13. R

313. ZIMRING, HAKINS & KAMIN, *supra* note 24, at 101 ("This result suggests that the decline in crime observed after the effective date of the Three Strikes law was not the result of the statute."). R

314. Kovandzic, Sloan & Vieraitis, *supra* note 299, at 234.

315. Roper v. Simmons, 543 U.S. 551, 571–72 (2005); Graham v. Florida, 130 S. Ct. 2011, 2028 (2010).

316. SHELDEN, *supra* note 310.

317. SCOTT & STEINBERG, *supra* note 5, at 199. R

318. *Id.* at 206.

concluded in *Graham* that the goal of deterrence could not justify sentencing non-homicide juvenile offenders to life without the possibility of parole. Similarly, branding juvenile offenders with strike offenses that last for the rest of their lives is not justified by the goal of deterrence.

c. Retribution

Habitual offender statutes such as three strikes are theoretically aligned with goals of incapacitation, deterrence, and "preventive detention" rather than retribution.[319] The rationale behind retribution is to inflict pain or suffering in revenge for the pain or suffering a criminal act has caused others;[320] three strikes statutes do not support this goal. Frequently, the third strike offense in question is not the type of offense that calls out for retribution, given that many third strike sentences imposed under California law are for victimless crimes.[321] Further, sentences imposed under three strikes statutes regularly "exceed the punishment deserved" for the most recent offense.[322] As such, such sentences are not properly construed as retribution for the offense at hand. Rather, the punishment "is a purely preventive detention . . . that cannot be justified as deserved punishment" as a retributive sentence would traditionally be defined.[323] Thus, the goal of retribution is not served by the use of juvenile strikes.

According to the Court's reasoning in *Graham*, the justification for retribution is not as strong for a juvenile as for an adult given what

319. *See* Paul H. Robinson, Commentary, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429 (2001).

320. *See id.* at 1432.

321. Over 3800 people are serving twenty-five years to life for nonviolent third strike offenses in California, including 2529 serving third strike sentences for property offenses, 1350 for drug offenses, and 830 for "other crimes." CAL. DEP'T OF CORRECTIONS & REHABILITATION, *supra* note 27, tbl.1. R

322. Robinson, *supra* note 319, at 1435.

323. *Id.* at 1436. In a commentary addressing preventive detention, Robinson uses habitual offender sentencing statutes such as three strikes as a prime example of such practices. He argues that there is an inherent conflict in the principles underlying incapacitation and "desert," which I would equate to retribution. Specifically, Robinson explains:

> [T]he traditional principles of incapacitation and desert conflict; they inevitably distribute liability and punishment differently. To advance one, the system must sacrifice the other. The irreconcilable differences reflect the fact that prevention and desert seek to achieve different goals. Incapacitation concerns itself with the future—avoiding future crimes. Desert concerns itself with the past—allocating punishment for past offenses.

Id. at 1441.

we know about adolescent development.[324] Adolescent offenders have a diminished responsibility due to their immaturity and are therefore less deserving of punishment.[325] According to the Supreme Court, "[r]etribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity."[326] Relying upon retribution as a justification in the context of juvenile offenses is problematic if we believe, as the Supreme Court has found, that juveniles are categorically less responsible than adults.

Retribution is especially unjustified for juvenile offenders when homicide is not committed.[327] In the case of California's three strikes statute, this is particularly relevant given that many third strike sentences of twenty-five years to life in prison are imposed on the basis of nonviolent third strike offenses. In these cases, the crime at issue is categorically less serious than a homicide offense and, in many cases, does not even rise to the level of a serious or violent offense. Just as retribution does not justify sentencing juvenile offenders convicted of non-homicide offenses to life without parole, it does not justify sentencing people to life in prison on the basis of adolescent behavior.

d. Rehabilitation

Rehabilitation is the final penological goal considered by the Court. Rehabilitation is premised on the idea that people can change, and rehabilitative efforts focus on helping to bring about positive change. Punitive sanctions such as long prison terms are inconsistent with rehabilitative goals. This is true particularly given the consistent erosion of rehabilitative programming in prisons throughout the United States and, more specifically, within California. In 2008, less than half of the inmates in California prisons were enrolled in educational programs, and only one-half of that number was enrolled in the type of program that is most likely to improve their educational or

324. Graham v. Florida, 130 S. Ct. 2011, 2029 (2010) (citing Roper v. Simmons, 543 U.S. 551, 571 (2005)).

325. Franklin E. Zimring, *Penal Proportionality for the Young Offender: Notes on Immaturity, Capacity, and Diminished Responsibility*, *in* YOUTH ON TRIAL 272–73 (Thomas Grisso & Robert G. Schwartz eds., 2000) (discussing cases where a juvenile offender has "the minimum abilities for blameworthiness and thus for punishment" yet "the immaturity of the offender still suggests that less punishment is justified by reason of the offender's immaturity").

326. Roper v. Simmons, 543 U.S. 551, 564 (2005).

327. In *Roper*, the Court stated that "[t]he case for retribution is not as strong with a minor as with an adult." *Id.* at 571.

employment opportunities.[328] Just as the Court found that sentencing juvenile offenders to life without the possibility of parole is inconsistent with rehabilitation,[329] imposing prison sentences of twenty five years to life is similarly inconsistent with this goal. Furthermore, mandating a penalty for a juvenile in the form of strike records that follow him for the rest of his life indicates a sense of disbelief in the capacity for these young offenders to change. Imposing permanent punishments upon juvenile offenders sends the signal that they are not capable of rehabilitation and thus runs counter to this penological goal.

2. Impediments to Effective Representation by Counsel

The practice of defining juvenile adjudications as strikes creates serious obstacles to the effective representation of juvenile offenders. Generally, juveniles have a tendency "to discount and undervalue risk, overvalue short-as compared to long-term consequences, and are more subject than adults to peer influences."[330] The ability to think through the future consequences continues to develop through late adolescence.[331] One exploratory study regarding juvenile offenders' relationships with attorneys found that many of the youth in the study "were driven by the desire to 'get it over with' or avoid the negative consequence of the immediate moment, with little regard for long-term issues."[332] The authors of this study cited an example of a young man who pled guilty because of a desire to "get home quickly," although in accepting this plea agreement "he would have to endure being publicly registered as a sex offender for years to come."[333]

Adolescents are not only less likely to think through long-term consequences than adults, they are also "likely to assign relatively less weight to them than to more immediate ramifications."[334] Research indicates that "differences in the decision-making capacities of adolescents and adults are linked to predictable changes in brain structure and function."[335] Elizabeth Scott and Laurence Steinberg conclude,

328. BRIAN BROWN, CAL. LEGISLATIVE ANALYST'S OFFICE, FROM CELLBLOCKS TO CLASSROOMS: REFORMING INMATE EDUCATION TO IMPROVE PUBLIC SAFETY 7, 11 (2008).

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

330. Emily Buss, *The Role of Lawyers in Promoting Juveniles' Competence as Defendants*, in YOUTH ON TRIAL, *supra* note 325, at 243, 249.

331. SCOTT & STEINBERG, *supra* note 5, at 34. R

332. Ann Tobey, Thomas Grisso & Robert Schwartz, *Youths' Trial Participation as Seen by Youths and Their Attorneys: An Exploration of Competence-Based Issues*, *in* YOUTH ON TRIAL, *supra* note 325, at 234.

333. *Id.* at 235.

334. SCOTT & STEINBERG, *supra* note 5, at 39. R

335. *Id.* at 44.

based upon their extensive research regarding adolescent development, that "youths who do not meet adult competence standards cannot be subject to sanctions that approximate adult punishment or carry consequences into adulthood."[336] They specifically cite "the use of juvenile records in adult sentencing, including sentencing under three strikes laws" as one of the practices that should be forbidden.[337]

In practice, one of the biggest problems juvenile defense attorneys face with their young clients is convincing them not to accept plea bargain offers that include admitting strike offenses.[338] Recognizing that adolescents tend to favor immediate gratification and often lack the capacity to think through long-term consequences of their actions, prosecutors regularly offer plea bargain deals that give youth the choice between admitting one or two strike offenses in order to be released the same day, or admitting a non-strike offense in exchange for serving a small amount of time in custody.

Prosecuting agencies may also file two strike offenses arising out of one incident as a bargaining tool to ensure that the juvenile offender will admit one strike offense. Beginning adulthood with two strike offenses is a situation most attorneys would advise their clients to avoid. With two strike offenses alleged, it is very risky to go to trial even if there is a valid defense. It is widely believed by criminal defense attorneys that judges are more likely than juries to find criminal or delinquent charges to be true,[339] and juveniles do not have the right to jury trials. Therefore, proceeding to trial with two strike offenses alleged presents a grave risk of sustaining two strikes on one's record. Prosecutors will often offer to dismiss one strike if the young person will admit the other. However, this practice often results in young people admitting guilt even when they are innocent or have a defense, because their attorneys will attempt to dissuade them from the risk of having two strikes on their record. Often, for these type of cases, the prosecutor will offer a disposition that is agreeable to the minor because the prosecutor is satisfied with the outcome of a strike conviction.

336. *Id.* at 178.

337. *Id.*

338. The following observations and narrative examples derive from the author's experience as a practicing attorney.

339. For a discussion of the potential advantages of jury trials (as opposed to court trials) for juvenile defendants, see Jennifer M. Segadelli, *Minding the Gap: Extending Adult Jury Trial Rights to Adolescents While Maintaining a Childhood Commitment to Rehabilitation*, 8 SEATTLE J. FOR SOC. JUST. 683, 700–05 (2010).

Allowing juvenile conduct to qualify as a strike also puts a disproportionate amount of power in the hands of prosecutors, which impairs counsel's ability to present a defense. This problem is exemplified by the case of Frank, a sixteen-year-old young man with an IQ bordering on being developmentally disabled. He had a sweet smile, stuttered when he spoke, and generally seemed eager to please. He was approached in a park one day by police officers, who searched him and found a marker in his pocket. He was arrested for a misdemeanor charge of possession of vandalism tools because he admitted that he used the marker to tag. The arresting officers transported Frank to the local police station where he was taken into an interrogation room. Police officers showed him hundreds of photographs of graffiti from the local area, printed from a database. They told him that he had to sign his initials next to each photograph, and sign his name at the bottom of each page, in order to indicate that he had been shown these photographs. He complied, writing his initials and name next to hundreds of photographs.

When he appeared in court for his arraignment, he was charged with over thirty counts of vandalism, each with an enhancement alleging that it was committed for the benefit of a gang. This enhancement converted each separate charge to a strike offense. He told his attorney he had committed one of the acts of vandalism depicted in the photographs, but he was adamant that he had not committed the other acts of vandalism. However, the police report stated that he had initialed and signed next to the photographs that he admitted responsibility for. In this case, the prosecutor offered that he could admit one strike offense in exchange for her dismissing the rest. The alternative would be to go to trial and risk the conviction of multiple strikes, thus requiring any future felony offense to be punished with a sentence of twenty-five years to life in prison.

Parental influence is an additional issue that may impact the juvenile's ability to communicate with counsel. Young people's ability to effectively communicate with counsel may either be enhanced or impaired by parental influence. In some cases, parents intervene to help their child communicate more effectively with counsel. Given that adolescents are easily influenced, parental advice can have a profound impact on the legal decisions a young person makes. At times, parental influence impairs counsel's ability to effectively assist a young person accused of a crime.

Legal rules are often counter-intuitive and contradict people's common sense understanding of the world. Parents who advise their

children against the advice of counsel often form their opinions regarding the legal case based upon their common sense understanding of the world. This can have disastrous consequences for their children. For example, a sixteen-year-old young man was charged with robbery in a Los Angeles juvenile court. This is a strike under California law. His father had an acquaintance that worked in a juvenile drug court operated by the County, and she convinced him that her son should admit the charge in order to be transferred to this drug court. She assured him that upon successful completion of the drug program the case would be dismissed. However, in order to be admitted into this program, the young man had to admit that the robbery charge was true. Under California law, even if the case were eventually "dismissed" through the drug court, it could still be used as a strike prior in the future.[340] As much as his attorney explained the importance of this nuance, the young man's father insisted that the charge could not be used against his son in the future if it was dismissed. Ultimately, the young man followed the advice of his father, admitting the strike offense against the advice of counsel.

Other times, parents may overestimate their child's likelihood of success in a trial. This was the dynamic that influenced Jacob's mother to advise her son to take his case to trial. Jacob was charged with assault with a deadly weapon. The victim was his younger brother. He was accused of holding a knife up to his brother's throat and threatening to hurt him because he ate the last of the cereal for breakfast. His mother called the police and then wished to "drop the charges." She believed that this was a typical teenage dispute between brothers and thought the case should be dismissed. The prosecution offered to dismiss the strike allegation if Jacob would admit a misdemeanor battery offense. His attorney encouraged him to accept this offer because the risk of sustaining a strike conviction was substantial. Jacob's mother, however, did not want him to admit any crime because she wanted the case to be dismissed. His mother told him that he would win at trial, and Jacob rejected the plea bargain against his attorney's advice. The judge found the strike allegation to be true, and Jacob ended up with a strike on his record that may be used against him for the rest of his life.

340. *See* People v. Franklin, 66 Cal. Rptr. 2d 742 (Ct. App. 1997) (holding that reducing a felony to a misdemeanor after sentencing does not preclude its use as a strike in the future); People v. Daniels, 59 Cal. Rptr. 2d 395 (Ct. App. 1996) (holding that expungement following from honorable discharge from California Youth Authority does not preclude its future use as a strike).

In some circumstances, a juvenile offender's communication with counsel may be enhanced by the involvement of a parent. However, there is no such right afforded to juvenile offenders, and attorneys who are pressed for time in court may neglect to involve a parent in the plea bargaining discussion. This also presents an obstacle to effective representation. While these problems can emerge in any juvenile case, they are much more profound in cases involving juvenile strikes because of the serious, life-long impact a strike offense carries.

3. International Standards

International human rights law played a role in the Supreme Court's decision that the juvenile death penalty violates the Eighth Amendment.[341] The Court drew upon international law and the practices of other countries to affirm its finding that evolving standards of decency reflect that sentencing juveniles to death is cruel and unusual.[342] While it did not interpret international treaties as binding, in *Roper* the Court referenced the Convention on the Rights of the Child and the International Covenant on Civil and Political Rights ("ICCPR").[343] In assessing whether the death penalty was disproportionate for juvenile offenders, the Court considered the fact that the United States was the only country that executed juvenile offenders.[344] The widespread international rejection of sentencing juveniles to life without the possibility of parole was also considered by the Court in *Graham*, as was the United Nations Convention on the Rights of the Child.[345]

International human rights standards generally support abolishing the use of juvenile adjudications and convictions as strikes. The United Nations Convention on the Rights of the Child provides:

> States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human

341. Linda M. Keller, *Using International Human Rights Law in US Courts: Lessons from the Campaign Against the Juvenile Death Penalty, in* WHAT IS RIGHT FOR CHILDREN?: THE COMPETING PARADIGMS OF RELIGION AND HUMAN RIGHTS 83 (Martha Albertson Fineman & Karen Worthington eds., 2009).

342. Graham v. Florida, 130 S. Ct. 2011, 2033 (2010) ("There is support for our conclusion in the fact that, in continuing to impose life without parole sentences on juveniles who did not commit homicide, the United State adheres to a sentencing practice rejected the world over.").

343. Roper v. Simmons, 543 U.S. 551, 576 (2005).

344. *Id.* at 575.

345. *Graham v. Florida*, 130 S. Ct. at 2034.

> rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.[346]

This reflects a commitment to rehabilitation and to reintegrating juvenile offenders into society. As discussed above, three strikes runs counter to these ideals. Branding young offenders with permanent strikes on their records impairs their ability to reintegrate into society or to move beyond their past. Similarly, using juvenile strikes does not take into account the child's age and accompanying diminished responsibility. The United Nations Committee on the Rights of the Child has expressed concern about an Australian provision that imposes a "three-strikes" sentence for juvenile offenders.[347] In that statute, juveniles convicted of three prior burglaries are sentenced to a mandatory sentence of twelve-months in detention.[348]

In a volume focusing on comparative sentencing practices in Western countries, Michael Tonry specifically references California's three strikes law to exemplify that "some penalties in the United States are harsher than the harshest in other Western countries."[349] His comparative analysis reveals that the United States is alone among Western countries in imposing mandatory lengthy or life sentences under three strikes laws.[350] Germany almost never imposes life sentences for crimes other than murder.[351] Some jurisdictions in Australia have enacted three strikes sentencing provisions, such as the relatively lenient one criticized by the Committee on the Rights of the Child.[352]

346. United Nations Convention on the Rights of the Child art. 40, Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990), *available at* http://www2.ohchr.org/english/law/pdf/crc.pdf.

347. *See* U.N. COMM. ON THE RIGHTS OF THE CHILD, CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 44 OF THE CONVENTION 15 (2005), *available* at http://www.unhcr.org/refworld/publisher,CRC,,AUS,45377eac0,0.html [hereinafter CONSIDERATION OF REPORTS UNDER ARTICLE 44].

348. Arie Freiberg, *Three Strikes and You're Out—It's Not Cricket: Colonization and Resistance in Australian Sentencing*, *in* SENTENCING AND SANCTIONS IN WESTERN COUNTRIES 29, 42 (Michael Tonry & Richard S. Frase eds., 2001).

349. Michael Tonry, *Punishment, Policies, and Patterns in Western Countries*, *in* SENTENCING AND SANCTIONS IN WESTERN COUNTRIES, *supra* note 348, at 3, 16.

350. *Id.* at 21 (noting that the three mandatory minimum sentencing laws in England are not mandatory like American versions of three strikes because England's law allows for judicial discretion and exceptions).

351. *See* DIRK VAN ZYL SMIT, TAKING LIFE IMPRISONMENT SERIOUSLY IN NATIONAL AND INTERNATIONAL LAW 135–37 (2002) ("[T]he number of life sentences for crimes other than murder has been so low as to make it almost negligible.").

352. Freiberg, *supra* note 348, at 41; *see also* CONSIDERATION OF REPORTS UNDER ARTICLE 44, *supra* note 347.

Decisions from other countries regarding sentencing provisions that parallel three strikes indicate international concerns with three strikes laws generally, as well as specifically, with regards to juvenile offenders. In 2006, Argentina's Supreme Court held that the country's three strikes sentencing statute violated the country's constitution.[353] The Argentinean court specifically found that the statute violated international human rights treaties, including the American Convention on Human Rights, the ICCPR, and the United Nations Convention Against Torture ("CAT").[354] An appellate court in the United Kingdom addressed whether a sentence of life imprisonment under a habitual offender statute violated the European Convention on Human Rights when the prior "serious crime" was committed by a sixteen-year-old.[355] In that case, the court declined to find the sentence to be categorically unlawful but instead recommended that courts take a case-by-case approach.[356] After this opinion, legislation was passed that changed the sentencing scheme, replacing the mandatory sentencing scheme inherent to three strikes laws with a set of factors courts should consider in determining whether to impose a life sentence when an offender has previous convictions.[357]

California's three strikes law has gained international attention because of its draconian nature.[358] The statute is much more punitive than the laws of other countries. Further, the practice of using juvenile convictions as strikes contradicts human rights principles. A comparison to international law thus supports a finding that juvenile strikes constitute cruel and unusual punishment.

According to the analysis set forth in *Graham*, the use of juvenile adjudications and convictions as strikes violates the Eighth Amendment. There is a clear national consensus against the use of juvenile adjudications as strikes. Penological goals do not justify the practice given the Court's conclusions regarding adolescents. Further, charging juveniles with strike offenses raises serious concerns about their ability to obtain effective legal representation. When analyzed in an international context, defining juvenile offenses as strikes under Cali-

353. *See* Anne Goldin, *The California Three Strikes Law: A Violation of International Law and a Possible Impediment to Extradition*, 15 SW. J. INT'L LAW 327, 341–42 (2008).

354. *Id.*

355. *See* VAN ZYL SMIT, *supra* note 351, at 128–31 (discussing the importance of *R. v. Offen*, [2001] 1 W.L.R. 253 (Eng.), particularly because of its reliance on the European Convention).

356. *Id.*

357. Goldin, *supra* note 353.

358. *See* Tonry, *supra* note 349, at 16.

fornia's three strikes law seems to violate international human rights principles and stands in contrast to the practices of many other countries. California's use of juvenile strikes is problematic because it exploits the documented vulnerabilities of adolescents. The practice is cruel and unusual and should be found unconstitutional.

Even if the strict application of *Graham*'s Eighth Amendment analysis to the context of juvenile strikes is rejected, there are aspects of the *Graham* opinion that should be used to challenge the practice. The Court's conclusions regarding fundamental characteristics of adolescents and their decision-making can be incorporated into a traditional proportionality analysis regarding cruel and unusual punishment.[359] The culpability of a particular offender is relevant to this inquiry, as recognized in Supreme Court precedent, and research on adolescent development and brain science would be important to consider in this context.[360] In addition, the serious impairment to the effective representation of youth offenders brought about by charging juveniles with strikes may give rise to a Sixth Amendment challenge. As previously discussed, the Supreme Court appears amenable to incorporating its conclusions regarding the distinct characteristics of adolescence in analyzing a variety of legal questions involving youth.

Conclusion

Research demonstrates fundamental differences between juveniles and adults, and the Supreme Court has acknowledged these differences. Juveniles do not engage in rational decision-making like adults do. They are more susceptible to peer pressure and negative influences, they are more impulsive, and they are more susceptible to change. Thus, in the words of the Supreme Court, "because juveniles have lessened culpability they are less deserving of the most severe punishments."[361] Sentences imposed under California's three strikes laws are among this category of most severe punishments, particularly given that sentences of twenty-five years to life are regularly imposed for nonviolent third strike offenses. California's three strikes law is recognized both nationally and internationally as a draconian measure that is out of line with common standards of decency. It regularly results in unjust sentences and is particularly problematic because it is

359. The Iowa Supreme Court took this approach in *Iowa v. Bruegger*, 773 N.W.2d 862, 883 (Iowa 2009).

360. Solem v. Helm, 463 U.S. 277, 290–94 (1983).

361. Graham v. Florida, 130 S. Ct. 2011, 2026 (2010) (citing Roper v. Simmons, 543 U.S. 551, 569 (2005)).

disproportionately applied to African American and Latino residents of California.[362]

Quite simply, California's three strikes sentencing scheme often results in cruel punishments. When third strike sentences are imposed on the basis of juvenile conduct, the cruelty is even more pronounced. Over five hundred people are serving twenty-five years to life in California as a result of at least one juvenile strike.[363] Many more are living with two juvenile strikes on their records such that any brush with the law will send them to prison for twenty-five years to life. Thousands of youth are accused of strike offenses in juvenile court each year and are then confronted with a complicated web of decisions that will impact the rest of their lives. Three strikes is not effective in reducing crime, and it is particularly unjust as applied to youth. According to the tenets set forth in *Graham*, the use of juvenile strikes should be abolished.

362. EHLERS, SCHIRALDI & LOTKE, *supra* note 199. **R**
363. CAL. STATE AUDITOR, *supra* note 28, at 29. **R**

Appendix A

Gray shading indicates that the state's three strikes law is substantially different from California's.

State	Third Strike Punishment	Juvenile Adjudications = Strikes?[364]	Juvenile Convictions in Adult Court = Strikes?
Alabama	Fifteen years to life.[365]	No (per case law).[366]	Yes, but youthful offender exception.[367]
Alaska	Ninety-nine years.[368]	Silent.[369]	Silent.
Arizona	Life (must serve at least twenty-five years).[370]	No.[371]	Probably allowed.[372]

364. Data contained in this column refers specifically to the state's use of juvenile adjudications as prior convictions for sentencing enhancement under three strikes laws. It does not refer to the state's use of juvenile adjudications for sentencing enhancements in other circumstances. Many states allow the use of juvenile adjudications to enhance sentences for some purposes but disallow their use for three strikes enhancements.

365. ALA. CODE § 13A-5-9 (LexisNexis 2005). Alabama imposes different sentences depending on whether the third strike is a Class A, B, or C felony. For third strikes that are Class A felonies, an individual "must be punished by imprisonment for life or for any term of not less than 99 years." § 13A-5-9(b)(3). Class B felonies constituting third strikes are punished by "imprisonment for life or for any term of not more than 99 years but not less than 15 years." § 13A-5-9(b)(2).

366. Gordon v. Nagle, 647 So. 2d 91 (Ala. 1994); *Ex parte* Thomas, 435 So. 2d 1324, 1326 (Ala. 1982); Craig v. State, 893 So. 2d 1250 (Ala. Crim. App. 2004).

367. *Gordon*, 647 So. 2d 91; *Ex parte Thomas*, 435 So. 2d 1324; Phillips v. State, 462 So. 2d 981 (Ala. Crim. App. 1984); *Craig*, 893 So. 2d at 1263.

368. ALASKA STAT. § 12.55.125(l) (2010).

369. A juvenile adjudication is not a conviction in Alaska. ALASKA STAT. § 47.12.180(a)(3) (2010). However, a felony juvenile adjudication can be considered as an aggravating factor for sentencing purposes in adult court. § 12.55.155(c)(19). The law is silent with regards to whether juvenile adjudications may be considered specifically to enhance sentences under the habitual offender sentencing provision.

370. ARIZ. REV. STAT. ANN. § 13-706 (2010).

371. *See In re* Casey G., 224 P.3d 1016, 1017–18 (Ariz. Ct. App. 2010) (holding that a juvenile adjudication does not constitute a predicate felony for the purposes of a statute regulating dangerous crimes against children because the adjudication is not a conviction).

372. Arizona case law prohibits the use of juvenile adjudications to enhance future sentences in adult court because they are not "convictions." *Id.* In contrast, a juvenile found guilty in adult court is technically "convicted" of a crime. *See id.*

Arkansas	Forty to eighty years or life.[373]	No (per case law).[374]	Probably allowed.[375]
California	Twenty-five to life.[376]	Yes (per statute).[377]	Yes.[378]
Colorado	Life.[379]	Silent.[380]	Silent.
Connecticut[381]	Up to life.[382]	Silent, but case law says delinquency not criminal.[383]	Silent.
Delaware	LWOP.[384]	No (per case law).[385]	Probably.[386]

373. ARK. CODE ANN. § 5-4-501(c)(1) (1997 & Supp. 2011) (imposing forty to eighty year sentence, or life, for second conviction of serious felony involving violence); *id.* § 16-90-202 (imposing mandatory life sentence).

374. Vanesch v. State, 37 S.W.3d 196 (Ark. 2001).

375. Arkansas does not address whether convictions of juvenile offenders in adult court qualify as "prior convictions" for the habitual offender statute. However, the reasoning in *Vanesch v. State* implies that juvenile adjudications may not be used to enhance adult sentences under the habitual offender statute because they are not "convictions" and do not constitute findings of guilt. *Id.* at 201. This reasoning would not prohibit the use of juvenile convictions from adult courts to enhance future sentences.

376. CAL. PENAL CODE § 667(e)(2) (West 2010 & Supp. 2011).

377. *Id.* § 667(d)(3).

378. Convictions of juvenile defendants in adult court are treated as adult court convictions and may be used to enhance future sentences. People v. Jacob, 220 Cal. Rptr. 520, 523 (Ct. App. 1985).

379. COLO. REV. STAT. ANN. § 18-1.3-801(1)(a) (West 2004 & Supp. 2011).

380. Juvenile adjudications are not criminal convictions. S.G.W. v. People, 752 P.2d 86, 90 (Colo. 1988). However, they may be used as aggravating factors to increase sentences in adult court. People v. Mazzoni, 165 P.3d 719, 723 (Colo. App. 2006). No statutes or case law address whether juvenile adjudications may be considered to enhance sentences under Colorado's habitual offender sentencing law.

381. Connecticut is categorized as substantially different from California because its habitual offender statute grants judges significant discretion to determine the length of sentence under the statute. *See* CONN. GEN. STAT. ANN. § 53a-40(h) (West 2007 & Supp. 2011).

382. *Id.*

383. State v. Angel C., 715 A.2d 652, 659 (Conn. 1998).

384. DEL. CODE ANN. tit. 11, § 4214(b) (2007).

385. Fletcher v. State, 409 A.2d 1254, 1256 (Del. 1979).

386. In *Fletcher*, the court held juvenile convictions (in other jurisdiction's adult courts) that would have been processed in juvenile court under Delaware law cannot enhance sentences under state's the habitual offender law because the legislature indicated an intent "to treat juvenile offenders in a different manner than adult offenders." *Id.* This reasoning implies that juveniles processed through adult court under Delaware law should not be treated differently than adults.

District of Columbia	Fifteen years to LWOP.[387]	Silent, but statute requires "conviction."[388]	Silent.
Florida[389]	Ten or thirty year minimum, or life.[390]	No (statute requires conviction "as an adult").[391]	Yes.[392]
Georgia	LWOP for 2d strike.[393]	No (per case law).[394]	Yes.[395]
Hawaii	Three to twenty year minimum.[396]	Silent.	Silent.
Idaho	Five years to life.[397]	Silent.	Silent.
Illinois	Natural life.[398]	Probably not.[399]	Yes.[400]

387. D.C. CODE § 22-1804a (LexisNexis 2010). An individual who is convicted of a crime of violence after suffering two prior convictions for crimes of violence must be sentenced to at least fifteen years and may be sentenced up to life without parole. § 22-1804a (a)(2). An individual convicted of any three felonies may be sentenced up to thirty years. § 22-1804a (a)(1).

388. *Id.* § 22-1804a(b).

389. Florida is categorized as similar to California because it imposes lengthy, mandatory prison terms under its habitual offender statute. Florida enhances sentences for habitual offenders under four separate provisions (for "violent career criminals," "habitual felony offenders," "habitual violent felony offenders," and "three-time violent felony offenders"). FLA. STAT. ANN. § 775.084 (West 2010). The "violent career criminal" provisions are most similar to California's three strikes law because the statute imposes mandatory, lengthy sentences. A third-strike first degree felony is punished by life in prison under these provisions, and a second degree felony is punished by thirty to forty years. § 775.084(4)(d). Florida is different from California because its statute imposes different punishments depending on the type of third-strike conviction. For example, third degree felony is punished by ten to fifteen years in prison as a third strike under the "violent career criminal" provisions. *Id.*

390. *Id.* § 775.084(1)(d).

391. *Id.* § 775.084(1)(a)–(d) (requiring predicate felonies to be adult court convictions for "three time violent offender" and "violent career criminal" sentences).

392. Williams v. State, 994 So.2d 337 (Fla. Dist. Ct. App. 2008).

393. GA. CODE ANN. § 17-10-7 (2008).

394. Smith v. State, 596 S.E.2d. 230 (Ga. Ct. App. 2004).

395. Lee v. State, 600 S.E.2d 825, 829 (Ga. Ct. App. 2004).

396. HAW. REV. STAT. § 706-606.5(1)(b) (1993 & Supp. 2011).

397. IDAHO CODE ANN. § 19-2514 (2004).

398. 730 ILL. COMP. STAT. 5/5-4.5-95(a)(5) (West Supp. 2011).

399. Illinois requires prior "convictions." 730 ILL. COMP. STAT. 5/5-4.5-95(a). In *People v. Bryant*, the court reasoned that juveniles transferred to adult court are treated as adults, and their convictions can therefore be used to enhance future sentences under the habitual offender statute. People v. Bryant, 663 N.E.2d 105, 111 (Ill. App. Ct. 1996). This reasoning highlights the important distinction between convictions in adult criminal courts and adjudications in juvenile courts. As such, it is unlikely that juvenile adjudications would qualify as "convictions" under the habitual offender sentencing statute.

400. *Bryant*, 663 N.E.2d 105; People v. Banks, 569 N.E.2d 1388 (Ill. App. Ct. 1991).

Indiana	At least advisory range for the underlying offense, up to three times this range (but not more than thirty years).[401]	Silent.	Yes.[402]
Iowa	Three to fifteen years.[403]	Silent.[404]	Silent.
Kansas	Repealed habitual offender statute.[405]	No (per case law).[406]	Silent.
Kentucky	Twenty to fifty years, or life.[407]	No (per statute).[408]	No (must be at least eighteen years old for prior conviction to qualify as a strike).[409]
Louisiana	LWOP.[410]	No per 2010 statutory revisions.[411]	Yes (per case law).[412]
Maine	No habitual offender law		

401. IND. CODE ANN. § 35-50-2-8 (LexisNexis 2009). The sentence may not exceed thirty years. § 35-50-2-8(h).

402. Polk v. State, 783 N.E.2d 1253, 1262 (Ind. Ct. App. 2003).

403. IOWA CODE ANN. §§ 902.8–.9 (West 2006).

404. Iowa law does not specifically address whether a juvenile adjudication may enhance a sentence under the habitual offender sentencing law. The Iowa Supreme Court has indicated that enhancing a sentence under a recidivist sentencing scheme on the basis of a juvenile adjudication may contribute to rendering a punishment cruel and unusual. State v. Bruegger, 773 N.W.2d 862, 885–86 (Iowa 2009).

405. 2010 Kan. Sess. Laws 136 (repealing KAN. STAT. ANN. § 21-4711 (2007), the state's former habitual offender sentencing statute).

406. Prior to the repeal of Kansas' habitual offender sentencing statute, juvenile delinquency adjudications did not qualify as convictions for the purposes of enhancing sentences under the Habitual Criminal Act. Paige v. Gaffney, 483 P.2d 494, 495 (Kan. 1971). Kansas allows juvenile adjudications to be considered for sentencing under its amended code in calculating general criminal history scores.

407. KY. REV. STAT. ANN. § 532.080 (West 2006 & Supp. 2011).

408. *Id.* § 532.080(2)(b)–(3)(b).

409. *Id.*

410. LA. REV. STAT. ANN. § 15:529.1 (2011).

411. *Id.*

412. State v. Youngblood, 647 So. 2d 1388, 1391–92 (La. Ct. App. 1994).

Maryland	Twenty-five years; life for fourth strike.[413]	Probably not because statute requires time served in a "correctional facility" for prior.[414]	Yes (implied by case law).[415]
Massachusetts	Ten to fifteen years.[416]	Yes (if involves a deadly weapon).[417]	Yes.[418]
Michigan	Up to double the maximum.[419]	Silent.	Silent.
Minnesota	Presumptive sentence under guidelines.[420]	Probably not.[421]	Yes.[422]
Mississippi	LWOP.[423]	Probably not.[424]	Silent.
Missouri	Increases sentencing range to next class of felonies.[425]	Silent.	Silent.

413. MD. CODE ANN., CRIM. LAW § 14-101 (LexisNexis Supp. 2011).

414. *Id.* § 14-101(d)(1)(ii).

415. *See* Calhoun v. State, 418 A.2d 1241, 1246 (Md. Ct. Spec. App. 1980).

416. MASS. GEN. LAWS ANN. ch. 269, § 10G (West 2008). A bill is currently pending in Massachusetts that is substantially similar to California's three strikes law. H.B. 3818, 187th Gen. Court (Mass. 2011); S.B. 2080, 187th Gen. Court (Mass. 2011). This proposed legislation would require that individuals convicted of a third strike receive the maximum penalty for the offense, which would require life without parole sentences for many crimes. *Id.* Interestingly, juvenile adjudications are specifically excluded as prior convictions in the text of the proposed legislation. H.B. 3818, § 3; S.B. 2080, § 46.

417. MASS. GEN. LAWS ANN. ch. 140, § 121 (West Supp. 2011) (defining "violent crime" to "mean any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or possession of a deadly weapon that would be punishable by imprisonment for such term if committed by an adult").

418. *Id.*

419. MICH. COMP. LAWS ANN. § 769.11 (West 2006 & Supp. 2011).

420. MINN. STAT. ANN. § 609.1095 (West 2009).

421. *Id.* § 609.1095(2) (providing that courts may consider prior juvenile adjudications in determining the appropriate sentence to impose). *See supra* note 235.

422. Given that courts may consider prior juvenile adjudications, it is logical to conclude that courts may also consider convictions of juveniles in adult courts. *Id.*

423. MISS. CODE ANN. § 99-19-83 (2007).

424. The statute is silent as to whether juvenile adjudications qualify as prior convictions. However, a separate statute provides that "[n]o adjudication upon the status of any child shall operate to impose any of the civil disabilities ordinarily imposed on an adult because of a criminal conviction, nor shall any child be deemed a criminal by reason of adjudication, nor shall that adjudication be deemed a conviction." MISS. CODE ANN. § 43-21-561(5) (2009 & Supp. 2011). According to a practicing attorney in the state, prosecutors do not use juvenile adjudications as prior convictions under the habitual offender statute. E-mail from Brenda Locke, Pub. Defender, Jackson Cnty. Youth Court, to author (March 13, 2012, 12:08 PST) (on file with author).

425. MO. ANN. STAT. § 558-019 (West 1999 & Supp. 2012).

Montana	Ten to one hundred years.[426]	No (per statute and case law).[427]	Yes per case law.[428]
Nebraska[429]	Ten to sixty years.[430]	Probably not (per case law).[431]	Yes (per case law).[432]
Nevada	Five to twenty years; LWOP or life for fourth strike.[433]	Silent.	Silent.
New Hampshire	Ten to thirty years.[434]	Silent.	Silent.
New Jersey	LWOP (for conviction of certain specified violent crimes).[435]	No (per statute priors must occur when 18 years old).[436]	No (priors must occur when eighteen years old).[437]
New Mexico	Life.[438]	No (per statute).[439]	No (has to be at least eighteen).[440]
New York	Twelve to twenty-five years up to life.[441]	Probably not because statute excludes "youthful offenders."[442]	Yes (but youthful offender exception.[443]

426. MONT. CODE ANN. § 46-18-501 (2011); § 46-18-502.

427. *See id.* § 41-5-106.

428. State v. Mainwaring, 151 P.3d 53, 57 (Mont. 2007).

429. Despite the fact that there are a wide range of possible sentences under the habitual offender law, Nebraska is categorized as similar to California because it requires sentences of twenty-five to sixty years for some third strike offenses. NEB. REV. STAT. § 29-2221(1)(a)–(b) (2008).

430. *Id.* § 29-2221(1).

431. In *Kennedy v. Sigler*, a juvenile conviction from adult court was found to be properly used to enhance a sentence under the state's habitual criminal statute. Kennedy v. Sigler, 397 F.2d 556, 561 (8th Cir. 1968). The court's reasoning focused on the fact that the juvenile in that case had been tried in adult court and therefore was convicted of a crime. *Id.* In addition, the court reasoned that the defendant could have been sentenced to the adult penitentiary even if his case had remained in juvenile court, which would result in a felony conviction arising out of the juvenile court. *Id.* This reasoning would not apply under current law, which more clearly distinguishes the dispositions available in juvenile court from those available in adult court. *See* NEB. REV. STAT. § 43-286 (2008 & Supp. 2011).

432. *Kennedy*, 397 F.2d at 561.

433. NEV. REV. STAT. § 207.010 (2011); *id.* § 207.012.

434. N.H. REV. STAT. ANN. § 651:6 (2007 & Supp. 2011).

435. N.J. STAT. ANN. § 2C:43-7.1 (West 2005).

436. *Id.* § 2C:44-3(a) (defining a "persistent offender" as "a person who at the time of the commission of the crime is 21 years of age or over, who has been previously convicted on at least two separate occasions of two crimes, committed at different times, when he was at least 18 years of age").

437. *Id.*

438. N.M. STAT. ANN. § 31-18-23 (2010).

439. *Id.* § 31-18-23(C).

440. *Id.*

441. N.Y. PENAL LAW § 70.4 (McKinney 2009 & Supp. 2012); § 70.08.

442. N.Y. PENAL LAW § 60.10 (McKinney 2009); People v. Meckwood, 927 N.Y.S. 2d 729, 730 (N.Y. App. Div. 2011).

443. N.Y. PENAL LAW § 60.10.

North Carolina	LWOP.[444]	Probably not(per case law).[445]	Silent.
North Dakota[446]	Up to ten years to life.[447]	No (per statute).[448]	No (per statute must be adult when convicted of prior).[449]
Ohio	Mandatory increased sentences.[450]	No (per statute).[451]	Silent.
Oklahoma	Twenty to life.[452]	Silent.	Silent.
Oregon	Thirty years (but also requires a personality disorder).[453]	Probably not.[454]	Yes, but must be at least sixteen at time of commission of prior crime.[455]

444. N.C. GEN. STAT. ANN. § 14-7.12 (West 2000 & Supp. 2010).

445. Juvenile adjudications are not criminal convictions, and a minor processed through juvenile court cannot be sentenced to a term of imprisonment. Therefore, an adult court sentence could be enhanced under a statute that imposed additional penalties for defendants who commit offenses while serving terms of imprisonment. State v. Tucker, 573 S.E.2d 197, 200–01 (N.C. Ct. App. 2002). Although this case did not specifically address whether juvenile adjudications could be used to enhance sentences under the habitual offender statute, the decision emphasizes the importance of the distinction between juvenile adjudications and criminal convictions and thus implies that juvenile adjudications cannot be used as predicates for habitual offender sentencing.

446. North Dakota's statute provides increased maximum penalties but does not require minimum terms. N.D. CENT. CODE § 12.1-32-09 (1997 & Supp. 2011). Judges maintain discretion to determine the appropriate sentence. *Id.* Accordingly, North Dakota is categorized as substantially different from California.

447. *Id.* § 12.1-32-09(2).

448. *Id.* § 12.1-32-09(1)(c) (providing that the prior felonies must have been committed "when the offender was an adult").

449. *Id.*

450. OHIO REV. CODE ANN. § 2929.14(B)(2) (LexisNexis 2010). Ohio is categorized as substantially different from California because the enhancements provided are less severe than California's and judges maintain substantial discretion to determine the appropriate sentence. The Ohio statute requires courts to impose the maximum prison term authorized for the underlying offense for repeat violent offenders. *Id.* It also allows (but does not require) judges to impose additional prison terms of one to ten years. *Id.*

451. *Id.* § 2901.08(B).

452. OKLA. STAT. ANN. tit. 21, § 51.1(B)–(C) (West 2002).

453. OR. REV. STAT. ANN. § 161.725 (2011).

454. *See id.* § 419C.400(5).

455. *Id.* § 161.725(3)(a).

Pennsylvania	LWOP or twenty-five year minimum.[456]	No (per case law).[457]	Probably (implied by case law).[458]
Rhode Island	Up to twenty-five year enhancement.[459]	Probably not because statute requires prison sentence for prior.[460]	Silent.
South Carolina	Up to LWOP.[461]	No (per case law).[462]	Probably (implied by case law).[463]
South Dakota	Enhance to next class of felonies; life for fourth strike.[464]	Silent.	Silent.
Tennessee	LWOP.[465]	No (per statute).[466]	Probably.[467]
Texas	Life or twenty-five to ninety-nine years.[468]	No (although statute allows use for other enhancements).[469]	Silent.
Utah	Five years to life.[470]	No (per statute).[471]	Silent.
Vermont	Up to life for 4th strike.[472]	No (per case law).[473]	Yes per case law.[474]

456. 42 PA. CONS. STAT. ANN. § 9714 (West 2007).

457. Commonwealth v. Thomas, 743 A.2d 460, 461 (Pa. Super. Ct. 1999).

458. *See id.* at 465.

459. R.I. GEN. LAWS § 12-19-21 (2002).

460. In order to enhance a sentence under this provision, a prior conviction must have resulted in a prison sentence. *Id.* Minors whose cases are addressed in juvenile courts cannot be sentenced to adult prisons, which would seem to exclude juvenile adjudications as prior convictions under this statute. *See* § 14-1-26.

461. S.C. CODE ANN. § 17-25-45 (2003 & Supp. 2011).

462. State v. Ellis, 547 S.E.2d 490, 492 (S.C. 2001).

463. *See id.*

464. S.D. CODIFIED LAWS §§ 22-7-7 to -8 (2006).

465. TENN. CODE ANN. § 40-35-120(g) (2010).

466. *Id.* § 40-35-120(e)(3) ("A finding or adjudication that a defendant committed an act as a juvenile . . . shall not be considered a prior conviction for the purposes of this section unless the juvenile was convicted of the predicate offense in a criminal court and sentenced to confinement in the department of correction . . . .").

467. State v. Moore, 596 S.W.2d 841 (Tenn. Crim. App. 1980).

468. TEX. PENAL CODE ANN. § 12.42 (West 2011 & Supp. 2011). Texas has multiple habitual offender sentencing provisions. Section 12.42(d) most closely resembles California's three strikes law because it imposes mandatory sentences of life, or twenty-five years to ninety-nine years, for third strike offenses.

469. *Id.* § 12.42(f); *see also* Vaughns v. State, No. 04-10-00364-CR, 2011 WL 915700, at *4 (Tex. App. Mar. 16, 2011).

470. UTAH CODE ANN. § 76-3-203.5 (LexisNexis 2008 & Supp. 2011); § 78A-6-116.

471. *Id.* § 78A-6-116 (stating that juvenile adjudications may only be used to enhance the level or degree of an adult offense as specifically provided). The habitual offender statute does not specifically provide that juvenile adjudications may be used to enhance adult sentences. § 76-3-203.5.

472. VT. STAT. ANN. tit. 13, § 11 (2009).

473. State v. Rideout, 933 A.2d 706 (Vt. 2007).

474. *Id.*

Virginia	LWOP.[475]	No (per case law).[476]	Probably (implied by case law).[477]
Washington	LWOP.[478]	No (per statute).[479]	Yes (case law implies)[480]
West Virginia	Life[481]	No (per case law)[482]	Probably (implied by case law)[483]
Wisconsin	LWOP.[484]	No (per statute).[485]	Probably, but youthful offender exception.[486]
Wyoming	Ten to fifty years, life for fourth strike[487]	Silent.	Silent.

475. VA. CODE ANN. § 19.2-297.1 (2008).

476. Conkling v. Commonwealth, 612 S.E.2d 235, 238–39 (Va. Ct. App. 2005).

477. *See id.*

478. WASH. REV. CODE ANN. § 9.94A.570 (West 2010).

479. *Id.* § 9.94A.030; *see also* State v. Knippling, 206 P.3d 332, 335–36 (Wash. 2009).

480. *Knippling*, 206 P.3d 332.

481. W. VA. CODE ANN. § 61-11-18 (LexisNexis 2011).

482. Justice v. Hedrick, 350 S.E.2d 565, 568 (W. Va. 1986).

483. *See id.* The reasoning in *Hedrick* focuses on the importance of the distinction between juvenile delinquency cases (in juvenile court) and juvenile cases handled in adult criminal court. *Id.* at 567. For example, the decision references the importance of maintaining the confidentiality of juvenile offenders and of separating children's wrongful actions from those of adults. *Id.* Accordingly, the court concludes that a juvenile conviction from a Michigan adult court "may not be used for enhancement purposes pursuant to the West Virginia Habitual Criminal Statute" because the conviction would have been a juvenile offense, and therefore not a felony, in West Virginia. *Id.* at 568. Based on this reasoning, the decision implies that if the offense would have been processed in adult court in West Virginia, it would have been acceptable to use it as a prior conviction because the distinguishing features of juvenile offenses (i.e. that they are not felonies) would not apply.

484. WIS. STAT. ANN. § 939.62(2) (West 2005 & Supp. 2011).

485. *Id.* § 939.62(3)(a).

486. State v. Geary, 289 N.W.2d 375 (Wis. 1980).

487. WYO. STAT. ANN. § 6-10-201 (2011).