

JUVENILE JUSTICE AND PIRACY: PROSECUTIONS OF JUVENILE PIRATES IN THE UNITED STATES

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INTRODUCTION

Juvenile pirates are not “The Lost Boys” who live in Neverland and “don’t wanna grow up.”¹ In fact, the activities they engage in and the crimes they commit seem quite grown-up. Contrary to popular perceptions about piracy, these juveniles do not fly the Jolly Roger, have talking parrots, or wear eye patches. Rather, they carry AK-47s, pilot small skiffs on the high seas, and engage in kidnapping, ransom, and other violent crimes.² In a recent attack, a pirate who later claimed juvenile status kidnapped the crew of a United States commercial maritime vessel and held the ship’s captain for ransom for several days in the middle of the Indian Ocean.³ The United States should prosecute and punish perpetrators of these types of violent crimes against maritime navigation. However, the emergence of juveniles⁴ in piracy operations has resulted in many legal challenges for the United States and the entire international community, which, if left unresolved, will result in a failure to prosecute these juvenile offenders.

Recent cases involving juveniles—or pirates claiming to be juveniles—include: (1) *United States v. Muse*⁵ in the Southern District of New York; (2) the release of a juvenile pirate involved in the attack on the United States civilian sailboat, *S/V Quest*; (3) the German prosecution of Somali juveniles for their attack on the Dutch ship, *Tromp*; (4) the Spanish prosecution and conviction of two pirates for their attack on the Basque vessel,

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¹ PETER PAN (Disney 1953).

² Yvonne M. Dutton, *Bringing Pirates to Justice: A Case for Including Piracy Within the Jurisdiction of the International Criminal Court*, 11 *CHI. J. INT’L L.* 197, 198-99 (2010).

³ Grand Jury Indictment at 2-5, *United States v. Muse*, No. 1:S109-cr-00512-01-LAP (S.D.N.Y. Jan. 12, 2010), ECF No. 17.

⁴ For the purposes of this Comment, a juvenile is any individual under the age of eighteen years old. U.S. courts and courts of other countries have evaluated juvenile status determinations in piracy cases under the assumption that any individual under the age of eighteen constitutes a juvenile. *See infra* Parts II.A-B.

⁵ No. 1:S109-cr-00512-01 (LAP) (S.D.N.Y. Feb. 25, 2011).

Alakrana; (5) the Indian piracy prosecution for multiple attacks on Indian ships; (6) the Italian prosecution of four Somali juvenile pirates for their attack on the Italian cargo vessel, *Montecristo*; (7) the Seychellois piracy prosecution for the hijacking of an Iranian fishing vessel; and (8) the Malaysian prosecution of three juvenile pirates for the hijacking of a chemical tanker.⁶ These recent cases demonstrate that juvenile piracy is very much a global reality.

This Comment argues that the application of the current United States piracy statute, 18 U.S.C. § 1651, to juveniles is unconstitutional in light of the Eighth Amendment prohibition on cruel and unusual punishment because it would result in mandatory life imprisonment without parole for a non-homicide juvenile offender. Therefore, unless Congress amends the piracy statute, juvenile pirates should be charged under other applicable federal statutes. Furthermore, a determination as to whether a pirate is of juvenile status is an important step in the ability to prosecute juvenile pirates. Thus, this Comment suggests ways to determine age in cases where a piracy defendant claims juvenile status.

This Comment primarily focuses on legal guidelines for the prosecution of juvenile pirates in the United States, but discusses cases from other countries to demonstrate how they have dealt with juvenile piracy and to illustrate that it is an international issue affecting multiple nations. Part I provides background on modern piracy, international and local piracy laws, recent piracy prosecution patterns, and current piracy prosecution standards in the United States. Part II discusses the *Muse* piracy case, the release of a juvenile pirate by United States authorities, and recent piracy prosecutions in Germany, Spain, India, Italy, Seychelles, and Malaysia. Part III describes the conflict between the United States piracy statute and the Eighth Amendment prohibition on cruel and unusual punishment after the Supreme Court's decision in *Graham v. Florida*.⁷ Part IV provides recommendations for the prosecution of juvenile pirates, from the initial determination of juvenile status to the charging options available to the prosecution once a pirate is found to be a juvenile.

I. MODERN PIRACY LAWS AND PIRACY PROSECUTIONS

Modern-day piracy severely interferes with international maritime trade and commerce and poses serious dangers to the crews of commercial, civilian, and military vessels.⁸ Laws to combat piracy are found in customary international law, international legal treaties, and domestic legal codes.⁹

⁶ See *infra* Parts II.A-B.

⁷ 130 S. Ct. 2011 (2010).

⁸ See *infra* Part I.A.

⁹ See *infra* Part I.B.

Recently, many countries, including the United States, have made efforts to combat piracy through domestic prosecutions.¹⁰

A. *Modern Piracy*

Piracy has existed for centuries, tracing its beginnings to the Mediterranean Sea in 1190 B.C.¹¹ In the sixteenth and seventeenth centuries, piracy gained legitimacy through the emergence of the privateering industry in Europe.¹² During this period, the major European powers facilitated imperialist ambitions by licensing privateers to raid, attack, and rob rival powers.¹³ Piracy was eventually delegitimized in the nineteenth century by the 1856 Paris Declaration on Maritime Rights and the 1899 and 1907 Hague Conventions.¹⁴ Despite its de-legitimization, piracy as a criminal enterprise has survived, and over the past decade, piratical operations have significantly increased.¹⁵ The International Maritime Bureau (“IMB”) reported that, in 2011, there were 439 piracy attacks worldwide, 237 of which occurred off the coast of Somalia.¹⁶ In 2010, 445 attacks were reported, and the numbers of crewmembers taken hostage significantly increased—from 188 in 2006 to 1,181 in 2010.¹⁷ Similarly, in 2009, there were 406 piracy attacks, 196 of which occurred the Gulf of Aden or off the Somali coast.¹⁸

Although some small pirate gangs remain unconnected to any larger organizations, most modern-day piratical operations are organized criminal enterprises with access to sophisticated equipment and weapons.¹⁹ Modern-day pirates use small skiffs, global positioning systems, satellite phones, and weapons such as AK-47s and rocket-propelled grenades.²⁰ Most pirate

¹⁰ See *infra* Part I.C.

¹¹ Michael Gagain, *Neglected Waters: Territorial Maritime Piracy and Developing States: Somalia, Nigeria, and Indonesia*, 16 NEW ENG. J. INT’L & COMP. L. 169, 172 (2010).

¹² Jon D. Peppetti, *Building the Global Maritime Security Network: A Multinational Legal Structure to Combat Transnational Threats*, 55 NAVAL L. REV. 73, 87-88 (2008).

¹³ *Id.*

¹⁴ *Id.* at 88.

¹⁵ Dutton, *supra* note 2, at 210.

¹⁶ *Piracy Attacks in East and West Africa Dominate World Report*, ICC COMMERCIAL CRIME SERVS. (Jan. 19, 2012, 07:00), <http://www.icc-ccs.org/news/711-piracy-attacks-in-east-and-west-africa-dominate-world-report>.

¹⁷ *Hostage-Taking at Sea Rises to Record Levels, Says IMB*, ICC COMMERCIAL CRIME SERVS. (Jan. 17, 2011, 11:33), <http://www.icc-ccs.org/news/312-hostage-taking-at-sea-rises-to-record-levels-says-imb>.

¹⁸ DAVID F. MARLEY, *MODERN PIRACY* 174 (2011) (citing International Maritime Bureau statistics).

¹⁹ Peppetti, *supra* note 12, at 88.

²⁰ Gagain, *supra* note 11, at 173; see also MARLEY, *supra* note 18, at 31-33; Michael H. Passman, *Protections Afforded to Captured Pirates Under the Law of War and International Law*, 33 TUL. MAR. L.J.1, 5-6 (2008).

attacks consist of boarding large commercial ships in attempts to steal cargo or to hold ships' crews for ransom.²¹ Many times, pirates are able to board vessels and steal cargo or kidnap the crew fairly quickly and easily.²² Since most commercial freight must travel through narrow and congested thoroughfares—such as the Straits of Malacca, Suez Canal, and Strait of Bab el-Mandab—large ships must slow their speeds, providing prime targets for pirates piloting small and fast skiffs.²³ Furthermore, large commercial ships usually lack the necessary security to fend off pirate attacks, as they have small crews and rarely carry weapons on board.²⁴

Most academics and piracy experts suggest that purely economic reasons and opportunism motivate pirate attacks, and many cite increases in maritime traffic and the existence of “failed states,” such as Somalia, for the recent surge in piracy.²⁵ Between 1970 and 2006, seaborne trade increased by 300 percent; currently, approximately 80 percent of all global freight is transported by sea.²⁶ This large increase in maritime traffic, particularly with the widespread use of slow, large commercial vessels for transportation of freight, has provided manifold opportunities for the typical “cash, cargo, and ransom”-type piratical operations.²⁷ With the average ransom payment estimated at \$2 million, modern-day pirates can make significant sums per operation.²⁸ Furthermore, many citizens of failed states have turned to piracy as a source of income, and the lack of any stable central government or enforcement structure in these states has led to an inability to fight piracy at its source.²⁹

²¹ See Dutton, *supra* note 2, at 210-11.

²² *Id.* at 212 (noting that, “in many cases, pirates are able to board the ship and take hostages within fifteen to thirty minutes of being sighted” by the ship’s crew).

²³ *Id.* at 211.

²⁴ *Id.* However, it should be noted that the commercial shipping industry could employ minimal safety measures such as hiring private security guards and driving faster. Yet, many shipping companies are unwilling to take these steps in light of the increased costs of adding security measures. See Anna Mulrine, *Why the U.S. Military Is Wary of Open Warfare with Somali Pirates*, U.S. NEWS & WORLD REP. (Apr. 21, 2009), <http://www.usnews.com/news/world/articles/2009/04/21/why-the-us-military-is-wary-of-open-warfare-with-somali-pirates>.

²⁵ “In terms of opportunity, the huge amount of commercial maritime traffic provides pirates with plenty of targets. Seaborne trade increased some 300 percent from 1970 to 2006, from about 2.5 billion tons to about 7.5 billion tons per year.” Dutton, *supra* note 2, at 211; see also J. Peter Pham, *The Failed State and Regional Dimensions of Somali Piracy*, in *THE INTERNATIONAL RESPONSE TO SOMALI PIRACY: CHALLENGES AND OPPORTUNITIES* 31, 32 (Bibi van Ginkel & Frans-Paul van der Putten eds., 2010) (stating that the “failed state” of Somalia has largely contributed to the surge in piracy).

²⁶ Dutton, *supra* note 2, at 211.

²⁷ Passman, *supra* note 20, at 6.

²⁸ Gunmen alone can earn as much as \$20,000 from a piracy attack. See Dutton, *supra* note 2, at 211.

²⁹ See Passman, *supra* note 20, at 7; see also Pham, *supra* note 25, at 44 (explaining that Somalia has a social climate that condones the actions of pirates).

B. *International Law of Piracy*

For centuries, piracy has been subject to universal jurisdiction—any nation can prosecute piracy under its domestic laws, regardless of the pirates' nationalities or where the piratical acts took place.³⁰ Initially, universal jurisdiction arose from customary international law;³¹ however, it also currently stems from international treaty agreements, such as the United Nations Convention on the Law of the Sea³² ("UNCLOS") and the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation³³ ("SUA"). The traditional reason for subjecting piracy to universal jurisdiction was that the international community considered pirates to be *hostis humani generis*—enemies of all mankind—due to the heinous nature of their acts against ships and individuals of all nations and their disruption of international trade and commerce.³⁴ Furthermore, due to the development of the doctrine of freedom of the seas in the seventeenth century, lack of territorial jurisdiction made the prosecution of piracy very difficult, thus establishing the need for a jurisdictional basis that allowed any and all states to prosecute piracy.³⁵

Two main international treaties, UNCLOS and the SUA, provide a definition of the crime of piracy and a jurisdictional basis for the prosecution of piratical acts.³⁶ Although not all nations have ratified UNCLOS, it is generally understood to be the best substantiation of any international agreement as to the definition and jurisdictional bases of piracy.³⁷ In Article 100, UNCLOS requires states to cooperate in the repression of piracy.³⁸ In Article 101, UNCLOS defines piracy as:

any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed . . . on

³⁰ Dutton, *supra* note 2, at 203-04.

³¹ Peppetti, *supra* note 12, at 106.

³² United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

³³ Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 222 [hereinafter SUA].

³⁴ Dutton, *supra* note 2, at 203-04.

³⁵ Peppetti, *supra* note 12, at 106.

³⁶ *See infra* notes 37-44.

³⁷ Peppetti, *supra* note 12, at 91; *see also* Michael Bahar, *Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy Operations*, 40 VAND. J. TRANSNAT'L L. 1, 10 (2007) (stating that the definition of piracy in UNCLOS "has become customary international law, binding on all nations").

³⁸ UNCLOS, *supra* note 32, art. 100.

the high seas . . . against another ship or aircraft, or against persons or property on board such ship or aircraft . . . in a place outside the jurisdiction of any State[.]³⁹

The SUA also provides a definition of offenses related to violence against maritime navigation.⁴⁰ Unlike the brief definition provided by UNCLOS, Article 3 of the SUA provides a lengthy list of offenses that constitute piracy, including: (1) seizing or exercising control of a ship by force or intimidation; (2) performing “an act of violence against a person on board a ship;” (3) destroying or causing damage to a ship or its cargo; (4) placing a device on a ship that is likely to destroy that ship; (5) destroying or seriously damaging maritime navigational facilities; (6) communicating information known to be false that will endanger the safe navigation of a ship; and (7) injuring or killing any person in connection with the offenses just listed.⁴¹ Additionally, the jurisdictional bases in Article 6 of the SUA allow a state party to establish jurisdiction over an offense in a variety of situations.⁴² While commentators have pointed out flaws in both treaties,⁴³ it is generally acknowledged that the definitions and jurisdictional bases presented by UNCLOS and the SUA establish an international understanding regarding the offenses involved in piracy as well as a desire to see pirates prosecuted for their crimes against the international community.⁴⁴

C. *General Piracy Prosecution Information and Procedural Standards for Piracy Prosecutions in the United States*

Despite the fact that there is universal jurisdiction over piracy, states rarely use universal jurisdiction or provisions of UNCLOS and the SUA as bases for the prosecution of piracy.⁴⁵ Additionally, even if a state does exercise universal jurisdiction over piracy under UNCLOS and the SUA, that state must also have incorporated the treaty provisions into its domestic laws.⁴⁶ Furthermore, even when states do have domestic piracy laws, some

³⁹ *Id.* art. 101.

⁴⁰ SUA, *supra* note 33, art. 3.

⁴¹ *Id.*

⁴² *Id.* art. 6. Article 6 of the SUA allows a state party to establish jurisdiction over an offense when: “(a) it is committed by a stateless person whose habitual residence is in that State; or (b) during its commission a national of that State is seized, threatened, injured or killed; or (c) it is committed in an attempt to compel that State to do or abstain from doing any act.” *Id.* art. 6, § 2.

⁴³ See Dutton, *supra* note 2, at 205-10; Peppetti, *supra* note 12, at 96-98.

⁴⁴ See Dutton *supra* note 2, at 205-10; Peppetti, *supra* note 12, at 91-92.

⁴⁵ See Dutton, *supra* note 2, at 216; see also Peppetti, *supra* note 12, at 99-105 (discussing the universality principle and other bases for jurisdiction, including the territoriality principle, nationality principle, and protective principle).

⁴⁶ See Peppetti, *supra* note 12, at 111; see also *Anti-Piracy Bill on Anvil to Punish Sea Bandits*, MAIL TODAY (India), June, 29, 2011, available at 2011 WLNR 12886799 (noting that the lack of do-

of these laws fail to be comprehensive and uniform in their operation and application.⁴⁷ Thus, a state must overcome many legal challenges in order to prosecute piracy, and these challenges have led to a general reluctance amongst many nations to do so.⁴⁸ According to a report by U.S. Central Command, between August 2008 and September 2009, authorities have disarmed and released 343 pirates, whereas only 212 pirates have been arrested and sent for prosecution.⁴⁹ In light of the widespread failure to prosecute pirates for their crimes, many scholars have proposed to amend UNCLOS, calling for expanded jurisdiction, regional criminal piracy courts, and an international criminal tribunal for the prosecution of piracy.⁵⁰

Although many acts of piracy go unpunished,⁵¹ some nations have recently made efforts to prosecute piracy.⁵² For example, in 2008-2009, Kenya signed various treaties with the United States, Great Britain, the European Union, China, and others, agreeing to act as a venue for piracy prosecutions.⁵³ However, in March 2010, Kenya filed notices of its intent to withdraw from deals made with Canada, China, the United States, the European Union, the United Kingdom, and Denmark, citing its dissatisfaction with the low level of involvement from other countries in battling piracy and its concerns over repatriation after the release of prosecuted pirates.⁵⁴ Despite the failure of the Kenyan agreements, the international community has seen the appearance of piracy trials in a number of countries within recent years, specifically in the United States,⁵⁵ Spain,⁵⁶ Germany,⁵⁷ the Netherlands,⁵⁸

mestic piracy laws in India caused difficulties in prosecutions and required Indian authorities to prosecute pirates under other domestic criminal statutes).

⁴⁷ Dutton, *supra* note 2, at 216. Furthermore, some domestic piracy laws may be outdated and difficult to apply in modern piracy prosecutions. An example of this could be the United States piracy law, 18 U.S.C. § 1651, which has experienced little revision since its adoption in 1790 and, as will be discussed, is likely unconstitutional as applied to certain defendants. *See infra* Part III.C.

⁴⁸ *See* Dutton, *supra* note 2, at 216; *see also* Joseph M. Isanga, *Countering Persistent Contemporary Sea Piracy: Expanding Jurisdictional Regimes*, 59 AM. U. L. REV. 1267, 1287-89 (2010); Peppetti, *supra* note 12, at 111.

⁴⁹ Amitai Etzioni, *Somali Pirates: An Expansive Interpretation of Human Rights*, 15 TEX. REV. L. & POL. 39, 43 (2010) (citing Jon Ungood-Thomas & Marie Woolf, *Navy Releases Pirates Caught Red-Handed*, TIMES ONLINE (UK) (Nov. 29, 2009), <http://www.timesonline.co.uk/tol/news/world/africa/article6936318.ece>).

⁵⁰ *See* Isanga, *supra* note 48, at 1314; *see also* Dutton, *supra* note 2, at 224-25; Peppetti, *supra* note 12, at 141-42.

⁵¹ *See* Dutton, *supra* note 2, at 216-18; *see also supra* note 49 and accompanying text.

⁵² *See infra* notes 53, 55-64 and accompanying text.

⁵³ *See* Dutton, *supra* note 2, at 220.

⁵⁴ *See* Lillian Leposo, *Kenya Ends Agreement with EU to Prosecute Suspected Somali Pirates*, CNN (Oct. 04, 2010), http://articles.cnn.com/2010-10-04/world/kenya.eu.pirates_1_somali-pirates-kenyan-authorities-kenya-s-ministry?_s=PM:WORLD; Walter Menya, *Kenya: Nation's Neighbours Reluctant Host Courts to Try Somali Pirates*, DAILY NATION (Nairobi) (July 9, 2011), <http://allafrica.com/stories/201107111497.html>.

⁵⁵ *See* *Pirate Who 'Wanted to Kill Americans' Gets 33 Years for Hijacking U.S. Ship*, MSNBC (Feb. 16, 2011, 12:35 PM), http://www.msnbc.msn.com/id/41615693/ns/us_news-crime_and_courts/

South Korea,⁵⁹ India,⁶⁰ Italy,⁶¹ Seychelles,⁶² Malaysia,⁶³ and Yemen.⁶⁴ Although rarely used, some nations have invoked universal jurisdiction under UNCLOS in recent piracy prosecutions.⁶⁵ However, most states, including specifically the United States, continue to employ their own domestic laws when prosecuting piracy.⁶⁶

The United States prosecutes acts of piracy under 18 U.S.C. § 1651.⁶⁷ Regarding the proper procedural standards to apply to pirates prosecuted in the United States, commentators have discussed the application of U.S. constitutional rights,⁶⁸ international legal standards based on treaties,⁶⁹ and

t/pirate-who-wanted-kill-americans-gets-years-hijacking-us-ship/#.Tmuf5-vgK8U; see also Press Release, U.S. Attorney's Office for the Eastern District of Virginia, Five Somalis Sentenced to Life Plus 80 Years in Prison for Piracy Against USS Nicholas (Mar. 14, 2011), available at <http://www.justice.gov/usao/vae/news/2011/03/20110314hasannr.html>; Terry Frieden, 2 Somali Pirates Sentenced to Life in Killing of U.S. Citizens, CNN (Aug. 23, 2011, 7:17 AM), <http://www.cnn.com/2011/CRIME/08/22/us.somali.pirates>; *infra* Part II.A.

⁵⁶ See Alexandra Malatesta, *Spain Court Sentences Somali Pirates to 439 Years*, JURIST (May 3, 2011, 12:52 PM), <http://jurist.org/paperchase/2011/05/spain-court-sentences-somali-pirates-to-439-years.php>.

⁵⁷ See Ann Riley, *Germany Court Opens Country's First Piracy Trial in 400 Years*, JURIST (Nov. 22, 2010, 1:43 PM), <http://jurist.org/paperchase/2010/11/germany-court-opens-countrys-first-piracy-trial-in-400-years.php>.

⁵⁸ See Julia Zebley, *South Korea Court Sentences 4 Somali Pirates*, JURIST (May 27, 2011, 2:16 PM), <http://jurist.org/paperchase/2011/05/south-korea-court-sentences-4-somali-pirates.php>.

⁵⁹ See Julia Zebley, *Dutch Court Sentences 5 Somali Pirates*, JURIST (Aug. 12, 2011, 12:30 PM), <http://jurist.org/paperchase/2011/08/dutch-court-sentences-5-somali-pirates.php>.

⁶⁰ See V. Narayan, *Trial of Somali Pirates to Begin in Sept*, TIMES OF INDIA (Aug. 27, 2011, 1:10 AM), http://articles.timesofindia.indiatimes.com/2011-08-27/mumbai/29935621_1_somali-pirates-pirates-hijack-mv-maersk-kensington.

⁶¹ See Brandon Gatto, *Italy Court Orders Trial for Accused Somali Pirates*, JURIST (Feb. 21, 2012, 1:44 PM), <http://jurist.org/paperchase/2012/02/italy-court-orders-trial-for-accused-somali-pirates.php>.

⁶² See C.J. Chivers, *Somali Suspects in Hijacking of Iranian Ship Face Trial in Seychelles*, N.Y. TIMES, Mar. 7, 2012, at A5.

⁶³ See Andrea Bottorff, *Malaysia Court Charges Suspected Somali Pirates*, JURIST (Feb. 11, 2011, 12:22 PM), <http://jurist.org/paperchase/2011/02/malaysia-court-charges-suspected-somali-pirates.php>.

⁶⁴ See Sarah Miley, *Yemen Court Sentences 6 Somali Pirates to Death*, JURIST (May 18, 2010, 12:35 PM), <http://jurist.org/paperchase/2010/05/yemen-court-sentences-12-pirates-6-to-death.php>.

⁶⁵ See Peppetti, *supra* note 12, at 109-10 (discussing how Kenya and India prosecuted the *Alondra Rainbow* and *Safina Al Bisaarat* piracy cases using UNCLOS).

⁶⁶ See *infra* notes 67-94 and accompanying text.

⁶⁷ 18 U.S.C. § 1651 (2006); see also Daniel A. Lavrish, Comment, *Pirates, Ye Be Warned: A Comparative Analysis of National Piracy Laws*, 42 U. TOL. L. REV. 255, 261 (2010) (discussing substantive piracy law in the United States).

⁶⁸ See generally Bahar, *supra* note 37, at 47-56. Bahar notes that under Supreme Court precedent the United States does not necessarily have to apply Fourth Amendment protections to non-citizen pirates. *Id.* at 47-51. However, he argues that international law may insist upon these standards. *Id.* Additionally, Bahar argues for the full application of Fifth Amendment protections for non-citizen pirates, although he notes that this approach may cause the loss of useful intelligence. *Id.* at 51-56; see also *infra* note 73.

standards based on morality and human rights.⁷⁰ As indicated by recent piracy trials in the United States,⁷¹ anti-piracy operations by the United States Navy,⁷² Supreme Court decisions related to the constitutional rights of non-citizens,⁷³ and international legal standards,⁷⁴ non-citizen pirates are generally afforded most of the same criminal procedural standards as United States citizens.⁷⁵ In regards to sentencing under United States law, a conviction under § 1651 carries a mandatory life sentence.⁷⁶ While some commentators suggest that a mandatory life sentence appears harsh, they recognize that a lesser sentence would present problems regarding the handling of prisoners upon release.⁷⁷

⁶⁹ See Bahar, *supra* note 37, at 47 (arguing that the SUA Convention could oblige the United States to provide full Fourth Amendment protections).

⁷⁰ See Passman, *supra* note 20, at 20-21, 33, 37-39. Passman concludes that the Third and Fourth Geneva Conventions are not applicable to traditional categories of pirates. *Id.* However, Passman argues that procedural rights and protections are provided to pirates by virtue of basic human rights law that has been affirmed in international human rights treaties. *Id.*; see also Etzioni, *supra* note 49, at 47 (suggesting that allowing pirates the same procedural standards as citizens may not be in the public interest because of difficulties in meeting U.S. evidentiary standards and the need to balance the common good with the individual rights of pirates that commit heinous crimes and require punishment).

⁷¹ See *United States v. Hasan*, 747 F. Supp. 2d 642, 656-57 (E.D. Va. 2010), *aff'd sub nom. United States v. Dire*, 680 F.3d 446 (4th Cir. 2012). In the opinion and order for pre-trial motions in *Hasan*, the judge stated that the Fifth and Sixth Amendments apply to non-citizens, and thus applied to the non-citizen defendants in the *Hasan* case. *Id.* Furthermore, the judge found that one of the defendant's statements would be suppressed because the Naval investigator failed to provide him with his *Miranda* warnings. *Id.* at 660-62; see also *United States v. Said*, 757 F. Supp. 2d 554, 566-67 (E.D. Va. 2010) (holding that the charges of piracy against non-citizen defendants violated their due process rights), *vacated*, 690 F.3d 374 (4th Cir. 2012).

⁷² See Transcript of Age Hearing at 36-37, *United States v. Muse*, No. 1:S109-cr-00512-01-LAP (S.D.N.Y. Apr. 21, 2009) (on file with author) (witness testifying that the piracy defendant in the case was read his *Miranda* rights prior to interrogation); see also Bahar, *supra* note 37, at 51-52 (explaining that the U.S. Navy has made efforts to provide *Miranda* warnings to captured pirates prior to questioning).

⁷³ See *Plyler v. Doe*, 457 U.S. 202, 212-13 (1982) (reaffirming the conclusion that all persons within the territory of the United States, including non-citizens unlawfully present, receive Fifth, Sixth, and Fourteenth Amendment protections); see also *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010) (finding that an illegal alien was entitled to Sixth Amendment protections); *infra* Part III.B.

⁷⁴ See Passman, *supra* note 20, at 20-21, 33, 37-39 (arguing that procedural rights and protections are provided to pirates by virtue of customary international human rights law and international human rights treaties); see also Bahar, *supra* note 37, at 47 (asserting that the SUA Convention could oblige the United States to provide full Fourth Amendment protections to piracy defendants).

⁷⁵ See *supra* notes 68-74.

⁷⁶ 18 U.S.C. § 1651 (2006).

⁷⁷ One of the largest problems with a lesser sentence for a piracy conviction is related to the fact that many captured pirates are Somali natives who come from a country with no central government or stable governing power. See Lavrisha, *supra* note 67, at 225, 280-81. Thus, there is a concern that upon release and deportation many pirates would simply return to piracy because Somalia has no way to implement a parole program. *Id.*

Additionally, Chapter 81 of Title 18 outlines ancillary offenses to piracy.⁷⁸ Of the various charges included in Chapter 81, 18 U.S.C. § 1657,⁷⁹ 18 U.S.C. § 1658,⁸⁰ and 18 U.S.C. § 1659⁸¹ are the most appropriate ancillary charges with which to prosecute non-citizen pirates that attack maritime navigation on the high seas.⁸² Some recent U.S. piracy cases⁸³ have charged pirates under other federal statutes with offenses such as hostage taking,⁸⁴ conspiracy to engage in hostage taking,⁸⁵ kidnapping,⁸⁶ conspiracy to engage in kidnapping,⁸⁷ and possession and use of a firearm.⁸⁸ Lastly, perhaps the most appropriate alternative charges to piracy are contained within the section titled “Violence Against Maritime Navigation,” 18 U.S.C. § 2280,⁸⁹ which provides significant sentencing discretion to the courts.⁹⁰ The Violence Against Maritime Navigation section offers a detailed array of offenses in comparison to § 1651, including the following:

(a) Offenses.

(1) In general.—A person who unlawfully and intentionally—

- (A) seizes or exercises control over a ship by force or threat thereof or any other form of intimidation;
- (B) performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship;
- (C) destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship;
- (D) places or causes to be placed on a ship, by any means whatsoever,

⁷⁸ 18 U.S.C. §§ 1651-61; *see also* Lavrisha, *supra* note 67, at 263-65.

⁷⁹ 18 U.S.C. § 1657. Section 1657 makes it a crime to “attempt[] to corrupt any commander, master, officer, or mariner to yield up or to run away with any vessel, or any goods, wares, or merchandise, or to turn pirate or to go over to or confederate with pirates,” and mandates a sentence of a fine or imprisonment for a maximum of three years, or both. *Id.*

⁸⁰ *Id.* § 1658. Section 1658 makes it a crime to plunder, steal, or destroy money, goods, or other merchandise belonging to a distressed or stranded ship, and mandates a sentence of imprisonment from ten years to life. *Id.*

⁸¹ *Id.* § 1659. Section 1659 makes it a crime to “maliciously attack[] or set[] upon any vessel belonging to another, with an intent unlawfully to plunder the same, or to despoil any owner thereof of any moneys, goods, or merchandise laden on board thereof,” and mandates a sentence of a fine or imprisonment for a maximum of ten years, or both. *Id.*

⁸² The other offenses listed in Chapter 81 apply to actions by U.S. citizens, actions by sailors stationed on U.S. vessels, and the offenses of receipt of pirate property and robbery ashore. *See id.* §§ 1654-56, 1660-61.

⁸³ *See* Grand Jury Indictment, *supra* note 3, at 1-10; *see also* United States v. Hasan, 747 F. Supp. 2d. 642, 656 (E.D. Va. 2010), *aff’d sub nom.* United States v. Dire, 680 F.3d 446 (4th Cir. 2012).

⁸⁴ 18 U.S.C. § 1203(a) (2006).

⁸⁵ *Id.*

⁸⁶ *Id.* § 1201(a)(2).

⁸⁷ *Id.* § 1201(c).

⁸⁸ *Id.* §§ 922-24.

⁸⁹ *Id.* § 2280.

⁹⁰ 18 U.S.C. § 2280(a)(1)(H), (a)(2); *see also* Lavrisha, *supra* note 67, at 266 (asserting that, in comparison to the ancillary charges provided for in Chapter 81, the more modern provisions of § 2280 gives courts greater discretion in sentencing).

a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship;

(E) destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if such act is likely to endanger the safe navigation of a ship;

(F) communicates information, knowing the information to be false and under circumstances in which such information may reasonably be believed, thereby endangering the safe navigation of a ship;

(G) injures or kills any person in connection with the commission or the attempted commission of any of the offenses set forth in subparagraphs (A) through (F); or

(H) attempts or conspires to do any act prohibited under subparagraphs (A) through (G),

* * *

(2) Threat to navigation.—A person who threatens to do any act prohibited under paragraph (1) (B), (C) or (E), with apparent determination and will to carry the threat into execution, if the threatened act is likely to endanger the safe navigation of the ship in question . . .⁹¹

Regarding sentencing, § 2280 provides that any person who commits offenses (a)(1)(A)-(H) “shall be fined under this title, imprisoned not more than 20 years, or both.”⁹² Furthermore, if the death of any person resulted from the conduct prohibited in (a)(1)(A)-(H), the court may impose a sentence of death, imprisonment for a term of years, or life imprisonment.⁹³ Finally, for the offense of “threat to navigation” described in (a)(2), the statute provides that a court may impose a fine, imprisonment up to five years, or both.⁹⁴

As explained above,⁹⁵ although some piracy prosecutions have employed universal jurisdiction and international law, most countries choose to employ their own domestic laws and procedural standards when prosecuting piracy. Since the United States has a specific piracy statute, and therefore the ability to try pirates under its own domestic laws,⁹⁶ this Comment continues under the assumption that U.S. law primarily governs decisions related to prosecutions, procedural standards, and legal protections afforded to juvenile pirates. Accordingly, the following discussion will focus on the application of the U.S. Constitution, federal statutes, and Supreme Court precedent in determining an appropriate strategy for the United States to adopt in the prosecution of juvenile pirates.

⁹¹ 18 U.S.C. § 2280(a).

⁹² *Id.* § 2280(a)(1).

⁹³ *Id.*

⁹⁴ *Id.* § 2280(a)(2).

⁹⁵ See *supra* notes 65-75 and accompanying text.

⁹⁶ 18 U.S.C. § 1651.

II. RECENT CASES INVOLVING THE JUVENILE QUESTION

Within the past few years, the possibility that some captured pirates may be juveniles—and thus may require different treatment than adult pirates—has confronted many countries, including the United States. To date, the United States has avoided dealing with the issue of juvenile piracy through the use of plea bargains and at-sea releases.⁹⁷ However, other countries' experiences with juvenile pirates,⁹⁸ in addition to questions presented by a recent piracy case in the United States,⁹⁹ suggest that the United States must soon adopt a strategy for the prosecution of juvenile pirates. Furthermore, the Congressional Research Service and the United Nations Security Council have voiced concerns over the appearance of juveniles in piracy operations and the need to develop particular procedures for their prosecution.¹⁰⁰ Therefore, it is important to examine the problems that could arise when trying juvenile pirates in the United States. The following discussion examines recent cases in the United States and other countries in which the juvenile question was presented, followed by an assessment of the problems that could arise in juvenile piracy prosecutions.

A. United States v. Muse and the Recent Release of a Juvenile Pirate

Within the past few years, United States piracy prosecutions have reemerged to battle the growing piracy problem affecting U.S. and international maritime interests.¹⁰¹ Along with this surge in piracy prosecutions comes the possibility that some of the pirates the United States prosecutes may be juveniles.¹⁰² Recently, United States policymakers, judges, lawyers,

⁹⁷ See *infra* Part II.A.

⁹⁸ See *infra* Part II.B.

⁹⁹ See *infra* Part II.A.

¹⁰⁰ LAUREN PLOCH ET AL., CONG. RESEARCH SERV., PIRACY OFF THE HORN OF AFRICA 35 (2011), <http://www.fas.org/sgp/crs/row/R40528.pdf> (“A developing legal issue concerns the prosecution of juveniles participating in acts of piracy. Reports suggest that some of the Somali pirates are teenage minors, and therefore could have a defense of infancy in certain jurisdictions” (footnote omitted)); U.N. Secretary-General, *Report of the Secretary-General on Possible Options to Further the Aim of Prosecuting and Imprisoning Persons Responsible for Acts of Piracy and Armed Robbery at Sea off the Coast of Somalia*, ¶ 46, U.N. Doc. S/2010/394 (July 26, 2010) (“A significant number of suspects apprehended may be, or may claim to be, juveniles. The Security Council would need to consider whether special provision should be made for their treatment.”).

¹⁰¹ See *supra* notes 55, 71.

¹⁰² See Exhibit A (Lee V. Cassanelli, Short Paper on Piracy in Somalia) at 4, in Sentencing Submission of Abduwali Abdukhadir Muse, *United States v. Muse*, No. 1:S109-cr-00512-01-LAP (S.D.N.Y. Feb. 2, 2011), ECF No. 28 (asserting that youths from Somalia turn from a life of poverty to terrorism, religious movements, petty crime, and piracy); see also *infra* notes 117-146 and accompanying text.

and commentators recognized this prospect as a reality that will affect future piracy prosecutions.¹⁰³ Furthermore, two recent instances between Somali pirates and the United States¹⁰⁴ support the premise that the United States must adopt a strategy to deal with juvenile pirates.

In *United States v. Muse*,¹⁰⁵ a recent piracy case in the Southern District of New York, the United States confronted the possibility of juvenile piracy.¹⁰⁶ The defendant in this case, a Somali native named Abduwali Abdukhadir Muse, participated in a hijacking and hostage-taking operation on the *Maersk Alabama*, a commercial U.S. flag vessel.¹⁰⁷ During the hijacking, Muse and his confederates repeatedly fired weapons while threatening and detaining crewmembers.¹⁰⁸ After several hours, the pirates kidnapped Captain Richard Phillips and proceeded to hold him hostage on a lifeboat in the Indian Ocean for five days.¹⁰⁹ During ransom negotiations with U.S. authorities, Muse and the other pirates threatened to kill, injure, or continue to detain Captain Phillips unless they were guaranteed safe passage from the scene.¹¹⁰ Subsequently, the U.S. Navy initiated a standoff and rescue operation, during which Muse and his confederates refused to release Captain Phillips.¹¹¹ Consequently, in order to rescue Captain Phillips, members

¹⁰³ For a discussion of the legal and moral issues raised by a potential juvenile piracy trial, see Devlin Barrett, *Teen Piracy Suspect Raises Legal, Moral Issues*, SEATTLE TIMES (Apr. 13, 2009, 2:00 PM), http://seattletimes.nwsource.com/html/nationworld/2009033081_appiracyyoungsuspect.html. The article reported that, in a public statement in 2009, former Secretary of Defense Robert Gates referred to some Somali pirates as “[u]ntrained teenagers with heavy weapons.” *Id.* Additionally, the article stated that an advocate for Human Rights Watch insisted that juvenile pirates must be entitled to international legal standards afforded to juvenile offenders. *Id.* Moreover, the article reported that the Dean Kenneth Randall of the University of Alabama School of Law noted that the age of a pirate is likely to affect his or her eventual sentence. *Id.*; see also PLOCH, *supra* note 100, at 29; *Mystery Surrounds Somali Teen Pirate*, USA TODAY (Apr. 21, 2009, 5:50 PM), http://www.usatoday.com/news/world/2009-04-21-teen-pirate-suspect_N.htm (reporting that New York legal experts stated that age would significantly affect how Muse would be treated in the short term and long term and that “getting [Muse] treated as an adult [would] ‘avoid difficult and cumbersome proceedings’” for the federal prosecutors (quoting Professor Daniel Richman, Columbia Law School)).

¹⁰⁴ See *infra* notes 117-146 and accompanying text.

¹⁰⁵ No. 1:S109-cr-00512-01-LAP (S.D.N.Y. Feb. 25, 2011).

¹⁰⁶ See Transcript of Age Hearing, *supra* note 72, at 2-3; see also *infra* notes 117-143 and accompanying text.

¹⁰⁷ Complaint at 6-9, *Muse*, No. 1:S109-cr-00512-01-LAP (S.D.N.Y. Apr. 21, 2009), ECF No. 1.

¹⁰⁸ Grand Jury Indictment, *supra* note 3, at 2-5.

¹⁰⁹ *Id.* at 5-7; see also Government’s Memorandum in Connection with the Sentencing of Abduwali Abdukhadir Muse at 9-10, *Muse*, No. 1:S109-cr-00512-01-LAP (S.D.N.Y. Feb. 09, 2011), ECF No. 29 [hereinafter Government’s Sentencing Submission].

¹¹⁰ Grand Jury Indictment, *supra* note 3, at 5-7.

¹¹¹ Government’s Sentencing Submission, *supra* note 109, at 11.

of the Navy SEALs killed all of Muse's confederates.¹¹² The Navy captured and transported Muse to the United States for prosecution.¹¹³

A Grand Jury indicted Muse on charges of hijacking a ship, conspiracy to hijack three ships, hostage taking, conspiracy to engage in hostage taking, kidnapping, conspiracy to engage in kidnapping, using and carrying a firearm in furtherance of a crime of violence, and piracy under 18 U.S.C. § 1651.¹¹⁴ Muse subsequently pled guilty to the hijacking and hostage-taking charges in return for the dismissal of the firearm charges and the piracy charge under § 1651.¹¹⁵ The court sentenced Muse to the maximum prison term of thirty-three and a half years, fined him \$550,000 in criminal penalties, and recommended him for mental health treatment and English education in prison.¹¹⁶

Shortly following his capture and arrival in the United States for prosecution, the possibility arose that Muse was a juvenile.¹¹⁷ National and international news sources reported multiple statements by Muse's defense team saying that he was a juvenile; however, prosecutors insisted he was over eighteen.¹¹⁸ Legal experts pointed out that age would greatly affect the ease of prosecution and that it was important from a prosecutorial perspective for Muse to be "treated as an adult to 'avoid difficult and cumbersome proceedings.'"¹¹⁹ Many commentators also suggested that a finding of Muse as a juvenile could result in less culpability, access to a juvenile court, and sentencing leniency.¹²⁰

In order to resolve this issue, the court held an age hearing to determine whether it would treat Muse as a juvenile.¹²¹ During the hearing, the prosecution presented one witness, a detective who interviewed Muse on his flight from Djibouti to the United States.¹²² The detective testified that

¹¹² *Id.* at 12.

¹¹³ MARLEY, *supra* note 18, at 110-11; see Government's Sentencing Submission, *supra* note 109, at 7; see also S. Res. 108, 111th Cong. (2009) ("Commending Captain Richard Phillips, the crew of the 'Maersk Alabama,' and the United States Armed Forces, recognizing the growing problem of piracy off Somalia's coast, and urging the development of a comprehensive strategy to address piracy and its root causes.").

¹¹⁴ Grand Jury Indictment, *supra* note 3, at 1-10.

¹¹⁵ Judgment in a Criminal Case at 1, United States v. Muse, No. 1:S109-cr-00512-01-LAP (S.D.N.Y. Feb. 25, 2011), ECF No. 31.

¹¹⁶ *Id.* at 1-8; see also Docket Sheet, Muse, No. 1:S109-cr-00512-01-LAP (S.D.N.Y. Feb. 25, 2011).

¹¹⁷ See *infra* notes 118-121 and accompanying text.

¹¹⁸ See Abduwali Abdukhadir Muse, N.Y. TIMES (Feb. 16, 2011), http://topics.nytimes.com/top/reference/timestopics/people/m/abduwali_abdukhadir_muse/index.html (reporting the debate over Muse's age); see also Barrett, *supra* note 103; Mystery Surrounds Somali Teen Pirate, *supra* note 103.

¹¹⁹ See Barrett, *supra* note 103; Mystery Surrounds Somali Teen Pirate, *supra* note 103 (quoting Professor Daniel Richman, Columbia Law School).

¹²⁰ See Barrett, *supra* note 103; Mystery Surrounds Somali Teen Pirate, *supra* note 103.

¹²¹ Transcript of Age Hearing, *supra* note 72.

¹²² *Id.* at 29-37.

Muse laughed when asked his age, apologized to the detective for lying about his age, and subsequently stated he was between eighteen and nineteen.¹²³ He also testified that Muse remained unable to provide him with a date of birth or proof of his age because there was no government—and thus no birth record—when he was born.¹²⁴ The defense chose not to call Muse to the stand during the age hearing.¹²⁵ Rather, the defense presented Muse's father as its sole witness, who testified that Muse was born in November 1993—a birthdate which would have made him sixteen at the time of his attack on the *Maersk Alabama*.¹²⁶ However, Muse's father provided conflicting evidence when he stated that his fourth oldest child was born in 1990 because he had earlier testified that Muse was his oldest child.¹²⁷ Citing the persuasiveness of the detective's testimony, the conflicting testimony of Muse's father, and the failure of Muse to testify as to his own age, the district court concluded that Muse was over eighteen and thus subject to trial as an adult.¹²⁸

Despite the district court's ruling on age, Muse's age continued to be a topic of dispute since he had no birth certificate, and there was conflicting evidence presented at his age hearing.¹²⁹ This supposition is supported in part by the fact that, as part of Muse's plea bargain with the government,¹³⁰ the defense agreed not to pursue the age question through an appeal.¹³¹ The arguments and evidence presented by the parties during Muse's sentencing phase further reinforce this possibility.¹³² In the government's sentencing brief, it asserted that Muse was eighteen at the time of the piracy attack, and thus deserved the maximum prison sentence in light of the severity of his offenses.¹³³ On the other hand, in Muse's sentencing brief, the defense continued to argue that Muse was sixteen at the time of his participation in the piracy attack and offered additional evidence that was not presented at

¹²³ *Id.* at 29-30.

¹²⁴ *Id.* at 33.

¹²⁵ *Id.* at 43.

¹²⁶ *Id.* at 39-40.

¹²⁷ Transcript of Age Hearing, *supra* note 72, at 42.

¹²⁸ *Id.* at 46-48.

¹²⁹ See Benjamin Weiser, *Leniency of Sentence for Somali Hijacker Is at Issue*, N.Y. TIMES, Feb. 14, 2011, at A24 (reporting that, even after Muse's age hearing, the age dispute amongst the two parties continued into the sentencing phase of the case).

¹³⁰ Muse pled guilty to hijacking and hostage-taking in return for the dismissal of the firearm and piracy charges (charges which would have made him eligible for a life term). See *supra* note 115.

¹³¹ See E-mail from Philip Weinstein, Fed. Defenders of N.Y., Def. Counsel in *United States v. Muse*, to Lauren Hahn (author) (Sept. 7, 2011, 11:09 EST) (on file with author) ("We resolved the issue [of age] as part of the plea negotiations so there was no litigation on that issue. In exchange for dropping the mandatory life sentence for piracy, we did not contest age."); see also Government's Sentencing Submission, *supra* note 109, at 17 (explaining the terms of Muse's plea agreement included a waiver of any challenge to his conviction based on his age).

¹³² See *infra* notes 133-142.

¹³³ Government's Sentencing Submission, *supra* note 109, at 21, 34.

Muse's age hearing.¹³⁴ The defense offered affidavits from Muse's family members stating that Muse was under eighteen at the time of his offenses.¹³⁵ Muse's mother asserted that she gave birth to him in 1993 and that he was the oldest of the four children she had with Muse's father.¹³⁶ Muse's brother—who claimed to be sixteen at the time of his affidavit in January 2011—asserted that Muse is approximately one year older than him, which would have made Muse fifteen or sixteen at the time of his offense in 2009.¹³⁷

Additionally, the defense pointed out that upon capture, Muse initially stated he was sixteen years old, a statement U.S. authorities recorded in the *U.S.S. Bainbridge's* ship log upon Muse's transfer to that ship for medical treatment.¹³⁸ Furthermore, the defense stated that it chose not to submit an affidavit from Muse out of concern that Muse's discussion of his own age could violate the plea agreement in which he agreed to be prosecuted as an adult.¹³⁹ Lastly, the defense explained how the lack of birth registration systems in Somalia has resulted in the inability of many Somali youth to know their own ages.¹⁴⁰ The defense argued that, despite the lack of birth records, Muse's dental records indicated he was likely between seventeen and twenty-one years old a few months after his arrest.¹⁴¹ Moreover, the defense cited various studies for the proposition that the teeth of Africans develop more quickly than those of Western populations, thus oftentimes resulting in overestimates of age for African youth.¹⁴² Ultimately, however, any possibility of Muse being a juvenile did not result in sentencing leniency, and the district court gave Muse the maximum sentence of thirty-three and a half years due to the gravity of his crimes.¹⁴³

¹³⁴ Sentencing Submission of Abduwali Abdukhadir Muse, *supra* note 102, at 22-25, United States v. Muse, No. 1:S109-cr-00512-01-LAP (S.D.N.Y. Feb. 2, 2011), ECF No. 28.

¹³⁵ *Id.* at 22.

¹³⁶ Exhibit F (Affirmation of Adar Abdirahman Hassan) ¶¶ 3-4, in Sentencing Submission of Abduwali Abdukhadir Muse, *supra* note 102.

¹³⁷ *Id.* ¶¶ 1-3.

¹³⁸ Sentencing Submission of Abduwali Abdukhadir Muse, *supra* note 102, at 22 n.10; see Exhibit L (Ship's Deck Log Sheet), in Sentencing Submission of Abduwali Abdukhadir Muse, *supra* note 102 (noting that "ONE PIRATE IS ONBOARD. 16 YRS OLD.").

¹³⁹ Sentencing Submission of Abduwali Abdukhadir Muse, *supra* note 102, at 22 n.10.

¹⁴⁰ *Id.* at 23.

¹⁴¹ *Id.*

¹⁴² *Id.* at 23-24 (citing Lesley E. Davidson & Helen D. Rodd, *Interrelationship Between Dental Age and Chronological Age in Somali Children*, 18 COMMUNITY DENTAL HEALTH 27 (2001); A. Olze et al., *Comparative Study on the Effect of Ethnicity on Wisdom Tooth Eruption*, 121 INT'L J. LEGAL MED. 445, 447 (2007); Andreas Olze et al., *Studies of the Chronological Course of Wisdom Tooth Eruption in a Black African Population*, 52 J. FORENSIC SCI. 1161, 1162-63 (2007)).

¹⁴³ Because the plea bargain between Muse and the government dismissed Muse's piracy charges under § 1651, he was not subject to the mandatory life sentence required by the piracy statute. See Judgment in a Criminal Case, *supra* note 115, at 3-4; see also *Pirate Who 'Wanted to Kill Americans' Gets 33 Years for Hijacking U.S. Ship*, *supra* note 55 (reporting that the judge in the Muse case rejected

In addition to the *Muse* case, there was another recent interaction between a juvenile pirate and United States authorities following a February 2011 pirate attack on the *S/V Quest*, a United States civilian vessel.¹⁴⁴ After the pirates killed the four civilians traveling on the *Quest*, U.S. authorities boarded the vessel and arrested the fifteen pirates responsible for the hijacking and murders.¹⁴⁵ However, according to Neil MacBride, the U.S. Attorney for the Eastern District of Virginia, U.S. authorities released one of the fifteen pirates at sea because he was a juvenile.¹⁴⁶

B. *International Cases Involving the Issue of Juvenile Piracy—Spain, Germany, India, Italy, Seychelles, and Malaysia*

The following case studies demonstrate that other countries have recognized the potential conflicts inherent in prosecuting juvenile piracy and are responding to the juvenile piracy question in various ways. Although some of the succeeding cases resulted in the determination that a pirate was of majority age, they demonstrate that other countries are attempting to extensively investigate and resolve issues related to juvenile piracy. Furthermore, the following cases in which pirates were found to be juveniles support the conclusion that juvenile piracy does exist and should be dealt with accordingly.

Spain recently convicted defendant Abdu Willy of piracy on the Basque vessel *Alakrana* and sentenced him to 439 years in prison.¹⁴⁷ Early in the case, Willy claimed juvenile status, at which point the judge ordered Willy to be removed to a juvenile facility and placed under the control of Spain's juvenile justice system.¹⁴⁸ For over two weeks, authorities conducted forensic and medical tests on Willy in order to discover his age.¹⁴⁹ The

Muse's plea for leniency and stated that the imposed sentence was necessary to punish someone who "appeared to relish [his] most depraved acts").

¹⁴⁴ See Press Release, Secretary of State Hillary Rodham Clinton, U.S. Dep't of State, Pirate Attack on the *S/V QUEST* (Feb. 22, 2011), available at <http://www.state.gov/secretary/rm/2011/02/156912.htm>.

¹⁴⁵ See *14 Indicted for Piracy over US Yacht Killings*, MSNBC (Mar. 10, 2011, 6:21 PM), http://www.msnbc.msn.com/id/42007399/ns/us_news-crime_and_courts/t/indicted-piracy-over-us-yacht-killings/#.ToemhOvgK8V.

¹⁴⁶ See *id.*

¹⁴⁷ *Spain Jails 2 Somali Pirates for 439 Years*, MANILA BULL. (May 6, 2011, 2:17 PM), <http://www.mb.com.ph/articles/317038/spain-jails-2-somali-pirates-439-years>.

¹⁴⁸ *Spain to Free Young Somali Pirate Suspect*, REUTERS (Oct. 20, 2009, 5:45 PM GMT), <http://af.reuters.com/article/topNews/idAFJOE59J0K620091020>; see also *Judge Orders Return to Prison for Somali Pirate Abdu Willy*, EITB ONLINE (Nov. 4, 2009), <http://www.eitb.com/en/news/detail/283127/judge-orders-return-prison-somali-pirate-abdu-willy>.

¹⁴⁹ See EITB ONLINE, *supra* note 148; see also S.A.N., May 3, 2011 (No. 10/2011) (Spain) at 19-21 [hereinafter Willy Sentencing Memorandum], available at http://www.elpais.com/elpaismedia/ultimahora/media/201105/03/espana/20110503elpepunac_2_Pes_PDF.pdf.

Spanish judge concluded Willy was over eighteen, explaining that subsequent medical and forensic tests had sufficiently discounted the initial indication that he was sixteen years old.¹⁵⁰ The judge cited three main forensic conclusions to support his decision: (1) Willy's weight and height were consistent with those of an adult; (2) an X-ray of his left hand demonstrated majority age; and (3) an X-ray of his clavicle suggested he was over eighteen years of age.¹⁵¹

In its first piracy trial in 400 years, Germany confronted the juvenile piracy problem in 2010 when several accused Somali pirates claimed they were under eighteen years old at the time of their offenses.¹⁵² Consequently, Germany is trying part of the piracy trial in juvenile court.¹⁵³ Most of the accused claimed ages from sixteen to twenty-eight; however, one of the accused asserted he was only thirteen at the time of the offenses.¹⁵⁴ By April 2011, the German court had recognized only one of the pirates, Abdiwali, as a juvenile.¹⁵⁵ In a lengthy article published by *Spiegel Online*, journalist Beate Lakotta interviewed Abdiwali and discussed Germany's strategy for dealing with the juvenile pirates.¹⁵⁶ Lakotta explained that Abdiwali was the only recognized juvenile as of April 2011.¹⁵⁷ She described the court's indecision regarding a prosecutorial strategy for the other alleged juvenile pirates and its struggle to determine the pirates' ages using various forensic tests.¹⁵⁸ Like the *Muse* case, many of the Somali pirates on trial in Germany could not provide any type of birth record or exact birth date due to the lack of government and general instability in Somalia.¹⁵⁹ However, as of January 25, 2012, forensic tests had determined that three of the pirates on trial

¹⁵⁰ Willy Sentencing Memorandum, *supra* note 149, at 19-21.

¹⁵¹ *Id.* at 20.

¹⁵² Francis Curta, *First Piracy Trial in 400 Years Opens in Germany*, GOOGLE NEWS (Nov. 22, 2010), <http://www.google.com/hostednews/afp/article/ALeqM5hN-h7lv9JheJC3yMnb6YGJH33r1g?docId=CNG.40ccdba1d2b38c4e26b3b463d9579d0d.7f1>.

¹⁵³ Karin Matussek, *Somalis Face Hamburg Court in First German Piracy Trial for Four Centuries*, BLOOMBERG (Nov. 22, 2010, 8:54 AM), <http://www.bloomberg.com/news/2010-11-22/ten-somalis-are-tried-in-hamburg-court-over-indian-ocean-pirate-attack.html>.

¹⁵⁴ Curta, *supra* note 152; *see also* Matussek, *supra* note 153. During argument as to the age of the supposed thirteen-year-old pirate, prosecutors presented two experts—one stated that the accused was at least fifteen, while another found him to be over eighteen. Matussek, *supra* note 153. The defense team countered this argument by stating that the experts erred because they did not take into account the accused's peer group, but rather, compared him to western peer groups. *Id.*

¹⁵⁵ *See* Beate Lakotta, *German Justice Through the Eyes of a Somali Pirate*, SPIEGEL ONLINE (Apr. 7, 2011), at 2, <http://www.spiegel.de/international/world/0,1518,755340,00.html>.

¹⁵⁶ *See id.* at 1.

¹⁵⁷ *Id.* at 2.

¹⁵⁸ *Id.*

¹⁵⁹ *See id.* at 4; *see also* *Court Faces Daunting Hurdles in Hamburg Pirate Trial*, SPIEGEL ONLINE (Jan. 18, 2011), <http://www.spiegel.de/international/world/0,1518,740122,00.html>.

were, in fact, juveniles.¹⁶⁰ Thus, these pirates are subject to Germany's juvenile law and will face imprisonment for no longer than ten years.¹⁶¹

Within the past two years, India also has been grappling with the issue of juvenile piracy.¹⁶² Like Spain and Germany, India is using forensic testing to determine the ages of nineteen Somali pirates that the government suspected of being minors.¹⁶³ On May 25, 2011, after the capture and arrest of the pirates for hijacking and hostage-taking, India's Deputy Director General of Shipping sent a letter to Indian police stating that some of the pirates were juveniles and could be tried under India's Juvenile Justice Act.¹⁶⁴ In response to this assertion by the Deputy Director General, the government selected nineteen pirates for bone, teeth, and other forensic tests.¹⁶⁵ As of June 21, 2011, forensic testing had confirmed that nine of the nineteen pirates were adults at the time of their offenses, while ten others continued testing.¹⁶⁶

Italy has recently encountered the juvenile piracy problem after charging nine Somali pirates for hijacking the *Montecristo*, an Italian cargo vessel.¹⁶⁷ Italian authorities determined that four of the pirates were juveniles; thus, they will be tried in the Tribunale dei Minori, Italy's juvenile court.¹⁶⁸

Seychelles, too, is battling the issue of juvenile piracy—Seychellois officials have expressed concern over the treatment of two juveniles involved in a current piracy prosecution for an attack on an Iranian fishing boat.¹⁶⁹ Regarding a possible resolution, Seychelles' Assistant Secretary of

¹⁶⁰ See *German Prosecutor Urges Jail in Somali Piracy Trial*, REUTERS (Jan. 25, 2012, 6:31 PM GMT), <http://af.reuters.com/article/somaliaNews/idAFL5E8CP3HR20120125>.

¹⁶¹ *Id.* As of September 12, 2012, the Germany trial had not been resolved. See Beate Lakotta, Op-Ed., *Germany's Somali Pirate Trial Is Pointless*, SPIEGEL ONLINE (Sept. 12, 2012) ("This marks the 100th day of the Somali piracy trial in Hamburg . . . Four judges, four lay judges, two prosecutors, 10 other court employees, 20 defense attorneys and three Somali language interpreters—along with numerous expert witnesses on subjects including conditions in war-torn Somalia, the estimation of age through carpal bone analysis, bullet holes and the Urdu language—have jointly managed to bring to light no more than what was known from the start—after all, the 10 defendants were caught red-handed by Dutch marines who stormed the ship.").

¹⁶² See *India Readies Anti-Piracy Law with More Teeth*, TIMES OF INDIA (June 29, 2011, 2:52 AM IST), http://articles.timesofindia.indiatimes.com/2011-06-29/india/29717029_1_anti-piracy-law-somali-pirates-aden (reporting that the appearance of "child pirates" amongst recently captured pirates has further complicated prosecutorial decisions); see also Mateen Hafeez, *Tests on Pirates to Determine Age*, TIMES OF INDIA (June 21, 2011, 1:00 AM IST), http://articles.timesofindia.indiatimes.com/2011-06-21/mumbai/29682867_1_somali-pirates-taloja-jail-indian-navy.

¹⁶³ Hafeez, *supra* note 162.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* As of September 2, 2012, there was no additional information as to the results for the final ten pirates.

¹⁶⁷ See Gatto, *supra* note 61.

¹⁶⁸ *Id.*

¹⁶⁹ See Chivers *supra* note 62.

State for Political-Military Affairs stated that the Seychelles and the United States would work with the United Nations for the repatriation of the two pirates if they were found to be juveniles.¹⁷⁰

Finally, Malaysia is prosecuting three fifteen-year-old pirates in connection with the hijacking of a merchant ship in the Gulf of Aden.¹⁷¹ Malaysian prosecutors have confirmed that the three juveniles will not face execution because they are underage.¹⁷²

III. EIGHTH AMENDMENT CONFLICT WITH THE UNITED STATES PIRACY STATUTE AS APPLIED TO JUVENILES

The preceding U.S. and international case studies demonstrate that juvenile piracy is an issue the United States must evaluate in order to identify and resolve any issues that could arise in the prosecution of juvenile pirates. Although the *Muse* Court ultimately determined *Muse* was an adult, the existence of an agreement not to pursue an age appeal and the evidence presented in *Muse*'s sentencing brief present the possibility that an appellate court may have found *Muse* to be of juvenile status.¹⁷³ At the very least, the *Muse* case demonstrates that only limited avenues were taken to discover *Muse*'s age; the government did not conduct forensic testing on *Muse*, but rather, avoided the issue entirely through a plea bargain.¹⁷⁴ Moreover, the release of a juvenile pirate following the attack on the *S/V Quest* illustrates the reality of juvenile piracy, as well as a potential reluctance by United States authorities to prosecute juvenile pirates.¹⁷⁵ This reluctance may be due in part to the conflicts described in this Part as well as the United States' concerns over international criticism regarding its treatment of juvenile offenders.¹⁷⁶

Additionally, the emergence of the juvenile question in the court systems of other countries further supports the conclusion that juvenile piracy is an issue requiring resolution. Although the pirate in Spain was found to be an adult and the Indian results are pending, the use of forensic testing

¹⁷⁰ *Id.*

¹⁷¹ See Bottorff *supra* note 63.

¹⁷² *Id.*

¹⁷³ See *supra* notes 131-142 and accompanying text.

¹⁷⁴ See *supra* notes 131-142 and accompanying text; see also *infra* note 242.

¹⁷⁵ See *supra* notes 144-146 and accompanying text.

¹⁷⁶ See Barrett, *supra* note 103 ("When it comes to international attention, [the U.S. government] do[es] have to be mindful of the mitigating circumstances of [*Muse*'s] age." (quoting Dean Kenneth Randall, University of Alabama School of Law)); *Mystery Surrounds Somali Teen Pirate*, *supra* note 103 (reporting a statement by Karen Greenburg, executive director of the Center for Law and Security, New York University School of Law, that the *Muse* case could bring the United States under international criticism "if [*Muse*] is a juvenile and he is tried as an adult . . . international law is more lenient when it comes to juveniles and [the United States] already take[s] criticism"); see also *infra* Part III.A.

and extensive efforts to discover age in these countries demonstrates recognition by other court systems that the juvenile piracy question merits legal attention.¹⁷⁷ Moreover, the existence of juvenile pirates in the court systems of Germany, Italy, Seychelles, and Malaysia confirms the fact that juvenile piracy is a reality.¹⁷⁸ Unlike the United States' avoidance of the juvenile piracy problem, Germany, Spain, India, Italy, and Malaysia have responded to the juvenile question by determining that any pirate found to be of juvenile status will be tried within the juvenile justice systems of those countries.¹⁷⁹ In making these determinations, these countries have evaluated potential conflicts and solidified their approach to juvenile piracy so they can properly prosecute juvenile pirates when the occasion arises.

Thus, it is imperative that the United States respond to the juvenile piracy question by investigating conflicts that could arise when trying juvenile pirates so that it may properly prosecute juvenile pirates for their crimes rather than offering them plea bargains or releasing them at sea. This Part explores the conflict between the Eighth Amendment prohibition against cruel and unusual punishment and the mandatory sentencing requirement in the United States piracy statute and discusses the potential repercussions this conflict may have on the efficacy of juvenile piracy prosecutions.

A. *Graham v. Florida and Section 1651*

Recently, in *Graham v. Florida*, the Supreme Court held that the imposition of life imprisonment without parole for a juvenile who committed a non-homicide offense violates the Eighth Amendment prohibition on cruel and unusual punishment.¹⁸⁰ The Court found that none of the penal goals it had previously recognized as legitimate provided an adequate justification for completely denying a non-homicide juvenile offender a "chance to demonstrate growth and maturity."¹⁸¹ Additionally, the Court explained that, although international views did not control its opinion, overwhelming global opinion regarding the unacceptability of imposing life without parole on non-homicide juvenile offenders offered support for the Court's rationale.¹⁸² Regarding what a state must do following the *Graham* opinion,

¹⁷⁷ See *supra* notes 149-151, 165-166 and accompanying text.

¹⁷⁸ See *supra* notes 152-161, 167-172 and accompanying text.

¹⁷⁹ See *supra* notes 148, 153, 161, 164, 168, 172 and accompanying text.

¹⁸⁰ *Graham v. Florida*, 130 S. Ct. 2011, 2030 (2010).

¹⁸¹ *Id.* at 2029.

¹⁸² *Id.* at 2033-34. The Court explained that the United States was the only nation that continued to impose sentences of life without parole on juvenile non-homicide offenders. *Id.* Although the Court recognized that international opinions are not binding on the United States, it noted that it has looked to international opinion in the past to assist in determinations of whether sentences qualify as cruel and unusual. *Id.* Thus, while not binding, overwhelming international opinion regarding the indecency of life

the majority explained that, if a state imposes a life sentence on a juvenile, it must provide the juvenile with a “realistic opportunity to obtain release before the end of [the prison] term.”¹⁸³

Graham affects the applicability of the piracy statute to juveniles because the statute imposes a mandatory sentence of life imprisonment for all piracy convictions.¹⁸⁴ Only one sentence in length, the piracy statute states: “Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life.”¹⁸⁵ This brief and to-the-point statement makes clear that life imprisonment is the mandatory punishment for any and all convicted of piracy.¹⁸⁶ However, under the holding in *Graham*, it is unconstitutional to charge a non-homicide juvenile offender with life imprisonment without the possibility of parole.¹⁸⁷ Thus, charging a non-homicide juvenile offender under the piracy statute would seemingly result in an Eighth Amendment conflict.

B. *Eighth Amendment Application to Non-Citizens*

One way to avoid the above conflict is to find that the Eighth Amendment does not apply to non-citizens. However, precedent regarding the applicability of constitutional amendments to non-citizens on trial in the United States strongly suggests that Eighth Amendment protections do extend to non-citizens.¹⁸⁸ The Court has repeatedly affirmed the applicability of due process and equal protection to non-citizens.¹⁸⁹ In *Wong Wing v. United States*,¹⁹⁰ the Court found that the protections guaranteed by the Fifth and Sixth Amendments applied to non-citizens.¹⁹¹ The Court reached this conclusion by applying the reasoning in *Yick Wo v. Hopkins*¹⁹² that the due process and equal protection clauses of the Fourteenth Amendment were “not confined to the protection of citizens.”¹⁹³ Thus, the Court explained, all per-

without parole for non-homicide juvenile offenders offered significant support for the Court’s conclusions. *Id.*

¹⁸³ *Id.* at 2034.

¹⁸⁴ 18 U.S.C. § 1651 (2006).

¹⁸⁵ *Id.*

¹⁸⁶ See Lavrisha, *supra* note 67, at 265; see also Docket Sheet, *United States v. Hasan*, 747 F. Supp. 2d 642 (E.D. Va. 2010) (No. 2:10-cr-00056-MSD-FBS) (sentencing defendants in the *Hasan* case to life imprisonment under § 1651).

¹⁸⁷ *Graham v. Florida*, 130 S. Ct. 2011, 2030 (2010).

¹⁸⁸ See *infra* notes 190-198 and accompanying text.

¹⁸⁹ See *infra* notes 190-198 and accompanying text.

¹⁹⁰ 163 U.S. 228 (1896).

¹⁹¹ *Id.* at 238.

¹⁹² 118 U.S. 356 (1886).

¹⁹³ *Id.* at 369.

sons within the territory of the United States—regardless of their citizenship—must be entitled to the due process and other procedural protections as contained in the Fifth, Sixth, and Fourteenth amendments.¹⁹⁴ Moreover, recent cases, including piracy cases, have reaffirmed this doctrine.¹⁹⁵

Additionally, some federal cases have dealt with claims by non-citizens that their sentences violated the Eighth Amendment prohibition against cruel and unusual punishment.¹⁹⁶ Although the courts found no violation in many of these cases, they supported their holdings on the basis that the petitioners' Eighth Amendment challenges had no merit—not upon the fact that the petitioners were not U.S. citizens.¹⁹⁷ Rather, the courts in these cases appeared to proceed under the assumption that Eighth Amendment protections apply to all those sentenced in the United States and are to be evaluated under Eighth Amendment precedent.¹⁹⁸

Cases involving Eighth Amendment claims by non-citizens, when taken in combination with the aforementioned precedent regarding the applicability of constitutional trial protections to non-citizens, support the conclusion that all those tried within the U.S. justice system receive basic constitutional trial protections, including the protection against cruel and unusual punishment in the sentencing context. Accordingly, a court would likely conclude that the Eighth Amendment prohibition against cruel and unusual punishment applies to non-citizen juvenile pirates, and thus bars the imposition of the piracy statute's mandatory sentencing requirement on a juvenile piracy defendant.

¹⁹⁴ *Wong Wing*, 163 U.S. at 238.

¹⁹⁵ See *Plyler v. Doe*, 457 U.S. 202, 212 (1982) (reaffirming the conclusion that “all persons within the territory of the United States,” including non-citizens unlawfully present, receive Fifth, Sixth, and Fourteenth Amendment protections (quoting *Wong Wing*, 163 U.S. at 238)); see also *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010) (finding that an illegal alien was entitled to Sixth Amendment right to counsel); *United States v. Said*, 757 F. Supp. 2d 554, 566 (E.D. Va. 2010) (holding that the charges of piracy against non-citizen defendants violated their due process rights), *vacated*, 680 F.3d 374 (4th Cir. 2012); *supra* note 71.

¹⁹⁶ See *United States v. Estrada-Plata*, 57 F.3d 757, 762 (9th Cir. 1995) (finding that defendant's 57-month sentence for being a deported alien found in the United States did not violate the Eighth Amendment); see also *United States v. Cupa-Guillen*, 34 F.3d 860, 864-65 (9th Cir. 1994) (finding that defendant's 100-month sentence for being a deported alien found in the United States was not so disproportionate to shock the court's sense of justice and demonstrate an Eighth Amendment violation); *United States v. Cardenas-Alvarez*, 987 F.2d 1129, 1133-34 (5th Cir. 1993) (finding that defendant's 100-month sentence for attempting to re-enter the United States after deportation did not violate the Eighth Amendment prohibition against cruel and unusual punishment).

¹⁹⁷ See *Estrada-Plata*, 57 F.3d at 762; see also *Cupa-Guillen*, 34 F.3d at 864-65; *Cardenas-Alvarez*, 987 F.2d at 1133-34.

¹⁹⁸ See *supra* notes 196-197. Every court in the three cases, *supra* note 197, discussed the petitioners' Eighth Amendment claims without regard to the fact that they were not U.S. citizens. Rather, the courts evaluated the claims under the requirement that an Eighth Amendment claim can only succeed if a sentence is so disproportionate as to shock a court's sense of justice.

C. *Section 1651 Is Void as Applied to Juvenile Pirates Because the Sentencing Portion of the Piracy Statute Is Not Severable*

The only other way a court could avoid the Eighth Amendment conflict would be to find the mandatory sentencing portion of the piracy statute severable from the rest of the statute as applied to juveniles. However, this conclusion is unlikely after the application of severability doctrine to the piracy statute's framework and intended purpose.

In *United States v. Mathurin*,¹⁹⁹ a district court confronted a conflict between *Graham* and a mandatory sentencing requirement as applied to a non-homicide juvenile offender.²⁰⁰ As a result of a federal statutory sentencing requirement that each prison term must run consecutively with any other term of imprisonment, the juvenile defendant in this case faced mandatory life imprisonment without the possibility of parole.²⁰¹ In light of the recent holding in *Graham*, the court held that the statutory provision requiring terms for second or subsequent violations to run consecutively was unconstitutional as applied to the juvenile defendant.²⁰² After this finding of unconstitutionality, the court engaged in a severability discussion in order to determine if the unconstitutional portion of the offending statute could be successfully severed from the rest of the statute when applied to juvenile offenders.²⁰³ The court found it could sever the unconstitutional portion from the rest of the statute because: (1) no other portion of the statute posed constitutional problems; (2) the remainder of the statute was capable of functioning independently; and (3) the remainder of the statute was consistent with Congress's basic objectives in enacting the statute.²⁰⁴

The *Mathurin* court supported its holding on the basis that, even after severance, the remainder of the statute retained its comprehensive two-tiered sentencing framework—a sentencing scheme Congress added to minimize judicial discretion in sentencing second-time offenders under the statute.²⁰⁵ Thus, the sentencing structure still mandated a specific term of years for courts to impose on a second-time violator regardless of whether the consecutive sentencing language was excised from the statute.²⁰⁶ Additionally, running the sentences concurrently rather than consecutively for a juvenile non-homicide offender could still effectuate Congress's intent for the statute.²⁰⁷ Lastly, the existence of a severability clause created a “pre-

¹⁹⁹ No. 09-21075-Cr., 2011 WL 2580775 (S.D. Fla., June 29, 2011).

²⁰⁰ *Id.* at *2-3.

²⁰¹ *Id.*

²⁰² *Id.* at *3.

²⁰³ *Id.* at *3-6.

²⁰⁴ *Id.* (using rule as outlined in *United States v. Booker*, 543 U.S. 220, 258-59 (2005)).

²⁰⁵ *Mathurin*, 2011 WL 2580775, at *3-6.

²⁰⁶ *Id.* at *4.

²⁰⁷ *Id.* at *4-5.

sumption that Congress did not intend the validity of the statute in question to depend on the validity of a constitutionally offensive provision.”²⁰⁸ Hence, the court could successfully sever the consecutive sentencing language from the rest of the statute when applied to juvenile non-homicide offenders.²⁰⁹

Disparate from the statute in *Mathurin*, the sentencing provision in § 1651 is not severable from the remainder of the statute as applied to juvenile offenders, and thus the entire statute is void when applied to juvenile pirates. The Supreme Court has held that severability is a question of legislative intent, and when “a statute is defective . . . [,] the court may ‘either declare it a nullity’ or ‘extend’ the [constitutional] benefit” by severing the unconstitutional provision from the rest of the statute.²¹⁰ While there is a presumption in favor of severability, “the court should not, of course, ‘use its remedial powers to circumvent the intent of the legislature.’”²¹¹ Accordingly, in determining whether the sentencing portion of the piracy statute is severable, a court must determine whether “the balance of the legislation is incapable of functioning independently” from the severed provision.²¹² In light of the framework of the piracy statute, the effect of severance on sentencing discretion, and the purpose of the piracy statute, it is unlikely that the statute is capable of functioning independently from the sentencing portion.²¹³

Unlike many modern criminal statutes, § 1651 is merely one sentence long and includes no tiered or graduated sentencing framework; rather, it clearly and concisely mandates a sentence of life imprisonment upon conviction.²¹⁴ Facially, the brevity and directness of this statute do not suggest that severability is an option. In determining severability, the Supreme Court has found that a statute cannot be severable if it “would require [the Court] to write words into the statute” so that it could remain fully operative.²¹⁵ The application of this rule to the piracy statute strongly suggests that the sentencing portion of the statute is not severable from the rest of the statute. When severed, the remainder of the statute reads, “Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States”²¹⁶ The severed

²⁰⁸ *Id.* at *5 (quoting *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987)).

²⁰⁹ *Id.* at *17-18.

²¹⁰ *United States v. Booker*, 543 U.S. 220, 247 (2005) (citing *Welsh v. United States*, 398 U.S. 333, 361 (1970) (Harlan, J., concurring in result)).

²¹¹ *Id.* (citing *Heckler v. Mathews*, 465 U.S. 728, 739 n.5 (1984)).

²¹² *See Mathurin*, 2011 WL 2580775, at *4 (quoting *United States v. Romero-Fernandez*, 983 F.2d 195, 196 (11th Cir. 1993) (per curiam)).

²¹³ *See infra* notes 214-230 and accompanying text.

²¹⁴ 18 U.S.C. § 1651 (2006); *see also supra* note 186.

²¹⁵ *Randall v. Sorrell*, 548 U.S. 230, 262 (2006).

²¹⁶ 18 U.S.C. § 1651.

sentencing portion then states “. . . shall be imprisoned for life.”²¹⁷ Separating the offending provision results in a grammatically and functionally incomplete provision—it cannot be removed without affecting the wording and structure of the rest of the statute. As the statute does not even form a complete sentence upon separation, it is likely a court would find that it would be required to “write words into the [piracy] statute” in order for the statute to remain fully operative. Furthermore, the lack of a severability clause in this statute, while not dispositive, may demonstrate Congress’s intent “to have the various components [of the statute] operate together or not at all.”²¹⁸

Additionally, unlike the statute in *Mathurin*, which retained a two-tiered sentencing framework guaranteeing minimal judicial discretion, the effect of severance on the piracy statute would allow complete judicial discretion in sentencing, a change that would likely “circumvent the intent of the legislature.”²¹⁹ Upon severance, the statute would provide no legislative direction as to sentencing and would effectively allow a court to prescribe no sentence to a juvenile convicted of piracy.²²⁰ However, there are several indications that the legislature did not want judicial discretion in piracy sentencing, but rather, intended to mandate a specific sentence for a piracy conviction.²²¹ Historically, one of the main purposes of the piracy statute was to prescribe a punishment for piracy.²²² In light of the extreme dangers posed by piracy, the Constitution specifically gave Congress the power “[t]o define and *punish* Piracies and Felonies committed on the high Seas.”²²³ Consequently, during its first session, Congress enacted the original piracy statute under an act entitled, “An Act for the *Punishment* of certain Crimes against the United States.”²²⁴ Moreover, when the fifteenth Congress revised the statute, it was contained within its own chapter enti-

²¹⁷ *Id.*

²¹⁸ See *Gubiensio-Ortiz v. Kanahale*, 857 F.2d 1245, 1267 (9th Cir. 1988), *vacated sub nom.* *United States v. Chavez-Sanchez*, 488 U.S. 1036 (1989).

²¹⁹ See *United States v. Booker*, 543 U.S. 220, 246-47 (2005) (quoting *Heckler v. Mathews*, 465 U.S. 728, 739 n.5 (1984)).

²²⁰ See *supra* notes 216-217 and accompanying text. Once severed, the statute would include no sentencing mandate for the crime of piracy, thus leaving the sentencing decision entirely up to the presiding judge or jury.

²²¹ See *infra* notes 222-230 and accompanying text.

²²² The purpose of a statute is important for determining legislative intent because it demonstrates the general intent of the legislature in enacting a statute. See WILLIAM N. ESKRIDGE JR. ET AL., *LEGISLATION AND STATUTORY INTERPRETATION* 220-22 (2000) (describing purposivism as a main statutory interpretation standard that asks what the drafters’ main goals were in passing a statute); see also U.S. CONST., art. I, § 8, cl. 10; *United Steelworkers of America, AFL-CIO-CLC v. Weber*, 443 U.S. 193, 202-03 (1979) (using purposivism in interpreting Title VII by looking at Congress’s “primary concern,” in enacting it); *infra* notes 223-229 and accompanying text.

²²³ U.S. CONST. art. I, § 8, cl. 10 (emphasis added).

²²⁴ An Act for the Punishment of Certain Crimes Against the United States, ch. 9, § 8, 1 Stat. 112, 113-14 (1790) (emphasis added).

tled, “An Act to protect the commerce of the United States, and punish the crime of piracy.”²²⁵ The use of the words “punish” and “punishment” in these early titles strongly suggest that one of Congress’s principal purposes in enacting the piracy statute was to prescribe a sentence for the crime of piracy.

Furthermore, the lack of significant amendments in the historical development of the piracy statute demonstrates that its purpose—to “define and *punish* piracies”—has not changed and that Congress intends to retain control over sentencing discretion.²²⁶ The only significant difference between the 1819 piracy statute and the current statute, as amended in 1948, is the change from a mandatory death sentence to a mandatory sentence of life imprisonment.²²⁷ For over 200 years, the piracy statute has carried a penalty of no less than life imprisonment upon conviction; it does not rationally follow that the legislature would have enacted the piracy statute “‘had it known’ [that] the constitutional invalidity of [the sentencing portion] of the statute” would result in complete judicial discretion in the sentencing of juvenile pirates.²²⁸ Thus, in repeatedly providing a clear-cut, direct sentencing mandate for a piracy conviction for over two centuries, Congress has demonstrated intent to retain discretion over the sentencing of pirates.²²⁹ Finally, the recent addition of the “Violence Against Maritime Navigation” section, which provides a more lengthy and comprehensive sentencing framework, may illustrate Congress’s intent to provide federal prosecutors and courts with a more modern formulation to try, convict, and sentence pirates.²³⁰

²²⁵ An Act to Protect the Commerce of the United States, and Punish the Crime of Piracy, ch. 77, 3 Stat. 510, 510 (1819).

²²⁶ See *infra* notes 227-229 and accompanying text.

²²⁷ Samuel Pyeatt Menefee “Yo Heave Ho!”, *Updating America’s Piracy Laws*, 21 CAL. W. INT’L L.J. 151, 161 (1990) (stating that the only major difference between the 1819 statute and the current version of § 1651 is that the sentencing mandate was changed from the death penalty to life imprisonment). Compare ch. 77, § 5, 3 Stat. at 513-14 (requiring the death penalty for convicted pirates), with 18 U.S.C. § 1651 (2006) (requiring life imprisonment).

²²⁸ See *United States v. Mathurin*, No. 09-21075-Cr., 2011 WL 2580775, at *4 (S.D. Fla., June 29, 2011) (quoting *United States v. Booker*, 543 U.S. 220, 246 (2005)); see also *Booker*, 543 U.S. at 247-48 (explaining that while extension is a more common remedy, nullification may be required if severing a statute would circumvent the legislative intent in enacting the statute in the first place); *INS v. Chadha*, 462 U.S. 919, 931-32 (1983) (explaining that invalid portions of a statute are to be severed unless it is “evident” that Congress “would not have enacted those provisions which are within its power, independently of [those] which [are] not” (quoting *Buckley v. Valeo*, 424 U.S. 1, 108 (1976) (per curiam))); *City of New Haven v. United States*, 809 F.2d 900, 901, 909 (D.C. Cir. 1987) (holding that Section 1013 of the Impoundment Control Act of 1974 was invalid in its entirety because the legislative purpose of Section 1013 was to control presidential deferrals and the statute would produced the opposite effect if the court simply severed the unconstitutional legislative veto from the section).

²²⁹ See *supra* notes 227-228.

²³⁰ 18 U.S.C. § 2280 (providing a long list of offenses and various sentencing structures that are easier to apply and understand than § 1651); Lavrisha, *supra* note 67, at 266 (arguing that, in compari-

The inability of § 1651 to function independently without the sentencing provision, in addition to various indications of legislative intent to retain substantial control over sentencing determinations for the crime of piracy, illustrates that § 1651 is not severable. Since § 1651 is not severable, and thus fully void as applied to juveniles, the analysis in Part IV.B provides recommendations on how to pursue prosecutions against juveniles without the use of § 1651.

IV. RECOMMENDATIONS: PROSECUTING JUVENILE PIRATES IN THE UNITED STATES

To date, the United States has avoided the juvenile piracy question through avenues such as the plea bargain in *Muse* that included an agreement not to pursue an age appeal and decisions by U.S. authorities to release pirates suspected to be juveniles rather than bringing them to the United States for prosecution.²³¹ However, the United States cannot avoid this issue,²³² nor should it—juvenile pirates commit heinous offenses against U.S. and international maritime navigation and should be held to answer for their crimes. The United States should not release suspected juveniles or allow them to plead guilty to lesser charges simply because it is unable or unwilling to prosecute them. Thus, the United States should evaluate and resolve the potential issues that may arise in a juvenile piracy prosecution in order to ensure juvenile pirates are prosecuted for their offenses. This Part begins with a brief discussion regarding the need for the United States to develop a comprehensive strategy for making age determinations when a pirate claims juvenile status. This Part continues by evaluating the charging options available to the prosecution once the court determines a pirate is a juvenile. In light of § 1651's unconstitutionality as applied to juvenile pirates,²³³ this Part concludes that juvenile pirates cannot be tried under the United States piracy statute and provides recommendations on how to charge juvenile pirates in light of this constitutional conflict.

son to ancillary charges under 18 U.S.C. § 81, Congress provided the courts with the greatest degrees of sentencing discretion through § 2280); *supra* notes 90-94 and accompanying text; *infra* Part IV.B.

²³¹ See *supra* notes 129-142, 144-146, and accompanying text.

²³² Juvenile pirates continue to appear in piracy trials throughout the world, and there has been at least one confirmed interaction between a juvenile pirate and U.S. authorities. See *supra* Part II. Additionally, the Congressional Research Service and the U.N. Security Counsel have acknowledged the appearance of juveniles in piracy operations and demonstrated concern over the adoption of provisions for their prosecution. See *supra* note 100. These facts demonstrate a strong likelihood that the United States will have to face the prospect of juvenile piracy prosecutions in the near future.

²³³ See *supra* Parts III.A, III.C.

A. *Juvenile Status Determinations*

One of the principal problems in *Muse*, as well as in the piracy cases in other countries, was the initial determination of the defendants' ages.²³⁴ There are many incentives for piracy defendants to claim juvenile status, including the possibility of trial in juvenile court and now, post-*Graham*, the ability to escape a life sentence.²³⁵ Since many piracy defendants are Somali natives who lack birth certificates or formal proof of age, claiming juvenile status is a viable defense strategy.²³⁶ In fact, the claims of juvenile status in the *Muse* case, the piracy cases of other countries, and the recent *United States v. Hasan*²³⁷ case in the Eastern District of Virginia suggest piracy defendants may be utilizing this strategy.²³⁸

²³⁴ See *supra* Part II.

²³⁵ Due to the unconstitutionality of § 1651 as applied to juveniles, a pirate found to be of juvenile status cannot be sentenced to life imprisonment under § 1651. See *supra* Parts III.A-C.

²³⁶ Most of the piracy incidents to date have involved Somali defendants. See *United States v. Hasan*, 747 F. Supp. 2d 642, 654 (E.D. Va. 2010), *aff'd sub nom.* *United States v. Dire*, 680 F.3d 446 (4th Cir. 2012); Sentencing Submission of Abduwali Abdukhadir Muse, *supra* note 102, at 1. A large number of recorded pirate attacks occur off the coast of Somalia, and many experts cite the "failed state" of Somalia as a large contributor to the recent surge in piracy. See *supra* notes 16-18, 25, 29 and accompanying text. Additionally, most Somalis do not have birth certificates due to civil upheaval and the lack of a stable government at the times of their births. See *Hasan*, 747 F. Supp. 2d at 675 (stating that defendant Hasan did not know his exact age due to a lack of documentation); Transcript of Age Hearing, *supra* note 72, at 29-30 (noting that Muse was unable to provide an exact age because there was no government when he was born, and thus no birth certificates); U.N. Secretary-General, *supra* note 100, ¶ 46 ("Many suspects apprehended have no identification papers, and sometimes no precise knowledge of their own age."); see also *supra* note 159 and accompanying text.

²³⁷ 747 F. Supp. 2d 642 (E.D. Va. 2010), *aff'd sub nom.* *United States v. Dire*, 680 F.3d 446 (4th Cir. 2012).

²³⁸ In the *Muse* case, Muse claimed juvenile status; this claim presumably earned him a plea bargain, and consequently less than life imprisonment. See *supra* notes 129-142 and accompanying text. In the *Hasan* case, Hasan claimed juvenile status under a juvenile delinquency statute. See Defendant Hasan's Brief in Support of His Motion to Dismiss the Indictment Pursuant to the Juvenile Justice Act at 1-2, *Hasan*, 747 F. Supp. 2d 642 (No. 2:10-cr-00056-MDS-FBS). The judge ultimately determined that Hasan was not a minor. *Hasan*, 747 F. Supp. 2d at 677. Additionally, the Somali interpreter who testified regarding his discussions with Hasan stated that in almost every interview he had with suspected Somali pirates, they claimed to be sixteen, seventeen, or eighteen, even when they clearly appeared to be well over eighteen years old. *Id.* at 676. Furthermore, the interpreter testified, without objection, that although many Somalis may not know their actual birthdate, they typically know their birth year. *Id.* at 675-76. Additionally, the piracy suspects in the Spanish *Alkarana* and recent Indian cases claimed juvenile status, although forensic tests later demonstrated that they were over eighteen at the time of their offense. See *supra* notes 149-151, 165-166, and accompanying text. However, it is important to note that the determination of adult status in these cases does not demonstrate that the juvenile piracy situation is a self-solving problem. Rather, the juvenile case in Germany, as well as the United States' release of a juvenile pirate at sea and the doubts surrounding the age determination in the *Muse* case, illustrate that there are cases in which an age determination will result in juvenile status. See *supra* notes 129-142, 144-146, 152-159 and accompanying text.

Even if piracy defendants are not actively using juvenile status as a strategy, the amount of cases in which these claims have appeared, and the ensuing difficulties they have caused in the prompt and orderly progression of these cases, demand a comprehensive and accurate strategy for making juvenile status determinations.²³⁹ In addition to slowing the progression of a case, claims of juvenile status, even when determined by a judge to be erroneous, may lead to arguably undeserved mitigation, such as the plea bargain in *Muse*.²⁴⁰ In light of the seriousness of the crimes committed by pirates against U.S. and foreign maritime navigation, the United States should aim to avoid any mitigation for piracy defendants due to false claims of juvenile status. Since the unconstitutionality of § 1651 as applied to juvenile pirates will only increase these incentives by piracy defendants to claim juvenile status,²⁴¹ it is important for the United States to immediately establish an age determination strategy and send a clear message that false claims of juvenile status will fail as defense strategies.

In the two U.S. piracy cases in which pirates claimed juvenile status, *Muse* and *Hasan*, the evidence offered at the defendants' age hearings was merely testimonial, and neither the government nor the defense offered any scientific or forensic evidence of age.²⁴² By contrast, other nations, specifically Spain, India, and Germany, have used medical and forensic testing in order to determine the age of pirates claiming to be juveniles.²⁴³ These tests

²³⁹ See *supra* Part II; see also note 103.

²⁴⁰ See *supra* note 238.

²⁴¹ Before *Graham v. Florida*, even if a defendant claimed juvenile status, he or she could still be transferred to adult court for prosecution and sentencing. See *United States v. I.D.P.*, 102 F.3d 507, 510 (11th Cir. 1996). Thus, even as a juvenile, a pirate could receive a life sentence under § 1651. After the decision in *Graham* and the resulting inapplicability of § 1651 to a juvenile pirate, there is no possible way a juvenile pirate could receive life imprisonment.

²⁴² In the *Hasan* case, the parties disputed the meaning of interview notes taken by the special agents assigned to Hasan's case. See *Hasan*, 747 F. Supp. 2d at 674-75. The agents asserted Hasan told them he was twenty-four or twenty-five at the time of capture, whereas Hasan argued that he did not know his age but was under eighteen at the time of capture. *Id.* In reviewing the solely testimonial evidence, the judge found that the weight of the testimonial evidence turned in the government's favor. *Id.* at 677. In the *Muse* case, the judge did not even hear from *Muse* himself, but rather received testimony from the detective on *Muse*'s case and from *Muse*'s family members. See Transcript of Age Hearing, *supra* note 72, at 33-48. The judge, when faced with conflicting testimony, found that the weight of the evidence turned in the government's favor. *Id.* at 46-48.

²⁴³ In Spain, the government used medical and forensic tests to discover the age of the piracy defendant claiming to be a juvenile. See *supra* notes 149-151 and accompanying text. The judge ultimately determined that the forensic evidence weighed in favor of a determination of adult status due to medical indications (X-rays and height and weight comparisons) that the defendant was over eighteen. See *supra* notes 148-152 and accompanying text. In Germany, the government brought in medical experts and began using forensic tests to determine the piracy defendants' ages. See *supra* notes 152-159 and accompanying text. In India, the government is also using forensic testing, such as bone and teeth scans, to determine the age of nineteen Somali pirates. See *supra* notes 163-167 and accompanying text. To date, the tests have shown that ten of the pirates are over eighteen. See *supra* note 166 and accompanying text.

employ the use of bone structure, tooth analysis, and other forensic techniques to make a realistic determination of a suspect's age.²⁴⁴ Although these tests are not perfect,²⁴⁵ it is likely they will provide a more accurate, comprehensive, and fair strategy for age determinations than those currently used by the United States courts—credibility determinations based on testimonial evidence.²⁴⁶ The United States needs an age determination strategy that is accurate and dependable enough to deter piracy suspects from false claims of juvenile status; the use of medical and forensic testing, when added to testimonial evidence, is more likely to deter pirates than the use of testimonial evidence alone.²⁴⁷ Therefore, in order to better avoid false claims that slow the progression of piracy cases and potentially lead to undeserved mitigation,²⁴⁸ the United States should adopt an age determination strategy that includes the use of medical and forensic testing in piracy cases.

B. *Ability to Prosecute Juvenile Pirates After Graham: Prosecuting Juvenile Pirates Under Other Statutes*

After a court determines that a pirate is a juvenile, the next step in a successful prosecution requires the United States to decide how to try that juvenile in light of the inapplicability of § 1651. As this Comment argues that § 1651 is not severable—and thus entirely void as applied to juvenile pirates that did not commit homicide²⁴⁹—Congress may want to amend the sentencing portion of the statute to enable the United States to charge juvenile pirates under § 1651. However, since there has not yet been a juvenile piracy case that has gone to trial in the United States, it may be too soon to

²⁴⁴ See *supra* note 243.

²⁴⁵ See Sentencing Submission of Abduwali Abdukhadir Muse, *supra* note 102, at 23-24 (citing various studies for the proposition that the teeth of Africans develop faster than those of European populations, making Africans appear older to Western eyes); see also Matussek, *supra* note 153; *supra* note 142.

²⁴⁶ See *supra* note 242.

²⁴⁷ The more dependable an age determination strategy, the more likely a piracy defendant is to avoid falsely claiming juvenile status. It is generally recognized that physical evidence carries stronger weight than oral evidence. See, e.g., *Harris v. Gen. Motors Corp.*, 201 F.3d 800, 803 (6th Cir. 2000) (recognizing the “physical facts rule” as standing for the proposition that undisputed physical facts will overcome conflicting oral testimony); see also *Zollman v. Symington Wayne Corp.*, 438 F.2d 28, 31-32 (7th Cir. 1971) (finding that witness testimony was of “no probative value” where it conflicted with uncontroverted physical evidence); *Whittington v. Mayberry*, 190 F.2d 703, 705 (10th Cir. 1951) (describing the “physical facts rule” as an evidentiary device that disregards oral testimony at odds with physical evidence introduced at trial). Thus, the use of physical evidence, such as the results from scientific and forensic testing, in an age determination strategy will result in a higher level of accuracy and dependability, and a greater deterrent for false claims of juvenile status.

²⁴⁸ See *supra* note 238 and accompanying text.

²⁴⁹ See *supra* Parts III.A, III.C.

realistically expect congressional action.²⁵⁰ Moreover, the enactment of § 2280, or the “Violence Against Maritime Navigation” section, may indicate Congress’s intent to provide prosecutors and courts with a more modern “piracy” statute that it would rather see used in piracy prosecutions than the arguably outdated § 1651.²⁵¹

Until Congress amends § 1651, should it even choose to do so, prosecutors should bring cases against juvenile pirates under § 2280. A decision to bring all juvenile piracy cases under § 2280 provides a uniform solution, as well as a suitable alternative to § 1651.²⁵² In fact, § 2280 may in many ways be a superior alternative to § 1651. Unlike § 1651, which simply lists “piracy” as the offense to be sanctioned, § 2280 offers a comprehensive list of many offenses against maritime navigation that will likely encompass most of the crimes committed during pirate attacks.²⁵³ The more modern formulation and explanations provided by § 2280 will avoid the difficulties in definition that have surfaced during attempts to prosecute pirates under § 1651.²⁵⁴ The contemporary sentencing framework delineated by § 2280 will also provide the sentencing discretion necessary for juvenile prosecutions after *Graham*.²⁵⁵

Moreover, the United States may charge juvenile pirates with offenses in addition to those covered under § 2280. For example, in *Muse*, the prosecutor charged the defendant with kidnapping, hostage taking, conspiracy,

²⁵⁰ Although there have been interactions between juvenile pirates and U.S. authorities, there has not yet been a juvenile pirate brought to trial in the United States. Rather, the *Muse* case ended in a plea bargain and the juvenile pirate captured by U.S. authorities following the *S/V Quest* attack was released at sea. See *supra* notes 129-146 and accompanying text. Thus, Congress is unlikely to act regarding an amendment to § 1651 until juvenile piracy cases begin to appear at trial. Additionally, the recent passage of § 2280 could demonstrate congressional intent to have prosecutors use that and other federal statutes instead of § 1651. See *supra* note 230. However, a report from the Congressional Research Service does illustrate that the issue of juvenile piracy has potentially been recognized by Congress. See *supra* Ploch et al., *supra* note 100, at 29.

²⁵¹ See *supra* note 230 and accompanying text; see also *infra* notes 252-255 and accompanying text.

²⁵² See *infra* notes 253-255 and accompanying text.

²⁵³ 18 U.S.C. § 2280 (2006); see *supra* notes 90-94 and accompanying text.

²⁵⁴ See *United States v. Said*, 757 F. Supp. 2d 554, 567 (E.D. Va. 2010) (dismissing case against piracy defendants and holding that the definition of piracy in the international community is unclear and is not consistent with § 1651), *vacated*, 680 F.3d 374 (4th Cir. 2012); see also *supra* note 43 and accompanying text.

²⁵⁵ See 18 U.S.C. § 2280(a). Section 2280 provides that any person who commits offenses (a)(1)(A)-(H) shall be fined, imprisoned for a maximum of twenty years, or both. *Id.* § 2280(a)(1). Furthermore, if the death of any person resulted from the conduct prohibited in (a)(1)(A)-(H), the court may impose a sentence of death, imprisonment for a term of years, or life imprisonment. *Id.* Finally, for the offense of “threat to navigation” described in (a)(2), the statute provides that a court may impose a fine, imprisonment for a maximum of five years, or both. *Id.* § 2280(a)(2); see also *supra* note 230. In fact, § 2280 was employed in the *Muse* case, where the charges included two ship hijacking charges under § 2280 to which *Muse* subsequently pled guilty. See Judgment in a Criminal Case, *supra* note 115, at 1.

and possession of a firearm during a crime of violence.²⁵⁶ Furthermore, when appropriate, prosecutors may charge juvenile pirates with three of the ancillary charges present in Chapter 81: §1657, § 1658, and § 1659.²⁵⁷ These three sections outline offenses applicable to non-citizen pirates and mandate sentences of less than life imprisonment.²⁵⁸ Therefore, unless Congress amends § 1651 to account for juvenile offenders, prosecutors should try juvenile pirates under § 2280 and add charges under other federal criminal statutes as appropriate.

CONCLUSION

Juvenile piracy is a realistic concern that merits attention by the United States' authorities. The United States cannot avoid this issue, given that juvenile pirates commit violent crimes against U.S. and international maritime navigation and should be held accountable for their actions. The first step in the ability to prosecute juvenile pirates is assuring that a claim of juvenile status is well founded; thus, this Comment contends that false claims of juvenile status are best combatted by an age determination strategy that integrates medical and forensic testing. Next, in assessing various conflicts that could arise in juvenile piracy cases, this Comment concludes that the current U.S. piracy statute—as applied to juveniles—is unconstitutional in light of the Eighth Amendment prohibition on cruel and unusual punishment. Therefore, unless Congress amends the piracy statute, federal prosecutors should charge juvenile pirates under § 2280 and other applicable federal criminal statutes.

This Comment has not attempted to present or resolve all of the issues that may arise in a juvenile piracy prosecution. Rather, this Comment has noted the emergence of juvenile piracy in modern-day piratical operations and has presented a number of issues that may develop in the initial stages of a juvenile piracy prosecution. However, many additional issues are likely to arise in the course of a juvenile piracy prosecution, particularly in the trying and sentencing stages and during the judicial determination as to whether a juvenile pirate will be tried in juvenile or adult court. Therefore, a comprehensive evaluation of issues that may arise in juvenile piracy prosecutions in the United States is the initial step in a resolution of the juvenile piracy problem and an impetus towards holding juvenile pirates responsible for their crimes.

²⁵⁶ See Grand Jury Indictment, *supra* note 3, at 1-11.

²⁵⁷ See *supra* notes 78-82.

²⁵⁸ See *supra* notes 78-82.