TOWARD MERCY: EXCESSIVE SENTENCING AND THE UNTAPPED POWER OF NORTH CAROLINA'S CONSTITUTION

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For decades, the North Carolina Supreme Court—like many other state supreme courts—largely ignored its own state constitution's ban on harsh criminal punishments and deferred entirely to federal case law on the constitutional limits of excessive sentences. The result has been near-total deference to the state legislature and a discriminatory mass incarceration crisis that has ballooned without meaningful constitutional checks.

This approach has been a serious mistake of constitutional law. As Justice Harry Martin once noted, "the Constitution of North Carolina . . . is the people's timeless shield against encroachment on their civil rights," and it provides uniquely broad protections of civil rights and personal liberty. Yet sentencing law has been the exception, despite a specific provision that bans "cruel or unusual punishments," and whose text and original meaning are distinct from the Eighth Amendment.

The North Carolina Supreme Court finally revived this clause, Article I, Section 27, in two recent cases involving children sentenced to serve decades, recognizing that it should not be interpreted in lockstep with its federal counterpart. This Article argues that these cases provide a crucial moment of doctrinal clarity and opportunity to articulate the independent meaning of Section 27 and unleash its power as an essential tool in the urgent project of dismantling mass incarceration. While previous scholarship has noted that state analogs to the Eighth Amendment can and should bear their own independent meaning, this Article provides a full analysis of Section 27 specifically, looking to its text and history, related constitutional provisions, and other factors to show that it provides broader protections against excessive punishments than does current Eighth Amendment case law. This Article also sketches a doctrinal framework that state courts can apply in all challenges to excessive punishment, not just those involving children.

Finally, the Article places this constitutional analysis in the specific context of North Carolina's criminal legal system, explaining how other mechanisms of reducing needless incarceration have proven wholly inadequate.

INTRODUCTION

On June 17, 2022, the Supreme Court of North Carolina issued opinions in *State v. Conner* and *State v. Kelliher*.[1] The specific questions in these cases were whether a child could be required to serve 45 or 50 years of incarceration before becoming eligible for parole and, if so, under what circumstances. More broadly, these cases sought to answer a question fundamental to the criminal legal system: how long is too long?

In deciding that children cannot be required to serve more than 40 years before becoming eligible for parole, the Court held that the "cruel or unusual" clause in Article I, § 27 of the North Carolina constitution—the state's analog to the federal Eighth Amendment—has independent meaning and provides greater protections against excessive criminal punishments than its federal counterpart. While the Eighth Amendment provides a floor of legal protections, the state constitution goes further.

These opinions provide necessary doctrinal clarity and come at a time of urgent need: North Carolina incarcerates more people per capita than every country in the world except the United States, and the state's criminal legal system produces horrific racial disparities, especially among children. While much of the machinery that produced this incarceration crisis has been rejected or discredited by both science and the state's values, North Carolinians continue to live with its effects. State courts should not be on the sideline of this crisis; they are essential to mitigating its damage.

While *Kelliher* and *Conner* have laid a new foundation for sentencing children in North Carolina, these decisions do not stand alone. They are the logical extension of nearly two decades of jurisprudence at the state and federal level. They are also not the endpoint. The state has yet to develop a meaningful framework for examining extreme sentencing. *Kelliher* and *Conner* offer a way forward.

This Article will argue for such a framework and will detail the historical and jurisprudential underpinnings that make extreme sentencing review in North Carolina possible. It will explain the origin and the legal context of *Kelliher* and *Conner*—including how a growing number of states are looking to their own constitutions to curb excessive punishments and why North Carolina should be among them. North Carolina's constitution has its own unique text, history, and body of case law that should not be ignored.

In examining North Carolina's cruel "or" unusual clause and its use by state courts, this Article builds on excellent work by Prof. William B.

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[1] State v. Conner, 381 N.C. 643, 873 S.E.2d 339 (N.C. 2022); State v. Kelliher, 381 N.C. 558, 873 S.E.2d 366 (N.C. 2022).

Berry III and other scholars examining how the texts of state constitutions should be applied to excessive non-capital sentences.[2] This Article will also explain how the same principles animating *Kelliher* apply beyond juvenile life cases and point toward an understanding of Article I, § 27 as a meaningful check on excessive sentencing, filling an essential gap that Eighth Amendment jurisprudence has left open. Fundamentally, the meaning of North Carolina's "cruel or unusual" clause—and the extent of protections it provides—turns on "evolving standards of decency" and is therefore responsive to, among other things, persistent racial disparities in sentencing; cognitive science about culpability and the capacity for change; social science about the need for and effectiveness of punishments; and a host of objective factors that indicate community consensus. A full understanding of Article I, § 27 must also consider the state's constitutional obligation to prioritize rehabilitation and the state's non-discrimination guarantee.

Finally, the Article will show how these considerations—analyzed through the constitutional framework started in *Kelliher* and *Conner* and expanded here—can be used to scrutinize different categories of problematic sentencing in North Carolina. These include discretionary "stacked" or enhanced sentences and mandatory minimums. When such sentences are handed out to racial minorities, North Carolinians should be doubly suspicious, both as a matter of policy or—as this article argues—constitutional law. North Carolina punishes Black and brown people so viciously that traditional deference to the incremental legislative process is unacceptable. We must have less cruelty and more mercy.

I. BACKGROUND: FEDERAL EIGHTH AMENDMENT JURISPRUDENCE, "LOCKSTEP" STATE LAW, AND THE RISE OF STATE CONSTITUTIONALISM

The Eighth Amendment to the United States Constitution states that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[3] Exactly which sentences rise to the level of excessive has long been subject to debates about "proportionality"—the fit

[2] William W. Berry III, *Cruel State Punishments*, 98 N.C. L. REV. 1201, 1204 (2020); William W. Berry III, *Cruel and Unusual Non-Capital Punishments*, 58 AM. CRIM. L. REV. 1627, 1628 (2021); JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (2018); Goodwin Liu, *State Courts and Constitutional Structure*, 128 YALE L.J. 1304, 1322 (2019); Robert J. Smith, Zoe Robinson, & Emily Hughes, *State Constitutionalism and the Crisis of Excessive Punishment*, 108 IOWA L. REV. 537 (2023); Loretta H. Rush & Marie Forney Miller, *Cultivating State Constitutional Law to Form a More Perfect Union—Indiana's Story*, 33 NOTRE DAME J. LAW, ETHICS & PUB. POL. 377 (2019); John Mills & Aliya Sternstein, *New Originalism: Arizona's Founding Progressives on Extreme Punishment*, 64 ARIZ. L. REV. 733 (2022).

[3] U.S. CONST., amend. VIII.

between crimes and punishments. These debates have been controlled mostly by the Supreme Court of the United States. For state courts, however, state constitutions provide an additional source of protection. While efforts to impose meaningful proportionality review failed in North Carolina prior to *Kelliher* and *Conner*, there is a growing movement to abandon reliance on federal jurisprudence to settle the argument.

A. The Federal Eighth Amendment – Adoption and Interpretation

The Eighth Amendment was "an exact transcript of a clause" in the English Bill of Rights from 1688.[4] It was adopted "as an admonition to all Departments of the National Government, to warn them against such violent proceedings as had taken place in England."[5] Some early Americans believed that Congress could be trusted not to impose such tyrannical punishments.[6] Others, more distrusting of those in power, believed that "[c]ruelty might become an instrument of tyranny; of zeal for a purpose, either honest or sinister."[7] Over the past 50 years, the U.S. Supreme Court has shown no similar distrust. Law professor Rachel Barkow puts it bluntly: "The Court has utterly failed to police sentence length, [] in complete derogation of its duty under the Constitution, which has an entire amendment devoted to cruel and unusual punishments."[8] In upholding extreme sentences, like 50 years-to-life for stealing a few videotapes from K-Mart,[9] "the Court has effectively taken the judiciary out of the business of checking the state when it seeks to impose outrageously long punishments."[10]

1. Early Interpretation

The federal Bill of Rights did not make clear what kinds of punishments were "cruel and unusual." For most of American history, state constitutions and common law provided the only limitations on sentences that local judges could impose, as the Eighth Amendment was not applied to state punishments until 1962.[11]

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[4] JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES: WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES, BEFORE THE ADOPTION OF THE CONSTITUTION § 1903 (Boston, Hilliard, Gray, & Co. 1833).

[5] *Id.*

[6] Weems v. United States, 217 U.S. 349, 372 (1910).

[7] *Id.*

[8] Rachel E. Barkow, *The Court of Mass Incarceration*, 2021-2022 CATO SUP. CT. REV. 11, 28 (2022).

[9] Lockyer v. Andrade, 538 U.S. 63 (2003).

[10] Barkow, *supra* note 8, at 30.

[11] *Weems*, 217 U.S. at 369 (citing Pervear v. Massachusetts, 72 U.S. 475 (1867), In Re

The 1910 case of *Weems v. United States* was the first time that the Court wrestled with what "cruel and unusual" actually meant. To this point, the U.S. Supreme Court had not heard a case that "called for an exhaustive definition."[12] Paul Weems was convicted of falsifying an official United States document while working as an officer in the Philippines, and was sentenced to 15 years of "hard and painful labor" with his wrists and ankles shackled at all times.[13]

The Court held that this punishment was cruel and unusual under the Eighth Amendment. More importantly for the development of federal law, the Court noted that "it is a precept of justice that punishment for crime should be graduated and proportioned to offense."[14] This was the beginning of proportionality analysis at the federal level.

The next milestone decision did not arrive for nearly 50 years, until the Court in *Trop v. Dulles*, held that stripping a soldier of citizenship as punishment for desertion was cruel and unusual under the Eighth Amendment.[15] The Court based this decision on the now-famous precept that the Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." [16]

2. Federal Proportionality Review

Weems and *Trop* are the basis for virtually all federal excessive sentencing decisions under the Eighth Amendment. But the current doctrinal framework is largely a by-product of death penalty litigation.[17] Beginning

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Kemmler, 136 U.S. 436, 447 (1890), O'Neil v. Vermont, 144 U. S. 323 (1892)); Robinson v. California, 370 U.S. 660, 667 (1962). This limitation to federal punishment held true even after the passage of the Fourteenth Amendment in 1868, as the United States Supreme Court repeatedly held that the Fourteenth did not make other amendments applicable against state action. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARVARD L. REV. 489, 493 (1977) (citing O'Neil v. Vermont, 144 U.S. 323, 332 (1892); McElvaine v. Brush, 142 U.S. 155, 158–59 (1891); In re Kemmler, 136 U.S. 436, 446 (1890); Presser v. Illinois, 116 U.S. 252, 263–68 (1886); Hurtado v. California, 110 U.S. 516 (1884); United States v. Cruikshank, 92 U.S. 542, 552–56 (1875); Walker v. Sauvinet, 92 U.S. 90 (1875)).

[12] *Weems*, 217 U.S. at 369 (citing Pervear v. Massachusetts, 72 U.S. 475 (1867), Wilkerson v. Utah, 99 U. S. 130 (1878), In Re Kemmler, 136 U. S. 436, 447 (1890), and O'Neil v. Vermont, 144 U. S. 323 (1892), as examples of cases where cruelty was considered but not defined).

[13] *Id.* at 357, 364.

[14] *Id.* at 367.

[15] Trop v. Dulles, 356 U.S. 86 (1958).

[16] *Id.* at 101.

[17] The majority opinion in *Gregg v. Georgia*, which upheld that state's new capital punishment scheme, cited *Weems* and *Trop* for the proposition that sentencing review must

with *Gregg v. Georgia* in 1976, the U.S. Supreme Court "has essentially drawn a bright line between capital and non-capital sentences [], with capital sentences receiving some scrutiny under the evolving standards of decency doctrine and non-capital sentences receiving virtually none."[18] The Court revived capital punishment in *Gregg*, but over the next 30 years it outlawed the death penalty as a mandatory penalty,[19] for intellectually disabled people,[20] and in rape cases[21] (including rape of a child[22]).

The Court later began to scrutinize life without parole (LWOP) sentences for juveniles in a similar fashion, carving out an additional category of cases for heightened review. In 2005, the U.S. Supreme Court held in *Roper v. Simmons* that juveniles were ineligible for the death penalty under "evolving standards of decency."[23] Five years later, the court held in *Graham v. Florida* that LWOP could not be imposed on juveniles who had not killed[24] because LWOP in such cases served no penological goals.[25]

Then in 2012, the Court considered the cases of two juveniles convicted of murder and sentenced to LWOP in Arkansas and Alabama, respectively. In each case, LWOP was the only permissible punishment. The Court held in *Miller v. Alabama* that these mandatory LWOP sentences violated the Eighth Amendment.[26]

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consider whether a punishment is "grossly out of proportion to the severity of the crime." 428 U.S. 153, 173 (1976). This was the beginning of the bifurcation of proportionality review.

[18] William W. Berry III, *Cruel State Punishments*, 98 N.C. L. REV. 1201, 1204 (2020).

[19] Woodson v. North Carolina, 428 U.S. 280 (1976).

[20] Atkins v. Virginia, 536 U.S. 304 (2002).

[21] Coker v. Georgia, 433 U.S. 584 (1977).

[22] Kennedy v. Louisiana, 554 U.S. 407 (2008).

[23] Roper v. Simmons, 543 U.S. 551, 561, 578 (2005)

[24] Terrence Graham had been convicted of armed burglary with assault or battery and attempted armed robbery after attempting to rob a BBQ restaurant. No money was taken. Terence and a friend entered through an unlocked back door and encountered the restaurant's manager. Graham's friend hit the manager twice with a metal bar. When the manager started yelling, "the two boys ran and escaped in a car driven by [a] third accomplice. The restaurant manager required stitches for his head injury." Terrence pled guilty, and his plea was accepted, but the judge decided to wait to impose a sentence, ordering Graham to complete three years of probation. During that time, law enforcement alleged that Terrence participated in another burglary, this time a home invasion robbery. Terrence denied his involvement, but admitted that he had fled supervision. He was brought for sentencing on his original charges, for which the State was seeking 30-45 years. The sentencing judge did not believe that Terrence was innocent of the new charges and was not lenient. Graham v. Florida, 560 U.S. 48, 53–57 (2010), as modified (July 6, 2010).

[25] *Graham*, 560 U.S. at 53. The Court held that the retributive force of LWOP was too large for children who didn't kill and thus had "twice diminished moral culpability." *Id.* at 69. Other penological goals are addressed *infra*.

[26] Miller v. Alabama, 567 U.S. 460, 489 (2012). Four years later, in *Montgomery v.*

These decisions were based on three factors. First, there was an emerging consensus against LWOP sentences for children.[27] Second, sociological and scientific studies demonstrated that children were less deserving of harsh punishment because they are more impetuous, more susceptible to peer pressure, and have greater capacity to change than adults.[28] Cumulatively, these traits make it "difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption."[29]

Third and finally, the Court found that "[t]he judicial exercise of independent judgment requires consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question. In this inquiry the Court also considers whether the challenged sentencing practice serves legitimate penological goals," namely retribution, deterrence, incapacitation, and rehabilitation.[30] In juvenile cases, none of these goals could be met by LWOP for non-homicides, mandatory LWOP, or the death penalty.

Roper, *Graham*, and *Miller* neatly showcase the Court's decision-making process in capital and juvenile cases under the evolving standards of decency doctrine. First, the Court looks for indicia of consensus. Consensus is important, but not dispositive, as *Miller* demonstrates.[31] Second, the Court uses its own judgment to conduct a proportionality assessment, one that includes but is not limited to the fit between the crime and the punishment. It also requires scrutinizing the fit between the punishment, the perpetrator's culpability, and the legitimate state purposes of punishment.

The result is that on one side of the "evolving-standards" ledger are more than a dozen cases analyzing sentences of death (for adults) and LWOP (for juveniles), which the Court scrutinizes thoroughly[32] under evolving standards of decency. On the other side of the ledger is . . . *Solem v. Helm*.[33]

Louisiana, the Court held that *Miller* was retroactive and required states to reconsider any mandatory LWOP sentences imposed on children. Montgomery v. Louisiana, 577 U.S. 190, 212 (2016), as revised (Jan. 27, 2016).

[27] *Roper*, 543 U.S. at 567, 569–70, 573; *Graham*, 560 U.S. at 67; *Miller*, 567 U.S. at 489. This is why they cannot vote, marry without consent, or serve on juries. *Roper*, 543 U.S. at 569.

[28] *Roper*, 543 U.S. at 569–70, 573.

[29] *Roper*, 543 U.S. at 573.

[30] *Graham*, 560 U.S. at 67.

[31] *Miller*, 567 U.S. at 482 (banning mandatory LWOP sentences for children despite the fact that "29 jurisdictions (28 States and the Federal Government) make a life-without-parole term mandatory for some juveniles convicted of murder in adult court").

[32] Or a least more thoroughly than in any other sentencing cases.

[33] 463 U.S. 277 (1983).

In this 1983 opinion, the Court struck down a LWOP sentence for a Nevada man with recidivist status who passed a bad $100 check. It remains the only modern case in which the Supreme Court found that a non-capital, non-juvenile LWOP sentence was unconstitutionally severe.

The *Solem* court laid out a framework for "proportionality analysis under the Eighth Amendment."[34] Judges "should be guided by objective criteria,"[35] but would be required to engage in "line-drawing," a task that courts are often asked to do in other contexts.[36] Because Solem had been treated more harshly than people in Nevada who had committed more serious crimes and more harshly than he would have been in any other state except one, his LWOP sentence was "grossly disproportionate" to the crime and prohibited.[37] It was an approach that considered not only whether the punishment fit the crime, but whether it was out step with prevailing practices both within and without the state.

But eight years later, the Court narrowed *Solem's* holding. Ronald Harmelin was convicted in Michigan of cocaine possession and sentenced to a mandatory term of life in prison without parole despite having no prior felony convictions.[38] Justice Scalia, writing for a divided court,[39] expressly disavowed *Solem* and would have held that "the Eighth Amendment contains no proportionality guarantee."[40] Instead, the majority held only that Harmelin's specific sentence was constitutional because it was not "unusual," its inherent cruelty beside the point.[41] Ultimately, Justice Kennedy's concurrence supporting "gross disproportionality" carried the day,[42] but left in place only "a narrow [] principle that applies to noncapital sentences."[43]

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[34] *Id.* at 292.

[35] These criteria included "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." *Id.*

[36] Such as measuring when Sixth Amendment rights to a speedy trial or trial by jury are violated. *Id.* at 294–95.

[37] *Id.* at 303.

[38] 501 U.S. 957, 961, 994 (1991).

[39] Justice Scalia was joined by Justices O'Connor, Kennedy, and Souter and Chief Justice Rehnquist in the judgment. However, only the Chief Justice joined in the first three parts of his four-part opinion.

[40] *Id.* at 965.

[41] *Id.* at 994–95.

[42] Joined by Justices O'Connor and Souter, Justice Kennedy wrote that four principles: "the primacy of the legislature, the variety of legitimate penological schemes, the nature of our federal system, and the requirement that proportionality review be guided by objective factors" informed his determination the Eighth Amendment "does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime." 501 U.S. at 1001.

[43] Ewing v. California, 538 U.S. 11, 20 (2003)

After *Harmelin*, the only coherent understanding of federal gross proportionality review "is as requiring a punishment to be both cruel and unusual" in order for it to be unconstitutionally harsh.[44] In practice, this has meant near-total deference to legislatures, prosecutors, and sentencing courts—what Prof. Barkow meant when she said that "the Court has utterly failed to police sentence length."[45] Under this review, for example, the Court upheld sentences of twenty-five years to life for people who stole only $150 and $1,200 worth of merchandise, respectively, but had prior felony convictions.[46] Any chance for robust federal proportionality review was gone after *Harmelin*. The U.S. Supreme Court had "erected a gross disproportionality standard that [is] insurmountable in most cases, even for draconian and excessive sentences."[47]

B. *Proportionality in North Carolina Before* Kelliher

The decision in *Solem* triggered the first and only "wave" of proportionality challenges to North Carolina sentencing practices. Over a two-and-a-half-year period from 1983 to 1986, the state supreme court heard five cases of people convicted of murder, sex offenses, and attaining habitual felon status. All challenged their sentences as grossly disproportionate. In each case, the court rejected the challenges.[48]

Of these, the 1985 case of Ricky Todd is notable, as his only substantive convictions were for felony breaking and entering and larceny. Due to his prior convictions, he had attained habitual felon status—North Carolina's version of a "three strikes" provision[49]—and was sentenced to life

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[44] Berry, *supra* note 18, at 1212 (emphasis added).

[45] See *supra* note 8.

[46] 538 U.S. 63 (2003).

[47] William W. Berry III, *Cruel and Unusual Non-Capital Punishments*, 58 AM. CRIM. L. REV. 1627, 1628 (2021).

[48] State v. Ysaguire, 309 N.C. 780, 309 S.E.2d 436 (1983); State v. Higginbottom, 312 N.C. 760, 324 S.E.2d 834 (1985); State v. Todd, 313 N.C. 110, 326 S.E.2d 249 (1985); State v. Peek, 313 N.C. 266, 328 S.E.2d 249 (1985); State v. Barts, 316 N.C. 666, 343 S.E.2d 828 (1986).

[49] The habitual felon statutes are housed in Chapter 14 of the North Carolina General Statutes, N.C. Gen. Stat. §§ 14-7.1 to 14-7.6. Todd's offenses took place during the Fair Sentencing Act era in North Carolina, which applied to acts committed from July 1, 1981 to October 1, 1994. At that time, a person charged with habitual felon status was eligible for a life sentence because they were automatically given a class C punishment. 1981 N.C. Sess. Laws ch. 179, § 13; 1981 N.C. Sess. Laws ch. 662, § 2 (class C felonies punished by "up to 50 years, or by life imprisonment, or a fine, or both imprisonment and fine"). Judges at the time had complete discretion to impose life with parole for any class C felony conviction. When Structured Sentencing was passed, habitual felon status meant an automatic bump to class C for sentencing, regardless of the class of the underlying felony. 1994 N.C. Sess. Laws

with parole.[50] He served 23 years for offenses that had previously led to less than 14 months imprisonment.[51]

Todd and its companion cases would negatively impact later attempts to bring mercy to North Carolina sentencing in *State v. Howell*[52] and *State v. Green*.[53] Following *Harmelin*'s lead, the Supreme Court of North Carolina used these cases to make clear that no one should expect relief from a legislatively-allowed sentence, no matter how draconian. In doing so, the court ignored distinctions between the Eighth Amendment and Article I, § 27, following U.S. Supreme Court case law as though its own state constitution was meaningless.

1. State v. Howell

The North Carolina Supreme Court reviewed William Howell's sentence in 2018. He was convicted of possessing 15 grams of marijuana with the intent to sell or deliver, a misdemeanor.[54] Because Howell had a prior marijuana conviction, this misdemeanor was enhanced to a class I felony. That class I felony was then enhanced to a class E felony under North Carolina's habitual felon status law. The end result was that Howell went from facing 4 months maximum to a sentence of 29-47 months.[55]

Nowhere in the *Howell* opinion did the majority even glance at a proportionality analysis. Only Justice Cheri Beasley in dissent noted that the trivial offense of minor marijuana possession ought not be punished as severely as other class E felonies,[56] which include Sexual Activity by a Substitute Parent or Custodian,[57] Assault with a Firearm on a Law Enforcement Officer,[58] Assault with a Deadly Weapon Inflicting Serious

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ch. 22, § 15. In 2011, this was changed to a bump of four felony classes, so a person convicted of a class H felony and attaining habitual felon status would be sentenced at the class D level. The four-class enhancement could not elevate sentencing beyond class C. 2011 N.C. Sess. Laws ch. 192, § 3(d).

[50] State v. Todd, 313 N.C. 110, 326 S.E.2d 249 (1985).

[51] *Compare* judgment BA-002, *Offender Information of Ricky Todd*, N.C. DEP'T OF ADULT CORR, OFFENDER PUB. INFO., https://webapps.doc.state.nc.us/opi/viewoffender.do?method=view&offenderID=0409462&searchLastName=todd&searchFirstName=ric&searchDOBRange=0&listurl=pagelistoffendersearchresults&listpage=1, *with* judgment AB-001, *id.*

[52] State v. Howell, 370 N.C. 647, 648, 811 S.E.2d 570, 571 (2018).

[53] 348 N.C. 588, 502 S.E.2d 819 (1998), *abrogated by* State v. Kelliher, 381 N.C. 558, 873 S.E.2d 366 (2022).

[54] 370 N.C. 647, 811 S.E.2d 570 (2018).

[55] *Id.* at 648–49, 811 S.E.2d at 571–72.

[56] *Id.* at 660–61, 811 S.E.2d at 578–79.

[57] N.C. Gen. Stat. § 14-27.31.

[58] N.C. Gen. Stat. § 14-34.5.

Injury,[59] and Second-Degree Kidnapping.[60] The court refused to consider whether a twelve-fold increase in punishment was either cruel or unusual.

2. Andre Green and Fear of "Superpredators"

To read the 1998 opinion in *State v. Green* is to travel back to a distinct but horrific time. Andre Green was convicted of first-degree sexual offense, attempted first degree rape, and first degree burglary for incidents that happened when he was 13 years old.[61] Green was described as borderline intellectually disabled, and the crimes were committed during the only five month period in North Carolina history where a 13 year-old could be sentenced to a mandatory term of life with parole.[62]

The early 1990s saw the rise of "superpredator" hysteria, the racialized fear "that there would be hordes upon hordes of depraved teenagers resorting to unspeakable brutality, not tethered by conscience."[63] John J. DiIulio Jr., then a political scientist at Princeton, predicted that a massive crime wave fueled by children was upon us.[64] Both major political parties and every mainstream news organization ran with this sensationalist idea.[65] The North Carolina General Assembly did too, passing legislation lowering the age of jurisdiction in adult court from 14 to 13 years old.[66]

In addition, the North Carolina Supreme Court's description of Andre Green is heartbreaking. The court twice described Andre as a "child," putting the word in quotation marks so that readers would clearly understand that the court did not believe this 13 year-old was worthy of the designation.[67] The court went on to say that Andre's "refusal to accept full responsibility, his difficulty controlling his temper, his previous record and his unsupportive family situation all suggest defendant is not particularly suited to the purpose and type of rehabilitation dominant in the juvenile system."[68]

The court considered whether Green's sentence comported with evolving standards of decency or was grossly disproportionate. In holding that Green's sentence was in line with evolving standards, the court cited "the

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[59] N.C. Gen. Stat. § 14-32(b).

[60] N.C. Gen. Stat. § 14-39.

[61] State v. Green, 348 N.C. 588, 592, 502 S.E.2d 819, 822 (1998).

[62] *Id.* at 613, 502 S.E.2d at 834 (Frye, J., concurring in part).

[63] Clyde Haberman, *When Youth Violence Spurred 'Superpredator' Fear*, N.Y. TIMES (Apr. 6, 2014), https://www.nytimes.com/2014/04/07/us/politics/killing-on-bus-recalls-superpredator-threat-of-90s.html.

[64] *Id.*

[65] *Id.*

[66] *Green*, 348 N.C. at 606–07, 502 S.E.2d at 829.

[67] *Id.* at 609–10, 502 S.E.2d at 831.

[68] *Id.* at 610, 502 S.E.2d at 832.

1994 extra crime session of the legislature," where "the general consensus of the people through their elected representatives was that violent youthful offenders were a substantial threat to the security and well-being of society, and they must be dealt with in a more severe manner."[69] The court similarly dispatched with Green's proportionality claim, stating that it was appropriate to determine that he appeared to "possess the wisdom and age of individuals considerably older than his chronological age," making "the adult justice system, with its primary goals of incapacitation and retribution" the proper place for him.[70]

Ultimately, the North Carolina Supreme Court noted that it "historically has analyzed cruel and/or unusual punishment claims by criminal defendants the same under both the federal and state Constitutions."[71] The *Green* court disagreed with the assertion that use of the disjunctive "or" in the North Carolina Constitution could compel a different result. "[R]esearch reveals neither subsequent movement toward such a position by either this Court or the Court of Appeals nor any compelling reason to adopt such a position."[72]

In *Howell* and *Green*, the North Carolina Supreme Court noted that the punishments suffered by the imprisoned people were authorized by the state's General Assembly. Just as the U.S. Supreme Court had done, the North Carolina court was unwilling to scrutinize legislation, despite sentences that were alternately cruel and unusual. If a 13 year-old could not get mercy, no one else stood a chance.

C. *Proportionality in Other States and Growing State Constitutionalism*

During the Warren Court era, as more provisions in the Bill of Rights were applied to the states,[73] state courts could be forgiven for believing that the federal judiciary would drive sentencing reform in the decades to come. Indeed, only two states—Alaska and California—took seriously their own constitutional role in protecting people from excessive sentences.[74]

It is not surprising, then, that the vast majority of states (40 of the nation's 50) joined North Carolina and have generally followed in

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[69] *Id.* at 607, 502 S.E.2d at 830. Virtually every state joined North Carolina in enacting stricter laws to combat the supposed child "superpredators" predicted by some criminologists. Haberman, *supra* note 63.

[70] *Green*, 348 N.C. at 610–11, 502 S.E.2d at 832.

[71] *Id.* at 603, 502 S.E.2d at 828.

[72] *Id.* at 603 n.1.

[73] Brennan, *supra* note 11, at 493–94.

[74] *See* Berry, *supra* note 47, at 1643–47.

"lockstep"[75] with federal Eighth Amendment case law.[76] But there is a growing movement among both scholars and jurists to reinvigorate the independent meaning of state constitutions—including in the sentencing context, specifically.[77] In the past ten years, state courts in Connecticut, Iowa, Louisiana, Maine, Massachusetts, Michigan, Montana, New Jersey, Washington, and West Virginia have revisited excessive sentencing and struck down sentences for both adults and juveniles.[78]

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[75] "Under the lockstep approach, the state constitutional analysis begins and ends with consideration of the U.S. Supreme Court's interpretation of the textual provision at issue. On this approach, federal rulings are regarded as having attained 'a presumption of correctness' from which the state court should be loathe to part." Lawrence Friedman, *The Constitutional Value of Dialogue and the New Judicial Federalism*, 28 HASTINGS CONST. L.Q. 93, 102 (2000).

[76] Berry, *supra* note 18, at 1252–54.

[77] JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (2018); Goodwin Liu, *State Courts and Constitutional Structure*, 128 YALE L.J. 1304, 1322 (2019); Robert J. Smith, Zoe Robinson, & Emily Hughes, *State Constitutionalism and the Crisis of Excessive Punishment*, 108 IOWA L. REV. 537 (2023); Loretta H. Rush & Marie Forney Miller, *Cultivating State Constitutional Law to Form a More Perfect Union—Indiana's Story*, 33 NOTRE DAME J. LAW, ETHICS & PUB. POL. 377 (2019); John Mills & Aliya Sternstein, *New Originalism: Arizona's Founding Progressives on Extreme Punishment*, 64 ARIZ. L. REV. 733 (2022).

[78] State v. Belcher, 342 Conn. 1, 25, 268 A.3d 616, 630 (2022) (sixty year sentence for juvenile was excessive when it relied on now-debunked "superpredator" theory); State v. Pearson, 836 N.W.2d 88, 97 (Iowa 2013), as corrected (Aug. 27, 2013) (sentence requiring incarceration for 35 years before parole eligibility is excessive for a juvenile); State v. Lyle, 854 N.W.2d 378, 404 (Iowa 2014), as amended (Sept. 30, 2014) (mandatory minimum time before parole eligibility for juveniles excessive); State v. Sweet, 879 N.W.2d 811, 839 (Iowa 2016) (LWOP sentences for juveniles prohibited under state constitution); State v. Dixon, 254 So. 3d 828, 836, 840-41 (La. Ct. App. 2018) (ninety-nine-year sentence for sexual battery of a juvenile under the age of thirteen excessive); Diatchenko v. Dist. Att'y for Suffolk Dist., 466 Mass. 655, 673, 1 N.E.3d 270, 286 (2013) (LWOP sentences for juveniles prohibited under state constitution); State v. Stanislaw, 2013 ME 43, ¶ 50, 65 A.3d 1242, 1257 (twenty-seven years for non-violent sexual conduct against minors excessive); People v. Stovall, No. 162425, 2022 WL 3007491, at *10 (Mich. July 28, 2022) (life with parole for juvenile convicted of second degree murder excessive); State v. Olivares-Coster, 2011 MT 196, ¶ 21, 361 Mont. 380, 386, 259 P.3d 760, 765 (requiring a juvenile to serve 60 years before parole eligibility illegal under conflicting state statutes); State v. Keefe, 2021 MT 8, ¶ 55, 403 Mont. 1, 23, 478 P.3d 830, 844 (McGrath, J., concurring) (Montana constitution does not support LWOP sentences for juveniles); State v. Comer, 249 N.J. 359, 401, 266 A.3d 374, 399 (2022) (statute requiring 30 years of incarceration before parole eligibility excessive as applied to juveniles); State v. Bassett, 192 Wash. 2d 67, 91, 428 P.3d 343, 355 (2018) and Matter of Monschke, 197 Wash. 2d 305, 329, 482 P.3d 276, 288 (2021) (barring LWOP for anyone under the age of 21); State v. Wilson, No. 11-0432, 2012 WL 3031065, at *2 (W. Va. Mar. 12, 2012) (recidivist life sentence excessive in a case involving non-violent crimes); State v. Kilmer, 808 S.E.2d 867, 871 (W. Va. 2017) (recidivist life sentence excessive when prior convictions were for driving under the influence); State v. Lane, 826

This movement is entirely congruent with a federalist system. "[F]ederal law sets certain minimum requirements that States must meet but may exceed in providing appropriate relief."[79] The federal constitution "provide[s] no support for the proposition that federal law places a limit on state authority" to act under state law.[80] As finally recognized in *Kelliher* and *Conner*, it made abundant sense for North Carolina to join this list of states re-examining extreme sentencing, and for North Carolina courts to provide more exacting constitutional review. But it remains both urgent and constitutionally-necessary for the state high court to go further.

II. EXCESSIVE SENTENCING REVIEW: A SERIOUS NEED

The decades-long reliance on toothless federal sentencing jurisprudence has left North Carolina in an untenable position. The "tough on crime" rhetoric of the 1990s led to mass incarceration in the state; North Carolina incarcerates people at a higher rate than every *country* in the world except the United States. The prison population is aging because more people are serving extreme sentences. Time and time again, the General Assembly has instituted "fixes" that seek to decrease incarceration but instead drive more people behind bars.[81] The state's parole and clemency systems are broken and no longer function as they were intended: to release people who have rehabilitated themselves in prison. In addition, the North Carolina criminal legal system produces massive racial inequality.

A. *Mass Incarceration in North Carolina: The Current Numbers*

If North Carolina, home to 10.5 million people, was a country, it would rank 34th in terms of total incarceration, right between Venezuela, with 30 million people, and Cuba, with 11.3 million.[82] On a per capita basis, North Carolina incarcerates more people than any country in the world except

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S.E.2d 657, 664 (W. Va. 2019) (recidivist life sentence excessive when prior conviction for violent crime was 20 years in the past).

[79] Am. Trucking Associations, Inc. v. Smith, 496 U.S. 167, 178–79 (1990).

[80] Danforth v. Minnesota, 552 U.S. 264, 288 (2008).

[81] See *infra* section II.B., detailing the increase in prison population after the passages of the Fair Sentencing and Structured Sentencing acts.

[82] *QuickFacts North Carolina*, UNITED STATES CENSUS BUREAU, https://www.census.gov/quickfacts/NC; *North Carolina Profile*, PRISON POLICY INITIATIVE, https://www.prisonpolicy.org/profiles/NC.html; *Highest to Lowest - Prison Population Total*, WORLD PRISON BRIEF, https://www.prisonstudies.org/highest-to-lowest/prison-population-total?field_region_taxonomy_tid=All; *Venezuela Population 2022*, WORLD POPULATION REVIEW, https://worldpopulationreview.com/countries/venezuela-population; *Cuba Population 2022*, WORLD POPULATION REVIEW, https://worldpopulationreview.com/countries/cuba-population.

the United States. In 2021, for every 100,000 North Carolinians, 617 of them were in jails, prisons, youth detention facilities, or involuntary commitment.[83] North Carolina's prison population more than doubled between 1980 and 2016.[84] This fact is the result, in part, of massive changes made to state sentencing laws in the 1990s.

B. *How North Carolina Got Here – Failed Sentencing Policy*

Until 1981, North Carolina had what is known as "indeterminate" sentencing. Judges could impose almost any sentence in misdemeanor and low-level felony cases, and most people sent to prison could be paroled at any time. Sentences varied widely across the state, and North Carolina led the nation in per capita incarceration rate in 1974.[85]

The first attempt at a "determinate" sentencing structure was the Fair Sentencing Act, which applied to crimes committed after July 1, 1981. Parole for most crimes was eliminated, and "presumptive" sentences were set for most convictions. Judicial discretion was limited in the sense that judges could not go beyond the statutory maximum sentence, but judges could sentence people to more or less time than the presumptive sentence by finding at least one aggravating or mitigating factor.[86]

Not surprisingly, eliminating parole for most people led to a larger prison population. "In 1975, the average daily population of our state's correctional facilities was less than 13,000." [87] By 1990, this number had grown to 19,000.[88] North Carolina prisons "were overcrowded and under threat of federal takeover."[89]

In response, the General Assembly passed the Structured Sentencing Act, which still applies to all felony and misdemeanor crimes (except Driving While Impaired and Drug Trafficking) committed on or after October 1,

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[83] *North Carolina Profile*, PRISON POLICY INITIATIVE, https://www.prisonpolicy.org/profiles/NC.html.

[84] *Blueprint for Smart Justice North Carolina*, AMERICAN CIVIL LIBERTIES UNION, available at https://50stateblueprint.aclu.org/assets/reports/SJ-Blueprint-NC.pdf.

[85] LORRIN FREEMAN, THE NORTH CAROLINA SENTENCING AND POLICY ADVISORY COMMISSION: A HISTORY OF ITS CREATION AND ITS DEVELOPMENT OF STRUCTURED SENTENCING, at 2–3 (Aug. 2009), available at https://www.nccourts.gov/assets/documents/publications/commission_history_aug2009.pdf

[86] *Id.* at 3.

[87] *Id.* at 4. As a short-term response, the General Assembly reauthorized parole release and began housing people in out-of-state prisons. They also imposed a population limitation on the prison system. *Id.* at 5.

[88] *Id.*

[89] *Id.* at 1.

1994.[90] The Structured Sentencing era in North Carolina brought with it a sentencing grid, where the minimum sentence is found at the intersection of the person's felony class and prior criminal record level.[91]

This grid was intended to bring "truth" to sentencing in North Carolina. Sentences would not be cut in half, and parole was eliminated entirely. But Structured Sentencing was not intended to be harsh. The legislature sought:

> [T]o impose a punishment commensurate with the injury the offense has caused, taking into account factors that may diminish or increase the offender's culpability; to protect the public by restraining offenders; to assist the offender toward rehabilitation and restoration to the community as a lawful citizen; and to provide a general deterrent to criminal behavior.[92]

However, the Structured Sentencing era has proven to be harsh. State prisons were in "crisis" when they housed 19,000 people in 1990. Currently, there are more than 30,000 people in North Carolina state prisons.[93] While Structured Sentencing reduced the sentences for some crimes, "one obvious consequence of a reform that increases the number of individuals serving prison terms that provide no opportunity of parole is that they will 'age in place' within the prison system until they die."[94] "In 1975, 140 individuals were serving sentences of over 50 years; by 2020 this number had increased to 3,820."[95] There was a clear spike in the number of extreme sentences after Structured Sentencing was enacted.[96]

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[90] NORTH CAROLINA SENTENCING AND POLICY ADVISORY COMMISSION, A CITIZEN'S GUIDE TO STRUCTURED SENTENCING (REVISED 2014), available at https://www.nccourts.gov/assets/inline-files/06_Citizen_Guide_to_Structured_Sentencing_2014.pdf.

[91] The sentencing laws are codified in N.C. Gen. Stat. § 15A-1340.10 to -1340.18. The punishment grid was amended in 1995, 2009, 2011, and 2013. Every version of the sentencing grid can be found at https://www.nccourts.gov/documents/publications/punishment-grids. The prior record level worksheet, setting forth the mechanism for calculating prior record levels, can be found at https://www.nccourts.gov/assets/documents/forms/cr600b.pdf.

[92] N.C. Gen. Stat. § 15A-1340.12.

[93] *Statistics, Data and Research*, N.C. DEP'T OF ADULT CORRECTION, https://www.dac.nc.gov/services/statistics-data-and-research (last accessed April 7, 2023).

[94] Frank R. Baumgartner & Sydney Johnson, *Aging in Place in the Big House: A Demographic Analysis of the North Carolina Prison Population*, p. 1, available at http://fbaum.unc.edu/papers/Baumgartner-Johnson-AgingInPrison-2020.pdf.

[95] *Id.* at 3–4.

[96] *Id.* at 6.

C. *The Failure of Parole and Clemency*

The U.S. Supreme Court has justified its hands-off approach to sentence review in part by invoking the possibility of parole. "Parole is a regular part of the rehabilitative process," the Court said in *Solem*. "Assuming good behavior, it is the normal expectation in the vast majority of cases . . . Thus it is possible to predict, at least to some extent, when parole might be granted. Commutation, on the other hand, is an ad hoc exercise of executive clemency. A Governor may commute a sentence at any time for any reason without reference to any standards.[97]

These statements will seem absurd to anyone practicing criminal law in North Carolina today. The North Carolina parole process is a sham,[98] and in 2015, the Eastern District of North Carolina found that the North Carolina Post-Release Supervision and Parole Commission[99] was violating the rights of former juveniles now eligible for parole. [100]

The court's decision was based, in part, on the fact that the Parole Commission had no idea whether a person being considered for parole was a juvenile at the time of the crime(s) or not.[101] It was also based on factors affecting all people eligible for parole, including enormous caseloads,[102] total lack of process,[103] and no connection between time spent in prison and

[97] Solem v. Helm, 463 U.S. 277, 300–01 (1983).

[98] During oral arguments at the Fourth Circuit in *LeBlanc v. Mathena*, counsel for Virginia defended the way the state conducted parole reviews of people in prison for juvenile convictions. Counsel argued that *Graham v. Florida* did not apply to Virginia's system, but noted that *Graham* might apply when parole was illusory "as in the Hayden case, where the parole system is just a sham, and people really aren't getting out." Oral Argument at 11:25, LeBlanc v. Mathena, 841 F.3d 256 (4th Cir. 2016), https://www.ca4.uscourts.gov/OAarchive/mp3/15-7151-20160510.mp3. Your author would like to note that he was counsel for Hayden, which was the next argument, and was very happy to hear counsel for Virginia acknowledge what seemed obvious to everyone but the state of North Carolina.

[99] As the name implies, the Commission does not only make discretionary parole decisions. It is also responsible for "establishing conditions of supervision and an aftercare program" for people released from prison. *Post-Release Supervision & Parole Commission*, N.C. DEP'T OF PUB. SAFETY, https://www.ncdps.gov/about-dps/boards-commissions/post-release-supervision-parole-commission.

[100] Hayden v. Keller, 134 F. Supp. 3d 1000, 1012 (E.D.N.C. 2015).

[101] *Id.* at 1009.

[102] "Each parole case analyst is responsible for approximately 4,338 offenders," and "[a]s of September 2014, the Parole Commission had reviewed about 15,200 parole cases for that year." "On a 'fairly typical day,' a commissioner casts approximately 91 votes." *Id.* at 1002.

[103] The Commission does not provide notice to the person in advance of the review. There is no opportunity for the person to be heard during the course of the review. The commissioners do not meet together to discuss anyone's parole review. *Id.* at 1002–03.

likelihood of release.[104]

In addition to these procedural problems, no one was actually getting released. From 2010-2015, the parole release rate was never higher than 5.9% in a single year. From 2011-2015, 158 people who had begun incarceration as juveniles were considered for parole. Only one was released. [105]

Like parole, executive clemency was once a regular part of the criminal justice system in North Carolina. Between 1977 and 1992, each North Carolina governor commuted 100-150 sentences.[106] But the use of commutations decreased greatly after 1992, and executive clemency as a whole dropped off a cliff after the year 2000.[107]

Emblematic of this shift is the change in commutation of capital sentences. Between 1977 and 1989, 26 people were removed from death row by executive clemency.[108] The number of death sentences in North Carolina then peaked in 1994.[109] Despite the increased number of people eligible for clemency, not a single death sentence has been commuted since 2002.[110]

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[104] An expert report showed that reaching the age of 58 or 59 led to increased likelihood of getting parole release, regardless of how long the person had spent in prison. *Id.* at 1004. Therefore, younger people were likely to spend significantly more time in prison than an older person convicted of the same offense and with a similar prison history.

[105] *Id.* at 1005.

[106] Ben Finholt & Jamie Lau, *Everything You Need to Know About Clemency in North Carolina*, WILSON CTR. FOR SCI. & JUST. AT DUKE L. (Sept. 17, 2021), https://wcsj.law.duke.edu/2021/09/everything-you-need-to-know-about-clemency-in-north-carolina/.

[107] *Id.*

[108] *List – Removed from Death Row*, N.C. DEPT. OF ADULT CORR., https://www.dac.nc.gov/divisions-and-sections/prisons/death-penalty/list-removed-death-row.

[109] *North Carolina*, DEATH PENALTY INFO. CENTER, https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/north-carolina.

[110] *List – Removed from Death Row*, N.C. DEPT. OF ADULT CORR., https://www.dac.nc.gov/divisions-and-sections/prisons/death-penalty/list-removed-death-row.

The only ray of hope for gubernatorial clemency is the Juvenile Sentence Review Board. Formed in 2021, it is intended to serve as an advisory board to "[r]eview sentences imposed on juveniles in North Carolina and make recommendations concerning clemency and commutation of such sentences when appropriate." The group of eligible people will have served at least 15 years for crimes committed when they were children. The JSRB is required to consider (1) the petitioner's prison record; (2) factors suggesting developmental immaturity in the crime; (3) the petitioner's mental health at the time of the crime; (4) input from victim or members of victim's immediate family; (5) the degree of risk the petitioner poses to society; (6) rehabilitation and maturity demonstrated by the petitioner; and (7) whether the petitioner's race unduly influenced the trial or sentencing. Executive Order 208, https://files.nc.gov/governor/documents/files/EO208-Juvenile-Sentence-Review-Board.pdf. The Board's mandate is to "promote sentencing outcomes that consider the fundamental

D. *Racial Disparities in Sentencing and the Warehousing of Black and Brown People*

The number of people in prison, the length of their sentences, and the failure or abolition of traditional release mechanisms are not the only problems facing the North Carolina criminal legal system. The table below shows Census estimates for the general North Carolina population, along with race/ethnicity data from North Carolina prisons.[111]

Race/ Ethnicity[112]	In NC	In prison	Served 10 years	Served 20 years	Served 40 years
Am. In./Nat. Am./Indg./Alsk. Nat.	1.1	1.9	2.4	2.4	1.9
Asian/As-Am.	2.9	0.3	0.3	0.2	0.0
Black/Af-Am.	21.8	50.0	58.4	61.9	65.6
Latinx	10.2	4.9	4.5	1.0	0.0
Two or more	2.5	1.6	0.8	0.7	0.0
White	61.4	41.3	33.5	33.7	32.6

differences between juveniles and adults and address the structural impact of racial bias while maintaining public safety." *Id.* So far, five people have received commutation through this process. Press Release, N.C. Office of the Governor, Governor Cooper Grants Clemency to 3 People who were Juveniles when Crimes Committed (Mar. 10, 2022), https://governor.nc.gov/news/press-releases/2022/03/10/governor-cooper-grants-clemency-3-people-who-were-juveniles-when-crimes-committed; Press Release, N.C. Office of the Governor, Governor Cooper Commutes Sentences and Issues Pardons of Forgiveness (Dec. 20, 2022), https://governor.nc.gov/news/press-releases/2022/12/20/governor-cooper-commutes-sentences-and-issues-pardons-forgiveness.

[111] *QuickFacts North Carolina, Population Estimates July 2, 2021*, UNITED STATES CENSUS BUREAU, https://www.census.gov/quickfacts/NC. Note that those of Hispanic or Latinx descent are often included in other categories as well. The total percentage of all categories was 102%, so I subtracted 0.5% from each of the main race categories (excluding two or more) to arrive at these adjusted estimates.

[112] All data about the prison population in North Carolina are gathered from the North Carolina Department of Adult Correction (DAC) Offender Population Unified System (OPUS). DAC makes a number of data sets publicly available, *Downloads*, N.C. DEP'T OF ADULT CORR. OFFENDER PUB. INFO., https://webapps.doc.state.nc.us/opi/downloads.do?method=view. The data in this chart were gathered using the "Inmate Profile" data set, which gives a race, ethnicity, and number of days served in DPS custody for each person who has been in a North Carolina prison since 1972. The race and ethnicity data in OPUS were combined into a single category and matched with slightly modified Census categories.

North Carolina researchers Baumgartner and Johnson found even worse disparities when only Black men are considered:

> Among male prisoners serving these long sentences, Blacks are 52% of those serving for sex-related crimes, 61% for first-degree murder, 66% for second-degree murder, 67% for drug-related crimes, 77% for other and lesser crimes, 78% for those serving for the designation of habitual felon, and 80% (32 of 40 individuals) serving for the designation of "violent habitual felon." Black men, of course, represent approximately 11 percent of the North Carolina population.[113]

The worst racial disparities, however, are produced by how the state sentences children. In the wake of *Green*, North Carolina has subjected more and more Black/African-American boys like him to severe punishments. Data from the 2010 Census indicates that Black/African-American boys make up a mere 13.1% of the children aged 13-17 in North Carolina, the ages at which children are eligible for sentencing as adults.[114] However, Black/African-American boys make up 73.6% of the juvenile prison population, 77.8% of the people serving life with parole or terms of more than 60 years for crimes occurring when they were children, and 80.2% of the children sentenced to LWOP.[115]

The numbers are even more depressing when all children of color are taken into consideration. Children of color make up 82.6% of the juvenile prison population, 90.0% of the people serving life with parole or terms of more than 60 years for crimes occurring when they were children, and 92.6% of the children sentenced to LWOP.[116]

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[113] Baumgartner & Johnson, *supra* note 94, at 5–6. Violent habitual felon status is similar to "regular" habitual felon status, *supra* note 49, though it requires two previous class A-E felonies instead of three felonies of any class. N.C. Session Law 1994-22, §§ 31–32. Prosecutors have complete discretion whether to charge a person with either of these statuses.

[114] *See* N.C. Gen. Stat. § 7B-1601.

[115] These data were gathered using the OPUS "Inmate Profile" data set, which includes birth dates, most serious conviction, parole eligibility dates, custody information, and number of days served in DPS custody for each person who has been in a North Carolina prison since 1972. *Downloads*, N.C. DEP'T OF ADULT CORR. OFFENDER PUB. INFO., https://webapps.doc.state.nc.us/opi/downloads.do?method=view (follow hyperlink for "Inmate Profile").

[116] In *Juvenile Life Without Parole in North Carolina*, 110 J. CRIM. L. & CRIMINOLOGY 141 (2020), Brandon L. Garrett, Karima Modjadidi, Kristen M. Renberg, and I found that 86 of the 94 LWOP sentences ever given to juveniles were imposed upon children of color. This number was based on OPUS data. Subsequently, one of the eight people identified as white wrote to inform me that his father was Black, and that he is not white.

III. A STATE CONSTITUTIONAL REMEDY: THE UNREALIZED MEANING OF NORTH CAROLINA ARTICLE I, § 27

North Carolina's analog to the federal Eighth Amendment is contained in Article I, § 27 of the state constitution and reads, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel *or* unusual punishments inflicted." Currently, North Carolina is one of thirty-four states whose constitutions discuss non-capital punishment differently than does the U.S. Constitution.[117] This difference does not appear accidental. However, North Carolina had been one of the 40 states moving in "lockstep" with federal interpretation of punishment limitations, as though the disjunctive was not intended.

In addition to the plain textual difference, there are other reasons why Article I, § 27 is both independent from and much broader than the Eighth Amendment. These include North Carolina's long history—even after incorporation of the Bill of Rights against the states—of providing its people with stronger constitutional rights than are available under the federal constitution. The particular history of Article I, § 27, related constitutional provisions that prohibit racial discrimination, and a statutory mandate for rehabilitation also inform what "cruel or unusual" means in North Carolina.

A. *North Carolina Constitutional Principles*

A review of North Carolina constitutional jurisprudence shows that, in many areas, the state's courts have followed the drafters' intent and protected the state's citizens more robustly than their federal counterparts. While the U.S. Supreme Court famously arrived at the conclusion that "[i]t is emphatically the province and duty of the judicial department to say what the law is" in 1803,[118] the North Carolina Supreme Court first struck down unconstitutional legislation in 1787, establishing judicial review in the state sixteen years before *Marbury v. Madison*.[119] The state was also one of the first to define due process of law in an 1805 decision.[120]

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[117] Berry, *supra* note 18, at 1215–40. The constitutions of Arizona, Colorado, Florida, Georgia, Idaho, New Mexico, New York, Ohio, Tennessee, Utah, Virginia, and Wisconsin all prohibit "cruel and unusual punishments." (Florida's clause was changed in 1998 from disjunctive to conjunctive, and a provision was added to require interpretation in line with the United States Supreme Court.) The constitutions of Iowa, Missouri, and Nebraska prohibit the singular "cruel and unusual punishment." New Jersey's constitution contains an additional clause specifically concerning the death penalty.

[118] Marbury v. Madison, 5 U.S. 137, 177 (1803).

[119] Bayard v. Singleton, 1 N.C. (Mart.) 5 (1787).

[120] Trustees of Univ. of N.C. v. Foy, 5 N.C. 58, 88 (N.C. Conf. 1805) (holding that the legislature could not take back land granted to the University of North Carolina "unless by a

Over the past 200 years, the North Carolina Supreme Court has largely held to the principle that the North Carolina Constitution "empower[s] the state courts to provide protections going even beyond those secured by the U.S. Constitution."[121] This is true even when the clauses in both constitutions are identical.[122] The North Carolina Supreme Court "is the only entity which can answer with finality questions concerning the proper construction and application of the North Carolina Constitution,"[123] and the North Carolina Supreme Court has generally given the state constitution "a liberal interpretation in favor of its citizens with respect to those provisions which were designed to safeguard the liberty and security of the citizens in regard to both person and property."[124] Consequently, the North Carolina Supreme Court continued to advance broad oversight under the state constitution,[125] with Justice Harry Martin noting that "The Constitution of North Carolina is a beacon of civil rights [and] . . . is the people's timeless shield against encroachment on their civil rights."[126]

Two criminal law cases offer prime examples of this shielding effect. In *State v. Carter*,[127] the North Carolina Supreme Court had to determine whether taking a blood sample without a warrant violated the right to be free from unreasonable search and seizure.[128] Two years prior, in *State v. Welch*,[129] the court had held that the "good faith exception" to the Fourth Amendment exclusionary rule announced in *United States v. Leon*[130] required the admission of a blood sample drawn without a search warrant.[131] The

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trial by Jury in a court of Justice, according to the known and established rules of decision, derived from the common law")

[121] John V. Orth & Paul Martin Newby, THE NORTH CAROLINA STATE CONSTITUTION 37 (2d ed. 2013).

[122] State v. Arrington, 311 N.C. 633, 642, 319 S.E.2d 254 (1984).

[123] Virmani v. Presbyterian Health Servs. Corp., 350 N.C. 449, 474, 515 S.E.2d 675, 692 (1999).

[124] Corum v. Univ. of N.C. Through Bd. of Governors, 330 N.C. 761, 783, 413 S.E.2d 276 (1992).

[125] *See, e.g.*, State v. Tenant, 110 N.C. 609, 14 S.E. 387 (1892); Bizzell v. Bd. of Aldermen of City of Goldsboro, 192 N.C. 348, 135 S.E. 50 (1926); State v. Brown, 250 N.C. 54, 108 S.E.2d 74 (1959), *vacated*, 305 N.C. 520, 290 S.E.2d 675 (1982).

[126] Justice Harry Martin, *The State As a "Font of Individual Liberties": North Carolina Accepts the Challenge*, 70 N.C. L. REV. 1749, 1753 (1992).

[127] 322 N.C. 709, 370 S.E.2d 553 (1988).

[128] The results of the blood test in this case showed that blood on Carter's underwear was not his own and was consistent with that of a rape victim. Carter was subsequently convicted of first degree rape, first degree kidnapping, and assault and sentenced to consecutive terms of life with parole and 30 years. *Id.* at 710–12.

[129] 316 N.C. 578, 342 S.E.2d 789 (1986).

[130] 468 U.S. 397 (1984).

[131] This exception allowed evidence to be admitted when "officers acted in objectively

crucial difference for Carter was that his lawyer asked for his blood sample to be excluded under the state constitution.

In considering this state law questions, the *Carter* court noted that "North Carolina was among a handful of states that adopted an exclusionary rule by statute rather than by judicial creation," illustrating that "[s]ince 1937 the expressed public policy of North Carolina has been to exclude evidence obtained in violation of constitutional rights against unreasonable searches and seizures."[132] Therefore, the court ignored federal precedent and declined to adopt a similar "good faith exception" to the state rule.[133]

It was the court's hope that excluding improperly obtained evidence would "impose the template of the constitution on police training and practices."[134] The court ordered a new trial, knowing that in so doing, there was a risk that a person who had committed rape would go free. "Unavoidably, a few criminals may profit along with the innocent multitude from this constitutional arrangement."[135]

> In determining the value of the exclusionary rule, we regard the crucial matter of the integrity of the judiciary and the maintenance of an effective institutional deterrence to police violation of the constitutional law of search and seizure to be the paramount considerations. We do not discount the implications of the failure to convict the guilty because probative evidence has been excluded in even one grave criminal case. The resulting injuries to victim, family, and society are tolerable not because they are slight but because the constitutional values thereby safeguarded are so precious.[136]

In *State v. Cofield,*[137] the court considered whether Cofield's rights

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reasonable reliance on a warrant issued by a detached and neutral magistrate but subsequently found invalid." *Welch*, 316 N.C. at 588, 342 S.E.2d at 794. In concurrence, Justice Exum agreed that "under the decisions of the United States Supreme Court relied on by the majority this Court must apply the 'good faith' exception to the exclusionary rule in determining admissibility of evidence unconstitutionally seized under the Fourth and Fourteenth Amendments to the United States Constitution." However, Justice Exum further noted that the parties "have not argued whether this exception may sustain admissibility under the North Carolina Constitution," and based his concurrence on his understanding that the *Welch* opinion "neither addresses nor answers this question." *Id.* at 590, 342 S.E.2d at 798.

[132] *Carter*, 322 N.C. at 718–19, 370 S.E.2d at 559.

[133] *Id.* at 724, 370 S.E.2d at 562.

[134] *Id.* at 720, 370 S.E.2d at 560.

[135] *Id.*

[136] *Id.* at 722, 370 S.E.2d at 560.

[137] 320 N.C. 297, 357 S.E.2d 622 (1987).

under both the state and federal constitutions were violated by "racial discrimination in the selection of grand jury foremen in Northampton County."[138] The court turned to the North Carolina Constitution to evaluate these claims. Noting that both Sections 19 and 26 of Article I of the North Carolina Constitution[139] bar racial discrimination, the court stated that the people of North Carolina:

> Have recognized that the judicial system of a democratic society must operate evenhandedly if it is to command the respect and support of those subject to its jurisdiction. It must also be perceived to operate evenhandedly. Racial discrimination . . . deprives both an aggrieved defendant and other members of his race of the perception that he has received equal treatment at the bar of justice. Such discrimination thereby undermines the judicial process.[140]

Based on state law, the court held that Cofield had made out "a prima facie case of racial discrimination in the selection of the foreman of the grand jury" and, as in *Carter*, remanded the case to the trial court.[141] Because the will of North Carolinians to prevent racial discrimination would have been thwarted by following federal law, the court did not.

These cases show that the North Carolina Supreme Court will expand the rights of people in the criminal legal system when the state's unique policy goals as expressed in state law and history require a different interpretation than in the federal system. They also show how state constitutional law, particularly in the criminal context, is responsive to relevant social science and other the data that show how the state's policy goals are not being met. Both factors suggest that North Carolina should also forge its own constitutional path on cruel or unusual sentencing.

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[138] *Id.* at 299, 357 S.E.2d at 623. Cofield's evidence showed that the county was "approximately sixty-one percent black and thirty-nine percent white." He produced testimony from the Clerk of Superior Court Clerk "that the racial composition of Northampton County grand juries since 1968 generally has reflected the racial composition of the county as a whole." However, the clerk's testimony also revealed that "although fifty appointments have been made and thirty-three persons have been appointed foreman since 1960, only one appointee was black." *Id.* at 309, 357 S.E.2d at 629.

[139] "No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin." N.C. CONST. art. I, § 19; "No person shall be excluded from jury service on account of sex, race, color, religion, or national origin." N.C. CONST. art. I, § 26.

[140] *Cofield*, 320 N.C. at 302.

[141] *Id.* at 309.

B. *The Text & History of Article I, § 27*

During drafting of the state constitution in 1776, the authors of the North Carolina Declaration of Rights consulted the recently-written constitutions of Virginia, Pennsylvania, Delaware, and New Jersey.[142] New Jersey made no reference to punishment,[143] while Pennsylvania required only that punishments be "in general more proportionate to the crimes."[144] Virginia used the phrase "cruel and unusual,"[145] and only Delaware used the phrase "cruel or unusual."[146] The drafters made a clear choice to use the disjunctive "or" rather than the conjunctive "and." That choice has survived two subsequent draftings of the state constitution in 1868 and 1971.[147]

In 1989, the North Carolina Supreme Court explained that, "[i]n interpreting our Constitution—as in interpreting a statute—where the meaning is clear from the words used, we will not search for a meaning elsewhere."[148] In theory, this interpretive framework alone would provide a basis for the North Carolina Supreme Court to evaluate punishment differently from federal courts.[149] In other contexts, such as the right to a pension[150] or the annexation of land by a municipality,[151] the use of conjunctive or disjunctive terms has led the court to read requirements in combination ("and") or "to indicate a clear alternative" ("or").[152] Recall too that in *Harmelin*, the U.S. Supreme Court emphasized the Eighth Amendment's conjunctive structure to limit its scope.[153]

North Carolina courts have often ignored this difference, largely conflating "cruel or unusual" with "cruel and unusual" or mistakenly reading them as identical.[154] The earliest example is *State v. Reid*, 106 N.C. 714, 11

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[142] John V. Orth, *State Constitution*, *in* ENCYCLOPEDIA OF NORTH CAROLINA (William S. Powell ed., 2006), available at https://www.ncpedia.org/government/nc-constitution-history.

[143] N.J. CONST. of 1776.

[144] PA. CONST. of 1776, § 38.

[145] VA. DECLARATION OF RIGHTS § 9.

[146] DEL. CONST. of 1776, Bill of Rights, § 16. Delaware later deleted "or unusual." Del. Const. of 1792.

[147] N.C. CONST. of 1868, § XIV; N.C. CONST. of 1971, Art. I, § 27.

[148] State ex rel. Martin v. Preston, 325 N.C. 438, 449, 385 S.E.2d 473, 479 (1989).

[149] Berry, *supra* note 18, at 1227.

[150] In re Duckett's Claim, 271 N.C. 430, 437, 156 S.E.2d 838, 844 (1967).

[151] Carolina Power & Light Co. v. City of Asheville, 358 N.C. 512, 519, 597 S.E.2d 717 (2004).

[152] Duckett's Claim, 271 N.C. at 437, 156 S.E.2d at 844.

[153] Harmelin v. Michigan, 501 U.S. 957 (1991) ("severe, mandatory penalties may be cruel, but they are not unusual in the constitutional sense").

[154] *See, e.g.*, State v. Manuel, 20 N.C. 144, 36 (1838) ("After what has been said on the subject of excessive fines, it cannot be necessary to say much on the subject of cruel and

S.E. 315, 316 (1890). There, the Supreme Court of North Carolina incorrectly stated that Article 1, § 14, of the 1868 constitution forbade "excessive bail, and the imposition of excessive fines, or cruel *and* unusual punishments." The North Carolina Court of Appeals repeated this mistake as late as 2022, stating that Article I, § 27 says, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel *and* unusual punishments inflicted."[155]

Thus North Carolina's tradition of moving in lockstep with the Eighth Amendment is grounded, at least partly, in a simple mistake.[156] This approach is not required, and over time the state supreme court has occasionally recognized as much. In 1992, Justice Harry Martin noted:

> While the federal Constitution prohibits "cruel and unusual punishments," our State Constitution prohibits "cruel or unusual punishments." The conjunction in the federal Constitution has been interpreted to limit the Eighth Amendment's prohibition to punishments that are both cruel and unusual. The disjunctive term "or" in the State Constitution expresses a prohibition on punishments more inclusive than the Eighth Amendment.[157]

Despite this admonition, the North Carolina Supreme Court needed 20 years and two false starts to begin to use Article I, § 27 properly.

C. *Related Constitutional Provisions*

In North Carolina, "all constitutional provisions must be read in pari materia."[158] Two provisions in particular are of interest when applying Article I, § 27 to criminal sentencing.

The first is Article XI, § 2, adopted in 1868.[159] "The object of punishments being not only to satisfy justice, but also to reform the offender and thus prevent crime, murder, arson, burglary, and rape, and these only, may be punishable with death, if the General Assembly shall so enact." Any punishment in North Carolina other than death, therefore, must comport with this constitutional requirement to reform the person upon whom the punishment is imposed.

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unusual punishments.").

[155] State v. McDougald, 2022-NCCOA-526, ¶ 21, 876 S.E.2d 648, 657 (N.C. App. Aug. 2, 2022).

[156] Grant E. Buckner, *North Carolina's Declaration of Rights: Fertile Ground in a Federal Climate*, 36 N.C. CENT. L. REV. 145, 154 (2014).

[157] Medley v. N.C. Dep't of Corr., 330 N.C. 837, 845–46, 412 S.E.2d 654, 659–60 (1992) (Martin, J., concurring) (citations omitted).

[158] Stephenson v. Bartlett, 355 N.C. 354, 378, 562 S.E.2d 377, 394 (2002).

[159] State v. King, 69 N.C. 419, 420 (1873).

The second is Article I, § 19, which states that "No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin." This section was approved by voters and added to the Constitution in 1971.[160] According to current Chief Justice Paul Newby, the first part of Article I, § 19—the Equal Protection Clause—was based on the Fourteenth Amendment to the United States Constitution, while the second part—the Non-Discrimination Clause—was based on the Civil Rights Act of 1964.[161]

That distinction is critical. "Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause" under both the United States and North Carolina constitutions.[162] Parts of the Civil Rights Act, however, have been read to prohibit "practices that are not intended to discriminate but in fact have a disproportionately adverse effect on minorities (known as 'disparate impact')."[163] Because the people of North Carolina chose to include both equal protection and non-discrimination in their constitution, the racial impact of particular sentencing laws must be taken into account, even if they are facially neutral and have no discriminatory intent.

IV. ARTICLE I, § 27 REVIVED: *KELLIHER*, *CONNER*, AND JUVENILE SENTENCING

The North Carolina Supreme Court finally breathed life into Article I, § 27 in the cases of James Kelliher and Riley Conner. Both were children when they committed terrible crimes, and they were each sentenced under procedures put in place by the North Carolina General Assembly following the U.S. Supreme Court's decision in *Miller v. Alabama*.[164] While both were ultimately sentenced to life *with* parole, Kelliher would serve 50 years and Conner 45 years before each became eligible. To address these sentences, the North Carolina Supreme Court had to disavow its reliance on the false "superpredator" narrative and federal precedents.

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[160] John V. Orth & Paul Martin Newby, THE NORTH CAROLINA STATE CONSTITUTION 68 (2nd ed., 2013).

[161] *Id.*

[162] Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977); Holmes v. Moore, 270 N.C. App. 7, 16, 840 S.E.2d 244, 254 (2020).

[163] Ricci v. DeStefano, 557 U.S. 557, 577 (2009) (citing Griggs v. Duke Power Co., 401 U.S. 424 (1971)).

[164] 567 U.S. 460. The "Miller-fix" statutes are codified in N.C. Gen. Stat. §§ 15A-1340.19A-D.

A. *James Kelliher, Riley Conner, and the Toll of Childhood Trauma*

James Kelliher had a difficult childhood. His father was physically abusive, and James dropped out of school after the ninth grade. Achievement tests he took at age 17 showed he functioned at a sixth-grade level. He began using drugs and alcohol at age 13. By age 17, James was "under the influence all day" from substances including ecstasy, acid, psilocybin, cocaine, marijuana, and alcohol. James tried to commit suicide three times: an attempted overdose at age 10; another on the night after the murders at issue in his case; and a third at age 18 while awaiting trial.[165]

In the summer of 2001, James and Joshua Ballard arranged to buy drugs from Eric Carpenter, and went to Carpenter's apartment. While James search the residence for drugs, Ballard shot and killed both Carpenter and Kelsey Helton, Carpenter's pregnant girlfriend.[166]

James and Ballard were charged capitally and faced the death penalty. James pled guilty in exchange for non-capital sentencing, and testified against Ballard at trial. [167] In 2004, James was given two consecutive LWOP sentences.[168]

Riley Conner was born to a twenty-year-old father and an eighteen-year-old mother; both were addicted to cocaine. Riley's parents "were constantly in and out of his life. They rejected [Riley] time and time again." Riley saw his father arrested multiple times, and his mother went to prison when he was seven years old.[169]

Riley began using marijuana at age nine. He began drinking alcohol and abusing Xanax at age 11.[170] By the sixth grade, Riley was officially homeschooled, though in reality he was a "free agent." He spent his days at an abandoned trailer, where he hung out and did drugs with his older cousin.[171] By the time he was 14, Riley was experiencing up to a dozen epileptic seizures per night.[172]

At age 15, Riley raped and killed Felicia Porter, one of his aunts. Riley pled guilty and was sentenced to life with parole for murder and 20 years minimum for rape. These sentences were run consecutively.[173]

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[165] Brief of Defendant-Appellant at 5, State v. Kelliher, 381 N.C. 558, 873 S.E.2d 366 (2022).

[166] *Kelliher*, 381 N.C. at 561, 873 S.E.2d at 371.

[167] *Id.* at 562–63, 873 S.E.2d at 371.

[168] *Id.*

[169] *Conner*, 381 N.C. at 646–47, 873 S.E.2d at 342.

[170] *Id.* at 647–48, 873 S.E.2d at 342–43.

[171] *Id.* at 648–49, 873 S.E.2d at 343.

[172] *Id.* at 649, 873 S.E.2d at 343.

[173] *Id.* at 651–55, 873 S.E.2d at 345–47.

B. Miller *in North Carolina*

After the U.S. Supreme Court banned mandatory LWOP for youth in *Miller v. Alabama*, the North Carolina General Assembly passed laws, codified in N.C. Gen. Stat. §§ 15A-1340.19A–D, that established new procedures for sentencing children convicted of first-degree murder, the only crime for which LWOP was the mandatory minimum punishment in the state.[174] Under these procedures, children convicted under the theory of felony murder (that is, where they did not personally kill but participated in a felony that led to someone's death) are automatically sentenced to life with parole, defined as 25 years to life.[175] For all other children, a sentencing hearing is held, at which mitigating factors are considered.[176] The sentencing judge is required to decide between life with parole and LWOP and issue an order with "findings on the absence or presence of any mitigating factors."[177]

The North Carolina Supreme Court, upon reviewing these procedures in *State v. James*, held that we "the relevant statutory language treats life imprisonment without the possibility of parole and life imprisonment with parole as alternative sentencing options, with the selection between these two options to be made on the basis of an analysis of all of the relevant facts and circumstances in light of the substantive standard enunciated in *Miller*."[178] The court went on to note that LWOP sentences "should be reserved for those juvenile defendants whose crimes reflect irreparable corruption rather than transient immaturity."[179]

James Kelliher's case came for resentencing in Cumberland County seven months after *James*. The sentencing judge's order described James as "a model inmate" who was "a low risk to society" and "neither incorrigible nor irredeemable."[180] James's sentence was therefore reduced to life with parole for each murder conviction. However, the court ran the two sentences consecutively, meaning James would not be eligible for parole for 50 years.[181] Riley Conner was sentenced after trial two months later.

Both Riley and James appealed their sentences under the federal and state constitutions, and argued that they were being required to serve de facto LWOP in violation of their rights to be free from cruel and/or unusual punishments. Different panels of the North Carolina Court of Appeals split

[174] N.C. Gen. Stat. § 14-17.
[175] N.C. Gen. Stat. § 15A-1340.19A, -1340.19B(a)(1).
[176] N.C. Gen. Stat. § 15A-1340.19B(c).
[177] N.C. Gen. Stat. § 15A-1340.19C(a).
[178] 371 N.C. 77, 89, 813 S.E.2d 195, 204 (2018).
[179] *Id.* at 94, 813 S.E.2d at 207.
[180] State v. Kelliher, 381 N.C. at 569, 563–64, 873 S.E.2d at 369–70, 372–73.
[181] *Id*. at 563–64, 873 S.E.2d at 372–73.

on this issue, with Kelliher's panel holding that his sentence was unconstitutional and Conner's finding that his sentence passed muster.[182]

The North Carolina Supreme Court accepted jurisdiction over both cases and heard them jointly. Together, *Kelliher* and *Conner* asked tthe court to consider whether:

1. A sentence for a child, even if it does not carry the official label of LWOP, can be so long that it is a "de facto" LWOP sentence that must conform with *Graham* and *Miller*;
2. A sentence can count as de facto JLWOP even if the total term of imprisonment comes from multiple consecutive sentences; and
3. Sentences requiring a minimum of 45 and 50 years, respectively, were de facto LWOP and therefore unconstitutional.

In order for James and Riley to get relief, each question had to be answered in the affirmative. The court began its analysis by looking to the federal and state constitutional provisions related to punishment. Before the court could conduct any substantive analysis, however, it had to deal with *Green*, the 1998 precedent built on the debunked theory of "superpredator" children. It then had to decide whether to depart from the guidance of federal courts and revive the independent and original meaning of Article I, § 27.

C. *Repudiating* Green *and Following the State Constitution*

In considering whether to follow *Green*, the *Kelliher* court focused on two factors. First, "the fear of an impending generation of superpredators proved to be unfounded."[183] Scholars who reviewed research published in the first decade of the 21st century were "unable to identify any scholarly research . . . that provide[d] support for the notion of the juvenile superpredator."[184] Even Dr. DiIulio renounced his former positions and admitted that he was wrong.[185]

Not only did superpredators not emerge, juvenile crime rates *decreased* between 1997 and 2007.[186] But importantly, legislation such as North Carolina's was not responsible for this decline. "Empirical studies show that the legislative changes undertaken by certain states were not

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[182] State v. Kelliher, 273 N.C. App. 616, 849 S.E.2d 333 (2020), review allowed, writ allowed, appeal dismissed, 854 S.E.2d 584 (N.C. 2021), and aff'd as modified, 381 N.C. 558, 873 S.E.2d 366; State v. Conner, 275 N.C. App. 758, 853 S.E.2d 824 (2020), rev'd and remanded, 381 N.C. 643, 873 S.E.2d 339.

[183] Brief for Fagan, et al. as Amici Curiae, p. 8, Miller v. Alabama, 567 U.S. 460 (2012) (hereinafter "Fagan Brief"); *Kelliher*, 381 N.C. at 582, 873 S.E.2d at 384.

[184] Fagan Brief at 8.

[185] *Id.* at 19.

[186] *Id.* at 30.

causally responsible for the decline in juvenile homicide rates," and juvenile crime rates during that period were the same "in states that transferred everyone over the age of sixteen to the jurisdiction of criminal court versus those states that transferred youths more selectively."[187] In addition, "there is little evidence that the prospect of longer sentences has a significant deterrent effect on adolescents."[188] In other words, draconian, life-ending punishments imposed on children were based on theories we now know to be false and proved ineffective at achieving their stated purpose of deterring crime.

The second problem with the panicked rhetoric in *Green* is that we now know much more about juvenile brains than we did in 1994. By 2012, social and cognitive brain science had debunked the theory that children and teenagers who cause harm are as culpable for their conduct as fully-grown adults and beyond rehabilitation. The "hallmark" youthful behaviors of Andre Green—used to justify imposing lifetime of imprisonment on a 13 year-old boy—would today all be considered mitigating factors under N.C. Gen. Stat. § 15A-1340.19B and would support a lesser sentence.

For these reasons, the *Kelliher* court held that "*Green*'s time has passed; our emerging science-based understanding of childhood development necessitates abandoning its reasoning."[189] Likewise, the *Conner* court found that Green "is no longer substantively applicable to the issue of mandatory life without parole sentences for juvenile offenders."[190]

Without *Green* to mandate an outcome, the court was free to decide whether analysis of James's and Riley's sentences under the North Carolina Constitution should be substantively different than analysis under the federal one. The court held that they should, with the *Kelliher* court holding that:

> The constitutional text, our precedents illustrating this Court's role in interpreting the North Carolina Constitution, and the nature of the inquiry used to determine whether a punishment violates the federal constitution all militate against interpreting article I, section 27 in lockstep with the Eighth Amendment.[191]

As has been shown above, the *Kelliher* court was entirely correct in this reading of the state "cruel or unusual" clause. The text is literally different, and this difference does not appear to be accidental. Yet early North Carolina decisions paid so little attention to this crucial difference that they incorrectly substituted "and" for "or." Thus, while the North Carolina Supreme Court has a long history of affording citizens of the state greater

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[187] *Id.*
[188] *Id.* at 35–36.
[189] *Kelliher*, 381 N.C. at 582, 873 S.E.2d at 384.
[190] *Conner*, 381 N.C. at 668 n. 14, 873 S.E.2d at 355 n. 14.
[191] *Kelliher*, 381 N.C. at 581–82, 873 S.E.2d at 383–84.

protection under the state constitution and has broken with federal precedent on several occasions, fears of non-existent "superpredators" drove the court to continue to move in lockstep with the Eighth Amendment.

It was only when years of scientific evidence revealed that much of the thinking on punishment of children was incorrect that the court changed course. In so doing, the *Kelliher* court also pointed to "features unique to the North Carolina Constitution," including "provisions . . . which have no federal counterpart and which bear on the interpretation of article I, section 27."[192] These provisions were considered in light of the penological goals of sentencing.

First, the *Kelliher* court noted that Article XI, § 2 of the North Carolina Constitution "expressly provid[es] that the object of punishments in North Carolina are not only to satisfy justice, but also to reform the offender and thus prevent crime."[193] This constitutional requirement that reform be part of any punishment implicates both retributive and rehabilitative theories of punishment. The rehabilitative function must prevail over retribution in all but the most serious of cases where reform is impossible.[194]

Next, the court invoked the state constitutional right to an education. Article I, § 15 provides that "[t]he people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right," and article IX, § 1 states that "[r]eligion, morality, and knowledge being necessary to good government and the happiness of mankind, schools, libraries, and the means of education shall forever be encouraged."[195] Children who commit homicide may have these rights curtailed, but those who are redeemable cannot be denied these rights forever.[196]

Finally, both the *Kelliher* and *Conner* courts were faced with the line-drawing problem discussed in *Solem*. If the sentences for James and Riley were too long, what amount of time would be appropriate? To help answer that question, both courts looked to Article I, § 1 of the North Carolina Constitution, which identifies "certain inalienable rights" of "all persons," including "life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness."[197] While the "fruits of their own labor" clause was "perhaps aimed originally at slavery," it has provided the basis for constitutional challenges against undue restraints on employment.[198]

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[192] *Id.* at 584–85, 873 S.E.2d at 385–86.

[193] *Id.* at 585, 873 S.E.2d at 386 (citing Article XI, § 2 of the North Carolina Constitution).

[194] *Id.*

[195] *Id.* at 586, 873 S.E.2d at 386–87.

[196] *Id.*

[197] *Id.* at 593, 873 S.E.2d at 391; *Conner*, 381 N.C. at 678, 873 S.E.2d at 361.

[198] *Kelliher*, 381 N.C. at 593, 873 S.E.2d at 391 (citing Orth & Newby at 46, *supra* note

Both the educational and employment provisions cited in these opinions are important for one of the major theories of punishment: incapacitation.[199] The clear implication is that, under the North Carolina Constitution, punishment that does not allow people to advance their education or engage in suitable employment is prohibited for all but the most serious of crimes. The desire to incarcerate those convicted of crimes for extended periods of time must bow to these other rights.

Ultimately, both the *Kelliher* and *Conner* courts found that children could only be incapacitated for 40 years before they must be given a chance at release.[200] The *Kelliher* court went on to say it would not depart from evolving standards of decency and would continue to "consider objective indicia of society's standards" when the justices exercised their "own independent judgment [to decide] whether the punishment in question violates the Constitution."[201]

V. TOWARD MERCY: REDUCING EXCESSIVE SENTENCING IN NORTH CAROLINA

Given the unique text of North Carolina's "cruel or unusual" clause and the state's constitutional history, it is not controversial to say that Article I, § 27 offers greater protection than the federal Eighth Amendment. The *Conner* and *Kelliher* holdings are the logical extension of new developments in juvenile brain science and sentencing jurisprudence. But these opinions are not the endpoint; as discussed throughout this Article, the same rationale animating the analyses in these cases point to a broader application of Article I, § 27 in general.

How would this work in practice? In the remaining sections, this Article will provide a doctrinal framework that builds on *Kelliher* and *Conner*. Courts can apply this framework in all excessive sentencing challenges under Article I, § 27, whether as-applied to a particular defendant or as a broader challenge to an entire sentencing scheme or sentences imposed on a certain category of people.

The Article will then highlight some of the factors and evidence that North Carolina courts should consider in order to assess extreme punishments under this framework. These include the overwhelming evidence of racial disparities in sentencing, social science research on the purposes of punishment and whether they are met, and various indicia showing a growing

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[199] *See infra* Part VI.A.

[200] *Kelliher*, 381 N.C. at 596, 873 S.E.2d at 393; *Conner*, 381 N.C. at 678, 873 S.E.2d at 361.

[201] *Kelliher*, 381 N.C. at 589, 873 S.E.2d at 388–89 (citing Trop v. Dulles, 356 U.S. 86, 100–01 (1958); Graham v. Florida, 560 U.S. 48, 61 (2010)).

consensus in North Carolina for fair and equal sentencing. The Article will also show how a state-specific approach that gives full meaning to Article I, § 27 casts doubt on a number of North Carolina's harsh sentencing practices, including terms for juveniles, discretionary "stacked" or enhanced sentences, and mandatory minimums.

A. *Evolving Standards of Decency in North Carolina – A New Framework*

In *Kelliher*, the North Carolina Supreme Court announced that it would continue to "draw the meaning of article I, section 27 from the evolving standards of decency that mark the progress of a maturing society, and [] consider objective indicia of society's standards when [it] exercised [its] own independent judgment to decide whether the punishment in question violates the [North Carolina] Constitution,"[202] The court also embraced the relevance of other constitutional provisions, and the idea that such provisions inform the constitutional limitations of excessive punishment.[203] Importantly, the court did not cabin this reasoning to juvenile cases, nor are there any grounds to do so. To the contrary, the court's opinions in *Kelliher and Conner* should be understood as dispensing altogether with the Eighth Amendment's toothless "gross disproportionality" test and establishing that the North Carolina Supreme Court will exercise its own state-based judgment to apply evolving standards of decency to all North Carolina sentences.

The evolving standards analysis is a familiar one from the U.S. Supreme Court's cases involving capital punishment and life terms for children.[204] It asks courts to decide two questions. First, is the punishment unusual? This is, essentially, a question of consensus. Second, is the punishment cruel? This is a proportionality analysis that looks at the nature of the offense and the person accused, including any mitigating evidence, and scrutinizes the nexus between a particular punishment and a legitimate state purpose of punishment. In North Carolina, with its disjunctive cruel *or* unusual clause, the punishment must be prohibited if the answer to either question is "yes."

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[202] *Id.* at 583, 873 S.E.2d at 385 (internal citations and quotations omitted).

[203] *Id.* at 586, 593, 873 S.E.2d at 386, 391 (referencing the guarantees in Article I, § 1, Article I, § 15, and Article XI, § 1, to "the enjoyment of the fruits of [one's] own labor" and to education). In this respect, North Carolina is not alone. None other than Antonin Scalia wrote that "[w]hen construing the United States Constitution in *McCulloch v. Maryland*, Chief Justice John Marshall rightly called for 'a fair construction of the whole instrument.'" ANTONIN SCALIA & BRIAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 30 (2012). Courts in California, Connecticut, Montana, and New Jersey have taken this approach as well. Robert F. Williams, *Enhanced State Constitutional Rights: Interpreting Two or More Provisions Together*, 2021 WIS. L. REV. 1001, 1004 (2021).

[204] *See* discussion of *Roper* and *Miller*, *supra* Section I.A.2.

1. Consensus

Any consensus analysis "relies on objective indicators," and recent scholarship has found that such indicators can be "broadly categorized in three buckets: legislative authorization, usage, and public and professional opinion."[205] A state-level analysis is critical, of course, but so are indicators at the local and national levels. Just as the U.S. Supreme Court has looked to individual state practices[206] and international trends[207] to inform its own evolving standards assessment, state supreme courts can and should look to communities within its own borders and norms in states across the country.

As for legislative and policy indicators, North Carolina courts should consider, for example, how recent pieces of legislation show a persistent trend toward prioritizing rehabilitation in sentencing. First, the General Assembly passed "Raise the Age," in 2017, eliminating North Carolina as the last state in the union to automatically send 16 and 17 year-olds to adult court.[208] Raise the Age was based, in part, on a report "[c]iting adolescent brain development research and recidivism data" and providing "evidence that treatment in the juvenile justice system is far more effective in reducing juvenile crime than incarcerating juveniles in adult facilities."[209] Second, the General Assembly passed the Second Chance Act, which "expands expunction opportunities and streamlines the process for people trying to clear their records."[210]

It is also relevant that, nationally, "[l]egislators in 25 states, including Minnesota, Vermont, West Virginia, and Florida, have recently introduced second look bills. A federal bill allowing resentencing for youth crimes has bipartisan support. And over 60 elected prosecutors and law enforcement leaders have called for second look legislation."[211] In the past ten years, state

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[205] Robert J. Smith, Zoe Robinson, & Emily Hughes, *State Constitutionalism and the Crisis of Excessive Punishment*, 108 IOWA L. REV. 537 (2023).

[206] *See* Miller v. Alabama, 567 U.S. 460, 482–83 (2012).

[207] *See* Roper v. Simmons, 543 U.S. 551, 576 (2012).

[208] The Juvenile Justice Reinvestment Act, N.C. Session Law 2017-257, § 16D.4; LaToya Powell, *"Raise the Age" Is Now the Law in North Carolina*, UNC SCH. OF GOV'T: N.C. CRIM. L. BLOG (Aug. 31, 2017), https://nccriminallaw.sog.unc.edu/raise-age-now-law-north-carolina/.

[209] LaToya Powell, *"Raise the Age" Is Now the Law in North Carolina*, UNC SCH. OF GOV'T: N.C. CRIM. L. BLOG (Aug. 31, 2017), https://nccriminallaw.sog.unc.edu/raise-age-now-law-north-carolina/.

[210] John Rubin, *A Second Chance in North Carolina through Expanded Criminal Record Clearance*, UNC SCH. OF GOV'T: N.C. CRIM. L. BLOG (Jul. 7, 2020), https://nccriminallaw.sog.unc.edu/a-second-chance-in-north-carolina-through-expanded-criminal-record-clearance/; N.C. Session Law 2020-35.

[211] Nazgol Ghandnoosh, *A Second Look at Injustice*, THE SENTENCING PROJECT (May

courts across the country have revisited excessive sentencing and struck down sentences for both adults and juveniles.[212]

What do we know about the opinions of current North Carolinians when it comes to sentencing? One indicator is a December 2020 report from the North Carolina Task Force for Racial Equity in Criminal Justice ("TREC"). TREC was formed by Governor Roy Cooper in June 2020 and was composed of a wide array of people from across the political and experiential spectrums, including law enforcement, prosecutors, public defenders, victims' rights advocates, justice-involved individuals, judges, and local elected officials.[213] TREC found that "[p]rosecutors have immense independent authority in the criminal justice system" and recommended that District Attorney offices identify and address unconscious bias and systemic racial disparities.[214] TREC also recommended reinstatement of the Racial Justice Act, the establishment of a Second Look Act to review older sentences, and reviews for all sentences "on a going-forward basis."[215]

Based on recent polling on the use of gubernatorial clemency to reduce the prison population, these types of sentencing review have broad public support in North Carolina. Overall, 72% of those surveyed support the use of clemency power to shorten the sentences of people the Governor believes are serving excessive sentences and do not pose a threat to public safety. This support extends to the use of clemency in several specific situations, with the following levels of approval:

1. To reduce racial disparities in sentencing – 70%
2. To reduce sentences for people serving longer than is required by current law – 80%
3. People over age 50 – 73%
4. People who were under age 20 at the time of the crime – 60%
5. People who have served more than 20 years – 60%
6. People convicted of drug crimes – 60%[216]

Matching these results to North Carolina prison data, we find many places of overlap. First, as of July 9, 2022, there were 787 people in North Carolina prisons who if sentenced under current laws would no longer be incarcerated, were eligible for parole, and were not in restrictive custody

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12, 2021), https://www.sentencingproject.org/reports/a-second-look-at-injustice/.

[212] *See supra* note 78.

[213] N.C. TASK FORCE FOR RACIAL EQUITY IN CRIM. JUST., REPORT 2020 EXECUTIVE SUMMARY 2.

[214] *Id.* at 10.

[215] *Id.* at 11. See Part V.A.3., *infra*, for a discussion of the Racial Justice Act.

[216] Dawn Milam & Sean McElwee, *North Carolina Voters: Ramp Up Clemencies To Reduce Prison Population*, THE APPEAL (May 19, 2021), https://theappeal.org/the-lab/polling-memos/nc-voters-want-governor-cooper-to-use-clemency-powers/.

(meaning they had not been found guilty of recent violent infractions).[217] There were also 7,646 people over the age of 50 (a number that will rise dramatically in the coming years);[218] 1,019 people imprisoned for crimes they committed as juveniles; 2,638 people who had served more than 20 years; and 3,902 people imprisoned for drug crimes.[219]

In other words, there are thousands of people serving sentences that the public would support reviewing, even without considering that doing so would address the horrific racial disparities produced by the North Carolina sentencing scheme. Providing second looks is supported both by the broad coalition of experts composing TREC and the general public. These factors are of course not exhaustive, and how courts weigh them will appropriately depend on the particular cases and issues to be decided. But they are all relevant to the constitutional inquiry on consensus.

2. Proportionality

As we have seen, proportionality means more than simply comparing punishment to the offense. It means scrutinizing the offender's culpability and other mitigating factors, and it means scrutinizing the fit between the punishment and the proper purposes of punishment. Sentencing practices that are racist, that undermine or erase the possibility of rehabilitation, or that lead to even greater crime and violence are not proportional to the valid reasons for imposing criminal sanctions. In North Carolina, the state constitution offers even more specific guidance on how criminal punishments must work: It explicitly prioritizes rehabilitation as the primary purpose of criminal sentencing, and it provides a non-discrimination guarantee.

In the 1993 Structured Sentencing Act, the North Carolina General Assembly again prioritized rehabilitation and specifically enunciated the four traditional justifications for punishment:

> [T]o impose a punishment commensurate with the injury the offense has caused, taking into account factors that may diminish or increase the offender's culpability [retribution]; to protect the public by restraining offenders [incapacitation]; to

[217] In particular, 29 people were still incarcerated for non-homicide, non-sex crimes committed prior to October 1, 1994, who had good incarceration records. These 29 people have served an average of 37 years and 9 months each for crimes that carry maximum punishments of 15 years today.

[218] Baumgartner & Johnson, *supra* note 94, at 19.

[219] Data in this paragraph were gathered using the OPUS "Inmate Profile" data set, which includes birth dates, most serious conviction, parole eligibility dates, custody information, and number of days served in DPS custody for each person who has been in a North Carolina prison since 1972.

> assist the offender toward rehabilitation and restoration to the community as a lawful citizen [rehabilitation]; and to provide a general deterrent to criminal behavior [deterrence].[220]

One reason that North Carolina courts have long failed to protect people from excessive punishment is that they have failed to enforce the constitutional mandates on rehabilitation and non-discrimination. Another reason is that they have failed to account for the fact that none of the four theories of punishment—rehabilitation, incapacitation, deterrence, and retribution—support extreme sentences.

The theory of rehabilitation posits that people "should generally remain in prison only until [they are] able to reenter society safely."[221] This re-entry decision will "often coincide[] with the successful completion of certain vocational, educational, and counseling programs."[222]

Sentencing in North Carolina has no connection to rehabilitation. Take, for example, people sent to prison for sex offenses. The North Carolina Department of Public Safety runs a highly successful rehabilitation program for these people: the Sex Offender Accountability and Responsibility Program (SOAR).[223] It is an intensive residential program that requires 600 hours of rehabilitative work.[224] But it is offered at only one facility and only to 56 individuals per year.[225] It takes 20 weeks to complete the program, far less than the 30.9 years, on average, that the 4,744 people in North Carolina prisons on sex offense convictions are required to serve.[226]

Incapacitation is the effect of physically removing people from society and thereby preventing whatever crimes they would commit if not in jail or prison.[227] In the 1970s, incapacitation became the dominant official justification for imprisonment in the United States, as rehabilitation was disfavored under the belief that some people were simply evil.[228] This is the exact sentiment that grew into the false "superpredator" scare of the 1990s.

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[220] N.C. Gen. Stat. § 15A-1340.12.

[221] Tapia v. United States, 564 U.S. 319, 324 (2011).

[222] *Id.*

[223] *SOAR Fact Sheet*, N.C. DEPT. OF PUB. SAFETY, available at https://www.doc.state.nc.us/dop/health/mhs/special/soardesc3.htm. The fact sheet erroneously states that SOAR can serve 72 people per year.

[224] *Id.*

[225] Emails on file with author.

[226] SOAR Fact Sheet; these data were gathered using the OPUS "Inmate Profile" data set, which includes most serious conviction and number of days served in DPS custody for each person who has been in a North Carolina prison since 1972

[227] Hannah S. Laqueur, *Incapacitation: Penal Policy and the Lessons of Recent Experience*, 24 BERKELEY J. OF CRIM. LAW 48, 50 (2019).

[228] *Id.*; JAMES Q. WILSON, THINKING ABOUT CRIME 209 (1975) (evil people need to be set "apart from innocent people");

Review of incapacitation research shows that while putting people in prison "reduces crime by some amount, it is relatively small and often difficult to quantify."[229] In addition, there is "academic agreement on a general point: there are diminishing marginal returns to expanding imprisonment."[230] We have incarcerated so many people for so long that, for each additional person put into prison and each additional year spent by those people in prison, there is virtually no effect on crime rates. Finally, research has consistently shown that people "age out" of crime.[231] By the age of 50, very few people are committing crimes, as the rates of arrests for 50-54 year-olds are 70-80% lower than those for 25-29 year olds.[232] Yet North Carolina prisons still warehouse an aging prison population with many thousands of people in their 50s and beyond.[233]

A third theory of punishment, deterrence, seeks to force would-be lawbreakers to "take a possible punishment into consideration when making decisions."[234] The hope is that people considering breaking the law will not do so if they know that their actions will lead to long prison sentences. Potential criminals must be aware of both parts: the long sentence, which researchers call "severity," and the belief that it will be imposed, known as "certainty."[235]

Daniel Nagin's review of studies on deterrence has found that the effect of "increasing an already long sentence is small, possibly zero."[236] This conclusion was based on review of empirical research dating back to the 1960s. Based on these data, Nagin concluded that long sentences generally and mandatory minimum sentencing in particular—i.e., sentence with high "severity"—are "unlikely to have a material deterrent effect."[237] Instead, Nagin found that the certainty of punishment has a more consistent deterrent effect. Even then, this effect is reliant on the person receiving "a negative but

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[229] Laqueur, *supra* note 227, at 64.

[230] *Id.*

[231] Marc Mauer, *Long-Term Sentences: Time to Reconsider the Scale of Punishment*, 87 UMKC L. REV. 113, 122 (2019).

[232] Howard N. Snyder, *Arrest in the United States, 1990-2010*, 17 tbl.3, BUREAU OF JUST. STATISTICS (Oct. 2012), available at https://bjs.ojp.gov/content/pub/pdf/aus9010.pdf.

[233] The number of prisoners aged 50 and older had never been above 1,500 before 1990. This change in the prison population is due to Structured Sentencing, and shows no signs of abating. "[F]or at least the next 20 years we can expect that the number of older individuals in the system will continue to rise, and dramatically so."[233] Baumgartner & Johnson, *supra* note 94, at 19.

[234] Graham v. Florida, 560 U.S. 48, 72 (2010).

[235] Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 CRIME & JUST. 199, 205 (2013).

[236] *Id*. at 231.

[237] *Id*.

not necessarily draconian consequence."[238]

Courts tasked with assessing whether certain punishments are proportional should take seriously the mounting evidence that none of these theories of punishment can justify long prison sentences. Rehabilitation does not require decades in prison. Incapacitating people for long periods of time keeps them in prison even as they mature out of risk-taking criminal behavior. And long sentences enhance the wrong part of deterrence theory—severity—without enhancing certainty.[239]

This leaves only one theory of punishment: retribution. In strict retributive theory, everyone who deserves prison time will get the full and

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[238] *Id*. at 244.

[239] Consider three examples specific to North Carolina. The first is a person convicted of three counts of robbery with a dangerous weapon, a class D offense. It is the person's first brush with the law. Under Structured Sentencing, the judge will sentence the person to a minimum prison term between 38 and 80 months, depending on aggravating and mitigating factors. The judge will also have complete discretion to run the sentences concurrently (all at once) or consecutively (one after another). Therefore, the person's total exposure is actually a minimum sentence between 38 and 240 months.

The second example is a man charged with felony breaking and entering (B&E) and felony larceny, both class H offenses. The man has on three prior occasions been convicted of these two crimes in tandem, as he often attempts to steal copper piping to feed a drug habit. The prosecutor now has total discretion whether to charge him with habitual felon status. Conviction of either the B&E or larceny, plus habitual felon status, would mean sentencing for a class D offense with a prior record level of III on the felony sentencing chart. Therefore, even without a showing of aggravation or mitigation, the man is facing a minimum sentence on each count of somewhere between 8 months and 84 months, depending on the whims of an assistant district attorney. If he is convicted of both counts, the judge will have discretion to consolidate the charges into one judgment, run two judgments concurrently, or run them both consecutively. The man's total exposure is 8 to 168 months.

Finally, consider a young woman with no prior convictions who becomes addicted to pain medication after a recent surgery. She is caught with 30 OxyContin pills for which she has no prescription, which cumulatively weigh 4.05 grams. Because she has more than 4 grams of "heroin," she is eligible to be charged with trafficking. If convicted, the mandatory minimum sentence is 70 months. However, in the prosecutor's discretion she could also be charged with the class I felony of possession of a schedule I controlled substance. She would avoid prison time altogether, as only "Community" punishment—which does not include prison time, assignment to a drug treatment court, or special probation —is authorized for a class I, level I offense.

None of these scenarios present would-be lawbreakers with any certainty as to what their sentence will be. While the Structured Sentencing Act limited judicial discretion in sentencing, the availability of consecutive sentences in all cases, without any burden on the prosecution, means that the range of outcomes is wide. Likewise, absolute prosecutorial discretion over charging decisions means that, without any further evidence, the state can seek sentence enhancements or mandatory minimums that increase punishment more than tenfold.

exact sentence necessary to "pay" for their actions.[240] Society will punish a person "who ha[s] committed a harmful and immoral act and [] justice is served when the person receives just desert or proportionate punishment for the harm they caused."[241] In addition, suffering will be inflicted upon the guilty party "without regard to their future dangerousness, the potential for rehabilitation, [or] costs to society of punishment."[242] In North Carolina, this suffering must be "commensurate with the injury the offense has caused, taking into account factors that may diminish or increase the offender's culpability."[243] But North Carolina is not punishing everyone equally and commensurate with their actions, and culpability does not dictate outcomes.

As discussed, if you are Black/African-American, you are far more likely to be punished harshly in North Carolina. Half of the state's prison population and nearly two-thirds of those serving 40 years—the amount of time where a juvenile sentence becomes unconstitutional—are Black/African-American.[244] Of the children who received the harshest punishment available to them, 92.6% were children of color. For males, it is even worse, with Black/African-American men and boys making up 67% of those in prison for drug-related crimes, 77% of those doing time for low-level felonies, 78% of those designated as habitual felons, and 80% of the people labeled "violent habitual felons." This is despite Black/African-American males constituting just 11 percent of North Carolina's population.[245]

This phenomenon is not unique to the state. Retribution is now implicitly linked with Black people, as the results of a recent study showed that participants "associated Black with Payback and White with Mercy" and "were faster to categorize Black faces with retributive words and White faces with mercy words."[246] In addition, participants' overall support for retribution as a good reason for punishment could be predicted by the bias they showed in associating Black people with retribution.[247]

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[240] Michael T. Cahill, *Retributive Justice in the Real World*, 85 WASH. U. L. REV. 815 (2007).

[241] Mark R. Fondacaro & Megan J. O'Toole, *American Punitiveness and Mass Incarceration: Psychological Perspectives on Retributive and Consequentialist Responses to Crime*, 18 NEW CRIM. L. REV. 477, 482 (2015)

[242] Molly J. Walker Wilson, *Retribution as Ancient Artifact and Modern Malady*, 24 LEWIS & CLARK L. REV. 1339, 1341 (2020).

[243] N.C. Gen. Stat. § 15A-1340.12.

[244] These data were gathered using the "Inmate Profile" data set, which gives a race, ethnicity, and number of days served in DPS custody for each person who has been in a North Carolina prison since 1972.

[245] Baumgartner & Johnson, *supra* note 94, at 5–6.

[246] Justin D. Levinson, Robert J. Smith, & Koichi Hioki, *Race and Retribution: An Empirical Study of Implicit Bias and Punishment in America*, 53 U.C. DAVIS L. REV. 839, 879 (2019).

[247] *Id.* at 882.

Thus, retributive theory in North Carolina is not only failing to punish all wrong-doers equally, it is actively working to increase racial disparities. Retribution in North Carolina is flowing in only one direction: toward the state's Black and brown communities. Justice cannot be satisfied by retribution under the North Carolina Constitution if the people being punished harshly are overwhelmingly people of color.

This type of empirical analysis of how criminal punishments work in practice, and whether they further any legitimate purpose, is central to the constitutional question of whether certain punishments are cruel or unusual. Even the U.S. Supreme Court recognized as much in its cases involving extreme sentences for youth, and the North Carolina Supreme Court did the same when it struck down the de facto life sentences given to James Kelliher and Riley Conner. But there is no reason to limit this sort of scrutiny to cases involving children, and the clear holding in *Kelliher* and *Conner* that Article I, § 27 bears its own independent and more expansive meaning presents a doctrinal opportunity for North Carolina state courts to consistently scrutinize the fit between punishment and purpose whenever an excessive sentencing claim is raised.

3. Non-Discrimination in the North Carolina Constitution

Given that retribution is failing due (in part) to racial disparities, state courts should consider claims that a person was sentenced in a racially discriminatory manner. They can do this by looking at the interaction between Article I, § 27, and Article I, § 19.[248]

Under North Carolina law, "[t]he best way to ascertain the meaning of a word or sentence in the Constitution is to read it contextually and to compare it with other words and sentences with which it stands connected."[249] Article I, § 19, states that "No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin." When it was added to the state constitution in 1971, the drafters noted that it added both "a guarantee of equal protection of the laws and a prohibition against improper discrimination by the State."[250] These separate provisions must be

[248] The particular interaction between these two constitutional provisions in the extreme sentencing context was first posited by attorneys for Darrell Anderson in their Amended Motion for Appropriate relief, filed in case number 02 CRS 12156 in Davidson County Superior Court on May 5, 2022.

[249] State ex rel. Martin v. Preston, 325 N.C. 438, 449, 385 S.E.2d 473, 478 (1989) (quoting State v. Emery, 224 N.C. 581, 583, 31 S.E.2d 858, 860 (1944)).

[250] REPORT OF THE N.C. STATE STUDY COMM'N TO THE N.C. STATE BAR AND THE N.C. BAR ASS'N 74 (1968) (emphasis added); *see also* State v. Berger, 368 N.C. 633, 643, 781

read as offering different protection; if they protect North Carolinians in the same way, one of them is superfluous.

A person brining a claim of racial discrimination must show either discriminatory intent or disparate impact.[251] There is no question that proof of racially discriminatory intent is required to show a violation of the Equal Protection Clause.[252] Therefore, the only coherent reading of the Non-Discrimination Clause is that it prohibits disparate impact.[253] This reading is supported by the fact that the Non-Discrimination clause was based on the Civil Rights Act, which also allows for disparate impact claims.[254]

We have seen how North Carolina punishes its Black/African-American citizens far more harshly than its white ones. Looking beneath general prison data, we can also see how some of the state's most severe sentencing laws, in particular, have targeted Black people, especially men and boys. This type of evidence should be presented to North Carolina courts in cases where counsel believes that a Black/African-American client has been harshly sentenced. The non-discrimination clause—and its protections against state action that yields racial disparities—must be part of proportionality review, just as the rights to education and to earn a living. Though now repealed, the Racial Justice Act showed how courts can assesses these claims.

The North Carolina Racial Justice Act (the RJA) became law in 2009 and provided that "[n]o person shall be subject to or given a sentence of death or shall be executed pursuant to any judgment that was sought or obtained on the basis of race."[255] The RJA placed the burden on the person

S.E.2d 248, 254–55 (2016) (describing the 1968 Study Commission Report as persuasive authority regarding additions to the 1970 Constitution).

[251] Ricci v. DeStefano, 557 U.S. 557, 577 (2009) ("Title VII prohibits both intentional discrimination (known as 'disparate treatment') as well as, in some cases, practices that are not intended to discriminate but in fact have a disproportionately adverse effect on minorities (known as 'disparate impact').")

[252] Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977); Holmes v. Moore, 270 N.C. App. 7, 16, 840 S.E.2d 244, 254 (2020).

[253] If the non-discrimination clause could only be invoked when there was discriminatory intent, it would be superfluous.

[254] *Ricci*, 557 U.S. at 577 (citing Griggs v. Duke Power Co., 401 U.S. 424 (1971)).

[255] North Carolina Racial Justice Act, S.L. 2009-464, § 1, 2009 N.C. Sess. Laws 1213, 1214 (codified at N.C. Gen. Stat. § 15A-2010 (2009)) (repealed 2013). The RJA was a legislative response to the United States Supreme Court's decision in *McCleskey v. Kemp*, which rejected McCleskey's evidence of racial disparities in capital sentencing because legislatures, not courts, should determine if such evidence was admissible. State v. Ramseur, 374 N.C. 658, 673, 843 S.E.2d 106, 108–09 (2020). "Once implemented, the RJA worked as intended. Immediately, proceedings initiated pursuant to the Act revealed pervasive racial bias in capital sentencing in North Carolina." Four RJA hearings were held in the four years following the law's passage. In every one of them, claimants were able to prove that their

accused/convicted of the crime to show that race "was a significant factor in decisions to seek or impose the sentence of death."[256] This burden could be met by presenting "statistical evidence or other evidence."[257] Anyone who met this evidentiary burden would have their death sentence vacated.[258]

Both the North Carolina Department of Public Safety and the North Carolina Administrative Office of the Courts make data on the state's criminal legal system publicly available. Lawyers across the state should make use of it and bring constitutional claims under Article I, §§ 19 and 27. If North Carolina courts are willing to listen, these claims should succeed.

B. *Examples: Constitutionally-Suspect Sentencing Practices in North Carolina*

Applying the sort of foregoing analysis to specific cases is beyond the scope of this Article, but the evolving standards analysis described in the previous section casts constitutional doubt on various sentencing practices in North Carolina, especially when combined with race-based claims. This section highlights two examples: First, all juvenile sentences, not just those of de facto LWOP, should be subject to scrutiny. Second, "stacked," enhanced, or mandatory sentences should be reviewed by focusing on theories of punishment previously ignored.

1. Juvenile Sentencing

"[B]ased on the science of adolescent brain development that this Court has previously recognized and our constitutional commitments to rehabilitating criminal offenders and nurturing the potential of all of North Carolina's children, we also conclude that juvenile offenders are presumed to have the capacity to change."[259] Given this stance by the North Carolina Supreme Court, sentencing for all juveniles should be subject to scrutiny. Three potential holdings by the state's courts immediately present themselves.

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cases had been "fundamentally flawed by racial animus." More than 100 RJA claims were waiting to be heard when the General Assembly repealed the law and made the repeal retroactive. State v. Robinson, 375 N.C. 173, 175, 846 S.E.2d 711, 714 (2020).

[256] North Carolina Racial Justice Act, S.L. 2009-464, § 1, 2009 N.C. Sess. Laws at 1214. Data could be presented concerning the use of the death penalty "in the county, the prosecutorial district, the judicial division, or the State." *Id.*

[257] *Id.*. "Other evidence" included, but was not limited to, "sworn testimony of attorneys, prosecutors, law enforcement officers, jurors, or other members of the criminal justice system." *Id*.

[258] State v. Ramseur, 374 N.C. 658, 660–61, 843 S.E.2d 106, 108–09 (2020).

[259] *State v. Kelliher*, 381 N.C. 558, 587, 873 S.E.2d 366, 387 (2022).

First, given what we know about juvenile brains, all children should receive the benefit of extraordinary mitigation. This statutory provision allows a court to impose probation instead of prison time when probation would not usually be permitted by the Structured Sentencing grid.[260] A presumption in favor of extraordinary mitigation in juvenile cases would not affect the most serious felony convictions and would only be applied where the person has few prior convictions.[261] This presumption can be overcome by evidence in aggravation offered by the prosecution.[262]

Second, the North Carolina Supreme Court should hold that there is a presumption that all class E-I sentences for juveniles will be probationary. These convictions are all eligible for probation under current law,[263] and all of the prior reasons for presuming extraordinary mitigation apply.

Finally, juveniles should be presumptively eligible for advanced supervised release (ASR). This program allows people sentenced to prison time to serve the shortest sentence for which they are eligible, even without a specific finding of mitigation.[264] The ASR program also includes anti-recidivism programming in prison, consisting of treatment, education, and rehabilitation.[265]

2. Stacked, Habitual, and Mandatory Sentences

The North Carolina Supreme Court, until *Kelliher*, focused almost exclusively on retribution and deterrence as "the two primary objectives of criminal punishment."[266] As we saw above, the deterrent effects of long sentences are small, and certainty of sentencing is more important than severity.[267] Retribution is so interwoven with the exact racial dynamics

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[260] N.C. Gen. Stat. § 15A-1340.13(g). Extraordinary mitigation is available when a case a) presents mitigating factors of a kind significantly greater than in the normal case; b) those factors substantially outweigh any factors in aggravation; and c) it would be a manifest injustice to impose an active punishment in the case. *Id*.

[261] N.C. Gen. Stat. § 15A-1340.13(h). Class A and B1 felonies are expressly exempted, as are people with more than five prior record points. A person will be level II on the sentencing grid after obtaining between two and five prior record points. *See* N.C. Gen. Stat. § 15A-1340.14.

[262] N.C. Gen. Stat. § 15A-1340.13(g).

[263] N.C. Gen. Stat. § 15A-1340.17(c).

[264] N.C. Gen. Stat. § 15A-1340.18(d) ("The ASR date shall be the shortest mitigated sentence for the offense at the offender's prior record level. If the court utilizes the mitigated range in sentencing the defendant, then the ASR date shall be eighty percent (80%) of the minimum sentence imposed.")

[265] N.C. Gen. Stat. § 15A-1340.18(b).

[266] State v. Bowditch, 364 N.C. 335, 351, 700 S.E.2d 1, 12 (2010) (quoting Kansas v. Hendricks, 521 U.S. 346, 361–62 (1997)).

[267] *See supra*, notes 235–39.

plaguing North Carolina as to serve as a reason for not imposing punishment, rather than a justification for it. A shift to thinking about incapacitation and rehabilitation would serve the state's courts better.

Three types of potential sentences, therefore, warrant greater scrutiny. All are regularly imposed in North Carolina, and all result in longer prison terms. All involve prosecutors exercising their discretion.

The first is when a prosecutor has chosen to charge someone with being a "habitual offender," which requires sentencing at a felony class four levels higher than the actual crime.[268] The second occurs when a prosecutor asks a court to impose consecutive sentences, a request the sentencing judge has total discretion to grant or deny. The third arises when a prosecutor has charged someone with "trafficking" in drugs, which carries a long mandatory sentence, rather than possession, sale, or delivery.[269]

As is obvious, prosecutors wield enormous power in these cases, power that often goes unchecked.[270] The first consideration for judges in these cases should be a human one. What brought the person accused of a crime in front of them? Is the person addicted to drugs? Are they unhoused and desperately poor? If so, stacking, enhancing, or imposing mandatory sentences to increase prison time is a net negative for North Carolina.

Sentencing judges should also ask whether the sentence will incapacitate the person beyond the time when they are expected to "age out" of crime. Based on federal statistics, people rapidly stop committing crimes after the age of 50, the same age that 73% of North Carolinians support for clemency review by the governor. If a stacked, enhanced, or mandatory sentence will imprison someone past the age of 50, North Carolina courts should be reluctant to impose that sentence.

Finally, if the sentence will be imposed on a person of color, judges should be deeply suspicious; when race and discretion intersect, the resulting racial disparities are horrific. In Mecklenburg County, for example, 87.8% of the habitual felon status convictions ending in prison time during the Structured Sentencing era have gone to people of color. Of the 30 people still imprisoned from Mecklenburg under the older, harsher habitual felon enhancement, 28 are Black/African-American. On average, sentences for these 30 people were 5.35 times longer than they would have been without

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[268] *See supra*, note 49, for an explanation of the operation of North Carolina's "habitual felon" statutes.

[269] *See supra*, note 239, for an example of the massive increase in punishment a person faces when charged with trafficking.

[270] As noted above, *see supra*, note 239, prosecutorial and judicial discretion along commonly leads to circumstances where a person's sentence exposure increases by multiples of six to 20 times.

habitual status.[271]

CONCLUSION

In his dissent in *Kelliher*, Chief Justice Paul Newby bemoaned what he saw as the majority's "judicial activism," and asked: "What branch of government is designed to enact criminal justice policy?" [272] The answer to that question in North Carolina is, of course, the General Assembly. It is unquestionably the role of judiciary, however, to interpret the state constitution.

As this Article has shown, North Carolina must depart from the Chief Justice when he asserts that *Kelliher* "casually disregards decades of our precedents and ignores the plain language of various constitutional provisions."[273] The majority's departure from *Green* was not taken casually. Departure came after years of evidence that children are different. There are mountains of data showing that Black/African-American boys like Andre are being discarded at frightening rates. *Kelliher* and *Conner* rest on sound constitutional analysis, based on our state's cruel *or* unusual clause.

Lastly, all North Carolinians share the Chief Justice's heartbreak over the anguish that the families of the victims in these cases must feel. There is no replacement for a lost loved-one. The question is not whether the state can punish sufficiently to ease their pain. It cannot. The question is whether the state will continue to ignore the evidence that its punishment system is not working and will continue to ignore its own constitutional mandate to take such evidence seriously.

If North Carolina courts will accept the call to begin rigorous proportionality review under evolving standards of decency, there will undoubtedly be victims who feel sorrow over the sentences handed out by judges. This sorrow should not be minimized. Instead, judges should return to *Carter*, where the North Carolina Supreme Court said that "[t]he resulting injuries to victim, family, and society are tolerable not because they are slight but because the constitutional values thereby safeguarded are so precious."[274]

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[271] These data were gathered using the DAC OPUS, *see supra*, note 112, "Sentence Component" data set, which contains a county and offense date for every offense that could have resulted in prison time since 1972. I then used each person in the set's OPUS number to match race and ethnicity data. The race and ethnicity data in OPUS were combined into a single category and matched with slightly modified Census categories. The most severe sentence had a minimum term of 160 months—more than 13 years—for simple drug possession, a crime that would have yielded 10 months in prison without enhancement.

[272] *State v. Kelliher*, 381 N.C. 558, 597, 873 S.E.2d 366, 394 (2022) (Newby, C.J., dissenting).

[273] *Id.* at 597–98, 873 S.E.2d at 394.

[274] *State v. Carter*, 322 N.C. 709, 722 (1988).

It is true that "[o]nly in exceedingly unusual non-capital cases will the sentences imposed be so grossly disproportionate as to violate the [federal] eighth amendment's proscription of cruel and unusual punishment." The same need not be true under article I, § 27. North Carolina courts should embrace a move towards mercy instead. Mercy is permitted, required, and necessary. The state cannot continue to erase Black and brown people simply because it chooses to follow an inadequate federal framework. North Carolinians cannot allow cruelty to "become an instrument of tyranny; of zeal for a purpose, either honest or sinister."[275] We can, and must, do better.

[275] Weems v. United States, 217 U.S. 349, 373 (1910).