State v. Kelliher: Providing a Meaningful Opportunity for Juvenile Offenders in North Carolina*

The United States is the only nation that still allows children to be sentenced to life in prison without parole. However, over the past few decades, courts have steadily recognized the important distinctions between adult criminal defendants and juvenile offenders, primarily acknowledging the impact of age, immaturity, inability to comprehend risk, and susceptibility to coercion on juvenile decision-making. This evolving understanding of adolescence has encouraged the growth of a trauma-informed juvenile justice system and the abolishment of death penalty sentences and mandatory life without parole sentences for juvenile offenders. North Carolina recently expanded its juvenile sentencing protections. In State v. Kelliher, the Supreme Court of North Carolina found that consecutive sentences exceeding forty years before parole eligibility are de facto life without parole sentences and that de facto life sentences for juvenile offenders who are neither incorrigible nor irredeemable violate the Eighth Amendment and the broader article I, section 27 of the North Carolina Constitution. This Recent Development examines the Kelliher decision, dissects the court's federal and state constitutional analyses, and assesses the holding's broader implications for juvenile justice.

INTRODUCTION

"When a child commits murder, the crime is a searing tragedy and profound societal failure."[1] Judges, legislatures, legal scholars, psychiatrists, and social scientists have all identified important distinctions between adult criminal defendants and juvenile offenders, primarily acknowledging that youth offenders are highly influenced by age, immaturity, inability to comprehend risk, and susceptibility to coercion.[2] Further, childhood trauma plays a

1. State v. Kelliher, 381 N.C. 558, 559, 873 S.E.2d 366, 369 (2022).

2. *See, e.g.*, *id.*; Miller v. Alabama, 567 U.S. 460, 471 (2012); S. 4051A, 2021–22 Reg. Sess. (N.Y. 2021) (raising the minimum age at which a child may be charged as a juvenile delinquent in family court to twelve from seven years); CTR. FOR L., BRAIN & BEHAV., MASS. GEN. HOSP., WHITE PAPER ON THE SCIENCE OF LATE ADOLESCENCE 4 (2022) (studying brain development in adolescence, identifying the scientific basis of "'transitory immaturity,' a feature of adolescence which will resolve as adolescents mature, resulting in desistance from criminal misconduct"); Julie E. McConnell, *Unshackled: Stories of Redemption Among Serious Youthful Offenders*, 25 RICH. PUB. INT. L. REV. 67, 72 (2022) ("In other words, the developing brain is moldable and continues to be shaped by the experiences we have in adolescence. Because the brain develops over many years, it allows young people to mature and rehabilitate over time. However, confining youth to adult jails and prisons can

significant role in juvenile delinquency, with an estimated seventy to ninety percent of youth offenders experiencing childhood trauma in the form of physical or sexual abuse, witnessing domestic violence, or being exposed to violence in their community.[3]

Just as scholars have identified the impact of youth and trauma on juveniles' criminal decision-making abilities, there is also increased recognition of the trauma caused by the arrest and imprisonment of minors.[4] Minors in the juvenile justice system may be victims of discriminatory practices by law enforcement, abusive behavior by correctional staff, and physical or sexual violence within juvenile facilities, which may increase the risks for post-traumatic stress disorder ("PTSD") symptoms or trigger psychological distress from prior trauma exposure.[5] This evolving understanding of adolescence has resulted in the growth of a trauma-informed juvenile justice system and the abolishment of death penalty sentences and mandatory life without parole ("LWOP") sentences for juvenile offenders, except in the most extreme of cases.[6]

The U.S. Supreme Court has embraced research in adolescent brain development and behavioral decision-making through a string of cases

significantly hinder their access to rehabilitation and educational services, impacting healthy brain growth.").

3. *See* Christopher Edward Branson, Carly Lyn Baetz, Sarah McCue Horwitz & Kimberly Eaton Hoagwood, *Trauma-Informed Juvenile Justice Systems: A Systematic Review of Definitions and Core Components*, 9 PSYCH. TRAUMA 635, 635 (2017); McConnell, *supra* note 2, at 73 ("[N]umerous studies have demonstrated that adverse childhood experiences ('ACEs'), or trauma, also profoundly affect the development of critical areas of the brain responsible for executive functioning (i.e., decision-making and risk-taking behavior), namely the pre-frontal cortex.").

4. *See* Branson et al., *supra* note 3, at 635 ("Involvement in the justice system itself places youth at risk for exposure to additional trauma as well as harsh practices that may exacerbate their psychological distress and contribute to worse legal outcomes.").

5. *See id.*

6. *See, e.g.*, *id.* at 636; McConnell, *supra* note 2, at 100 ("While there have been significant strides in the right direction, and data has debunked the superpredator myth, there is still much to be done. If we are genuinely committed to reducing serious crime in our communities, we must invest in evidence-based, trauma-informed policies that genuinely address the root causes of crime."); Haley R. Zettler, *Much To Do About Trauma: A Systematic Review of Trauma-Informed Treatments on Youth Violence and Recidivism*, 19 YOUTH VIOLENCE & JUV. JUST. 113, 114 (2021) ("Increased attention to the needs of juveniles with trauma histories had led to development of trauma-informed systems of care, calling on juvenile justice agencies to emphasize youths' strengths, feelings of security, and self-regulation." (citations omitted)); *End Juvenile Life Without Parole*, ACLU (June 25, 2009), https://www.aclu.org/documents/end-juvenile-life-without-parole [https://perma.cc/T6BM-FK28] ("In March 2014, the ACLU urged the Inter-American Commission on Human Rights (IACHR) to rule that sentencing children to mandatory life without the possibility of parole violates the Declaration of the Rights of Man and universal human rights principles."); Jennifer L. Piel, *Term-of-Years Sentences Since* Miller v. Alabama, 48 J. AM. ACAD. PSYCHIATRY & L. 98, 98 (2020) ("With an increasing recognition that children are different from adults, the Court has ruled that imposing harsh criminal sentences on most juvenile offenders violates the Eighth Amendment."); *see also infra* Section III.A.

expanding Eighth Amendment protections for juveniles.[7] These protections have prohibited death penalty sentences for convicted juveniles under the age of eighteen,[8] LWOP sentences for nonhomicide convictions,[9] and mandatory sentencing under LWOP statutes[10] as violative of the Constitution's Eighth Amendment prohibition on cruel and unusual punishment.[11]

In *State v. Kelliher*,[12] the Supreme Court of North Carolina addressed juvenile sentencing under the Eighth Amendment of the U.S. Constitution and article I, section 27 of the North Carolina Constitution.[13] In a matter of first impression, the Supreme Court of North Carolina held that any sentence or combination of sentences that requires a juvenile to serve more than forty years without parole is a life sentence under the state constitution's meaning of cruel or unusual punishment.[14] As a result, the court held that the defendant's two consecutive sentences of life with parole eligibility after fifty years violated the U.S. Constitution's cruel and unusual punishment prohibition and the North Carolina Constitution's broader cruel or unusual punishment prohibition.[15]

This Recent Development will discuss the Supreme Court of North Carolina's analysis of juvenile sentencing and the larger impact of such sentencing trends. Part I summarizes the recent decision in *State v. Kelliher* and the defendant's journey toward "hope for some years of life outside of prison walls."[16] Part II examines the *Kelliher* court's constitutional analysis of the Eighth Amendment and Supreme Court jurisprudence regarding juvenile sentencing. Part III looks specifically at the N.C. Constitution and the analysis that led to the court's conclusion on this matter of first impression for the State. Finally, Part IV discusses the national trends in juvenile sentencing and the impact of the *State v. Kelliher* decision.

7. *See infra* Section II.A.

8. *See* Roper v. Simmons, 543 U.S. 551, 578 (2005).

9. *See* Graham v. Florida, 560 U.S. 48, 74 (2010).

10. *See* Miller v. Alabama, 567 U.S. 460, 465 (2012).

11. *See* Tiffani N. Darden, *Juvenile Justice's Second Chance: Untangling the Retroactive Application of* Miller v. Alabama *Under the* Teague *Doctrine*, 42 AM. J. CRIM. L. 1, 2 (2014); U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

12. 381 N.C. 558, 873 S.E.2d 366 (2022).

13. *See id.* at 560, 873 S.E.2d at 370; N.C. CONST. art I, § 27 ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.").

14. *Kelliher*, 381 N.C. at 560, 873 S.E.2d at 370.

15. *Id.*

16. *Id.* at 577, 873 S.E.2d at 380 (quoting Montgomery v. Louisiana, 577 U.S. 190, 213 (2016)) (citing State v. Kelliher, 273 N.C. App. 616, 641, 849 S.E.2d 333, 350 (2020)).

I. *STATE V. KELLIHER* FACTUAL ANALYSIS

A. *The Facts: "a profound societal failure"*[17]

On August 7, 2001, at just seventeen years old, James Ryan Kelliher participated in a plan that resulted in the death of Eric Carpenter and his pregnant girlfriend, Kelsea Helton.[18] Kelliher, "like many juveniles who commit criminal offenses," grew up with physical abuse from his father, substance abuse, and depression.[19] By the age of seventeen, Kelliher had attempted to end his own life, dropped out of high school, and developed a drug habit which he regularly stole to support.[20]

In the summer of 2001, Kelliher planned a robbery against a known drug dealer, Eric Carpenter, with his friend Joshua Ballard.[21] Kelliher and Ballard targeted Carpenter knowing that he would have cocaine, marijuana, and money.[22] Ballard told Kelliher that they would need to kill Carpenter to get away with the robbery, so they made a plan in which Kelliher would drive Ballard to the meeting spot and provide him with a .38 caliber pistol.[23] Ballard would complete the transaction, shoot Carpenter, and steal any additional drugs or money, and Kelliher would drive them away.[24]

When they arrived at the transaction spot, a police officer was patrolling the area.[25] Carpenter told them to follow him to his apartment, which he shared with his girlfriend, Kelsea Helton, who was five or six months pregnant.[26] At some point in the transaction, Ballard pulled the gun and told Carpenter and Helton to get on their knees and face the wall while Kelliher searched the apartment for drugs.[27] According to Kelliher, he heard two shots and then fled the apartment with Ballard back to his car.[28] Carpenter and Helton died from

17. *Id.* at 559, 873 S.E.2d at 369.
18. *Id.* at 560, 873 S.E.2d at 370.
19. *Id.*
20. *Id.*
21. *Id.* at 561, 873 S.E.2d at 370–71. Joshua Ballard was tried separately for the crimes described herein and pleaded not guilty but was convicted of all charges and sentenced to two consecutive LWOP sentences. State v. Ballard, 180 N.C. App. 637, 639, 638 S.E.2d 474, 476 (2006). However, his conviction was overturned due to procedural errors and the constitutionality of his LWOP sentences was not challenged. *Kelliher*, 381 N.C. at 562 n.3, 873 S.E.2d at 371 n.3 (citing *Ballard*, 180 N.C. App. at 643, 638 S.E.2d at 479).
22. *Kelliher*, 381 N.C. at 561, 873 S.E.2d at 370.
23. *Id.* at 561, 873 S.E.2d at 370–71.
24. *Id.* at 561, 873 S.E.2d at 371.
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*

gunshot wounds to the back of the head, and Kelliher was arrested two days later.[29]

B. *Sentencing and Resentencing: "neither incorrigible nor irredeemable"*[30]

In March 2022, Kelliher was indicted for two counts of first-degree murder, two counts of robbery with a dangerous weapon, and one count of conspiracy to commit robbery.[31] The superior court held a Rule 24 hearing, during which the State argued that it had "evidence of one or more aggravating factors which would call for the imposition of the death penalty."[32] However, Kelliher pled guilty to all charges, and the district attorney chose not to pursue capital punishment.[33] Instead, Kelliher was sentenced to two consecutive life sentences without parole.[34]

In 2012, during Kelliher's sentence, the U.S. Supreme Court reassessed juvenile sentencing in *Miller v. Alabama*,[35] holding that mandatory life sentences were unconstitutional.[36] Kelliher filed a motion for appropriate relief, claiming that his sentence violated the Eighth Amendment of the U.S. Constitution and article I, section 27 of the N.C. Constitution following the *Miller* holding; however, the *Kelliher* court held that *Miller* did not apply retroactively.[37]

In 2016, the U.S. Supreme Court again addressed juvenile sentencing in *Montgomery v. Louisiana*,[38] holding that the substantive constitutional rule established in *Miller* was retroactively applicable in state postconviction proceedings.[39] This resulted in the N.C. Court of Appeals ordering that Kelliher's motion denial be reversed and remanded for resentencing.[40] In Kelliher's 2018 resentencing hearing, the sentencing court found that Kelliher was "neither incorrigible nor irredeemable" but that "when it comes to murder, there are not bogos [buy one get one] . . . . There is no consolidation of sentences."[41] Therefore, the sentencing court sentenced Kelliher to two

29. *Id.*

30. *Id.* at 564, 873 S.E.2d at 373.

31. *Id.* at 561, 873 S.E.2d at 371.

32. *Id. See generally* N.C. SUPER. CT. & DIST. CTS. R. 24 (defining a rule 24 hearing as a pretrial conference in capital cases to determine whether the State will pursue the death penalty).

33. *Kelliher*, 381 N.C. at 561–62, 873 S.E.2d at 371.

34. *Id.* at 562, 873 S.E.2d at 371. Kelliher was also given term-of-year sentences for the robbery and conspiracy charges, which are not at issue in this review. *Id.*

35. 567 U.S. 460 (2012).

36. *Id.* at 465.

37. *Kelliher*, 381 N.C. at 562, 873 S.E.2d at 371. *See generally* N.C. GEN. STAT. § 15A-1411 (LEXIS through Sess. Laws 2023-149 of the 2023 Reg. Sess. of the General Assemb.) (defining a motion for appropriate relief as a motion to correct an error that occurred during the proceedings).

38. 577 U.S. 190 (2016).

39. *See id.* at 212.

40. *Kelliher*, 381 N.C. at 562, 873 S.E.2d at 371.

41. *Id.* at 564, 873 S.E.2d at 373.

consecutive sentences of life with parole to align with Miller's ban on mandatory LWOP sentences.[42]

However, the N.C. Court of Appeals panel reversed and held that the consecutive life sentences were a violation of his Eighth Amendment right to be free from cruel and unusual punishment under U.S. Supreme Court precedent.[43] The N.C. Court of Appeals concluded that the U.S. Supreme Court juvenile sentencing cases[44] established a constitutional rule that "[j]uvenile homicide offenders who are neither incorrigible nor irreparably corrupt are . . . so distinct in their immaturity, vulnerability, and malleability as to be outside the realm of [life without parole] sentences under the Eighth Amendment."[45] Because the sentencing court determined that Kelliher was "neither incorrigible nor irredeemable" he could not be sentenced to life without parole.[46] Though Kelliher was sentenced with two counts of life *with* parole, the court of appeals held that consecutive sentences may be a de facto life without parole punishment as Kelliher's two sentences would amount to a fifty-year sentence before eligibility for parole.[47] Because a fifty-year sentence would "render Kelliher ineligible for release until after 'retirement age' depriving him of an 'opportunity to directly contribute to society,'" it constituted an unconstitutional de facto LWOP sentence.[48]

The Supreme Court of North Carolina reviewed the case, allowing the State's petition for discretionary review and Kelliher's conditional petition seeking review of the scope of protection afforded to him under article I, section 27 of the N.C. Constitution.[49] The court fully assessed both the state and federal constitutional claims.[50]

42. *Id.*

43. *Id.* at 565, 873 S.E.2d at 373 (citing State v. Kelliher, 273 N.C. App. 616, 644, 849 S.E.2d 333, 352 (2020)).

44. *See generally* Roper v. Simmons, 543 U.S. 551 (2005) (holding that executing minors under the death penalty is unconstitutional); Graham v. Florida, 560 U.S. 48 (2010) (holding that a nonhomicidal conviction leading to a life sentence without parole for juveniles is unconstitutional); Miller v. Alabama, 567 U.S. 460 (2012) (holding that mandatory life without parole sentencing for juveniles convicted of a homicidal offense is unconstitutional); Montgomery v. Louisiana, 577 U.S. 190 (2016) (holding that the substantive rule applied in *Miller* has retroactive effect); *infra* Part II (examining the U.S. Supreme Court's jurisprudence on this topic).

45. *Kelliher*, 381 N.C. at 565, 873 S.E.2d at 373.

46. *Id.* at 586, 873 S.E.2d at 373.

47. *Id.* at 576, 873 S.E.2d at 380 (citing *Kelliher*, 273 N.C. App. at 633, 849 S.E.2d at 344–45).

48. *Id.* at 566, 873 S.E.2d at 374 (citing *Kelliher*, 273 N.C. App. at 642–43, 849 S.E.2d at 350–51).

49. *Id.*

50. *See id.* at 567–96, 873 S.E.2d at 374–93.

II. FEDERAL CONSTITUTIONAL CLAIMS

The Supreme Court of North Carolina first assessed Kelliher's argument that his consecutive life sentences were unconstitutional under the Eighth Amendment because he was a juvenile offender who was deemed "neither incorrigible nor irredeemable," and therefore, a life sentence is inevitably disproportionate.[51] In considering Kelliher's argument, the court assessed whether an LWOP sentence is inconsistent with the Eighth Amendment and whether a de facto life sentence constituted an LWOP.[52]

A. *Supreme Court Precedent: "truly unusual over the last decade"*[53]

The *Kelliher* court looked to a string of juvenile offender cases decided by the U.S. Supreme Court, the first of which was *Roper v. Simmons*.[54] There, the Court held that death sentences for juvenile offenders violated the Eighth Amendment, even in cases of homicide.[55] In *Roper*, seventeen-year-old Missouri high school student Simmons committed murder, and nine months later, when he had turned eighteen, was sentenced to death.[56] The Missouri Supreme Court set aside the death sentence and resentenced Simmons to life without parole, holding that

> a national consensus has developed against the execution of juvenile offenders, as demonstrated by the fact that eighteen states now bar such executions for juveniles, that twelve other states bar executions altogether . . . and that the imposition of the juvenile death penalty has become truly unusual over the last decade.[57]

The U.S. Supreme Court agreed and held that the death penalty cannot be imposed against a juvenile offender under the Eighth Amendment, as it must be "limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'"[58] The Court relied on "[t]hree general differences between juveniles under 18 and adults [that] demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders," including that juveniles lack maturity and have an underdeveloped sense of responsibility, are more vulnerable or susceptible to negative influence and outside peer pressure,

51. *Id.* at 568, 873 S.E.2d at 375.

52. *See id.*

53. Roper v. Simmons, 543 U.S. 551, 560 (2005) (quoting State *ex rel.* Simmons v. Roper, 112 S.W.3d 397, 399 (2003) (en banc)).

54. 543 U.S. 551 (2005).

55. *Kelliher*, 381 N.C. at 568, 873 S.E.2d at 375 (citing *Roper*, 543 U.S. at 575).

56. *Roper*, 543 U.S. at 556.

57. *Id.* at 559–60 (quoting *Roper*, 112 S.W.3d at 399).

58. *Id.* at 568 (quoting Atkins v. Virginia, 536 U.S. 304, 319 (2002)).

and do not have fully formed character compared to an adult.[59] The U.S. Supreme Court concluded that the Eighth Amendment forbids the death penalty for offenders under the age of eighteen because the differences between juvenile and adult offenders are "too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability."[60]

Five years later in *Graham v. Florida*,[61] seventeen-year-old Graham was charged as an adult and sentenced to life in prison without parole for a string of robberies while on probation.[62] The Court relied on the differences between juveniles and adults identified in *Roper* to hold that LWOP sentences for juvenile offenders violated the Eighth Amendment.[63] The Court determined that LWOP sentences and death sentences share characteristics including that they are irrevocable and are deprivations of the most basic liberties with no hope of restoration.[64] The Court also believed that LWOP sentences were especially harsh for juvenile offenders because they would theoretically have more remaining years in their lives than adult offenders, thus making their sentence disproportionately severe.[65] As a result, the Court held that states do not need to guarantee eventual release but must give juvenile offenders a "meaningful opportunity to obtain release."[66]

Miller v. Alabama then furthered the decision in *Graham*, holding that mandatory LWOP sentences for juvenile offenders violate the Eighth Amendment.[67] *Miller* addressed two separate cases involving fourteen-year-olds tried as adults and convicted of felony murder and murder by way of arson, both of which have a mandatory minimum punishment of life without parole in Alabama.[68] The *Miller* Court followed the reasoning that children are constitutionally different from adults, stating that "mandatory penalties, by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it."[69] Therefore, the Court held that the Eighth Amendment forbids mandatory LWOP sentences for juvenile offenders, even in cases of homicide.[70]

59. *Id.* at 569–70.
60. *Id.* at 572–73.
61. 560 U.S. 48 (2010).
62. *Id.* at 53–57.
63. *Id.* at 81–82 (citing Roper v. Simmons, 543 U.S. 551, 578 (2005)).
64. *Id.* at 69–70.
65. *Id.* at 70–71.
66. *Id.* at 75.
67. Miller v. Alabama, 567 U.S. 460, 465 (2012).
68. *Id.* at 465–69.
69. *Id.* at 476.
70. *Id.* at 489.

Finally, the Supreme Court of North Carolina relied on *Montgomery v. Louisiana* to confirm that the *Miller* rule applied retroactively in state postconviction cases.[71] *Montgomery* summarized the precedent cases as drawing a line "between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption" and determining that courts must consider youth and its attendant characteristics as factors to draw that line.[72]

These four U.S. Supreme Court cases have banned death penalties for juvenile offenders and have incrementally limited juvenile LWOP sentences. The Court has recognized the important characteristics that differentiate juvenile offenders from adults and required that sentencing courts take these characteristics into consideration in the juvenile justice system.[73] The *Kelliher* court interpreted this Supreme Court precedent as "categorically prohibit[ing] a sentencing court from sentencing any juvenile to life without parole if the sentencing court has found the juvenile to be 'neither incorrigible nor irredeemable'" and therefore determined that Kelliher could not be sentenced to life without parole.[74]

B. *De Facto Life Without Parole: "the nature of the offender, not the circumstances of the crime"*[75]

Supreme Court precedent established that Kelliher could not be sentenced to life without parole. However, the Kelliher court still had to determine whether the consecutive life sentences constituted an LWOP sentence under this sentencing scheme.[76]

The U.S. Supreme Court has not addressed whether an aggregate, lengthy sentence can be considered a de facto LWOP sentence.[77] However, according to the N.C. Court of Appeals, a "clear majority of . . . states" "recognize de facto LWOP sentences as cognizable and may warrant relief under the Eighth

71. State v. Kelliher, 381 N.C. 558, 571, 873 S.E.2d 366, 377 (citing Montgomery v. Louisiana, 577 U.S. 190, 200 (2016)).

72. *Id.* at 572 (quoting *Montgomery*, 577 U.S. at 209–10). The *Kelliher* court also debated the relevance of *Jones v. Mississippi*, 141 S. Ct. 1307 (2021), but held that it does not alter the rule from *Miller*. *Kelliher*, 381 N.C. at 573–76, 873 S.E.2d at 378–80. In *Jones*, the Supreme Court held that a separate factual finding of incorrigibility before sentencing a juvenile to LWOP was not required, only that the sentencer has discretion to and does consider a defendant's youth. *Id.* at 574, 873 S.E.2d at 378–79 (quoting *Jones*, 141 S. Ct. at 1313, 1319). The *Kelliher* court reads *Jones* narrowly as a procedural holding and holds that, because Kelliher was already found to be redeemable, the *Miller* and *Montgomery* prohibitions on LWOP for redeemable juveniles apply. *Id.* at 575–76, 873 S.E.2d at 380. For further discussion on *Jones v. Mississippi*, see *infra* Section IV.A.

73. *See* Piel, *supra* note 6, at 100.

74. *Kelliher*, 381 N.C. at 576, 873 S.E.2d at 380.

75. *Id.* at 577–78, 873 S.E.2d at 381.

76. *Id.* at 576, 873 S.E.2d at 381.

77. *Id.* at 577, 873 S.E.2d at 381.

Amendment."[78] The court considered the "'true reality of the actual punishment imposed on a juvenile' rather than how the punishment was formally denoted"[79] and held that a sentence constitutes a de facto LWOP if it deprives a juvenile offender of the "hope for some years of life outside prison walls."[80]

The Supreme Court of North Carolina agreed.[81] By assessing the underlying theme of the U.S. Supreme Court cases, the *Kelliher* court determined that the crux of those cases was the age of the offender, not the nature of the crime.[82] The *Kelliher* court, following the themes of the Supreme Court precedent, held that a sentence of fifty years before eligibility for parole denied Kelliher the right to "'reenter the community' in any meaningful way" and is therefore "akin to a de facto sentence of life without parole."[83]

III. NORTH CAROLINA CONSTITUTION

The N.C. Court of Appeals did not analyze Kelliher's state constitutional claim, arguing that it falls under the same analysis as the federal claim.[84] However, the *Kelliher* court assessed the language of the state constitution alongside societal context to hold that article I, section 27 of the state constitution provides distinct and broader protections than the Eighth Amendment.[85] Therefore, Kelliher's sentence is a violation of the N.C. Constitution, independent of an Eighth Amendment violation.[86]

A. *Distinction Between Federal and State Constitutional Construction: "cruel or unusual"*[87]

The *Kelliher* court started with the textual distinctions between the constitutions' provisions on punishment.[88] Article I, section 27 of the N.C. Constitution prohibits "cruel *or* unusual" punishment, while the Eighth

78. State v. Kelliher, 273 N.C. App. 616, 633–34, 849 S.E.2d 333, 344–46 (2020).

79. *Kelliher*, 381 N.C. at 576, 873 S.E.2d at 380 (quoting *Kelliher*, 273 N.C. App. at 636, 849 S.E.2d at 346); *see also Kelliher*, 273 N.C. App. at 633 n.11, 849 S.E.2d at 345 n.11 (citing cases in California, Iowa, Wyoming, Connecticut, Florida, Nevada, Illinois, Louisiana, Ohio, Missouri, Montana, New Jersey, Washington, Pennsylvania, Maryland, New Mexico, and Oregon that recognize de facto LWOP).

80. *Id.* at 643, 849 S.E.2d at 351 (quoting Montgomery v. Louisiana, 577 U.S. 190, 213 (2016).

81. *See Kelliher*, 381 N.C. at 577, 873 S.E.2d at 381.

82. *Id.* at 577–78, 873 S.E.2d at 381.

83. *Id.* at 578, 873 S.E.2d at 381 (quoting Graham v. Florida, 560 U.S. 48, 74 (2010)). The court did not provide substantial rationale for drawing the line at fifty years in its federal constitutional analysis but did address its rationale in more depth under the state constitutional analysis. *See infra* Section III.C.

84. *Kelliher*, 381 N.C. at 566, 873 S.E.2d at 374.

85. *Id.* at 579, 873 S.E.2d at 382.

86. *Id.*

87. *Id.*

88. *Id.*

Amendment prohibits "cruel *and* unusual" punishment.[89] This small but clear differentiation suggests that North Carolinians "intended to provide a distinct set of protections in the N.C. Constitution than those provided to them by the federal constitution," and the term "and" creates a much more narrow set of punishments than the alternative term "or."[90] Because constitutional analysis always begins with textual interpretation, this difference in language is important, and therefore the Eighth Amendment analysis cannot be directly applied to a state constitutional analysis.[91] The court acknowledged that the State has authority to construe its own constitution differently than the U.S. Supreme Court's construction of the U.S. Constitution so long as citizens' rights are not limited.[92] Further, the U.S. Supreme Court has suggested that states should not "reflexively defer" to U.S. Supreme Court precedent when assessing similar claims under state constitutions.[93] Therefore, the *Kelliher* court determined that its state constitutional analysis must be independent.

The court also considered a Supreme Court of North Carolina case, *State v. Green*,[94] in which a juvenile was convicted of first-degree sexual assault and sentenced to life imprisonment.[95] In *Green*, the Supreme Court of North Carolina stated that it has historically analyzed "cruel and/or unusual punishment" cases the same under both the state and federal constitutions and that there was no compelling reason to further analyze the state constitution's use of "or" in juvenile sentencing cases.[96]

However, the *Kelliher* court determined that *Green*'s reasoning is "starkly inconsistent with contemporary understandings of adolescence which have been recognized by this Court."[97] The *Green* court explicitly stated that youth did not render the sentence disproportionate because the "number of years a defendant has spent on this planet is not solely determinative of his 'age,'"[98] and that the State had an interest in protecting citizens from "predators, regardless of the

89. *Id.* (emphasis added); N.C. CONST. art I, § 27 ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted."); U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

90. *Kelliher*, 381 N.C. at 579, 873 S.E.2d at 382.

91. *Id.* at 580, 873 S.E.2d at 383 (citing Comm. to Elect Dan Forest v. Emps. Pol. Action Comm., 376 N.C. 558, 564, 853 S.E.2d 698, 705 (2021)).

92. *Id.* at 580–81, 873 S.E.2d at 383 (first citing State v. Carter, 322 N.C. 709, 713, 370 S.E.2d 553, 555 (1988); and then citing State v. Arrington, 311 N.C. 633, 642, 319 S.E.2d 254, 260 (1984)).

93. *Id.* at 581, 873 S.E.2d at 383 (citing Graham v. Florida, 560 U.S. 48, 61 (2010)).

94. 348 N.C. 588, 502 S.E.2d 819 (1998).

95. *Id.* at 594, 502 S.E.2d at 822; *see also Kelliher*, 381 N.C. at 581, 873 S.E.2d at 383.

96. *Kelliher*, 381 N.C. at 581–82, 873 S.E.2d at 383–84 (quoting *Green*, 348 N.C. at 603, 502 S.E.2d at 828).

97. *Id.* at 582, 873 S.E.2d at 384.

98. *Green*, 348 N.C. at 610, 502 S.E.2d at 832 (quoting State v. Oliver, 309 N.C. 326, 372, 307 S.E.2d 304, 333 (1983)).

predators' ages."[99] This conception of age and description of children as predators conflicts with the current understanding of juvenile offenders and was the result of a now discredited juvenile superpredator theory.[100] Therefore, the court concluded that "*Green*'s time has passed," and that article I, section 27 of the N.C. Constitution need not be interpreted in lockstep with the Eighth Amendment.[101]

B. *Protections Under Article I, Section 27: "'our collective citizenry' benefits when all children are given the chance to realize their potential"*[102]

Neither the state nor the federal constitution defines cruel or unusual, so the *Kelliher* court followed the U.S. Supreme Court's approach of requiring a contextual and social analysis, as well as a consideration of proportionality.[103] What is considered cruel and unusual relies on "the evolving standards of decency that mark the progress of a maturing society."[104] Additionally, a court must consider culpability and proportionality.[105] The *Kelliher* court relied on "'objective indicia of society's standards' when we 'exercise[d] [our] own independent judgment [to decide] whether the punishment in question violates the Constitution.'"[106] The court also considered constitutional context by looking elsewhere in the N.C. Constitution to identify guidance for the provision.[107]

The N.C. Constitution specifically addresses the goals of punishment in article XI, section 2 to include not only the satisfaction of justice but also reformation of the offender and thus prevention of future crime.[108] The *Kelliher* court noted that when the nature of an adult's crimes requires such a harsh

99. *Id.* at 608, 502 S.E.2d at 831.

100. *Kelliher*, 381 N.C. at 582–83, 873 S.E.2d at 384 (first citing State v. Null, 836 N.W.2d 41, 56 (Iowa 2013); and then citing State v. Belcher, 268 A.3d 616, 623–24 (Conn. 2022)) (discussing the juvenile predator theory). The "superpredator" theory was popularized in 1994 by a Princeton University Professor, John DiIulio, who believed that moral poverty in Black inner-city neighborhoods would result in a generation of violent teenagers, and then furthered in 1995 by political scientist James Q. Wilson, who claimed that there would be a million more teenagers by the year 2000, which would result in 30,000 more criminals. McConnell, *supra* note 2, at 77–78. The theory led to harsher juvenile laws and consequences for youth across the country even though the rates of juvenile crime actually declined. *Id.* at 78; *see also Null*, 836 N.W.2d at 56 ("The predictions of the mid-1990s that thousands of juvenile superpredators would soon appear and threaten public safety did not materialize.").

101. *Kelliher*, 381 N.C. at 583, 873 S.E.2d at 384.

102. *Id.* at 586, 873 S.E.2d at 386 (quoting Hart v. State, 368 N.C. 122, 138, 774 S.E.2d 281, 292 (2015)).

103. *Id.* at 385, 873 S.E.2d at 385.

104. Trop v. Dulles, 356 U.S. 86, 101 (1958).

105. *See* Weems v. United States, 217 U.S. 349, 366–67 (1910).

106. *Kelliher*, 381 N.C. at 584, 873 S.E.2d at 385 (quoting Graham v. Florida, 560 U.S. 48, 61 (2010)).

107. *Kelliher*, 381 N.C. at 584–85, 873 S.E.2d at 385–86.

108. *Id.* at 585–86, 873 S.E.2d at 386–87; N.C. CONST. art. XI, § 2.

sentence, the State may deem that they are incapable of reform.[109] However, the court also noted that juvenile offenders lack fully developed cognitive, social, and emotional skills, and are thus more malleable and more likely to be rehabilitated.[110] Therefore, sentencing juveniles to life in prison without parole is contrary to the goal of punishment identified in the N.C. Constitution because "[g]iven juveniles' diminished moral culpability, it is unjustifiably retributive; given juveniles' heightened capacity for change, it unjustifiably disavows the goal of reform."[111]

North Carolina has also identified an express commitment to nurturing the potential of the children throughout the state. Children are protected in the right to access education[112] and the encouragement of education[113] as identified in the state constitution. The Supreme Court of North Carolina has acknowledged that "'our collective citizenry benefits' when all children are given the chance to realize their potential."[114] Since juvenile offenders are malleable and have the capacity to learn information and the self-awareness to develop into someone that may have a positive impact on the collective citizenry, it is cruel to sentence them to life sentences without a meaningful opportunity to reenter society.[115] Because of juveniles' capability to be rehabilitated and studies on adolescent brain development, the *Kelliher* court held that juvenile life without parole is cruel and therefore violates the N.C. Constitution.

C. *De Facto Life Sentence Under the N.C. Constitution: "a meaningful opportunity to reenter society"*[116]

Because Kelliher argued that LWOP sentences are unconstitutional for juvenile offenders who are neither incorrigible nor irredeemable, and that he was among the class of juvenile offenders who cannot be sentenced to life without parole, his claim relied on the *Kelliher* court finding that his two sentences requiring fifty years of imprisonment before parole constitute a de facto life sentence.[117]

The court acknowledged that what separates juvenile from adult defendants is the nature of their age rather than the nature of the crime; therefore whether an offender commits one crime or multiple crimes, the factors

109. *Kelliher*, 381 N.C. at 585, 873 S.E.2d at 386.
110. *Id.* (citing State v. James, 371 N.C. 77, 96, 813 S.E.2d 195, 209 (2018)).
111. *Id.* at 586, 873 S.E.2d at 386; N.C. CONST. art. XI, § 2.
112. N.C. CONST. art. I, § 15.
113. N.C. CONST. art. IX, § 1.
114. *Kelliher*, 381 N.C. at 586, 873 S.E.2d at 386 (quoting Hart v. State, 368 N.C. 122, 138, 744 S.E.2d 281, 292 (2015)).
115. *Id.* at 586, 873 S.E.2d at 386–87.
116. *Id.* at 586, 873 S.E.2d at 387.
117. *Id.* at 587, 873 S.E.2d at 387.

of youth that differentiate them from adults do not change.[118] Those factors of youth make a juvenile offender less culpable than an adult and more capable of rehabilitation.[119] Therefore, "a sentence which deprives a juvenile of any genuine opportunity to earn his or her release by demonstrating that he or she has been rehabilitated is, in effect if not in name, a sentence of life without parole within the meaning of article I, section 27."[120]

A "genuine opportunity" requires both a meaningful amount of time to mature and show rehabilitation while imprisoned, as well as a meaningful amount of time to establish a life outside of prison.[121] In Kelliher's case, his consecutive life sentences would result in fifty years in prison before becoming parole eligible at the age of sixty-seven.[122] Considering that the average life expectancy of federal inmates does not exceed thirty-nine years in prison and the negative impact of childhood trauma and imprisonment on life expectancy, requiring fifty years in prison before a meaningful opportunity for release runs the risk of the juvenile dying in prison before proving rehabilitation.[123] Similarly, release after fifty years in prison would be exceedingly difficult in terms of housing, relationship building, and employment.[124] Because of the difficulty of reentering society and the diminished life expectancy after five decades in prison, the court held that a life sentence requiring fifty years before parole is a de facto life sentence without parole.[125]

To guide sentencing for juvenile offenders moving forward, the court set a standard of forty years so that "any sentence or sentences which, individually or collectively, require a juvenile to serve more than forty years in prison before

118. *Id.* at 588, 873 S.E.2d at 387.

119. *See id.* at 588, 873 S.E.2d at 388.

120. *Id.*

121. *Id.*

122. *Id.* at 559, 873 S.E.2d at 370.

123. *See id.* at 589–90, 873 S.E.2d at 388–89.

124. *See id.* at 589–90, 873 S.E.2d at 389; *see also* Melissa Li, *From Prisons to Communities: Confronting Re-Entry Challenges and Social Inequality*, AM. PSYCH. ASS'N (Mar. 2018), https://www.apa.org/pi/ses/resources/indicator/2018/03/prisons-to-communities [https://perma.cc/T9X4-9C3N (staff-uploaded archive)] ("Men and women released from correctional facilities receive minimal preparation and inadequate assistance and resources, which makes their re-entry into communities challenging. A criminal conviction limits employment prospects, public housing assistance and social services." (citations omitted)); ELIZABETH GAYNES, TANYA KRUPAT, DAVID GEORGE & COLIN BERNATZKY, OSBOURNE ASS'N, THE HIGH COSTS OF LOW RISK: THE CRISIS OF AMERICA'S AGING PRISON POPULATION 32–36 (2018) ("[W]hile reentry is full of challenges for most individuals of all ages returning from prison, older adults face additional obstacles and heightened complexities including greater rates of homelessness, low employment, increased anxiety, fragmented community and family ties, chronic medical conditions, and increased mortality rates."); Nathan A. Boucher, Courtney H. Van Houtven & Walter D. Dawson, *Older Adults Post-Incarceration: Restructuring Long-Term Services and Supports in the Time of COVID-19*, 22 J. AM. MED. DIRS. ASS'N 504, 506 (2021) ("[A]ccess to stable housing is often difficult for older, formerly incarcerated individuals, who experience the highest rate of housing insecurity of any group.").

125. *Kelliher*, 381 N.C. at 560, 873 S.E.2d at 370.

becoming eligible for parole is a de facto sentence of life without parole within the meaning of article I, section 27."[126] This balances the interest in respecting trial court discretion in successive sentences and the obligation to protect against cruel or unusual punishment, supports rehabilitative goals of punishment, and provides realistic hope for meaningful opportunity of reentry to society which in turn encourages offenders to develop personal and professional skills while in prison.[127]

The court expanded on the reasoning behind the forty-year maximum in *State v. Conner*,[128] a case decided concurrently with *Kelliher* regarding a juvenile convicted of violent crimes including murder.[129] Justice Morgan wrote,

> The recognition of a forty-year term of incarceration as a reasonable maximum . . . is an appropriate length of incarceration prior to parole eligibility which affords such a defendant with a realistic, meaningful, and achievable opportunity for release to parole, while simultaneously setting parole eligibility far enough in the juvenile offender's future to allow the defendant adequate time to mature, rehabilitate, and develop a record upon which to show a potential readiness for parole. Such considerations are consistent with the prohibition of the infliction of "cruel *and* unusual punishments" addressed in the Eighth Amendment to the United States Constitution and the prohibition of the infliction of "cruel *or* unusual punishments" mentioned in article I, section 27 of the Constitution of North Carolina. . . .Despite their violations of criminal law, juvenile offenders who are deemed by the trial courts of North Carolina to be eligible for parole after these defendants' respective terms of incarceration are still regarded to be worthy of a chance to work themselves back into positions in the free society to potentially experience fulfilling undertakings outside of prison in the event that parole is granted.[130]

While courts may still determine that a juvenile defender is one of the rare youths who cannot be rehabilitated and therefore outside of this consideration and parole boards may still determine that juvenile offenders are not permitted for release after forty years, juvenile defenders who are capable of rehabilitation must have "a meaningful opportunity to reenter society and contribute to this state."[131] As a result, North Carolina juvenile sentences may not, whether alone or in the aggregate, exceed forty years without violating the N.C. Constitution's prohibition of cruel or unusual punishment.

126. *Id.* at 590, 873 S.E.2d at 389.
127. *See id.* at 591–92, 873 S.E.2d at 390.
128. 381 N.C. 643, 873 S.E.2d 339 (2022).
129. *Id.* at 667 n.12, 873 S.E.2d at 354 n.12.
130. *Id.* at 678, 873 S.E.2d at 361.
131. *See id.* at 586, 873 S.E.2d at 387.

IV. IMPACT OF JUVENILE PROSECUTION AND SENTENCING IN NORTH CAROLINA AND THE UNITED STATES

The national understanding of childhood psychology and adolescence is constantly evolving. Therefore, states must modernize their juvenile sentencing schemes to consider the effects of youth and focus on providing a meaningful opportunity to reenter society like North Carolina did in *State v. Kelliher*.

A. *National Trends in Juvenile Sentencing: "the evolving standards of decency that mark the progress of a maturing society"*[132]

Juvenile LWOP sentences have been banned in every country except the United States and are prohibited by many human rights treatises.[133] The 1990s saw a surge in LWOP sentencing, but the Supreme Court cases discussed by the *Kelliher* court, primarily *Miller v. Alabama*, led to consistent decline of the practice in the 2000s.[134] As of 2020, 1,465 people were serving LWOP sentences for crimes they committed as minors, which is thirty-eight percent fewer than in 2016 and forty-four percent fewer than at the peak of juvenile LWOP sentences in 2012.[135]

Following the *Miller* decision in 2012, mandatory LWOP sentences were no longer constitutional under the Eighth Amendment and states drastically changed their juvenile sentencing laws.[136] In addition to removing mandatory LWOP sentences, twenty-seven states, plus the District of Columbia, banned LWOP sentences for offenders under age eighteen and seven states limited the

132. *Id.* at 596, 873 S.E.2d at 393.

133. Ben Finholt, Brandon L. Garrett, Karima Modjadidi & Kristen M. Renberg, *Juvenile Life Without Parole in North Carolina*, 110 J. CRIM. L. & CRIMINOLOGY 141, 143 (2020) ("Indeed, the United States is the only country in the world that imposes juvenile life without parole sentences; such sentences are banned in every other country and prohibited by human rights treaties."); Joshua Rovner, *Juvenile Life Without Parole: An Overview*, SENTENCING PROJECT (Apr. 7, 2023), https://www.sentencingproject.org/policy-brief/juvenile-life-without-parole-an-overview [https://perma.cc/E7PV-AMX2] ("The United States stands alone as the only nation that sentences people to life without parole for crimes committed before turning 18."); *Juvenile Life Without Parole*, JUV. L. CTR., https://jlc.org/issues/juvenile-life-without-parole [https://perma.cc/9HW6-TSYZ (staff-uploaded archive)] G.A. Res. 44/25, U.N. Convention on the Rights of the Child art. 37(a) (Nov. 20, 1989) ("No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age . . . ."); Steven M. Watt, *Out of Step with the World: Juvenile Life Without Parole in the United States*, ACLU (May 11, 2012), https://www.aclu.org/news/criminal-law-reform/out-step-world-juvenile-life-without-parole-united-states [https://perma.cc/RL5T-EJDX] ("Today, the United States is the only country in the world that that allows child offenders to be locked away for life. . . . Human rights law has long recognized that child offenders cannot be held fully culpable for their immature acts.").

134. Finholt et al., *supra* note 133, at 143.

135. Rovner, *supra* note 133.

136. *Id.*

application of LWOP sentences.[137] However, since *Miller*, there has been a circuit split and disagreement among states regarding whether de facto LWOP sentences violate the Eighth Amendment. The Third, Seventh, Ninth, and Tenth Circuits have held that stacked, consecutive sentences that exceed the life of the offender trigger the Eighth Amendment as de facto life without parole sentences.[138] On the other hand, the Eighth Circuit has held a de facto life sentence without parole for juveniles does not violate the Eighth Amendment, and the Fourth Circuit has permitted life with parole sentences with continuously denied parole so long as parole was considered.[139]

Many courts are also extending this trend of limiting juvenile sentences by relying on their state constitutions. Of the sixteen state supreme courts to consider de facto life sentences, seven have extended *Miller* to prohibit de facto LWOP sentences while nine have not.[140] Some of these courts have based their opinions on extensions of their state constitutions, while others have interpreted the U.S. Constitution and Supreme Court precedent to cover de facto life sentences. North Carolina did both in *Kelliher* by analyzing the state and federal constitutions separately.[141]

The Iowa Supreme Court also held that functionally equivalent sentences must be given the same protections as granted under *Miller* to formal LWOP sentences.[142] The Wyoming Supreme Court reached the same holding relying on Iowa's decision as persuasive.[143] As more state courts find prohibitions in their state constitutions, they can continue to influence other courts, just as the Wyoming Supreme Court's "treatment of persuasive state constitutional reasoning from the Iowa Supreme Court shows the potential for the expansion of protection under *both* the federal and state constitutions if there is an open dialogue among states regarding constitutional reasoning."[144]

Some scholars have raised concerns that the expansive trend of protective juvenile sentencing in the U.S. Supreme Court will end or be walked back

137. *Id.* ("Since 2012, 33 states and the District of Columbia have changed their laws for people under 18 convicted of homicide, mostly by banning life without parole for people under 18, but also eliminating life without parole for felony murder or re-writing penalties that were struck down by Graham. Twenty-seven of the 32 reforms, plus that of the District of Columbia, banned life without parole for people under 18; the other seven states limited its application.").

138. Hanna Shah, Note, *De Facto Life Sentences Trigger Juvenile-Specific Eighth Amendment Protections: Why* Bowling *Was Wrongly Decided*, 30 PUB. INT. L.J. 215, 230–32 (2021).

139. *Id.* at 232–35.

140. Mark Denniston & Christoffer Binning, *The Role of State Constitutionalism in Determining Juvenile Life Sentences*, 17 GEO. J.L. & PUB. POL'Y 599, 617 (2019) (citing Petition for Writ of Certiorari at 3, Wyoming v. Sam, 138 S. Ct. 1988 (2018) (No. 17-952)).

141. State v. Kelliher, 381 N.C. 558, 560, 873 S.E.2d 366, 370 (2022).

142. Denniston & Binning, *supra* note 140, at 614–16 (citing State v. Null, 836 N.W.2d 41, 77–76 (Iowa 2013)).

143. *Id.* at 616 (citing Bear Cloud v. State, 334 P.3d 132, 137, 142 (Wyo. 2014)).

144. *Id.*

following the retirement and replacement of Justice Kennedy, who was an influential fifth vote in the split *Roper*, *Graham*, and *Miller* cases.[145] This fear is not unfounded, as the Supreme Court, with a new composition of Justices, addressed juvenile sentencing and the impact of *Miller* in 2021 in *Jones v. Mississippi*.[146] In *Jones*, the Mississippi judge acknowledged his sentencing discretion under *Miller* but still sentenced Jones, who committed murder at the age of fifteen, to life without parole.[147] Jones argued that to satisfy *Miller*, the sentencer must make "a separate factual finding that the defendant is permanently incorrigible."[148] But the U.S. Supreme Court, in an opinion by Justice Kavanagh, held that the Supreme Court precedent on juvenile sentencing, including *Miller* and *Montgomery*, did not require any formal fact finding regarding a child's incorrigibility.[149]

While this holding does not walk back the Supreme Court's juvenile sentencing rulings as some have feared, it does mark a stark contrast to Justice Kennedy's consistent limitations on juvenile sentencing and, as Justice Sotomayor noted in her dissent, "guts" *Miller* and *Montgomery*.[150] The *Kelliher* court acknowledged the recent holding in *Jones v. Mississippi* but determined that its ruling had no impact.[151] The State in *Kelliher* argued that under *Jones*, the Eighth Amendment requires nothing more than the existence of a discretionary sentencing procedure so that the sentencer can consider the defendant's age.[152] The *Kelliher* court acknowledged that "[o]n its face, aspects of *Jones* could be viewed as conflicting with, and thus implicitly overruling, aspects of *Miller* and *Montgomery*" but instead the *Kelliher* court determined that the States' "proposed interpretation . . . is irreconcilable with the Supreme Court's own characterization of the question it was answering in *Jones*, the narrowness of its holding, and its description of the relationship between *Jones* and the Supreme Court's prior juvenile sentencing decisions."[153]

While the *Kelliher* court was able to apply the holding in *Jones* in a manner that maintains the protections in *Miller* and *Montgomery*, juvenile sentencing may come before the U.S. Supreme Court again, putting states in a difficult position by making them choose between "follow[ing] the anticipated future precedent of a more conservative Supreme Court's clarification or narrowing of

145. *Id.* at 617.

146. 141 S. Ct. 1307 (2021).

147. *Id.* at 1311–12.

148. *Id.* at 1311.

149. *Id.*

150. Adam Liptak, *Supreme Court Rejects Limits on Life Terms for Youths*, N.Y. TIMES (Apr. 22, 2021), https://www.nytimes.com/2021/04/22/us/supreme-court-life-terms-youths.html [https://perma.cc/V7RA-F69A (staff-uploaded, dark archive)].

151. State v. Kelliher, 381 N.C. 558, 576, 873 S.E.2d 366, 380 (2022).

152. *Id.* at 573, 873 S.E.2d at 378.

153. *Id.* at 574–75, 873 S.E.2d at 379.

Miller" or "follow[ing] their own state's precedent based on the authority of their state constitutions which may be interpreted more broadly than the Eighth Amendment."[154]

B. Kelliher *Dissent and Counterarguments: A "dangerous criminal policy"*[155]

Despite the movement towards protective sentencing standards for juvenile offenders, there is opposition towards this approach. A primary concern of the *Kelliher* holding is sentencing for juveniles convicted of multiple homicides. Because of the forty-year limit set by the court, consecutive first-degree murder sentences, which have an established twenty-five-year minimum sentence, are no longer permissible.[156] Any juvenile who is convicted of multiple homicides, but is "neither incorrigible or irredeemable," must serve *concurrent*, rather than *consecutive*, sentences.[157] In his dissent, Chief Justice Newby wrote: "The majority's holding today sets dangerous criminal policy. It devalues human life by artificially capping sentences for offenders who commit multiple murders."[158] The dissent also raised concerns for exacerbated gang violence, stating that this decision "feeds the growing trend of gangs using younger members to do their killings as they recognize the leniency of criminal sentencing of minors. Further, this decision removes any incentive to limit the murder of witnesses at the crime scene."[159]

154. Denniston & Binning, *supra* note 140, at 617.

155. *Kelliher*, 381 N.C at 598, 873 S.E.2d at 394 (Newby, J., dissenting).

156. Maren Hurley, *The End of De Facto Life for Juveniles*, EMANCIPATE NC (June 29, 2022), https://emancipatenc.org/new-jlwop-rulings-from-the-nc-supreme-court/ [https://perma.cc/VE7K-2H5F].

157. *Id.* ("Because of the *Miller* fix law's firm 25 year minimum for first degree murder, any juvenile convicted of two or more murder charges whom the court finds is 'neither incorrigible nor irredeemable' must have their sentences run concurrently to stay within the constitutional limit.").

158. *Kelliher*, 381 N.C. at 598, 873 S.E.2d at 394.

159. *Id.* While Justice Newby does not provide any support for these claims, they are not unfounded as gang violence and youth participation in gangs has been reported to have increased in recent years. *See, e.g.*, Tyler Harding, *News Channel 12 Investigates: Young Children Turn to Gang-Related Crimes*, ABC NEWS 12 (Feb. 14, 2023), https://wcti12.com/news/newschannel-12-investigates/newschannel-12-investigates-young-children-turn-to-gang-related-crimes [https://perma.cc/U6YT-CT2R] ("Established gangs are turning to children to commit violence, while some as young as 12 years old are starting gangs of their own."); Virginia Bridges, *A Blip or a Trend? The Number of NC Minors Committing Violent Crimes Rose in 2022*, NEWS & OBSERVER, https://www.newsobserver.com/news/state/north-carolina/article272490637.html [https://perma.cc/6UKF-H7CR (staff-uploaded, dark archive)] (last updated Mar. 1, 2023, 11:10 AM) ("The number of North Carolina youth charged with committing violent crimes, such as robberies, murders and shootings, rose 9% to 990 individuals . . . ."); Chelsea Donovan, *NC Gangs Use Social Media, Pretending To Be 'Public Interest Groups,' To Lure Kids*, WRAL NEWS, https://www.wral.com/story/NC-gangs-using-social-media-pretending-to-be-public-interest-groups-to-lure-kids/20744374/ [https://perma.cc/VG95-VAQZ] (last updated Mar. 2, 2023, 3:35 PM) ("More and more often, gangs are using boys to carry guns or drugs and girls for human trafficking.").

Other courts have criticized or refused to implement the prohibition of de facto life sentences for reasons of judicial practicality and authority. Florida's Fifth District Court of Appeals argued that "the exact point at which a lengthy term-of-years sentence becomes the equivalent of LWOP cannot be determined without drawing some sort of seemingly arbitrary line based on discretionary judgment calls."[160] The *Kelliher* dissent also criticized the *Kelliher* majority opinion as an act of "judicial activism" that overstepped bounds by legislating criminal justice policy and ignoring case precedent and constitutional interpretation.[161]

C. *Support for Juvenile Protections and* State v. Kelliher*: "hope of restoration"*[162]

Despite the concerns identified, there is strong support for the *Kelliher* decision and the trend toward protective juvenile sentencing. Ben Finholt, Director of the Just Sentencing Project at the Wilson Center of Duke University, stated:

> The rulings by the North Carolina Supreme Court in *Kelliher* and *Conner* are an important step forward for our state. . . . The Court has given children hope that their efforts to demonstrate maturity and rehabilitation will be recognized, and are based on decades-old brain science that affirmed what all parents know: that children change rapidly throughout adolescence and should not be discarded.[163]

Most support for protective sentencing relies on the changing nature of juvenile offenders, their need for an opportunity to rehabilitate, and the potential step toward remedying racial disparities. Studies in adolescence have confirmed that the "sections of the brain dedicated to impulse control, weighing

160. Kelly Scavone, Note, *How Long Is Too Long?: Conflicting State Responses to De Facto Life Without Parole Sentences After* Graham v. Florida *and* Miller v. Alabama, 82 FORDHAM L. REV. 3439, 3464 (2014) (citing Henry v. State, 82 So. 3d 1084, 1089 (Fla. Dist. Ct. App. 2012)). While they do not provide much further reasoning for the determination aside from life expectancy data, the U.S. Sentencing Commission defines the cut off for a de facto life sentence at 470 months, which is approximately 39.2 years. GLENN R. SCHMITT & HYUN J. KONFRST, U.S. SENT'G COMM'N, LIFE SENTENCES IN THE FEDERAL SYSTEM 10, 15 (2015).

161. *Kelliher*, 381 N.C. at 597, 873 S.E.2d at 394; *see also* Kelan Lyons, *PW Special Report: Two Recent State Supreme Court Decisions Could Alter NC's Juvenile Justice Landscape*, NC NEWSLINE (July 22, 2022, 6:00 AM), https://ncpolicywatch.com/2022/07/22/pw-special-report-two-recent-state-state-supreme-court-decisions-could-alter-ncs-juvenile-justice-landscape/ [https://perma.cc/RY47-CXEK] ("The [*Kelliher* and *Conner*] decisions—written over the dissent of Chief Justice Paul Newby—come a year after a failed attempt at the legislature to end life-without-parole sentences for people convicted of crimes when they were children. Co-sponsored by four Republicans, the bill never made it out of committee.").

162. *Kelliher*, 381 N.C. at 570, 873 S.E.2d at 376.

163. *NC Supreme Court Imposes Limits on Severe Punishment for Youth*, WILSON CTR. SCI. & JUST. (June 27, 2022), https://wcsj.law.duke.edu/2022/06/nc-supreme-court-imposes-limits-on-severe-punishment-for-youth/ [https://perma.cc/N35H-48XT (staff-uploaded archive)].

consequences, and regulating emotions are still developing during adolescence, while the part of the brain focused on sensation-seeking and risk taking is unusually active."[164] As youth continue to age into adulthood, their rates of criminal offenses decline.[165] Sixty-three percent of youth who enter the justice system never return once reaching adulthood and in a study of youth who were tried for serious offenses, only nine percent continued to commit serious offenses over a three-year period.[166] Similarly, attempts at deterrence through harsh sentencing penalties are unsuccessful for juveniles who lack foresight and are "less likely to take a possible punishment into consideration when making decisions."[167]

Evidence also supports the conclusion that extended sentences for juvenile offenders lead to abuse, poor health outcomes, and shorter life expectancy.[168] Studies have found that youth who have been incarcerated are about two and a half times more likely to die prematurely than youth who were only arrested.[169] This is due in large part to trauma, abuse, and maltreatment.[170] A national

164. RICHARD MENDEL, SENT'G PROJECT, WHY YOUTH INCARCERATION FAILS: AN UPDATED REVIEW OF THE EVIDENCE 20 (2022), https://www.sentencingproject.org/reports/why-youth-incarceration-fails-an-updated-review-of-the-evidence/ [https://perma.cc/EJG6-GYDM].

165. *Id.*

166. *Id.*

167. Finholt et al., *supra* note 133, at 149 (quoting Graham v. Florida, 560 U.S. 48, 72 (2010)).

168. *See* MENDEL, *supra* note 164, at 4–5 ("Studies find that incarceration during adolescence leads to poorer health in adulthood. . . . Young people entering youth correctional facilities suffer disproportionately from many physical health challenges (such as dental, vision, or hearing problems, as well as acute illnesses and injuries), and they are far more likely to have mental health problems such as depression, post-traumatic stress disorder (PTSD), and suicidal thoughts. Incarceration in juvenile justice facilities is associated with shorter life expectancy."); Elizabeth S. Barnert, Rebecca Dudovitz, Bergen B. Nelson, Tumaini R. Coker, Christopher Biely, Ning Li & Paul J. Chung, *How Does Incarcerating Young People Affect Their Adult Health Outcomes?*, 139 PEDIATRICS 1, 7 (2017) ("Incarcerated and formerly incarcerated individuals face disproportionate morbidity and mortality compared with their non-justice involved counterparts . . . ."); Boucher et al., *supra* note 124, at 505 ("Prison accelerates aging such that the prison population develops chronic illness 10 to 15 years earlier than community counterparts. Incarcerated persons can be considered an 'older adult' by age 55.").

169. *See* MENDEL, *supra* note 164, at 16 ("Among youth involved in the justice system, those who were incarcerated in detention centers (the equivalent of jails in the adult justice system) or correctional facilities were 1.7 times and 2.5 times more likely to die prematurely, respectively, than youth who were arrested but never confined."); Matthew C. Aalsma, Katherine S.L. Lau, Anthony J. Perkins, Katherine Schwartz, Wanzhu Tu, Sarah E. Wiehe, Patrick Monahan & Marc B. Rosenman, *Mortality of Youth Offenders Along a Continuum of Justice System Involvement*, 50 AM. J. PREVENTATIVE MED. 303, 306 (2016) ("[T]he data indicate that the greater the extent of an individual's justice system involvement, the greater the risk of death. Mortality rates increased incrementally along the continuum of justice system involvement . . . transferred youth were more than three times as likely to die when compared with arrested youth.").

170. *See* MENDEL, *supra* note 164, at 16–18; Barnert et al., *supra* note 168, at 2 ("Proposed mechanisms for a causal linkage between incarceration and worse subsequent health include exposures within detention facilities (e.g., communicable diseases) and physical or sexual traumas sustained while confined. Confinement also likely erodes mental health."); Branson et al., *supra* note 3, at 635

survey of youth in juvenile facilities in 2018 found that seven percent of the 6,000 surveyed reported being victimized sexually in the prior year, "most of whom reported sexual victimization that involved force or coercion by facility staff or other youth."[171] Juveniles also worry about physical abuse, solitary confinement, and developing Post-Traumatic Stress Disorder, depression, or mental illnesses.[172]

Finally, racial disparities plague the imposition of juvenile LWOP sentences as approximately sixty-two percent of those serving LWOP are African American.[173] The surge of LWOP sentences for juvenile offenders was predominantly based in the racially motivated "superpredator" theory.[174] The superpredator theory was a fearmongering, racially coded warning of "'tens of thousands of severely morally impoverished juvenile superpredators' who would include 'elementary school youngsters who pack guns instead of lunches' and 'have absolutely no respect for human life'" in the 1990s.[175] Not surprisingly, the fear was unwarranted as the warned-of superpredators never materialized, with Justice Earls acknowledging, "[w]e now recognize that our practice of describing children as 'predators' fundamentally misapprehended the nature of childhood and, frequently, reflected racialized notions of some children's supposedly inherent proclivity to commit crimes."[176] Yet, in North Carolina alone, more than ninety percent of children sentenced to LWOP are Black and

("Involvement in the justice system itself places youth at risk for exposure to additional trauma as well as harsh practices that may exacerbate their psychological distress and contribute to worse legal outcomes. Potential sources of trauma in the justice system include discriminatory law enforcement practices like 'Stop and Frisk,' abusive behavior by correctional staff, and the high rates of physical and sexual victimization in juvenile justice facilities, all of which are associated with an increased risk of PTSD symptoms.").

171. *See* MENDEL, *supra* note 164, at 17.

172. *Id.*

173. Rovner, *supra* note 133.

174. *See supra* note 100 and accompanying text; McConnell, *supra* note 2, at 77–78 ("The media quickly adopted the superpredator rhetoric and played a significant role in its proliferation across the United States. . . . The media's sensationalization of superpredators led to extreme changes in how the criminal legal system treated children and still influences policy today."); Vincent M. Southerland, *Youth Matters: The Need To Treat Children like Children*, 27 J.C.R. & ECON. DEV. 765, 773 (2015) ("Thus, to the extent that the super-predator myth contributed to the trend toward harsher sentences for young people, racial bias and stereotype were critical drivers of that momentum.").

175. *Connecticut Supreme Court Holds Sentence Based on Discredited Superpredator Myth Is Illegal*, EQUAL JUST. INITIATIVE (Jan. 24, 2022), https://eji.org/news/connecticut-supreme-court-holds-sentence-based-on-discredited-superpredator-myth-is-illegal/ [https://perma.cc/HVN3-MZ27].

176. *Id.*; State v. Kelliher, 381 N.C. 558, 582, 873 S.E.2d 366, 384 (2022); *see also* Lyons, *supra* note 161. Even the creator of the superpredator theory acknowledged that theory was wrong. *See* Carroll Bogert & Lynnell Hancock, *Superpredator: The Media Myth That Demonized a Generation of Black Youth*, MARSHALL PROJECT (Nov. 20, 2020), https://www.themarshallproject.org/2020/11/20/superpredator-the-media-myth-that-demonized-a-generation-of-black-youth [https://perma.cc/7H8W-WSVJ] ("In 2001, DiIulio admitted his theory had been mistaken, saying 'I'm sorry for any unintended consequences.' In 2012, he even signed on to a brief filed with the U.S. Supreme Court supporting a successful effort to limit life sentences without parole for juveniles.").

two-thirds of those currently serving forty or more years in state prison for crimes committed as children are Black.[177] The decision in *Kelliher* and the reduction of de facto LWOP sentences could "open the door for dozens of people of color who are locked away for violent crimes they committed when they were children" and "start to address racial disparities among the imprisoned population."[178]

V. CONCLUSION

The Supreme Court of North Carolina held that an LWOP sentence or a de facto life sentence of more than forty years for juvenile offenders who are neither incorrigible nor irredeemable is a violation of the Eighth Amendment and a violation of the broader article I, section 27 of the N.C. Constitution. The court specified that it is the unique characteristics of youth that differentiate sentencing guidelines for juvenile offenders from adult offenders, even for the same crimes or for multiple crimes. This decision is in line with a national trend towards protective juvenile sentencing in light of new research and evidence regarding brain development in adolescence and the nature of juvenile imprisonment. Despite the national trend, scholars are skeptical that the U.S. Supreme Court will continue with this line of sentencing, especially in light of *Jones v. Mississippi*. Still, more states should follow the lead set forth in North Carolina to broaden juvenile protection under their state constitutions so that all children are afforded the opportunity to develop, change, and contribute to society. As the *Kelliher* court concluded, "[h]e cannot be deprived the opportunity to demonstrate that he has become someone different than the person he was when he was seventeen years old and at his worst."[179]

AMY R. PRICE**

177. Lyons, *supra* note 161.

178. *Id.*

179. *Kelliher*, 381 N.C. at 597, 873 S.E.2d at 393.

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