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INNOCENCE LOST IN THE WAKE OF GREEN: THE TREND IS CLEAR—IF YOU ARE OLD ENOUGH TO DO THE CRIME, THEN YOU ARE OLD ENOUGH TO DO THE TIME

Matthew Thomas Wagman

Illinois implemented the first juvenile justice system in 1899 and now every state and territory of the United States has a separate court system for adjudicating juveniles. From the beginning, the procedural rights afforded in the adult criminal justice system differed from those in the juvenile justice system. Early promulgators of a separate entity for juveniles designed the juvenile justice system to promote rehabilitation and

1. See Amicus Curiae Brief of the American Civil Liberties Union of North Carolina Legal Foundation in Support of Appellant at 3, State v. Green, 502 S.E.2d 819 (N.C. 1998) (No. 519A96) (providing a brief history of the juvenile justice system and explaining its purposes); see also In re Gault, 387 U.S. 1, 14-15 (1967) (noting that a concern of the promulgators of the juvenile justice system included the possibility of children assimilating with serious adult offenders); Deborah L. Mills, Note, United States v. Johnson: Acknowledging the Shift in the Juvenile Court System From Rehabilitation to Punishment, 45 DEPAUL L. REV. 903, 905-06 (1996).

2. See Gault, 387 U.S. at 14; Mills, supra note 1, at 912 (stating that all jurisdictions have some method of juvenile transfer to adult criminal court). The most common method is that of judicial waiver, where the juvenile court judge will base her decision on the threat the juvenile poses to society and whether the juvenile is amenable to rehabilitation. See id. at 912-13. Moreover, studies show that the majority of Americans favor punitive sentences for juveniles because many people in society fear juvenile offenders. See id. at 932. This fear caused legislatures to shift their goals from rehabilitation to punishment in an effort to deter juveniles from future criminal behavior. See id. But see Lisa A. Cintron, Comment, Rehabilitating the Juvenile Court System: Limiting Juvenile Transfers to Adult Criminal Court, 90 NW. U. L. REV. 1254, 1254 (1996) (explaining how state lawmakers and courts increasingly transfer juveniles out of the juvenile justice system and try them as adults). The public still supports, however, the traditional goals of the juvenile justice system: rehabilitation and treatment of youthful offenders. See id. at 1255. Nevertheless, commentators feel that the system of treatment for juveniles is lacking in many respects. See id. For example, some critics argue that sending juveniles to prison does not further societal goals in any way because society is essentially giving up on its reformable criminal offenders. See id. Furthermore, sentencing juveniles as adults only creates a public perception that the state is curbing the crime problem. See id. at 1255-56. The state fosters this perception because the majority of juvenile delinquents subject to transfer do not commit serious crimes, e.g., those against persons, and consequently, society is doing little to prevent these crimes by transferring juveniles to adult criminal court. See id. at 1256.

treatment. Conversely, the adult criminal justice system sought retribution and punishment.

The early promulgators of a separate system for adjudicating juveniles sought to avoid the possibility of young offenders sharing prison space with hardened criminals. These reformers felt that society owed a duty to juveniles to act as parens patriae to prevent children from beginning a "downward career" toward recidivism. To further meet this preventive end, the early proponents of the juvenile justice system sought to avoid labeling juveniles as "criminal," favoring instead the term "delinquent." Proponents determined that because juveniles were not criminals, they did not need to have the same due process rights that the Constitution  

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4. See id. at 15-16. Commentators find that, [w]ith respect to the delinquent child, the philosophy of juvenile court laws is that the juvenile is to be considered and treated not as a criminal, but as a person requiring care, education, and protection. A fundamental aim of juvenile court laws is the prevention of delinquency of children. Consequently, such laws are not punitive, but are corrective and protective in that their purpose is to make good citizens of potentially bad ones. In other words, the welfare of the child lies at the very foundation of the statutory scheme.

5. See Gault, 387 U.S. at 15-16. The creators of the juvenile justice system wanted to rehabilitate and treat juveniles in addition to providing the juveniles with "clinical," as opposed to "punitive," procedures for adjudication. See id.; see also 47 AM. JUR. 2D, supra note 4, at § 5 (stating that a goal of the juvenile justice system is to treat and not punish, while the sole purpose of criminal law is to punish its offenders).

6. See Gault, 387 U.S. at 15 (explaining that the early reformers of the juvenile justice system believed that society's role was to educate juveniles to prevent them from becoming career criminals).

7. See id. at 16. But see id. at 21-22 (rejecting the notion of parens patriae); Amicus Curiae Brief of the American Civil Liberties Union of North Carolina Legal Foundation in Support of Appellant at 8, State v. Green, 502 S.E.2d 819 (N.C. 1998) (No. 519A96) (contending that the Court in Gault rejected the notion of parens patriae because of the inability of the state to use fair and consistent procedures).

8. See Gault, 387 U.S. at 15; see also Julian W. Mack, The Juvenile Court, 23 HARV. L. REV. 104, 119-20 (1909) (explaining that the juvenile justice system should treat juveniles in the system as though the child was under the state's care rather than under arrest).

9. See Gault, 387 U.S. at 22-24 (noting that unfortunately the term "delinquent" carries with it an almost identical social stigma as the term "criminal"); see also Kent v. United States, 383 U.S. 541, 554-55 (1966) (stating that the juvenile justice system is not designed to adjudicate criminal conduct; rather, its purpose is to act as parens patriae in determining the best interests of the child and society); In re Burrus, 169 S.E.2d 879, 886-87 (N.C. 1969) (holding that juveniles who are deemed delinquent are not on par with adults considered criminal). See generally 47 AM. JUR. 2D, supra note 4, at § 1 (asserting that the laws of the juvenile court should not be punitive in nature).

10. See U.S. CONST. amend. V ("nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be
guarantees criminals.\textsuperscript{11} The lack of due process standards in juvenile proceedings, however, meant juveniles did not receive individualized attention.\textsuperscript{12} Instead, departures from established constitutional procedures have often produced unfair, inefficient, and arbitrary results rather than the enlightened adjudication originally sought.\textsuperscript{13} Currently, the societal trend has been to label some juveniles as "criminals" because of the heinous crimes they commit.\textsuperscript{14}

According to the Uniform Crime Reports for 1995,\textsuperscript{15} juvenile arrests increased 20% from 1991 to 1995, more than ten times that of adults.\textsuperscript{16} Juveniles in the age group of thirteen to fourteen years old represented the highest percent distribution, 4.5%, of all juveniles charged.\textsuperscript{17} The statistics also illustrate that police arrested children between the ages of thirteen and fourteen for forcible rape with greater frequency than most other age groups considered juvenile.\textsuperscript{18} These statistics made the implementation of transfer statutes, and the sentencing of juveniles as adults, more attractive to lawmakers.\textsuperscript{19} The number of jurisdictions allowing for

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\textsuperscript{11} See also id. amend. XIV § 1.

\textsuperscript{12} See \textit{Gault}, 387 U.S. at 16-17; see also \textit{Kent}, 383 U.S. at 555 (noting that the state should, in juvenile proceedings, act as \textit{parens patriae} and not as an adversary). Traditionally, juvenile proceedings have been labeled as civil rather than criminal and therefore the juvenile cannot claim that he is entitled to the same due process rights as a criminal. \textit{See id.}

\textsuperscript{13} See \textit{Gault}, 387 U.S. at 18-20 (concluding that an unfair adjudication may occur when the state ignores due process rights because due process of law "is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise.").

\textsuperscript{14} See \textit{Stanford v. Kentucky}, 492 U.S. 361, 380 (1989) (ruling that the death sentence awarded to a 17-year-old defendant convicted of murder was not cruel and unusual punishment); \textit{State v. Foley}, 456 So. 2d 979, 984 (La. 1984) (deciding that giving a life sentence to a 15-year-old juveniles for committing aggravated rape was not cruel and unusual punishment); \textit{May v. State}, 398 So. 2d 1331, 1332 (Miss. 1981) (discussing a 14-year-old defendant arrested for armed robbery); \textit{see also Mills, supra} note 1, at 932 (explaining that juveniles today are not only committing more crimes in general, they are also committing more violent crimes).


\textsuperscript{16} See \textit{id.} at 207.

\textsuperscript{17} See \textit{id.} at 218 (noting that juveniles age 13 to 14 and those 18 years of age both accounted for 4.5% of all persons arrested). The next highest age group was 17-year-old juveniles who accounted for 4.3% of all persons arrested. \textit{See id.}

\textsuperscript{18} See \textit{id.} (stating that the police arrested 82 more 18-year-old juveniles for forcible rape than 13- to 14-year-old juveniles).

the transfer of juveniles ages thirteen and below to adult criminal court is evidence of this trend. Moreover, of the 1,356,108 juveniles arrested in 1995, police referred 3.3% immediately to adult criminal court while they referred 65.7% to the jurisdiction of the juvenile court. These statistics leave open the possibility that law enforcement officials could transfer two-thirds of all juveniles arrested to adult criminal court.

In State v. Green, the Supreme Court of North Carolina decided two constitutional issues that arise when courts adjudicate juveniles as adults. First, the court reviewed the constitutionality of North Carolina's transfer statute. Second, the court decided whether the imposition of a mandatory life sentence for a thirteen-year-old convicted rapist was cruel and/or unusual punishment under the Eighth Amendment to that juvenile crime has to be dealt with more seriously); see also 47 AM. JUR. 2d, supra note 4, at § 41. The term "transfer statute" refers to a statute that permits juvenile court judges to remand a case to adult criminal court for adjudication. See 1 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 98, at 657-64 (15th ed. 1993). Some statutes provide that juvenile courts may retain jurisdiction or transfer jurisdiction depending on the amenability of the juvenile. See id. Other statutes automatically bring the juvenile before the adult criminal court, which then makes the transfer decision. See id. Finally, some statutes require that the minor request a transfer to juvenile court when brought before the adult criminal court.. See 47 AM. JUR. 2d, supra note 4, at § 41.


22. See id.


24. See id. at 823, 831 (upholding the constitutional validity of North Carolina's system of transferring juveniles to adult criminal court, as well as sentencing a 13-year-old juvenile to a mandatory life term).

25. See id. at 826. Recently, the North Carolina Legislature repealed sections 7A-608 through 7A-610 to create a separate juvenile code. See N.C. GEN. STAT. §§ 7A-608 to -610 (1995) (repealed 1999) (recodified as N.C. GEN. STAT. §§ 7B-2200 to -2204 (1999)). The recodification does not change any of this Note's analysis or discussion.
the United States Constitution, or article I, section 27 of the North Carolina Constitution.\textsuperscript{26} In determining these issues, the court first addressed whether North Carolina had an unconstitutionally vague system for transfer that would have violated the defendant's due process rights.\textsuperscript{27} The court utilized the two-prong standard set forth by the United States Supreme Court in \textit{Grayned v. City of Rockford}\textsuperscript{28} and upheld the validity of North Carolina's transfer statute.\textsuperscript{29}

The court then discussed the constitutionality of the mandatory life sentence.\textsuperscript{30} Upholding the sentence, the court refused to recognize the differences in language found in the Eighth Amendment to the United States Constitution and in article I, section 27 of the North Carolina Constitution.\textsuperscript{31} Furthermore, the court held that the sentence fell within the prevailing views of society, and rejected an argument urging reversal based on the disproportionate nature of the sentence to the crime committed.\textsuperscript{32}

\textsuperscript{26} See Green, 502 S.E.2d at 833 (holding that North Carolina courts do not recognize a difference between the "cruel" and "unusual" punishment provisions of the federal and state constitutions). Compare \textit{U.S. Const.} amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.") (emphasis added) with \textit{N.C. Const.} art. I, § 27 (1997) ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.") (emphasis added).

\textsuperscript{27} See \textit{Green}, 502 S.E.2d at 823 (stating that a statute is unconstitutionally vague if it does not "contain sufficiently definite criteria to govern a court's exercise of discretion").

\textsuperscript{28} 408 U.S. 104 (1972).

\textsuperscript{29} See \textit{id.} at 108 (holding that a municipal anti-noise ordinance prohibiting persons from making loud noises that disrupt a school in session was not unconstitutionally vague); \textit{Green}, 502 S.E.2d at 824 (listing the two-prong test).

\textsuperscript{30} See \textit{Green}, 502 S.E.2d at 827-28 (explaining the three-fold argument asserted by Green to illustrate that his sentence was cruel and/or unusual punishment). Green first argued that a sentence of a mandatory life term did not "comport with current societal standards of decency." \textit{Id.} at 828. Next, Green asserted that the U.S. Constitution required that his sentence be in proportion to the crime that he committed. \textit{See id.} Third, he contended that his sentence was cruel or unusual punishment because he would be the only 13-year-old in the history of the state to receive a mandatory life sentence for a first-degree sexual offense. \textit{See id.; see also infra} note 34 and accompanying text (explaining the legislative acts that made this anomaly possible).

\textsuperscript{31} See supra note 26 and accompanying text (providing the text of the Eighth Amendment to the United States Constitution and article I, section 27 of the North Carolina Constitution, respectively).

\textsuperscript{32} See \textit{Green}, 502 S.E.2d at 831. The majority explained the numerous instances where the public expressed concern about the increase in juvenile crime. \textit{See id.} at 829-30. This public concern caused the Governor of North Carolina to mandate the General Assembly sit for an extra session to address crime issues. \textit{See id.} at 830. Furthermore, the majority points out that numerous groups including prosecutors, police officers, victims of crime, and educators expressed as their biggest concern the increase in violent crime
Concurring in part and dissenting in part, Justice Frye agreed with the majority concerning the validity of the transfer statute. Justice Frye dissented from the majority, however, because he reasoned that it was unlikely that the North Carolina Legislature meant to create a five-month window in which a thirteen-year-old convicted of a first-degree sexual offense would be sentenced to a mandatory life sentence. Justice Frye also acknowledged the "unusualness" of the defendant's sentence and stated that under article I, section 27 of the North Carolina Constitution, the sentence should have been disregarded.

This Note first examines recognition by the courts that the due process rights guaranteed by the Constitution apply to juvenile offenders as well as adult offenders. Next, this Note analyzes North Carolina's system of transferring juveniles to adult criminal court and whether the statutes involved are unconstitutionally vague. This Note then discusses whether the imposition of a mandatory life sentence for a first-degree sexual offense is cruel and/or unusual punishment. Finally, this Note analyzes the majority, concurring, and dissenting opinions in State v. Green and concludes that although the transfer statutes are constitutionally valid, the dissenting opinion is correct in stating that the imposition of the manda-

committed by juveniles. See id.; see also Stanford v. Kentucky, 492 U.S. 361, 369 (1989) (noting that the Court does not look to its own perceptions of decency when determining if a sentence is within the prevailing views of society; instead, the conceptions of modern American society are the controlling factor).

33. See Green, 502 S.E.2d at 834 (Frye, J., concurring in part and dissenting in part) (stating that the majority correctly upheld the validity of North Carolina's transfer statutes).

34. See id. (recognizing that this case centers around two independent legislative acts that, when combined, adversely affected no one except Andre Green). The first act, passed by the North Carolina Legislature, effective May 1, 1994, reduced the minimum age of transfer to adult criminal court from 14 to 13 years of age. See id. at 834-35 (referring to N.C. GEN. STAT. § 7A-608 (1995) (repealed 1999)). But see N.C. GEN. STAT. § 7B-2200. The second act, effective October 1, 1994, abolished the sentence of mandatory life imprisonment for those convicted of a first-degree sexual offense. See Green, 502 S.E.2d at 834 (discussing N.C. GEN. STAT. § 14-1.1 (1986), amended by N.C. GEN. STAT. § 15A-1340.17 (1997)). Andre Demetrius Green raped his victim on July 27, 1994. See Green, 502 S.E.2d at 823. He was the only 13-year-old between the months of May and October that committed the crime of first-degree sexual offense, and therefore he was, and will be, the only person in the history of the State of North Carolina to be sentenced to a mandatory life sentence for that crime. See id. at 834 (Frye, J., concurring in part and dissenting in part).

35. See Green, 502 S.E.2d at 834-35 (Frye, J., concurring in part and dissenting in part). The dissent expresses doubt that North Carolina's General Assembly knew that it created a five-month period subjecting defendants such as Andre Green to a mandatory life sentence. See id. at 835. Although states may afford greater protections in their criminal justice systems than the federal system, they may not fall below the minimum standards established by the U.S. Constitution. See California v. Ramos, 463 U.S. 992, 1013-14 (1983).
tory life sentence in this case is cruel or unusual punishment.

I. THE JUVENILE JUSTICE SYSTEM AND THE SERIOUS YOUTHFUL OFFENDER

A. The Process of Transferring Juvenile Offenders to Adult Criminal Court

The Supreme Court took the first step toward providing procedural due process rights to juveniles in Kent v. United States. Prior to this case, society did not consider juveniles "criminals"; thus, an assumption existed that they did not need the due process protections afforded to adults. In Kent, the police arrested the defendant for housebreaking, rape, and robbery. The police then delivered him to the juvenile court

36. 383 U.S. 541 (1966); see also Stanford v. Kentucky, 492 U.S. 361, 371-72 (1989) (establishing the minimum age of a death sentence at 16 years). In 1989, 37 states had capital punishment available as a sentence, while 15 of those states did not permit a death sentence on 16-year-olds and 12 did not permit 17-year-olds to receive a death sentence. See id. at 370. Based on these statistics the Stanford Court held that "[t]his does not establish the degree of national consensus this Court has previously thought sufficient to label a particular punishment cruel and unusual." Id. at 370-71; see also Thompson v. Oklahoma, 487 U.S. 815, 838 (1988) (holding that sentencing a 15-year-old murderer to death was cruel and unusual punishment); Eddings v. Oklahoma, 455 U.S. 104, 116 (1982) (holding that the age of a juvenile can be a mitigating factor when applying the death penalty); Breed v. Jones, 421 U.S. 519, 541 (1975) (holding that if a juvenile court adjudicated a juvenile, a subsequent trial in adult criminal court violates the Double Jeopardy Clause of the Fifth Amendment); Gallegos v. Colorado, 370 U.S. 49, 54 (1962) (reaffirming the Court's holding in Haley v. Ohio); Haley v. Ohio, 332 U.S. 596, 607 (1948) (holding that confessions by juveniles must conform to the Due Process Clause of the Fourteenth Amendment); Amicus Curiae Brief of the American Civil Liberties Union of North Carolina Legal Foundation in Support of Appellant at 9 n.1, State v. Green, 502 S.E.2d 819 (N.C. 1998) (No. 519A96) (noting that many cases decided before and after Kent guaranteed certain constitutional protections to juveniles).

37. See supra notes 10-13 and accompanying text (explaining that at the time of the promulgation of the juvenile justice system, some reformers believed that juveniles did not need due process protections).

38. See Kent, 383 U.S. at 543.
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for adjudication.\(^{39}\) After a full investigation,\(^{40}\) the juvenile court judge decided to transfer the case to adult criminal court.\(^{41}\) The judge made this decision without ruling on the defendant's motion for retention of jurisdiction by the juvenile court and without conducting a hearing or interviewing the defendant, his parents, or his counsel.\(^{42}\)

The Supreme Court in *Kent* provided much needed guidance to juvenile court judges faced with the decision of whether to transfer a juvenile to adult criminal court.\(^{43}\) Justice Fortas, writing for the majority, held

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39. See *id.* Kent broke into a woman's apartment and raped her. See *id.* The police arrested him after lifting his fingerprints from inside the victim's house. See *id.* After arriving at police headquarters and enduring a seven-hour interrogation, Kent admitted to committing the crimes. See *id.* at 543-44. He then went to a "receiving home for children" and remained in detention there for approximately one week without an arraignment or a probable cause hearing. See *id.* at 544-45. During this detention, Kent's mother retained counsel who promptly gave notice to the juvenile court of Kent's intention to oppose transfer of jurisdiction. See *id.* at 545. Kent's counsel also attempted to obtain a copy of his client's Social Service file, which contained all Kent's juvenile court records used by the judge in making his transfer decision. See *id.* at 546.

40. See *id.* at 546; cf. *Pee v. United States*, 274 F.2d 556, 559 (D.C. Cir. 1959). The *Pee* court stated that a "full" investigation "means an inquiry not only into the facts of the alleged offense but also into the question whether the *parens patriae* plan of procedure is desirable and proper in the particular case." Id. at 559.

41. See *Kent*, 383 U.S. at 546 (noting that the juvenile court judge did not rule on any motions, hold any hearings, confer with Kent's counsel, or provide a statement of reasons for his transfer order). When a juvenile court judge decides if a transfer is proper in the District of Columbia (the jurisdiction that adjudicated Kent), the judge is required to conduct a full investigation:

> "If a child sixteen years of age or older is charged with an offense which would amount to a felony in the case of an adult, or any child charged with an offense which if committed by an adult is punishable by death or life imprisonment, the judge may, after full investigation, waive jurisdiction and order such child held for trial under the regular procedure of the court which would have jurisdiction of such offense if committed by an adult; or such other court may exercise the powers conferred upon the juvenile court . . . in conducting and disposing of such cases."

*Id.* at 547-48 (emphasis added) (quoting D.C. CODE § 11-1553 (Supp. IV 1965)).

42. See *id.* at 546. The majority recognized that the underlying goal of the juvenile court is to determine the needs of the juvenile as well as that of society, not to adjudicate criminal conduct. See *id.* at 554. It follows then that the juvenile justice system provides treatment and rehabilitation to juveniles, rather than affixing punishment. See *id.* The *Kent* Court cautioned, however, that even though the state acts as *parens patriae*, it cannot adjudicate juveniles arbitrarily. See *id.* at 554-55.

43. See generally *id.* The majority did not decide the merits of the transfer decision; they simply stated that "there is no place in our system of law for reaching a result of such tremendous consequences without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons." *Id.* at 554. Challenging the procedures, or lack thereof, utilized by the juvenile court judge, the majority asserted that it was obvious such behavior would not be tolerated in adult criminal court. See *id.*
that this transfer order was invalid. The majority found that when a juvenile court decides to transfer its jurisdiction to an adult criminal court, the court has to provide the defendant with a hearing, all relevant records, and a recitation of the factors that led to the transfer decision.

The Court then created a list of factors for lower courts to utilize when deciding whether to transfer a juvenile to adult criminal court. By creating these factors, the Kent Court ensured that the Due Process Clause of the Constitution would protect juveniles who committed crimes seri-

44. See id. at 552-53 (noting that the juvenile court has wide discretion as to whether to transfer a juvenile to adult criminal court, but stating that this discretion must include "procedural regularity sufficient in the particular circumstances to satisfy the basic requirements of due process and fairness, as well as compliance with the statutory requirement of a 'full investigation'").

45. See id. at 557 (relying on constitutional principles of due process and effective assistance of counsel); see also R.S. v. Georgia, 274 S.E.2d 810, 811 (Ga. Ct. App. 1980) (holding that Georgia statutory law is consistent with Kent, in that the court must hold an evidentiary hearing to determine whether a juvenile can be transferred to criminal court). Though the juvenile court has discretion with regard to whom it recommends for transfer, it cannot deny the juvenile the right to a hearing by simply waiving jurisdiction. See id.

46. See Kent, 383 U.S. at 566-67. The Court listed the following factors:

1. The seriousness of the alleged offense to the community and whether the protection of the community requires waiver.
2. Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner.
3. Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted.
4. The prosecutive merit of the complaint, i.e., whether there is evidence upon which a Grand Jury may be expected to return an indictment (to be determined by consultation with the United States Attorney).
5. The desirability of trial and disposition of the entire offense in one court when the juvenile's associates in the alleged offense are adults who will be charged with a crime in the U.S. District Court for the District of Columbia.
6. The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living.
7. The record and previous history of the juvenile, including previous contacts with the Youth Aid Division, other law enforcement agencies, juvenile courts and other jurisdictions, prior periods of probation to this court, or prior commitments to juvenile institutions.
8. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available to the Juvenile Court.

Id. at 566-67. But see State v. Green, 502 S.E.2d 819, 827 (N.C. 1998), cert. denied, ___ U.S. ___, 119 S. Ct. 883 (1999) (noting that the Supreme Court did not make the factors enunciated in Kent a constitutional requirement and that, therefore, they are not binding in North Carolina courts).
ous enough to warrant a transfer to adult criminal court.47

One year later, In re Gault48 expanded the ruling in Kent, and held that juveniles had the same due process rights as adults.49 While his parents were at work, the police arrested Gerald Gault for allegedly making obscene telephone calls to his neighbor.50 The police neither gave Gault’s parents notice as to where and why he was taken into custody, nor took steps to ensure that his parents would be notified.51

The Gault Court radically transformed the procedures accorded to juveniles who are deemed delinquent.52 First, the Court required that authorities give notice of the charges to the juvenile and his parents before scheduled court proceedings, so they would have adequate time to prepare a defense.53 Second, the Court mandated that when a juvenile

47. See Kent, 383 U.S. at 566-67 (noting that when the court is contemplating waiving jurisdiction it will be an officer of the court’s responsibility to address all of these factors, though not all of them will be relevant in all cases); see also supra note 10 and accompanying text (citing the relevant portions of the Fifth and Fourteenth Amendments to the U.S. Constitution).
49. See id. at 21 (concluding that there is no danger of states “abandon[ing]” the “benefits” of the juvenile justice system simply because due process rights have been established for juveniles); see also supra note 43 and accompanying text (explaining that prior to Kent, juveniles had no due process rights).
50. See Gault, 387 U.S. at 4. The sheriff took Gault, who was on probation, into custody for allegedly making the obscene telephone calls on June 8, 1964. See id. Gault went to a Children’s Detention Home, and he remained in custody even though his parents were not notified of his whereabouts. See id. at 5.
51. See id. at 5. Eventually his parents learned where he was and were informed that there would be a juvenile court hearing concerning their son the following day. See id. The juvenile court judge conducted the hearing in his chambers with the complainant absent, without sworn testimony, and without a court stenographer to make a record of the proceeding. See id. After the hearing, Gault returned to the Detention Center and was not allowed to leave until June 11 or 12. See id. at 6. On June 15, the Court held another hearing concerning the Gault matter, and after the meeting, the judge deemed Gerald Gault a juvenile delinquent, sentencing him to the State Industrial School until he was 21 years old. See id. at 7. This was a six-year “sentence” because Gault was a 15-year-old when he allegedly made the lewd calls. See id. at 7-8. At the habeas corpus hearing, the juvenile court judge testified that he found Gault delinquent based on an ordinance that made it unlawful to make lewd comments in the presence of woman and children. See id. at 8. This crime, if committed by an adult, is a misdemeanor with a penalty consisting of a five to fifty dollar fine or two months jail time. See id. at 8-9.
52. See generally id. at 30-57 (providing the essential elements of due process to juveniles); see also Mills, supra note 1, at 916 (explaining that Gault impacted the juvenile justice system by providing juveniles with the same procedural due process rights given to adults).
53. See Gault, 387 U.S. at 32-33. The Supreme Court of Arizona held that Mrs. Gault knew from the moment Gerald was put in the detention home that the state was charging him with an offense. See id. at 32. The Arizona court also held that a notice requirement was inappropriate because it is the policy of the juvenile court to keep juveniles out of the
faces a proceeding that may result in his commitment to an institution, the state must advise him and his parents of the juvenile's right to counsel. Lastly, the Court held that the state must afford both the juvenile the opportunity to cross-examine witnesses as well as protection against self-incrimination.

*Gault* represented a major shift in the procedural rights afforded to juveniles in the United States because it guaranteed that states would have to apprise juveniles of their rights and protect them from arbitrary judgments. It also paved the way for states to create a more constitutionally sensitive criminal justice system for juveniles, whether in juvenile or adult criminal court.

1. *North Carolina's System of Transfer*

North Carolina is among the minority of states that allow juvenile offenders below age fourteen to be transferred to adult criminal court for adjudication. Before the court can transfer jurisdiction to an adult

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54. *See id.* Justice Fortas, in his majority opinion, held that the notice requirement in juvenile proceedings is the same as that constitutionally required in adult court. *See id.* at 33. "It does not allow a hearing to be held in which a youth's freedom and his parents' right to his custody are at stake without giving them timely notice, in advance of the hearing, of the specific issues that they must meet." *Id.* at 33-34.

55. *See id.* at 41. The majority explained that at least one-third of the states provide juveniles with the right to be represented by retained counsel, notice of that right, or to have assigned counsel in juvenile court proceedings. *See id.* at 37-38. Furthermore, the majority cited to the President's Crime Commission report, which stated that it was essential that juveniles be represented by counsel in proceedings that could result in "coercive action" against the juvenile. *See id.* at 38. Based on these facts the Court concluded that the Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child. *Id.* at 41.

56. *See generally id.*; *Amicus Curiae Brief of the American Civil Liberties Union of North Carolina Legal Foundation in Support of Appellant at 8, State v. Green, 502 S.E.2d 819 (N.C. 1998) (No. 519A96) (noting that the *Gault* Court rejected the notion of parens patriae because the majority felt that the doctrine led to arbitrary and unfair adjudication of juveniles).


58. *See supra* note 20 (listing states that allow transfer of juveniles to adult criminal
criminal court, North Carolina requires that it provide the juvenile with adequate notice of the charges against him, a hearing based on the charges, and proof of probable cause that the juvenile committed the unlawful act.\(^5\)

The probable cause hearing resembles the hearing mandated by the Supreme Court in *Gault* in that separate counsel must represent both the state and the juvenile.\(^6\) Moreover, the juvenile may, but is not required to, testify on his behalf.\(^6\) The juvenile also is allowed to call and examine all witnesses.\(^6\) If the court finds probable cause in accordance with section 7A-609 of the North Carolina Code,\(^6\) the prosecutor may request

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Transfer of jurisdiction of juvenile to superior court.
After notice, hearing, and a finding of probable cause the court may, [upon motion of the prosecutor or the juvenile's attorney or upon its own motion], transfer jurisdiction over a juvenile to superior court if the juvenile was 13 years of age or older at the time the juvenile allegedly committed an offense that would be a felony if committed by an adult. If the alleged felony constitutes a Class A felony and the court finds probable cause, the court shall transfer the case to the superior court for trial as in the case of adults.

N.C. GEN. STAT. § 7B-2200 (1999). The bracketed material in the above quote denotes the changes section 7B-2200 made to section 7A-608.

60. See N.C. GEN. STAT. § 7A-609(b)(1)-(2) (1995) (repealed 1999) (recodified as N.C. GEN. STAT. § 7B-2202(b)(1)-(2) (1999)). "At the probable cause hearing: (1) A prosecutor [shall] represent the State; (2) The juvenile shall be represented by counsel [\(\text{\textsuperscript{B}}\)]." N.C. GEN. STAT. § 7B-2202(b)(1)-(2). The bracketed material in the above quote denotes the changes section 7B-2202(b)(1)-(2) made to section 7A-609(b)(1)-(2). *See also supra* notes 11-13 and accompanying text (highlighting the positive and negative aspects of providing juveniles with the same due process rights as adults).

61. See N.C. GEN. STAT. § 7A-609(b)(3)-(4) (1995) (repealed 1999) (recodified as N.C. GEN. STAT. § 7B-2202(b)(3)-(4) (1999)). "At the probable-cause hearing: (3) The juvenile may testify[, call, and examine witnesses, and present evidence]; and (4) Each witness [shall] testify under oath or affirmation and be subject to cross-examination." The bracketed material in the above quote denotes the changes section 7B-2202 (b)(3)-(4) made to section 7A-609(b)(3)-(4).

62. See N.C. GEN. STAT. § 7B-2202(b)(3).

63. See N.C. GEN. STAT. § 7B-2202(a).

(a) The court shall conduct a hearing to determine probable cause in all felony cases in which a juvenile was 13 years of age or older when the offense was allegedly committed. [The hearing shall be conducted within 15 days of the date of the juvenile's first appearance. The court may continue the hearing for good cause.]

*Id.* The bracketed material in the above quote denotes the changes section 7B-2202(a) made to section 7A-609(a).
transfer of the proceedings to adult criminal court. The judge then must analyze the effects on the juvenile and the safety of the transfer state to determine if the juvenile's actions necessitate a transfer from the juvenile court to the appropriate adult criminal court. If the judge determines that either of these interests necessitates the transfer of jurisdiction, he must state his reasons with specificity. The appropriateness of transfer

64. See id. § 7B-2202(e)-(f).

65. See N.C. GEN. STAT. § 7B-2202(e)-(f).

66. See id.

67. See id. § 7B-2203(c); see also In re Bunn, 239 S.E.2d 483, 484 (N.C. App. 1977) (explaining that the juvenile court judge need only state his reasons for transferring jurisdiction, and that he need not make findings of fact to support his decision of transfer). The Bunn court explained that the juvenile court judge's findings of fact included the seriousness of the offense, the defendant's past criminal history, as well as the societal interest
is a decision within the sole discretion of the presiding juvenile court judge. This judicial interpretation of the deferential standard of review has lead to criticism that the transfer statute is unconstitutionally vague.

2. Due Process and Vagueness

When analyzing due process rights with respect to transfer statutes, a common argument, and one central to Green, is that the statutes are unconstitutionally vague. The vagueness argument surfaces because some transfer statutes provide that the juvenile court judge has sole discretion to make the decision on whether to transfer the juvenile to adult criminal court. Like North Carolina's transfer statute, these laws provide juvenile court judges with very little guidance in making the transfer determination.
In Grayned v. City of Rockford, the United States Supreme Court delineated the standard for determining whether a statute is void for vagueness. Justice Marshall, writing for the majority, created a two-pronged test for making this determination. The first prong states that the law must be clear enough to give a person with reasonable intelligence knowledge of forbidden conduct so that the person can alter his actions to comport with the law. The second prong requires laws to have instructions clearly expressed within their text, so that judges will know how to apply them.

North Carolina created protections against vague statutes even before the United States Supreme Court ruled on the issue in Grayned. In In re Burrus, the Supreme Court of North Carolina developed a similar test to that promulgated in Grayned. Here, the court first interpreted statutes prohibiting citizens from impeding the flow of vehicular traffic, and second, examined statutes that made it unlawful to disrupt, by way of making loud noises, a public or private school. The court stated that

not unconstitutionally vague. See id. at 825.
73. 408 U.S. 104 (1972).
74. See id. at 108-09 (finding that a city anti-noise ordinance prohibiting persons from making loud noises that disrupt a school in session was not unconstitutionally vague).
75. See id. The court delineated three reasons why vague statutes are detrimental to society. See id. at 108-09. Only the first two, however, represent the test created by the majority to determine whether a statute is void for vagueness. See id. The first reason why vague statutes are detrimental to society is that vague statutes do not help citizens adjust their behavior to comport with the law’s requirements. See id. at 108. The second reason is that it is essential that the law enforcement personnel charged with implementing the law do so fairly and consistently. See id. at 108-09. The third reason is that vague statutes have the ability in some instances to violate First Amendment rights, thereby restricting a person’s freedom of speech. See id. at 109.
76. See id. at 108 (explaining that “[v]ague laws may trap the innocent by not providing fair warning.”).
77. See id. “A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.” Id. at 108-09.
79. See id. at 888. The Burrus court held:

It is settled law that a statute may be void for vagueness and uncertainty. A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law . . . . When the language of a statute provides an adequate warning as to the conduct it condemns and prescribes boundaries sufficiently distinct for judges and juries to interpret and administer it uniformly, constitutional requirements are fully met.
Id. (citations and internal quotations omitted).
80. See Burrus, 169 S.E.2d at 881, 883. Barbara Burrus was charged with deliberately standing on a portion of a busy highway and stopping the flow of traffic in violation of state law. See id. at 881-82. James Howard was charged with deliberately interrupting a
when deciding if a statute is void for vagueness, an initial determination should be made on whether a person of ordinary intelligence would have to guess at the statute’s meaning. Next, the court reasoned that the statute meets constitutional requirements if it provides an initial adequate warning and is clear enough for judges and juries to implement. The holding in *Burrus* provided the framework for the *Green* court’s inquiry into the constitutional validity of North Carolina’s transfer statute. The court, however, looked to the Eighth Amendment to the United States Constitution for guidance in evaluating the constitutionality of Green’s punishment.

### B. The Evolution of the Cruel and Unusual Punishment Debate

Scholars debate the precise meaning of the words “cruel and unusual punishment,” written in the Eighth Amendment, and have done so since the days of the *Magna Carta*. Nevertheless, in American jurisprudence, those words in the Eighth Amendment “draw [their] meaning from the evolving standards of decency that mark the progress of a maturing society.”

Three cases in which the Supreme Court attempted to clarify the meaning of the Eighth Amendment are *Gregg v. Georgia*, *Solem v. School that was in session by making rude and riotous noises outside the school in violation of state law.* See id. at 882-83.

81. See id. at 888; see also *Cramp v. Board of Pub. Instruction*, 368 U.S. 278, 287 (1961).

82. See *Burrows*, 169 S.E.2d at 887; see also *Cramp*, 368 U.S. at 287 (holding that a Florida statute that required state employees to take a loyalty oath against the Communist Party was unconstitutionally vague).

83. See *State v. Green*, 502 S.E.2d 819, 824 (N.C. 1998), cert. denied, ___ U.S. ___, 119 S. Ct. 883 (1999) (stating the holding of *Grayned* and illustrating that the identical rule of law was created prior to *Grayned in Burrus*).

84. See id. at 827-28. This Note contends that the *Green* court should have looked to article I, section 27 of the North Carolina Constitution, which is a broader provision than the Eighth Amendment to the United States Constitution.

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

86. See *Trop v. Dulles*, 356 U.S. 86, 100 & n.32 (1958) (holding that the phrase “cruel and unusual punishment” is to be interpreted as one phrase with no difference between cruel punishments and unusual punishments).

87. *Id.* at 101; see also *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989). “In discerning those ‘evolving standards,’ we have looked to objective evidence of how our society views a particular punishment today. The clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures.” *Id.* (citations omitted); see also *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (stating that the Eighth Amendment mandates that the court look to the prevailing views of society in determining if punishments are cruel and unusual).

88. 428 U.S. 153, 187 (holding that a death sentence for the crime of murder does not
Innocence Lost: In the Wake of Green, 89 and Harmelin v. Michigan.90 In Gregg, the Court analyzed whether a death sentence for a convicted murderer was cruel and unusual punishment within the meaning of the Eighth Amendment.91 After finding that a death sentence was not per se unconstitutional, the Court created a two-pronged test to determine whether a punishment is excessive within the bounds of the Eighth Amendment.92 The first prong stated that whatever the punishment, it cannot involve an unnecessary and unwarranted infliction of pain.93 The second prong delineated that the punishment inflicted must be in proportion to the crime committed.94 Justice Stewart, writing for the Court, cautioned, however, that when determining the validity of a democratically created statute, the unelected judiciary should be wary and presume the statute's validity.95

The Solem Court expanded and clarified the second prong enunciated by the Gregg Court.96 In Solem, the Court reviewed a South Dakota case that sentenced a six-time convicted felon to life imprisonment for forging a check in the amount of one hundred dollars.97 Relying on Gregg, the

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89. 463 U.S. 277 (1983). In Solem, the Court overturned a life sentence imposed upon a defendant who was found guilty of his seventh felony, the last of which was forging a check. See id. at 281. In so holding, the Court stated although the judiciary must show substantial deference to legislatures enacting sentencing schemes, the sentence must be proportionate to the crime committed. See id. at 290.

90. 501 U.S. 957 (1991). The Harmelin Court modified the Eighth Amendment proportionality principle and agreed that courts should use the Solem objective criteria analysis only in cases where the defendant's sentence was "grossly disproportionate" to the offense. See id. at 1001 (Kennedy, J., concurring in part and concurring in the judgment).

91. See Gregg, 428 U.S. at 162; see also supra note 26 and accompanying text (delineating the semantic difference between the Eighth Amendment of the Federal Constitution and article I, section 27, of the North Carolina Constitution).

92. See Gregg, 428 U.S. at 173.


94. See Gregg, 428 U.S. at 173; see also Trop v. Dulles, 356 U.S. 86, 100 (1958); Weems, 217 U.S. at 367.

95. See Gregg, 428 U.S. at 175; see also WILLIAM A. KAPLIN, THE CONCEPTS AND METHODS OF CONSTITUTIONAL LAW 54-55 (1992) (explaining the counter-majoritarian difficulty). "'[W]hen the Supreme Court declares unconstitutional a legislative act... it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it.'" Id. (quoting ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 16-17 (2d ed. 1986).


97. See Solem, 463 U.S. at 277, 281 (noting that the defendant had been convicted under the state's recidivist statute because he had six prior felony convictions, and that the statute carried a maximum penalty of life imprisonment for a Class 1 felony); see also S.D.
Solem Court held that regardless of the crime, the sentence imposed must be in proportion to the crime committed. The Court further stated that if courts find it necessary to conduct an Eighth Amendment analysis on a particular punishment, they should be guided by an objective analysis of certain factors. First, it is important to look at the seriousness of the crime as well as the subsequent punishment. Second, courts should conduct an analysis of how the state treats other criminals. This analysis determines whether or not criminals who commit more serious crimes are subject to a less severe penalty—a certain indication of the excessiveness of the sentence in question. Lastly, the Court suggested that an analysis of how other jurisdictions adjudicate the crime is beneficial. Thus, judges using these objective criteria should view them “in light of the harm caused or threatened to the victim or society, and the culpability of the offender.”

In Harmelin, Justice Scalia announced the judgment of the Court and delivered an opinion in which Chief Justice Rehnquist joined, rejecting the Solem three-pronged test for proportionality. Justice Scalia at-
tacked the first prong, which spoke of the gravity of the offense, pointing to its incompleteness because it made no mention of how to determine what other crimes were as grave or more grave as the original offense.\textsuperscript{106} He then commented that these inadequate standards made the criteria unmistakably \textit{subjective} rather than \textit{objective}.\textsuperscript{107} Each individual judge's value system, he argued, would determine the criteria with no set factors to formulate that determination.\textsuperscript{108}

Next, Justice Scalia challenged the second prong of \textit{Solem}, reasoning that it would be impossible to compare offenses of similar gravity because, as the first prong illustrated, there was no way to determine that standard.\textsuperscript{109} Finally, Justice Scalia rejected the third prong, conceding that analyzing how other jurisdictions adjudicated the same crime would be practical and conceivable, but finding that this criterion had no basis in the Eighth Amendment.\textsuperscript{110}

Justice Kennedy, in a concurring opinion joined by Justices Souter and O'Connor, modified the proportionality principle, finding that it does exist in narrow circumstances.\textsuperscript{111} This concurring opinion has been most influential and is recognized as the state of the law today.\textsuperscript{112} Justice Kennedy based his contentions on the principle of \textit{stare decisis}, holding that prior Supreme Court decisions delineate the aspects of proportionality

\begin{itemize}
    \item \textsuperscript{106} \textit{See id.} at 986-90 (noting that an analysis of this type leads to subjective determinations that are unrealistic). The Court further observed that in Louisiana the same criminal sentence applies to a person who commits assault with a dangerous weapon as to a person who removes a shopping basket from the grounds of the store. \textit{See id.} at 987.
    \item \textsuperscript{107} \textit{See id.} at 986.
    \item \textsuperscript{108} \textit{See id.} at 988-89.
    \item \textsuperscript{109} \textit{See id.} at 988. Justice Scalia reasoned: Judges will be comparing what \textit{they} consider comparable. Or, to put the same point differently: When it happens that two offenses judicially determined to be "similarly grave" receive significantly dissimilar penalties, what follows is not that the harsher penalty is unconstitutional, but merely that the legislature does not share the judges' view that the offenses are similarly grave.
    \item \textit{Id.} (emphasis in original).
    \item \textsuperscript{110} \textit{See id.} at 989 (noting that some states choose to criminalize activity such as hunting endangered animals while others offer rewards for those that engage in similar activity). "That a State is entitled to treat with stern disapproval an act that other States punish with the mildest of sanctions follows \textit{a fortiori} from the undoubted fact that a State may criminalize an act that other States do not criminalize \textit{at all.}" \textit{Id.} (emphasis in original).
    \item \textsuperscript{111} \textit{See id.} at 996-1009 (Kennedy, J., concurring in part and concurring in the judgment).
    \item \textsuperscript{112} \textit{See State v. Pilcher,} 655 So. 2d 636, 643 (La. Ct. App. 1995) (explaining that the \textit{Harmelin} Court held that the \textit{Solem} analysis was only to be used when the sentence was "grossly disproportionate" to the crime); \textit{State v. Green,} 502 S.E.2d 819, 830-31 (N.C. 1998), \textit{cert. denied,} \textit{U.S.} \textit{119 S. Ct. 883} (1999) (quoting Justice Kennedy's concurrence in \textit{Harmelin}).
\end{itemize}
In sum, Justice Kennedy postulated that there is no defined proportionality between the crime and sentence mandated by the Eighth Amendment. Instead, he argued, the Eighth Amendment prohibits outrageous sentences which are "grossly disproportionate" to the crime committed.

1. North Carolina and the Debate on Cruel and Unusual Punishment

a. North Carolina's Version of the Eighth Amendment

Article I, section 27 of the North Carolina Constitution provides that, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted." This language has been in North Carolina's Constitution since it was amended in 1868. Moreover, North Carolina courts acknowledge the differing language in the federal and state constitutions. In Medley v. North Carolina Department of Corrections, the North Carolina Supreme Court determined that the Eighth Amendment to the United States Constitution and article

113. See Harmelin, 501 U.S. at 996-98 (Kennedy, J., concurring in part and concurring in the judgment).

114. See id. at 1001 (Kennedy, J., concurring in part and concurring in the judgment); see also supra note 112 and accompanying text (explaining that courts recognize Justice Kennedy's concurring opinion in Harmelin as the prevailing law in the proportionality debate).

115. See Harmelin, 501 U.S. at 1001 (Kennedy, J., concurring in part and concurring in the judgment) (emphasis added).


117. See Amicus Curiae Brief of the American Civil Liberties Union of North Carolina Legal Foundation in Support of Appellant at 22, State v. Green, 502 S.E.2d 819 (N.C. 1998) (No. 519A96). The ACLU argued that:

[T]he 1776 version of Article I, Section 27 used the word "nor" instead of the word "or" between the words "cruel" and "unusual." In the Constitution of 1868, Article I, Section 27 was amended to read the way it does today: "Nor [shall] cruel or unusual punishments [be] inflicted."

The change from the 1776 Constitution to the 1868 Constitution does not alter the fundamental difference between this State's Constitution and the Eighth Amendment to the United States Constitution. To the contrary, the change from "nor" to "or" in 1868 serves to highlight the fact that North Carolina's prohibition against certain punishments is broader than its federal counterpart. Those attending the North Carolina Constitutional Convention of 1868 certainly were aware that the Eighth Amendment to the United States Constitution prohibited cruel and unusual punishment; yet, Article I, Section 27 was not redrafted to mirror the Eighth Amendment.

Id. (citations omitted).


Innocence Lost: In the Wake of Green

b. North Carolina and First-Degree Sexual Offenses

Prior to October 1, 1994, North Carolina sentenced persons convicted of a first-degree sexual offense to life imprisonment. Faced with questions regarding the constitutional validity of the sentence, the North Carolina Supreme Court held that the life imprisonment sentence was not cruel and unusual punishment within the meaning of the Eighth Amendment. The court has extended this reasoning to uphold life terms for convicted juvenile offenders. For example, in State v. Rogers, the court examined whether a mandatory life sentence was cruel and unusual punishment when applied to a fifteen-year-old boy convicted of first-degree rape. The court held that unless otherwise provided by a specific statute, there is no presumption of criminal inca-

120. See id. at 659.
121. See id. at 659-60 (Martin, J., concurring); see also Amicus Curiae Brief of the American Civil Liberties Union of North Carolina Legal Foundation in Support of Appellant at 22-23, State v. Green, 502 S.E.2d 819 (N.C. 1998) (No. 519A96) (explaining that North Carolina courts have construed their state constitution more broadly than that of the Federal Constitution).
124. See Green, 502 S.E.2d at 828. The Green court refused to recognize a linguistic difference between the North Carolina and the Federal Constitutions; consequently, the court’s discussion focused on the Eighth Amendment of the United States Constitution. See id. The court failed to recognize that although the United States Constitution sets out the minimal standard, North Carolina was free to create broader provisions than those of the Federal Constitution. Cf. California v. Ramos, 463 U.S. 992, 1014 (1983); State v. Higginbottom, 324 S.E.2d 834, 837 (N.C. 1985) (holding that a prosecution for first-degree sexual offense that subjects a defendant to a mandatory life sentence is not cruel and unusual punishment).
125. See State v. Rogers, 168 S.E.2d 345, 351 (N.C. 1969) (upholding the mandatory life sentence for a rape conviction of a 15-year-old juvenile as not being cruel and unusual punishment). "When punishment does not exceed the limits fixed by statute it cannot be classified as cruel and unusual in a constitutional sense unless the punishment provisions of the statute itself are unconstitutional." Id. at 350 (citations omitted).
127. See id. at 351.
pacity for youths over age fourteen. Thus, the court determined that it is constitutionally permissible to sentence a juvenile tried as an adult to a mandatory life term. Consequently, according to Rogers, the state can subject a juvenile tried as an adult and convicted of rape to the statutorily mandated sentence of life imprisonment.

II. **STATE v. GREEN:** Enforcing the Adult Consequences of Crimes on Juveniles

The State of North Carolina arrested and convicted Andre Green for raping a twenty-three-year-old woman. On July 27, 1994, the victim, asleep in her bed, heard a banging noise on her back door. She immediately called the police for emergency assistance, and while she was on the telephone with the operator, Green broke in through the back door and repeatedly raped and molested her. After abusing his victim unmercifully, he fled the scene when he heard the police enter the back door of the victim's apartment. Two witnesses identified Green leaving the house, and later Green made a statement to the police admitting to the attack.

On July 28, 1994, thirteen-year old Green appeared before the juvenile court, charged with both first-degree rape and burglary. Twelve days

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128. See id. at 353; see also State v. Johnson, 346 S.E.2d 596, 624 (N.C. 1986) (discussing the proposition that a criminal defendant's maturity is not necessarily determined by his chronological age).
129. See Rogers, 168 S.E.2d at 351.
130. See id. at 353.
132. See id. at 822.
133. See id. (noting that the victim had experienced, for six weeks prior to the rape, this same disturbing behavior of someone ringing her doorbell and banging on the doors and the windows to her apartment).
134. See id. at 823. The victim was armed only with a golf club that she kept near her bed. See id. at 822. She had this protection since the harassment involving the ringing of her doorbell and the banging on her doors began. See id.
135. See id. at 823.
136. See id.
137. See id. at 822. North Carolina defines first-degree rape as:
   (a) A person is guilty of rape in the first degree if the person engages in vaginal intercourse: (1) With a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim; or (2) With another person by force and against the will of the other person, and: a. Employs or displays a dangerous or deadly weapon or an article which the other person reasonably believes to be a dangerous or deadly weapon; or b. Inflicts serious personal injury upon the victim or another person; or c. The person commits the offense aided and abetted by one or more other persons.
   (b) Any person who commits an offense defined in this section is guilty of a Class
later, the prosecutor added a third charge of first-degree sexual offense.\textsuperscript{138} The district attorney, after conducting a probable cause hearing pursuant to sections 7A-608 through 7A-612 of the North Carolina Code, successfully moved to transfer Green's case to adult criminal court.\textsuperscript{139} On September 13, 1994, the grand jury indicted Green on the three counts, for which he was tried and found guilty.\textsuperscript{140} The Supreme Court of North Carolina granted discretionary review to assess the validity of both the state's transfer statutes and Green's sentence of life imprisonment.\textsuperscript{141}

In \textit{Green}, the Supreme Court of North Carolina faced two important constitutional issues.\textsuperscript{142} First, the court examined the constitutional sufficiency of North Carolina's transfer statute with respect to the Due Process Clause of the Fourteenth Amendment.\textsuperscript{143} Applying the two-pronged

\begin{itemize}
\item[138.] See \textit{Green}, 502 S.E.2d at 822. In North Carolina:
\begin{enumerate}
\item[(a)] a person is guilty of a sexual offense in the first degree if the person engages in a sexual act: (1) With a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim; or (2) With another person by force and against the will of the other person, and: a. Employs or displays a dangerous or deadly weapon or an article which the other person reasonably believes to be a dangerous or deadly weapon; or b. Inflicts serious personal injury upon the victim or another person; or c. The person commits the offense aided and abetted by one or more other persons.
\item[(b)] Any person who commits an offense defined in this section is guilty of a Class B1 felony.
\end{enumerate}
\item[139.] See \textit{Green}, 502 S.E.2d at 822. The district judge's reasons for transfer include:
\begin{itemize}
\item [The] serious nature of the offenses; [The] victim [was] essentially a stranger to the juvenile; [The] community's need to be aware of & protected from this serious type of criminal activity; [The] juvenile has a history of assaultive behavior (fights in school) & juvenile acknowledges he had a very bad temper; [[and]] there was strong evidence of probable cause presented based on testimony from victim and juvenile's confession to law enforcement.
\end{itemize}
\item[140.] See \textit{Green}, 502 S.E.2d at 822 (noting that the trial court sentenced Green to a mandatory life sentence for the first-degree sexual offense, a 6 year sentence for attempted first-degree rape to run at the same time as the life sentence, and a 15 year sentence for first-degree burglary to run consecutively after the life sentence).
\item[141.] See id. at 821-22.
\item[142.] See id.
\item[143.] See \textit{id.} at 823-26.
\end{itemize}
vagueness test delineated in *Burrus* and *Grayned*, the court proclaimed the validity of sections 7A-608 and 7A-610 of the North Carolina Code. The court recognized that the statute satisfied the first prong because a person of ordinary intelligence could understand what the law prohibits. The second prong, however, forced the court to examine if the laws provide clear standards of application. The majority held that North Carolina's transfer statutes met this burden. In making this decision, the majority determined that it was important to analyze the entire North Carolina criminal justice system as well as the transfer statute. Ultimately, the majority determined that the statute sufficiently satisfied the second prong.

The court then evaluated whether sentencing a juvenile to a mandatory life sentence after transfer to adult criminal court was cruel and/or unusual punishment, as defined by either the Eighth Amendment of the United States Constitution or article I, section 27 of the North Carolina

144. See id.
145. See id. at 824-25. The court addressed the notice requirement even though Green did not assert that his due process rights were impinged due to inadequate notice. See id. The court determined that a cursory examination of section 7A-610 would lead a person of ordinary intelligence to also study section 7A-608 and, consequently, that a citizen of ordinary intelligence would be able to understand the possibility of juvenile transfer to adult criminal court. See id.
146. See id.
147. See id. at 825-26. The court determined that when analyzing the aggregate of criminal and juvenile law in North Carolina there was sufficient guidance to aid judges in their transfer decisions. See id.
148. See id. at 825. "[T]he rules of statutory construction provide, where the language of a statute is arguably ambiguous, that courts must give effect to legislative intent by reference *inter alia* to statutes *in pari materia*, those having a common purpose." Id.
149. See id. at 825-26. Examining North Carolina's transfer statute *in pari materia*, the Green court looked first to section 7A-516(3) of the North Carolina Code. See id. at 825; see also N.C. GEN. STAT. § 7A-516(3) (1995). Section 7A-516(3) explains that the purpose of the Juvenile Code is "[t]o develop a disposition in each juvenile case that reflects consideration of the facts, the needs and limitations of the child, the strengths and weaknesses of the family, and the protection of the public safety." Id. Next, the court studied the goal of the Juvenile Code as well as the dispositions available to the juvenile court judge. See id. The juvenile court judge is required, when considering dispositions, to take into account numerous factors, including the "seriousness of the offense, the degree of culpability indicated by the circumstances of the particular case and the age and prior record" of the defendant. See id. at 826.
Constitution. In affirming the decision of the court of appeals, the North Carolina Supreme Court held that the Eighth Amendment and article I, section 27 of the North Carolina Constitution should not be treated differently, societal standards of decency approved of the punishment, the sentence was not disproportionate to the crime committed, and a mandatory life sentence was not cruel and/or unusual punishment.

A. The Majority Opinion: Approving the Constitutionality of North Carolina’s Transfer Statutes and Determining that a Mandatory Life Sentence for a Thirteen-Year-Old is Not Cruel and/or Unusual Punishment

1. Upholding North Carolina’s Transfer Statute

In Green, the Supreme Court of North Carolina held that the state’s transfer statute was not unconstitutionally vague. In making this determination, the court utilized the two-prong vagueness test enunciated in Grayned and concluded that the methods of implementation of the transfer statute did not violate the Due Process Clause of the Fourteenth Amendment.

The Green majority began its probe into whether North Carolina violated Andre Green’s due process rights by analyzing the text of section 7A-610 of the North Carolina Code. Green argued that section 7A-610

150. See Green, 502 S.E.2d at 827-34. The Due Process Clause of the Fourteenth Amendment incorporates upon the states the “cruel and unusual punishment” language of the Eighth Amendment. See Furman v. Georgia, 408 U.S. 238, 257 n.1 (1972) (Brennan J., concurring). The Eighth Amendment is, however, the minimal standard that the states have to overcome, and it is settled law that “[s]tates are free to provide greater protections in their criminal justice system than the Federal Constitution requires.” California v. Ramos, 463 U.S. 992, 1014 (1983).


152. See Green, 502 S.E.2d at 827-34.

153. See id. With respect to the constitutionality of the transfer statute, the Green court focused its discussion on the Fifth and Fourteenth Amendments to the United States Constitution. See id. The court narrowed the discussion of whether Green’s sentence was cruel and/or unusual punishment by examining both the Eighth Amendment to the United States Constitution and article I, section 27 of the North Carolina Constitution. See id. at 827-28. The court determined, however, that the Eighth Amendment was the proper standard to determine the outcome of the case. See id. at 828.

154. See id. at 826.

155. See id. at 824; see also Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972) (explaining the three-pronged test for determining if a statute is void for vagueness).

156. See Green, 502 S.E.2d at 823.
was unconstitutionally vague because it provided "no meaningful guidance to juvenile court judges, resulting in arbitrary and discriminatory decisions regarding which juveniles to transfer to superior court."\textsuperscript{157} These arbitrary decisions, Green contended, occurred because the decision of whether to transfer a juvenile to adult court was in the sole discretion of the juvenile court judge.\textsuperscript{158} Therefore, Green argued that the statute was unconstitutionally vague and the implementation of the statute violated his due process rights.\textsuperscript{159}

In reviewing Green's vagueness argument, the majority applied the two-pronged test in \textit{Grayned}.\textsuperscript{160} The majority analyzed the first prong by examining section 7A-610 in conjunction with section 7A-608, determining that North Carolina met the notice requirement.\textsuperscript{161} The court reasoned that section 7A-610 states the criterion that allows a juvenile court judge to invoke the transfer statute, and section 7A-608\textsuperscript{162} gives the judge a basis for making the transfer determination.\textsuperscript{163} The majority therefore concluded that the statutes satisfied the first prong because, when read together, the statutes make clear the possibility of a thirteen-year-old having his case transferred for adjudication to adult criminal court.\textsuperscript{164}

Next, the court analyzed the second prong of the vagueness standard.\textsuperscript{165} The majority reiterated that in making a determination of whether the language of a statute is unclear, courts should look not only to the specific statute in question, but to other related statutes.\textsuperscript{166} The court held that this is the only way to develop fully the scope of the legislative intent, and to determine if the statute is ambiguous.\textsuperscript{167} Laying this founda-

\textsuperscript{157} \textit{Id.; see also N.C. GEN. STAT. §§ 7A-608 to -610 (1995) (repealed 1999).}
\textsuperscript{158} \textit{See Green, 502 S.E.2d at 823; see also In re Bunn, 239 S.E.2d 483, 484 (N.C. App. 1977) (noting that the juvenile court judge's determination is subject to review only when there is a clear abuse of discretion).}
\textsuperscript{159} \textit{See Green, 502 S.E.2d at 823.}
\textsuperscript{160} \textit{See id. at 825; see also \textit{Grayned}, 408 U.S. at 108.}
\textsuperscript{161} \textit{See id. at 824-25 (noting that Green stipulated that the statute satisfied the first prong of the vagueness standard).}
\textsuperscript{162} \textit{See N.C. GEN. STAT. § 7B-2203(b) (1999) (providing that the juvenile court judge may use as a basis for her decision whether "the needs of the juvenile or the best interest of the State will be served by [a] transfer . . . to [adult criminal court]").}
\textsuperscript{163} \textit{See supra note 59 and accompanying text (reporting that the North Carolina Legislature repealed section 7A-608 of the North Carolina Code and replaced it with section 7B-2200, which provides that a juvenile may be transferred to adult criminal court if the juvenile was at least 13 years old at the time of the offense and the alleged crime would have been a felony offense if it was committed by an adult).}
\textsuperscript{164} \textit{See Green, 502 S.E.2d at 825.}
\textsuperscript{165} \textit{See id.}
\textsuperscript{166} \textit{See id.}
\textsuperscript{167} \textit{See id.}
In the wake of Green, the court examined section 7A-516(3) as well as sections 7A-646 to 7A-661 of the North Carolina Code to determine if, when read together with the transfer statute, they were collectively vague. The majority found that these statutes created two main factors for juvenile court judges to weigh when deciding whether to transfer a juvenile to superior court:

[First], the seriousness of the offense; and [second] the evolving standards and will of the majority in society, as expressed through the legislature, reflecting concern that the rapid increase in the commission of serious, violent crimes by younger and younger offenders must be dealt with more stringently than was previously being done in the juvenile system.

Based on these factors and those already enumerated, the court held that section 7A-610 of the North Carolina Code, when taken in the context of the entire Code, did not violate Andre Green's due process rights.

Next, the majority determined whether the juvenile court judge correctly applied the transfer statute in Green. The court noted that the statute required the juvenile court judge to state her reasons for transfer, but that those reasons were within her sole discretion. The majority determined that the juvenile court judge’s decision satisfied both North Carolina’s statutory scheme and the Due Process Clause of the Fourteenth Amendment. Accordingly, the court rejected Green’s due pro-

169. See Green, 502 S.E.2d at 825; see also N.C. GEN. STAT. §§ 7A-646 to 7A-661 (1995).
170. See Green, 502 S.E.2d at 825.
171. See id. at 826 (considering that the legislature recently amended section 7A-608 of the North Carolina Code to reduce the minimum age of transfer from 14 years old to 13 years old).
172. Id.; see also id. at 829 (recognizing the prevailing view of society to lower the minimum age of transfer); UNIFORM CRIME REPORTS 1995, supra note 15, at 207, 218 (documenting the rapid increase in juvenile crime).
173. See Green, 502 S.E.2d at 826. Green urged the court to adopt the Kent factors as controlling. See id. The court rejected this argument because the Supreme Court in Kent did not make the factors constitutionally required. See id. at 827. Furthermore, the Green court held that the juvenile court judges already essentially used the Kent factors, and to mandate their use might unwittingly limit future judges from expanding the factors used in the determination. See id. But see N.C. GEN. STAT. § 7B-2203 (1999) (adopting some of the Kent factors for the juvenile court judge to consider at the transfer hearing).
174. See Green, 502 S.E.2d at 827.
175. See id.; see also supra note 139 (quoting the juvenile court judge's considerations in ordering the transfer).
176. See Green, 502 S.E.2d at 827.
cess assignment of error. 177

2. Rejecting the Eighth Amendment Argument

After holding Green's transfer to adult criminal court valid under the laws of North Carolina and the United States, the court turned its attention to whether the imposition of a mandatory life sentence for first-degree sexual offense was cruel and/or unusual punishment.178 The court dismissed any distinction between cruel and/or unusual punishment, holding that North Carolina courts traditionally treat both article I, section 27 of the North Carolina Constitution and the Eighth Amendment to the United States Constitution the same. 179 Having determined that the decision in the Green case was consistent with both the federal law and laws of North Carolina, the court turned to examining Green's assignments of error.180

First the majority examined whether Green's sentence was contrary to societal standards by relying on the Supreme Court's holding in Trop v. Dulles.181 In Trop, the Court stated that the Eighth Amendment draws its application from the "evolving standards of decency that mark the progress of a maturing society."182 The Green majority recognized that the judiciary is not a representative body; therefore, it should show deference to the legislature's determination of appropriate sentences by presuming their validity.183 The majority then applied this "decency"


177. See id.
178. See id. at 827-28.
179. See id. at 828. See generally State v. Bronson, 423 S.E.2d 772 (N.C. 1992); State v. Peek, 328 S.E.2d 249 (N.C. 1985); State v. Higginbottom, 324 S.E.2d 834 (N.C. 1985); State v. Fulcher, 243 S.E.2d 338 (N.C. 1978); State v. Rogers, 168 S.E.2d 345 (N.C. 1969). Likewise, the U.S. Supreme Court held in Trop v. Dulles, 356 U.S. 86, 100 n.32 (1958) that there has never been a distinction drawn between those punishments that are cruel and those that are unusual; instead, punishment is examined in terms of whether it violates human standards of decency.
180. See Green, 502 S.E.2d at 827-28.
183. See KAPLIN, supra note 95, at 54-55 (explaining that courts should show a great deal of deference to legislatures because of the counter-majoritarian difficulty); see also Gregg v. Georgia, 428 U.S. 153, 175 (1976). The Gregg Court reasoned that in assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity. We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. And a heavy burden rests on those who would attack the judgment of the representatives of the people. . . .

. . . [H]in a democratic society legislatures, not courts, are constituted to respond to
standard, finding that the actions of North Carolina's legislature illustrated the appropriateness of Green's sentence. Furthermore, the majority noted that North Carolina's appellate court had on numerous occasions ruled that a mandatory life sentence was not cruel and unusual punishment.

Next, the majority examined the proportionality of Green's sentence using the "grossly disproportionate" standard created in Justice Kennedy's concurring opinion in *Harmelin.* Green's principal proportionality argument urged that because of his age, a mandatory life sentence was disproportionate to his crime. The majority rejected this argument, holding that the nature of the crime transcended the realm of those usually committed by children. Moreover, the majority felt that Green was unamenable to treatment and that an adult sentence was the only appropriate remedy for both the victim and the state. Finally, the majority considered whether Green's punishment was cruel and unusual because he would be the only thirteen-year old in the state's history to receive a mandatory life sentence for a first-degree sexual offense. The majority was not impressed by the fact that the legislature abolished the statute imposing a mandatory life sentence for a first-degree sexual offense approximately two months after Green committed the crime. Even though there were only five months where a thirteen-year-old...
could have been subject to the same sentence as Green, the majority held that the sentence did not constitute cruel and unusual punishment. In affirming the decision of the lower court, the majority simply enforced what the law of the state allowed, and continued a growing trend toward treating both juvenile and adult criminals equally.

B. Justice Frye's Opinion: Satisfactory Transfer Procedures, but an Anomalous Result

Justice Frye concurred with respect to the validity of the transfer statutes, but dissented on the issue of whether Green's sentence was cruel and unusual punishment. Justice Frye recognized that almost two-thirds of jurisdictions in the United States do not allow a life sentence for sexual offenses. In searching beyond whether the sentence was per se unconstitutional, Justice Frye urged that the legislature could have neither foreseen, nor intended to create, a five-month window during which a thirteen-year old could receive a life sentence for a first-degree sexual offense. In addition, Justice Frye argued that this window was sufficiently "unusual" to be in violation of article I, section 27 of the North Carolina Constitution. He further expressed concern regarding the trial judge's inability to exercise any discretion in sentencing Green because the sentence was mandatory. Lastly, although Justice Frye's opinion endorsed the transfer statute, he chose not to join the majority because he felt that because the legislature abolished the mandatory sentencing scheme for a first-degree sexual offense, Green's sentence must have been "inconsistent

192. See id.
193. See id. at 833-34; see also supra note 19 and accompanying text (illustrating the growing trend of treating juveniles as adults).
194. See Green, 502 S.E.2d at 834 (Frye, J., concurring in part and dissenting in part).
195. See id. at 834 (Frye, J., concurring in part and dissenting in part).
196. See id. (Frye, J., concurring in part and dissenting in part) (noting that the decision to reduce the minimum age of transfer and the decision to repeal the mandatory sentencing scheme occurred at the same General Assembly session, yet both had different dates of enactment thereby creating the five-month window).
197. See id. (Frye, J., concurring in part and dissenting in part) (observing that although sentencing guidelines are a legislative matter and courts should show deference, the court has a duty to determine if the legislature acted with full knowledge and understanding of the consequences of their enactment's); see also California v. Ramos, 463 U.S. 992, 1013-14 (1983).
198. See Green, 502 S.E.2d at 835 (Frye, J., concurring in part and dissenting in part). "The judge could not consider or weigh any mitigating factors in determining whether a sentence less than life imprisonment was the appropriate penalty." Id.
with [the] State’s own evolving standards of decency . . . ."\footnote{199}

III. THE VALIDITY OF NORTH CAROLINA'S TRANSFER STATUTE AND ALTERING CRUEL OR UNUSUAL JURISPRUDENCE IN NORTH CAROLINA

Although the majority in \textit{Green} correctly upheld the constitutional validity of North Carolina's transfer statute, the court should have invalidated Green's sentence because of its unusual nature.\footnote{200} The majority declined to make a distinction between the words "cruel and unusual" found in the Eighth Amendment of the United States Constitution and the words "cruel or unusual" found in article I, section 27, of the North Carolina Constitution.\footnote{201} Thus, the \textit{Green} court ignored language expressly designed by the North Carolina legislature to provide greater constitutional protections to its citizens.\footnote{202}

\textbf{A. North Carolina's Transfer Statute Comports with the Due Process Clause}

The \textit{Green} court correctly held that the system of transfer in North Carolina is constitutionally permissible and not in violation of the Due Process Clause.\footnote{203} By first analyzing the two-prong framework created in \textit{Grayned} and then recognizing that the \textit{Kent} factors were not controlling, the majority declared the transfer statute valid.\footnote{204}

In analyzing the first prong of \textit{Grayned}, the majority correctly determined that a person of ordinary intelligence would have recognized the possibility that a juvenile court could transfer a youthful offender to

\begin{footnotes}
\item[199] \textit{Id.} (Frye, J., concurring in part and dissenting in part) (emphasis added) (stating that North Carolina’s action of replacing the mandatory life sentence with the Structured Sentencing Act speaks to the societal standards of decency and illustrates that Green’s sentence was improper).
\item[200] \textit{See id.} at 834-35 (Frye, J., concurring in part and dissenting in part) (concurring with the majority concerning the due process protections accorded to juveniles who are subject to transfer, but dissenting as to the sentence because he felt it was cruel or unusual punishment under North Carolina law).
\item[201] \textit{See id.} at 828 (stating that North Carolina courts have always treated the Eighth Amendment and article I, section 27 of the North Carolina Constitution as standing for the same principles).
\item[202] \textit{See id.} at 835 (Frye, J., concurring in part and dissenting in part) (recognizing that the North Carolina Constitution has, since 1868, prohibited cruel or unusual punishments, and stating that it is clear that Green’s sentence was unusual within the meaning of article I, section 27 of the North Carolina Constitution); \textit{see also Ramos}, 463 U.S. at 1014 (holding that states may provide greater constitutional protections than the minimal federal standard found in the United States Constitution).
\item[203] \textit{See Green}, 502 S.E.2d. at 823-27 (holding that sections 7A-608 to 7A-610 of the North Carolina Code were not unconstitutionally vague).
\item[204] \textit{See id.} at 823-24, 826-27.
\end{footnotes}
adult criminal court. The majority supports its position by pointing out that the internal cross-references within the statutes, as well as the title of the chapter in which they are found, clearly satisfy the first prong of the vagueness standard.\textsuperscript{206}

With regard to the second prong, which inquires into the guidance a statute provides those who implement it, the court also properly did not look at section 7A-610 of the North Carolina Code myopically, as Green urged.\textsuperscript{207} Instead, the court chose to analyze that statute along with North Carolina's Criminal Procedure Act and both Chapters 14 (Criminal Law) and 15A of the \textit{General Statutes}, in an effort to illustrate that the juvenile court judge has sufficient avenues to guide her decision to transfer a youth to adult criminal court.\textsuperscript{208} The court rightly concluded that the statute is not vague because a judge makes a decision to transfer only after she considers a number of factors, including the needs of the juvenile and the interests of the state.\textsuperscript{209}

Lastly, the court appropriately rejected Green's argument that the transfer statute was invalid because it did not mandate consideration of the \textit{Kent} factors.\textsuperscript{210} To justify this view, the majority pointed out that the \textit{Kent} Court did not make the factors a constitutional requirement.\textsuperscript{211} Furthermore, the \textit{Green} court recognized that mandating the factors would be unnecessary because juvenile court judges already considered most of the factors when making a transfer decision.\textsuperscript{212}

\textsuperscript{205} See id. at 825 (noting that sections 7A-608 to 7A-610 are found in Article 49 of the Juvenile Code which is entitled, "Transfer to Superior Court").

\textsuperscript{206} See id.; see also supra notes 59-64 and accompanying text (providing the text of sections 7A-608 and 7A-610 of the North Carolina Code).

\textsuperscript{207} See Green, 502 S.E.2d at 825-26.

\textsuperscript{208} See id. at 825. "Hence, when a juvenile court judge seeks to determine whether 'the needs of the juvenile or the best interest of the State will be served by transfer,' in accord with section 7A-610(a), he or she does so within the structure of the entire criminal justice system." \textit{Id}.

\textsuperscript{209} See id. at 826-27 (explaining that if the judge decides that a transfer is valid, she does so with full knowledge of her alternatives in both justice systems). In addition, some other factors she may consider are the seriousness of the crime, the juvenile's chance of rehabilitation, family life, and the ideals of society concerning the disposition of juvenile offenders. \textit{See id}.

\textsuperscript{210} See id. at 827; see also \textit{Kent v. United States}, 383 U.S. 541, 566-67 (1966) (listing the applicable factors).


\textsuperscript{212} See \textit{Green}, 502 S.E.2d at 827. \textit{Compare id} (enumerating the factors the juvenile court judge in \textit{Green} considered), \textit{with} \textit{Kent}, 383 U.S. at 566-67 (listing the factors).
B. Altering Cruel or Unusual Jurisprudence in North Carolina

Although the Green court correctly upheld North Carolina's system of transfer, the court erred when it failed to recognize that Andre Green's sentence was cruel or unusual punishment.213 The court recognized that a state sovereign may alter the constitutional rights of its citizens, but only if the alteration provides more rather than less protection.214 The North Carolina Constitution exemplifies this principle, as it creates a more broad protection against excessive punishment by including the disjunctive “or” in article I, section 27, as opposed to the conjunctive “and” found in the Federal Constitution's Eighth Amendment.215

When the court addressed Green's “unusual” punishment argument with respect to article I, section 27, though, it determined that stare decisis principles forbade it from treating the United States Constitution and the North Carolina Constitution differently.216 This determination was unfounded, however, because an analysis of the cases cited by the majority reveals that none of them directly discuss the dichotomy between the two constitutions.217 In fact, only State v. Fulcher218 mentions the words “cruel or unusual punishment” found in article I, section 27, of the

213. See Green, 502 S.E.2d at 834-35 (Frye, J., concurring in part and dissenting in part).

214. See id. at 828 (providing the distinction between article I, section 27 of the North Carolina Constitution and the Eighth Amendment to the U.S. Constitution); Amicus Curiae Brief of the American Civil Liberties Union of North Carolina Legal Foundation in Support of Appellant at 22, State v. Green, 502 S.E.2d 819 (N.C. 1998) (No. 519A96) (noting the origins of article I, section 27, of the North Carolina Constitution and stating that legislative history “highlight the fact that North Carolina's prohibition against certain punishments is broader than its federal counterpart”); see also California v. Ramos, 463 U.S. 992, 1013-14 (1983).

215. See supra note 26 and accompanying text (comparing the differences between the punishment provisions in the Federal and North Carolina Constitutions); see also Amicus Curiae Brief of the American Civil Liberties Union of North Carolina Legal Foundation in Support of Appellant at 21, State v. Green, 502 S.E.2d 819 (N.C. 1998) (No. 519A96) (noting that the use of the word “or” represents a “significant departure” by North Carolina from the Eighth Amendment of the Federal Constitution).

216. See Green, 502 S.E.2d at 828 (citing State v. Bronson, 423 S.E.2d 772, 780 (N.C. 1992); State v. Rogers, 374 S.E.2d 852, 858 (N.C. 1989); State v. Peek, 328 S.E.2d 249, 256 (N.C. 1985); State v. Higginbottom, 324 S.E.2d 834, 837 (N.C. 1985); and State v. Fulcher, 243 S.E.2d 338, 352 (N.C. 1978) as the line of cases supporting the majority's contention that the court has historically treated cruel and/or unusual punishment claims the same under both the Federal and North Carolina Constitutions).


Moreover, the majority cites *Trop v. Dulles* for the proposition that the United States Supreme Court does not recognize a difference between the words “cruel” and “unusual.” Specifically, the *Trop* Court held that, “whether the word ‘unusual’ has any qualitative meaning different from [the word] ‘cruel’ is not clear. On the few occasions this Court has had to consider the meaning of the phrase, precise distinctions between cruelty and unusualness do not seem to have been drawn.” The *Green* majority misapplied this holding because first, *Trop* was referring to the language found in the Eighth Amendment of the United States Constitution and not the more broad article I, section 27 language, and second, the *Trop* court did not take a definitive stance on the issue. Instead, the *Trop* majority explained that few precedents existed on the issue, but those that did exist appeared not to create a distinction between the words “cruel” and “unusual.” It is apparent, therefore, that the *Green* court should have recognized the difference in the words of the two constitutions, and, moreover, should have determined whether or not Andre Green’s punishment was cruel or unusual. If the majority conducted this analysis, it would have been clear that Andre Green’s punishment was “unusual,” and therefore unconstitutional. When the General Assembly lowered the minimum age of transfer and abolished the mandatory life sentence for a first-degree sexual offense, it created an idiosyncratic five-month window into which only Andre Green fell.

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219. See id. at 352 (emphasis added).
221. *Trop*, 356 U.S. at 100 n.32.
222. See, e.g., *California v. Ramos*, 463 U.S. 992, 1013-14 (1983) (holding that the states may create broader provisions in their respective criminal justice systems than the Federal Constitution provides); *Trop*, 356 U.S. at 100 n.32.
223. See *Trop*, 356 U.S. at 99-101 & n.32.
224. See *Green*, 502 S.E.2d at 834-35 (Frye, J., concurring in part and dissenting in part).
225. See id. (Frye, J., concurring in part and dissenting in part).
226. See supra note 34 and its accompanying text (explaining the background of the two pieces of legislation); see also *Green*, 502 S.E.2d at 834 (Frye, J., concurring in part and dissenting in part) (noting that there are 31 jurisdictions that do not permit a life sentence for sexual offense, and only two other states, Arizona and Iowa, provide mandatory life sentences for sexual offenses). Moreover, Arizona is the only state that creates the possibility that a 13-year old juvenile could be subjected to the mandatory life sentence for first-degree sexual offense. See id. Compare *COLO. REV. STAT.* § 18-1-105(V)(A) (1998) (first-degree sexual offense is a Class 2 felony, pursuant to *COLO. REV. STAT. ANN.* § 18-3-402 (1998), and carries a minimum sentence of 8 years in prison and maximum of 24 years in prison), and *GA. CODE ANN.* § 16-6-1 (1999) (anyone who commits rape is subject to a death sentence, life imprisonment, or imprisonment between 10 and 20 years), and
Justice Frye's partial dissent is constitutionally correct in urging that the sentence be set aside because of the "unusual" circumstances involving the creation of the five-month window.

IV. CONCLUSION

In relying on the void for vagueness doctrine, the Green majority appropriately recognized the constitutional validity of North Carolina's transfer statute. The majority recognized the recent public outcry concerning juvenile crime and affirmed the judgment of the legislature by upholding the validity of the statute. By disregarding the language of North Carolina's equivalent of the Eighth Amendment, however, the Green majority ignored the will of the people as expressed by the North Carolina General Assembly. The majority refused to apply the law as the legislature wrote it, and Andre Green was an unfortunate victim of the misgivings of the North Carolina Supreme Court. The majority failed to recognize that the United States Constitution creates the minimal standard of protection a state must provide its citizens, and that a state is free to create broader provisions in its constitution. By overlooking the language of North Carolina's equivalent of the Eighth Amendment, the Green court effectively rendered the legislature's broader provision meaningless.

ME. REV. STAT. ANN. tit. 17-A, §§ 253, 1252 (West Supp. 1998) (classifying gross sexual conduct as a Class A felony subject to a prison term not to exceed 40 years), and MISS. CODE ANN. § 97-3-71 (1999): Every person who shall be convicted of an assault with intent to forcibly ravish any female of previous chaste character shall be punished by imprisonment in the penitentiary for life, or for such shorter time as may be fixed by the jury, or by the court upon the entry of a plea of guilty,

and N.C. GEN. STAT. § 15A-1340.17 (1997) (under the structured sentencing system, the maximum sentence Green would have received could have been 20 years of imprisonment for the crime of first degree sexual offense, while the minimum sentence he could have received would have been 12 years in prison), with VT. STAT. ANN. tit. 13, § 3253(b) (Supp. 1998) (stating that a person who commits aggravated sexual assault faces a maximum sentence of life imprisonment).