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## CRIMINAL LAW/CONSTITUTIONAL LAW—ARTICLE 26 OF THE MASSACHUSETTS DECLARATION OF RIGHTS: THE SUPREME JUDICIAL COURT’S “CRUEL” AND “UNUSUAL” NEGLECT OF ITS LONGEVITY COMPONENT

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**CRIMINAL LAW/CONSTITUTIONAL LAW—  
ARTICLE 26 OF THE MASSACHUSETTS DECLARATION OF  
RIGHTS: THE SUPREME JUDICIAL COURT’S “CRUEL” AND  
“UNUSUAL” NEGLIGENCE OF ITS LONGEVITY COMPONENT***Thomas H. Townsend\**

*Article 26 of the Massachusetts Declaration of Rights, which prohibits “cruel or unusual punishments,” is arguably broader in scope than its federal counterpart, the Eighth Amendment to the United States Constitution. In addressing constitutional challenges to the length of incarceration sentences, the Massachusetts Supreme Judicial Court utilizes essentially the same test under Article 26 as the United States Supreme Court does under the Eighth Amendment. Among other considerations, the tests compare the subject sentence of a crime to the potential sentences for more serious crimes within the same jurisdiction, as well as to the prescribed sentences for the same crime in other states. This is an unduly restrictive analysis, however. A comparison of merely theoretical sentences under analogous statutes sheds no light on whether an imposed sentence is, in reality, excessively long. Instead, Massachusetts appellate courts should compare the subject sentence to sentences actually imposed for comparable crimes both within and outside of the jurisdiction. Only then can a court accurately gauge whether a particular sentence of incarceration is actually “unusual.” The limitations of the current approach can be appreciated by considering a hypothetical case involving statutory rape, which is a potential life felony in Massachusetts.*

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## INTRODUCTION

When Justice William Brennan challenged state supreme courts to interpret their state constitutions to be more protective of individual rights than the United States Supreme Court had the federal Constitution,<sup>1</sup> few courts accepted the challenge with as much alacrity and gusto as the Massachusetts Supreme Judicial Court (SJC). In the forty years since then, the SJC has consistently and resoundingly rejected restrictive Supreme Court precedent in favor of a broader approach to individual rights and liberties under the Massachusetts Declaration of Rights.<sup>2</sup> The

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1. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

[S]tate courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed.

*Id.*

2. See *Commonwealth v. Augustine*, 4 N.E.3d 846, 857–66 (Mass. 2014) (rejecting application of *United States v. Miller*, 425 U.S. 435, 442–43 (1976) and *Smith v. Maryland*, 442 U.S. 735, 744 (1979) to cellular service location information (CSLI) and requiring a separate search warrant under Article 14 for such data); *Commonwealth v. Balicki*, 762 N.E.2d 290, 297–98 (Mass. 2002) (rejecting *Horton v. California*, 496 U.S. 128, 138 (1990) and clarifying that Article 14 retains an “inadvertence requirement” for plain-view discoveries); *Commonwealth v. Mavredakis*, 725 N.E.2d 169, 177–79 (Mass. 2000) (rejecting *Moran v. Burbine*, 475 U.S. 412, 433 (1986) and holding that Article 12 requires police to inform a suspect undergoing interrogation of his attorney’s efforts to contact him); *Commonwealth v. Gonsalves*, 711 N.E.2d 108, 111–12 (Mass. 1999) (rejecting *Pennsylvania v. Mimms*, 434 U.S. 106, 120–21 (1977) and concluding that Article 14 prevents an exit order of stopped motorist without suspicion); *Commonwealth v. Amirault*, 677 N.E.2d 652, 660, 676 (Mass. 1997) (rejecting *Maryland v. Craig*, 497 U.S. 836, 845–46 (1990) and holding that Article 12 encompasses a defendant’s right to confront witnesses “face to face”); *Commonwealth v. Stoute*, 665 N.E.2d 93, 94–95, 97 (Mass. 1996) (rejecting *California v. Hodari D.*, 499 U.S. 621, 627–29 (1991) and holding that a pursuit intended to stop and detain an individual is the functional equivalent of a seizure under Article 14 and therefore must be effectuated only when there is a reasonable suspicion of criminal conduct); *Commonwealth v. Lydon*, 597 N.E.2d 36, 39–40 (Mass. 1992) (rejecting *South Dakota v. Neville*, 459 U.S. 553, 561–62 (1983) and holding that Article 12 prevents the admission of a defendant’s refusal to take a breathalyzer test); *Guiney v. Police Comm’r*, 582 N.E.2d 523, 526 (Mass. 1991) (rejecting *Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 674–75 (1989) and holding that Article 14 prohibits random urine testing of police officers in the absence of concrete, substantial governmental interest); *Commonwealth v. Amendola*, 550 N.E.2d 121, 125–26 (Mass. 1990) (rejecting *United States v. Salvucci*, 448 U.S. 83, 90–92 (1980) and adopting the “automatic standing” rule under Article 14, thereby permitting defendants to seek to suppress evidence where possession is an element of the charged offense); *Commonwealth v. Doe*, 544 N.E.2d 860, 862–63 (Mass. 1989) (rejecting *Braswell v. United States*, 487 U.S. 99, 108–09 (1988) and holding that Article 12 permits the withholding of subpoenaed evidence if the act of production would be incriminating); *Commonwealth v. Upton*, 476 N.E.2d 548, 556–57 (Mass. 1985) (rejecting

justifications for the more expansive interpretation of the state constitution can be stated succinctly: the Massachusetts Declaration of Rights is both older and broader. As former Chief Justice Herbert P. Wilkins noted,

Our Constitution is older than the Federal Constitution. Much of the Federal Bill of Rights is derived from concepts appearing in our Declaration of Rights. We need not move lock-step with Washington on every point. I think of the Supreme Court as describing a common base from which we can go up. We often agree with them. We are not trying to be contrary. We are, however, entitled to our own views, indeed constitutionally required to have them.<sup>3</sup>

But noticeably absent from these declarations of independence was an enhanced role for Article 26 of the Massachusetts Declaration of Rights, which prohibits the infliction of “cruel or unusual” punishments.<sup>4</sup> Although the SJC relied on Article 26 to banish a *form* of punishment permitted under the federal Constitution (the death penalty),<sup>5</sup> the justices have not parted with their federal brethren when it comes to challenges to the *length* of sentences of incarceration—which is surprising. After all, the SJC was an early proponent for extending the cruel-or-unusual prohibition—traditionally understood to curtail barbarous types of

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Illinois v. Gates, 462 U.S. 213, 238–39 (1983) and holding that Article 14 requires that probable cause undergird both an unnamed informant’s basis of knowledge and reliability); Freeman v. Wood, 401 N.E.2d 108, 112–13 (Mass. 1980) (rejecting Dimick v. Schiedt, 293 U.S. 474, 486 (1935) and upholding the availability of additur under Article 15).

3. Herbert P. Wilkins, *Remarks of Chief Justice Herbert P. Wilkins to Students at New England School of Law on March 27, 1997*, 31 NEW ENG. L. REV. 1205, 1213 (1997). Other justices, both of the SJC and the Massachusetts Appeals Court, have echoed these sentiments. See Robert J. Cordy, *Criminal Procedure and the Massachusetts Constitution*, 45 NEW ENG. L. REV. 815, 833 (2011) (“Where the U.S. Constitution sets a floor below which no state can go, the expectations with respect to liberty and privacy of those who authored the Massachusetts Constitution and of the community that constitution governs today require more.”); Joseph A. Grasso, Jr., “John Adams Made Me Do It”: *Judicial Federalism, Judicial Chauvinism, and Article 14 of Massachusetts’ Declaration of Rights*, 77 MISS. L.J. 315, 340 (2007) (citation omitted) (“[T]he SJC has often recognized its authority and duty to interpret and enforce cognate provisions of the Massachusetts Constitution that afford greater protections than its federal counterpart.”); Roderick L. Ireland, *How We Do It in Massachusetts: An Overview of How the Massachusetts Supreme Judicial Court Has Interpreted Its State Constitution to Address Contemporary Legal Issues*, 38 VAL. U. L. REV. 405, 407 (2004) (quoting Charles G. Douglas, *State Judicial Activism—The New Role for State Bills of Rights*, 12 SUFFOLK U. L. REV. 1123, 1145 (1978)) (“Because the Massachusetts Declaration of Rights is a sovereign document, the SJC has an ‘obligation to make an independent determination’ of [its provisions] . . .”).

4. MASS. CONST. art. 26.

5. See *Op. of the Justices*, 364 N.E.2d 184, 186–89 (Mass. 1977); *Dist. Att’y v. Watson*, 411 N.E.2d 1274, 1281–87 (Mass. 1980).

punishment<sup>6</sup>—into the realm of sentence duration.<sup>7</sup> In fact, the United States Supreme Court relied on a precedent from the SJC when it extended the Eighth Amendment’s protection to sentence longevity.<sup>8</sup> Nonetheless, to this day, the SJC adheres to the Supreme Court’s approach in substance and form when reviewing such challenges.<sup>9</sup>

It is an unduly fettered analysis, however. Both courts employ tests that compare the subject sentence to those allowed for more serious crimes within the jurisdiction and to prescribed penalties for comparable crimes in other jurisdictions.<sup>10</sup> But these considerations are at odds with Article 26’s language and scope. Unlike the Eighth Amendment, Article 26 is explicitly aimed at judges: “No . . . court of law shall . . . inflict cruel or unusual punishments.”<sup>11</sup> So it makes little sense to consider the potential penalties available for other crimes; those theoretical sentences may never be imposed in practice. Rather, Article 26 demands a comparison between the sentence at issue and other sentences inflicted.<sup>12</sup> Only then can it be determined if a subject sentence is actually “unusual.” To demonstrate the shortsightedness of the current, theoretical approach, and to commend a more reality-based analysis, a hypothetical case involving a sentence for statutory rape is considered.

#### I. ARTICLE 26 AND THE EIGHTH AMENDMENT: SIMILARITIES AND DIFFERENCES

The Massachusetts Declaration of Rights is “one of the great, enduring documents of the American Revolution.”<sup>13</sup> It is, in fact, “the oldest functioning written constitution in the world.”<sup>14</sup> Authored by John Adams, “[t]he Massachusetts Constitution is unique in that it not only predates the Federal Constitution, but was also used as a model for it.”<sup>15</sup>

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6. See *In re Kemmler*, 136 U.S. 436, 446–47 (1890). But see *O’Neil v. Vermont*, 144 U.S. 323, 339–40 (1892) (Field, J., dissenting) (arguing that the Eighth Amendment “is directed . . . against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged”).

7. See *McDonald v. Commonwealth*, 53 N.E. 874, 875 (Mass. 1899), *aff’d*, 180 U.S. 311 (1901).

8. See *Weems v. United States*, 217 U.S. 349, 368 (1910) (quoting *McDonald*, 53 N.E. at 875).

9. See, e.g., *Commonwealth v. Perez*, 80 N.E.3d 967, 974–75 (Mass. 2017).

10. See *Commonwealth v. Therriault*, 515 N.E.2d 1198, 1200 n.3 (Mass. 1987) (noting that federal and state tests are “virtually identical”).

11. MASS. CONST. art. 26; *Sturtevant v. Commonwealth*, 33 N.E. 648, 649 (Mass. 1893) (“This article is directed to courts, not to the legislature.”).

12. See MASS. CONST. art. 26.

13. DAVID MCCULLOUGH, *JOHN ADAMS* 225 (2001).

14. *Id.*

15. Ireland, *supra* note 3, at 407 (footnote omitted).

Both the Massachusetts and the U.S. constitutions enshrine a provision curtailing the infliction of certain “punishments.”<sup>16</sup> Article 26 reads: “No magistrate or court of law, shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments.”<sup>17</sup> The Eighth Amendment provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”<sup>18</sup> Although similarly worded, the provisions contain two differences. One difference is of negligible significance; however, the other is potentially important.

The more noticeable difference is that Article 26 bans “cruel *or* unusual punishments,” while Eighth Amendment prohibits “cruel *and* unusual punishments.”<sup>19</sup> The reason for this difference is unclear. The antecedent for both provisions is the English Declaration of Rights of 1689, which used the word “and.”<sup>20</sup> Nonetheless, Article 26 contains the disjunctive “or,” which mirrored state constitutional provisions already in use in Delaware, Maryland, and North Carolina.<sup>21</sup> Eleven years later, the drafters of the Eighth Amendment followed the provision from the Virginia Declaration of Rights, which itself was taken virtually verbatim from the English Declaration of Rights and contained the conjunctive “and.”<sup>22</sup> One influential SJC jurist posited “that art. 26 stands on its own footing,” due to the use of the word “or,” and argued “that a punishment may not be inflicted if it be either ‘cruel’ or ‘unusual.’”<sup>23</sup> But Chief Justice Oliver Wendell Holmes had years earlier scoffed at the notion that the word difference made a difference: “[T]he word ‘unusual’ must be construed with the word ‘cruel,’ and cannot be taken so broadly as to

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16. See MASS. CONST. art. 26.

17. *Id.*

18. U.S. CONST. amend. VIII.

19. Compare MASS. CONST. art. 26 (emphasis added) (banning punishment that is cruel or unusual), with U.S. CONST. amend. VIII (emphasis added) (banning punishment that is cruel and unusual).

20. See *Harmelin v. Michigan*, 501 U.S. 957, 966–67 (1991).

21. *Id.*

22. See *id.*

23. *Dist. Att’y for Suffolk Dist. v. Watson*, 411 N.E.2d 1274, 1289 (Mass. 1980) (Liacos, J., concurring).

prohibit every humane improvement not previously known in Massachusetts.”<sup>24</sup> The Court has adhered to this view ever since.<sup>25</sup>

The other difference concerns the infliction of the punishments. The Eighth Amendment states simply that cruel and unusual punishments shall not be inflicted.<sup>26</sup> Article 26, on the other hand, is explicit: “No magistrate or court of law, shall . . . inflict cruel or unusual punishments.”<sup>27</sup> “[A]rticle [26] is directed to courts, not to the legislature.”<sup>28</sup> The significance of this direction has yet to be appreciated.

## II. PARALLEL APPROACHES

Notwithstanding any language dissimilarities in their respective constitutions, both the Supreme Court and the SJC have “recognized that it is possible that imprisonment for a long term of years might be so disproportionate to the offense as to constitute cruel and unusual punishment.”<sup>29</sup> Nonetheless, “[o]utside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare.”<sup>30</sup> In fact, aside from cases involving life sentences without the possibility of parole,<sup>31</sup> the Supreme Court has never

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24. *In re Storti*, 60 N.E. 210, 211 (Mass. 1901); *accord Watson*, 411 N.E.2d at 1299 (Quirico, J., dissenting) (labeling the dissimilarity a “slight difference”); *Commonwealth v. O’Neal*, 339 N.E.2d 676, 704 (Mass. 1975).

In the absence of historical evidence suggesting that the framers meant to proscribe every new form of punishment, regardless of its nature, or every form of punishment which might be characterized as “cruel” without regard to its ordinariness, I believe Chief Justice Holmes’s reading of the two adjectives together is the only sensible construction of the phrase.

*Id.* (Reardon, J., dissenting).

25. *See Commonwealth v. McGonagle*, 88 N.E.3d 1128, 1131 n.2 (Mass. 2018) (citation omitted) (“We have never interpreted the phrase ‘inflict cruel or unusual punishments’ under art. 26 of the Massachusetts Declaration of Rights more broadly than the United States Supreme Court has interpreted the phrase ‘cruel and unusual punishments inflicted’ under the Eighth Amendment to the United States Constitution . . .”).

26. U.S. CONST. amend. VIII.

27. MASS. CONST. art. 26.

28. *Sturtevant v. Commonwealth*, 33 N.E. 648, 649 (Mass. 1893).

29. *Cepulonis v. Commonwealth*, 427 N.E.2d 17, 19 (Mass. 1981) (citing *McDonald v. Commonwealth*, 53 N.E. 874, 875 (Mass. 1899), *aff’d*, 180 U.S. 311 (1901)); *see Graham v. Florida*, 560 U.S. 48, 59 (2010).

30. *Rummel v. Estelle*, 445 U.S. 263, 272 (1980); *see United States v. Polk*, 546 F.3d 74, 76 (1st Cir. 2008) (using the idiom “hen’s-teeth rare” to describe the frequency of successful challenges).

31. *See Miller v. Alabama*, 567 U.S. 460, 479 (2012) (“[T]he Eighth Amendment forbids a sentencing scheme that mandates life in prison without [the] possibility of parole for juvenile offenders[. including those convicted of murder.]”); *Graham*, 560 U.S. at 74–75 (invalidating a life sentence without parole for a juvenile convicted of a non-homicide crime); *Solem v. Helm*,

found a sentence imposed in a criminal case violative of the Eighth Amendment simply due to its length.<sup>32</sup> As for Massachusetts, with the exception of a recent line of cases involving juvenile offenders,<sup>33</sup> neither the SJC nor the Massachusetts Appeals Court has ever held a sentence to be constitutionally excessive—either under the Eighth Amendment or Article 26 of the Massachusetts Declaration of Rights.<sup>34</sup> Due to this dearth

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463 U.S. 277, 299, 303 (1983) (finding unconstitutional a life sentence without parole for passing a worthless check, after the defendant's seventh nonviolent felony).

32. See *Lockyer v. Andrade*, 538 U.S. 63, 64, 70–77 (2003) (upholding sentence of two consecutive twenty-five-years-to-life terms under recidivist statute for stealing videotapes in a habeas corpus proceeding); *Ewing v. California*, 538 U.S. 11, 28–31 (2003) (upholding a twenty-five-years-to-life sentence for theft of golf clubs under a recidivist law); *Harmelin v. Michigan*, 501 U.S. 957, 961, 994–96 (1991) (upholding a sentence of life without parole for possession of 650 grams of cocaine); *Hutto v. Davis*, 454 U.S. 370, 371, 373–74 (1982) (per curiam) (upholding forty years for a conviction of marijuana distribution and possession with intent to distribute); *Rummel*, 445 U.S. at 265–66, 285 (affirming life without parole for obtaining money by false pretenses; third nonviolent felony); *Badders v. United States*, 240 U.S. 391, 393–94 (1916) (upholding concurrent five-year sentences for mailing letters in execution of scheme); *Graham v. West Virginia*, 224 U.S. 616, 631 (1912) (finding life sentence under three-strikes law did not constitute cruel and unusual punishment).

33. See *Commonwealth v. Lutskov*, 106 N.E.3d 632, 636 (Mass. 2018) (holding that mandatory twenty-year minimum sentence for juvenile offender's armed home invasion "violates the proportionality requirement inherent in art. 26"); *Commonwealth v. Perez*, 106 N.E.3d 620, 624 (Mass. 2018) (concluding that juvenile's sentence for nonhomicide offense with parole eligibility after twenty-seven and one-half years was excessively long in the absence of "extraordinary circumstances"); *Commonwealth v. Perez*, 80 N.E.3d 967, 970 (Mass. 2017) ("[W]here a juvenile is sentenced for a nonmurder offense or offenses and the aggregate time to be served prior to parole eligibility exceeds that applicable to a juvenile convicted of murder, the sentence cannot be reconciled with art. 26 [absent an individualized hearing]."); *Diatchenko v. Dist. Att'y*, 1 N.E.3d 270, 284–85 (Mass. 2013) (alteration in original) ("[T]he discretionary imposition of a sentence of life in prison without the possibility of parole on juveniles who are under the age of eighteen when they commit murder in the first degree violates the prohibition against 'cruel or unusual punishment[]' in art. 26.").

34. See *Commonwealth v. Alvarez*, 596 N.E.2d 325, 330–32 (Mass. 1992) (upholding two-year mandatory enhancement for school-zone violations); *Commonwealth v. Grimshaw*, 590 N.E.2d 681, 686 (Mass. 1992) (fifteen to twenty years for manslaughter); *Commonwealth v. Tart*, 557 N.E.2d 1123, 1135 (Mass. 1990) (thirty days—twenty-three suspended—for fishing without a permit); *Commonwealth v. Sanchez*, 540 N.E.2d 1316, 1323–24 (Mass. 1989) (consecutive life sentences for forcible rape of a child); *Commonwealth v. Therriault*, 515 N.E.2d 1198, 1200–01 (Mass. 1987) (upholding one-year minimum mandatory for homicide by motor vehicle while intoxicated); *Commonwealth v. Tuitt*, 473 N.E.2d 1103, 1105, 1112 (Mass. 1985) (affirming life sentence for armed robbery while masked, where defendant was a habitual offender); *Commonwealth v. Bianco*, 454 N.E.2d 901, 905–06 (Mass. 1983) (eighteen months for assault and battery); *Cepulonis*, 427 N.E.2d at 19–21 (forty to fifty years for possession of a machine gun); *Op. of the Justices to the House of Representatives*, 393 N.E.2d 313, 318–20 (Mass. 1979) (involving mandatory twenty-five-year sentence for dealing narcotics with street value of \$25,000); *Commonwealth v. Nolin*, 364 N.E.2d 1224, 1228–29 (Mass. 1977) (life sentence for second-degree murder); *Commonwealth v. Jackson*, 344 N.E.2d 166, 170–74 (Mass. 1976) (one-year minimum mandatory for carrying a firearm); *Commonwealth v. Morrow*, 296 N.E.2d 468, 472, 476–77 (Mass. 1973) (involving sixteen-year-old defendant;

of actual examples of disproportionality, the Supreme Court repeatedly resorts to its life-sentence-for-a-parking-ticket hypothetical to animate the principle.<sup>35</sup>

“Although punishment may be cruel and unusual not only in manner but length, ‘a heavy burden is on the sentenced defendant to establish that the punishment is disproportionate to the offense for which he was convicted.’”<sup>36</sup> Reviewing courts recognize that “[i]n matters of punishment, of course, the Legislature has primacy, and its action carries a presumption of validity.”<sup>37</sup> Consequently, appellate judges “do not lightly second guess or upset the Legislature’s independent determinations concerning particular conduct it wishes to criminalize and the sanctions it wishes to prescribe for that conduct to vindicate the community’s legitimate interests in a secure, peaceable, and orderly society.”<sup>38</sup> “Only where the punishment is so disproportionate to the crime that it shocks the conscience and offends fundamental notions of human dignity may [a court] declare a criminal sanction to be in violation of the Eighth Amendment or art. 26.”<sup>39</sup>

“In order to mitigate the inherent subjectivity in the ‘shocks the conscience’ standard, a growing number of courts, [the SJC] among them, have attempted to develop a more objective framework for the evaluation

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several sentences up to forty years); *Commonwealth v. Harding*, 186 N.E. 556, 556–58 (Mass. 1933) (upholding five to eight years for receiving stolen papers worth six cents and bank book worth ten cents); *Sturtevant v. Commonwealth*, 33 N.E. 648, 649 (Mass. 1893) (affirming twenty-five years for larceny, where defendant was a habitual criminal); *Commonwealth v. Hitchings*, 71 Mass. (5 Gray) 482, 486 (1855) (twenty to thirty days for single sale of intoxicating liquor); *Commonwealth v. Medina*, 835 N.E.2d 300, 313–14 (Mass. App. Ct. 2005) (upholding two concurrent life sentences for rape of a child, to be followed by twenty- to thirty-year concurrent sentences for indecent assault and battery convictions); *Commonwealth v. Dunn*, 680 N.E.2d 1178, 1182–84 (Mass. App. Ct. 1997) (twenty-year minimum mandatory for home invasion); *Commonwealth v. Derry*, 522 N.E.2d 436, 437 n.2 (Mass. App. Ct. 1988) (seven to ten years for conspiracy to traffic in marijuana); *Commonwealth v. Silva*, 488 N.E.2d 34, 38–39 (Mass. App. Ct. 1986) (ten-year minimum mandatory for cocaine trafficking); *Commonwealth v. Hamm*, 471 N.E.2d 416, 419 n.1, 423 (Mass. App. Ct. 1984) (upholding concurrent life sentences for armed robbery and assault with intent to rape followed by twenty-six to forty years for other crimes); *Commonwealth v. Marcus*, 454 N.E.2d 1277, 1277–80 (Mass. App. Ct. 1983) (affirming five-year mandatory sentence for selling heroin, where defendant was a repeat offender).

35. See, e.g., *Ewing*, 538 U.S. at 21 (“[T]he proportionality principle ‘would . . . come into play in the extreme example . . . if a legislature made overtime parking a felony punishable by life imprisonment.’” (quoting *Rummel*, 445 U.S. at 274 n.11)).

36. *Jackson*, 344 N.E.2d at 170 (quoting *Commonwealth v. O’Neal*, 339 N.E.2d 676, 680 (Mass. 1975)).

37. *Marcus*, 454 N.E.2d at 1278 (citing *Weems v. United States*, 217 U.S. 349, 379 (1910)).

38. *Dunn*, 680 N.E.2d at 1182.

39. *Op. of the Justices*, 393 N.E.2d at 319 (citing *Jackson*, 344 N.E.2d at 170).

of the constitutionality of criminal sentences.”<sup>40</sup> Under Article 26, Massachusetts courts employ a tripartite test for disproportionality, which the SJC adopted from a decision of the California Supreme Court.<sup>41</sup> Using this test, the court considers:

- (1) the “nature of the offense and the offender in light of the degree of harm to society”; (2) “a comparison between the sentence imposed here and punishments prescribed for the commission of more serious crimes in the Commonwealth”; and (3) “a comparison of the challenged penalty with the penalties prescribed for the same offense in other jurisdictions.”<sup>42</sup>

The Supreme Court utilizes a comparable three-pronged test in the federal context.<sup>43</sup> The main difference is that, under the Eighth Amendment, a court will not engage in the intra- and inter-jurisdictional analyses unless the “threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality,” which is a “rare case.”<sup>44</sup>

### III. STATUTORY RAPE IN MASSACHUSETTS

Massachusetts has, without question, the most draconian statutory rape law in the country. It is a strict liability offense, carries a potential life sentence, and contains no exception based on the perpetrator’s age<sup>45</sup>:

Whoever unlawfully has sexual intercourse or unnatural sexual intercourse, and abuses a child under 16 years of age, shall be punished by imprisonment in the state prison for life or for any term of years or, except as otherwise provided, for any term in a jail or house of correction.<sup>46</sup>

40. *Id.*

41. *See Jackson*, 344 N.E.2d at 170–71 (citing *In re Lynch*, 503 P.2d 921, 930–32 (Cal. 1972)).

42. *Commonwealth v. Bianco*, 454 N.E.2d 901, 905–06 (Mass. 1983) (quoting *Cepulonis v. Commonwealth*, 427 N.E.2d 17, 20 (Mass. 1981)).

43. *See Graham v. Florida*, 560 U.S. 48, 60–61 (2010); *see also Commonwealth v. Therriault*, 515 N.E.2d 1198, 1200 n.3 (Mass. 1987) (comparing the federal test to the state test adopted in *Jackson*, 344 N.E.2d at 170–71).

44. *Ewing v. California*, 538 U.S. 11, 30 (2003) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1005 (1991) (Kennedy, J., concurring in part and concurring in judgment)).

45. In fact, “[w]hen two minors have consensual sexual relations, both of whom are members of the class the statute is designed to protect, each has committed a statutory rape.” *Commonwealth v. Wilbur W.*, 95 N.E.3d 259, 263 (Mass. 2018). Consequently, at least twenty percent of ninth and tenth graders in Massachusetts have committed life felonies. *See id.* at 274 (Gants, C.J., concurring) (“[C]onservatively estimated, prosecutors potentially have the ability to prosecute at least one in five ninth and tenth graders for rape and abuse of a child.”).

46. MASS. GEN. LAWS. ch. 265, § 23 (2018).

Because lack of consent is not an element of the crime, all that the prosecution needs to prove is “that the accused had sexual intercourse with a person who was less than sixteen years old at the time.”<sup>47</sup> And while other states have modernized their statutes in recent years by incorporating age-gap or “Romeo and Juliet” clauses for like-aged peers,<sup>48</sup> Massachusetts has gone in the opposite direction by instituting mandatory-minimum sentences based on certain age differentials.<sup>49</sup>

Nonetheless, both the SJC and the Massachusetts Appeals Court have rejected Article 26 and Eighth Amendment challenges to the law. In *Commonwealth v. Murphy*, the defendant contended that his conviction for having carnal knowledge of a girl under sixteen years of age constituted cruel or unusual punishment.<sup>50</sup> The SJC rejected the contention, concluding that “it is clear that the punishment prescribed is not cruel or unusual in kind,”<sup>51</sup> notwithstanding that the girl was almost sixteen years old.

[W]hatever we may think of the policy of a statute that treats a girl of 15 years and 11 months old, however mature she may be in body and mind, as if she were incapable of committing the crime of fornication, and subjects a boy of the same age, with whom she joins in sexual intercourse, to a possibility of the same punishment as if he were guilty of murder in the second degree, the legislature is ordinarily the judge of the expediency of creating new crimes, and of prescribing penalties, whether light or severe, for prohibited acts. We cannot say that the punishment prescribed for this offense, when the girl is nearly 16 years of age, and voluntarily participates in it, is beyond the constitutional power of the legislature to inflict.<sup>52</sup>

The court affirmed the *Murphy* holding three-quarters of a century later in *Commonwealth v. Moore*.<sup>53</sup> There, the defendant was a twenty-three-year-old pimp, who had intercourse with a runaway fourteen-year-

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47. *Wilbur W.*, 95 N.E.3d at 263.

48. See, e.g., IDAHO CODE § 18-6101 (2018); see also Danielle Flynn, *All the Kids Are Doing It: The Unconstitutionality of Enforcing Statutory Rape Laws Against Children and Teenagers*, 47 NEW ENG. L. REV. 681, 687–90 (2013) (discussing age-gap provisions that “either decriminalize sexual conduct between persons close in age or reduce the crime from a felony to a misdemeanor,” and Romeo and Juliet clauses that provide an affirmative defense if the requisite age qualifications are met).

49. MASS. GEN. LAWS ch. 265, § 23A (2018) (requiring a mandatory-minimum sentence of ten years depending on the age difference between the defendant and the victim).

50. *Commonwealth v. Murphy*, 42 N.E. 504, 504 (Mass. 1896).

51. *Id.*

52. *Id.*

53. *Commonwealth v. Moore*, 269 N.E.2d 636, 639–40 (Mass. 1971).

old girl.<sup>54</sup> The defendant challenged his conviction under the Eighth Amendment, which, by that time, had been judicially incorporated into the Fourteenth Amendment to apply to the states.<sup>55</sup> The court noted that it had already “considered this point in *Commonwealth v. Murphy* and upheld the statute.”<sup>56</sup> Although “[t]he possible penalties remain Draconian,” the court did “not deem them disproportionate to the offence shown in this case.”<sup>57</sup>

The defendants in both *Murphy* and *Moore* challenged the potential penalties contained in the law. The SJC has since clarified that, in weighing a cruel-and-unusual-punishment challenge, a reviewing court looks only to the sentence that a defendant actually received, not theoretical ones.<sup>58</sup> Such a challenge was brought in *Commonwealth v. Medina*, where a defendant received two concurrent life sentences for the statutory rapes of his stepdaughter, who was between ten and twelve years of age at the time.<sup>59</sup> The defendant claimed that,

[T]he sentences imposed by the trial judge, both *individually as to the rape convictions*, and collectively, by way of the twenty- to thirty-year concurrent sentences on the indecent assault and battery convictions, to run from and after the life terms, constitute cruel and unusual punishment, as proscribed by the Eighth Amendment to the United States Constitution and art. 26 of our Commonwealth’s Declaration of Rights.<sup>60</sup>

The Appeals Court rejected the constitutional challenges, concluding that the sentences were “lawful[,] . . . within the statutory limits,” and tailored to the case.<sup>61</sup>

#### IV. THE TEST APPLIED

A hypothetical case<sup>62</sup>: Clark was a high school senior, age seventeen years and six months. Kimmy was a sophomore at the same school and a

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54. *Id.* at 637–38.

55. *Robinson v. California*, 370 U.S. 660, 664–68 (1962).

56. *Moore*, 269 N.E.2d at 640 (citation omitted).

57. *Id.*

58. *See Cepulonis v. Commonwealth*, 427 N.E.2d 17, 19 n.1 (Mass. 1981) (“This court adjudges only whether the right of this petitioner to be free of cruel and unusual punishment has been violated in this case.”); *Commonwealth v. Therrien*, 269 N.E.2d 687, 691–92 (Mass. 1971) (observing that defendant sentenced to life imprisonment cannot challenge the statute as violative of the Eighth Amendment simply because it allows for capital punishment).

59. *Commonwealth v. Medina*, 835 N.E.2d 300, 305–06, 306 n.3 (Mass. App. Ct. 2005).

60. *Id.* at 313 (emphasis added).

61. *Id.* at 313–14.

62. The underlying facts are loosely drawn from *Commonwealth v. Rivera*, No. 09-P-1865, 2011 WL 166399 (Mass. App. Ct. Jan. 19, 2011). *See* Brief and Appendix for the

month away from turning sixteen. The two had met a year earlier at school and each considered the other to be a friend. One day in the school corridor, Clark overheard Kimmy discussing with her friend, Paige, plans for the upcoming weekend. Paige's parents would be traveling abroad, so she invited Kimmy to watch a movie at her home on Saturday night. Clark asked if he could come too. They answered in unison, "Sure. Why not?"

On Saturday night, the three watched the movie in Paige's upstairs bedroom. While Paige sat on her bed, the defendant and Kimmy kissed on a pull-out trundle bed. At one point, Clark put his hand inside Kimmy's shorts and placed his hand over her underwear. A short time later, Paige left the room and went downstairs for something. As soon as Paige was gone, Clark pulled down Kimmy's shorts. Kimmy protested, "Don't. She'll be right back." Clark pleaded, "Come on, come on." Although she felt uncomfortable, Kimmy did not protest further, and the defendant put his penis into her vagina. The sound of Paige ascending the stairs prompted Clark to roll off; Kimmy pulled her shorts back up. The three resumed watching the remainder of the movie, after which Clark went home.

For purposes of this hypothetical, we shall assume that Clark was charged as an adult,<sup>63</sup> convicted after trial and sentenced to five years in prison. If Clark were to challenge the sentence as violative of the Eighth Amendment and Article 26, a reviewing court would engage in the following analysis.

A. *Nature of Offense/Offender; Degree of Societal Harm*

The first "criterion requires a relatively abstract inquiry."<sup>64</sup> It "considers the nature of the offense and the offender in light of the degree of harm to society."<sup>65</sup> Although there is no exhaustive list of relevant factors, general considerations have included the defendant's maturity, his criminal record, and whether the crime involved violence and a victim.<sup>66</sup>

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Commonwealth at 2–7, *Commonwealth v. Rivera*, No. 09-P-1865 (Mass. App. Ct. 2010), 2010 WL 3096440, at \*2–7; Brief and Appendix for Defendant-Appellant Raphael Rivera at 4–9, *Commonwealth v. Rivera*, No. 09-P-1865 (Mass. App. Ct. 2010), 2010 WL 1746479, at \*4–9.

63. The Massachusetts Legislature recently expanded the jurisdiction of the juvenile court to encompass seventeen-year-olds, although juveniles in that age group can still be treated as adults under certain circumstances. MASS. GEN. LAWS ch. 119, § 52 (2018). For purposes of the hypothetical, we shall assume either that Clark qualified to be treated as an adult or that his case preceded this change. Interestingly, the Legislature also recently raised the minimum age of criminal culpability to twelve. *Id.* So, consenting eleven-year-olds may legally engage in sexual intercourse, but consenting fifteen-year-olds may not.

64. *United States v. Rivera-Ruperto*, 884 F.3d 25, 28 (1st Cir. 2018) (Barron, J., concurring in the denial of rehearing en banc).

65. *Commonwealth v. Jackson*, 344 N.E.2d 166, 171 (Mass. 1976).

66. See *In re Lynch*, 503 P.2d 921, 930–31 (Cal. 1972).

For statutory rape specifically, factors can include whether there was coercion or threatened violence, the victim willingly engaged in sexual relations, there was a violation of trust, and there was a preexisting romantic relationship between the two.<sup>67</sup> “The penological purposes of the prescribed punishment are also relevant to this analysis, for . . . ‘[c]learly the severity of the penalty, in the case of a serious offense, is not enough to invalidate it where the nature of the penalty is rationally directed to achieve the legitimate ends of punishment.’”<sup>68</sup>

The hypothetical provides limited information on the characteristics of the offender. We know that Clark was seventeen years old and a senior in high school. As for the crime-related circumstances, Clark and Kimmy were friends, but were not romantically involved. He sought her out to the extent that he asked if he could join her at Paige’s house, but there is no indication that it was part of a pernicious plan. The intercourse involved some coercion (“Come on, come on”), but no overt violence. Any violation of trust would have related solely to their friendship, which is far different than a relationship where one has caregiving authority over another, such as a teacher, step-parent, or clergy member, to name a few.

In weighing the degree of societal harm, the fact that Kimmy was close to sixteen years of age should be as irrelevant as whether or not she consented. “The Legislature as a matter of public policy, for the protection of . . . children under the age of sixteen, has fixed an age below which a . . . child is to be held legally incapable of consenting to” sexual intercourse.<sup>69</sup> “The law conclusively presumes that those under sixteen years of age are not sufficiently mature to understand fully the physical, mental, and emotional consequences of sexual intercourse, and are therefore incapable of making a rational decision about whether to consent to such conduct.”<sup>70</sup> Through the statutory rape law, the Legislature has long recognized the immaturity of those under sixteen and sought to safeguard them regardless of the age or sophistication of their sexual partners.<sup>71</sup> In fact, the Legislature recently amended the statutory rape law, adding a new section targeting adult offenders,<sup>72</sup> but leaving Mass.

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67. *State v. Davis*, 79 P.3d 64, 71–72 (Ariz. 2003).

68. *Jackson*, 344 N.E.2d at 171 (citation omitted) (quoting *Trop v. Dulles*, 356 U.S. 86, 111 (1958) (Brennan, J., concurring)).

69. *Commonwealth v. Gallant*, 369 N.E.2d 707, 711 (Mass. 1977) (quoting *Glover v. Callahan*, 12 N.E.2d 194, 196 (Mass. 1937)).

70. *Commonwealth v. Dunne*, 474 N.E.2d 538, 545 n.17 (Mass. 1985).

71. See *Commonwealth v. Washington W.*, 928 N.E.2d 908, 916 (Mass. 2010) (Cordy, J., dissenting) (“[T]he age of consent is an important line in the law, intentionally laid down by the Legislature ‘to protect all children under sixteen years old from sexual abuse.’” (quoting *Commonwealth v. Bernardo B.*, 900 N.E.2d 834, 845 (Mass. 2009))).

72. MASS. GEN. LAWS ch. 265, § 23A (2018) (“[If] there exists more than a 5 year difference between the defendant and the victim and the victim is under 12 years of age[, or]

Gen. Laws chapter 265, section 23 intact, implicitly acknowledging its continued applicability to offenders who are closer in age to their victims.

Moreover, the Massachusetts Appeals Court has reaffirmed the purpose of the statutory rape law and the suitability of its application to a seventeen-year-old who has sex with a fifteen-year-old. In *Driscoll v. Board of Trustees of Milton Academy*, a seventeen-year-old student at Milton Academy, together with four of his hockey teammates, brought a fifteen-year-old girl into the boy's locker room, where she performed oral sex on each of them.<sup>73</sup> All of the boys were expelled from the school and prosecuted for statutory rape.<sup>74</sup> The seventeen-year-old student sued the school for negligence, among other claims.<sup>75</sup> In rejecting the negligence claim, the Appeals Court concluded that "the student may not recover in tort against the school for his own sexual misconduct."<sup>76</sup> Citing the statutory rape law and the maturity rationale of *Commonwealth v. Dunne*, the Appeals Court emphasized that a "seventeen year old who receives oral sex from a fifteen year old has committed statutory rape in this Commonwealth. . . . Our statutory rape law provides for punishment, not protection, for a seventeen-year-old for this conduct."<sup>77</sup>

Under these circumstances, a reviewing court would likely conclude that, based solely on the first criterion, Clark's five-year sentence for rape of a child is not obviously disproportionate to the crime. That would end the inquiry for purposes of the Eighth Amendment.<sup>78</sup> Article 26 requires, however, that the other two prongs of the three-part disproportionality test be addressed.

#### B. *Intra-Jurisdictional Analysis*

The intra-jurisdictional analysis involves "a comparison between the sentence imposed here and punishments prescribed for the commission of more serious crimes in the Commonwealth."<sup>79</sup> Compiling "more serious" crimes can prove difficult, however. "The crime of rape of a child, G.L. c. 265, § 23, encompasses a range of very different kinds of offenses. That crime includes any number of acts whose seriousness [the courts] well

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there exists more than a 10 year age difference between the defendant and the victim where the victim is between the age of 12 and 16 years of age . . . [the offender] shall be punished by imprisonment . . . for . . . not less than 10 years."

73. *Driscoll v. Bd. of Trs. of Milton Acad.*, 873 N.E.2d 1177, 1181 (Mass. App. Ct. 2007).

74. *Id.* at 1181–83.

75. *Id.* at 1181.

76. *Id.* at 1184–85.

77. *Id.* at 1184 (citations omitted) (citing *Commonwealth v. Dunne*, 474 N.E.2d 538, 545 n.17 (Mass. 1985)).

78. See *Ewing v. California*, 538 U.S. 11, 30 (2003).

79. *Commonwealth v. Bianco*, 454 N.E.2d 901, 905 (Mass. 1983) (quoting *Cepulonis v. Commonwealth*, 427 N.E.2d. 17, 20 (Mass. 1981)).

recognize.”<sup>80</sup> Therefore, a court would likely conclude that the “more appropriate comparison” would be with penalties contained in other statutes that are designed to protect children.<sup>81</sup> Those crimes and their accompanying penalties are as follows:

- Indecent Assault and Battery on Person Fourteen or Older:  
“[I]mprisonment in the state prison for not more than five years, or by imprisonment for not more than two and one-half years in a jail or house of correction.”<sup>82</sup>
- Kidnapping Child Under 16:  
“[I]mprisonment in the state prison for not more than 15 years.”<sup>83</sup>
- Enticement of Child Under 16:  
“[I]mprisonment in the state prison for not more than 5 years, or in the house of correction for not more than 2½ years, or by both imprisonment and a fine of not more than \$5,000.”<sup>84</sup>
- Posing or Exhibiting Child Under 18 in State of Nudity or Sexual Conduct:  
“[I]mprisonment in the state prison for a term of not less than ten nor more than twenty years, or by a fine of not less than ten thousand nor more than fifty thousand dollars, or by both such fine and imprisonment.”<sup>85</sup>
- Dissemination of Visual Material of Child Under 18 in State of Nudity or Sexual Conduct:  
“[S]tate prison for a term of not less than ten nor more than twenty years or by a fine of not less than ten thousand nor more than fifty thousand dollars or three times the monetary value of any economic gain derived from said dissemination, whichever is greater, or by both such fine and imprisonment.”<sup>86</sup>

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80. Doe v. Att’y Gen., 715 N.E.2d 37, 44 (Mass. 1999).

81. Commonwealth v. Dunn, 680 N.E.2d 1178, 1184 (Mass. App. Ct. 1997) (concluding that “punishments for similar offenses” may be a “more appropriate comparison” than punishments for “more serious offenses”).

82. MASS. GEN. LAWS ch. 265, § 13H (2018).

83. *Id.* § 26.

84. *Id.* § 26C.

85. MASS. GEN. LAWS ch. 272, § 29A (2018).

86. *Id.* § 29B(a).

- Engaging in Sexual Conduct with Child Under Age 18 for a Fee:  
“[I]mprisonment in the state prison for not more than 10 years, or in the house of correction for not more than 2 and one-half years . . . whether such sexual conduct occurs or not.”<sup>87</sup>

Far from exceeding any of the penalties contained in these statutes, Clark’s sentence falls comfortably within (indeed, on the low end of) the permitted punishments. In short, “[a] comparison [of] the . . . sentence imposed here and the punishments prescribed for more serious [or comparable] crimes in the Commonwealth, permits the conclusion that the sentence was not unconstitutionally excessive.”<sup>88</sup>

### C. *Interstate Analysis*

The third prong requires “a comparison of the challenged penalty with the penalties prescribed for the same offense in other jurisdictions.”<sup>89</sup> In addressing this prong, a court looks only to those jurisdictions that criminalize the activity,<sup>90</sup> whether they be numerous, as in *Commonwealth v. Alvarez*,<sup>91</sup> or few, a situation that the Appeals Court faced in *Commonwealth v. Dunn*.<sup>92</sup>

Here, only seven other jurisdictions have laws that would criminalize Clark’s intercourse with Kimmy:

- California—up to six months imprisonment;<sup>93</sup>
- Florida—up to fifteen years in prison;<sup>94</sup>
- Georgia—up to one year of incarceration;<sup>95</sup>
- Illinois—less than one year of imprisonment;<sup>96</sup>

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87. *Id.* § 53A(c).

88. *Commonwealth v. Bianco*, 454 N.E.2d 901, 905 (Mass. 1983).

89. *Id.* (quoting *Cepulonis v. Commonwealth*, 427 N.E.2d 17, 20 (Mass. 1981)).

90. *See Commonwealth v. Alvarez*, 596 N.E.2d 325, 332 (1992); *Commonwealth v. Dunn*, 680 N.E.2d 1178, 1183 (Mass. App. Ct. 1997).

91. *Alvarez*, 596 N.E.2d at 332 (involving at least twenty-three states with comparable statutes).

92. *Dunn*, 680 N.E.2d at 1183 (involving only two other jurisdictions).

93. CAL. PENAL CODE § 261.5(b) (West 2018); CAL. PENAL CODE § 19 (West 2018).

94. FLA. STAT. § 800.04(4) (2018); FLA. STAT. § 775.082(3)(d) (2018).

95. GA. CODE ANN. § 16-6-3 (2018); GA. CODE ANN. § 17-10-3 (2018).

96. 720 ILL. COMP. STAT. 5/11-1.50 (2018); 730 ILL. COMP. STAT. 5/5-1-14 (2018).

- Kansas—sentencing range of fifty-five to sixty-one months, with a presumptive sentence of fifty-nine months (for offender with no record);<sup>97</sup>
- Michigan—up to fifteen years in prison;<sup>98</sup> and
- Wisconsin—up to nine months in prison.<sup>99</sup>

As with the intra-jurisdictional analysis, an interstate comparison discloses that Clark’s sentence is not disproportionate to those prescribed by comparable statutes. His five-year sentence was an available disposition in nearly half of the states with relevant provisions (Florida, Kansas, Michigan). In fact, it practically mirrors the “presumptive” sentence in Kansas (fifty-nine months). And it is substantially less than the sentences available in Florida and Michigan (up to fifteen years). His sentence exceeds the punishment available only in Georgia (up to one year), Illinois (less than one year), and Wisconsin (up to nine months). A Massachusetts court would likely conclude that, all in all, “[t]he difference between the punishment meted out in this case and that prescribed in other States is merely one of degree. It is not violative of Article 26 or of the Eighth Amendment.”<sup>100</sup>

#### V. THE CURRENT APPROACH: ITS SHORTCOMINGS AND A SUGGESTED IMPROVEMENT

As shown above, the five-year sentence for statutory rape easily satisfied the second and third prongs of the disproportionality analysis. But both prongs suffer from two significant shortcomings.

First, as noted earlier, the language of Article 26 is directed explicitly at judges—not the legislature—and prohibits them from inflicting cruel or unusual punishments.<sup>101</sup> It therefore makes little sense, in gauging whether a particular sentence is excessively long, to consider potential penalties contained in other statutes. Those theoretical penalties may never be imposed in practice. If that is the case, then considering them necessarily skews the determination of whether the subject sentence is actually “unusual.”

The second shortcoming undermines the very basis of the second and third prongs. As will be recalled, the SJC derived its tripartite test from the California Supreme Court’s decision in *In re Lynch*.<sup>102</sup> But the *Lynch*

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97. KAN. STAT. ANN. § 21-5506 (2018); KAN. STAT. ANN. § 21-6804 (2018); *Nondrug Sentencing Guidelines*, KANSAS SENTENCING COMMISSION, <https://www.sentencing.ks.gov/docs/default-source/2017-forms/2017-nondrug-grid.pdf> [<https://perma.cc/CS24-XDMZ>].

98. MICH. COMP. LAWS § 750.520d (2018).

99. WIS. STAT. § 939.5 (2018); WIS. STAT. § 948.093 (2018).

100. *Cepulonis v. Commonwealth*, 427 N.E.2d 17, 21 (Mass. 1981).

101. *See* MASS. CONST. art. 26.

102. *In re Lynch*, 503 P.2d 921, 930–33 (Cal. 1972).

decision harbored a startling judicial abdication of constitutional responsibility with respect to the test's second and third prongs. In justifying a comparison to potential penalties contained in comparable statutes within a jurisdiction (the second prong), the California Supreme Court stated that "although isolated excessive penalties may occasionally be enacted, [for example], through 'honest zeal' generated in response to transitory public emotion, the Legislature may be depended upon to act with due and deliberate regard for constitutional restraints in prescribing the vast majority of punishments set forth in our statutes."<sup>103</sup> In other words, the Legislature may be "depended upon" to prescribe penalties within constitutional limits; therefore, reference to those penalties is an appropriate constitutional yardstick for judges to use in reviewing prison sentences. Quite a quaint notion. And the court did not limit this deference to its own legislature's enactments. The court bestowed it upon the legislative enactments of other states (the third prong): "Here the assumption is that the vast majority of those jurisdictions will have prescribed punishments for this offense that are within the constitutional limit of severity."<sup>104</sup> Regardless of the merits or demerits of this approach as a matter of California constitutional law, the SJC should not have incorporated these aspects of constitutional abdication in its formula for assessing challenges under Article 26.

A better approach presents itself. And it is compatible with the existing three-pronged framework. Rather than measuring a subject sentence against potential penalties in analogous statutes, Massachusetts courts should compare the sentence received to actual sentences previously imposed by Massachusetts judges for comparable crimes (prong two) and those imposed by judges in other jurisdictions for the same crime (prong three). This approach would be consistent with Article 26's focus on punishments inflicted by a "court of law," thereby presenting a more accurate picture of whether the sentence is truly "unusual." Moreover, it would jettison the naive assumption that legislatures act within constitutional limits in prescribing sentences. And the compilation of such data should not be unduly burdensome. In the late 1980s, an industrious defense attorney presented findings from his review of over 2,600 cases in arguing that his client received an unconstitutionally harsh prison sentence for statutory rape.<sup>105</sup> Doubtless such a task would be immeasurably easier in today's era of sophisticated storage and retrieval of electronic data. None of this is to say, of course, that Clark's challenge to his sentence would be successful. That would remain to be seen. But this improved framework would ensure a more accurate assessment of his constitutional challenge.

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103. *Id.* at 931–32 (citation omitted).

104. *Id.* at 932.

105. *See State v. Bartlett*, 792 P.2d 692, 702 (Ariz. 1990), *vacated*, 501 U.S. 1246 (1991).

## CONCLUSION

The SJC has neglected Article 26's longevity component for too long. The court's recently renewed interest, as it relates to sentences for juvenile offenders, stems from the Supreme Court's decision in *Miller v. Alabama*,<sup>106</sup> not from any impetus independently originating from Article 26.<sup>107</sup> While this renewed interest is heartening, constitutional challenges to sentences for adult offenders remain unduly fettered by an unrealistic formula for gauging disproportionality. The court can remedy this through the simple mechanism of requiring a comparison between a sentence at issue and other sentences previously imposed by Massachusetts and other judges for the same or similar crimes, rather than to theoretical ones. Such an approach would better reflect the letter and spirit of Article 26.

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106. *Miller v. Alabama*, 567 U.S. 460, 479 (2012) (holding that the Eighth Amendment prohibits mandatory life sentences for juvenile offenders without the possibility of parole).

107. See cases cited, *supra* note 33.