STATE CONSTITUTIONAL LAW—EXCESSIVE SENTENCING—THE SUPREME JUDICIAL COURT OF MAINE TAKES THE SENTENCING PROCESS ONE STEP FURTHER TO ENSURE FAIRNESS AND PROPORTIONALITY. *STATE v. STANISLAW*, 65 A.3D 1242 (ME. 2013).

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I. INTRODUCTION

In *State v. Stanislaw*,[1] Theodore Stanislaw originally pled guilty in Superior Court, Hancock County, to three counts of Class B unlawful sexual conduct, one count of Class C unlawful sexual contact, one count of unlawful sexual touching, and four counts of assault.[2] After two appeals by the Defendant, the Supreme Judicial Court of Maine vacated his sentence and remanded, holding that the overall unsuspended sentence was disproportionate to the crimes committed.[3] In its holding, the court explained the Maine state constitution's provision for proportionality of punishment and took the analysis one step further by analyzing the *overall* unsuspended prison term to better safeguard against disproportionate sentencing.[4] The general purpose of a proportionality doctrine is to promote fairness and justice in the judicial process, specifically when constitutional questions are at issue.[5] Therefore, the

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1. State v. Stanislaw (*Stanislaw II*), 65 A.3d 1242 (Me. 2013).
2. *Id.* at 1245–46.
3. *Id.* at 1244, 1256–57.
4. *Id.* at 1256–57.
5. *See* Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 699 n.102 (2005) (noting the "tension between . . . the Eighth Amendment proportionality cases and . . . the Due Process Clause").

court's thorough and comprehensive sentencing analysis better ensures overall proportionality by going one step further and assessing proportionality of the overall sentence imposed for multiple count offenders.

This Comment analyzes the majority and dissenting opinions and concludes that although both the majority and dissenting opinions present sound methodologies, Justice Silver's majority opinion more appropriately balances the interests of the victims and society as a whole against a just, fair, and proper punishment of the Defendant. While recognizing the important state interests implicated by punishing criminals for their actions and creating a stable society for its citizens, the majority's analysis provides a more reasonable and appropriate outcome. The majority properly balances the interests of the victims and society against the appropriate punishment for the Defendant to create a consistency between the law and reality. On remand, the trial court in *Stanislaw*, whether or not they followed the proper sentencing analysis, reached the same result—an unsuspended sentence that was excessive. Despite disagreement from the dissent, the majority's proposal to the trial court to limit Stanislaw's sentence to one third to one half of the original sentence was proper in that it ensures proportionality and justice for all parties involved. Absent this suggestion, the risk remained for the Defendant to be over-sentenced once again, with no other relief.

II. STATEMENT OF THE CASE

In an open plea, Theodore Stanislaw pled guilty to sexual offenses occurring between 2004 and 2008 involving five different girls, aged ten to fourteen.[6] Specifically, Stanislaw pled guilty in an open plea to three counts of Class B unlawful sexual contact and one count of Class C unlawful sexual contact, as well as a number of other misdemeanor counts. The conduct which triggered these charges to be brought against Stanislaw included exposing himself, kissing and touching his victims, and hugging them while both he and the victims were either fully or partially naked; however, no penetration occurred.[7] Stanislaw had one prior felony conviction in New York in 1982 for fondling the privates of a child under the age of eleven.[8] In Stanislaw's original sentencing, he was

6. *Stanislaw II*, 65 A.3d at 1245 ("His actions toward these girls involved a range of contact, but none of his actions constituted a 'sexual act' as that term is defined in 17-A M.R.S. § 251(1)(C) (2012).").

7. *Id.* at 1245–46.

8. *Id.* at 1246 ("In 1982, when Stanislaw was twenty-four, he pleaded guilty in New York to Sexual Abuse 1st Degree for subjecting 'a person less than eleven years old, to

ordered by Justice Kevin Cuddy to serve twenty-eight years in prison and four years of probation following his release.[9]

The Supreme Judicial Court of Maine then reviewed the sentence,[10] vacated it, and remanded the case for resentencing, reasoning that the trial court failed to articulate a comprehensive analysis in coming to its decision.[11] The court further reasoned that Justice Cuddy had erred in applying Maine's mandated three-step sentencing analysis[12] and did not articulate why Stanislaw was given a sentence near the maximum allowed.[13]

On remand, the sentencing court properly conducted a *Hewey* analysis,[14] but Justice Cuddy ordered Stanislaw to serve "twenty-eight years in prison, with all but twenty-seven years suspended, followed by four years of probation"[15] which provided nearly no change in the overall sentence.

Stanislaw appealed his sentence again (*Stanislaw II*) arguing that Justice Cuddy failed to correctly apply the sentencing analysis, that his prison terms should not be served consecutively, and that his overall twenty-seven-year sentence was excessive.[16] The Supreme Judicial Court of Maine, on its second review, held that the lower court did not err in applying the *Hewey* analysis,[17] but vacated the resentence on grounds that the sentence was unconstitutionally disproportionate.[18]

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sexual contact, by fondling her vagina.' He was sentenced to five years' probation." (citations omitted)).

9. *Id.* (citing State v. Stanislaw (*Stanislaw I*), 21 A.3d 91, 93 (Me. 2011)).

10. *Id.* ("On appeal, we concluded that we were unable to review how the court determined the basic sentence on the Class B offenses because the court appeared to have combined its analysis of the objective facts of the crime itself with its analysis of aggravating factors." (citing *Stanislaw I*, 21 A.3d at 95–97)).

11. *Id.*

12. *Stanislaw II*, 65 A.3d at 1246–47. "The court did not repeat the third step of the required sentencing analysis—determining whether a suspension of a portion of the sentence of imprisonment is required, 17-A M.R.S. § 1252-C(3)—after concluding that consecutive sentences should be imposed." *Id.* at 1247.

13. *Id.*

14. *Id.* ("When determining a sentence, the sentencing court conducts a *Hewey* analysis, which is a three-step sentencing analysis codified at 17-A M.R.S. § 1252-C. *See* State v. Hewey, 622 A.2d 1151, 1154–55 (Me. 1993).").

15. *Id.*

16. *Id.* at 1244.

17. *Id.* at 1249–50, 1252.

18. *Stanislaw II*, 65 A.3d at 1252–53. ("[B]y failing to suspend any portion of the . . . sentences imposed . . . the court imposed a sentence that . . . cannot be upheld."). See *infra* text accompanying notes 21–23, for an explanation of the *Hewey* analysis.

III. HISTORY OF THE AREA

A. The Development and Application of the State Sentencing Process—The Hewey Analysis

In Maine, a sentencing court must conduct a *Hewey* analysis when deciding a sentencing term.[19] The *Hewey* analysis is codified in title 17-A, section 1252-C of the Maine Statutes, and involves three steps in the sentencing analysis.[20] In the first step, "[t]he court shall first determine a basic term of imprisonment by considering the particular nature and seriousness of the offense as committed by the offender."[21] Next, "[t]he court shall . . . determine the maximum period of imprisonment to be imposed by considering all other relevant sentencing factors."[22] Finally, "[t]he court shall . . . determine what portion, if any, of the maximum period of imprisonment should be suspended and, if a suspension order is to be entered, determine the appropriate period of probation to accompany that suspension."[23]

When a case involves multiple offenses, the court must also decide whether to impose consecutive or concurrent sentences.[24] Sentences should normally be served concurrently,[25] but the statute provides the sentencing court discretion in its determination based on several factors.[26] If, however, the court does decide to impose consecutive sentences, a separate *Hewey* analysis for each conviction must be done.[27]

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19. *Stanislaw II*, 65 A.3d at 1247.

20. *Id.* (citing State v. Hewey, 622 A.2d 1151, 1154–55 (Me. 1993)); *see also* ME. REV. STAT. ANN. tit. 17-A, § 1252-C (2014).

21. § 1252-C.

22. *Id.*

23. *Id.*

24. *Stanislaw II*, 65 A.3d at 1247.

25. *Id.* at 1248.

26. *Id.* The court noted some of the statute's discretionary factors:

> [S]entences shall be concurrent unless, in considering the following factors, the court decides to impose sentences consecutively:
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> A. That the convictions are for offenses based on different conduct or arising from different criminal episodes;
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> . . .
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> D. That the seriousness of the criminal conduct involved in either a single criminal episode or in multiple criminal episodes or the seriousness of the criminal record of the convicted person, or both, require a sentence of imprisonment in excess of the maximum available for the most serious offense.

Id. (alterations in original).

27. *Id.* (citing State v. Downs, 962 A.2d 950, 954–55 (Me. 2009)).

The decision to impose consecutive or concurrent terms should be decided before the third step of the *Hewey* analysis.[28]

B. The Eighth Amendment of the U.S. Constitution Compared to and Contrasted with Article I, Section 9 of the Maine State Constitution

The scope and application of the Eighth Amendment focuses on the meaning of "cruel and unusual" punishment.[29] In 1983, Justice Powell stated in his opinion in *Solem v. Helm*[30] that the Eighth Amendment traces back to the English Bill of Rights of 1689,[31] which he believed encompassed a proportionality principle.[32] However, in *Harmelin v. Michigan*,[33] Justice Scalia disagreed. According to Justice Scalia's majority opinion, "the Eighth Amendment contains no proportionality guarantee."[34] Furthermore, he stated the term "cruel and unusual" only

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28. *Id.* "When consecutive sentences are imposed, the sentencing court must make a determination that the unsuspended portion of any consecutive sentence is not excessive and is proportionate to the offense." *Id.* at 1250 (citing ME. CONST. art. I, § 9).

29. *Id.* at 1251. The text of the Eighth Amendment reads, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

30. 463 U.S. 277 (1983). This case concerned the scope of the Eighth Amendment protection against cruel and unusual punishment. The defendant was convicted of his seventh nonviolent felony conviction. *Id.* at 279–81. Under South Dakota law, he received a mandatory sentence of life in prison with no parole. *Id.* at 281–82. The Supreme Court overruled the sentence, stating that it was prohibited by the Eighth Amendment. *Id.* at 303. The majority stated that the defendant received the "penultimate sentence for relatively minor criminal conduct." *Id.* The opinion however, did not strike down South Dakota's statute setting minimum sentencing guidelines for recidivism; instead, it mandated exceptions to the minimum sentencing guidelines to protect constitutional freedom from cruel and unusual punishment. *Id.*

31. *Id.* at 285; *see, e.g.*, MARSHALL J. TINKLE, THE MAINE STATE CONSTITUTION: A REFERENCE GUIDE 43 (1992).

32. *Solem*, 463 U.S. at 284. The Court in *Solem* discussed the proportionality doctrine previously proposed in *Enmund v. Florida*, 458 U.S. 782, 792–801 (1982). The Court set precise guidelines for deciding when a punishment is proportional to the specific crime committed. The three factors necessary in deciding whether a sentence is proportional to a crime are: (1) the nature and gravity of the offense and the harshness of the penalty; (2) the sentences imposed on other criminals in the same jurisdiction; and (3) the sentences imposed for commission of the same crime in other jurisdictions. *Solem*, 463 U.S. at 291–93.

33. 501 U.S. 957 (1991). The Court held that the Eighth Amendment's Cruel and Unusual Punishment Clause allowed a state to impose a life sentence without the possibility of parole for possession of 672 grams of cocaine. *Id.* at 961, 996. The Court stated, "[s]evere, mandatory penalties may be cruel, but they are not unusual in the constitutional sense, having been employed in various forms throughout our Nation's history." *Id.* at 994–95. The Court also noted that the Eighth Amendment did not require a sentencing court to consider mitigating factors in sentences not imposing a death penalty. *Id.* at 995.

34. *Id.* at 965. In *Harmelin*, Justice Scalia reasoned that because the words "cruel and unusual" did not refer historically to proportionality, and because, in contrast, the language

referred to "certain methods of punishment" which does not embody proportionality.[35] His reasoning was that the Eighth Amendment does not explicitly refer to proportionality, and thus the framers considered and rejected the idea; therefore, he believed applying a proportionality principle under the U.S. Constitution would violate the framers' intent.[36] Regardless, the majority of the U.S. Supreme Court still finds a proportionality requirement within the Eighth Amendment.[37]

The Eighth Amendment states, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[38] In *Furman v. Georgia*,[39] Justice Brennan articulated four principles available to determine "cruel and unusual" punishment: (1) the "essential predicate" is "that a punishment must not by its severity be degrading to human dignity," especially torture; (2) "a severe punishment that is obviously inflicted in wholly arbitrary fashion"; (3) "a severe

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in certain contemporaneous state constitutions did, the framers of the Eighth Amendment considered and rejected a ban on disproportionality in punishment. *Id.* at 977–81; *see also* Note, *The Eighth Amendment, Proportionality, and the Changing Meaning of "Punishments*,*"* 122 HARV. L. REV. 960, 978 (2009).

35. *Harmelin*, 501 U.S. at 979.

36. *Id.* at 979–81. *But see* Note, *supra* note 34, at 962–63 (stating that the gap in meaning between "punishments" at the time of the founding and "punishments" under the system that subsequently developed make problematic Justice Scalia's claims about the intention of the framers as to proportionality in punishments generally). The framers may have intended not to ban disproportionality in the existing system of public punishments. Note, *supra* note 34, at 962–63. But it is doubtful that this gives us any direct evidence on the intention of the framers regarding proportionality in the new system of nonpublic punishments.

37. *See* Note, *supra* note 34, at 963.

> Through the beginning of the twentieth century, the Supreme Court consistently held that the Cruel and Unusual Punishments Clause was intended to prohibit "inhuman and barbarous" modes of punishment—"burning at the stake, crucifixion, breaking on the wheel, or the like." The Court first suggested that the clause might contain a proportionality principle in *Weems v. United States*. In that case, the Court stated that while the Eighth Amendment was "ordinarily" said to prohibit punishments that were "inhuman and barbarous, torture and the like," the punishment of incarceration "for a long term of years might be so disproportionate to the offense as to constitute a cruel and unusual punishment." . . . By the late 1970s, the Court appeared to have accepted the proposition that the Eighth Amendment "proscribes grossly disproportionate punishments."

Id. (footnotes omitted).

38. U.S. CONST. amend. VIII.

39. 408 U.S. 238 (1972) (per curiam). In *Furman*, defendant Furman shot and killed his victim while committing a house robbery. *Id.* at 252 (Douglas, J., concurring). The Court held, per curiam, that the imposition of the death penalty in these types of cases was a violation of the Constitution under the Eighth Amendment ban on cruel and unusual punishment because, essentially, the punishment was disproportionate to the crime. *See id.* at 239–40 (majority opinion).

punishment that is clearly and totally rejected throughout society"; and (4) "a severe punishment that is patently unnecessary."[40] Furthermore, Justice Brennan stated that a court's decision regarding the Eighth Amendment would be a "cumulative" analysis of the implication of the four aforementioned principles.[41] In this case, along with *Gregg v. Georgia*, the U.S. Supreme Court set a standard for defining and determining what constitutes cruel and unusual punishment, which included a proportionality element.[42]

Aside from case law, the use of proportionality analysis under the Eighth Amendment is discussed and debated in academic literature. Professor John Stinneford contends that the Eighth Amendment incorporates proportionality in punishments, regardless of whether the punishment itself is not intrinsically barbaric.[43] He further analyzes the phrase "cruel and unusual," concluding that the phrase fundamentally requires an analysis "in terms of prior practice,"[44] which essentially calls for a proportionality element. Professor Richard Epstein, however, holds an opposing view, arguing that the Eighth Amendment does not refer broadly to the imposition of penalties.[45] He explains that Supreme Court Justices have been rewriting key parts of the Constitution, and those who favor the broad view of the Eighth Amendment read the clause without the letter "s" at the end of "punishments" because it is easier to demand proportionality between the crime and the punishment.[46] Although Epstein makes an interesting point that the use of judicial discretion is improper with regard to the Eighth Amendment, "even if the historical assumptions used by the majority of the [c]ourt[s] to justify the proportionality element of the Eighth Amendment are incorrect, it is in no way clear that a ban on disproportionate punishments would be contrary to the intention of the Framers."[47] This intertemporal view of

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40. *Id.* at 281 (Brennan, J., concurring).

41. *Id.* at 282.

42. William W. Berry III, *Promulgating Proportionality*, 46 GA. L. REV. 69, 76 (2011).

43. *See* John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899, 910 (2011).

44. *Id.* at 978 ("If the punishment is significantly harsher than the punishments that have previously been given for the offense, it is likely to be excessive relative to the offense.").

45. *See* Richard A. Epstein, *The Constitution's Vanishing Act*, HOOVER INSTITUTION J.: DEFINING IDEAS (Dec. 16, 2013), http://www.hoover.org/research/constitutions-vanishing-act (discussing how the Supreme Court Justices have been rewriting key parts of our governing document and using the *Kennedy v. Louisiana* decision as an example, where the Court found that "the Eighth Amendment should be read in light of 'the evolving standards of decency that mark the progress of a maturing society,'" although Epstein disagrees).

46. *Id.*

47. Note, *supra* note 34, at 981.

the law fully supports the contention that the Eighth Amendment inherently contains a proportionality requirement in a sentencing analysis as it applies today—as opposed to its application when the Constitution was drafted—and a disproportionate sentence would be a violation of that constitutional right.

The Maine Constitution's article I, section 9 sentencing clause is the corresponding law to the U.S. Constitution's Eighth Amendment. The Maine Constitution, unlike the U.S. Constitution, explicitly bans grossly disproportionate sentencing.[48] Although all fifty states have constitutional provisions related to sentencing,[49] Maine is one of few that explicitly provides for proportionality.[50] Maine also prohibits cruel or unusual punishment with an express proportionality requirement.[51] However, as mentioned earlier, the U.S. Supreme Court tends to assume proportionality as part of the "cruel and unusual" analysis. Under the Maine Constitution, "whether a punishment is unconstitutionally disproportionate to the offense committed or is otherwise cruel or unusual are closely related, but not identical, questions."[52] Thus, under Maine law, since a ban on disproportionate sentencing is explicitly stated, it is presumed to be extremely important in sentencing analysis.

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48. *Compare* ME. CONST. art. I, § 9, *with* U.S. CONST. amend. VIII. Although the Eighth Amendment does not explicitly ban disproportionate sentencing, Supreme Court case law, as previously mentioned, has discussed proportionality within the Eighth Amendment; *see supra* notes 39–42 and accompanying text. Furthermore, although the majority opinion in *Harmelin* did not find proportionality to be part of the Eighth Amendment, it stated that "[d]uring the 19th century several [s]tates ratified constitutions that prohibited 'cruel and unusual,' 'cruel or unusual,' or simply 'cruel' punishments *and* required *all* punishments to be proportioned to the offense." Harmelin v. Michigan, 501 U.S. 957, 982 (1991). An example of such a state is Maine. *Id.*

49. Richard S. Frase, *Limiting Excessive Prison Sentences Under Federal and State Constitutions*, 11 U. PA. J. CONST. L. 39, 64 (2008).

50. *Id.* There are eight states in total with explicit provisions requiring proportionate penalties: Indiana, Maine, Nebraska, New Hampshire, Oregon, Rhode Island, Vermont, and West Virginia. *Id.*

51. *See id.*

52. MARSHALL J. TINKLE, THE MAINE STATE CONSTITUTION 51 (2d ed. 2013) (quoting State v. Ward, 21 A.3d 1033, 1037–38 (Me. 2011)). "[A] punishment can violate this section . . . even if it is not cruel or unusual in the sense that it is inherently barbaric." *Id.* (citing *Ward*, 21 A.3d at 1038). "In determining proportionality, it is improper to consider the characteristics of the offender, as opposed to the offense itself." *Id.* (citing State v. Gilman, 993 A.2d 14 (Me. 2010)).

IV. THE COURT'S REASONING

A. The Majority Opinion[53]

The court's review in this matter is de novo for misapplication of the principle, and the abuse of discretion review for the maximum, final, and overall sentence.[54] In reviewing the statutorily mandated *Hewey* analysis for sentencing, the court looks for abuse of power.[55] Finally, the court will look for an abuse of discretion when reviewing the decision to impose consecutive sentences.[56]

To determine whether a sentence is disproportionate under the Maine Constitution, a court is required to conduct a two-part test: first, the court must "compare the gravity of the offense [with] the severity of the sentence"; and second, if the aforementioned "comparison results in an inference of gross disproportionality, [the court should] then compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction."[57]

Under the first step of the proportionality analysis, the court examined whether Stanislaw's overall sentence appeared "grossly disproportionate" to the offenses he committed.[58] The court explained that this process involved comparing "the gravity of the offense [with] the severity of the sentence."[59] The court further explained that if this comparison produces an "inference of gross disproportionality" the court will then compare the defendant's sentence to sentences received by other offenders in the same jurisdiction.[60] On appeal, the court pointed to the overall sentence of twenty-seven years of unsuspended incarceration as grossly disproportional because it exceeded sentences imposed for more serious crimes.[61] Moreover, the court reasoned that the sentence imposed

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53. *Stanislaw II*, 65 A.3d 1242 (Me. 2013).
54. *Id.* at 1248–1250.
55. *Id.* at 1248.
56. *Id.*
57. *Id.* at 1251 (alteration in original) (quoting *Ward*, 21 A.3d at 1038 n.5) (internal quotation marks omitted).
58. *Id.* at 1251–53.
59. *Stanislaw II*, 65 A.3d at 1251 (alteration in original) (quoting *Ward*, 21 A.3d at 1038 n.5).
60. *Id.* (quoting *Ward*, 21 A.3d at 1038 n.5).
61. *Id.* at 1256. The court explained:

upon Stanislaw failed to serve legislatively established sentencing goals of rehabilitating offenders and minimizing "correctional experiences which might serve to promote further criminality."[62] Putting a sex offender in prison for an extended length of time clearly precludes him from reoffending because he is not in such an environment to be able to reoffend, however it does not necessarily deter him from reoffending upon his release. Instead, the majority properly noted that incarceration alone does not prevent reoffending the way rehabilitation plus incarceration would.[63]

After finding an inference of gross disproportionality, the court next compared Stanislaw's sentence to the sentences of other offenders in four groups of cases: (1) cases which the State found comparable to Stanislaw's case;[64] (2) cases involving a comparable unsuspended term;[65] (3) cases involving gross sexual assault convictions, in which the longest unsuspended term was twenty years;[66] and (4) cases involving unlawful

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> The disparity in sentences revealed by all four categories of comparison leads us to conclude that, although Stanislaw's total sentence is within the parameters of the sentencing statutes, the unsuspended portion of the period of imprisonment is grossly disproportionate to the crimes he committed when compared to the sentences imposed for the same or similar crimes, and some more serious crimes.
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> *Id.*

62. *Id.* at 1252.

63. *Id.* at 1252–53.

64. *Id.* at 1253–54. The court found that under the set of cases presented by the State, Stanislaw's sentence was grossly disproportionate. *Id.* at 1254. The cases chosen involved conduct as serious or more serious than Stanislaw's actions, yet their sentences ranged from three to eight years unsuspended, while Stanislaw's sentence resulted in twenty-seven years unsuspended. *Id.* at 1253–54.

65. *Stanislaw II*, 65 A.3d at 1254–55. The court compared Stanislaw's case to four cases: (1) *State v. Archer*, 25 A.3d 103 (Me. 2011); (2) *State v. Reese*, 991 A.2d 806 (Me. 2010); (3) *State v. Keene*, 927 A.2d 398 (Me. 2007); and (4) *State v. Dumas*, 997 A.2d 760 (Me. 2010). *Stanislaw II*, 65 A.3d at 1254–55. The court concluded that these four cases involved crimes more violent than Stanislaw's, where the victim "either lost or nearly lost his or her life." *Id.* at 1255. To sentence Stanislaw to nearly the same unsuspended term as the defendants in these four cases "suggests the disproportionate nature of Stanislaw's sentence." *Id.*

66. *Stanislaw II*, 65 A.3d at 1255. The court then turned to comparing cases involving more serious sexual assault. *Id.* The court compared Stanislaw's case to five cases under this category: (1) *State v. Soucy*, 890 A.2d 719 (Me. 2006); (2) *State v. Gould*, 43 A.3d 952 (Me. 2012); (3) *State v. Dion*, 928 A.2d 746 (Me. 2007); (4) *State v. Lewis*, 711 A.2d 119 (Me. 1998); and (5) *State v. Prewara*, 687 A.2d 951 (Me. 1996). *Stanislaw II*, 65 A.3d at 1255. Stanislaw was guilty of committing a sexual act, while the defendants in these five cases were convicted of gross sexual assault. *Id.* Regardless of this distinction, Stanislaw's unsuspended sentence was longer than most of the unsuspended sentences of these five defendants. *Id.* The court concluded, "[t]his inconsistency suggests a lack of proportionality." *Id.*

sexual contact.[67] The State, to no avail, argued that Stanislaw's overall sentence should be compared to the overall sentences in the cases it presented *without* accounting for the fact that large portions of the sentences in the comparison cases were suspended.[68] The court rejected the State's argument and pointed to the irrefutable difference between a suspended sentence and unsuspended sentence, and concluded that overlooking this difference would result in an incomplete evaluation.[69]

The court, in its conclusion regarding the comparisons of cases, stated that Stanislaw's offenses should be assessed by what they *did not* involve, and although his actions were "appalling," they "did not involve the use of physical force or a weapon, threats of violence, or any other factors that warrant an ultimate sentence imposing an unsuspended twenty-seven-year term of imprisonment."[70]

Thus, the court held Stanislaw's overall sentence to be grossly disproportionate and overly excessive; the sentencing court erred by failing to consider whether the overall, unsuspended portion of Stanislaw's sentence should have been subject to an additional period of suspension to ensure that it was proportional to the unsuspended sentences of other offenders after completing a proper *Hewey* analysis.[71]

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67. *Stanislaw II*, 65 A.3d at 1255–56. In its last set of cases, the court compared cases involving unlawful sexual conduct, the same crime that Stanislaw was convicted of. *Id.* The court turned to four cases: (1) *State v. Severy*, 8 A.3d 715 (Me. 2010); (2) *State v. Lavoie*, 1 A.3d 408 (Me. 2010); (3) *State v. Graham*, 998 A.2d 339 (Me. 2010); and (4) *State v. Moores*, 910 A.2d 373 (Me. 2006). *Stanislaw II*, 65 A.3d at 1256. After review, the court concluded that "Stanislaw's term of imprisonment is roughly four and a half to eight times longer" than the sentences imposed on these defendants. *Id.*

68. *Stanislaw II*, 65 A.3d at 1254.

69. *Id.* The court explained that the State's comparison is not reasonable because a prison term is not the equivalent of a suspended prison term and probation. *Id.* Stanislaw's sentence resulted in twenty-seven years of unsuspended incarceration, which was three to nine times longer than the unsuspended sentences imposed in any of the cases chosen by the State as being comparable. *Id.* The court concluded that Stanislaw's sentence, in this category, appeared grossly disproportionate. *Id.*

70. *Id.* at 1256. ("[A]lthough Stanislaw's total sentence is within the parameters of the sentencing statutes, the unsuspended portion of the period of imprisonment is grossly disproportionate to the crimes he committed when compared to the sentences imposed for the same or similar crimes, and some more serious crimes.").

71. *Id.* The court specifically explained that:

> In short, to avoid an overall sentence in this case that will result in "manifest and unwarranted inequalities among the sentences of comparable offenders," 15 M.R.S. § 2154(3), and fails "[t]o eliminate inequalities in sentences that are unrelated to legitimate criminological goals," 17-A M.R.S. § 1151(5), the court must sentence Stanislaw to an unsuspended term of imprisonment that is shorter than sentences imposed on defendants who have raped, kidnapped, or killed their victims.

Id. at 1256–57 (alteration in original).

The court, therefore, added a final step in the sentencing analysis by analyzing the unsuspended portion of Stanislaw's sentence.

In a 4-3 decision, the Supreme Judicial Court of Maine vacated the sentence and remanded to Hancock County Superior Court for resentencing, holding that by imposing a sentence that included twenty-seven unsuspended years of incarceration, Hancock County Superior Court had exceeded its discretion because the overall sentence was far out of line with sentences of other defendants convicted of unlawful sexual contact.[72] The court indicated that the twenty-seven-year sentence was closer to the length of incarceration that had been ordered for other defendants who were found guilty of murder or attempted murder.[73] In terms of other sex crimes, the decision indicated, "Stanislaw's unsuspended prison term is longer, sometimes significantly so, than those imposed in many gross sexual assault cases."[74]

In his second appeal, Stanislaw requested that the case be remanded to a justice other than Cuddy for resentencing. However, the court declined his request.[75] The four justices in the majority added that because Stanislaw's sentence has now been vacated twice and because of the need to resolve the case for the sake of the young victims, instead of reassigning the case to another justice, they *advised* that a term equal to nine to thirteen years behind bars—"one-third to one-half of the current unsuspended sentence"—might be more appropriate.[76] By reassigning to a different justice, there still remained the risk that Stanislaw would be over-sentenced, whereas if a sentence is proposed on remand instead, the risk is minimized.

B. Concurrence in Part and Dissent in Part[77]

Although the 4-3 decision seems to convey the idea that the panel disagreed about the constitutional proportionality of the sentence, in reality, the issue leading to the close decision was due to the way the majority handled the remand requirements, specifically the suggested sentencing.

Chief Justice Saufley concurred with the majority's opinion that the sentence be vacated and that the case be remanded to the trial court.[78]

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72. *Id.* at 1257.
73. *Id.* at 1254–55.
74. *Stanislaw II*, 65 A.3d at 1255.
75. *Id.* at 1257.
76. *Id.*
77. *Id.* at 1257–60 (Saufley, C.J., concurring in part and dissenting in part).
78. *Id.* at 1257.

More importantly, Chief Justice Saufley concurred with the "final step" addition to the *Hewey* analysis, stating that it is within the trial court's responsibility to "assure that consecutive sentences are accompanied by a final review for proportionality."[79] Therefore, the panel was in agreement that the twenty-seven-year incarceration period was disproportionate.

Chief Justice Saufley, however, dissented with the majority's opinion regarding the suggested sentencing.[80] Chief Justice Saufley stated that "it is affirmatively not the role" of this court "to set sentences."[81] Furthermore, Chief Justice Saufley opined that the suggested sentence should not be read to impose firm guidelines on the trial court.[82] Chief Justice Saufley stated that if the guideline is read as a mandate, the court would be overstepping its authority.[83] Instead, the court would be within its authority by recognizing and mandating that a "thorough background investigation"[84] be prepared prior to the resentencing, ensuring "accurate application of the sentencing factors, facilitating rehabilitation when that is possible, promoting respect for the law, and promoting the development of rational and just sentencing criteria."[85]

V. AUTHOR'S ANALYSIS

A. Analysis of the Majority and Dissenting Opinions

The Supreme Judicial Court of Maine, in *Stanislaw II*, set a precedent for sentencing standards throughout Maine. In essence, the court created a new, final step in the sentencing analysis under which a sentencing court must assess whether or not the overall sentence, particularly the unsuspended portion determined under the *Hewey* analysis, is constitutionally proportional to the crimes committed. This "final step" is actually a two-part analysis in which the court first decides whether the severity of the sentence is proportional to the severity and seriousness of the offense. If the comparison creates an inference of disproportionality, the sentencing court must compare the sentence to

79. *Id.*

80. *Stanislaw II*, 65 A.3d at 1257–60 (Saufley, C.J., concurring in part and dissenting in part).

81. *Id.* at 1258.

82. *Id.*

83. *Id.*

84. *Id.* at 1259.

85. *Id.* (citing ME. REV. STAT. ANN. tit. 15, § 2154 (2014)). The purpose of sentence review is to correct "sentences imposed without due regard for the factors set forth in this chapter," to "promote respect" for the law, to rehabilitate the offender, and to "promote the development and application" of sentencing that is "both rational and just." § 2154.

sentences received by other offenders, focusing on the unsuspended portions of those sentences, to determine whether the sentence derived from a proper *Hewey* analysis is grossly disproportional. If gross disproportionality is found, the court must suspend an additional portion of the sentence to bring it within a proper range in accordance with sentences imposed on other Maine offenders in comparable situations. Following *Stanislaw II*, not only will sentencing courts have to follow the mandated analysis for each count against a defendant, they will have to go one step further by including an overall analysis of the unsuspended sentence.

Although this "final step" does pose a problem in itself by adding another stage in the analysis, the benefits outweigh the risks. It is true that adding more aspects to an analysis may lengthen the sentencing process and slow down a criminal docket. However, by having a more sound, thorough sentencing analysis, the court minimizes the possibility of error and thus, the likelihood of an appeal, as well. Moreover, even if appeals are raised after a sentence is imposed, the likelihood that the sentence is overturned after a proper, more thorough sentencing analysis is performed, is also diminished. Thus, the short-term delay is worth the long-term advantage because a more comprehensive analysis, whether for sentencing or otherwise, creates a more reliable judicial system and creates a more trustworthy, dependable relationship between the people and the judiciary.

In order to achieve sentencing proportionality, there must be a balance between two components: the seriousness of the offense and the severity of the sentence. The court in *Stanislaw II* aimed to achieve this balance. However, in order to decide the seriousness of the offense and the severity of the sentence, it is important to look at all relevant elements to ensure that a proper balance between the two is achieved. The majority properly looked to relevant, comparable categories of cases to determine the severity of the sentence, and looked to Stanislaw's actions in comparison to the actions of defendants in these comparable cases. Within its proportionality analysis, however, the majority failed to consider the danger posed by the accused and the term of imprisonment to which he was sentenced, something the dissent noted. Nevertheless, this oversight was not a fatal flaw to the soundness of the majority's opinion. The majority appropriately considered rehabilitation, deterrence, prevention, and retribution, which in a sense encompasses the danger posed by the Defendant.

Constitutional provisions on their own do not always ensure that proportionality is maintained in sentencing, but they do ensure a certain degree of proportionality and are needed in order to set bounds. However, when a constitutional provision is not enough to ensure proportionality,

the judiciary should step in. Ultimately, in some situations a genuine protection of proportionality in sentencing is left up to judicial determination.[86] As demonstrated by *Stanislaw I* and *Stanislaw II*, even judicial determination leaves room for improvement. The Supreme Judicial Court of Maine took appropriate steps, after realizing that the current sentencing test, the *Hewey* analysis, was deficient in ensuring proportionality. After the court determined there was an inference of gross disproportionality, it went above and beyond the *Hewey* analysis, as it stood at the time, to determine whether the sentence was just and proportionate. The court acted appropriately because, even when the trial court did not err in its sentencing analysis, an improper sentence resulted. The inadequacy of the analysis was not length of the sentence imposed, but the unsuspended portion of it. The sentence imposed was technically within the statutory limits allowed for such crimes, but when looking to the totality of the circumstances, it was disproportionate to the crime committed here. This is a clear example of a situation in which the applicable law and reality do not properly correspond to reach a fair and just result. Furthermore, since the court did not grant Stanislaw's request to order a reassignment to a different justice, recommending an appropriate range for an unsuspended sentence is even more appropriate in this case since the presiding justice sentenced Stanislaw to the same, excessive term twice.

Both the dissent and the majority agree that sentencing should not be as punitive as possible. Instead, there should be a sense of proportion, a punishment to fit the crime. Sentencing guidelines should reflect contemporary, reasoned judgment.[87] Professor Herbert Wechsler notes that criminal statutes should be updated regularly to ensure efficiency.[88] However, when they are not updated regularly, or when there seems to be a disjunction between the law and reality, the courts should be allowed to step in to ensure such efficiency.[89]

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86. *See* Thomas A. Balmer, *Some Thoughts on Proportionality*, 87 OR. L. REV. 783, 787 (2008) ("The method . . . of inflicting punishment ought always to be proportioned to the particular purpose it is meant to serve, and by no means to exceed it . . . ." (alterations in original) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 12 (1769))).

87. *See* Herbert Wechsler, *The Model Penal Code and the Codification of American Criminal Law*, *in* CRIME, CRIMINOLOGY, AND PUBLIC POLICY: ESSAYS IN HONOR OF SIR LEON RADZINOWICZ 419, 424–25 (Roger G. Hood ed., 1974).

88. *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 583 n.277 (2011) (citing *Model Penal Code Conference Banquet Remarks and Responses*, 19 RUTGERS L.J. 855, 864 (1988) (remarks of Herbert Wechsler)).

89. *See* Gregory S. Schneider, Note, *Sentencing Proportionality in the States*, 54 ARIZ. L. REV. 241, 243 (2012) ("[T]here is an important public interest in exercising [judicial] power: ensuring a fundamental sense of fairness and justice in the criminal system."); *see*

The dissent, however, properly noted that this "final step" approach leaves its own grey area. Mary Kellett, the prosecutor who has handled Stanislaw's case, also agreed. In an interview, Ms. Kellett stated that sentencing "is the prerogative of the presiding judge, as long as it is within the statutory limits."[90] Ms. Kellett further reasoned that "[c]omparing one case to another . . . can be difficult because extenuating factors vary greatly from one seemingly similar case to the next."[91] According to Ms. Kellett, Justice Cuddy did not think it was safe to have Stanislaw out of prison.[92] The dissent's discussion of the factual issues in Stanislaw's past is akin to the statements of Ms. Kellett regarding Justice Cuddy's opinion that it was not safe for Stanislaw to be out in the public. The dissent noted particular factual issues in this case that were not taken into account in the majority's comparison analysis: "Stanislaw's prior felony child sexual abuse conviction; his highly skillful cultivation of the parents' trust; the number of victims . . . and the effect on the child victims and the community of a person who has the intellect, but not the moral fiber, to recognize that his behavior is abhorrent."[93] Chief Justice Saufley was of the opinion that these factual findings are unique and incomparable to other cases. Furthermore, they should be incorporated into a sentencing analysis on remand, and for this reason, sentencing should be within the sole discretion of the sentencing court. However, as previously noted, since the majority did not reassign the case to another judge, not prescribing a recommended sentence would pose a serious threat to Stanislaw. The dissent is correct in that there needs to be a precedent set for future cases that will be affected by this analysis, and in this case specifically. However, from the facts available in this appeal—the fact that Stanislaw did not engage in any sexual penetration, and the fact that this is Stanislaw's final appeal—the majority's recommendation of a maximum unsuspended prison term was proper.

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also Imer B. Flores, *Proportionality in Constitutional and Human Rights Interpretation*, GEO. U. L. CENTER 83, 110 (2013), *available at* http://scholarship.law.georgetown.edu/facpub/1168/ (noting Justice Anthony Kennedy's concurring opinion in *Texas v. Johnson*, "sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result" (quoting Texas v. Johnson, 491 U.S. 397, 420–21 (1989) (Kennedy, J., concurring))).

90. Bill Trotter, *Blue Hill Sex Offender's Sentence Too Long, Maine Supreme Court Rules Again*, BANGOR DAILY NEWS (May 8, 2013), https://bangordailynews.com/2013/05/08/news/hancock/court-again-vacates-blue-hill-sex-offenders-sentence.

91. *Id.*

92. *Id.*

93. *Stanislaw II*, 65 A.3d 1242, 1258 (Me. 2013) (Saufley, C.J., concurring in part and dissenting in part).

B. Proportionality and Policy Considerations

Ensuring proportionality is most important from a constitutional standpoint because it is a safeguard for fundamental human rights.[94] However, there are considerations to be made beyond that. Ensuring proportionality in Maine is especially important, from a policy perspective, because its prisons have reached capacity.[95] In the United States generally, prison populations have been growing historically, which puts pressure on public budgets.[96] This pressure can raise the issue of where taxpayers' money is being spent within their community. It is arguable that a taxpayer would rather his money be spent on public school education, for example, than on housing over-sentenced criminals.

Sentencing proportionality is also important when considering the judicial system as a whole. When a trial court properly applies the *Hewey* analysis as it stands post-*Stanislaw II*, the court puts itself in a better position of minimizing error, thus minimizing the possibility of an appeal. In addition, the people of Maine should be able to trust their judicial system. By over-criminalizing and over-sentencing, the judicial system fails the people and instills a sense of abuse of power, in its ordinary definition, and leaves citizens of the state with a failed confidence in the legal system.[97]

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94. *See* Nancy Gertner, *On Competence, Legitimacy, and Proportionality*, 160 U. PA. L. REV. 1585, 1586 (2012) (discussing that sentencing proportionality analyses are an essential part of international human rights adjudication and furthermore stating that "[w]hile the use of proportionality analysis is widespread in constitutional courts throughout the world, sentencing is an area in which it is perhaps the most critical and has the oldest pedigree"); *see also* Flores, *supra* note 89, at 106 (discussing Justice Stephen Breyer's dissent in *District of Columbia v. Heller*, stating that Justice Breyer advocates for making proportionality a "central method for the protection of rights and the justification of its limitations").

95. *See* BRIAN ALBERT, NAT'L ASS'N COUNTIES, *State Prisoners in County Jails* 9 (2010), *available at* http://www.naco.org/newsroom/pubs/Documents/Health,%20Human%20Services%20and%20Justice/State%20Prisoners%20in%20County%20Jails%20Updated.pdf ("[A]ll fifteen of Maine's county jails are overcrowded, due . . . [to] harsher penalties over the past decade. Some jails are over capacity because of their housing of inmates from other, more seriously crowded, jails."); *see also* Schneider, *supra* note 89, at 247 (noting that the United States now leads the world in number of prisoners and length of their sentences).

96. Michael Tonry, *Proportionality, Parsimony, and Interchangeability of Punishments*, *in* WHY PUNISH? HOW MUCH?: A READER ON PUNISHMENT 217, 218 (Michael Tonry ed., 2011).

97. *See* John G. Malcom & Norman L. Reimer, *Over-Criminalization Undermines Respect for Legal System*, WASH. TIMES (Dec. 11, 2013), http://www.washingtontimes.com/news/2013/dec/11/malcolmreimer-over-criminalization-undermines-resp ("[O]ver-criminalization can . . . undermine the public's respect for the integrity and fairness of our criminal justice system.").

Furthermore, when a punishment no longer fits a crime, there is a risk that a criminal will disregard the consequences by increasing the crime, because regardless of the degree of his actions, the punishment will be just as grave.[98] A harsh, or harsher than necessary, sentencing does not always achieve the goals of punishment. Though it is debatable that criminals are not rational actors, in reality there are situations where someone is convicted of a crime for which he committed when acting out of character, as opposed to crimes convicted by reoffenders or crimes of a more heinous nature. Furthermore, studies show that the milder a sanction, the more swift and certain the enforcement; the harsher the punishment, the more safeguards necessary to avoid misapplication.[99]

VI. CONCLUSION

It is undisputed that Maine has a compelling interest in protecting its victims and determining how its offenders should serve their respective sentences while at the same time preserving all of the state constitution's goals of punishment.[100] The court's decision in *Stanislaw II* effectively

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98. *See* Note, *supra* note 34, at 978 ("[I]f theft and murder are both punished by life imprisonment, what incentives does the thief have not to murder the officer who discovers him?").

99. *Crime and Politics: The Velvet Glove: Why the Soft Approach Sometimes Works*, ECONOMIST (Oct. 22, 2009), http://www.economist.com/node/14699623.

> States that execute murderers do so only after decades of appeals. This costs millions in legal fees. So they hardly ever do it, which means it is not much of a deterrent.
>
> It turns out that milder sanctions can be swifter and more certain. For example, in Hawaii, until recently, felons ignored the terms of their probation because the only punishment available was a harsh one: being sent back to prison for the remainder of their term . . . . Courts and probation officers were too swamped to handle the necessary paperwork and rebut the legal challenges to such harsh penalties. So violators typically got off scot free. This led people to conclude that they could misbehave with impunity. The chaos only ended when a judge started handing out instant sentences of a week or so. The certain prospect of spending a few days behind bars straight away made most of the probationers behave.

Id.

100. *Stanislaw II*, 65 A.3d 1242, 1252 (Me. 2013) (citing ME. REV. STAT. ANN. tit. 17-A, § 1151 (2014)). The court noted that Maine's criminal code discusses eight goals:

> (1) [t]o prevent crime through the deterrent effect of sentences, the rehabilitation of convicted persons, and the restraint of convicted persons when required in the interest of public safety;
>
> (2) [t]o encourage restitution in all cases in which the victim can be compensated and other purposes of sentencing can be appropriately served;

determined that the *Hewey* analysis, the sentencing analysis at the time, was not enough to preserve these vital aspects of Maine's justice system. As such, the Supreme Judicial Court of Maine added a final step in the analysis to promote constitutional proportionality and better serve all goals of the justice system and protecting its citizens. By analyzing each count against a defendant separately under the *Hewey* analysis, then determining the proportionality of the overall, unsuspended sentence by comparison to cases in the aforementioned categories, the Supreme Judicial Court of Maine maximizes the effectiveness and efficiency of the sentencing system, while protecting individuals' constitutional rights.

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(3) [t]o minimize correctional experiences which serve to promote further criminality;
(4) [t]o give fair warning of the nature of the sentences that may be imposed on the conviction of a crime;
(5) [t]o eliminate inequalities in sentences that are unrelated to legitimate criminological goals;
(6) [t]o encourage differentiation among offenders with a view to a just individualization of sentences;
(7) [t]o promote the development of correctional programs which elicit the cooperation of convicted persons; and
(8) [t]o permit sentences that do not diminish the gravity of offenses . . . .

Id. (quoting § 1151).