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## One Step Forward, One Step Back: Emergency Reform and Appellate Sentence Review in Maine

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# ONE STEP FORWARD, ONE STEP BACK: EMERGENCY REFORM AND APPELLATE SENTENCE REVIEW IN MAINE

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Anyone can try a case. That is as easy as falling off a log. The difficulty comes in knowing what to do with a man once he has been found guilty.

—Justice McCardle<sup>1</sup>

## I. THE PROBLEM GENERALLY: THE NEED FOR SENTENCE REVIEW

Perhaps in no other area of the law is a trial court's power greater than when it is given the task of criminal sentencing. Historically and traditionally, the trial court judge has been given the widest latitude of discretion in determining a proper sentence once a criminal defendant has been found guilty.<sup>2</sup> Indeed, the task of sentencing has been deemed a matter of discretion rather than a question of law.<sup>3</sup> As a result, trial judges historically have not articulated reasons for the sentences that they impose. However, with very few standards or criteria to measure the appropriateness of their decisions, trial judges have been left to rely on little more than their individual biases and private notions of justice.

When one examines the number of possible factors to consider in setting punishment, the wide discretion of the trial court can become problematic. Consider the hypothetical case of a child molester who lures a ten-year-old girl into the woods, forces her to perform sexual acts on him, but does not threaten or physically beat her. The defendant has one prior conviction for unlawful sexual contact of a minor and a history of psychological problems. He is convicted of gross sexual assault, which carries a maximum sentence of forty years, as mandated by the Legislature. What is the appropriate length of punishment for the child molester? Any of the following factors might be considered important: the nature and seriousness of

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1. Simon E. Sobeloff, *The Sentence of the Court: Should There Be Appellate Review?*, 41 A.B.A. J. 13 (1955) (quoting Justice McCardle, an English judge).

2. Simon E. Sobeloff, former Solicitor General of the United States and Chief Judge of the Fourth Circuit, has pointed out the irony of our criminal justice system, where the defendant is afforded a variety of protections at every stage of the trial—the right to be represented by counsel, the exclusion of hearsay, the right of the accused to be confronted with witnesses against him, and the right not to take the stand without comment by the prosecutor—yet no such protections exist when the defendant goes before the sentencing judge to be sentenced. Judge Sobeloff commented, "It has been very impressive to me that the law is so solicitous of the defendant in safeguarding his rights at every stage of the trial before verdict and yet leaves him almost completely without protection when he stands before the judge to be sentenced." *Id.* at 13.

3. Daniel E. Wathen, *Disparity and the Need for Sentencing Guidelines in Maine: A Proposal for Enhanced Appellate Review*, 40 ME. L. REV. 1, 5 n.10 (1988) [hereinafter *Disparity*]. However, as Justice Wathen points out, the fact that sentencing may require a discretionary judgment does not mean that it should escape review altogether, since in other areas of the law discretionary judgments are subject to a deferential standard of review (i.e., abuse of discretion). *Id.* See also MARVIN E. FRANKEL, CRIMINAL SENTENCES—LAW WITHOUT ORDER 83-84 (1972).

his conduct; his prior criminal conviction; his history of psychological problems; and the impact of the assault on the ten-year-old victim. For example, because of the seriousness of the offense, the impact on the victim, and defendant's prior history of child molestation, the need to protect the public by isolating him from society might suggest that a substantial period of incarceration is appropriate. Yet, in light of the defendant's psychological problems, the absence of extreme violence in his acts, and the absence of an extensive criminal record, rehabilitation might be ineffective unless a lesser period of incarceration is imposed.

Thus, in order to determine the appropriate length of punishment, the sentencing judge must decide which sentencing goal is primary, as well as the relative weight of the secondary goals. However, while Judge A might consider victim impact to be relatively unimportant in this case, Judge B might consider it the primary factor in setting punishment. Likewise, Judge C could believe that the nature of the conduct is particularly egregious in this case; by contrast, Judge D might consider the fact that the defendant did not physically harm the child to be a mitigating circumstance requiring a less severe sentence than that imposed by Judge C. All four judges may differ on what role the defendant's prior criminal conviction should play in determining his sentence—and so on.

The above hypothetical illustrates the basic, philosophical problem of sentencing: What factors should be considered in determining a sentence, and how should these factors interact to produce specific sentences in particular cases? Furthermore, who should have the authority to decide the answer to this question? As the hypothetical shows, individual trial judges, each with their own sentencing philosophies, would almost inevitably arrive at very different sentences for the child molester. Yet because of the trial judge's virtually unlimited discretion to determine the length of a sentence, each sentence would also be upheld as proper as long as it fell within the broad statutory limits set by the Legislature.

Such a system, vesting all sentencing discretion in the trial judge, has been criticized as leading to gross, unexplainable disparities in sentences.<sup>4</sup> Although in reality only one trial judge sentences the offender (or offenders) in any given case, disparity occurs in the system when similar offenders committing similar offenses receive widely disparate sentences from different judges. For example, unwarranted disparity exists when two first offenders, each carrying a gun, enter a bank, steal \$10,000 from a teller, are arrested, convicted, and sentenced—one of them to two years in prison by one judge, the other to ten years by another. It is this inter-judge dispar-

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4. See, e.g., Sobeloff, *supra* note 1, at 13; Sobeloff, *Appellate Review of Sentences*, 32 F.R.D. 249, 273 (1962) [hereinafter *Appellate Review of Sentences*].

ity in sentencing which works harm to the criminal justice system, as members of society lose faith in the ability of the system to produce a just and rational result.

Hence, critics argue that there is a need to further structure and govern the exercise of discretion by the sentencing judge through the creation of sentencing guidelines. There are two primary mechanisms for creating sentencing guidelines: legislative enactment, and the development of a common law body of sentencing guidelines through the appellate process. Although an in-depth comparison of a system of legislatively-determined sentencing guidelines with that of appellate review of sentences is beyond the scope of this Comment, some basic points can be made.<sup>5</sup> Typically, under a legislatively-created sentencing guideline system, a sentence is determined by applying the offender's circumstances to a grid which takes into account two variables: the nature of the offender's conduct, and the background and character of the offender.<sup>6</sup> The range of sentence length depends on where the sentence for that particular crime is located on the grid, and the location of a sentence on the grid depends in turn on a number of fact-specific criteria, such as the presence or absence of a weapon, the amount of drugs, if any, in possession, or a prior criminal record. Anticipating all the possible factual situations which should be taken into consideration in determining a proper sentence and putting them in the form of sentencing guidelines are monumental tasks, ill-suited to a legislative body.<sup>7</sup> In addition, legislatively-created sentencing guidelines have been criticized for being too rigid, mechanical, and inflexible;<sup>8</sup> for removing the sentencing judge's discretion and replacing it with even more prosecutorial discretion;<sup>9</sup> for causing heavy backlogs and delay; and

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5. For a discussion of the benefits and drawbacks of the Federal Sentencing Guidelines model, a system of legislatively-determined guidelines, see, e.g., Charles J. Ogletree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938 (1988); Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883 (1990); Stephen G. Breyer and Kenneth R. Feinberg, *The Federal Sentencing Guidelines: A Dialogue*, 26 CRIM. L. BULL. 5 (1990).

6. An example of a system of sentencing guidelines created through the legislative and administrative process is the federal model adopted in 1987. See *Sentencing Guidelines for United States Courts*, 52 Fed. Reg. 18,046 (May 13, 1987). For a more thorough explanation of how the Federal Sentencing Guidelines operate, see also *infra* notes 46-54 and accompanying text.

7. *Disparity*, *supra* note 3, at 3.

8. See, e.g., *id.*

9. See, e.g., Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 4 FED. SENTENCING REP. 142, 143 (1991); William W. Schwarzer, *Judicial Discretion in Sentencing*, 3 FED. SENTENCING REP. 339, 340 (1991); Frank S. Gilbert, *A Probation Officer's Perception of the Allocation of Discretion*, 4 FED. SENTENCING REP. 109, 109-10 (1991). Under the Federal Sentencing Guideline model, if the Guidelines are rigorously applied there is little opportunity to plea bargain because the defendant will be able to calculate his punishment well before sentencing and thus

for needing constant refinement and oversight by an administrative body.<sup>10</sup>

By contrast, a system which creates sentencing guidelines through appellate review utilizes an existing system—the judiciary—to develop a body of common law principles which evolves step by step through the process of deciding actual cases. Appellate review of criminal sentences can contribute significantly to the fair imposition of sentences by providing a second look at the sentence—in effect, a check upon the exercise of trial court discretion. By examining the propriety of the sentence and correcting improper sentences, appellate review can provide a remedy for the problem of sentencing disparity. Perhaps more importantly, a system of appellate sentence review has the potential to create a body of rational and just sentencing criteria through case law which, through continued application, leads to more fair and consistent sentencing practices by trial judges.

Thus, appellate review of sentences may be seen as a compromise, striking an appropriate balance between the rigidity of statutory guidelines and the inevitable inconsistency of individual sentencing judges exercising unqualified discretion. As Judge Sobeloff, former Chief Judge of the Fourth Circuit, commented: “Equally to be avoided are two extremes: on the one hand the undeviating rigidity of statutes and on the other unappealable and sometimes capricious and inflamed sentencing by a single [person] on the bench.”<sup>11</sup>

Maine, like many other states,<sup>12</sup> has chosen the judiciary as the body to structure the exercise of trial court discretion in sentencing matters. In 1965, the Legislature enacted a procedure of limited ap-

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will have little incentive to enter a guilty plea (and every incentive to insist on going to trial). This situation has prompted prosecutors to “bend the rules a little bit” by engaging in fact bargaining (i.e., stipulating to certain facts—such as a smaller quantity of drugs in possession than was actually found—in return for cooperation) and charge bargaining (i.e., dropping certain charges in striking a deal). *Id.* These practices have been criticized as producing more sentencing disparity, which was exactly what the Federal Sentencing Guideline system was intended to prevent. *Id.*

10. See, e.g., *Disparity*, *supra* note 3, at 3.

11. Sobeloff, *supra* note 1, at 17.

12. See ALASKA STAT. § 12.55.120 (1990); ALASKA R APP P 215(a)(1); ARIZ REV STAT ANN. § 13-4033 (1989); CAL. PENAL CODE § 1237 (West 1981); COLO REV STAT § 18-1-409(1) (1986); CONN. GEN. STAT. ANN. § 51-195 (West 1985); GA CODE ANN § 17-10-6(A) (Michie 1990); HAW REV STAT. § 641-11 (1985); IDAHO CODE § 1-204 (1990); IDAHO APP. R. 11(c)(6); ILL. ANN STAT ch. 38, para. 1005-5-4.1 (Smith-Hurd Supp. 1991); IND. R. APP. REV. SENTENCES I; IOWA CODE ANN § 814.6(1)(a) (West 1979); MD ANN. CODE of 1957 Art. 27, § 645JA (1992); MASS GEN LAWS ANN, ch. 278, § 28A, 28B (West 1981); MINN. STAT. ANN § 244.11 (West Supp. 1992); MONT CODE ANN § 46-18-903 (1990); NEB. REV. STAT § 29-2308 (1989); NH REV STAT ANN § 651:58 (1986); N.J. STAT. ANN. § 2C:44-7 (West 1982); NY CRIM PROC LAW § 450.10(2) (McKinney 1983 & Supp. 1992); N.C. GEN. STAT § 15A-1444 (1988); TENN CODE ANN § 40-35-402 (1990); WIS. STAT. ANN § 974.02 (West 1985) *construed in Nelson v. State*, 151 N.W.2d 694, 705-06 (Wis. 1967).

pellate review of sentences. Under that system, a three-judge panel was restricted to correcting only the most extreme sentences on review, and thus it largely failed to develop any useful precedent on the law of sentencing.<sup>13</sup>

Accordingly, sentencing in Maine remained a matter of nearly absolute discretion and unreviewable power by the sentencing judge.<sup>14</sup> With the adoption of the Maine Criminal Code in 1976,<sup>15</sup> parole and indeterminate sentences were abolished, giving the sentencing judge an even less reviewable degree of discretion in sentencing.<sup>16</sup> After abolition of parole and indeterminate sentences, virtually the only limitation placed on the sentencing judge as to length of sentence was a broad range of sentences set forth in the Maine Criminal Code based on the severity of the offense.<sup>17</sup> In an attempt to further guide the exercise of the sentencing judge's discretion, the Legislature also enacted a list of general sentencing purposes in 1976. These purposes include the following:

1. To 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. To encourage restitution in all cases in which the victim can be compensated and other purposes of sentencing can be appropriately served;
3. To minimize correctional experiences which serve to promote further criminality;
4. To give fair warning of the nature of the sentences that may be imposed on the conviction of a crime;
5. To eliminate inequalities in sentences that are unrelated to legitimate criminological goals;
6. To encourage differentiation among offenders with a view to a

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13. See *infra* note 37 and accompanying text.

14. See *Disparity*, *supra* note 3, at 5. See also *State v. Allison*, 427 A.2d 471, 475 (Me. 1981) (Law Court's appellate role is limited to review of the sentence's legality).

15. ME. REV. STAT. ANN. tit. 17-A, §§ 1-1357 (West 1983 & Supp. 1990-1991).

16. An indeterminate sentence leaves the length of imprisonment open to continual re-evaluation by an administrative body. Melvyn Zarr, *Sentencing*, 28 ME L REV 117, 117 (1976). In a determinate sentence, the sentencing judge has the power to fix the term of imprisonment within a range; the judge's discretion is enhanced because the sentence may no longer be changed or reviewed by the Parole Board or other administrative agency. See also *Disparity*, *supra* note 3, at 7.

17. In 1976, the Maine Criminal Code established a classification system whereby each crime carries a maximum term of imprisonment. Five classes of offenses were created, from A to E. A Class A offense carried with it a maximum period of imprisonment of twenty years (this maximum was increased to forty years in 1988 by P.L. 1987, ch. 808); Class B offenses are punishable by up to ten years imprisonment; a Class C offense has a maximum period of imprisonment of five years; Class D crimes may result in a maximum of one year imprisonment; and Class E offenses carry a maximum six-month sentence. ME. REV. STAT. ANN. tit. 17-A, § 1252(2) (West 1983). In addition, for murder, the most serious offense, the authorized range of sentence is from twenty-five years to life imprisonment. *Id.* § 1251.

just individualization of sentences;

7. To promote the development of correctional programs which elicit the cooperation of convicted persons; and

8. To permit sentences which do not diminish the gravity of offenses, with reference to the factor, among others, of the age of the victim.<sup>18</sup>

However, these purposes of sentencing were also insufficient to guide the discretion of the trial judge because, in determining a sentence, the judge normally seeks to achieve more than one of the multiple sentencing objectives above—yet many of these sentencing purposes are in direct conflict with each other. For example, the aim of rehabilitating the offender often conflicts with that of deterring others; similarly, the goal of differentiation of offenders in order to individualize sentences may be at odds with eliminating inequalities in sentences. In addition, individual trial judges differ on the relative weight to give to each sentencing objective, and even on whether the priorities should change from case to case. Finally, there is even disagreement over whether a particular factor is a mitigating or aggravating circumstance.<sup>19</sup> Therefore, without more structure in the sentencing process, it was difficult under the 1976 enactments for trial judges to reach consistent sentences for similar offenses committed by similar offenders.

Thus, dissatisfaction with the system's ability to reduce unwarranted sentencing disparity continued, notwithstanding the limited appellate review system and the purposes of sentencing set forth in the Criminal Code.<sup>20</sup> In 1988, perhaps in response to this perceived discontent, Chief Justice Daniel E. Wathen, then Associate Justice of the Maine Supreme Judicial Court, proposed to expand the appellate sentence review procedure to a discretionary review by the full Supreme Judicial Court, sitting as the Law Court.<sup>21</sup> The proposal urged creation of an affirmative duty on the Law Court to create a common law body of sentencing guidelines.<sup>22</sup> The Legislature adopted Justice Wathen's proposal in 1989; but less than two years later the Legislature passed emergency legislation again reforming

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18. ME. REV. STAT. ANN. tit. 17-A, § 1151 (West 1983 & Supp. 1991-1992). In 1976, the original language in the eighth factor read as follows: "To permit sentences which do not diminish the gravity of offenses." ME. REV. STAT. ANN. tit. 17-A, § 1151 (West 1983). The language was modified in 1983 to include "with reference to the factor, among others, of the age of the victim." ME. REV. STAT. ANN. tit. 17-A, § 1151 (West Supp. 1991-1992).

19. *Disparity*, *supra* note 3, at 7. Justice Wathen cited the example of whether intoxication mitigates or aggravates the seriousness of an unrelated offense. *Id.*, n.16.

20. In 1983, for example, the Legislature created the Maine Sentencing Guidelines Commission, finding that "disparate sentences for similar crimes by similarly situated defendants continue to occur and undermine the principles of the penal system." P. & S.L. 1983, ch. 53, § 1.

21. *Disparity*, *supra* note 3, at 35.

22. *Id.* at 34.



the appellate review statute.

The frequency of legislative activity in the relatively short history of appellate review of criminal sentences illustrates the difficulty Maine has experienced in determining the proper role of the appellate court in sentencing. The purpose of this Comment is to examine the role of the appellate court in the sentencing process in Maine, and specifically to evaluate the effectiveness of Maine's appellate sentence review procedure in reducing disparity in sentences and in developing a coherent, rational body of law on sentencing policy.

Part II of this Comment will present a brief history and overview of appellate review of sentences in Maine prior to 1989, and will examine the changes in the appellate review system as prompted by Justice Wathen's proposal.<sup>23</sup> Part III will review the Law Court's development of sentencing guidelines and will identify the problems which arose under the enhanced appellate review system as illustrated by case law. Part IV will document the legislative response to the aforementioned problems and its impact on the effectiveness of the appellate review procedure. It will also analyze the procedure's effectiveness under the recently amended appellate review statute as compared to that of the previous statute. This Comment will conclude in Part V with some recommendations and a discussion of the tensions and conflicts between the Legislature and the Law Court which make the future success of appellate review of criminal sentences in Maine uncertain. Finally, the Appendix to this Comment will propose legislation to the Maine Criminal Code creating a new Class AA classification of crimes.

## II. BACKGROUND

### A. Pre-1988 Appellate Review of Sentences

In 1965 Maine deviated from the general rule that "the appellate court has no control over a sentence which is within the limits allowed by a statute"<sup>24</sup> and adopted a system of limited appellate review of sentences.<sup>25</sup> That year, the Legislature created the appellate division, composed of three justices of the Maine Supreme Judicial

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23. *Id.* at 34-40.

24. *Guerra v. United States*, 40 F.2d 338, 341 (8th Cir. 1930). See also *Williams v. New York*, 337 U.S. 241 (1949) (upholding trial court's broad discretion to determine sentence).

25. P.L. 1965, ch. 419, § 1 (effective Dec. 1, 1965) (codified at ME. REV. STAT ANN tit. 15, §§ 2141-2144 (West 1980)), repealed by P.L. 1989, ch. 218 (effective Sept. 30, 1989). For an in-depth discussion of appellate review of sentences under this statute (from 1965 to 1988), see *Disparity*, *supra* note 3, at 8-19. See also Roy T. Pierce, *The Efficacy of Maine's Procedure for Discretionary Appellate Review of Legal but Excessive Criminal Sentences by the Supreme Judicial Court* (Mar. 1991) (unpublished manuscript, on file with the author); David J. Halperin, *Sentence Review in Maine: Comparisons and Comments*, 18 ME. L. REV. 133 (1966) [hereinafter *Sentence Review in Maine*].

Court as appointed by the chief justice, to review sentences to the state prison of one year in length or more.<sup>26</sup> Under this system of sentence review, the appellate division could change a sentence which had been legally imposed within statutory limits, but which was "improper" for any number of reasons.<sup>27</sup> The appellate division was authorized to review sentence appeals and substitute either a reduced or increased sentence.<sup>28</sup> Sentence appeals were a matter of right for any eligible defendant, and the appellate division's decision was deemed final.<sup>29</sup> Decisions written by the three-justice panel were neither published in the Maine Reporter nor in the Atlantic Reporter, but were available in slip opinion form.<sup>30</sup>

The appellate division had three main purposes: first, to "detect and correct cases of substantial disparity not explained by the need to individualize the sentence";<sup>31</sup> second, to permit correction of sentences which, although legal in length, were caused by a "failure to consider relevant factors or of a consideration of improper factors[;]"<sup>32</sup> and finally, to provide trial judges with "guides for the formulation of better sentences."<sup>33</sup> Although appellate review under the appellate division did result in the correction of the most egregious cases of sentence disparity,<sup>34</sup> it was unsuccessful in producing workable sentencing criteria to guide the discretion of trial judges. Statistics show that a very small percentage (less than ten percent) of eligible defendants sought appellate review of their sentences,<sup>35</sup>

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26. P.L. 1965, ch. 419 (codified at ME. REV. STAT. ANN. tit. 15, § 2141 (West 1980)) (repealed 1989). The basic structure of Maine's system of appellate review was taken from that adopted by Massachusetts in 1943 and Connecticut in 1957. See MASS GEN. LAWS ANN. ch. 278, § 28A, 28B (West 1981). See also CONN. GEN. STAT. ANN. § 51-194 (West 1985). For a discussion of Connecticut's system of appellate review of sentences, see Comment, *Appellate Review of Primary Sentencing Decisions: A Connecticut Case Study*, 69 YALE L.J. 1453 (1960) [hereinafter *Connecticut Case Study*].

27. For example, one such reason is that the sentence is excessive. "An illegal sentence is one that exceeds the range of sentence authorized by statute. An excessive sentence, on the other hand, falls within the range authorized by statute, but is disproportionate to the offense." *Disparity*, *supra* note 3, at 7 n.18. Maine's Constitution may be seen as authority for creating more structure in the sentencing process by virtue of its requirement that "all penalties and punishments shall be proportioned to the offence." ME. CONST. art. I, § 9.

28. However, the appellate division could not increase the sentence under review without giving the defendant an opportunity to be heard. P.L. 1965, ch. 419 (codified at ME. REV. STAT. ANN. tit. 15, § 2142 (West 1980)) (repealed 1989).

29. *Id.*

30. See *Disparity*, *supra* note 3, at 13.

31. *Sentence Review in Maine*, *supra* note 25, at 134. "[T]he goal is not simple equality of sentences but consistent application of sentencing principles . . ." *Id.* at 151.

32. *Id.* at 135.

33. *Id.*

34. See *Disparity*, *supra* note 3, at 14-15.

35. *Id.* at 13.

and an even smaller percentage (less than five percent) of appeals resulted in changed (increased or decreased) sentences.<sup>36</sup> In the more than twenty years following its enactment, the appellate division pronounced sentencing guidelines in only one case involving a life sentence for murder.<sup>37</sup> Clearly, with so few opportunities to review sentences, the appellate division was not meeting the goals it had been established to achieve—the reduction of sentencing disparity and the development of rational sentencing principles.

*B. 1984-1987: The Federal Sentencing Guidelines and the Movement to Reduce Sentencing Disparity*

Concern for sentencing fairness in Maine continued into the 1980s due to the perceived problems of overcrowded prisons, the abolition of parole, increased sentences, and the imposition of disparate sentences for similar offenders.<sup>38</sup> Maine's concern over sentencing disparity was no doubt influenced by the movement to address the same problem within the federal system. Accordingly, the 1988 changes in Maine's appellate sentence review procedure are perhaps best understood against the background of some unprecedented federal sentencing reforms in the period between 1984 and 1987.

In 1984 Congress enacted the Sentencing Reform Act<sup>39</sup> in response to the widespread perception that unwarranted disparities in sentencing were undermining public faith in the criminal justice system.<sup>40</sup> Under the old federal system, critics complained that the length of sentence depended more on the judge than on the offense committed by the defendant, and that judges did not have to articulate reasons for imposing a sentence.<sup>41</sup> The 1984 Act's primary ob-

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36. *Id.* In its twenty-four years of operation, the appellate division changed only twenty sentences. Daniel E. Wathen, *Judges on Judging: Making Law the Old Fashioned Way—One Case at a Time*, 52 OHIO ST. L.J. 611 (1991) [hereinafter *Judges on Judging*]. By contrast, the Massachusetts appellate division acted on more than 1,200 appeals and modified over 350 sentences in a thirteen-year period from 1943 to 1956. *Connecticut Case Study*, *supra* note 26, at 1464 n.62.

37. In *State v. Anderson*, Nos. AD-78-37, AD-78-40 (Me. App. Div. June 30, 1980), the panel reduced the sentences of two defendants from life imprisonment to a term of forty years each. After reviewing the appeal, the appellate division set forth the following sentencing guideline for life sentences: a life sentence is never justified unless the crime is accompanied by aggravating circumstances such as premeditation-in-fact; multiple deaths; or cruelty. *Id.* slip op. at 7-8.

38. *Disparity*, *supra* note 3, at 2.

39. See Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, §§ 211-239, 98 Stat. 1837, 1976, 1987-2040 (1984). See also 18 U.S.C.A. §§ 3551-3599 (West 1985 & Supp. 1991) and 28 U.S.C.A. §§ 991-998 (West Supp. 1991).

40. See, e.g., William W. Schwarzer, *Judicial Discretion in Sentencing*, 3 *FED SENTENCING REP.* 339 (1991).

41. See, e.g., Helen G. Corrothers, *Rights in Conflict: Fairness Issues in the Federal Sentencing Guidelines*, 26 *CRIM. L. BULL.* 38, 44 (1990). In the legislative history of the Sentencing Reform Act of 1984, Congress issued the following complaint:

[E]ach judge is left to apply his own notions of the purposes of sentencing.

jective was to reduce unwarranted sentencing disparity. In order to achieve this goal, Congress set out to create a system "which would ensure that sentences were consistent with certain parameters";<sup>42</sup> these parameters would take the form of sentencing guidelines. The Act established the United States Sentencing Commission, whose duties included writing sentencing guidelines for the purpose of providing "certainty and fairness in meeting the purposes of sentencing, [by] avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct . . . ."<sup>43</sup> The Commission was composed of seven voting members, including three federal judges, who were appointed by the President subject to Senate confirmation.<sup>44</sup>

In November 1987, the Federal Sentencing Guidelines became law.<sup>45</sup> The Guidelines took the form of a grid which determined a sentence based on the characteristics of the offense and the characteristics of the offender. How a sentence is determined under the Guidelines may be summarized in six basic steps.<sup>46</sup> First, the offense with which the defendant is charged determines the "base offense level."<sup>47</sup> Second, the base offense level may be modified up or down in light of several aggravating and/or mitigating factors concerning

As a result, every day Federal judges mete out an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances. . . . [T]wo such offenders who are sentenced to terms of imprisonment for similar offenses may receive widely differing prison release dates . . . .

These disparities . . . can be traced directly to the unfettered discretion the law confers on those judges . . . responsible for imposing and implementing the sentence. This sweeping discretion flows from the lack of any statutory guidance or review procedures to which courts . . . might look.

S. REP. NO. 98-225, 98th Cong., 2d Sess. 38 (1983), *reprinted in* 1984 USCCAN 3182, 3221.

42. Harvey M. Silets and Susan W. Brenner, *Commentary on the Preliminary Draft of the Sentencing Guidelines Issued by the United States Sentencing Commission in September, 1986*, 77 J. CRIM. L. & CRIMINOLOGY 1069, 1073 (1986).

43. 28 U.S.C.A. § 991(b)(1)(B) (West Supp. 1991).

44. 28 U.S.C.A. § 991(a) (West Supp. 1991).

45. UNITED STATES SENTENCING COMM'N. GUIDELINES MANUAL (1988) [hereinafter 1988 GUIDELINES MANUAL]. The Commission sent its initial guidelines to Congress in April 1987, and the Guidelines took effect on November 1, 1987. *Id.* at 1.1. The Commission may submit guideline amendments each year to Congress between the beginning of the regular session and May 1. These amendments take effect automatically 180 days after submission unless a law is enacted to the contrary. 28 U.S.C.A. § 994(p) (West Supp. 1991).

46. See Stephen G. Breyer and Kenneth R. Feinberg, *The Federal Sentencing Guidelines: A Dialogue*, 26 CRIM. L. BULL. 5, 9-16 (1990).

47. See 1988 GUIDELINES MANUAL, *supra* note 45, § 1B1.1(b), at 1.13 (the "base offense level" is a number first assigned to each offense which corresponds to the crime's severity relative to that of other crimes). See also Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 6, 12 (1988); Breyer & Feinberg, *supra* note 46, at 9-10.

specific offense characteristics.<sup>48</sup> Third, "adjustments" may be made to the offense level for the offender's role in the offense, efforts to obstruct justice, acceptance of responsibility, and the impact of the crime on the victim.<sup>49</sup> Fourth, "points" may be calculated on the basis of the offender's prior criminal record to determine a criminal history category.<sup>50</sup> Fifth, the offense level and the criminal history category are applied to a sentencing table<sup>51</sup> containing rows of offense levels and columns of criminal history categories to determine a range of sentences, the top of which range cannot exceed the bottom by more than twenty-five percent.<sup>52</sup> And finally, the sentencing court may impose any sentence within the Guideline range, and it may depart from the range if it gives reasons for the departure.<sup>53</sup> In such cases, the imposed sentence is subject to appellate review for "reasonableness."<sup>54</sup>

As a result of these changes in the federal system, the issue of sentencing disparity moved to the forefront of sentencing policy nationwide. Yet the Federal Sentencing Guidelines model immediately came under heavy criticism on several fronts,<sup>55</sup> including complaints that sentencing disparity—albeit a different kind—continued under the Guidelines,<sup>56</sup> and that draconian sentences were routinely imposed.<sup>57</sup> The movement to reduce sentencing disparity at the federal level and the early perception that the Federal Sentencing Guidelines had failed to achieve this goal no doubt had an intellectual impact on the direction of sentencing policy in Maine.

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48. See, e.g., 1988 GUIDELINES MANUAL, *supra* note 45, § 2B3.1(b)(1)-(5), at 2.21-2.22 (listing "specific offense characteristics" for the crime of bank robbery). For example, in a robbery case, levels may be added for the amount of money taken and for the presence of a weapon. *Id.*

49. See *id.* §§ 3A1.1 - 3E1.1, at 3.1-3.22.

50. See *id.* § 4A1.1(a), at 4.1.

51. See *id.* at 5.2.

52. Congress established the maximum size of the sentencing range as that term which "shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months, except that, if the minimum term of the range is 30 years or more, the maximum may be life imprisonment." 28 U.S.C.A. § 994(b)(2) (West Supp. 1991).

53. See 18 U.S.C.A. § 3553(b) (West Supp. 1991) (stating that a court must presumptively impose a sentence within the Guideline range unless "the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines . . .").

54. See 18 U.S.C.A. § 3742(a) and (b) (West 1985 & Supp. 1991).

55. See *supra* notes 7-10 and accompanying text.

56. Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 4 FED. SENTENCING REP. 142 (1991).

57. Schwarzer, *supra* note 40, at 341.

C. 1988: Justice Wathen's Proposal for Enhanced Appellate Review of Sentences Becomes Law

By 1988 the need for some modification of Maine's system of appellate sentence review had become apparent. Influenced by the federal sentencing reform movement (i.e., the Federal Sentencing Guidelines) and the inadequacies of the sentence review procedure under the appellate division, Maine responded in its own way to the movement to reduce unwarranted disparity in sentences. In that year, Justice Wathen proposed an expansion of the appellate sentence review mechanism in his law review article *Disparity and the Need for Sentencing Guidelines in Maine: A Proposal for Enhanced Appellate Review*.<sup>58</sup> Justice Wathen's proposal, which provided for a discretionary appeal of sentences to the Supreme Judicial Court, was enacted in large part by the Maine Legislature in 1989 as the Appellate Review Act.<sup>59</sup> The system was modeled after the English appellate sentence review system<sup>60</sup> and the American Bar Association (ABA) Standards for Criminal Justice.<sup>61</sup>

A brief description of the appeals procedure under the 1989 statute is as follows:<sup>62</sup> a person convicted of a criminal offense and sentenced to more than one year in prison may apply to the Law Court for review of sentence by first making application with a screening panel (the Sentence Review Panel), composed of three justices of the Law Court.<sup>63</sup> If any one of the three members of the panel votes in favor of granting leave to appeal, the appeal is heard before the

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58. *Disparity*, *supra* note 3.

59. P.L. 1989, ch. 218 (effective Sept. 30, 1989) (codified at ME REV STAT ANN tit. 15, §§ 2151-2157 (West Supp. 1989)), amended by P.L. 1991, ch. 525, § 4 (effective June 30, 1991) (codified at ME REV STAT ANN tit. 15, §§ 2151-2157 (West Supp. 1991-1992)) [hereinafter 1989 Appellate Review Act]. The intent of the bill which introduced this statute in 1989, L.D. 44, was specifically to implement the changes in sentence review proposed by Justice Wathen in his MAINE LAW REVIEW article. See L.D. 44, Statement of Fact (114th Legis. 1989).

60. For a brief discussion of the English appellate review system, see *Disparity*, *supra* note 3, at 19-34. See also D. A. Thomas, *Appellate Review of Sentences and the Development of Sentencing Policy: The English Experience*, 20 ALA L REV 193 (1968).

61. American Bar Association, 4 STANDARDS FOR CRIMINAL JUSTICE, Standards 20-1.1 to -3.3 (2d ed. 1980 & Supp. 1986). See also American Bar Association Special Committee on Minimum Standards for the Administration of Criminal Justice, STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES (1968) [hereinafter APPELLATE REVIEW STANDARDS].

62. For a more comprehensive description of the Appellate Review Act proposed in 1988, see *Disparity*, *supra* note 3, at 34-40. See also Roy T. Pierce, *The Efficacy of Maine's Procedure for Discretionary Appellate Review of Legal but Excessive Criminal Sentences by the Supreme Judicial Court*, at 22-29 (Mar. 1991) (unpublished manuscript, on file with the author).

63. ME REV. STAT. ANN. tit. 15, §§ 2151-2152 (West Supp. 1991-1992). The procedure for application for leave to appeal is set forth pursuant to § 2153 in ME R CRIM P. 40, 40A, 40B, and 40C (adopted effective October 2, 1989).

entire Law Court.<sup>64</sup> After briefing and oral argument, the Law Court is authorized to change the sentence to any sentence that was open to the sentencing court, as long as the substituted sentence is not more severe than that originally imposed.<sup>65</sup>

The Appellate Review Act was designed to remedy several weaknesses in the appellate division system. First, the structure and composition of the appellate division was not conducive to making a comprehensive law of sentencing. The three-justice panel changed in composition every few years, preventing any single member from gaining the experience needed to formulate rational sentencing principles.<sup>66</sup> Under the new statute, although the application for appeal of sentence was first viewed by a screening panel, granted appeals were heard before and decided by the full court, whose composition changed much less frequently than that of the appellate division. In addition, while the appellate division was perceived as limited in its role of correcting the most grossly disparate sentences, under the new system the full Law Court was charged specifically with creating a common law body of sentencing guidelines.<sup>67</sup>

Second, under the old system of appellate review the small number of cases reviewed by the appellate division made it difficult to achieve sentencing consistency. Clearly, a higher volume of appeals was necessary to create a comprehensive body of law on sentencing. Although appeal to the appellate division was a matter of right under the former system, the possibility that a sentence could be increased had a chilling effect on the number of appeals brought.<sup>68</sup> As Justice Wathen commented: "[Although] the risk of an increased sentence reduces the number of frivolous appeals, . . . the chance of a stiffer sanction deters meritorious appeals as well. The continued

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64. P.L. 1989, ch. 218 (codified at ME. REV. STAT. ANN. tit. 15, § 2152 (West Supp. 1991-1992)).

65. P.L. 1989, ch. 218 (codified at ME. REV. STAT. ANN. tit. 15, § 2156 (West Supp. 1989)) (amended 1991).

66. *Disparity*, *supra* note 3, at 19.

67. Section 2154(4) of the Appellate Review Act states that one of the purposes of sentence review by the Law Court is "[t]o promote the development and application of criteria for sentencing which are both rational and just." ME. REV. STAT. ANN. tit. 15, § 2154(4) (West Supp. 1991-1992).

68. The power to increase sentences on appeal also presents some constitutional due process concerns. *See State v. Violette*, 576 A.2d 1359 (Me. 1990); *see also* Thomas C. Bradley, Note, *State v. Violette: Harsher Resentencing Encounters a Bolder Presumption of Vindictiveness*, 43 ME. L. REV. 523 (1991). *See also* Gregory P. Dunsky, *The Constitutionality of Increasing Sentences on Appellate Review*, 69 J. CRIM. L. & CRIMINOLOGY 19 (1978) (examining whether increasing a defendant's sentence on appeal violates the double jeopardy clause of the Fifth Amendment). The power to increase sentences has also been criticized in England as unfair because only those who seek appeal are singled out for the risk of an increased sentence, while defendants who do not appeal are not subject to such risk. *Sentence Review in Maine*, *supra* note 25, at 138.

use of such a blunt procedural device is both unnecessary and unwise. . . . [T]here are less draconian means of screening out frivolous appeals."<sup>69</sup>

The new statute provided that the Law Court did not have the power to increase sentences, but could substitute a sentence, if it chose to do so, with a reduced term within the statutory range. The Sentence Review Panel was a more precise tool to control any potential flood of appeals to the court, since it determined which applicants would be granted leave to appeal. Furthermore, the requirement that only sentences of greater than one year in length were appealable reduced the number of frivolous appeals which came up for review.

Finally, the lack of wide publication of opinions was a major defect in the former system. The appellate division rarely issued full, written opinions containing sentencing criteria, and the few opinions which did exist were not readily available to the legal community.<sup>70</sup> It was virtually impossible to create sentencing guidelines through the appellate process without the means to preserve precedent and follow its development. Under the Appellate Review Act, granted sentence appeals followed the standard appellate procedure of briefing and oral argument before the Law Court, and the production of an appellate opinion that was published in both the Atlantic Reporter and the Maine Reporter, along with the other opinions of the Law Court.

In addition to remedying the defects in the previous statute, the purposes of enhanced appellate review of sentences were set forth explicitly in the new statute:

**§ 2154. Purposes of sentence review by Supreme Judicial Court**

The general objectives of sentence review by the Supreme Judicial Court are:

1. **Sentence correction.** To correct a sentence which is excessive in length, having regard to the nature of the offense, the character of the offender and the protection of the public interest;
2. **Promote respect for law.** To promote respect for law by correcting abuses of the sentencing power and by increasing the fairness of the sentencing process.
3. **Rehabilitation.** To facilitate the possible rehabilitation of an offender by reducing manifest and unwarranted inequalities among the sentences of comparable offenders; and
4. **Sentencing criteria.** To promote the development and application of criteria for sentencing which are both rational and just.<sup>71</sup>

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69. *Disparity*, *supra* note 3, at 35-36.

70. *Id.* at 19.

71. P.L. 1989, ch. 218 (codified at ME REV STAT ANN tit. 15, § 2154 (West Supp. 1989)) (amended 1991).



The four purposes of the new statute address overlapping, interrelated concerns. When considered as a group, they reveal the main underlying objective of the Appellate Review Act: to develop a more uniform but still flexible approach to sentencing whose application would reduce disparities in sentence length, and thereby increase the fairness of the criminal justice system. However, achieving this goal does not require that all offenders committing similar offenses receive exactly the same sentence. Appellate review does not seek uniform sentences for all offenders; if that were the goal, the Legislature could easily enact mandatory sentences for every offense. "[W]hat is sought is not absolute uniformity but a uniformly fair and equitable approach."<sup>72</sup>

The first stated purpose of appellate review is to correct sentences that are excessive in length. The very use of the words "sentence correction" in the statute represents a departure from the traditional notion of the trial court's unreviewable discretion in sentencing. In choosing this statutory language, the Maine Legislature recognized that such sentencing power in the exclusive hands of the trial judge can lead to the imposition of excessive sentences. The danger of excessive sentences may be great when, for example, the influence of the media has led to emotional demands for extreme and severe punishment.<sup>73</sup> On appeal, there is less likely to be emotional pressure or excessive publicity; thus, being removed from trial may actually be an advantage in certain circumstances.

If the Law Court determines on appeal that the sentencing court imposed an excessive sentence because it did not properly consider any one of three primary sentencing factors—"the nature of the offense, the character of the offender and the protection of the public interest"<sup>74</sup>—it can correct the sentence. One objection to this goal is that sentencing is fundamentally a discretionary matter of judgment involving an intuitive process not amenable to rational analysis.<sup>75</sup> Therefore, the argument goes, there is no such thing as a "correct" sentence. In the opinion of one trial judge: "Our judgment . . . is better than our reasons. And it is vain to attempt to explain the exact proportions attributable to our interest in punishment, retribution, reform, deterrence, even vengeance."<sup>76</sup> Sentence review directly challenges this notion; its premise is that, within fairly liberal boundaries, there can and should be a correct and reproducible sen-

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72. *Appellate Review of Sentences*, *supra* note 4, at 273.

73. Simon E. Sobeloff, *A Recommendation for Appellate Review of Criminal Sentences*, 21 *BROOK. L. REV.* 2, 8 (1955).

74. P.L. 1989, ch. 218 (codified at *ME. REV. STAT. ANN.* tit. 15, § 2154(1) (West Supp. 1989)) (amended 1991).

75. *APPELLATE REVIEW STANDARDS*, *supra* note 61, at 5.

76. Charles E. Wyzanski, Jr., *A Trial Judge's Freedom and Responsibility*, 65 *HARV. L. REV.* 1281, 1292 (1952).

tence, if the criminal justice system is to be fair and equitable to all.

Another argument against the "correction" of sentences is that it interferes with the executive pardoning power.<sup>77</sup> But the rationale behind clemency (or, specifically, the governor's commutation of sentences) is to provide relief in those extraordinary cases where the system of justice is deficient. As the ABA Special Committee on Minimum Standards for the Administration of Criminal Justice stated, "Executive clemency is, and should remain, for the highly exceptional case where the question is not one of excessiveness based on the ordinary factors affecting sentence, but where intervention of the executive is prompted by unusual public interests."<sup>78</sup> It is precisely the goal of appellate review of sentences to prevent such deficiencies in the system of justice so that the pardoning power is reserved for the most exceptional cases. Since sentencing is largely a judicial function, the judiciary should have the internal means to correct its own mistakes.

The second and third purposes of appellate sentence review—the promotion of respect for law and rehabilitation of the offender—are concerned with the fairness and equity of the sentencing process. As mentioned above, with absolute discretion vested in the sentencing judge, the length of sentence may depend more on the individual judge's conscience and personal convictions about justice than on any consistent sentencing criteria. This results in unwarranted disparity in sentences for offenses committed by comparable offenders, and lack of faith in the fair administration of justice. In addition, since it is clear that prisoners compare their sentences with one another, unexplained disparities in sentences are likely to foster hostile attitudes and therefore hamper rehabilitation.<sup>79</sup> Sentence review promotes respect for law and facilitates the rehabilitation of the offender by creating a sense of fairness and rough reproducibility in the process of determining a sentence. Thus, at the community

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77. See APPELLATE REVIEW STANDARDS, *supra* note 61, § 1.2 at 22-23.

78. APPELLATE REVIEW STANDARDS, *supra* note 61, § 1.2 at 23.

79. As James V. Bennett, former Director of the Federal Bureau of Prisons, commented:

[Sentencing disparity fails] to stimulate a respect for the law among the very persons whom the law is supposed to teach that respect. The prisoner who must serve his excessively long sentence with other prisoners who receive relatively mild sentences under the same circumstances cannot be expected to accept his situation with equanimity. And the more fortunate prisoners do not attribute their luck to a sense of fairness and justice on the part of the law but to its whimsies. The existence of such disparities is among the major causes of prison riots, and it is one of the reasons why prisons so often fail to bring about an improvement in the social attitudes of its charges.

JAMES V. BENNETT, OF PRISONS AND JUSTICE, S. Doc. No. 70, 88th Cong., 2d Sess. 319 (1964), *quoted in* ROBERT O. DAWSON, SENTENCING: THE DECISION AS TO TYPE, LENGTH, AND CONDITIONS OF SENTENCE 216 n.6 (1969).

level, appellate review instills public confidence in the criminal justice system; at the individual level, it protects the criminal defendant against the unchecked idiosyncrasies or prejudices of a particular judge, thereby facilitating the rehabilitative process.

The fourth purpose of sentence review, perhaps the most important in the Act, is the development of rational and just sentencing criteria. Sentencing guidelines created through court decisions which explain the grounds for modifying sentence length help to guide the future discretion of the sentencing judge. Thus, in any given case, the Law Court must state which circumstances should be considered aggravating as opposed to mitigating factors, and which of the criminological objectives of sentencing—deterrence, rehabilitation, punishment, etc.—should be determinative. This purpose does not operate independently of the other three objectives of the Act. For example, the goals of rehabilitation and promotion of respect for law cannot be achieved without the consistent application of sentencing criteria, since a consistent sentencing approach reduces disparities in sentences, which in turn promotes respect for the criminal justice system and enhances the prisoner's response to the rehabilitative process. Thus, the development of sentencing criteria becomes the dominant overarching purpose of sentence review in that its success is required in order for the other purposes to be achieved.<sup>80</sup>

Under the 1989 Appellate Review Act, the Law Court had the power to order one of three dispositions on review of a sentence appeal:

**1. Substitution of Sentence or Remand.** If the Supreme Judicial Court determines that relief should be granted, it may:

A. Substitute for the sentence under review any other disposition that was open to the sentencing court, provided however, that the sentence substituted shall not be more severe than the sentence appealed; or

B. Remand the case to the court that imposed the sentence for any further proceedings that could have been conducted prior to the imposition of the sentence under review and for resentencing on the basis of such further proceedings, provided however, that the sentence shall not be more severe than the sentence originally imposed.

**2. Affirmation of Sentence.** If the Supreme Judicial Court determines that relief should not be granted, it shall affirm the sentence under review.<sup>81</sup>

Thus, under the Act, the Law Court had the necessary procedural

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80. Roy T. Pierce, *The Efficacy of Maine's Procedure for Discretionary Appellate Review of Legal but Excessive Criminal Sentences by the Supreme Judicial Court*, at 18-19 (Mar. 1991) (unpublished manuscript, on file with the author).

81. P.L. 1989, ch. 218 (codified at ME. REV. STAT. ANN. tit. 15, § 2156 (West Supp. 1989)) (amended 1991).

mechanisms at its disposal to reduce unwarranted disparities in sentences, the most important of which was the power to directly reduce sentences that were improperly imposed by the trial court. This power not only ensured a speedy and efficient sentence appeal mechanism (i.e., the Law Court could create sentencing principles without having to remand every case to the sentencing court), it also made it possible for any modification of sentence to be based on a uniform scale of punishment for each offense as determined by the Law Court, as opposed to the individual scales of punishment of different sentencing judges.

In determining whether to grant relief in a sentence appeal, the Law Court was authorized to consider several sentencing factors. First, the court could consider the propriety of the sentence (i.e., its proportionality to the offense rather than its legality), having regard to three major sentencing factors: the nature of the offense; the character of the offender; and the protection of the public interest.<sup>82</sup> The facts of the aforementioned hypothetical child molester case can be used to illustrate what type of circumstances are generally considered within these three sentencing categories. For example, the circumstances of the sexual assault (i.e., duration, extent of force or violence, absence of weapon) would all be considered under the nature of offense category. The character of offender category would include such circumstances as the defendant's prior sexual misconduct conviction, his psychological history, his remorse (or lack thereof), and his prospects for rehabilitation. Finally, under the protection of the public interest category, such factors as the need for the defendant to be isolated from society, community condemnation, general deterrence, the impact of the offense on the victim, and deductions in sentence length due to good time may all be relevant considerations.<sup>83</sup>

Second, the Law Court could consider the manner in which the sentence was imposed and the sufficiency and accuracy of the information on which it was based.<sup>84</sup> For instance, if the trial court's sentencing record did not contain information about the child molester's history of psychological problems—a factor which could be critical to determining whether the defendant is criminally responsible—the Law Court could remand the case back to the trial court for re-sentencing pending consideration of the omission.

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82. P.L. 1989, ch. 218 (codified at ME. REV. STAT. ANN. tit. 15, § 2155(1) (West Supp. 1989)) (amended 1991).

83. There may be some overlap in the factors considered under both the nature of the offense category and the protection of the public interest category. This overlap may explain why the Law Court did not separately consider the third sentencing factor—protection of the public interest—in its first eight sentence appeal decisions. See *infra* part III.A.

84. P.L. 1989, ch. 218 (codified at ME. REV. STAT. ANN. tit. 15, § 2155(2) (West Supp. 1991-1992)).

With the new statute in place, the Law Court was equipped with an express mandate from the Legislature to give direction and form to sentencing law in Maine. "It is difficult to imagine a broader charter or a more sweeping mandate for lawmaking" than that given to the Law Court under the 1989 Appellate Review Act.<sup>85</sup> Yet, only eight sentence appeals and less than two years later, the Legislature intervened with an emergency bill that removed some of the Law Court's power to fulfill its mandated task. The following section contains an analysis of the cases decided under the 1989 Appellate Review Act, and the concomitant development of sentencing guidelines. Included in this section are three cases which became the target of widespread criticism and led very rapidly to some modifications in the statute.<sup>86</sup>

### III. THE DEVELOPMENT OF SENTENCING GUIDELINES THROUGH CASE LAW

#### A. *The Early Cases under the 1989 Appellate Review Act*

The Law Court first exercised its new statutory duty to review trial court sentences in *State v. Hallowell*.<sup>87</sup> In that case, the defendant had been convicted of possession of a firearm by a felon<sup>88</sup> and criminal threatening with a dangerous weapon.<sup>89</sup> The superior court had sentenced the defendant to five years with all but four years suspended, and four years probation for criminal threatening, and a concurrent four-year term on the possession count.<sup>90</sup> The defendant appealed to the Law Court, claiming, in part, that his sentence was excessive in length and failed to take into consideration his prospects for rehabilitation.

In *Hallowell* the defendant, who had been drinking, got into an argument over rent with the manager of a boarding house where he had been living. As a result of the argument, he pulled a revolver from his pocket and pointed it at the manager. When the manager said to use the gun or put it away, the defendant cocked the hammer and spun the cylinder showing live ammunition in the chamber. He eventually left the manager alone, went outside and discharged two bullets into a snowbank. After calling the manager and threat-

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85. *Judges on Judging*, *supra* note 36, at 613.

86. These three cases are *State v. Lewis*, 590 A.2d 149 (Me. 1991); *State v. Michaud*, 590 A.2d 538 (Me. 1991); and *State v. Clark*, 591 A.2d 462 (Me. 1991).

87. 577 A.2d 778 (Me. 1990).

88. ME. REV. STAT. ANN. tit. 15, § 393 (West 1980 & Supp. 1991-1992).

89. ME. REV. STAT. ANN. tit. 17-A, § 209 (West 1983). The maximum sentence for both possession of a firearm by a felon and criminal threatening with a dangerous weapon is five years.

90. *State v. Hallowell*, 577 A.2d at 779. The superior court initially sentenced the defendant to two four-year consecutive terms for the offenses. On its own motion, the court resentenced the defendant to concurrent terms. *See generally* ME. REV. STAT. ANN. tit. 17-A, § 1256 (West Supp. 1983).

ening him twice more on the telephone, the defendant was apprehended by the police.<sup>91</sup>

The defendant's circumstances offered little hope for rehabilitation. At the time of sentencing, he was a thirty-seven-year-old unemployed carpenter and high school drop-out. He had substantial problems with substance abuse, and had an extensive criminal record, including felony convictions for arson, gross sexual misconduct, and aggravated assault.<sup>92</sup>

In an opinion written by Justice Wathen, the full Law Court reviewed the propriety of a criminal sentence for the first time and set forth its standard of review for sentence appeals under the new statute: the court would examine sentences for "misapplication of principle."<sup>93</sup> Here, the court recognized that its role under the new statute was not to replace the trial court as the main sentencing authority, but only to correct mistakes in principle. "It is not enough that the members of this court might have passed a different sentence, rather it is only when a sentence appears to *err in principle* that we will alter it."<sup>94</sup> The court seemed to indicate that, notwithstanding the new appellate review statute, the discretion of the sentencing judge would be largely preserved.

A closer look at the "misapplication of principle" standard of review, however, reveals that deference to the sentencing court is not required in all cases. Since the Law Court was charged with creating a law of sentencing under the Appellate Review Act, its task was to identify the proper sentencing principles to be applied in the first instance. Thus, it would be premature for the Law Court to defer to the lower courts until it had laid out the most basic sentencing principles in its decisions. For example, if the Law Court found that a sentencing court did not consider all the proper sentencing factors, it could find an "error in principle" and remand the case to the lower court for consideration of those other factors. Likewise, if the sentencing court did not correctly apply those factors to the case in question, the Law Court could directly substitute a lesser sentence to reflect a "correct" application of principle without deferring to the court below.

In applying the "misapplication of principle" standard in *Hallowell*, the Law Court concluded that the sentences were appropriate and affirmed them. In doing so, the court pronounced its first sentencing guideline under the 1989 Appellate Review Act, describing how it had determined that the sentences in *Hallowell* were proper. The court began with a consideration of the nature of the offense, the first of three factors listed in the Act under the propriety of

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91. *State v. Hallowell*, 577 A.2d at 780.

92. *Id.* at 780-81.

93. *Id.* at 781.

94. *Id.* (emphasis added).

sentence.<sup>95</sup> "The *maximum* sentence in a given case should, *in the first instance*, be determined by a consideration of the particular nature and seriousness of the offense rather than by a consideration of the circumstances of the offender."<sup>96</sup> The court recognized that varying degrees of seriousness could be present even within the same generic offense and therefore recommended that all the different ways in which the offense could be committed should be ranked on a uniform scale.

The court then addressed the second sentencing factor in the Act—the character of the offender.<sup>97</sup> In rejecting the defendant's argument that the sentencing court failed to consider rehabilitation in determining a sentence, the Law Court noted that "[t]he degree of mitigation called for by the circumstances of the offender is, in the first instance, a matter for the sentencing judge. Any mitigating circumstances presented in this case are more than offset by aggravating circumstances."<sup>98</sup> When considering the Law Court's statement that the *maximum* sentence is determined by the nature of the offense only, a logical inference is that any aggravating circumstances of the offender could never increase the length of a sentence. Thus, the court's language in *Hallowell* suggests that if circumstances of the offender exist which would be considered aggravating factors (e.g., prior criminal record, no remorse), they could only prevent the mitigation of a basic maximum sentence and could not serve to increase the sentence.

Thus in *Hallowell* the court seemed to propose a two-step process by which to determine a criminal sentence: first, the maximum sentence should be determined by examining the nature of the offense; second, after a maximum sentence was determined the court could consider the circumstances of the offender, but only in terms of mitigation. In other words, factors such as the offender's age, mental disposition, prospects for rehabilitation, and prior criminal record could serve only to reduce a basic maximum sentence. It should have come as no surprise that this approach to determining a sentence was not only considered in Justice Wathen's 1988 law review article, but was apparently modeled after English sentencing guidelines.<sup>99</sup>

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95. See P.L. 1989, ch. 218 (codified at ME. REV. STAT. ANN. tit. 15, § 2155(1) (West Supp. 1989)) (amended 1991).

96. *State v. Hallowell*, 577 A.2d at 781 (emphasis added).

97. See P.L. 1989, ch. 218 (codified at ME. REV. STAT. ANN. tit. 15, § 2155(1) (West Supp. 1989)) (amended 1991).

98. *State v. Hallowell*, 577 A.2d at 781-82.

99. See *Disparity*, *supra* note 3, at 31. Justice Wathen noted:

Under the English view, although a sentencing judge is free to reduce a sentence to reflect mitigating factors, "no penal objective . . . justifies the imposition of a sentence which is disproportionate to the facts of the case in the sense that it exceeds the bracket or range appropriate to that variety of

The soundness of such an approach to sentencing must be questioned at this point. It is unclear why the circumstances of the offender (such as an offender's prior criminal record) should never operate to increase a basic sentence determined by the nature of the offense. In the study of penology, it is widely accepted that an offender's prior criminal record is an aggravating factor, and that our criminal justice system deals more harshly with recidivists than with first-time offenders.<sup>100</sup> That the Law Court, in its first chance to pronounce rational sentencing principles, would propose an approach that considered the circumstances of the offender only in a mitigating light is a bit baffling.<sup>101</sup>

It is possible that the Law Court did not intend to fashion such an approach to sentencing; instead, the above language simply may have been the result of imprecise drafting or oversight. That the Law Court was neither perfectly clear nor comprehensive in its pronouncement of its first sentencing principles is certainly understandable; after all, the court was attempting for the first time to establish the proper relationship between the components of sentencing "on the basis of little more than notions of justice, common sense, rationality, custom, and prevailing practice."<sup>102</sup> Nevertheless, because the court's articulation of sentencing principles in *Hallowell* was at best unclear, it left room for interpretations which would result in strong criticism of the new appellate review mechanism in the fu-

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the offence concerned." Thus, the seriousness of the offense, *rather than aggravating factors that arise from the circumstances of the offender*, generally controls the maximum sentence for the crime.

Given this flexibility for downward adjustment, the final step for the sentencing judge is to identify any mitigating factors present and to determine what reduction, if any, such factors merit . . . .

*Id.* (emphasis added) (citation omitted).

100. See, e.g., *Rummel v. Estelle*, 445 U.S. 263 (1980). In addition, Maine has long recognized the increased seriousness of a crime committed by a habitual offender. See ME. REV. STAT. ANN. tit. 17-A, § 362(3-A) (West Supp. 1991-1992). For example, in *State v. Bennett*, 592 A.2d 161, 162 (Me. 1991), the Law Court (still using the *Hallowell* approach) explicitly recognized that recidivism was an aggravating factor in determining a sentence. However, the court reasoned that in determining a sentence, the persistent nature of the defendant's conduct (the fact that he had been convicted twice of burglary five years prior to his present three-count conviction for theft) was to be considered under the category of the nature of the offense, rather than the character of the offender. *Id.* at 163. *But see* RICHARD G. SINGER, *JUST DESERTS: SENTENCING BASED ON EQUALITY AND DESERT* 67-74 (1979) (recidivists are no more culpable than first offenders under a "just deserts" theory because the harm imposed by the offense and the injury inflicted upon the victim are the same in each instance).

101. Noticeably absent from the court's analysis was the third factor listed in the Appellate Review Act—protection of the public interest. From the language in *Hallowell*, then, one might conclude that since the maximum sentence was determined by the nature of the offense only, factors such as the public interest in removing dangerous individuals from society or the extent of victim impact also could serve only to mitigate a sentence.

102. *Judges on Judging*, *supra* note 36, at 611.



ture. But rather than refine or clarify the *Hallowell* language in subsequent opinions, the Law Court followed its two-step approach in several later cases without incident or adverse reaction.<sup>103</sup>

One such case was *State v. Shortsleeves*.<sup>104</sup> In that case the defendant, John Shortsleeves, was convicted of murder.<sup>105</sup> He and a male companion, Tracy Meggison, killed a woman in her home. Shortsleeves and Meggison had been drinking and, while driving past the victim's home, Meggison indicated to the defendant that he wanted to kill her. The defendant feigned a leg injury to get the victim to let the co-defendants into her house. Once inside, Meggison hit her repeatedly with his fist, then beat her with a billy club and a frying pan provided by the defendant. They both kicked her. In order to ensure that she was dead, Meggison then slit the woman's throat and stabbed her several times with a steak knife which the defendant had helped him find.<sup>106</sup>

Shortsleeves was convicted and sentenced to life imprisonment<sup>107</sup> and he appealed his sentence to the Law Court. In upholding the sentence, the Law Court expressly adopted the guidelines for imposing a life sentence that had been articulated in 1980 by the former appellate division in *State v. Anderson*.<sup>108</sup> The Law Court agreed

103. See, e.g., *State v. Tellier*, 580 A.2d 1333 (Me. 1990); *State v. Shortsleeves*, 580 A.2d 145 (Me. 1990); *State v. St. Pierre*, 584 A.2d 618 (Me. 1990); *State v. Constantine*, 588 A.2d 294 (Me. 1991); *State v. Michaud*, 590 A.2d 538 (Me. 1991); *State v. Clark*, 591 A.2d 462 (Me. 1991); *State v. Bennett*, 592 A.2d 161 (Me. 1991); and *State v. Rolerson*, 593 A.2d 220 (Me. 1991).

104. 580 A.2d 145 (Me. 1990).

105. ME. REV. STAT. ANN. tit. 17-A, § 201(1)(A) (West 1983). The sentence for murder is from 25 years to life. ME. REV. STAT. ANN. tit. 17-A, § 1251 (West Supp. 1991-1992). A life sentence may not be reduced to a term of years; however, a sentence for a term of years may be reduced by as much as one-third or more for good behavior ("good time"). ME. REV. STAT. ANN. tit. 17-A, § 1253(3) (West Supp. 1991-1992).

106. *State v. Shortsleeves*, 580 A.2d at 146.

107. Tracy Meggison was also later convicted of murder and sentenced to life imprisonment. *Id.*

108. The *Anderson* guidelines for life imprisonment are as follows:

[T]he imposition of a life sentence has such a serious impact on the offender so different from the impact of a sentence for a term of years that a life sentence is never justified unless the murder is accompanied by aggravating circumstances. Such aggravating circumstances include:

1. Premeditation-in-fact. By this we mean a planned, deliberate killing including a killing for hire. By the use of the words "in-fact," we mean to differentiate the premeditation to which we refer from the legal fiction of premeditation recognized in some states in which the premeditation exists for only an instant of time before the actual killing. (Footnote omitted.)
2. Multiple deaths, including situations in which the offender in committing the murder knowingly created a substantial risk of death to several individuals.
3. Murder committed by a person who has previously been con-

that a life sentence was not justified absent aggravating factors such as those enumerated in *Anderson*; however, it also noted that the sentencing court must consider whether the circumstances of the offender required the reduction of a life term to a lesser sentence.<sup>109</sup> In this case, the Law Court held that the sentencing court did not err in finding that the murder was accompanied by premeditation and extreme cruelty and therefore justified a life sentence for the defendant, even though he was an accomplice.<sup>110</sup> Likewise, because

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victed of homicide or any other crime involving the use of deadly force against a person. We use the words "deadly force" as defined by our Criminal Code in 17-A M.R.S.A. § 2(8).

4. Murder accompanied by torture, sexual abuse or other extreme cruelty inflicted upon the victim.

5. Murder committed in a penal institution by an inmate of that institution. This would include the murder of another inmate as well as prison personnel.

6. Murder of a law enforcement officer while in the performance of his duties.

7. Murder of a hostage.

It is not our intention to suggest that life imprisonment must always be imposed in cases of the types enumerated above. Such an approach was abandoned by our legislature when it repealed the mandatory sentence of life imprisonment for first-degree murder. Even in these circumstances there may be mitigating factors which in the exercise of a sound judicial discretion may cause a presiding Justice to impose a sentence for a term of years rather than life imprisonment.

It is our intention to suggest that under the present formulation of our Criminal Code life imprisonment is not justified in the absence of one of these enumerated circumstances.

*State v. Anderson*, Nos. 78-37, 78-40, slip op. at 7-8 (Me. App. Div. June 30, 1980). In *Anderson* the appellate division reduced two life sentences to 40 years each, finding that a life sentence was not justified where the defendants shot the victim with a gun during a planned robbery.

The Law Court's express adoption of the *Anderson* guidelines in *Shortsleeves* suggests that the court may not have intended to consider the circumstances of the offender only in a mitigating light. For example, the third aggravating circumstance listed in the *Anderson* guidelines, "murder committed by a person who has previously been convicted of homicide or any other crime involving . . . deadly force," is clearly a circumstance specific to the offender, not to the offense. *Id.* (emphasis added). Under *Anderson*, then, certain aggravating circumstances of the offender could increase a sentence from a term of years to life. Nevertheless, the Law Court's language in *Shortsleeves* seemed to indicate otherwise. See *infra* note 109 and accompanying text.

109. The court in *Shortsleeves* stated:

Although the presence of these aggravating circumstances, premeditation and extreme cruelty, permit the imposition of a life sentence, the court must consider whether mitigating factors require a lesser sentence . . . .

. . . [W]e conclude that the sentencing justice did not err in determining that the *circumstances of the defendant* did not require any *mitigation* in the sentence.

*State v. Shortsleeves*, 580 A.2d at 150 (emphasis added).

110. *Shortsleeves* illustrates the need for interplay between court and counsel in developing sentencing policy through the appellate review scheme. Although charged

of the defendant's extensive prior criminal record and unfavorable psychological evaluation, the Law Court found that the sentencing court did not err in concluding that *Shortsleeves'* circumstances did not require mitigation of the life sentence imposed.<sup>111</sup>

Less than four months after *Shortsleeves*, the Law Court decided *State v. St. Pierre*,<sup>112</sup> another appeal of a life sentence for murder. For the first time the Law Court used its newly-expanded authority to modify a sentence directly, reducing a life sentence to a term of forty-five years. The defendant, Michael St. Pierre, met the victim, a young, deaf mute woman, at a bar one evening. At the end of the evening, after the defendant had allegedly consumed many drinks, the victim voluntarily accompanied the defendant to his room, where they became involved in a sexual encounter. According to defendant's testimony, while engaging in oral sex the victim bit the defendant's penis and punched him.<sup>113</sup> He reacted angrily and struck her repeatedly with a broken jackhammer bit, attempted to strangle her, and then dragged her body to the Kennebec River, where he deposited her in the water.<sup>114</sup> The victim's body was discovered floating in the river the next day.

In *St. Pierre* the Law Court once again followed the *Anderson* guidelines: a life sentence for murder is permissible only if there are aggravating circumstances of a specific type and only if there are no mitigating factors that would require a lesser sentence. The Law

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with creating sentencing guidelines, the Law Court, like any common law court, is constrained by the arguments of counsel. The court cannot simply pronounce new sentencing guidelines outside the context of a given case. In *Shortsleeves* defense counsel never raised the argument that the sentencing criteria for murder accomplices should differ from the *Anderson* guidelines. *Judges on Judging*, *supra* note 36, at 615. Instead, defense counsel argued that this case was similar to a previous case in which the appellate division vacated a life sentence and distinguishable from those cases in which premeditation and extreme cruelty had been found. *Id.*

Hence, the *Shortsleeves* court never had the opportunity to formulate new sentencing guidelines for murder accomplices. Whether the result in *Shortsleeves* was intended or not, the case reminds us of the Law Court's limitation in articulating new guidelines without the aid of counsel. Strong appellate advocacy is a fundamental and critical element of a successful appellate sentence review mechanism. As Justice Wathen has commented:

Although analogy is useful in making incremental steps in advancing or retarding a developed doctrine, it is less useful when formulating the doctrine. Here a broader frame of reference is required. It is not enough that the sentence is similar to another; rather the question is whether each sentence is based on a formulation that is workable and produces desirable results.

*Judges on Judging*, *supra* note 36, at 622.

111. *State v. Shortsleeves*, 580 A.2d at 151.

112. 584 A.2d 618 (Me. 1990). *St. Pierre* was decided on December 19, 1990. *Shortsleeves* was decided on August 30, 1990.

113. *Judges on Judging*, *supra* note 36, at 617.

114. *State v. St. Pierre*, 584 A.2d at 619.

Court first noted that the sentencing court could have found the defendant's lack of a prior criminal record of violence and his good prospects for rehabilitation to be mitigating circumstances requiring a lesser sentence.<sup>115</sup> However, the court instead rested its decision on the fact that the sentencing court had erred in principle because the defendant's conduct did not rise to the level of "extreme cruelty" as that term had been defined in *Shortsleeves*.<sup>116</sup>

In evaluating the nature and seriousness of the offense, the court stated that a uniform scale within the statutory maximum must be fixed for any given offense. The court said:

We are therefore commanded to arrange these heinous acts on a continuum in order to determine which act justifies the imposition of the most extreme punishment. Imposition of a life sentence on the basis of extreme cruelty alone will require a showing that the viciousness of the murder differed in a substantial degree from that which inheres in the crime of murder.<sup>117</sup>

The court went on to say that St. Pierre's acts, even though savage, "did not involve torture or other gratuitous suffering inflicted on the victim" and therefore did not deserve to be placed at the outermost portion of the continuum which constituted extreme cruelty.<sup>118</sup> In reducing the life sentence to forty-five years, the court relied in part on supporting statistics which showed that the average sentence for murder during the first eleven years under the Criminal Code was thirty-four years.<sup>119</sup>

Thus, in *St. Pierre* the Law Court demonstrated its willingness to be bold in formulating sentencing guidelines and to interpret its scope of authority broadly under the new statute. In keeping with the *Hallowell* two-step approach to sentencing, the court could have decided to reduce the sentence based entirely upon the theory that the defendant's circumstances demanded mitigation of the life sentence imposed. Instead, it ventured into potentially more controversial territory by concluding that the defendant's conduct "did not evidence the extremely vicious quality that would constitute extreme cruelty."<sup>120</sup> Arguably, a sentencing court could have found that St. Pierre's conduct—repeated blows with a broken jackhammer bit, attempted strangulation, and throwing a body in a river—constituted extreme cruelty; yet the Law Court still found a "misapplication of principle" in that case. Under one view, the Law

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115. *Id.* at 621.

116. *Id.* at 622. The *Shortsleeves* court defined the extreme cruelty circumstance as "murder accompanied by torture, sexual abuse or other extreme cruelty inflicted upon the victim." *State v. Shortsleeves*, 580 A.2d at 150.

117. *State v. St. Pierre*, 584 A.2d at 621.

118. *Id.* at 622.

119. *Id.*

120. *Id.* at 621.

Court may have appeared to be abandoning its deference to the sentencing court's discretion and substituting its own opinion of "extreme cruelty." Under another view, however, it was merely fulfilling its mandated responsibility to create a common law body of sentencing principles by functionally defining that term. It is interesting to note that there was no widespread public reaction to the decision in *St. Pierre*, and no legislative intervention at this point. However, as this Comment will show, in *State v. Lewis*, *State v. Michaud*, and *State v. Clark* (the *Lewis* cases), it was precisely this line of reasoning which prompted strong criticism and the resulting changes in the Appellate Review Act.

In *State v. Tellier*<sup>121</sup> the Law Court first considered the manner in which the sentence was imposed in deciding to remand the case to the sentencing court. One afternoon Joseph Tellier lured his neighbor's ten-year-old daughter into his car under the pretext of getting her advice in choosing flowers for his wife. He drove the girl to an isolated spot, where he threatened to hurt her if she did not engage in sexual acts with him. The defendant removed her clothes, had sexual contact with her, and, when she would not agree not to tell anyone what had happened, he choked her until she lost consciousness, then left her.<sup>122</sup>

As a result of a plea bargain, the defendant eventually entered guilty pleas to kidnapping, unlawful sexual contact, and aggravated assault. He was sentenced to the maximum sentence of twenty years for kidnapping, five years for unlawful sexual contact, and ten years, with all but four years suspended and six years of probation, for aggravated assault, to be served consecutively.<sup>123</sup>

Tellier appealed his sentence to the Law Court on two grounds. First, he argued that consecutive sentences for kidnapping and sexual contact were prohibited by statute<sup>124</sup> since the offenses proceeded from the same criminal episode. The Law Court agreed and held that the sentences should be concurrent, not consecutive. Second, Tellier argued that his sentences were excessive in length. However, the Law Court held that it could not review the propriety of the sentences because of the manner in which they were imposed. Specifically, the sentencing court had considered only the nature and seriousness of the offense in determining the sentences; it had made no inquiry into the circumstances of the defendant. Therefore, the Law Court found that the record contained insufficient information and remanded for resentencing.<sup>125</sup>

The Law Court's decision in *Tellier* is significant for two reasons.

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121. 580 A.2d 1333 (Me. 1990).

122. *Id.* at 1334.

123. *Id.*

124. See ME. REV. STAT. ANN. tit. 17-A, § 1256(2-3) (West 1983 & Supp. 1989).

125. *State v. Tellier*, 580 A.2d at 1336.

First, the court emphasized the need for the sentencing court to explicitly articulate its reasons for imposing a given sentence in order for appellate review to function properly. Second, in remanding *Tellier* the Law Court demonstrated its willingness to require a sentencing court's accountability and consideration of *all* relevant sentencing factors. Ironically, the Law Court itself had not yet determined what role the need to protect the public should play in determining a sentence. In utilizing the *Hallowell* approach, it had considered only two of the three sentencing factors listed in the statute: the nature of the offense, and the circumstances of the offender. The third factor, the protection of the public interest, had not been considered in any of the sentence appeals to the Law Court thus far. However, assuming that the protection of the public interest encompasses the consideration of victim impact, this factor was clearly a relevant concern in *Tellier* (i.e., the victim being a ten-year-old girl).<sup>126</sup> Nevertheless, the court did not explicitly acknowledge its validity in determining the sentence in *Tellier*.

It was not until *State v. Constantine*<sup>127</sup> that the Law Court first mentioned the protection of the public interest as a sentencing factor. In that case, the defendant was convicted of vehicular manslaughter and was sentenced to the ten-year maximum for that offense. The defendant, who had been drinking at a dance one night, took his parents' car without permission and drove it for approximately one mile on the wrong side of the road without the use of headlights. He collided with a car operated by the victim, who died on impact. The defendant was twenty-two years old at the time of the offense, had been convicted of over a dozen other offenses, and was a known abuser of alcohol and drugs.<sup>128</sup>

He appealed his sentence to the Law Court on the grounds that the sentencing court gave too little weight to his remorse and potential for rehabilitation, and too much weight to the goal of deterrence. The Law Court held that the sentencing court did not misapply principle in weighing the sentencing factors, "in view of the serious nature of Constantine's offense, Constantine's character as demonstrated by his record and his prior probation violations, and the protection of the public interest through deterrence of drunken driving that risks inflicting death."<sup>129</sup> Thus, although the Law Court identified the need to protect the public as a sentencing factor in

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126. It was unclear whether the Law Court viewed factors such as the crime's impact on the victim as affecting the nature and seriousness of the offense, or the protection of the public interest. Nonetheless, the court's failure to squarely address the issue of victim impact in *Tellier* became a central problem in the *Leuis* cases, which led to reform of the Appellate Review Act. See *infra* notes 172-74 and accompanying text.

127. 588 A.2d 294 (Me. 1991).

128. *Id.* at 295.

129. *Id.* at 296.

*Constantine*, it still did not state what relationship it had with the other two sentencing components.

The uncertainty over the role of victim impact (one aspect of protecting the public interest) in sentencing decisions also continued in *Constantine*. Unlike *Tellier*, though, the Law Court in *Constantine* explicitly validated victim impact as a sentencing factor. According to the court, the victim was an eighteen-year-old college freshman. His father, a volunteer firefighter, coincidentally responded to the scene of the accident and suffered severe emotional distress as a result. The victim's mother and younger brother were also strongly affected, and there was community outrage about the incident.<sup>130</sup> Among the factors that the sentencing court had considered in sentencing was the impact on the victim and the victim's family. In upholding the sentencing court's decision, the Law Court agreed that victim impact was a proper factor to consider: "[T]he factors considered by the court are, in general, the ones that a sentencing court should take into consideration."<sup>131</sup> However, while the Law Court approved of victim impact as a valid factor in sentencing, it again fell short of stating *how* this factor should be considered and what relative weight it should be assigned in determining a sentence. The court could have given significant guidance by defining the limits of applicability of this factor. Instead, the court did not make clear whether victim impact should be considered under the nature of the offense category as a primary factor increasing the maximum sentence, or only as a secondary factor under the protection of the public interest category which, under the *Hallowell* approach, would only offset any mitigating circumstances of the offender.<sup>132</sup>

In *Constantine* it is possible that the Law Court intended to show deference to the sentencing court by not mandating just how the protection of the public interest (and, specifically, victim impact) should be weighed in determining a sentence. However, such sudden "deference" to the sentencing court is unlikely, considering that the sentencing approach set forth in *Hallowell* specifically outlined how the factors of nature of offense and character of offender were to be weighed in relation to one another.<sup>133</sup> It is more likely that the Law Court was trying to preserve its options for future cases as it had not itself determined how the need to protect the public should influence sentencing policy. Unfortunately, as the next three cases will

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130. *Id.* at 295.

131. *Id.* at 296.

132. See Supplemental Brief of Appellee on Sentence Appeal at 43 n.18, *State v. Gosselin*, 600 A.2d 1108 (Me. 1991).

133. The fact that the Law Court was willing to enforce the *Hallowell* approach by remanding *Tellier* because the sentencing court did not consider the character of the offender is also inconsistent with the notion that the Law Court intended to defer to the sentencing court on this matter.

show, an early determination of the relationship among the three components of a sentence is critical to a successful appellate sentence review system. The uncertainty over these fundamental questions which remained after *Constantine* made it almost inevitable that the Appellate Review Act would require modification.

*B. The Problem Cases: State v. Lewis, State v. Michaud, and State v. Clark*

In April and May of 1991, the Law Court decided three sentence appeals under the 1989 Appellate Review Act. In all three cases—*State v. Lewis*,<sup>134</sup> *State v. Michaud*,<sup>135</sup> and *State v. Clark*<sup>136</sup>—the Law Court reduced the sentence by one-half or more under its new authority to substitute lesser sentences directly on appeal.<sup>137</sup> This sharp reduction of sentence in three consecutive appeals appeared to be a sudden departure from the court's previous line of cases, in which only one out of five sentences had been reduced.<sup>138</sup> However, unlike the previous decisions, the *Lewis* cases were decided after the enactment of a bill increasing the maximum sentence for Class A crimes from twenty to forty years (Class A sentence amendment).<sup>139</sup> Thus, the sentence reductions in these three cases were influenced more by the Law Court's interpretation of the intent behind the Class A sentence amendment than by any other factor. Nevertheless, the public reacted strongly to what it perceived as an abuse of the Law Court's new sentencing power; as a result, the Legislature passed an emergency bill limiting the Law Court's future power in the sentence review scheme.

*1. The 1988 Class A Sentence Amendment*

At this point, it is important to outline the legislative history of the Class A sentence amendment in order to better understand the problems which arose in the *Lewis* cases. In 1988 a bill proposing to double the maximum sentences for Class A, B, and C offenses was introduced in the Maine Legislature.<sup>140</sup> The bill was intended to address two problems. First, as a result of a perceived increase in the

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134. 590 A.2d 149 (Me. 1991).

135. 590 A.2d 538 (Me. 1991).

136. 591 A.2d 462 (Me. 1991).

137. The court reduced the sentence from 20 to 10 years in *Lewis*, from 40 to 12 years in *Michaud*, and from 30 to 15 years in *Clark*. See *supra* and *infra* text accompanying notes 151, 152, 157 & 165.

138. In *St. Pierre* the Law Court reduced a life sentence to a term of 45 years. *State v. St. Pierre*, 584 A.2d at 622.

139. P.L. 1987, ch. 808, § 1 (codified at ME. REV. STAT. ANN. tit. 17-A, §§ 1252(2)(A), 1252-B (West Supp. 1991-1992)).

140. L.D. 2312 (113th Legis. 1988). The bill specifically sought to increase the maximum sentence for Class A crimes from 20 to 40 years; for Class B crimes, from 10 to 20 years; and for Class C crimes, from 5 to 10 years.



nature and seriousness of crimes being committed, the criminal justice system did not have a sufficient maximum range of sentencing available to punish the most violent and dangerous offenders.<sup>141</sup> Although the legislation would double the limits for these types of offenses, the bill's Statement of Fact anticipated that the number of offenders sentenced to prison would not increase. It stated, "The bill is expected to affect less than ½ of 1% of sentenced inmates."<sup>142</sup> The second problem was the reduction in sentences resulting from automatic good-time credits.<sup>143</sup> The bill would require that the sentencing court specifically consider the extent to which the length of sentence was altered by good-time laws.

During the same legislative session, an amendment was proposed to the bill which would double the maximum sentence for Class A offenses only.<sup>144</sup> The bill, as thus amended, was enacted into law effective July 1, 1989.<sup>145</sup> The Judiciary Committee noted that the amended bill would not automatically double the sentence for every Class A offender; instead, sentencing judges would have expanded discretion in dealing with "the most heinous and violent crimes that are committed against a person."<sup>146</sup> Unlike the original bill, the amended legislation did not contain the same estimate that only a very small percentage of sentenced offenders would be affected by the proposed legislation; however, it did state that "close-to-maximum" sentences were the most likely to be affected.<sup>147</sup>

What the Legislature intended in doubling the maximum sentence for a Class A offender is not entirely clear from the available legislative history. On the one hand, the statutory language did not place any explicit limits on when the full range of forty years could be considered by the sentencing judge. It merely stated that "[i]n the case of a Class A crime, the court shall set a definite period not to exceed 40 years."<sup>148</sup> On the other hand, the legislative history clearly

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141. *Id.* Statement of Fact.

142. *Id.*

143. *Id.* Under the Maine Criminal Code, a sentence may be reduced by one-third or more by the accumulation of "good-time" credits. See ME. REV. STAT. ANN. tit. 17-A, § 1253 (West Supp. 1991-1992). The bill sought to double the penalties in Class A, B, and C crimes because the good-time laws automatically reduced the impact of the original sentence upon the convicted criminal. The bill also sought to ensure that the effect of the good-time laws on sentences would be considered uniformly by every judge.

144. Comm. Amend. A to L.D. 2312, No. H-720 (113th Legis. 1988). The amendment also retained the mandate to consider good-time credits for all applicable classes of crimes.

145. P.L. 1987, ch. 808 (codified at ME. REV. STAT. ANN. tit. 17-A, §§ 1252(2)(A), 1252-B (West Supp. 1991-1992)).

146. Comm. Amend. A to L.D. 2312, No. H-720, Statement of Fact (113th Legis. 1988).

147. Comm. Amend. A to L.D. 2312, No. H-720 (113th Legis. 1988).

148. ME. REV. STAT. ANN. tit. 17-A, § 1252(2)(A) (West Supp. 1991-1992).

indicated that the amendment was not designed to automatically double the sentence for every Class A offense, but instead was designed to affect primarily the "close-to-maximum" sentences. However, just how these "close-to-maximum" sentences would be affected by the Class A sentence bill was a matter of speculation. Would the sentences approaching twenty years in length be automatically doubled, or would they simply be the only sentences eligible for consideration in the expanded twenty-to-forty year range? As the following three cases will show, this ambiguity in the operation of the Class A sentence amendment was a significant factor in prompting a change in the then less than three-year-old Appellate Review Act.

## 2. *The Cases*

In *State v. Lewis*,<sup>149</sup> the first of the three sentence appeals, the defendant was convicted of arson, a Class A offense.<sup>150</sup> On a November evening, Donald Lewis set fire to an unoccupied 1979 Dodge Aspen belonging to an acquaintance. There were no reported injuries. Lewis, an alcoholic, had an extensive record of felony convictions, including aggravated assault and crimes involving property. The superior court sentenced the defendant to twenty years, with all but fifteen suspended, and six years probation. At the sentencing hearing, the superior court specifically noted that the maximum sentence for Class A crimes had been increased to forty years.<sup>151</sup>

Lewis appealed his sentence to the Law Court, claiming that it was excessive in length. The Law Court agreed, and reduced the sentence from twenty to ten years, with all but eight years suspended. Justice Roberts, writing for the court, set forth the following interpretation of the legislative intent behind the Class A sentence revision:

[W]e conclude that the intent was to make available *two discrete ranges of sentences* for Class A crimes. For the majority of such crimes the sentence imposed should be the same as it would have been under the twenty-year limit. Only for the most heinous and violent crimes committed against a person should the court in its discretion consider imposing a basic sentence within the expanded range of twenty to forty years.<sup>152</sup>

Thus, in the Law Court's view, the sentencing court in *Lewis* had committed a "misapplication of principle" when it considered the full forty-year range of sentence. Instead, since the defendant's conduct was not a "heinous and violent crime committed against a per-

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149. 590 A.2d 149 (Me. 1991).

150. See ME. REV. STAT. ANN. tit. 17-A, § 802 (West 1983 & Supp. 1991-1992).

151. *State v. Lewis*, 590 A.2d at 150.

152. *Id.* at 151 (emphasis added).

son," the sentencing court should have applied the original twenty-year range. Had it done so, the Law Court reasoned, it would have found that the defendant was not deserving of twenty years, the most serious sentence for a crime not involving heinous and violent conduct against a person.

In *Lewis* Justice Roberts also departed from the sentencing procedure which Justice Wathen had set forth in *Hallowell*. Justice Roberts stated in *Lewis*:

In imposing sentence the court must first determine a *basic* sentence by considering the particular nature and seriousness of the offense, without regard to the circumstances of the offender. *State v. Hallowell*, 577 A.2d 778, 781 (Me. 1990). Only after this first step should the court apply its discretion to determine the degree of sentence mitigation or *aggravation* called for by the circumstances of the offender. *Id.*; *State v. Constantine*, 588 A.2d 294, 297 (Me. 1991).<sup>153</sup>

Although Justice Roberts cited *Hallowell* as authority, the sentencing scheme articulated above was different from the *Hallowell* approach in two fundamental respects. First, it called for a basic sentence, not a maximum sentence, to be determined by the nature of the offense. Second, that basic sentence could be decreased or increased based on a consideration of the circumstances of the offender. Thus, under *Lewis*, if the defendant had an extensive criminal record and a history of drug abuse, and showed poor prospects for rehabilitation, the basic sentence initially determined could be increased due to these aggravating factors.

The sentencing principles articulated in *Lewis* seem more sensible and fair than those outlined in *Hallowell*; a defendant's aggravating factors should have the capacity to increase a basic sentence determined by the nature of the offense. It is unclear, however, whether the Law Court intended to create a new sentencing procedure in *Lewis* or whether it was merely explaining what was not made clear in *Hallowell*.

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153. *Id.* at 150 (emphasis added). This quote illustrates the Law Court's inconsistency in language in declaring sentencing principles. First, the quote cites *Hallowell* as authority for the idea that a basic sentence is determined by looking at the nature of the offense. In reality, however, the court in *Hallowell* stated that the *maximum* sentence, not the *basic* sentence, is determined by considering the nature of the offense. "The *maximum* sentence in a given case should, in the first instance, be determined by a consideration of the particular nature and seriousness of the offense . . ." *State v. Hallowell*, 577 A.2d at 781 (emphasis added). Likewise, the quote cites *Constantine* to support the idea that the circumstances of the offender can serve either to mitigate or *aggravate* a basic sentence. But in *Constantine* the Law Court made no specific mention of aggravating circumstances of the defendant. It stated, "the sentencing court first imposes a sentence appropriate to the severity of the offense, and then considers the possible existence of *mitigating factors* that favor a suspended sentence or probation, including the likelihood of successful rehabilitation." *State v. Constantine*, 588 A.2d at 297 (emphasis added).

Only two weeks after *Lewis* the Law Court decided *State v. Michaud*.<sup>154</sup> In that case, the defendant apprehended two ten-year-old girls who were picking flowers in a rural area and took them into the woods, where he threatened to kill them if they did not keep quiet. Once in the woods, he made them undress, and engaged in sexual acts with each of them before he let them go.<sup>155</sup> The defendant was convicted of two counts of gross sexual misconduct and was sentenced to maximum twenty-year terms on each count, to be served consecutively, for a total of forty years.<sup>156</sup>

On appeal of sentence, the Law Court reduced Michaud's sentence to two concurrent fifteen-year terms of imprisonment with all but twelve years of those sentences suspended, followed by six years of probation.<sup>157</sup> The court stated that in determining a sentence, the defendant's conduct had to be compared on a scale of seriousness to all possible means of committing gross sexual misconduct. A maximum sentence was inappropriate in this case because, the Law Court reasoned, "gross sexual misconduct could be committed in much more aggravating and heinous ways."<sup>158</sup> The court noted that the defendant did not expose his genitals to the girls, nor did he make contact between his genitals and the mouth, anus, or genitals of either girl.<sup>159</sup> The court also emphasized that the defendant did not exert violent physical force upon the victims and that the entire encounter lasted only twenty minutes. Furthermore, the Law Court concluded that the imposition of consecutive sentences was improper because the gross sexual misconduct offenses were not "unusually serious" in this case.<sup>160</sup>

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154. 590 A.2d 538 (Me. 1991).

155. *Id.* at 540. The defendant kissed the vagina of one of the girls, made one of the girls kiss the other on the lips, kissed the first girl on the lips, and inserted a device into the second girl's vagina. *Id.* at 542 n.8.

156. *Id.* at 540. Apparently the defendant was sentenced prior to the amendment lengthening the maximum sentence for a Class A crime to 40 years. *See id.* at 540 n.2. Gross sexual misconduct (now defined as gross sexual assault, *see* P.L. 1989, ch. 401, § A(4)) is a Class A crime. ME. REV STAT ANN tit. 17-A, § 253(1), (4) (West Supp. 1991-1992).

157. *State v. Michaud*, 590 A.2d at 545.

158. *Id.* at 542.

159. *Id.* The court also pointed out that there were more offensive ways in which gross sexual misconduct could be committed, such as by sexual intercourse, anal intercourse, fellatio, or forcing a person to have sexual contact with an animal. *Id.* at 543 n.11.

160. *Id.* at 543. In reviewing the propriety of a consecutive sentence for an abuse of discretion, the Law Court noted that when the defendant has been given multiple sentences, there is a statutory presumption that a sentencing court shall impose the sentences concurrently; consecutive sentences may not be imposed unless the criminal conduct involved is "unusually serious." *Id.* (citing ME. REV STAT ANN tit. 17-A, § 1256(2)(D) (West 1983 & Supp. 1991-1992) and *State v. Walsh*, 558 A.2d 1184, 1188 (Me. 1989)). Consecutive sentences are also permitted if the offenses are based on different conduct or arise from different criminal episodes. ME. REV STAT ANN tit.

In *Michaud*, an opinion written by Justice Clifford, the Law Court also reverted to the *Hallowell* approach of determining the sentence. "The nature and seriousness of the defendant's conduct is determinative of the *maximum* sentence that may be imposed."<sup>161</sup> This time the court stated that both the circumstances of the offender and the *protection of the public interest* should be considered once the maximum sentence was determined, but only as mitigating factors favoring the reduction of the sentence imposed: "The circumstances of the offender and the protection of the public must be weighed to determine whether and to what extent the sentences otherwise called for by virtue of the nature and seriousness of the crime should be *reduced*."<sup>162</sup> While the court acknowledged that aggravating factors did exist in this case, it nevertheless concluded that these were offset by countervailing mitigating circumstances, which required the suspension of a portion of the defendant's sentence.<sup>163</sup>

Finally, in *State v. Clark*,<sup>164</sup> an opinion written by Justice Wathen, the Law Court reduced a thirty-year term of imprisonment

17-A, § 1256(2)(A) (West 1983 & Supp. 1991-1992). However, the Law Court concluded that the acts in *Michaud* "were so much a part of a single criminal episode [that it would] be inappropriate to make the sentences consecutive." *State v. Michaud*, 590 A.2d at 544 n.15.

Current Maine law does not allow the imposition of consecutive sentences where there is more than one victim. However, as a result of *Michaud*, further legislation may be introduced in the next legislative session to address this issue. According to legislative debate on the proposed amendments to the Appellate Review Act (L.D. 1932), which took place on June 19, 1991, in the House of Representatives, Representative Patrick Paradis made the following statements on the House floor:

[The Judiciary Committee] will be drafting specific language . . . before the next session . . . [concerning] the idea expressed by the [Law Court] in *State v. Michaud* that a person should get concurrent sentences rather than consecutive sentences for attacking multiple victims. It is inconceivable to me that the court should look upon a double rape as a "two-for-one sale." That was not our intent in drafting the consecutive sentencing section of the criminal code, and every member of the Judiciary Committee, I believe, is appalled at the callousness of the court in rewarding the defendant in *Michaud* for taking "only twenty minutes" to attack two little girls whose lives have been transformed forever . . . .

Legis. Rec. (Proof), H-1227 (1st Reg. Sess. 1991) (statement of Representative Paradis), House of Representatives, June 19, 1991.

161. *State v. Michaud*, 590 A.2d at 542 (emphasis added) (citing *State v. Hallowell*, 577 A.2d at 781).

162. *Id.* at 544 (emphasis added) (citing *State v. Hallowell*, 577 A.2d at 781-82).

163. *Id.* The defendant's aggravating circumstances included the following: two prior convictions for criminal assault and one for criminal threatening; lack of remorse; and mental illness that, although successfully treated in the past, had gotten out of control due to the defendant's more recent refusal to submit to treatment. Defendant's countervailing mitigating factors included no felony criminal record and no prior conviction for sexual offenses, a history of being raised in a dysfunctional family, and mental illness treatable with hospitalization and medication. *Id.*

164. 591 A.2d 462 (Me. 1991).

for a gross sexual assault conviction to fifteen years.<sup>165</sup> In that case, the defendant, Mark Clark, offered to walk a sixteen-year-old high school student home from her sister's apartment late one night. On the way home, he grabbed the young woman by the throat, dragged her into the bushes, and forced her face-first into the ground with his arms around her throat. He then opened her shirt, grabbed her breasts, and threatened to knock her out if she did not keep quiet. After removing her pants, underwear, and a tampon, he had sexual intercourse with her but did not ejaculate.<sup>166</sup>

At the time of the offense the defendant, a thirty-three-year-old, had four prior burglary convictions, a probation violation, several misdemeanor convictions, and a history of alcoholism. On appeal of his sentence, he argued that the sentencing court improperly failed to consider the goal of rehabilitation. Nevertheless, the Law Court held that the sentencing court adequately considered rehabilitation and committed no error in determining that the prospects for rehabilitation were outweighed by other factors.<sup>167</sup>

However, although the issue was not raised on appeal, the Law Court *sua sponte* examined the propriety of the sentence and determined that it was excessive in length in light of the recent increase of the maximum Class A sentence from twenty to forty years. The court cited *Lewis* for the interpretation that the Legislature had created a two-tiered system of Class A crimes whereby only the most "heinous and violent crimes" could be punished in the expanded twenty- to forty-year range.<sup>168</sup> In the opinion, Justice Wathen reasoned that gross sexual assault offenses did not deserve punishment in the expanded Class A range unless they involved either a weapon or a "heightened degree of violence, injury, torture, or depravity."<sup>169</sup> Although the court acknowledged that the defendant's use of force, violence, and degradation ranked high on the scale of seriousness for all sexual assaults, it still concluded that the defendant's sentence was excessive because, "[c]omparing defendant's conduct against all the possible means of committing gross sexual assault, however, we cannot conclude that it ranks at or near the very top of that scale."<sup>170</sup>

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165. *Id.* at 464-65. At the time of sentencing, the Class A sentence amendment had taken effect, and the superior court had a maximum of 40 years statutorily available to it in determining the defendant's sentence.

166. *State v. Clark*, 591 A.2d at 463.

167. *Id.* at 464.

168. *Id.*

169. *Id.*

170. *Id.*

#### IV. REFORMING THE 1989 APPELLATE REVIEW ACT

##### A. Reaction to the Lewis Cases

Almost immediately after the decisions in *Lewis*, *Michaud*, and *Clark* were published, the Law Court encountered strong criticism on several fronts. In particular, various victim rights groups protested the Law Court's seeming insensitivity to the victims in those decisions and its willingness to reduce sentences based on what appeared to be nothing more than its own opinion of "heinousness."<sup>171</sup> In addition, the prosecutorial community was alarmed that the Appellate Review Act had made the discretion of the sentencing court virtually a dead letter.<sup>172</sup>

Where public reaction to the *Lewis* trilogy was strong, reform was equally swift in following. On June 6, 1991, an emergency bill was proposed to modify the appellate sentence review procedure in light of the three controversial cases.<sup>173</sup> The original bill was amended,

171. At a press conference at the State House on May 15, 1991, Laura A. Fortman, Chair of the Maine Coalition Against Rape, was quoted as follows: "These decisions negate all of the progress we have made to date. . . . The message being given by our Supreme Court to perpetrators is that, in Maine, sexually assaulting children and adolescents is not in and of itself 'violent enough' or 'depraved enough' to warrant the maximum or near-maximum sentence." Peter Jackson, *Court Criticized for Reducing Terms in 3 Criminal Cases*, BANGOR DAILY NEWS, May 16, 1991, at 5. At the same press conference, Marilyn Owen Robb, head of the Maine Chapter of Mothers Against Drunk Driving, stated, "With the precedent-setting decision here, we may look to the near future when the court will decide that the drunk driver who kills only two people in the other car does not deserve the maximum sentence because there was room for three more in the back seat." *Id.*

172. According to District Attorney Janet Mills, president of the Maine Prosecutors Association, sentencing should be left to the trial court judge, who has heard the evidence in the case and observed the defendant. Her reaction to the three decisions was that "[t]hey . . . are sitting up there in their ivory tower and picking out a number without eyeballing the defendant or hearing from any witnesses. I think that strikes at everybody's gut as wrong." Gary J. Remal, *Paradis Wants Courts to Take Heed of Clarification*, KENNEBEC JOURNAL, June 18, 1991, at 1.

173. L.D. 1932 (115th Legis. 1991), entitled "An Act to Correct a Conflict in the Law Relating to Sentencing Considerations and Appellate Review." Two major changes proposed in the original bill were not enacted in the final emergency legislation. According to the House and Senate chairs of the Joint Standing Committee on the Judiciary, these two changes were not enacted only because of time constraints. *See infra* note 200.

The first of these was intended to clarify the intent behind P.L. 1987, ch. 808, the Class A sentence amendment that increased the maximum sentence for Class A crimes to 40 years, and to send a message to the Law Court that its interpretation of a two-tiered system of Class A crimes was wrong. The original bill proposed that the Law Court's standard of review in a sentence appeal be for an abuse of discretion only. Section 2 of the original bill (not enacted) proposed an addition to the statute of a new § 2154-A providing:

##### § 2154-A. Discretion of the sentencing court

The review of any sentence by the Supreme Judicial Court may be for abuse of discretion by the sentencing court only. Nothing in this chapter may be construed by the Supreme Judicial Court to limit the discretion of

and, as enacted on June 30, 1991,<sup>174</sup> made three major changes to the 1989 Appellate Review Act.<sup>176</sup>

The first change modified the language of one of the objectives of sentence review. It repealed former section 2154(1) of the Act, which had provided:

The general objectives of sentence review by the Supreme Judicial Court are:

**1. Sentence Correction.** To correct a sentence which is excessive in length, having regard to the nature of the offense, the character of the offender and the protection of the public interest.<sup>176</sup>

In its place the emergency legislation substituted the following language:

The general objectives of sentence review by the Supreme Judicial Court are:

**1. Sentence Correction.** To provide for the correction of sentences imposed without due regard for the sentencing factors set forth in this chapter.<sup>177</sup>

the sentencing court in exercising the full statutory range of punishments after due consideration of all the sentencing criteria and sentencing considerations provided in this chapter. The means or method employed by a defendant to commit a particular offense may not be used by the Supreme Judicial Court to establish a maximum sentence that is less than the sentence established by the class of that offense. All sentences must reflect the full consideration by the sentencing court of all applicable sentencing criteria.

L.D. 1932, § 2 (115th Legis. 1991).

The original bill also sought to address the decision in *Michaud*, in which the Law Court changed the defendant's sentence from two consecutive terms to two concurrent terms because it determined that his conduct was part of one criminal episode even though there were two victims involved. Specifically, the bill proposed to amend the statutory guidelines for multiple sentencing, ME REV STAT ANN tit. 17-A, § 1256(2) (West 1983 & Supp. 1991-1992), to include a definition of "criminal episode" whereby "[c]riminal acts against different victims constitute different criminal episodes." L.D. 1932, § 6 (115th Legis. 1991). See *supra* note 153. This proposed change was also not enacted into law.

174. Comm. Amend. A to L.D. 1932, No. H-662 (115th Legis. 1991) (enacted by P.L. 1991, ch. 525, and codified at ME REV STAT ANN tit. 15, §§ 2151-2157 (West 1989 & Supp. 1991-1992)). The amended bill, proposed on June 12, 1991, became effective on June 30, 1991, since it was enacted as emergency legislation. See ME CONST., art. 4, pt. 3, § 16. On June 19, 1991, the House of Representatives voted 125 - 1 to enact the amended version of L.D. 1932. Also on that date, the Senate approved the legislation by a vote of 29 - 1. Legis. Rec. (Proof) H-1227 (1st Reg. Sess. 1991).

175. For a more detailed comparison of the changes proposed in L.D. 1932 and those eventually adopted in the amended version of L.D. 1932, see Supplemental Brief of Appellee on Sentence Appeal at 15-24, *State v. Gosselin*, 600 A.2d 1108 (Me. 1992) (No. 90-394).

176. P.L. 1989, ch. 218 (codified at ME REV STAT ANN tit. 15, § 2154(1) (West Supp. 1989)) (repealed 1991).

177. P.L. 1991, ch. 525, § 1 (codified at ME REV STAT ANN tit. 15, § 2154(1) (West Supp. 1991-1992)).



This change seemed to remove the limitation in the Act that the Law Court correct only sentences which are excessive in length. After the emergency reform, one interpretation is that the Law Court can also correct sentences which are too lenient. In a sense, this interpretation is inaccurate because the sentencing court on remand may still not impose a more severe sentence than that from which the defendant has appealed.<sup>178</sup> However, the interpretation may be valid in another sense, since the Law Court still can (and should) review sentence appeals in which the sentence is inadequate and pronounce rational sentencing principles, even though the court cannot increase a sentence. Thus, the Law Court can still satisfy its mandated task of declaring sentencing guidelines even if it reviews a sentence appeal from an arguably inadequate sentence.

The second main change, addressing the propriety of a sentence, specifically added victim impact to the factors to be considered on sentence review. The language modifying section 2155 of the 1989 Appellate Review Act reads (deletions are struck out; additions are underlined):

**§ 2155. Factors to be Considered by Supreme Judicial Court.**

In reviewing a criminal sentence, the Supreme Judicial Court ~~is authorized to~~ shall consider:

**1. Propriety of Sentence.** The propriety of the sentence, having regard to the nature of the offense, the character of the offender, and the protection of the public interest, the effect of the offense on the victim and any other relevant sentencing factors recognized under law.<sup>179</sup>

By the above provision, the Legislature sought to clarify that the Law Court is required on appeal to consider all the same sentencing factors as the sentencing court, including victim impact. The "Statement of Fact" section of the Judiciary Committee's amendment to L.D. 1932 (which was enacted) provides an explanation of the legislative intent behind this change.<sup>180</sup> It states:

The purpose of this amendment is to modify the sentencing review factors in light of certain recent decisions of the Maine Supreme Judicial Court. Decisions such as *State v. Lewis*, No. \_\_\_\_ (Me. April 19, 1991); *State v. Michaud*, No. \_\_\_\_ (Me. May 2, 1991); and *State v. Clark*, No. \_\_\_\_ (Me. May 13, 1991), reveal the conflict between the sentencing criteria in the Maine Criminal Code and the appellate review provisions in the Maine Revised

178. See *infra* note 184 and accompanying text.

179. Comm. Amend. A to L.D. 1932, § 2, No. H-662 (115th Legis. 1991) (enacted by P.L. 1991, ch. 525, § 2, and codified at ME. REV. STAT. ANN. tit. 15, § 2155 (West Supp. 1991-1992)).

180. "The 'Statement of Fact' attached to an act's legislative document is a proper and compelling aid to ascertaining legislative purpose and intent." *Franklin Property Trust v. Foresite, Inc.*, 438 A.2d 218, 223 (Me. 1981).

Statutes, Title 15, chapter 306-A. The Title 17-A provisions contain a number of criteria to be considered by the sentencing court in every criminal case and a conflict occurs because different factors are indicated in the Title 15 review process. This amendment resolves the apparent conflict that has arisen as a result of the different statutory mandates.

This amendment includes factors that a sentencing judge considers as the factors the Supreme Judicial Court, sitting as a reviewing court, is required to consider. In addition to the nature of the offense, the character of the offender and the protection of the public interest, *this amendment requires the court to consider the effect of the offense on the victim and any other relevant sentencing factors* recognized under law. The term "law" is used to refer to not only statutorily required factors, but also considerations that have been developed through case law. The court is required to consider the criminal record of the defendant by the current law inclusion of "the character of the offender" as a factor.<sup>181</sup>

Although the specific inclusion of victim impact in the section above may have been redundant (as the Law Court had already acknowledged victim impact to be a valid sentencing factor in *Constantine*),<sup>182</sup> the Legislature included the language for emphasis. Here the Legislature was responding in part to the Law Court's perceived failure to consider victim impact in *Michaud* and *Clark*, and generally, to the court's failure to articulate clearly the proper role of this factor in sentencing decisions. The amendment makes clear the legislative intent that the Law Court be required to consider victim impact specifically before it reduces a sentence based on propriety.

Perhaps the most significant of the three changes enacted by the emergency legislation was the removal of the Law Court's authority to reduce sentences directly in cases in which it determines that relief should be granted. This reform was intended to limit the Law Court's sentence review powers to a remand to the trial court for resentencing because of a perceived encroachment on the province of the sentencing court.<sup>183</sup> The language as enacted reads as follows:

**1-A. Remand.** If the Supreme Judicial Court determines that relief should be granted, it must remand the case to the court that

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181. Comm. Amend. A to L.D. 1932, Statement of Fact (115th Legis. 1991) (emphasis added).

182. See *supra* note 131 and accompanying text.

183. Another reason advanced for limiting the Law Court's authority to a remand was the perceived benefit of bringing the victim (or victim's family) and the defendant together at resentencing. Since the victim has the right to be heard by the court at the time of sentencing, see ME. REV. STAT. ANN. tit. 17-A, § 1257(2) (West Supp. 1991-1992), and the defendant has a similar right of allocution, ME. R. CRIM. P. 32(a)(2), the theory is that both parties would achieve a catharsis at resentencing before the trial court which they would otherwise be deprived of if the Law Court were to reduce the defendant's sentence directly. See, e.g., *infra* note 187.

imposed the sentence for any further proceeding that could have been conducted prior to the imposition of the sentence under review and for resentencing on the basis of such further proceedings provided that the sentence is not more severe than the sentence appealed.<sup>184</sup>

The legislative mandate was clear. The Law Court would no longer have the authority to impose substitute sentences in those cases which required relief, but instead would have to remand the case to the sentencing court for resentencing. The rationale behind removing the Law Court's power to reduce sentences was further explained in the "Statement of Fact" of the amended version of L.D. 1932:

This amendment requires the Supreme Judicial Court to remand the case to the sentencing court for resentencing if relief from the original sentence is necessary. The Supreme Judicial Court is not authorized to substitute its own sentence for the trial court sentence. *The sentencing court has had the opportunity to view the defendant through the course of a trial or other court proceeding and has had the opportunity to view the victim of the defendant's crime.*<sup>185</sup>

This reasoning is not convincing in all cases. Admittedly, the sentencing judge who has observed the defendant's demeanor at trial may be better informed to determine a proper sentence. However, in most cases this advantage is not present because the defendant has pleaded guilty, thereby foregoing trial.<sup>186</sup> Thus, in the vast majority

184. Comm. Amend. A to L.D. 1932, § 4, No. H-662 (115th Legis. 1991) (enacted by P.L. 1991, ch. 525, § 4, and codified at ME. REV. STAT. ANN. tit. 15, § 2156(1-A) (West Supp. 1991-1992)). This language replaced that of the earlier law, which read:

**1. Substitution of Sentence or Remand.** If the Supreme Judicial Court determines that relief should be granted, it may:

A. Substitute for the sentence under review any other disposition that was open to the sentencing court, provided however, that the sentence substituted shall not be more severe than the sentence appealed; or

B. Remand the case to the court that imposed the sentence for any further proceedings that could have been conducted prior to the imposition of the sentence under review and for resentencing on the basis of such further proceedings, provided however, that the sentence shall not be more severe than the sentence originally imposed.

**2. Affirmation of Sentence.** If the Supreme Judicial Court determines that relief should not be granted, it shall affirm the sentence under review.

P.L. 1989, ch. 218 (codified at ME. REV. STAT. ANN. tit. 15, § 2156(1) (West Supp. 1989)) (repealed 1991).

185. Comm. Amend. A to L.D. 1932, Statement of Fact (115th Legis. 1991) (emphasis added).

186. See ADMINISTRATIVE OFFICE OF THE COURTS, ANNUAL REPORT FISCAL YEAR 1989 STATE OF MAINE JUDICIAL DEPARTMENT 112. According to this report, from 1983 to 1988 there were 32,266 guilty pleas in Maine's superior courts, which disposed of between 81.1% and 88.8% of all criminal cases. See also *Connecticut Case Study*, *supra* note 26, at 1465.

of cases which come before it, the Law Court has access to the same information as the sentencing judge and is no less able to determine a proper sentence in these situations.

Nonetheless, the speedy legislative response to the *Lewis* cases illustrates the level of concern over the Appellate Review Act's distribution of sentencing power. Clearly the Legislature was uncomfortable with the Law Court's direct influence on sentencing under the Act, notwithstanding the fact that the Legislature itself had given the court a broad mandate to create a body of sentencing law in Maine. A majority of the Maine public apparently believed that the Law Court's creation of sentencing guidelines was acceptable in theory, but the application of those guidelines through the reduction of sentences was, upon reflection, a task which properly belonged within the province of the trial court's discretion.<sup>187</sup>

## *B. Analysis: Failures and Successes of the Process*

### *1. The Class A Sentence Amendment*

Removing the Law Court's authority to reduce sentences directly did not solve all of the problems in the *Lewis* cases. In fact, in its haste to reform the Appellate Review Act, the Legislature failed to address the main problem in those cases: the Law Court's interpretation of the Class A sentence amendment as creating two discrete ranges of sentences. As mentioned above,<sup>188</sup> the Law Court's adoption of a two-tiered system of Class A sentences was chiefly responsible for that court's sentence reductions in the *Lewis* cases, and hence the resulting impression that it had departed from the "misapplication of principle" standard of review pronounced in *Hallowell*.

Because the intent behind the Class A sentence amendment was unclear from the statutory language and legislative history, different

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187. In legislative debate of the amended version of L.D. 1932, one legislator showed his discomfort with the notion of an appellate court, equipped only with a record before it, limiting the discretion of sentencing judges to determine appropriate sentences:

Section 4 of this bill requires the Supreme Judicial Court to remand the case for another sentencing hearing if it finds that the sentence imposed was in error. This is important because all too often of late, the Law Court has determined that the sentence was wrong and, instead of sending the case back to the sentencing judge to reconsider the matter, they have just literally picked a number out of the air, with no explanation and without ever having seen or heard from the defendant or the victim in the case. That is wrong and the members of the Judiciary feel strongly that there must be another hearing, usually before the same judge who originally heard the case, and all parties will have a right to be heard again on reconsideration of the sentence following the dictates of the Law Court.

Leg. Rec. (Proof) 1227 (1st Reg. Sess. 1991) (statement of Rep. Paradis), House of Representatives, June 19, 1991.

188. See *supra* part III.B(1).

interpretations were possible. As mentioned above,<sup>189</sup> one such interpretation was that the amendment was intended to expand the discretion of sentencing judges by giving them the full sentencing range of up to forty years for *all* Class A offenses. Certainly on its face the pertinent statutory language supports this interpretation. "In the case of a Class A crime, the court shall set a definite period not to exceed 40 years . . ." <sup>190</sup> In addition, some support for this interpretation may be found in the legislative history. For example, one legislator described the intent of the legislation in the following way: "The intent of that bill was to allow the sentencing judge a great deal of leeway when dealing with Class A crimes, which are *by definition*, the most serious and heinous crimes on the books."<sup>191</sup>

However, this interpretation of the Class A sentence amendment is not entirely consistent with the legislative history. An alternative interpretation of the amendment is that a small percentage of Class A crimes—only the most heinous and violent—were intended to be affected by the legislation.<sup>192</sup> One of the main purposes of this legislation was to reduce the impact of the good-time laws on sentences imposed upon the "most serious and violent criminals."<sup>193</sup> In addition, the legislative history indicates that only those crimes committed against a person (as opposed to property offenses), and not all Class A offenses, were targeted for the expanded range of sentence.<sup>194</sup> Under this interpretation, then, the Class A crimes affected

189. *Id.*

190. Comm. Amend. A to L.D. 2312 (113th Legis. 1988) (enacted by P.L. 1987, ch. 808, and codified at ME. REV. STAT. ANN. tit. 17-A, § 1252(2)(A) (West Supp. 1991-1992)).

191. Leg. Rec. (Proof) H-1226 (1st Reg. Sess. 1991) (statement of Rep. Paradis), House of Representatives, June 19, 1991 (emphasis added), debating L.D. 1932, An Act to Correct a Conflict in the Law Relating to Sentencing Considerations and Appellate Review.

192. For example, pertinent language in the bill states:

2. The bill would not automatically double the length of sentence for every Class A offender. . . . [A] judge who currently imposes a 10-year sentence for a Class A offense, for which 20 years is allowable by law, is highly unlikely to begin handing down 20-year sentences for the same offense after enactment of this bill.

3. . . . It is the "close-to-maximum" sentences that are most likely to be affected . . . .

Comm. Amend. A to L.D. 2312 (113th Legis. 1988).

193. Comm. Amend. A to L.D. 2312, Statement of Fact (113th Legis. 1988). Under Maine good-time laws, a criminal sentence can be automatically reduced by up to one-third. ME. REV. STAT. ANN. tit. 17-A, § 1253(3) (West Supp. 1991-1992). Thus, prior to P.L. 1987, ch. 808, "good time" Class A offenders sentenced to the maximum twenty-year period were actually incarcerated for a period of about thirteen years.

194. The Statement of Fact of the bill which was eventually enacted noted that the crimes intended to be affected by the legislation were those committed against a person, rather than property offenses. The bill specifically targets "the most heinous and violent crimes that are committed against a person. The amendment does not increase the penalties for crimes committed against property." Comm. Amend. A to

by an expanded penalty of up to forty years would include attempted murder, manslaughter, and gross sexual assault; but not arson, robbery, or burglary when armed by a firearm, unless those offenses involved serious bodily injury to another person or threats thereof.<sup>195</sup>

If the intent of the Legislature was indeed to reduce the impact of the good-time laws and to expand the range of sentence for only the most serious conduct against a person, then increasing the maximum sentence for all Class A offenses across the board was a rather imprecise way to achieve those goals. At least two alternatives come to mind. First, if the impact of good-time laws on sentences were the main problem, the solution would be to change the good-time laws directly,<sup>196</sup> not the maximum Class A sentence. Second, if the objective was to punish the most heinous crimes committed against a person, then those crimes only—attempted murder, manslaughter, etc.—should be specifically targeted and classified into a new category of offense whose maximum sentence is forty years. Instead, by increasing the maximum sentence for *all* Class A offenses to forty years, the Legislature disturbed the proportionality of sentences established by Maine's Criminal Code<sup>197</sup> in 1976 and mandated by the state constitution.<sup>198</sup>

Regardless of what the Legislature really intended in enacting the Class A sentence amendment, there was nothing in the statutory language of the amendment itself to indicate that only certain types of crimes were to be considered in the expanded forty-year range. Thus, the Law Court's adoption of two discrete ranges of sentences—a regular Class A and a "super" Class A range—was a somewhat strained interpretation of the language itself.<sup>199</sup> Even the legislative history, which predicted that only close-to-maximum sentences would be affected, does not support an automatic two-tiered system without some creativity.

Notwithstanding the Law Court's strained interpretation of the Class A amendment, the Legislature was perhaps a bit too quick to

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L.D. 2312, Statement of Fact (113th Legis. 1988).

195. See Comm. Amend. A to L.D. 2312, Statement of Fact (113th Legis. 1988).

196. For example, the one-third automatic deduction could be changed to a smaller fraction of the sentence. Or, alternatively, deduction for good time could be made discretionary rather than automatic. See *infra* part V.

197. ME. REV. STAT. ANN. tit. 17-A, § 1252 (West 1983 & Supp. 1991-1992). The Criminal Law Advisory Commission opposed the original bill proposing to double the maximum sentences for Class A, B, and C crimes because of the "disproportion that it would create between the enhanced sentences for Class A, B and C crimes, and the unaffected sentences for Class D and E crimes." *State v. Lewis*, 590 A.2d at 150 n.3.

198. Article I, § 9 of the Maine Constitution states in part that "all penalties and punishments shall be proportioned to the offence . . ." ME CONST art. I, § 9.

199. The Law Court may have adopted this interpretation in order to reduce the distortion in the proportionality of the Criminal Code caused by the Class A sentence amendment.

respond. In passing the emergency bill, it seemed more concerned with sending a clear message to the Law Court that it had overstepped its bounds in the sentencing process than in addressing the critical problem. A direct and appropriate legislative response to the problems in the *Lewis* cases would have included a clarification of the intent behind the Class A sentence amendment, i.e., a correction (or endorsement) of the Law Court's interpretation in *Lewis*.<sup>200</sup> Had the Legislature taken a slower, less reactionary approach, it might well have waited until the next legislative session to propose a comprehensive solution to the problems in the *Lewis* cases, including a clarification of the Class A sentence amendment.<sup>201</sup>

## 2. *The Law Court's Inconsistency in Pronouncing Sentencing Guidelines*

The Legislature's emergency bill did provide some necessary di-

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200. Although the original emergency bill (L.D. 1932) modifying the Appellate Review Act indirectly addressed the Law Court's interpretation of the Class A sentence amendment, this proposed change was not enacted along with the final amended legislation on June 30, 1991. See *supra* note 173 and accompanying text. According to both the House and Senate Chairs of the Joint Standing Committee on the Judiciary, changes addressing the Law Court's interpretation of P.L. 1987, ch. 808, the Class A sentence amendment, in *Lewis* were not enacted with the emergency legislation due to time constraints only. Both chairs also indicated that further legislation would be introduced in the next session to address this issue. Leg. Rec. (Proof) H-1226 (1st Reg. Sess. 1991) (statement of Rep. Paradis), House of Representatives, June 19, 1991; Leg. Rec. (Proof) S-1237 (1st Reg. Sess. 1991) (statement of Sen. Gauvreau), Senate, June 12, 1991.

201. See *supra* note 200 and accompanying text. The question arises at this juncture whether it is prudent for the legislative branch to change the internal procedures of a judicially-operated mechanism (criminal sentencing) whenever it disagrees with the result in particular decisions. Once given a broad legislative mandate, the judiciary should be allowed to determine procedures for carrying out its duties. Legislative intervention in those procedures has a chilling effect on judicial independence and hampers the judiciary's ability to fulfill its mandate. In this case, an argument can be made that since the Law Court was given a broad mandate under the Appellate Review Act to reduce disparity in sentencing and to develop rational sentencing guidelines, the Legislature should not remove the procedural tools to accomplish that goal, i.e., the Law Court's power to reduce sentences. If sentencing is to remain a judicial task, then it would seem that telling a court how it should determine sentences and what procedural tools it should have available to it is an inappropriate legislative function. Senator Paul Gauvreau, in legislative debate on the bill reforming the appellate review statute, raised some important questions concerning sentencing in Maine:

To what extent should this Legislature involve itself in restricting or limiting the flexibility of sentencing justices to fashion appropriate sentences?

To what extent should this Legislature restrict our law court in the development of a substantive law of Sentencing in Trial Courts? . . . [T]hese are major policy considerations as we know Maine like most states in the country have [sic] significant overcrowding in our corrections facilities.

Leg. Rec. (Proof) S-1237 (1st Reg. Sess. 1991) (statement of Sen. Gauvreau), Senate, June 12, 1991.

rection to the Law Court in another critical area—the consideration of all sentencing factors recognized under law. In order for appellate review of sentences to work effectively, it is essential to first establish the proper relationship among the three components of a sentence: the nature of the offense; the circumstances of the offender; and the protection of the public interest. However, in the eight cases decided under the 1989 Appellate Review Act, the Law Court failed to consistently and clearly articulate the most basic notions of how a sentence should be determined.

As the cases discussed above illustrate, the Law Court's sentencing guidelines created confusion because they proposed two very different approaches to determining an ultimate sentence. Under the *Hallowell* approach proposed by Justice Wathen, the maximum sentence was to be determined based on the nature and seriousness of the offense, followed by a consideration of the circumstances of the offender, which could serve only to reduce the ultimate sentence. But after the court followed the *Hallowell* approach in several cases, Justice Roberts announced a different approach in *Lewis*: a basic sentence was to be established based on the nature and seriousness of the offense; then the circumstances of the offender could be considered a mitigating or aggravating factor which could either reduce or increase the basic sentence. The confusion over which sentencing approach the Law Court had adopted was exacerbated by the opinion in *Michaud*, in which Justice Clifford, writing for the court only two weeks after its decision in *Lewis*, once again subscribed to the approach taken in *Hallowell*.<sup>202</sup>

Another source of confusion in the cases was the Law Court's failure to articulate how the third sentencing component—protection of the public interest—should be considered, what factors should be considered in that category, and whether those factors should be mitigating or aggravating factors. By changing the language of section 2155(1) of the Appellate Review Act to include "the effect of the offense on the victim and any other relevant sentencing factors recognized under law,"<sup>203</sup> the Legislature made clear that the nature of the offense and the character of the offender are just two of the many factors that a sentencing court and the Law Court on appeal must consider (in other words, the Law Court cannot ignore all the

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202. The inconsistent application of sentencing approaches in these three cases may have been caused more by a difference in opinion between judges about sentencing theory than by imprecise language. Indeed, one inference that can be drawn from these cases is that Justice Wathen in *Hallowell* had a different theory about the role of aggravating circumstances of the offender in sentencing than Justice Roberts had in *Lewis*. This difference was eventually resolved in *State v. Weir*, 600 A.2d 1105 (Me. 1991), an opinion written by Justice Roberts in which the court clarified that aggravating circumstances of the offender could increase a basic sentence. See *infra* notes 232-233 and accompanying text.

203. ME REV STAT ANN. tit. 15, § 2155(1) (West Supp. 1991-1992).



sentencing factors except two in evaluating a sentence for propriety). The new language emphasized that one such factor which the court must consider is victim impact—a factor which the Law Court should have but did not give explicit treatment to in either *Michaud* or *Clark*.

The legislative history of L.D. 1932 (the amended version) suggests that the Legislature was trying to tell the Law Court that it needed to clarify its approach to sentencing. The Statement of Fact of that bill states in part, “The court is required to consider the criminal record of the defendant by the current law inclusion of ‘the character of the offender’ as a factor.”<sup>204</sup> Thus, if a defendant had a prior criminal record, this would presumably be an aggravating factor which could increase a basic sentence determined by the nature of the offense. The comments in legislative debate of Representative Patrick Paradis, House Chair of the Joint Standing Committee on the Judiciary, are also revealing:

[T]his bill [is] intended to address the court’s decisions in *State v. Hollowell*, *State v. Clark*, *State v. Michaud*, etc., which states very clear [sic], but erroneously, that the maximum sentence should be determined solely by the nature of the conduct involved, blinding the court to the burglar’s 3 prior convictions, the rapist’s prior assaults or the horrendous terrifying effect of a sexual attack on two ten-year old girls.

Thus, under the language of the current bill, the reviewing court should look at whether the sentencing judge properly considered *all appropriate factors*, including all those factors which we have set out in Title 17-A, such as deductions for good time, victim impact, restitution, public safety and probable rehabilitation.<sup>205</sup>

Thus, the bill clearly endorsed the Law Court’s “basic sentence” approach to sentencing in *Lewis* as opposed to the “maximum sentence” approach of *Hollowell*.

### 3. *A Single Scale of Punishment for Each Offense*

Finally, the Law Court encountered strong public criticism for its reasoning in the *Lewis* cases that the crimes could have been committed in more heinous ways. Although the court may not have used the most tactful or sensitive language in these opinions, it was correctly attempting to place the criminal conduct in those cases on a single continuum for each applicable offense.<sup>206</sup> This effort, though

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204. Comm. Amend. A to L.D. 1932, Statement of Fact, No. H-662 (115th Legis. 1991).

205. Leg. Rec. (Proof) H-1227 (1st Reg. Sess. 1991) (statement of Rep. Paradis), House of Representatives, June 19, 1991 (emphasis added).

206. The notion of placing an offender’s acts on a uniform scale of seriousness was not a novel one in *Lewis*, *Michaud*, and *Clark*. Under the 1989 Appellate Review Act, the Law Court first mentioned the idea of a “continuum” in *State v. St. Pierre*. See

criticized as an abandonment of deference to the trial court, is fundamentally important to the reduction of sentencing disparity. Without a unified frame of reference as to the seriousness of the crime, similar offenders stand the chance of receiving grossly disparate sentences. The Law Court seems the natural choice for identifying in broad terms where on a continuum a particular crime should lie. This is not because the Law Court's collective judgment is any better than that of an individual sentencing court judge, but because the application of a single scale identified by one consistent body will better achieve sentencing consistency than several scales determined by individual trial court judges.

It is argued that some offenses by their very nature deserve punishment at the top of a given scale even though one could imagine more violent ways to commit them. With the exception of murder, however, our criminal justice system cannot afford to do this, for two reasons. First, this theory would directly undermine Maine's constitutional mandate that "all penalties and punishments shall be proportioned to the offence . . . ." <sup>207</sup> If punishment is to be based upon moral blameworthiness, then it should be arranged on a scale roughly corresponding to the comparative seriousness of the offense. Only the most grave offense should receive the maximum punishment, for if several offenses of different seriousness were to receive the same maximum punishment, the moral distinctions between them would be lost and the public would lose faith in the ability of the criminal justice system to mete out just punishment. <sup>208</sup> Second,

*supra* note 117 and accompanying text. The "continuum" idea was followed thereafter in *State v. Rolerson*. In affirming a 40-year murder sentence in that case, the Law Court stated: "The nature and seriousness of Rolerson's conduct falls somewhere in the middle on a continuum of acts . . . and a forty-year sentence does not reflect misapplication of sentencing principles." *State v. Rolerson*, 593 A.2d 220, 222-23 (Me. 1991).

207. ME. CONST. art. I, § 9.

208. For example, New Hampshire's Constitution provides:

All penalties ought to be proportioned to the nature of the offense. . . . Where the same undistinguishing severity is exerted against all offenses, the people are led to forget the real distinction in the crimes themselves, and to commit the most flagrant with as little compunction as they do the lightest offenses.

N.H. CONST. pt. 1, art. 18. Blackstone also commented on the need for proportionality between punishment and the relative seriousness of the offense:

It is a kind of quackery in government to apply the same universal remedy in every case of difficulty. . . .

. . . [A] scale of crimes should be formed, with a corresponding scale of punishments, descending from the greatest to the least. . . . Where men see no distinction made in the nature and gradations of punishment, they will be led to conclude, there is no distinction in the guilt. Thus, in France, the punishment of robbery, with or without murder, is the same, hence robbery is usually accompanied with murder. In China, murderers are cut to pieces and robbers not, hence robbery often occurs on the highway, while

such a theory would have the effect of incarcerating more offenders for a longer period of time. Without the development of intermediate forms of punishment, Maine's criminal justice system literally could not afford the prison space that would be required to accommodate this notion of punishment.<sup>209</sup>

In the *Lewis* cases, then, the Law Court was merely fulfilling its mandate under the appellate review statute by developing sentencing guidelines which fixed general scales of punishment for a given offense. In order to establish an appellate review system that could achieve sentencing consistency, it was inevitable that the Law Court would have to change a few sentences in the beginning to establish uniform scales of punishment. The real problem, however, was that there was significant disagreement about how severe the scale of punishment actually was. For example, in *Clark* the issue was not only the Law Court's determination of where on the scale of gross sexual assault the offender's conduct belonged, but how long the scale was. Since the Law Court's scale was twenty years long, and the sentencing court's scale was forty, a reduction in sentence on appeal was inevitable. Nevertheless, the Law Court's actions were perceived as unduly limiting sentencing court discretion, an outcome the public was clearly not ready to accept.

### C. *The Impact of Emergency Legislation on Appellate Review*

In its original conception, the Appellate Review Act's broad objective was to develop fair and principled sentencing practices so that different sentences would not be based solely on the individual philosophies of different judges. This goal can be further divided into two parts: (a) the development of a common law of sentencing principles to guide the discretion of the sentencing court; and (b) the reduction of disparity in criminal sentences. After the enactment of the emergency legislation in June, 1991, reforming the statute, the question arises whether the appellate review mechanism still can achieve those goals. As the following analysis illustrates, the emergency reform bill may hinder the Law Court in effectively reducing the number of disparate sentences, but it does not affect the court's ability to pronounce sentencing guidelines.

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murders are unusual.

WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 590 (New York, L. K. Strouse & Co. 1892).

209. In November 1991, Maine voters rejected a proposed \$5.5 million bond issue to expand Maine's prison space—the third time a prison bond issue was voted down in as many elections. William C. Hidlay, *Defeat of Bond Issues Sends Clear Message*, PORTLAND PRESS HERALD, Nov. 7, 1991, at 5D. According to Corrections Commissioner Donald Allen, "The overcrowding is going to continue, but voters are basically saying they want criminals locked up, they want them punished, but they don't want to pay for it. They can't have it both ways." *Id.*

### 1. Reduction of Sentencing Disparity

Removing the Law Court's power to reduce sentences directly limits the effectiveness of the appellate review mechanism in two ways. First, it slows down the appellate review process considerably, resulting in a waste of valuable judicial resources, by requiring the Law Court to remand to the sentencing court in all cases where it determines relief is necessary. Second, it leaves the Law Court with a blunter procedural device with which to reduce sentencing disparity. Since the Law Court can no longer substitute a sentence directly on appeal, it also cannot fix a uniform scale for a given offense, a task which, as mentioned earlier, is critical to reducing inter-judge sentencing disparity.

To illustrate, consider the example of a hypothetical *Clark* case (*Clark II*) being decided after the enactment of the emergency bill. In *Clark II*, the defendant, convicted of gross sexual assault for his rape of a sixteen-year-old woman, appeals his thirty-year sentence to the Law Court. The Law Court, in an attempt to place the defendant's conduct on a fixed scale of seriousness, determines that the defendant's conduct does not rank at or near the top of that scale (e.g., no weapon or extreme violence resulting in severe physical injury). But now it must remand to the trial court for resentencing. Once remanded, the scale of seriousness for the offense is no longer fixed by the Law Court but instead by the individual sentencing judge. The placement of the defendant's conduct on that scale of seriousness no doubt will vary from judge to judge, depending on individual biases against the offense and offender. With nothing more than the guidance that the defendant's conduct does not belong at the top of the scale, the trial judge may be left guessing how much less than thirty years the Law Court considered an appropriate sentence. Thus, it is conceivable that on remand one trial judge could resentence the defendant to twenty-five years, while another could choose a ten-year sentence.<sup>210</sup>

In addition, the following scenario is possible now that the Law Court must remand all sentence appeals to the sentencing court if it determines that relief is necessary: the Law Court remands an excessive thirty-year sentence to the trial court for resentencing; on remand, the trial court imposes a sentence of twenty-nine years. The defendant again appeals the sentence to the Law Court, which again remands the excessive twenty-nine-year sentence to the trial court for another resentencing—and so on. Although in reality this scenario is unlikely considering the mutual respect between the Law Court and lower courts, it illustrates the potential for a more costly

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210. This example illustrates that from a sentencing consistency point of view, requiring the Law Court to remand sentence appeals to the trial court will likely result in less consistent sentences arrived at over a longer period of time than under the 1989 Appellate Review Act.

and slower appellate review mechanism.

Since removing the Law Court's authority to reduce sentences was in theory only a procedural and not a substantive change,<sup>211</sup> there is nothing in the statute today which prevents the Law Court from requiring the trial court on remand to impose a sentence within a given range or even a specific sentence. In practice, though, the Law Court has been reluctant to take such bold steps to date. Specifically, the court has declined to recommend an appropriate sentence or range of sentence in the three remanded cases in which it could have made such a recommendation since the emergency reform.<sup>212</sup>

In *State v. Gosselin*<sup>213</sup> the defendant, who shot an unarmed man allegedly in self-defense at a local boat landing, was convicted of manslaughter and sentenced to forty years imprisonment.<sup>214</sup> In imposing the forty-year sentence, the trial court considered the fact that the Legislature had recently increased the maximum Class A sentence from twenty to forty years.<sup>215</sup> The Law Court vacated the sentence and remanded for resentencing, determining that the severity of the sentence imposed was inconsistent with the facts in that case. Specifically, the court stated that "[t]he trial judge's findings of fact acquitting defendant of murder are difficult to reconcile with the imposition of the sentence of 40 years, coming as that sentence does at the very top of the sentencing range for manslaughter and well above the 25-year minimum for murder."<sup>216</sup> Although the

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211. The Law Court agreed with the State in *State v. Gosselin* that P.L. 1991, ch. 525 made only procedural changes in the 1989 Appellate Review Act. "[T]he amendment to section 2155 added no new sentencing factors to those we were already bound to consider and . . . the substitution of section 2156(1-A) effected a change in procedure only . . . [T]he 1991 amendments make no substantive change in the law applicable to sentence appeals . . ." *State v. Gosselin*, 600 A.2d 1108, 1110 (Me. 1991).

212. *State v. Gosselin*, 600 A.2d 1108 (Me. 1991); *State v. Gonzales*, 604 A.2d 904 (Me. 1992); *State v. Reynoso*, 604 A.2d 441 (Me. 1992). Although it is still too early to tell, the Law Court's reluctance to suggest appropriate sentences to the trial court on remand may be indicative of a more deferential approach to sentence appeals adopted since the reaction to *Lewis*. Of the most recent sentence appeals to be decided since the emergency legislation, a majority of the sentences appealed have been upheld. The cases in which the sentences were upheld include: *State v. Hutchinson*, 597 A.2d 1344 (Me. 1991) (decided Oct. 17, 1991); *State v. Weir*, 600 A.2d 1105 (Me. 1991) (decided Dec. 26, 1991); *State v. Kehling*, 601 A.2d 620 (Me. 1991) (decided Dec. 27, 1991); *State v. Smith*, 600 A.2d 1103 (Me. 1991) (decided Dec. 27, 1991); and *State v. Lemieux*, 600 A.2d 1099 (Me. 1991) (decided Dec. 27, 1991). Technically, in *State v. Lemieux*, the Law Court vacated the sentence and remanded only because the term of probation exceeded the statutory limit, not because it found error in the sentence imposed. *State v. Lemieux*, 600 A.2d at 1100. In the other four cases mentioned, the Law Court affirmed the sentences.

213. 600 A.2d 1108 (Me. 1991).

214. *Id.* at 1109. The underlying facts of this case which led to Clarence Gosselin's conviction are set out more fully in *State v. Gosselin*, 594 A.2d 1102 (Me. 1991).

215. *State v. Gosselin*, 600 A.2d at 1110.

216. *Id.* The Law Court was presumably referring to the lack of symmetry in the sentence structure which resulted from the increase of the maximum Class A sen-

Law Court also urged the trial court to consider the *Lewis* interpretation of the Class A sentence amendment previously adopted by the Law Court, it did not go so far as to suggest that a twenty-year range was appropriate.<sup>217</sup>

Similarly, in *State v. Reynoso*<sup>218</sup> the Law Court remanded a twenty-year sentence imposed for aggravated drug trafficking<sup>219</sup> in order for the trial court to reconsider the sentence under the two-tiered system established in *Lewis*. Once again, although the court noted that at the time of sentencing "the trial court did not have the guidance of our opinions in *State v. Lewis* . . . and *State v. Clark* . . ., construing the recent increase in the maximum sentence for a Class A offense,"<sup>220</sup> it did not recommend an appropriate sentence.

The Law Court perhaps came closest to recommending an appropriate range of sentence in *State v. Gonzales*.<sup>221</sup> In that case, the defendant was convicted of aggravated trafficking in scheduled drugs, an offense which was elevated from Class B to Class A because the defendant was within 1,000 feet of a school at the time of the offense.<sup>222</sup> The defendant had no prior criminal record and had sold a relatively small quantity of drugs;<sup>223</sup> nevertheless, he was sentenced to fifteen years.

In defending the fifteen-year sentence, the prosecution on appeal stated that the defendant, a Dominican national, deserved a more serious sentence than the four-year statutory minimum because "the Dominicans dominate the drug trade in Lewiston."<sup>224</sup> The Law Court rejected this rationale, stating that "[s]entencing on the basis of racial categories or nationality, as opposed to demonstrated individual involvement and culpability, is constitutionally impermissible."<sup>225</sup> In doing so, the court gave great weight to the fact that the defendant would have faced a maximum sentence of two years had he been prosecuted in federal court.<sup>226</sup> Although the court did not explicitly recommend that the defendant be re-sentenced to two years, the fact that it considered the comparable federal sentence to

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tence from 20 to 40 years.

217. *Id.*

218. 604 A.2d 441 (Me. 1992).

219. In this case, aggravated trafficking was a Class A offense. See ME REV STAT ANN. tit. 17-A, §§ 1103(2)(A) (West Supp. 1991-1992); 1105(1)(C) (West Supp. 1991-1992); 1105(2) (West 1983).

220. *State v. Reynoso*, 604 A.2d at 442-43.

221. 604 A.2d 904 (Me. 1992).

222. *Id.* at 906.

223. Defendant sold no more than 17 grams of cocaine, or just over half an ounce. *Id.* at 907.

224. *Id.*

225. *Id.*

226. *Id.*

be a relevant factor is notable.<sup>227</sup>

Nevertheless, as a result of the emergency legislation, the Law Court no longer has the means to reduce sentencing disparity directly by determining the proper sentence on appeal. And as *Goselin*, *Reynoso*, and *Gonzales* illustrate, neither may the court be willing to do so indirectly by recommending an appropriate sentence or range.<sup>228</sup>

## 2. *Development of Sentencing Guidelines*

By contrast, the court's ability to pronounce sentencing guidelines remains intact after the emergency reform of the Appellate Review Act. In fact, the legislation forced a clarification of the Law Court's previously inconsistent sentencing principles. In at least two cases following the Legislature's reform of the Act, the Law Court clarified its previously inconsistent approaches to determining sentences.

The first post-reform case was *State v. Weir*.<sup>229</sup> In the fall of 1989, the defendant, while a juvenile, began a series of criminal activities which culminated in an armed robbery with a firearm. After his arrest, while free on bail, he committed another armed robbery. The defendant, who had no prior criminal record but was receiving psychotherapy treatment at the time the offenses were committed, entered guilty pleas for both offenses. He received a twenty-year sentence with all but nine years suspended and eight years probation.<sup>230</sup>

In *Weir* the Law Court clarified that it was following the *Lewis* approach to sentencing.<sup>231</sup> The court stated:

When imposing a sentence "the court must first determine a basic sentence by considering the particular nature and seriousness of the offense, without regard to the circumstances of the offender." *State v. Lewis*, 590 A.2d 149, 150 (Me. 1991). Only after this first step should the court apply its discretion to determine the degree of mitigation called for by the circumstances of the offender and the degree of aggravation indicated by specific factors demonstrating a high risk of re-offending. A sentencing court has wide discretion in selecting sources of mitigating circumstances and aggravating factors . . . .<sup>232</sup>

Thus, the court acknowledged that aggravating factors could increase a basic sentence just as mitigating circumstances could reduce

227. The court stated, "It is appropriate . . . that sentencing decisions in Maine courts be informed by the likely sentence that would have been imposed for the same offense if prosecuted in the concurrent federal jurisdiction." *Id.*

228. The Law Court may well want to avoid the appearance of seeking to achieve by indirection what the Legislature explicitly took away from it.

229. 600 A.2d 1105 (Me. 1991).

230. *Id.* at 1106.

231. Not surprisingly, *Weir* was written by Justice Roberts, who also authored the *Lewis* decision.

232. *State v. Weir*, 600 A.2d at 1106 (citation omitted) (emphasis added).

a basic sentence, thereby removing the *Hallowell* inconsistency. In affirming the sentence, the Law Court was satisfied that the trial court had considered both aggravating factors (committing the second offense while free on bail) and mitigating factors (youth, prospects for rehabilitation) in the process of selecting an unsuspended portion of the sentence.<sup>233</sup>

Just one day after *Weir*, the Law Court again endorsed the *Lewis* approach to sentencing in *State v. Kehling*.<sup>234</sup> The facts of that case are summarized as follows: One night Norman Kehling got into a fight at a bar and threatened to kill the bar owner; he was arrested for drunken and disorderly conduct. After he was released on bail, he returned to the apartment he shared with his wife and threatened to "burn [her] out."<sup>235</sup> He set fire to their multi-tenant apartment building at about 3:00 a.m. in November, "taking with him his prized football betting cards but leaving his fellow tenants to their fate."<sup>236</sup> Although all the tenants got out safely, their belongings were lost in the fire. Kehling was subsequently convicted of arson (a Class A offense) and sentenced to the new maximum forty-year sentence. He appealed his sentence, contending that it was excessive and failed to give proper consideration to rehabilitation.

In affirming the sentence, the Law Court clearly stated how all sentencing factors should be considered in determining an ultimate sentence: "Trial courts in imposing sentence should, *in order to make possible effective appellate review*, first determine the appropriate basic sentence by considering the particular nature and seriousness of the offense, and then apply whatever mitigation and enhancement of the basic sentence *all other pertinent sentencing factors* justify."<sup>237</sup>

Unlike previous cases, the court in *Kehling* then referred to the protection of the public interest,<sup>238</sup> and, for the first time, specifically clarified that this sentencing factor was an aggravating circum-

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233. *Id.* Justice Wathen offered a lone dissent in *State v. Weir*. In his dissent, he noted that the sentencing court had accepted the State's recommendation of sentence without knowing that it was premised in part on the fact that the defendant was the last among four co-defendants to strike a plea bargain with the prosecutor. *Id.* at 1107 (Wathen, J., dissenting). He would have vacated the sentence and remanded for resentencing because of the manner in which the sentence was imposed. *Id.* at 1108. See ME. REV. STAT. ANN. tit. 15, § 2155(2) (West Supp. 1991-1992).

234. 601 A.2d 620 (Me. 1991). Chief Justice McKusick wrote for the court in *Kehling*.

235. *Id.* at 622.

236. *Id.* at 624.

237. *Id.* at 625 (emphasis added).

238. The court noted that the category of "protection of the public interest" included the prevention of further crime through "the restraint of convicted persons when required in the interest of public safety," a statutorily stated goal of sentencing found in ME. REV. STAT. ANN. tit. 17-A, § 1151(1) (West 1983). *State v. Kehling*, 601 A.2d at 625.



stance that could increase a basic sentence. The court stated, "[I]n reviewing the propriety of a sentence, one factor we consider is 'the protection of the public interest.' . . . The necessity of protecting the public through incapacitation is a *significant aggravating factor that could enhance Kehling's basic sentence* and offset any mitigating factors."<sup>239</sup>

*Kehling* is also notable for the Law Court's continued adherence to the *Lewis* interpretation of the Class A sentence amendment. The court reiterated that, by increasing the maximum Class A sentence to forty years, the Legislature had created "two discrete ranges of sentences [whereby only] the most heinous and violent crimes committed against a person [could be sentenced] within the expanded range of twenty to forty years."<sup>240</sup> However, in this case (unlike the *Lewis* cases) the Law Court affirmed the defendant's maximum forty-year sentence, concluding that *Kehling's* conduct of setting a fully occupied apartment house afire in the middle of the night was "sufficiently heinous and violent to justify the imposition of a basic sentence at the top of the upper range recognized by *Lewis*."<sup>241</sup> The result in *Kehling* illustrates the ineffectiveness of the emergency legislation to deal with what may be a fundamental misinterpretation of the Class A sentence amendment. Yet, without legislative clarification on this issue, the Law Court has shown that it will continue to apply this interpretation in future cases.

Nevertheless, the above cases show that even after the emergency bill reforming the Appellate Review Act, the Law Court still can, and indeed has, pronounced clear, consistent sentencing principles to guide the sentencing court. By taking away the Law Court's power to reduce a sentence on appeal, the emergency legislation may impede the future ability of the court to reduce the number of disparate sentences directly. On the other hand, the legislation may actually have encouraged the court to clarify the most fundamental sentencing principles essential to an effective appellate review mechanism.

#### V. CONCLUSION AND RECOMMENDATIONS: THE FATE OF APPELLATE REVIEW OF SENTENCES IN MAINE

After a contentious and unstable beginning, Maine's appellate review system appears to have stabilized, at least temporarily. Twice

239. *Id.* (emphasis added).

240. *Id.* at 624 (quoting *State v. Lewis*, 590 A.2d at 151).

241. *Id.* It is interesting that the Law Court could so easily distinguish between the seriousness of the defendant's behavior in *Kehling* as compared to that in *Clark*. Apparently, the court concluded that setting fire to an occupied apartment building (*Kehling*) was "sufficiently heinous and violent" to justify a sentence in the twenty-to forty-year range, but dragging a young woman into the woods by the throat, forcing her on the ground, and raping her (*Clark*) was not.

reformed in as many years, the current appellate review statute restores a comfortable degree of discretion in the sentencing court, at the expense of reducing sentencing disparity as effectively. With the removal of the Law Court's power to reduce sentences directly, the main argument against appellate review—that the appellate court has not personally observed the defendant (or victim) and thus is not equipped to make an intelligent decision on sentencing—no longer exists.<sup>242</sup>

Notwithstanding the results in *Lewis, Michaud, and Clark*, the Law Court has shown a great deal of deference to the trial court in many areas. For example, although the Law Court has required the sentencing court to consider all relevant sentencing factors and to ensure that the sentence imposed is based on sufficient and adequate information, it has deliberately refrained from telling the sentencing court what weight to give such factors in any given case.<sup>243</sup> This practice comports with the notion that the sentencing court has observed the defendant at trial and is better able to evaluate such factors as remorse, prospects for rehabilitation, and victim impact.

Although Maine's sentence appeal mechanism has survived legislative attack so far, the question remains whether the Appellate Review Act in its current form can effectively reduce disparity in sentences. According to one source,<sup>244</sup> Maine's appellate review statute is ineffective at reducing sentencing disparity systemically for the following reasons. First, although a sentence can no longer be increased on appeal, only the more severe sentences tend to be appealed; thus, there is little opportunity to correct disparity in the more lenient sentences imposed.<sup>245</sup> Second, the kinds of cases most often appealed are not representative of the cases typically han-

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242. As suggested earlier in this Comment, the rationale that the sentencing court should have all the sentencing power because it has the opportunity to observe the defendant at trial is flawed because of the frequency of plea bargains. See *supra* note 186 and accompanying text.

243. The Law Court, for instance, has upheld the sentencing court's evaluation of a defendant's prospects for rehabilitation in sentence appeals. See, e.g., *State v. Kehling*, 601 A.2d at 625. The court has stated: "A sentencing court has wide discretion in selecting sources of mitigating circumstances and aggravating factors, provided they are factually reliable. In addition, we accord the sentencing court great deference in weighing these factors in order that it may appropriately individualize each sentence." *State v. Weir*, 600 A.2d at 1106 (citation omitted).

244. Donald F. Anspach and S. Henry Monsen, *The Failure of the New Sentence Review Process to Reduce Sentence Disparity in Maine: Policy Failure or Judicial Politics?* (Nov. 21, 1991) (unpublished manuscript, on file with the author). For other works citing the ineffectiveness of appellate review of criminal sentences in reducing sentencing disparity, see generally *Connecticut Case Study*, *supra* note 26; Pamela Samuelson, *Sentence Review and Sentence Disparity: A Case Study of the Connecticut Sentence Review Division*, 10 CONN L REV 5 (1977).

245. Anspach & Monsen, *supra* note 244.

dled.<sup>246</sup> For example, studies show that the most frequent offense types handled by Maine's courts are burglary and theft; by contrast, the types of offenses most often appealed are drug trafficking, rape, and gross sexual misconduct.<sup>247</sup> Finally, the number of sentence appeal cases in which review is granted under the new procedure remains quite small. As of September, 1991, the Sentence Review Panel had considered 178 applications in its almost three years in existence, granting review in only twenty-four of those cases.<sup>248</sup> Of those, eleven cases had been decided, with only five sentence reductions.<sup>249</sup> With such a small number of cases being considered on appeal, it is impossible to have a widespread, cumulative effect on the sentencing disparities that pervade the system.

If reducing the number of disparate sentences across the board continues to be a primary goal of appellate review, then two suggestions can be made. First, the Law Court could grant review in a greater number of sentence appeals in order to increase the volume of cases considered in any given year. Under the current statute, the court would be well within its discretion to do this,<sup>250</sup> and the present average of fewer than ten cases per year<sup>251</sup> hardly represents an unmanageable caseload.

Second, the number of disparate sentences could be further limited by creating an administrative body<sup>252</sup> charged with the task of compiling and disseminating sentencing statistics statewide. Currently, judges receive no comprehensive information about sentencing patterns and statistics in the state and thus have no measure with which to compare the sentences before them. To date, Chief Justice Wathen has taken the first step of gathering sentencing statistics, but the data collected so far are not statewide in scope.<sup>253</sup> These efforts to accumulate sentencing statistics should be encouraged. If statewide data were made widely available, statistical information would no doubt assume greater importance in sentence

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246. *Id.*

247. *Id.* See also Daniel E. Wathen, *Sentencing and Statistics*, 6 ME. BAR J. 290 (1991) [hereinafter *Sentencing and Statistics*].

248. Anspach & Monsen, *supra* note 244.

249. *Id.*

250. The Sentence Review Panel, composed of three justices of the Supreme Judicial Court, decides whether to grant leave to appeal sentence for any case. If any one of the three justices decides that the case should be reviewed, leave to appeal is granted. ME. REV. STAT. ANN. tit. 15, § 2152 (West Supp. 1991-1992).

251. See text accompanying note 236.

252. One potential recipient of this task would be the former Maine Sentencing Guidelines Commission, which submitted a report on the Maine Sentencing Guidelines to the Legislature in 1984. Final Report of the Maine Sentencing Guidelines Commission established by the 111th Legislature (Nov. 30, 1984); see also P. & S.L. 1983, ch. 53, § 1.

253. *Sentencing and Statistics*, *supra* note 247. Other efforts have also been made to gather sentencing statistics. See, e.g., Anspach & Monsen, *supra* note 244.

appeals, and, if used carefully, could help reduce the sentencing disparities that exist in the system today.

However, to conclude from the above that Maine's appellate review statute is wholly ineffective because it fails to reduce sentencing disparity in a statistical sense would be to miss the larger purpose of the appellate review procedure. This purpose is to develop fair and just sentencing principles at common law with which to better structure and guide the discretion of the sentencing court. If the Law Court can create and articulate uniform and rational sentencing principles, then it can encourage trial judges to impose reasonable sentences and to affirmatively state the reasons for their sentencing decisions. There is no reason why sentencing judges should not be required to articulate in detail the basis for a sentence imposed. Mandatory sentences prescribed by the Legislature fail to take into consideration human factors uniquely within the sentencing judge's knowledge. Appellate review attempts to strike a balance between rule and discretion.

Maine's appellate review statute thus provides the Law Court with the opportunity to create a body of sentencing law. And as the cases discussed in this Comment have shown, the Law Court has reached a level of preliminary success in achieving that goal. In evaluating the success of Maine's appellate review procedure, it is important to keep in mind that "[e]quality of sentences is not the goal—such uniformity would be as unjust as disparity. Rather the goal is an equality of consideration; a consistent application of sentencing principles."<sup>254</sup>

The history of appellate review of criminal sentences in Maine has been brief but tumultuous. Appellate sentence review has suffered from the errors and misjudgments of many parties, foremost the Law Court and the Legislature. First, as to the Law Court, an inconsistent and unclear line of early cases on sentencing principles created confusion within the legal community. For example, comparing the sentencing approaches in *Hallowell* and *Lewis* reveals an uncertainty as to whether circumstances of the offender, such as a prior criminal record, could increase or only decrease a basic sentence. Similarly, whether the court considered victim impact a valid sentencing factor (and, if so, whether victim impact could increase a basic sentence) was not entirely obvious from the pre-reform cases. However, as the most recent line of cases shows, the court appears to have rectified this problem, at least for now.

Second, the court adopted an interpretation of the Legislature's recent increase of the maximum Class A sentence from twenty to forty years which was not supported by the statutory language of the amendment. This interpretation, although understandably an

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254. *State v. Morton*, No. AD-82-8, slip op. at 4 (Me. App. Div. June 3, 1983).

attempt to limit the distortion in the proportionality of the Maine Criminal Code, amplified the court's sentence reductions in the *Lewis* cases to alarming proportions. Finally, by writing needlessly inflammatory, untactful opinions in *Michaud* and *Clark*, the Law Court seemed to invite criticism and media attention. For example, justifying a fifteen-year sentence reduction on the ground that rape could be committed in "more aggravating and heinous ways" than by dragging a girl into the woods by the throat, forcing her on the ground, and threatening her<sup>255</sup> was neither a persuasive nor compelling argument to the public.

However, the Legislature's response to the Law Court was not without its own problems. In 1988 the Legislature gave the Law Court a broad mandate to reduce disparity in criminal sentences through appellate review. Yet only eight decisions and less than two years later, that same body took away one of the court's salutary powers to accomplish that goal. Although removing the Law Court's power to reduce sentences certainly restored some discretion in the trial court, it also created early instability and uncertainty in the system by altering the appellate review procedure.

In its haste to reprimand the Law Court, the Legislature, in its emergency reform, also failed to address the court's interpretation of the Class A sentence amendment. Today, the Legislature is left in the position of having either to introduce yet another bill reforming the appellate review statute or to accept the Law Court's interpretation. Perhaps more importantly, though, the Legislature should not have increased the maximum sentence for *all* Class A crimes from twenty to forty years. Not only did this amendment lead to various interpretations concerning which crimes should be affected by the new forty-year maximum (thus the resulting problems under the Appellate Review Act), it also disturbed the structure of the sentencing system set forth in the Maine Criminal Code.

The following recommendation should remedy this problem. The Legislature should repeal or reform the 1988 amendment that increased the maximum sentence for all Class A offenses from twenty to forty years. Several alternatives are possible. First, since one of the objectives of the Class A sentence amendment was to allow trial courts greater discretion when punishing the most heinous crimes committed against the person, those crimes only—attempted murder, manslaughter, gross sexual assault, etc.—should be targeted specifically and classified into a new category of offense with a maximum sentence of forty years.<sup>256</sup> The creation of a Class AA category would neither distort the proportionality of the Criminal Code nor undermine the intent of the Legislature to target the most serious

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255. See *State v. Clark*, 590 A.2d 538, 542 (Me. 1991).

256. See Appendix of this Comment for proposed legislation adding a Class AA offense category to the Maine Criminal Code.

crimes committed against the person. In addition, further conflict between the intent of the Class A sentence amendment and the operation of the appellate sentence review procedure could be avoided. Second, in order to reduce the impact of the good-time laws on sentences, the Legislature should do either of the following: change the automatic one-third deduction to a smaller fraction of the sentence; or make the deduction for good time discretionary rather than automatic.

In addition, this Comment makes the following recommendations in order to preserve and perhaps improve the functioning of the appellate sentence review procedure. First, the Law Court, as it has done in its recent decisions, should continue to issue opinions consistent with the sentencing approach set forth in *Lewis* and clarified in *Weir*. This sentencing approach is fair and equitable because it parallels current community sentiment that some factors, such as a defendant's prior criminal record and the impact of the offense on the victim, ought to be able to increase a basic sentence determined by the nature and seriousness of the offense. Second, the court should grant review in a greater number of sentence appeals, since the process of developing sentencing guidelines depends on a relatively high volume of cases considered in any given year. If current numbers are any indication, increasing the quantity of sentence appeals granted would not exceed the court's capacity for review. Third, the Legislature should refrain from tinkering with the appellate review statute in the near future. Indeed, changing the appellate sentence review procedure every time the Law Court renders a "bad" decision may create worse problems than the one solved; thus, legislative intervention should be a last resort. Rather, prosecutors and defense counsel alike should direct problems to the Law Court through strong advocacy for change, in order to give the court the first opportunity to clarify its position or correct its mistakes. A statement made by a commentator regarding Connecticut courts is equally applicable to Maine's Law Court: "[G]reater scrutiny and criticism by the bar of such sentencing principles as are proposed would contribute substantially to the improvement of future opinions and, ultimately, to the improvement of the sentencing process itself."<sup>257</sup>

In the final analysis, a return to the basic, philosophical questions of sentencing posed by the hypothetical case of the child molester at the beginning of this Comment is helpful: What are the appropriate sentencing factors to consider? What relative importance should these factors have in any given case? These fundamental questions must be resolved if any sentencing guideline system is to succeed. Obviously, Maine's appellate sentence review mechanism cannot by

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257. *Connecticut Case Study*, *supra* note 26, at 1476.

itself resolve these intractable sentencing questions, but by balancing trial court discretion with appellate court review, the current system does attempt to determine who should decide these questions and why. The conflict between the Law Court and the Legislature over where that balance should lie has caused early instability in the sentence review procedure and uncertainty for its future. Ultimately, whether appellate review of criminal sentences can succeed in Maine depends on whether the court and the Legislature can maintain a delicate balance between their respective interests and ends. From the cases decided since the emergency legislation, they appear to have struck that balance, at least for the time being. But a reasonable question remains whether the early conflicts described in this Comment portend future tensions for the appellate review procedure in Maine.

*Amy K. Tchao*

#### VI. APPENDIX: PROPOSED AMENDMENTS TO THE MAINE CRIMINAL CODE<sup>258</sup>

The proposed legislation offered below has two main objectives: (a) to create a new category of crimes—a Class AA crime—which carries a maximum sentence of forty years; and (b) to restore the maximum sentence for a Class A crime to twenty years. In keeping with the legislative intent behind the Class A sentence amendment enacted in 1988, this proposal targets the most serious crimes committed against a person for Class AA status. Specifically, those offenses (currently Class A crimes) which involve intentional infliction of serious bodily injury or extreme indifference to the value of human life are redefined as Class AA crimes. This proposal addresses the problem of disproportionality in the structure of the Maine Criminal Code which currently exists as a result of the 1988 enactment changing the maximum sentence for *all* Class A crimes to forty years.

Part I of the proposed legislation lists pertinent sections of the Maine Criminal Code which, under this proposal, would require the inclusion of a Class AA crime in the statutory language. Part II contains all the offenses which are currently Class A crimes. It leaves the language of some Class A offenses unchanged; thus, these offenses carry a twenty-year maximum sentence. However, some of these offenses are elevated to Class AA crimes, which would carry a maximum sentence of forty years.

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258. The proposed legislation below was drafted with the assistance of Michael Saucier, Esq., of the law firm of Thompson & Bowie, Portland, Me., and Professor Melvyn Zarr, University of Maine School of Law.

PART I. GENERAL PROVISIONS<sup>259</sup>TITLE 17-A

## CHAPTER 1: PRELIMINARY

## § 4. Classification of crimes in this Code

1. Except for murder, all crimes defined by the Code are classified for purposes of sentencing as Class AA, Class A, Class B, Class C, Class D and Class E crimes.

## § 4-A. Crimes and civil violations outside the Code

2-A. A statute outside this code may be expressly designated as a Class AA, Class A, Class B, Class C, Class D or Class E crime, in which case sentencing for violation of such a statute is governed by the provisions of this code.

3. In statutes defining crimes which are outside this code and which are not expressly designated as Class AA, Class A, Class B, Class C, Class D or Class E crimes, the class depends upon the imprisonment penalty that is provided as follows. If the maximum period authorized by the statute defining the crime:

~~A. Exceeds 10 years, the crime is a Class A crime;~~

A.(1) Exceeds 20 years, the crime is a Class AA crime;

A.(2) Exceeds 10 years, but does not exceed 20 years, the crime is a Class A crime;

B. Exceeds 5 years, but does not exceed 10 years, the crime is a Class B crime;

C. Exceeds 3 years, but does not exceed 5 years, the crime is a Class C crime;

D. Exceeds one year, but does not exceed 3 years, the crime is a Class D crime; and

E. Does not exceed one year, the crime is a Class E crime.

## CHAPTER 51: SENTENCES OF IMPRISONMENT

## § 1252. Imprisonment for crimes other than murder

2. The court shall set the term of imprisonment as follows:

~~A. In the case of a Class A crime, the court shall set a definite period not to exceed 40 years;~~

A.(1) In the case of a Class AA crime, the court shall set a definite period not to exceed 40 years;

A.(2) In the case of a Class A crime, the court shall set a definite period not to exceed 20 years;

B. In the case of a Class B crime, the court shall set a definite period not to exceed 10 years;

C. In the case of a Class C crime, the court shall set a definite period not to exceed 5 years;

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259. Proposed deletions are struck out; proposed additions are underlined.



D. In the case of a Class D crime, the court shall set a definite period of less than one year; or

E. In the Case of a Class E crime, the court shall set a definite period not to exceed 6 months.

### Comment

This amendment to subsection 2, paragraph A creates a new class of crimes—Class AA—with a maximum sentence of 40 years and restores the maximum Class A sentence to 20 years.

3. (unchanged)

3-A. (unchanged)

4. If the State pleads and proves that a Class A, B, C, D or E crime was committed with the use of a dangerous weapon then the sentencing class for such crime is one class higher than it would otherwise be. In the case of a Class A AA crime committed with the use of a dangerous weapon, such use should be given serious consideration by the court in exercising its sentencing discretion. This subsection shall not apply to a violation or an attempted violation of section 208 or to any offense for which the sentencing class is otherwise increased because the actor or an accomplice to his knowledge is armed with a firearm or other dangerous weapon.

5. Notwithstanding any other provision of this code, if the State pleads and proves that a Class AA, A, B, or C crime was committed with the use of a firearm against a person, the minimum sentence of imprisonment, which shall not be suspended, shall be as follows: When the sentencing class for such crime is Class AA, the minimum term of imprisonment shall be 6 years; when the sentencing class for such crime is Class A, the minimum term of imprisonment shall be 4 years; when the sentencing class for such crime is Class B, the minimum term of imprisonment shall be 2 years; and when the sentencing class for such crime is Class C, the minimum term of imprisonment shall be one year. For purposes of this subsection, the applicable sentencing class shall be determined in accordance with subsection 4.

### Comment

This amendment to subsection 5 creates a mandatory minimum sentence of 6 years when a Class AA crime is committed with the use of a firearm against a person.

5-A. Notwithstanding any other provision of this Code, for a person convicted of violating section 1105:

A. Except as otherwise provided in paragraphs B and C, the minimum sentence of imprisonment, which shall not be suspended, shall be as follows: When the sentencing class is Class AA, the minimum term of imprisonment shall be 6 years; when the sentencing class for

such crime is Class A, the minimum term of imprisonment shall be 4 years; when the sentencing class is Class B, the minimum term of imprisonment shall be 2 years; and, with the exception of trafficking or furnishing marijuana under section 1105, when the sentencing class is Class C, the minimum term of imprisonment shall be one year.

#### Comment

This amendment to subsection 5-A creates a mandatory minimum sentence of 6 years when a person convicted of violating section 1105 (aggravated trafficking or furnishing scheduled drugs) commits a Class AA crime.

#### B. (unchanged)

C. If the court imposes a sentence under paragraph B, the minimum sentence of imprisonment, which shall not be suspended, shall be as follows: When the sentencing class is Class AA, the minimum term of imprisonment shall be one year; when the sentencing class is Class A, the minimum term of imprisonment shall be 9 months; when the sentencing class is Class B, the minimum term of imprisonment shall be 6 months; and with the exception of trafficking or furnishing marijuana under section 1105, when the sentencing class is Class C, the minimum term of imprisonment shall be 3 months.

#### Comment

This amendment to paragraph C creates a mandatory minimum sentence of one year when a person convicted of violating section 1105 (aggravated trafficking or furnishing scheduled drugs) commits a Class AA crime and the court imposes a sentence under paragraph B.

### CHAPTER 53: FINES

#### § 1301. Amounts authorized

1-A. A natural person who has been convicted of a Class AA, Class A, Class B, Class C, Class D or Class E crime may be sentenced to pay a fine . . . . Subject to these sentences and to section 1302, the fine may not exceed:

A. \$50,000 for a Class AA crime or a Class A crime;

B. \$20,000 for a Class B crime;

C. \$5,000 for a Class C crime;

D. \$1,000 for a Class D crime;

E. \$1,000 for a Class E crime; and

F. Regardless of the classification of the crime, any higher amount that does not exceed twice the pecuniary gain derived from the crime by the defendant.

2. (unchanged)

3. If the defendant convicted of a crime is an organization and the law that the organization is convicted of violating expressly provides that the fine it authorizes may not be suspended, the organization must be sentenced to pay the fine authorized in that law. Otherwise, the maximum allowable fine that such a defendant may be sentenced to pay is:

- A. Any amount for murder;
- B. \$100,000 for a Class AA crime or a Class A crime;
- C. \$40,000 for a Class B crime;
- D. \$20,000 for a Class C crime;
- E. \$10,000 for a Class D crime or a Class E crime; and
- F. Any higher amount that does not exceed twice the pecuniary gain derived from the crime by the convicted organization.

### Comment

Subsections 1-A and 3 are amended to provide that the maximum fine for a Class AA crime is the same as the maximum fine for a Class A crime.

## PART II. SUBSTANTIVE OFFENSES (Current Class A Crimes)

### TITLE 17

#### CHAPTER 93-B: SEXUAL EXPLOITATION OF MINORS

##### § 2922. Sexual exploitation of a minor

1. (unchanged)

2. (unchanged) Penalty. Sexual exploitation of a minor is a Class B crime, except that any person convicted of this crime shall be sentenced by imprisonment for not less than 5 years. If the State pleads and proves a prior conviction under this section, then the crime is a Class A crime, except that any person convicted of this 2nd crime shall be sentenced by imprisonment for not less than 10 years. . . .

### TITLE 17-A

#### CHAPTER 7: OFFENSES OF GENERAL APPLICABILITY

##### § 151. Conspiracy

§ 151(9). . . . except that conspiracy to commit murder is a Class A AA crime.

##### § 152. Attempt

§ 152(4). . . . attempt to commit murder is a Class A AA crime.

##### § 153. Solicitation

§ 153(4). (unchanged) . . . . except that solicitation to commit murder is a Class A AA crime.

### Comment

This amendment changes the offenses of conspiracy to commit murder, attempt to commit murder, and solicitation to commit murder from Class A to Class AA crimes, giving each offense a maximum sentence of 40 years.

## CHAPTER 9: OFFENSES AGAINST THE PERSON

### § 202. Felony murder

§ 202(3). Felony murder is a Class A AA crime.

### § 203. Manslaughter

§ 203(3). Manslaughter is a Class A AA crime except that . . . .

### Comment

This amendment changes the offenses of felony murder and manslaughter from Class A to Class AA crimes, giving each offense a maximum sentence of 40 years.

## CHAPTER 11: SEXUAL ASSAULTS

### § 251. Definitions and general provisions

§ 251(1)(E). (unchanged) "Compulsion" means the use of physical force, a threat to use physical force or a combination thereof that makes a person unable to physically repel the actor or produces in that person a reasonable fear that death, serious bodily injury or kidnapping might be imminently inflicted upon that person or another human being.

"Compulsion" as defined in this paragraph places no duty upon the victim to resist the actor.

### § 253. Gross sexual assault

1. (unchanged) A person is guilty of gross sexual assault if that person engages in a sexual act with another person and:

A. The other person submits as a result of compulsion, as defined in section 251, subsection 1, paragraph E; or

B. The other person, not the actor's spouse, has not in fact attained the age of 14 years.

1-A. A person is guilty of gross sexual assault if that person engages in a sexual act with another person and:

A. The actor causes serious bodily injury to the other person; or

B. The actor causes bodily injury to the other person with use of a dangerous weapon; or

C. The actor causes bodily injury to the other person under circumstances manifesting extreme indifference to the value of human life. Such circumstances include, but are not limited to, the number, location or nature of the injuries, the manner or method inflicted, or the observable physical condition of the victim.

2. (unchanged)

3. (unchanged)

4[**two options**]. (Option 1) Violation of subsection 1 is a Class A crime.

OR

4. (Option 2) Violation of subsection 1, paragraph A is a Class A crime. Violation of subsection 1, paragraph B is a Class AA crime.

4-A. Violation of subsection 1-A is a Class AA crime.

5. (unchanged) Violation of subsection 2, paragraph A, B, C, D, E or H is a Class B crime. Violation of subsection 2, paragraph F, G or I is a Class C crime.

### Comment

The proposed changes to section 253 are designed to differentiate between gross sexual assault which causes serious bodily injury or is committed with extreme indifference to the value of human life on the one hand, and gross sexual assault which involves physical force or threat of physical force but which does not result in serious bodily injury, on the other. The language in proposed subsection 1-A is derived from section 208 (aggravated assault). The amendment treats the former offense more seriously as a Class AA crime with a maximum sentence of 40 years, while the latter offense is a Class A crime with a 20-year maximum sentence. Currently, the Code makes no statutory distinction between these two ways to commit the offense and the maximum sentence for both is 40 years.

Subsection 4 presents two options for designating the maximum sentence when a section 253 offense is committed against a victim less than 14 years old. The first option leaves the subsection 4 language unchanged; thus, if the victim is less than 14 years old and the offense does not involve serious bodily injury or extreme indifference to the value of human life, the maximum sentence under Option 1 is 20 years. The second option is designed to give the sentencing court greater discretion when dealing with gross sexual assault committed against a person less than 14 years old. Option 2 thus makes such an offense a Class AA crime with a 40-year maximum sentence. An adoption of Option 2 would evidence the Legislature's intention to overrule the Law Court's opinion in *State v. Michaud*, 590 A.2d 538 (Me. 1991).

## CHAPTER 13: KIDNAPPING AND CRIMINAL RESTRAINT

### § 301. Kidnapping

1. A person is guilty of kidnapping if either:

A. He knowingly restrains another person with the intent to

(1) hold him for ransom or reward;

(2) use him as a shield or hostage;

(3) inflict bodily injury upon him or subject him to conduct de-

fined as criminal in chapter 11;

(4) terrorize him or a 3rd person;

(5) facilitate the commission of another crime by any person or flight thereafter; or

(6) interfere with the performance of any government or political function; or

**B.** He knowingly restrains another person:

(1) circumstances which, in fact, expose such other person to risk of serious bodily injury; or

(2) by secreting and holding him in a place where he is not likely to be found-;

(3) and the actor causes serious bodily injury to the other person;

(4) and the actor causes bodily injury to the other person with use of a dangerous weapon; or

(5) and the actor causes bodily injury to the other person under circumstances manifesting extreme indifference to the value of human life. Such circumstances include, but are not limited to, the number, location or nature of the injuries, the manner or method inflicted, or the observable physical condition of the victim.

2. (unchanged)

2-A. (unchanged)

2-B. (unchanged)

3. Kidnapping as defined in subsection 1, paragraph A is a Class A crime. It is, however, a defense which reduces the crime to a Class B crime, if the defendant voluntarily releases the victim alive and not suffering from serious bodily injury, in a safe place prior to trial.

4. Violation of subsection 1, paragraph B, subparagraph (1), (3), (4), or (5) is a Class AA crime. Violation of subsection 1, paragraph B, subparagraph (2) is a Class AA crime.

### Comment

The proposed changes in section 301 are designed to differentiate between kidnapping under circumstances which cause serious bodily injury or risk of serious bodily injury on the one hand, and kidnapping without such circumstances, on the other. The proposed language in subsection 1, paragraph B, subparagraphs (3), (4), and (5) is derived from section 208 (aggravated assault). The amendment treats the former kidnapping offense more seriously as a Class AA crime with a maximum sentence of 40 years, while the other kidnapping offenses are Class A crimes carrying a 20-year maximum sentence.

## CHAPTER 17: BURGLARY AND CRIMINAL TRESPASS

### § 401. Burglary

§ 401(2). (unchanged) Burglary is classified as:

A. A Class A crime if the defendant was armed with a firearm, or

knew that an accomplice was so armed; and . . .

## CHAPTER 27: ROBBERY

### § 651. Robbery

1. (unchanged) A person is guilty of robbery if he commits or attempts to commit theft and at the time of his actions:

A. He recklessly inflicts bodily injury on another;

B. He threatens to use force against any person present with the intent

(1) to prevent or overcome resistance to the taking of the property, or to the retention of the property immediately after the taking; or

(2) to compel the person in control of the property to give it up or to engage in other conduct which aids in the taking or carrying away of the property;

C. He uses physical force on another with the intent enumerated in paragraph B, subparagraphs (1) or (2);

D. He intentionally inflicts or attempts to inflict bodily injury on another; or

E. He or an accomplice to his knowledge is armed with a dangerous weapon in the course of a robbery as defined in paragraphs A through D.

2. Robbery as defined in subsection 1, paragraphs A and B, is a Class B crime. Robbery as defined in subsection 1, paragraph C, ~~D,~~ and ~~E,~~ is a Class A crime. Robbery as defined in subsection 1, paragraphs D and E, is a Class AA crime.

### Comment

The purpose of this amendment to section 651 is to make the following offenses Class AA crimes with a 40-year maximum sentence: robbery while armed with a dangerous weapon; and robbery committed with intentional infliction of bodily injury. Robbery which involves physical force on another is a Class A crime, and robbery involving threats of use of force or reckless infliction of bodily injury are Class B crimes.

## CHAPTER 33: ARSON AND OTHER PROPERTY DESTRUCTION

### § 802. Arson

1. A person is guilty of arson if he starts, causes, or maintains a fire or explosion:

A. On the property of another with the intent to damage or destroy property thereon; or

B. On his own property or the property of another with the intent to enable any person to collect insurance proceeds for the loss

caused by the fire or explosion, or which recklessly endangers the property of another.

~~(1) with the intent to enable any person to collect insurance proceeds for the loss caused by the fire or explosion; or~~

~~(2) which recklessly endangers any person or the property of another.~~

C. On his own property or the property of another which recklessly endangers any person.

2. (unchanged)

3. Arson as defined in subsection 1, paragraphs A and B, is a Class A crime. Arson as defined in subsection 1, paragraph C is a Class AA crime.

### Comment

This proposed change to section 802 is designed to treat arson which endangers the life of any person more severely than arson which endangers only property. Arson which creates a serious risk to human life is a Class AA crime warranting a 40-year maximum sentence; however, arson committed with intent to destroy property which does not endanger any person is a Class A crime.

### § 803. Causing a catastrophe

1. A person is guilty of causing a catastrophe if he recklessly causes a catastrophe by explosion, fire, flood, avalanche, collapse of a structure, release of poison, radioactive material, bacteria, virus or other such force or substance that is dangerous to human life and difficult to confine.

2. As used in this section, "catastrophe" means death or serious bodily injury to 10 or more people or substantial damage to 5 or more structures, as defined in section 2, subsection 24.

3. Causing a catastrophe is a Class ~~A~~ AA crime.

### Comment

Since the definition of "catastrophe" includes death or serious bodily injury to 10 or more people, the proposal changes the crime of causing a catastrophe from a Class A to a Class AA offense.

## CHAPTER 45: DRUGS

### § 1105. Aggravated trafficking or furnishing scheduled drugs

1. (unchanged)

2. (unchanged) Aggravated trafficking or furnishing is a crime one class more serious than such trafficking or furnishing would otherwise be.



### Comment

Under section 1105, if the drug trafficking offense is considered a Class B crime, i.e., section 1103(2)(A), the aggravated offense is a Class A crime with a 20-year maximum sentence. To the extent that the sentencing of drug offenses in Maine courts should take into consideration the federal sentence for the same offense, *see State v. Gonzales*, 604 A.2d 904 (Me. 1992), a 20-year maximum sentence for aggravated drug trafficking of the substances listed in section 1103(2)(A) is more consistent with the comparable range of sentences under the Federal Sentencing Guidelines than a 40-year maximum sentence.