Maine Law Review

Volume 40 | Number 1 Article 2

January 1988

Disparity and the Need for Sentencing Guidelines in Maine: A Proposal for Enhanced Appellate Review

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DISPARITY AND THE NEED FOR SENTENCING GUIDELINES IN MAINE: A PROPOSAL FOR ENHANCED APPELLATE REVIEW

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I. INTRODUCTION

> The inference which we try to draw from the resemblance of events is uncertain because they are always dissimilar. There is no quality so universal in this aspect of things as diversity and variety. . . . Resemblance does not make things so much alike as difference makes them unlike. Nature has committed herself to make nothing other that was not different.
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> Therefore I do not much like the opinion of the man who thought by the multitude of laws to curb the authority of judges by cutting up their meat for them.[1]

Perhaps in no other field of judicial endeavor is diversity and variety more apparent than when a sentencing judge considers the circumstances presented by a defendant convicted of a criminal offense. In each case, the sentencing judge confronts an individual who has no exact counterpart in any defendant previously appearing before the court for sentencing. The sentence imposed is primarily a matter of judicial discretion and is based upon consideration of the nature of the offense, the circumstances surrounding the commission of the offense, and the circumstances of the defendant. The sentencing judge formulates a specific sentence within broad statutory authorization[2] by balancing the competing and contradictory societal goals reflected in the statutory purposes of sentencing.[3] Such a scheme provides significant leeway for the exercise of judicial discretion in determining the length of a criminal sentence and thus permits variations in sentences imposed for convictions of the same criminal offense. Some commentators suggest that sentencing in Maine can be compared to an extreme form of substantively irrational law described as "Khadi Justice."[4] The Khadi, for whom this concept is named, is a Moslem judge who sits in the market place and renders decisions without reference to rules or norms. He operates within a broad universe of information and he alone determines what portion of that information is relevant and should be employed

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* Justice, Maine Supreme Judicial Court.

1. M. MONTAIGNE, *Of Experience*, in SELECTED ESSAYS 537-38 (B. Bates ed. 1949).
2. *See* ME. REV. STAT. ANN. tit. 17-A, § 1252(2) (1983).
3. *Id.* § 1151 (1983 & Supp. 1987-1988). *See infra* text accompanying note 13.
4. *See* D. Anspach & S. Monsen, Sentencing Reform and Khadi Justice in Maine 23 (June 1987) (unpublished manuscript).

in any given case. Although the comparison is far from accurate, it does point out the absence in current sentencing practice of a coherent and accepted scale of punishment within the broad sentencing range established by statute.

Acting under the impetus provided by overcrowded prisons, the abolition of parole, increased sentences, and claims of disparate treatment, critics argue that there is a need to structure and to govern the exercise of discretion by the sentencing judge in order to promote uniformity in sentencing.[5] Legislative enactment of sentencing guidelines is the means generally considered for accomplishing such a goal.[6] Sentencing guidelines typically take into account two variables, the seriousness of the offense and the background of the offender, and provide scales with which to measure each variable. The actual sentence is determined by reference to a grid that

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5. In 1983, the Maine Legislature created a Maine Sentencing Guidelines Commission and found "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. *See* D. Anspach & S. Monsen, Sentencing Guidelines: "A Solution in Search of a Problem?" (Mar. 1986) (unpublished manuscript).

6. A current example of an effort to create sentencing guidelines through the legislative and administrative process is provided by the United States Sentencing Commission. United States Sentencing Commission Guidelines, 52 Fed. Reg. 18,046 (1987). Any evaluation of the federal guidelines must await their full implementation. It is worth noting, however, that the guidelines do not purport to deal with sentences resulting from the plea bargaining process. *Id.* at 18,051. Such a provision severely limits the effectiveness of the guidelines in addressing disparity. It should be noted that the approach adopted by Congress in creating the United States Sentencing Commission has provoked serious legal challenge. Thus far, two United States district courts have ruled on the validity of the sentencing guidelines. *See* United States v. Ruiz-Villanueva, No. 87-1296-E (S.D. Cal. Feb. 29, 1988); United States v. Arnold, 678 F. Supp. 1463 (S.D. Cal. 1988). Both courts rejected claims of unlawful delegation of legislative power. While the *Ruiz-Villanueva* court rejected a claim of unlawful delegation of legislative power, United States v. Ruiz-Villanueva, No. 87-1296-E (S.D. Cal. Feb. 29, 1988), the *Arnold* court invalidated the guidelines as a violation of the separation of powers doctrine. United States v. Arnold, 678 F. Supp. 1463 (S.D. Cal. 1988). The creation of sentencing guidelines through appellate review of sentences does not implicate issues of delegation or separation of powers, because it is simply a structuring of existing judicial power.

The Maine Sentencing Guidelines Commission, created by P. & S.L. 1983, ch. 53, was charged with investigating sentencing practices and making recommendations to the Legislature for sentencing guidelines, including presumptive fixed sentences. The report of the Commission, issued in November 1984, stated that the Commission recommended advisory guidelines, but had been unable to formulate those guidelines in the time that was available. The report recommended that the Legislature establish a new commission to continue the study. MAINE SENTENCING GUIDELINES COMMISSION, REPORT TO THE 111TH LEGISLATURE 5 (Nov. 30, 1984). The Maine Legislature responded by creating a new Sentencing Guideline Commission, effective January 10, 1986. Apparently through oversight, the Act required the Commission to file a final report with the Legislature by January 5, 1986, five days before the creation of the Commission. P. & S.L. 1986, ch. 84, § 7. No members were ever appointed and no further developments have taken place.

designates a sentence corresponding to the combined measurement on both scales.[7] For an administrative commission or a legislature, it is a monumental task to determine abstractly an appropriate sentence for every conceivable future offender. Moreover, the legislative process is too unwieldy to enact and refine sentencing guidelines, and such statutory sentencing schemes thus suffer from rigidity. Finally, there are certain risks in subjecting the sensitive subject of sentencing directly to the whims of the political process.[8] These shortcomings suggest that the Legislature is ill-suited for creating sentencing guidelines. It is not necessary, however, to abandon all efforts at improving the current system.

Thus far, little thought has been given in Maine to the alternative of expanding the grounds for direct appeal of sentences and charging the judiciary with the task of creating sentencing guidelines in the process of deciding cases. Appellate courts with common law powers share the lawmaking function with legislatures, and the case-by-case decisional process affords courts the flexibility required to establish scales of punishment. Maine is one of only twenty-six states that provide some form of appellate review of criminal sentences.[9] This Article discloses the deficiencies in the current sys-

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7. For a complete description of the methodology for constructing sentencing guidelines, see W. RICH, L. SUTTON, T. CLEAR & M. SAKS, SENTENCING BY MATHEMATICS: AN EVALUATION OF THE EARLY ATTEMPTS TO DEVELOP AND IMPLEMENT SENTENCING GUIDELINES (1982).

8. *Id.* at 207 n.131.

9. In 1962, only 14 states allowed appeals of legal but excessive sentences. Mueller, *Penology on Appeal: Appellate Review of Legal but Excessive Sentences*, 15 VAND. L. REV. 671, 677 & n.26 (1962). Maine first adopted a sentence review statute in 1965. In 1967, the American Bar Association Advisory Committee on Sentencing and Review concluded that review of a sentence should be available in each case where review of trial leading to conviction was available. Pursuant to its conclusion, the Committee issued standards outlining the purposes and procedures of appellate review of sentences. STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES (1968) [hereinafter APPELLATE REVIEW STANDARDS].

Of the 50 American states and the District of Columbia, 26 states allow appellate review of legal but excessive sentences. *See* ALASKA STAT. § 12.55.120(a) (1984), *construed in* State v. Chaney, 477 P.2d 441, 444 (Alaska 1970); ARIZ. REV. STAT. ANN. § 13-4037(A) (1978), *construed in* State v. Smith, 111 Ariz. 149, 152, 526 P.2d 392, 395 (1974); CAL. PENAL CODE § 1260 (West 1981); COLO. REV. STAT. § 18-1-409(1) (1986); CONN. GEN. STAT. ANN. §§ 51-195 to -196 (West 1985); GA. CODE ANN. § 17-10-6(a) (Supp. 1987); HAW. REV. STAT. § 641-16 (1985), *construed in* State v. Kui Ching, 46 Haw. 135, 138-39, 376 P.2d 379, 381 (1962); IDAHO CODE § 1-205 (1979), *construed in* State v. Wolfe, 99 Idaho 382, 385, 582 P.2d 728, 731 (1978); IDAHO APP. R. 11(c)(6); ILL. ANN. STAT. ch. 38, para. 1005-5-4.1 (Smith-Hurd Supp. 1987-1988), *construed in* People v. Brown, 103 Ill. App. 3d 306, 310, 431 N.E.2d 43, 46 (1982); ILL. SUP. CT. R. 615; IND. R. APP. REV. SENTENCES 1-2; IOWA CODE ANN. §§ 814.6(1)(a), .20 (West 1987); ME. REV. STAT. ANN. tit. 15, § 2142 (1980); MD. ANN. CODE art. 27, §§ 645JA, 645JC (1982); MASS. GEN. LAWS. ANN. ch. 278, § 28B (West 1981), *construed in* Walsh v. Picard, 328 F. Supp. 427, 428 (D. Mass. 1971); People v. Coles, 417 Mich. 523, 535-36, 339 N.W.2d 440, 446 (1983); MINN. STAT. ANN. § 244.11 (West 1988); MONT. CODE

tem of sentence review in Maine and compares it to the eighty-year-

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ANN. § 46-18-904 (1987); NEB. REV. STAT. § 29-2308 (1985), *construed in* State v. Last, 212 Neb. 596, 604, 324 N.W.2d 402, 406 (1982); N.H. REV. STAT. ANN. §§ 651:57-:60 (1986); N.H. SUP. CT. SENTENCE REV. DIV. R. 22; N.J. STAT. ANN. § 2C:44-7 (West 1982), *construed in* State v. Roth, 95 N.J. 334, 363-65, 471 A.2d 370, 386-87 (1984); N.Y. CRIM. PROC. LAW §§ 450.30(1), 470.15 (McKinney 1983 & Supp. 1988); N.C. GEN. STAT. §§ 15A-1442(5a), -1444 (1983), *construed in* State v. Conard, 55 N.C. App. 63, 67, 284 S.E.2d 557, 559-60 (1981); 42 PA. CONS. STAT. ANN. § 9781 (Purdon 1982); State v. Fortes, 114 R.I. 161, 173, 330 A.2d 404, 411 (1975); TENN. CODE ANN. § 40-35-402 (1986 & Supp. 1987); WIS. STAT. ANN. § 974.02 (West 1985), *construed in* Nelson v. State, 35 Wis. 2d 797, 820, 151 N.W.2d 694, 705-706 (1967).

Nineteen of the remaining 25 jurisdictions clearly prohibit or substantially limit appellate review of sentences that are within statutory limits. *See* Cabble v. State, 347 So. 2d 546, 548 (Ala. Crim. App. 1977) (a sentence that is within statutory limits cannot be revised by an appellate court); Abbott v. State, 256 Ark. 558, 562-63, 508 S.W.2d 733, 735-36 (1974) (a sentence will not be reduced unless it is in excess of statutory limits); Osburn v. State, 224 A.2d 52, 52 (Del. 1966) (Delaware appellate court has no power to reduce a sentence which is within statutory limits); FLA. STAT. ANN. § 921.001(5) (West Supp. 1987) (allows appeal of sentence only if it is outside the limits set by statutory guidelines); State v. Strauch, 239 Kan. 203, 219, 718 P.2d 613, 627 (1986) (appellate court will not disturb a sentence that is within statutory limits unless it is the result of partiality, prejudice, oppression or corrupt motive); Parsons v. Commonwealth, 285 Ky. 472, 474, 148 S.W.2d 301, 303 (1940) (appellate court does not have authority to set aside a sentence that falls within statutory limits); State v. Pierson, 296 So. 2d 324, 325 (La. 1974) (sentence within statutory limits is generally not subject to review); State v. Bibee, 496 S.W.2d 305, 312 (Mo. Ct. App. 1973) (appellate court will not review a punishment that falls within statutory limitations); Spillers v. State, 84 Nev. 23, 31, 436 P.2d 18, 23 (1968) (only unauthorized sentences may be modified); State v. McCall, 101 N.M. 616, 631, 686 P.2d 958, 973 (N.M. Ct. App. 1983) (appellate courts do not have authority to review sentences that fall within statutory limits); State v. Joern, 249 N.W.2d 921, 923 (N.D. 1977) (Supreme Court of North Dakota has no authority to modify sentences that are within the range of penalties permitted by statute); State v. Collier, 22 Ohio App. 3d 25, 31, 488 N.E.2d 887, 893 (1984) (appellate court is not normally permitted to review the severity of a sentence that falls within the parameters set by the legislature); Severs v. State, 477 P.2d 695, 697 (Okla. Crim. App. 1970) (the court of criminal appeals can modify a sentence only where it is so excessive that it shocks the conscience of the court); OR. REV. STAT. §§ 138.040-.050 (1985) (allows appeal of sentence only if it exceeds the maximum sentence permitted by statute or is unconstitutionally cruel and unusual); State v. Alexander, 230 S.C. 195, 197, 95 S.E.2d 160, 161 (1956) (sentence within statutory limits will not be disturbed unless the defendant challenges the sentence on constitutional grounds or alleges partiality, prejudice, oppression or corrupt motive); State v. Big Head, 363 N.W.2d 556, 563 (S.D. 1985) (sentence within statutory limits will not be overturned); Sampayo v. State, 625 S.W.2d 33, 35 (Tex. Ct. App. 1981) (sentence will not be disturbed if it is within limits prescribed by the legislature); WASH. REV. CODE ANN. § 9.94A.210 (West Supp. 1987) (prohibits appeal of sentence that is within the standard range for the offense); Seeley v. State, 715 P.2d 232, 242 (Wyo. 1986) (no sentence will be set aside unless there is an abuse of discretion, and there is no abuse of discretion when the sentence is within statutory limits).

Only six jurisdictions have unclear positions on the issue of whether an appellate court has authority to modify legal sentences. There are statutory provisions in these jurisdictions that permit appeals from final orders and judgments, but the courts have not determined whether a reviewing court can overturn a legal sentence under

old English system of direct appeal of criminal sentences. The sentencing guidelines produced in England show that appellate review provides an effective and rational means of flexibly structuring the exercise of sentencing discretion. Maine has not yet achieved improvements in sentencing practice through channelling sentencing discretion. This Article therefore suggests that the Legislature should change Maine's present system of appellate review in order to permit the development of a law of sentencing by the judiciary.

II. SENTENCE REVIEW IN MAINE

Throughout most of Maine's history, the discretion of the sentencing judge has been absolute and unreviewable when exercised within the broad range established by the Legislature for a particular offense.[10] The adoption of a modern criminal code in 1976 signifi-

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the authority of these statutes. *See* D.C. CODE ANN. § 11-721 (1981); MISS. CODE ANN. § 99-35-101 (1972), *construed in* Jones v. State, 241 So. 2d 829, 830 (Miss. 1970); UTAH CODE ANN. §§ 77-1-6(g), -35-26 (1982 & Supp. 1987); VT. STAT. ANN. tit. 13, § 7042(a) (Supp. 1987) (allows any court imposing sentence to reduce that sentence within certain period of time, but the scope of authorization of court to reduce a legal sentence has not been defined by case law); VA. CODE ANN. § 19.2-324 (1983); W. VA. CODE § 58-5-25 (1966). The West Virginia Constitution requires that a criminal sanction be proportionate to the character and degree of the crime. Criminal defendants use this provision to challenge the constitutionality of sentences. W. VA. CONST. art. III, § 5, *construed in* State v. Cooper, 304 S.E.2d 851, 852 (W. Va. 1983) (A sentence will be "constitutionally impermissible . . . if it is so disproportionate to the crime . . . that it shocks the conscience and offends fundamental notions of human dignity.").

10. *See* State v. Allison, 427 A.2d 471, 475 (Me. 1981). In retrospect, it is difficult to understand how sentencing decisions came to be considered as unreviewable on direct appeal. It is true that the imposition of a sentence involves an exercise of discretion rather than a question of law. In every other area of the law, however, a discretionary judgment is subject to a deferential standard of review, but does not escape review altogether. The situation has been aptly described by Judge Frankel as follows:

> The talk about sentencing lying in "discretion," and thus outside "law," bundles together a complex of conceptions and misconceptions that goes far to summarize the evils of the system. It is true that as we now handle this enormous power, trial judges are invited to proceed by hunch, by unspoken prejudice, by untested assumptions, and not by "law." But that is, as I have argued, the crux of what is wrong, not an argument for keeping things as they are. Correctly understood, the "discretion" of judicial officers in our system is not a blank check for arbitrary fiat. It is an authority, *within the law*, to weigh and appraise diverse factors (lawfully knowable factors) and make a responsible judgment, undoubtedly with a measure of latitude and finality varying according to the nature and scope of the discretion conferred. But "discretionary" does not mean "unappealable." Discretion may be abused, and discretionary decisions may be reversed for abuse.
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> The contention that sentencing is not regulated by rules of "law" subject to appellate review is an argument for, not against, a system of appeals. The "common law" is, after all, a body of rules evolved through the process of reasoned decision of concrete cases, mainly by appellate courts. English appellate courts and some of our states have been evolving general, legal

cantly enhanced the practical effect of the sentencing judge's discretion. In the Maine Criminal Code, the Legislature has discharged its responsibility for determining the length of criminal sentences by creating five classes of offenses. For the most serious offense, murder, the authorized range of sentence extends from a minimum of twenty-five years to life imprisonment.[11] Class A offenses are punishable by imprisonment for a definite period ranging from zero to twenty years; class B crimes can result in incarceration for zero to ten years; class C offenses are punishable by imprisonment for a zero to five year period; class D crimes can result in a zero to one-year imprisonment sanction; and class E offenses are punishable for a period ranging from zero to six months.[12] The Legislature enacted the following statement of principles in order to control the exercise of the sentencing judge's discretion within the broad range of authorized sentences:

> The general purposes of the provisions of this part are:
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> **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;
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> **2.** To encourage restitution in all cases in which the victim can be compensated and other purposes of sentencing can be appropriately served[;]
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> **3.** To minimize correctional experiences which serve to promote further criminality;
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> **4.** To give fair warning of the nature of the sentences that may be imposed on the conviction of a crime;
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> **5.** To eliminate inequalities in sentences that are unrelated to legitimate criminological goals;
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> **6.** To encourage differentiation among offenders with a view to a just individualization of sentences;
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> **7.** To promote the development of correctional programs which elicit the cooperation of convicted persons; and
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> **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.[13]

"principles of sentencing" in the course of reviewing particular sentences claimed to be excessive. One way to begin to temper the capricious unruliness of sentencing is to institute the right of appeal, so that appellate courts may proceed in their accustomed fashion to make law for this grave subject.

M. FRANKEL, CRIMINAL SENTENCES — LAW WITHOUT ORDER 83-84 (1972).

For an interesting discussion of some of the reasons for the absence of appellate review in American jurisdictions, see Mueller & Le Poole, *Appellate Review of Legal but Excessive Sentences: A Comparative Study*, 21 VAND. L. REV. 411 (1968).

11. ME. REV. STAT. ANN. tit. 17-A, § 1251 (Supp. 1987-1988).

12. *Id.* § 1252(2) (1983).

13. *Id.* § 1151 (1983 & Supp. 1987-1988).

The range of sentences under the Criminal Code gives considerable discretion to the sentencing judge, and the Code does not differ markedly on its surface from prior law. The impact of the judge's discretion, however, increased exponentially when the Code abolished parole and introduced determinate sentences.[14] Contrary to prior law, a sentence imposed by a sentencing judge under the Code actually fixes the duration of confinement. This practical effect of sentencing decisions heightens the need to regulate the exercise of discretion afforded to the sentencing judge.

An attempt to document the extent to which unjustified sentence disparity exists in Maine would serve no useful purpose. At the outset, there is the difficult task of defining and measuring disparity.[15] Beyond that, the unique circumstances of each case make a direct comparison of cases difficult, if not impossible. Without doubt, however, disparity exists. Although convention and law dictate to some extent the factors upon which judges rely in fixing a sentence, little agreement exists as to the relative weight attributed to any one factor. There is even disagreement as to whether a particular factor constitutes a mitigating or an aggravating circumstance.[16] One of the few definite statements that can be made about the current sentencing process is that the judge is required to perform his task in the presence of the defendant, in the view of the public, and in that respect is personally accountable for his decision.

The law of Maine has long proclaimed a sensitivity to the need for structure in the sentencing process. The Declaration of Rights of the Maine Constitution, which was adopted in 1820, requires that "all penalties and punishments shall be proportioned to the offence."[17] The proportionality provision has been interpreted as affording a remedy for a legal but excessive sentence.[18] In the history of Maine, however, only five appeals have been presented on this issue. Whether the issue was raised directly on appeal or collaterally by way of post-conviction review,[19] no appellant has successfully established that his sentence was disproportionate to his offense.[20] More-

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14. *See* ME. REV. STAT. ANN. tit. 17-A, § 1252 comment (1983) (discusses changes resulting from enactment of Maine Criminal Code).

15. Disparity has been defined as a " 'form of unequal treatment that is often of unexplained cause' " and that is disadvantageous to the defendant and to the state. D. Anspach & S. Monsen, *supra* note 4, at 8-9 (quoting J. Hagan & K. Bumiller, *Making Sense of Sentencing: A Review and Critique of Sentencing Research*, in 2 RESEARCH ON SENTENCING: THE SEARCH FOR REFORM 9 (1983)).

16. It is difficult to generalize, for example, whether intoxication mitigates or aggravates the commission of an unrelated offense.

17. ME. CONST. art. I, § 9.

18. 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.

19. ME. REV. STAT. ANN. tit. 15, §§ 2121-2132 (Supp. 1987-1988).

20. *See* Smith v. State, 479 A.2d 1309, 1311 (Me. 1984); State v. Tardiff, 380 A.2d

over, on direct appeal, a claim of sentence disparity faces significant procedural hurdles. Maine law holds that only the "legality" of a sentence may be challenged on direct appeal and that "the alleged infirmity, even if one of law, must appear affirmatively from the record."[21] Assuming that a disproportionate sentence could be considered illegal, the disproportionality would rarely appear affirmatively on the record. Direct appeal has produced virtually no useful precedent on the law of sentencing and, as presently constituted, cannot effectively secure the constitutional promise of proportionate sentencing.

Concern for sentencing fairness led to the enactment of a provision for limited appellate review of sentences in 1965. In that year, the Legislature created the Appellate Division of the Maine Supreme Judicial Court and assigned to the division the task of reviewing sentences to the state prison.[22] A contemporary commenta-

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609, 609-10 (Me. 1977); State v. Heald, 307 A.2d 188, 191-92 (Me. 1973); Cunningham v. State, 295 A.2d 250, 252 (Me. 1972); State v. Alexander, 257 A.2d 778, 782 (Me. 1969).

21. State v. Palmer, 468 A.2d 985, 987 n.6 (Me. 1983).

22. P.L. 1965, ch. 419, § 1. The current version of the chapter is codified at ME. REV. STAT. ANN. tit. 15, §§ 2141-2142 (1980), which provides:

§ 2141. Appellate division of the Supreme Judicial Court for review of certain sentences

There shall be an appellate division of the Supreme Judicial Court for the review of any sentence of one year or more to the State Prison, Maine Correctional Center or any county jail imposed by a final judgment in a criminal case, except in any case in which a different sentence could not have been imposed. The appellate division shall consist of not more than 3 Justices of the Supreme Judicial Court to be designated from time to time by the Chief Justice of said court, and shall sit in Rockland, Portland or at such other place as may be designated by the Chief Justice, and at such times as he shall determine. No justice shall sit or act on an appeal from a sentence imposed by him. Two justices shall constitute a quorum to decide all matters before the appellate division.

A designation by the Chief Justice of the members of the appellate division shall be recorded by the Executive Secretary to the Supreme Judicial Court who shall forthwith send copies thereof to the several clerks of the Superior Court.

§ 2142. Procedure for appeal; hearing and determination

A person aggrieved by a sentence which may be reviewed may after imposition thereof and within such time as the Supreme Judicial Court shall by rule provide, notwithstanding any partial execution of such sentence, file with the clerk of the court in which the sentence was imposed an appeal to the appellate division for the review of such sentence. Upon the imposition of a sentence of one year or more to any of the institutions enumerated in section 2141, the clerk of the appropriate court shall notify the person sentenced of his right to request such appeal. An appeal shall not stay the execution of a sentence. The clerk shall forthwith notify the justice or judge who imposed the sentence appealed from and the appellate division of the filing of such an appeal. Such justice or judge may transmit to the appellate division a statement of his reasons for imposing the sentence and shall

tor describes the role of the appellate division in the following terms:

> Under the system adopted in Maine, the appellate division will review sentences imposed by all the Superior Court Justices in the state and will thus be able to detect and correct cases of substantial disparity not explained by the need to individualize the sentence to the requirements of the offender. An equally important purpose is to permit correction of sentences which—while within statutory limits—were the result of a failure to consider relevant factors or of a consideration of improper factors. The reviewing court can help in consistently applying the community sentencing policies enumerated above. Related to these specific purposes is the less tangible hope that trial judges will find, in the decisions of the reviewing court, guides for the formulation of better sentences.[23]

Several notable features of the law and the implementing court rule[24] deserve attention. Only the defendant may seek a review of

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make such a statement within 7 days if requested to do so by the appellate division.

The appellate division shall have jurisdiction to consider the appeal with a hearing, review the judgment so far as it relates to the sentence imposed, and also any other sentence imposed when the sentence appealed from was imposed, notwithstanding the partial execution of any such sentence, and shall have jurisdiction to amend the judgment by ordering substituted therefor a different appropriate sentence or sentences or any other disposition of the case which could have been made at the time of the imposition of the sentence or sentences under review, but no sentence shall be increased without giving the defendant an opportunity to be heard. If the appellate division decides that the original sentence or sentences should stand, it shall dismiss the appeal. Its decision shall be final. The clerk of the appellate division shall forthwith notify the justice or judge who imposed the sentence appealed from of the final action by the appellate division on the appeal. The appellate division may require the production of any records, documents, exhibits or other things connected with the proceedings; if a presentence investigation has not previously been made, the appellate division may refer the matter to the State Parole Board for investigation and report. The Supreme Judicial Court shall by rule establish forms for requests for appeals and for leave to appeal under this chapter and may by rule make such other regulations of procedure and notice relative thereto, consistent with law, as justice may require.

23. Halperin, *Sentence Review in Maine: Comparisons and Comments*, 18 MAINE L. REV. 133, 134-35 (1966).

24. ME. CRIM. P. 40. Rule 40 provides:

APPELLATE REVIEW OF CERTAIN SENTENCES

(a) **How Secured.** Any person entitled by statute to appellate review of a sentence imposed in a criminal case may appeal to the appellate division of the Supreme Judicial Court by filing an original and four copies of a notice of appeal with the clerk of the court in which sentence was imposed.

(b) **Notice of Appeal.** The notice of appeal shall conform to Form 12 of the Appendix of Forms. The notice of appeal shall be signed by the appellant. The clerk shall forthwith notify the justice or judge who imposed the sentence appealed, the attorney for the State who prosecuted the case,

his sentence,[25] and he must personally sign the notice of appeal.[26] The panel conducting the review consists of three justices of the Supreme Judicial Court who are appointed by the Chief Justice.[27] Re-

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and the clerk of the appellate division, who shall be the Clerk of the Law Court, by mailing a copy thereof to each of them. The clerk shall note in the criminal docket the giving of such notification, with the date thereof.

(c) Time for Taking Appeal. An appeal may be taken within 30 days after entry of the sentence appealed from. The 30-day time period for filing the notice of appeal may not be enlarged. A sentence is entered within the meaning of this paragraph when it is entered in the criminal docket. A notice of appeal filed after sentencing but before entry of the sentence in the docket shall be treated as filed on the day of the entry of the sentence.

When a court imposes a sentence of imprisonment for one year or more which may by statute be reviewed, the clerk of the court in which the sentence is imposed shall notify the person sentenced of his right to appeal and note the fact of such notification in the criminal docket.

(d) Proceedings Before Appellate Division.

(1) *Time of Review.* The appellate division shall as soon as practicable after the filing of the notice of appeal review the sentence appealed from. The appellate division shall decline to review the sentence in any case in which there is pending a motion for new trial, a motion for judgment of acquittal after verdict, a motion in arrest of judgment, a motion to correct or reduce a sentence pursuant to rule 35 or an appeal to the Law Court pursuant to Rule 37. In such case, the appeal shall not be dismissed, but review shall be continued until final termination of the proceedings then pending.

(2) *Hearing.* The appellate division may review the sentence with or without hearing, but no sentence may be changed without giving the appellant and the attorney for the State an opportunity to be heard. If a hearing is to be held, the appellate division shall cause the defendant, his attorney of record in the appellate division and the attorney for the State to be given notice of the time and place of hearing at least 10 days prior to the holding thereof, and, if the defendant is in custody, shall take the necessary steps to secure his attendance.

(3) *Dismissal.* An appeal may be dismissed or withdrawn only with leave of the appellate division.

(4) *Remand.* The Appellate Division may order a remand to the court that imposed sentence for the purpose of having the court set forth its reasons for the sentence, as required by Rule 32(a)(3).

(e) Decision. The final order of the appellate division shall be filed with the clerk of the appellate division, who shall forthwith notify the justice who imposed sentence, the appellant, the clerk of the court in which sentence was imposed, the appellant's attorney of record in the appellate division, if any, and the head of the institution in which the appellant is confined, of the final action of the appellate division. If the judgment is amended by an order substituting a different sentence or sentences or disposition of the case, any judge or justice of the court which imposed sentence when in the county in which the defendant is confined shall resentence the defendant or make any other disposition of the case ordered by the appellate division.

25. *See* ME. REV. STAT. ANN. tit. 15, § 2142 (1980); M.R. CRIM. P. 40(a).

26. M.R. CRIM. P. 40(b).

27. ME. REV. STAT. ANN. tit. 15, § 2141 (1980).

view is available only to defendants sentenced to imprisonment for one year or more.[28] Once an appeal is filed, it may be withdrawn only with leave of the appellate division.[29] The panel is authorized to review the sentence and substitute an appropriate sentence, including an increased sentence and a different type of sentence.[30] The process of review may be accomplished with or without a hearing, but under the current rule no sentence may be changed without granting both sides an opportunity to be heard.[31] The standard of review employed by the appellate division is derived from the statutory grant of jurisdiction to substitute "a different appropriate sentence."[32]

As it has evolved over the years, the system operates as follows. After the trial court has imposed a sentence of one year or more, the sentencing judge informs the defendant of his right to seek appellate review of the sentence. The judge routinely informs the defendant that, upon review, the sentence is subject to upward or downward adjustment.[33] The implementing court rule states that the notice of

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28. *Id.*

29. M.R. CRIM. P. 40(d)(3).

30. ME. REV. STAT. ANN. tit. 15, § 2142 (1980).

31. *See id.*; M.R. CRIM. P. 40(d)(2).

32. In State v. Carter, No. AD-76-824 (Me. App. Div. Jan. 2, 1979), the panel made the following observations concerning the standard of review:

> The Appellate Division is aware of the fact that 15 M.R.S.A. § 2142 does not articulate specific standards for the review of a particular sentence. A careful reading of the statute, however, suggests that the sentence may be altered by "ordering substituted therefor a different *appropriate* sentence." (emphasis supplied) Professor Glassman has stated, in distinguishing between appellate review of sentence and an appeal therefrom, that "the sole issue which the Appellate Division may consider is the *propriety* of the sentence imposed." (emphasis supplied) Glassman, Maine Practice, Rules of Criminal Procedure, Commentary 40.1. We have quoted the above comment by Professor Glassman with approval. *State v. Carver*, 330 A.2d 785, 786 (1975). We thus construe our commission as authorizing a survey of the circumstances faced by the trial judge at the time of sentencing. The "propriety" of the sentence may involve a consideration of whether the sentence imposed was, or was not, excessive. The nature of the offense, the background and character of the offender, and the necessity for protecting the public interest, with the many ramifications which flow therefrom, are factors, among others, that should be considered. *See* American Bar Association, *Minimum Standards Relating to Appellate Review of Sentences*, § 3.2(1).

Id. slip op. at 2-3.

33. The clerk of the court provides a written notice to the defendant that describes the process to be followed if the defendant desires to appeal from the sentence. *See* M.R. CRIM. P. 40(c); M.R. CRIM. P. FORM 11. If the defendant is represented by court-appointed counsel, it is expected that counsel will consult with the defendant and advise him with regard to the possibility of an appeal. Counsel is also expected to assist in the preparation of the notice of appeal. Such services are part of appointed counsel's trial responsibilities and are reflected on a voucher for services rendered during trial. In any case, a defendant is constitutionally entitled to counsel

appeal form, which the court clerk provides to the defendant, must include a statement of the defendant's acknowledgement of the possibility of an increased sentence.[34] Once the notice of appeal is filed, the clerk of the superior court transmits to the appellate division a transcript of the sentencing proceedings, the original pre-sentence report prepared by the Department of Probation and Parole, and a copy of the sentence and docket entries. If an appeal of the conviction is pending, or if there are other motions pending that might result in a change of sentence, the review of sentence is held in abeyance until the direct appeal has been decided or the other proceedings have been terminated.[35] After the appeal is in order, the three panel members separately review the case file. With or without a conference, the members vote either to deny the appeal or grant a hearing.[36] If the appellate division denies an appeal, an order of denial issues at that point without any further proceedings and without explanation.

In cases in which a hearing is granted,[37] the hearing ordinarily consists of oral argument, but may also include briefs and the presentation of statistical compilations with respect to certain types of sentences.[38] The defendant, the defendant's counsel, and the counsel

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in filing an appeal to the appellate division, since sentence review is a critical stage of a criminal proceeding. Stack v. State, 492 A.2d 599, 601-602 (Me. 1985). The notice of appeal must be filed within 30 days after the imposition of the sentence. M.R. CRIM. P. 40(c).

34. M.R. CRIM. P. 40(b). The notice of appeal form provides in pertinent part:

ACKNOWLEDGMENT OF POSSIBLE SENTENCE INCREASE OVER THAT IMPOSED AT TRIAL

I acknowledge that unless all of the sentences imposed upon me in this proceeding on _____ are maximum sentences, I take the risk in seeking review of one or more of such sentences that the Appellate Division, after giving me an opportunity to be heard, might increase any of the sentences, even those I have not asked to be reviewed.

Dated: _____ _____

Appellant

Witness: _____

M.R. CRIM. P. FORM 12.

35. M.R. CRIM. P. 40(d)(1).

36. If two justices vote in favor of a hearing, a hearing is granted. The appeal is dismissed when the appellate division "decides that the original sentence or sentences should stand." ME. REV. STAT. ANN. tit. 15, § 2142 (1980).

37. After granting a hearing, the appellate division appoints counsel if the defendant is indigent. *Cf.* Stack v. State, 492 A.2d 599, 601-602 (Me. 1985) (defendant has constitutional right to counsel in filing appeal to the appellate division for sentence review). Thereafter, the panel establishes a schedule for the presentation of oral argument and briefs, if any. The defendant, the defendant's attorney, and the state's attorney must be given notice of the time and place of the hearing at least ten days prior thereto. M.R. CRIM. P. 40(d)(2).

38. At present, statistical information concerning sentencing results is not generally available. The Office of the Attorney General maintains computerized records on all sentences imposed in homicide cases prosecuted by the attorney general. Occa-

for the state attend the hearing. After oral argument, the panel confers and renders a decision. If the appellate division makes no change in the sentence, its decision ordinarily issues in the form of a written order of denial. At least in recent years, the division writes a full opinion if the sentence is either increased or decreased.[39] Although the opinions receive wide circulation,[40] they are not compiled, indexed or published in the *Maine Reporter* or the *Atlantic Reporter* and therefore quickly become unavailable except by resort to the original case file.

III. An Assessment of the Work Product of the Appellate Division

Statistical reports over the last eleven years reveal that a very small percentage of defendants seek appellate review of their sentences. The number of appeals in any year has not exceeded eighty-four. Although precise calculation is not possible, that number undoubtedly constitutes significantly less than ten percent of the total number of cases in which defendants were sentenced to imprisonment for periods of one year or longer. Moreover, the two to four sentences that the appellate division changed on appeal in any year constitute less than five percent of the appeals filed and less than one-half of one percent of the total number of defendants eligible for appeal.[41]

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sionally, the prosecutor or the defense counsel will compile a statistical report by manually retrieving the information from the original files maintained in the clerk's office.

39. Written opinions of the panel are published in the same manner as advance opinions of the Law Court, but are not included in the *Maine Reporter* or the *Atlantic Reporter*.

40. Copies of the opinion are mailed to subscribing law offices, judges, and representatives of the media.

41. The available statistical reports provide the following information with respect to the operation of the appellate division:

Year	Number of Appeals Filed	Number of Dispositions	Hearings	Sentences Reduced	Sentences Increased
1976	57	55	0	1	0
1977	50	43	0	1	0
1978	55	59	2	3	0
1979	49	67	3	4	0
1980	51	30	2	3	0
1981	54	58	2	1	0
1982	53	65	2	2	0
1983	52	48	3	3	0
1984	61	56	0	0	0
1985	84	69	3	1	2
1986	59	87	0	0	0

These statistics alone, however, are an incomplete measure of the work of the appellate division. The impact of the appellate division is better evaluated with reference to what one commentator described as the three goals of the appellate division: correction of "cases of substantial disparity," correction of sentences resulting from "a failure to consider relevant factors or [from] a consideration of improper factors," and creation of guidelines "for the formulation of better sentences."[42] A review of all the opinions rendered by the appellate division since 1980 reveals that the first two goals of appellate review have been met to a modest degree. The appellate division has achieved success in the creation of sentencing guidelines, however, only with respect to punishment for the crime of murder.[43]

Appellate division review of sentences appears to safeguard adequately against the rare occurrence of substantial and unwarranted sentence disparity. In three instances, the appellate division has re-

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See STATE OF ME. JUD. DEP'T ANN. REP. (1986); STATE OF ME. JUD. DEP'T ANN. REP. (1985); STATE OF ME. JUD. DEP'T ANN. REP. (1984); STATE OF ME. JUD. DEP'T ANN. REP. (1983); STATE OF ME. JUD. DEP'T ANN. REP. (1982); STATE OF ME. JUD. DEP'T ANN. REP. (1981); STATE OF ME. JUD. DEP'T ANN. REP. (1980); STATE OF ME. JUD. DEP'T ANN. REP. (1979); STATE OF ME. JUD. DEP'T ANN. REP. (1978); STATE OF ME. JUD. DEP'T ANN. REP. (1977); STATE OF ME. JUD. DEP'T ANN. REP. (1976).

The total number of dispositions includes cases that are withdrawn, mooted, or dismissed for lack of jurisdiction. On average, 13 cases per year are disposed of on such grounds.

Unfortunately, there are no statistical compilations showing the number of defendants in any given year who were sentenced to imprisonment, suspended or unsuspended, for one year or more. A rough estimate can be obtained, however, by considering the number of defendants convicted in each of the last four years for a class A, B, or C offense.

Year	Defendants Convicted Class A	Defendants Convicted Class B	Defendants Convicted Class C	Total
1983	232	682	1,316	2,230
1984	185	626	1,267	2,078
1985	310	573	1,332	2,215
1986	313	612	1,506	2,431

See STATE OF ME. JUD. DEP'T ANN. REP. (1986); STATE OF ME. JUD. DEP'T ANN. REP. (1985); STATE OF ME. JUD. DEP'T ANN. REP. (1984); STATE OF ME. JUD. DEP'T ANN. REP. (1983).

A class C offense, the least serious class of offense among those listed, is punishable by a maximum of five years' imprisonment. ME. REV. STAT. ANN. tit. 17-A, § 1252(2) (1983). It is certain that the vast majority of the defendants represented on the chart received a sentence of at least one year of suspended imprisonment and thus were eligible for appellate review of sentence. *See* ME. REV. STAT. ANN. tit. 15, § 2141 (1980).

42. *See supra* note 23 and accompanying text.

43. Although the opinions of the appellate division do not reflect a complete body of law governing the factors involved in a sentencing decision, they do represent a foundation for further development.

duced life sentences to imprisonment for a term of years on the basis of disparity.[44] In four other cases, the panel reduced the term of incarceration by approximately fifty percent for the same reason.[45] A fair sampling of cases appealed to the appellate division shows that sentences involving gross disparity are identified and remedied.

In a number of cases, the appellate division has addressed a sentencing judge's consideration of improper factors or failure to consider proper factors. The panel has encouraged sentencing judges to explain, on the record at the time sentence is imposed, the rationale for a particular sentence. Such a statement assists the appellate division's review and limits the basis for dissatisfaction with the sentence. More importantly, it compels the sentencing judge "to think more carefully about the sentence he imposes and to formulate in his mind a justification for the sentence."[46] The appellate division also requires the sentencing judge to exercise his discretion on an informed basis. In this regard, the most common defect is the failure to obtain a pre-sentence report.[47] When the sentencing judge fails to order a pre-sentence report, the panel orders a post-sentence report to collect information that would have been contained in a report ordered prior to sentencing.[48] If the report reveals relevant information that does not appear in the sentencing transcript, the appellate division does not afford deference to the sentencing judge's decision. In one case, for example, the panel explained that "the presiding justice was not fully informed. Thus, this appellate tribunal is the first judicial tribunal with information sufficient for a proper exercise of discretion."[49]

The panel has also commented on the failure of the sentencing judges to consider the sentences of co-defendants. In one case, the

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44. *See* State v. Haberski, No. AD-85-54 (Me. App. Div. Feb. 6, 1987) (reduction of a life sentence to a term of 50 years); State v. Anderson, Nos. AD-78-37, AD-78-40 (Me. App. Div. June 30, 1980) (reduction of life sentences for two individual defendants to a term of 40 years for each defendant).

45. *See* State v. Hebert, No. AD-83-29 (Me. App. Div. May 29, 1985); State v. Merrill, No. AD-83-33 (Me. App. Div. Dec. 16, 1983); State v. Sanders, No. AD-82-43 (Me. App. Div. Oct. 18, 1983); State v. Morton, No. AD-82-8 (Me. App. Div. June 3, 1983).

46. State v. Anderson, Nos. AD-78-37, AD-78-40, slip op. at 6.

47. The division has relied on the absence of a pre-sentence report to support a sentence reduction in two cases. State v. Hebert, No. AD-83-29 (Me. App. Div. May 29, 1985); State v. Morton, No. AD-82-8 (Me. App. Div. June 3, 1983).

48. The Maine Rules of Criminal Procedure permit the sentencing court to direct the State Board of Probation and Parole to make a pre-sentence investigation and report. M.R. CRIM. P. 32(c). A pre-sentence report typically includes the following information: identifying data, official version of the offense, status of co-defendants, statement of the defendant, statement of the victim, prior criminal record, personal background, family history, marital history, military history, physical and mental health evaluation, educational history, employment history, current financial situation, living arrangements, summary, and recommendation of probation department.

49. State v. Morton, No. AD-82-8, slip op. at 2.

appellate division found that the appellant's sentence was unjustified when compared with a lesser sentence of a co-defendant, although the appellant's sentence was not disparate outside of that context. The panel compared the requirement of sentence equality with individualization and concluded: "It is our judgment that . . . convicted codefendants ought to receive equal sentences unless the record discloses a significant difference in their respective roles in the planning of and carrying out the commission of the crime or unless their personal histories and records disclose significant differences."[50]

The panel, moreover, evaluates a sentencing judge's consideration of inappropriate factors as well as his neglect of appropriate factors. In one case, the panel concluded that the sentencing judge erred in considering the possibility of an early release due to action by the executive branch of government. "The judiciary fulfills its responsibility when it applies the legislatively mandated criteria and imposes an appropriate sentence in accordance with those criteria. What the executive branch of government may or may not do thereafter should have no influence upon the sentencing Justice."[51]

Other cases demonstrate that the appellate division corrects inappropriate sentences that result from a failure to weigh properly various sentencing factors as opposed to error due to the consideration of an improper factor.[52] In *State v. Sanders*,[53] for example, the sentencing judge imposed a maximum sentence of five years on a first-time offender for the crime of unlawful sexual contact. The panel concluded that the judge did not attribute sufficient weight to the defendant's lack of a prior criminal record and thus reduced the term of imprisonment to two and one-half years.[54] The panel observed:

> Although a prior criminal record and previous correctional experience are not necessary prerequisites of the imposition of a maximum sentence, the absence of those factors argues strongly against the single minded focus upon general deterrence and protection as justification for such a sentence. Exclusive reliance upon those two

50. State v. Coyne, No. AD-80-23, slip op. at 5 (Me. App. Div. Sept. 27, 1982). The same principle also applies where one or more of the appellant's co-defendants entered into a plea agreement. "We do not imply that the first sentence of a co-defendant binds any subsequent sentencing court to that sentence. Prior sentences of a co-defendant, however, must be considered in arriving at an appropriate sentence." State v. Morton, No. AD-82-8, slip op. at 3.

51. State v. Anderson, Nos. AD-78-37, AD-78-40, slip op. at 7 (Me. App. Div. June 30, 1980).

52. The distinction between a failure to weigh properly a sentencing factor and consideration of an improper factor is somewhat artificial; consideration of an improper factor could be characterized as a failure to consider an appropriate factor and vice versa.

53. No. AD-82-43 (Me. App. Div. Oct. 18, 1983).

54. *Id.* slip op. at 2-4.

> general purposes of sentencing will always lead inexorably to the maximum sentence and would negate the other purposes identified by the Legislature.[55]

In *State v. Merrill*,[56] the sentencing judge imposed a maximum sentence on a first-time offender for the crime of vehicular manslaughter. The judge justified his sentence on the basis that he was "fed up with this carnage on the highway," the impact upon the victim, and general deterrence concerns.[57] The panel found "an abuse of discretion in the sentencing justice's reliance on general deterrence and victim impact to the exclusion . . . of other applicable purposes of sentencing . . . ."[58]

Turning to the third goal, the creation of guidelines for the formulation of better sentences, only one case involves the pronouncement of such guidelines. In *State v. Anderson*,[59] the panel reviewed the imposition of life sentences for murder on two defendants and reduced both sentences to a term of 40 years. After reviewing the development of the law relating to homicide sentences, the panel set forth the following guidelines for life sentences:

> Under our present Criminal Code, the 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

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55. *Id.* slip op. at 3.

56. No. AD-83-33 (Me. App. Div. Dec. 16, 1983).

57. The judge stated: " 'But I for one, Mr. Merrill am fed up with this carnage on the highway and because of what happened in this particular case and the seriousness I hope this serves as an example to others.' " *Id.* slip op. at 3.

58. *Id.* The panel stated: "In the imposition of a sentence, a judge's personal indignation about a particular type of criminal conduct cannot justify the avoidance of considering the purposes of sentencing in section 1151, a consideration of which requires the assessment of the aggravating and mitigating circumstances presented in the particular case." *Id.*

In both *Sanders* and *Merrill*, the sentencing judges imposed the maximum sentence on first-time offenders in the absence of a factual demonstration that the defendants were incorrigible or unlikely to respond to a lesser term of punishment. Two later cases that might appear to contradict *Sanders* and *Merrill* involve an increase in sentence. In State v. Dingle, No. AD-85-13 (Me. App. Div. Dec. 13, 1985), and State v. Merchant, No. AD-85-16 (Me. App. Div. Dec. 13, 1985), the panel increased the unsuspended sentences of one and one-half and three years respectively to the maximum of five years for the first offense of unlawful sexual contacts. Although there are a number of points of distinction, the critical consideration in each case was the psychological evaluation included in the pre-sentence report. The psychological experts suggested that the sexual abuse was only part of a larger pattern of antisocial and exploitative behavior. Moreover, the evaluations indicated that the prospects for treatment were poor and that the likelihood of repeated offenses was great. State v. Dingle, No. AD-85-13, slip op. at 3; State v. Merchant, No. AD-85-16, slip op. at 3. Under these circumstances, the panel increased the sentence because the interest of public safety could not be protected by lesser sentences. State v. Dingle, No. AD-85-13, slip op. at 5; State v. Merchant, No. AD-85-16, slip op. at 4-5.

59. Nos. AD-78-37, AD-78-40 (Me. App. Div. June 30, 1980).

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.
2. Multiple deaths, including situations in which the offender in committing the murder knowingly created a substantial risk of death of several individuals.
3. Murder committed by a person who has previously been convicted 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.[60]

In 1987, nearly seven years after the adoption of the *Anderson* guidelines, the panel was presented with an opportunity to review the operation of those guidelines and to consider their continuing validity.[61] In reviewing a life sentence, the panel noted that thirteen out of seventy-nine defendants convicted of murder since 1976 had been given a life sentence.[62] The panel found that "the facts of those cases demonstrate substantial conformity with the *Anderson* guidelines."[63] Thus, appellate review of sentences has identified a workable guideline in this one area. At the present rate of production, however, such a system cannot promise to achieve the desired degree of uniformity in criminal sentencing unless the system is

60. *Id.* slip op. at 7-8.
61. *See* State v. Haberski, No. AD-85-54 (Me. App. Div. Feb. 6, 1987).
62. *Id.* slip op. at 3-4.
63. *Id.* slip op. at 4.

modified.

There are several reasons why the achievements of more than twenty years of sentence review are so meager. The first problem, which is unique in modern court history, is the small number of cases brought before the appellate division. Sixty to eighty cases per year do not provide sufficient opportunity for the development of useful sentencing principles. The possibility of an increased sentence undoubtedly reduces the number of appeals. This disincentive is enhanced by the sentencing justices' practice of informing defendants of the possibility of an increased sentence and is reinforced by the inclusion of the same warning in the notice of appeal form.[64]

A second major defect in the existing system is the non-dissemination of sentencing law that is created. There is no easily available record of the appellate division decisions rendered during its first fifteen years of experience. Entries in the docket of the appellate division reflect that the panel reduced a total of twenty-five sentences in the years between 1965 and 1980. Full written opinions were not issued in those cases,[65] but in any event there are no accessible records. One could resort to an examination of the original files, but that endeavor requires a knowledge of the defendants' identities. Any legal development that may have occurred is lost. The opinions written since 1979 are more readily accessible merely because the files have not been placed in storage. For all practical purposes, however, the known existence and identity of a particular opinion depends upon oral communication. With the exception of *State v. Anderson*, one rarely hears reference to a decision of the appellate division in a sentencing proceeding. Copies of the opinions are not readily accessible even to sentencing judges. The opinions have not been treated as appellate opinions to the extent that they are not indexed, collected, or published in a useful form.

Finally, the composition and operation of the appellate division is not conducive to the lawmaking function of the panel. Since 1980, eight different justices have served on the three-member panel. During that same time period, the panel has had four chairmen. Given this high turnover rate and the average of less than two hearings per year,[66] no single member has the opportunity to accumulate any significant experience in the formulation and application of sentencing principles. Such a lack of institutional continuity precludes, or at least slows, the development of useful legal precedent.

IV. The English System as a Model

Appellate review of criminal sentences, as it currently exists in

64. *See supra* notes 33-34 and accompanying text.

65. There was one exception in 1979, when the appellate division issued a full written opinion in State v. Carter, No. AD-76-824 (Me. App. Div. Jan. 2, 1979).

66. *See supra* note 41.

Maine, has had a very limited effect in guiding the exercise of discretion by the sentencing judge. Expanded appellate review of sentences represents a promising alternative procedure for constructing, by the methods of the common law, an effective set of sentencing guidelines. The history of the common law is filled with many examples of beneficial legal development achieved through the accretive, case-by-case decisional process. The flexibility afforded by the common law method is ideally suited for addressing systematically the infinite variety of sentencing decisions in criminal cases. Moreover, the English experience in appellate review of sentences serves as a model for determining whether such a procedure produces coherent sentencing guidelines. Although a complete description of the English system is beyond the scope of this Article, a brief review of the English experience demonstrates that appellate review effects a system of judicially evolved sentencing guidelines for trial judges.[67]

Since 1907, convicted defendants in England have had the opportunity to "appeal against sentence," either in connection with an appeal of the conviction or separately as the sole ground of appeal.[68] The Criminal Division of the Court of Appeal, the appellate tribunal for general criminal appeals, has jurisdiction to review sentences[69] imposed by the highest level of the English trial courts, the Crown Court. The appellate court is granted wide discretion and "if they consider that the appellant should be sentenced differently," they may quash the sentence and substitute "such sentence . . . or order as they think appropriate for the case."[70] Significantly, the grant of authority is limited by the requirement that the appellant must not

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67. For a description of the English procedure for appellate review of sentences, see APPELLATE REVIEW STANDARDS, *supra* note 9, app. C; D.A. THOMAS, PRINCIPLES OF SENTENCING 365-401 (2d ed. 1979) [hereinafter D.A. THOMAS, PRINCIPLES]; Meador, *English Appellate Judges from an American Perspective*, 66 GEO. L.J. 1349 (1978); Thomas, *Appellate Review of Sentences and the Development of Sentencing Policy: The English Experience*, 20 ALA. L. REV. 193 (1968) [hereinafter Thomas, *Appellate Review*]; Eveleigh, Court of Appeal, Criminal Division: Summary of Procedures (1984) (unpublished manuscript).

68. The opportunity to appeal against sentence was originally granted in the Criminal Appeal Act, 1907, 7 Edw. 7, ch. 23, § 3, and is currently found in the Criminal Appeal Act, 1968, ch. 19, §§ 9-11. Sentence review in England includes the right to appeal to the Crown Court from a sentence imposed by a Magistrate's Court, as well as the right to appeal to the Court of Appeal from a sentence imposed by the Crown Court. *See* APPELLATE REVIEW STANDARDS, *supra* note 9, app. C, at 113; D.A. THOMAS, PRINCIPLES, *supra* note 67, at 3 & n.3, 4, 392. For comparative purposes, this Article considers only the latter aspect of English sentence procedure.

69. Appellate review is not confined to sentences of imprisonment. The term sentence is defined by the Criminal Appeal Act, 1968, ch. 19, § 50(1) to include "any order made by a court when dealing with an offender," and thus includes, inter alia, imprisonment, fines, restitution orders, and disqualifications from driving or holding a driver's license. *See* D.A. THOMAS, PRINCIPLES, *supra* note 67, at 392.

70. Criminal Appeal Act, 1968, ch. 19, § 11(3).

be "more severely dealt with on appeal than he was dealt with by the court below."[71] In 1985, the most recent year for which figures are available, 6,274 defendants, or seven percent of the total number of defendants receiving a sentence, applied for leave to appeal against sentence or against both conviction and sentence. The Court of Appeal heard 1,812 sentence appeals and changed the sentence in 1,153 cases. Slightly more than one percent of the total number of sentences were changed as a result of appellate review.[72]

Consideration of the process of sentence review conducted by the English Court of Appeal must rest on an understanding of the basic form and function of that court and the identification of its American counterpart. The Court of Appeal is the principal appellate court of England.[73] The court is organized into a civil division and a criminal division and consists of not more than twenty-three ordinary full-time judges. In addition, the court has two presiding justices; the Master of the Rolls is the head of the civil division and the Lord Chief Justice of England is the head of the criminal division. In contrast to the strict separation that exists between the trial and appellate courts in most American jurisdictions, the English trial court has significant involvement with the Criminal Division of the Court of Appeal. The Lord Justices of Appeal are generally promoted from the trial court and the Lord Chief Justice acts as a trial judge and presides over the Queen's Bench Division of the High Court of Justice, the highest level of trial court in the country.[74] Finally and most importantly, cases submitted to the criminal division are heard by three-member panels usually consisting of one Court of Appeal judge and two judges of the High Court of Justice.[75] The extensive involvement of trial judges in the work of the Court of Appeal undoubtedly has beneficial effect on both the quantity and quality of the court's work product.

In comparing the Court of Appeal with American courts, it is necessary to note two additional aspects in which the English sentencing system differs from the American sentencing process. First, prosecuting counsel in England play a very limited role in the sentencing process. On the trial level, the prosecutor may provide the court with details about the offense if they were not provided at trial and

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71. *Id.*

72. GOV'T STATISTICAL SERV., CRIMINAL STATISTICS, ENGLAND AND WALES Table 6.7 at 113 (1985); *id.* Table S4.14a at 100 (Supp. 4, 1985).

73. Except for the House of Lords, which entertains a very limited number of appeals, the Court of Appeal is the court of last resort and the only strictly appellate court in the country. Functionally, it resembles an American state supreme court in a state in which there is no intermediate appellate court, both in the volume of its cases and in the nature of its jurisdiction. Meador, *supra* note 67, at 1354.

74. For a description of the English trial court system, see R.M. JACKSON, THE MACHINERY OF JUSTICE IN ENGLAND (7th ed. 1977).

75. Eveleigh, *supra* note 67, at 4.

may present a police officer who testifies about the defendant's previous convictions, family circumstances, education and employment background. The prosecution, however, never makes any argument or recommendation for a particular sentence.[76] On the appellate level, the prosecution neither appears nor files a brief when an appeal from sentence is being heard. The second major difference flows naturally from the limited role of the prosecutor. Plea bargaining does not exist in England, since the prosecutor makes no sentencing recommendation.[77] By declining to permit sentence bargaining, the English system avoids one of the significant causes of sentence disparity in the United States. In England, more so than in the United States, each sentence is solely the result of an exercise of judicial discretion.

Although an appeal against conviction on a question of law is a matter of right in the English appellate process, an appeal on a question of fact and an appeal against sentence depend on the granting of an application for leave to appeal.[78] With respect to sentence appeals, the defendant files the application with the registrar of the court within twenty-eight days after sentence is imposed.[79] The official form is readily available and is usually completed by the prisoner himself. The completed form includes a narrative statement of the reasons for seeking an appeal, factual details concerning the conviction, and a request for legal aid if appropriate. After the application is filed, the Registrar's Office prepares the record on appeal. Such a record normally consists of a statement of charges, the defendant's prior criminal record, probation reports, and a transcript of the sentencing proceedings.[80] While applications for leave to appeal against conviction generally go before a panel of three judges, the ordinary complement for hearing appeals, applications for leave to appeal against sentence do so only in three instances: one, if they are joined with an appeal against conviction; two, if the defendant has privately retained counsel; and three, if there is some unusual need for expedition.[81] Otherwise, a single judge initially rules on an application for leave to appeal against sentence.[82] The vast majority of applications are processed through the single judge procedure.[83] A judge of the Queen's Bench Divisional Court, a posi-

76. APPELLATE REVIEW STANDARDS, *supra* note 9, app. C, at 107-108.

77. *See* Thomas, *Appellate Review*, *supra* note 67, at 200.

78. Criminal Appeal Act, 1968, ch. 19, §§ 1, 11.

79. *Id.* § 18.

80. APPELLATE REVIEW STANDARDS, *supra* note 9, app. C, at 116-17.

81. *Id.* at 118.

82. *See* Criminal Appeals Act, 1968, ch. 19, § 31(2)(a) (single judge has power to grant leave to appeal); APPELLATE REVIEW STANDARDS, *supra* note 9, app. C, at 118.

83. For example, in 1985, single judges screened 5,130 out of a total of 5,742 applications for leave to appeal against sentence only. *See* GOV'T STATISTICAL SERV., CRIMINAL STATISTICS, ENGLAND AND WALES Table S4.14a at 100 (Supp. 4, 1985); Letter from

tion roughly comparable to an American trial judge in a court of general jurisdiction, considers the papers privately at his leisure[84] and either grants or denies the application without explanation.[85] Obviously, it is not possible to describe the standard that individual judges employ in considering applications, but one English judge described the standard as "something more than a remote prospect that the Court of Appeal will grant the appeal."[86]

In the event of a denial, the prisoner is informed that he may renew the application before a three-member panel of the court if he does so within five days.[87] In effect, the prisoner is afforded an appeal as a matter of right from the single judge's denial, but frivolous applications are discouraged by the practice known as "docking time." The statute authorizing the practice provides that either the single judge or the court may direct that all or part of the time spent in custody pending determination of the application shall not be counted toward the sentence.[88] The leave procedure, involving both single judges and the full court, effectively screens out seventy-two percent of the applications submitted.[89] The remainder receive leave to appeal either from a single judge or from a three-member panel. Once leave has been granted, the appeal is set for hearing.

The actual sentence appeal is heard on the same record upon which either the three-member panel or the single justice granted leave to appeal.[90] Defense counsel files no written brief, but the court has the benefit of "a summary" or bench memorandum prepared by the Office of the Registrar.[91] The defendant and his coun-

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J.R. Read, Chief Clerk, Criminal Appeal Office to D.E. Wathen (Nov. 4, 1987) (concerning number of applications considered by single judges for the year 1985).

84. The single judge receives the application and record while he is on circuit in the country. The rationale for this procedure has been described as follows: "Somehow it seems to be thought that a judge sitting in the Judge's Lodgings in the country after a day in Court is more in need of something to do to fill in his leisure hours than is a judge when sitting in London." Eveleigh, *supra* note 67, at 7.

85. APPELLATE REVIEW STANDARDS, *supra* note 9, app. C, at 119. If the application is granted, the judge will also grant any request for legal aid and set the matter for hearing before the court. Eveleigh, *supra* note 67, at 7.

86. Lectures by Hon. Sir (Frederick) Maurice Drake, Judge of the High Court of Justice, Queen's Bench Division, University of Virginia School of Law Graduate Program for Judges (July 1986).

87. Criminal Appeal Act, 1968, ch. 19, § 31(3); APPELLATE REVIEW STANDARDS, *supra* note 9, app. C, at 119 & n.8.

88. Criminal Appeal Act, 1968, ch. 19, § 29(1). In practice, defendants may be docked seven days by the single judge for a frivolous application, and the full court may dock the defendant from 14 to 28 days.

89. In 1985, for example, three-member panels and single judges granted 1,809 out of a total of 6,265 applications for leave to appeal against sentence or against both sentence and conviction. *See* GOV'T STATISTICAL SERV., CRIMINAL STATISTICS, ENGLAND AND WALES Table S4.14a at 100 (Supp. 4, 1985).

90. APPELLATE REVIEW STANDARDS, *supra* note 9, app. C, at 123.

91. Criminal Appeal Act, 1968, ch. 19, § 21(1)(b).

sel are present when the appeal is heard.[92] Hearing usually consists of a brief oral presentation by defense counsel and questions from the court.[93] At the conclusion of the hearing and after the three judges confer at the bench, one of the judges delivers the judgment. This oral opinion includes a recitation of the relevant facts of the case and the decision of the court concerning the sentence under review.[94] The court either affirms the sentence and dismisses the appeal or quashes the original sentence and passes in its place an appropriate sentence.[95] Although no written opinions are delivered, a " 'short-hand writer' " is present in court, and some of the judgments or summaries of those judgments are later published by commercial reporting services.[96]

Until recent years, inadequacies of the English reporting system presented the principal impediment to the development of a comprehensive body of precedent on the matter of sentencing. Despite a number of reporting services, coverage was incomplete and indexing was nonexistent. The American reader must remember that although English law has always been guided by precedent, the doctrine of stare decisis was not adopted in England until the nineteenth century and remains somewhat flexible in practice.[97] The recitation of prior decisions is not as central to the appellate function in England as it is in an American jurisdiction. Furthermore, the smaller and more homogenous English bench and bar rely heavily on orally communicated principles of law. David Thomas, a lecturer in Criminology at the University of Cambridge, offered a solution to the inadequacies of the reporting system when he published a book entitled *Principles of Sentencing* in 1970.[98] Now in a second edition, his treatise is the authoritative source to which one refers for a detailed analysis of the practices of the Court of Appeal and for guidance concerning the sentencing principles that the court employs. Thomas indexes and analyzes a great number of opinions, both reported and unreported, and identifies the principles discernible from the aggregative actions of the court.

The Court of Appeal has adopted a broad view of its function as an appellate tribunal. Accordingly, the policy resulting from the exercise of that broad function is of equal breadth.[99] The English ap-

92. *Id.* § 22; APPELLATE REVIEW STANDARDS, *supra* note 9, app. C, at 123.

93. The length of the argument may vary from three to fifteen minutes, but is rarely longer even though there is no absolute time limit. APPELLATE REVIEW STANDARDS, *supra* note 9, app. C, at 123.

94. *Id.* at 124. Although not every opinion is published, the opinion of the court is typed and placed in the file of each case.

95. Criminal Appeal Act, 1968, ch. 19, § 3.

96. APPELLATE REVIEW STANDARDS, *supra* note 9, app. C, at 124-25.

97. *See* R.M. JACKSON, *supra* note 74, at 10-17.

98. D.A. THOMAS, PRINCIPLES, *supra* note 67.

99. Thomas describes the relationship between function and policy in the follow-

pellate court does not confine itself to adjusting merely the length of sentences of imprisonment, but undertakes to change sentences of imprisonment to sentences of probation or to change a sentence from one rehabilitative measure to another.[100] Apart from the breadth of its function, the sentencing guidelines developed by the Court of Appeal are difficult to identify, in part because the English sentencing policy does not result from dramatic pronouncements in landmark cases.[101] Thus, no single opinion or group of opinions can be studied as the source of a particular policy, and careful analysis of single opinions is largely unproductive. As a result, one can discern English sentencing law only by examining the court's action with regard to a number of similar cases over a substantial period of time. The system is fueled by a high volume of cases, and the ripple set off as each case is decided may not be very meaningful. The pattern and rhythm of many ripples, however, constitutes a significant source of guidance.

For purposes of analysis, sentences in England may be grouped into two categories: "tariff sentences," punitive sentences that reflect the gravity of the offense and the offender's culpability; and "individualized measures," sentences that are based on the individualized needs of the offender.[102] Placement in one category or the other usually determines whether an offender will actually serve

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ing terms:

> It seems clear that the extent to which a reviewing tribunal can develop policies, and the kind of policies it can develop, are directly linked to the view it takes of the limits of its right to intervene, for it is only by intervention that it will evolve these policies. A court which will intervene only where there is abuse of discretion by the trial judge automatically limits its potential contribution to the widest generalities, and probably to the context of procedure. A court which goes further and intervenes where a sentence is excessive or disproportionate although within statutory limits may well develop tariff norms and principles, but will not have sufficient scope to deal with the fundamental issues of penal philosophy which are the basic problems of sentencing in a modern system. In order to reach such questions, the reviewing tribunal must be prepared to discard the narrow approach typically taken by appeal courts (and taken by the English Court when reviewing convictions) in favour of a broader view, and in particular to think in terms of varying the nature of sentences as well as reducing their length.

Thomas, *Appellate Review*, *supra* note 67, at 220.

100. *Id.* at 218.

101. *Id.* at 197-98; D.A. THOMAS, PRINCIPLES, *supra* note 67, at 5.

102. D.A. THOMAS, PRINCIPLES, *supra* note 67, at 8. Punitive sentences generally look backwards in time and seek to punish the offender for his past transgression. Note that there is some prospective nature to punitive sentences, however, in that they have a specific and general deterrent effect. Individualized measures, in contrast, look forward in time and attempt to influence the defendant's future conduct "by subjecting him to an appropriate measure of supervision, treatment or preventive confinement." *Id.*

time in jail.[103] In the United States, the decision "jail or no jail" is one of the most difficult issues for any sentencing judge, and the results usually resist rational and principled explanation. While to a certain extent this is also true in England, at least the appellate court recognizes that this initial choice must be made. If a sentencing court imposes imprisonment, the appellate court first reviews that choice before proceeding to a review of the actual sentence. The court recognizes that each type of sentence is designed to accomplish a different goal, such as deterrence or rehabilitation, and no meaningful review of a sentence can be undertaken without first addressing the propriety of the type of sentence chosen.

Thomas suggests that the nature of the offense generally determines whether a tariff sentence will be imposed. A variety of serious crimes require imprisonment in spite of the needs of the offender.[104] In addition, a special relationship between the offender and the victim or the prevalence of a particular kind of offense might necessitate the imposition of a tariff sentence.[105] On the other side of the coin, individualized measures may be appropriate in a great variety of cases, but they are thought to be particularly appropriate when dealing with four kinds of offenders: "young offenders (predominantly those under 21), offenders in need of psychiatric treatment, recidivists who appear to have reached a critical point in their life and persistent recidivists who are in danger of becoming completely institutionalized as a result of repeated sentences of imprisonment."[106] Although individualized treatment is not automatic with regard to these four types of offenders, the court will apply an individualized measure if there is some indication that it may prove successful. With respect to these types of individuals, the appellate

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103. "Usually" does not mean always. It is not entirely accurate to equate an individualized measure with probation or a suspended sentence. For example, a life sentence is considered an individualized measure under certain circumstances. *Id.* at 10. Although the same sentence may simultaneously serve the backward-looking and the forward-looking purposes of the penal sanction in some instances, this frequently is not possible. Thomas explains:

> Achievement of the broader objectives of a punitive sentence may require the sentencer to adopt an approach which is not likely to assist the offender towards conformity with the law in the future, and indeed may positively damage such prospects of future conformity as exist already, while a measure designed to assist the offender to regulate his behaviour in the future may appear to diminish the gravity of the offense and weaken the deterrent effect of the law on potential offenders.

Id. at 8. The sentencing judge when confronted with such a conflict must choose between imposition of a tariff sentence and imposition of an individualized measure. *Id.*

104. Such crimes include "rape, robbery, wounding with intent to do grievous bodily harm, dealing with controlled drugs, perjury, arson . . . , and blackmail." *Id.* at 15.

105. *Id.* at 15-16.

106. *Id.* at 17.

court will uphold a tariff sentence "only after a careful consideration of the claims of the offender to be treated in terms of his needs as an individual."[107] As these examples illustrate, there is nothing radical about the principles that are worked out through the process of appellate review. They represent the common sense conclusions that would occur to most individual judges who have sufficient experience in sentencing.

The incorporation of sentencing principles into appellate opinions, however, offers significant advantages. First, these principles represent the cumulative pool of sentencing wisdom and are derived from the common experience of judges. Second, a reasoned opinion forces the appellate judges to articulate the basis for their action and thereby compels meaningful and constructive criticism. Most importantly, the appellate process provides a means for achieving greater uniformity in the application of sentencing principles than otherwise would be possible. There will always be individual judges who disagree with commonly accepted sentencing principles. In the absence of appellate review, such individuals impose disparate sentences that give rise to claims of unfairness in sentencing. Appellate review removes this cause of disparity by establishing commonly accepted principles as effectively enforceable law. In short, the English principles concerning "jail or no jail" would be unremarkable but for the fact that they are declared and enforced by appellate review.

The principles developed to determine the length of a tariff sentence are somewhat more elaborate than the principles used to determine whether the imposition of a tariff sentence is appropriate. Thomas identifies the primary task of the Court of Appeal as "defining the range within the scale" of sentences.[108] Similar to the situation in Maine,[109] statutes that establish offenses do nothing more than fix maximum sentences.[110] The statutory maxima, however, are usually of limited value, since they either are antiquated or provide a broad scope of judicial discretion.[111] Faced with nothing more than a statutorily defined offense and a maximum penalty, the Court of Appeal determines the length of the tariff by constructing a scale of punishments within the offense for recurring patterns of behavior. Thomas describes the process as follows:

> Innovation in crime, although by no means unknown, is relatively rare. The overwhelming majority of offences which come before criminal courts arise from factual situations which conform to a recurring pattern and which can be categorized by reference to par-

107. D.A. THOMAS, PRINCIPLES, *supra* note 67, at 25.
108. *Id.* at 29.
109. *See supra* text accompanying notes 10-12.
110. *See generally* D.A. THOMAS, PRINCIPLES, *supra* note 67, at 30-33.
111. *Id.* at 30-31.

> ticular elements. This recurring pattern of common factual situations provides a basis for a corresponding pattern of sentences, which can be adjusted to accord with the detailed variations of particular cases. The conventional relationships between frequently encountered factual situations and corresponding levels of sentence constitute the foundations of the tariff.
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> . . . [T]he tariff for any offence may be seen to consist of two parallel scales—one, a scale of factual situations which are typically encountered within the legal definition of the offence, and the other, a scale of ranges (or brackets) of sentences within which the sentence for a case within the corresponding category of situations will normally be expected to fall, excluding consideration of mitigating factors personal to the offender.[112]

The construction of a scale of typical factual situations results naturally from the sentencing process. A rather rudimentary example is provided in the case of *Regina v. Mohammed*,[113] in which the Court of Appeal considered a sentence of five years' imprisonment for living on the earnings of prostitution. The court remarked:

> [T]he range of facts covered by this offence is very wide indeed. At one end of the scale are the cases where men get hold of young adolescent girls and by threats and ill treatment put them on the street as prostitutes. When that kind of case comes before the courts heavy sentences are called for. Another kind of case nearly as bad . . . is where the offender attracts some prostitute to his so-called protection and . . . uses force and ill treatment to keep her under his sway. At the other end of the scale are the cases where the prostitute for her own convenience encourages some man to act as her protector.[114]

Thomas provides a more complete example of a scale of factual situations, together with the corresponding range of sentences, for the offense of procuring an abortion. According to Thomas, the Court of Appeal maintains the view that this offense ordinarily calls for a tariff sentence and that the extent to which the defendant makes a business of providing illegal abortions determines the length of imprisonment. The range of sentences for the "real professionals," those who make a business practice of the criminal conduct, lies between five and eight years' imprisonment. "[T]he offender who occasionally performs abortions for payment but does not make it a regular business" faces a sentence of imprisonment for a term between two and three years. The final category of offenders, "the casual abortionists who commit the offence on an isolated occasion" for

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112. *Id.* at 29-30, 34 (footnote omitted).

113. Regina v. Mohammed, 60 Crim. App. 141 (1974), *discussed in* D.A. THOMAS, PRINCIPLES, *supra* note 67, at 34.

114. Regina v. Mohammed, 60 Crim. App. at 142, *quoted in* D.A. THOMAS, PRINCIPLES, *supra* note 67, at 34.

other than financial reasons, may receive a sentence of imprisonment for approximately twelve months.[115]

The statutory formulations of criminal offenses in England differ from the statutory schemes generally employed in the United States even when both are designed to prohibit similar conduct. Accordingly, English law contains few offenses that adequately serve as a basis for illustrating how scales of punishment might function in the American context. Some English offenses, however, bear some similarity to offenses in Maine and other state jurisdictions. The English crimes of causing grievous bodily injury with intent, rape, and robbery resemble their American counterparts to the degree that they aptly demonstrate scales of ranges (or brackets) of sentences constructed by appellate review.

English law sets forth the offense of wounding or causing grievous bodily injury with intent.[116] The elements of the crime include specific intent to inflict serious bodily injury. The crime thus bears some resemblance to aggravated assault, as that crime is defined in many state jurisdictions.[117] Thomas states that the scale of sentences runs from three to twelve years' imprisonment,[118] with the great majority of cases falling between three to five years.[119] Thomas describes three distinct brackets as follows:

> Within the bracket of three to five years' imprisonment, the sentence will vary according to such factors as the nature of the weapon used, the degree of the injury intended, the actual injury inflicted and the degree of provocation, if any. Evidence of any significant degree of deliberation, such as the acquisition or possession of a dangerous weapon, may justify a sentence at the upper extreme of the bracket.
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> The next range of sentences, from five up to eight years' imprisonment, is reserved for cases exhibiting a combination of aggravating features. Cases for which sentences in this bracket are upheld usually involve the premeditated infliction of grave injury, the use of a lethal weapon and the absence of any real provocation or other mitigation.
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> Sentences above the level of eight years' imprisonment are upheld in relatively few cases, usually where grave injuries are deliberately inflicted in the course of some otherwise criminal purpose, such as robbery or blackmail.[120]

Thomas cites to and discusses a number of cases that distinguish

115. D.A. THOMAS, PRINCIPLES, *supra* note 67, at 85-86.
116. Offences against the Person Act, 1861, 24 & 25 Vict., ch. 100, § 18.
117. *Compare id. with, e.g.*, ME. REV. STAT. ANN. tit. 17-A, § 208 (1983).
118. D.A. THOMAS, PRINCIPLES, *supra* note 67, at 93.
119. *Id.* at 94.
120. *Id.* at 95-98.

the typical fact situations falling within each of the three brackets.[121]

For the offense of rape, which is basically identical to its American counterpart,[122] the sentence scale runs from two years to twelve years.[123] Brackets within the scale rest on "the degree of violence used or threatened in the course of committing the act, the infliction of other forms of sexual abuse, the involvement of more than one defendant and the forcible abduction of the victim or the invasion of the victim's house."[124] The scale for robbery, another comparable offense,[125] is more elaborate. The scale of factual situations that are generally encountered within the legal definition of the offense includes four categories: large-scale organized robbery, robbery in the home, robbery of small business premises, and street muggings. The correlative bracket of sentences for large-scale organized robbery entails imprisonment for a period of approximately fifteen years. Robbery in the home involves a sentence bracket of five to ten years, and the term imposed within this range depends on the degree of violence used against the occupants. The bracket for the robbery of stores and other small businesses extends from three to seven years, depending on the degree of organization and violence involved in the commission of the crime. The last category calls for a bracket of sentences in the range of two to four years, unless the offense is accompanied by unusual violence.[126]

The guidelines provided by the English process for determining the length of a tariff sentence, like the principles used to evaluate whether the imposition of a tariff is appropriate, reflect the common sense practices of individual sentencing judges. Sentencing judges who exercise their discretion in a system where such guidelines are absent necessarily construct their own scales of sentences and create brackets within those scales for particular offenses. The English process is unremarkable, except that it is institutionalized and regularized. The results of the process, therefore, are largely uniform. In this country, unarticulated scales of punishment produce disparate

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121. *Id.* at 94-99. In England, there is a lesser offense, maliciously inflicting grievous bodily harm, which does not require that a specific intent be established. Offences against the Person Act, 1861, 24 & 25 Vict., ch. 100, § 20. This offense also falls within the definition of aggravated assault. *See, e.g.*, ME. REV. STAT. ANN. tit. 17-A, § 208 (1983). The scale of sentences for this lesser offense has similar brackets, but does not extend beyond three years. *See* D.A. THOMAS, PRINCIPLES, *supra* note 67, at 99-102.

122. *Compare* Sexual Offenses (Amendment) Act, 1976, ch. 82, § 1 *with, e.g.*, ME. REV. STAT. ANN. tit. 17-A, § 252 (Supp. 1987-1988).

123. D.A. THOMAS, PRINCIPLES, *supra* note 67, at 113.

124. *Id.*

125. *Compare* Theft Act, 1968, ch. 60, § 8 *with, e.g.*, ME. REV. STAT. ANN. tit. 17-A, § 651 (1983).

126. D.A. THOMAS, PRINCIPLES, *supra* note 67, at 138-46.

sentences, because the scales are created and applied by individual judges. The English system demonstrates, however, that the process of appellate review, which applies the collective experience of individual judges to fashion uniform scales of sentencing, can effectively eliminate sentencing disparity.

The Court of Appeal determines whether imposition of a tariff is appropriate for a particular crime and develops both a scale of factual situations and a corresponding scale of ranges (or brackets) of sentences for that offense.[127] Assuming that the imposition of a tariff is proper, the sentencing judge must find where the case under consideration falls on the scale of factual situations. Once the sentencer makes this determination, he is not free to impose a sentence that exceeds the correlative bracket of sentences for that factual situation. With a few minor exceptions, the scale of sentences "fixes the ceiling" for the offense.[128] 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 offence concerned."[129] 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. Thomas describes this process in the following terms:

> [A]llowance for mitigation is not considered to be an entitlement of the offender. The sentencer may withhold a reduction which might normally be expected if some recognized penal objective, such as general deterrence or the preventive confinement of a dangerous offender, requires the imposition of the whole of the permissible sentence. Apart from this, the value of a particular factor varies considerably from one category of offence to another; a factor which has a critical impact on the sentence in one kind of case will often have no more than a marginal effect in another. Additionally, mitigating factors seldom occur singly, and the weight of a combination of mitigating factors will usually be greater than the sum of their individual values considered separately, as the presence of one factor will enhance the significance of another. For these reasons it is not possible to construct a 'negative tariff' of mitigating factors showing that a particular factor will normally justify a reduction of a specified proportion of the notional level of sentence fixed by reference to the facts of the offence. It is possible, however, to examine the more common mitigating factors and to iden-

127. *See supra* text accompanying notes 104-112.
128. D.A. THOMAS, PRINCIPLES, *supra* note 67, at 35-46.
129. *Id.* at 35.

> tify the circumstances under which they are most likely to be effective.[130]

Thomas examines in detail several mitigating factors that he categorizes under four broad headings: "the age and history of the offender,"[131] "the circumstances leading to the commission of the offence,"[132] "the indirect effect of the conviction or sentence,"[133] and "the behaviour of the offender since the commission of the offence."[134]

The foregoing survey of the English system of sentence review, while hardly complete, demonstrates the potential of the process of appellate review for developing a flexible, comprehensive, and coherent body of law that structures and governs the exercise of discretion by sentencing judges. The success of the English sentencing scheme in fostering uniformity in sentencing practices is attributable largely to three characteristics of the process. These features include the broad scope of review of the Court of Appeal, the relatively high volume of appeals against sentence, and the ease with which the sentencing principles are applied.

The Court of Appeal has taken a broad view of its appellate function.[135] Sentencing unfairness involves the kind of sentence imposed[136] as well as disparity in the length of a prison term.[137] In many respects, a mistake with regard to the nature of the sentence is more detrimental to both the defendant and society than a mistake with regard to the length of the sentence. Accordingly, appellate review is not confined to the disparate length of sentences, but rather is available for each sentencing choice made by the presiding judge. Despite the breadth of the court's function, however, the basis for intervention is limited to the correction of mistakes in principle and does not extend to disagreement with the judgment of the sentencing judge.[138]

> In the first place, this Court does not alter a sentence which is the subject of an appeal merely because the members of the Court

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130. *Id.* at 194.

131. *Id.* at 195-205.

132. *Id.* at 206-11.

133. *Id.* at 211-16.

134. *Id.* at 216-22.

135. *See supra* text accompanying notes 99-100.

136. The sentencing judge must initially decide whether a particular offense calls for a tariff or an individualized measure. *See supra* notes 102-103 and accompanying text.

137. *See supra* text accompanying notes 108-112.

138. Thomas explains that when a defendant appeals against a sentence on the grounds that it is disproportionate to the offense, "the Court has consistently adopted the view that the relevant criterion is . . . whether the sentence falls within the appropriate 'range' or 'bracket' of sentences." D.A. THOMAS, PRINCIPLES, *supra* note 67, at 397.

> might have passed a different sentence. The trial Judge has seen the prisoner and heard his history and any witnesses to character he may have chosen to call. It is only when a sentence appears to err in principle that the Court will alter it. If a sentence is excessive or inadequate to such an extent as to satisfy this Court that when it was passed there was a failure to apply the right principles, then this Court will intervene.[139]

Moreover, the court regards its own guidelines and principles with a fair degree of flexibility and does not require precision in application. For example, when faced with minor variations in the length of sentences, the court has declined to "tinker" with the sentences.[140] The precise parameters of the concept of "tinkering" remain vague, but Thomas suggests that "it is unusual for the Court to reduce a sentence on the ground of simple disproportionality by less than one-fifth."[141]

The English experience clearly shows that the process of developing sentencing guidelines depends upon a relatively high volume of cases.[142] Courts do not and should not create a penal philosophy spontaneously. The product of appellate review must be carefully crafted, grounded in experience, and involve a wide range of considerations. The resulting principles, moreover, must reflect the common experience of the sentencing judges if they are to be faithfully applied. This is insured by the involvement of the English trial judges in the process of appellate review.[143] It is reported that the trial judges in England readily accept the sentencing guidelines enunciated by the Court of Appeal and that there is little resentment, if any, of appellate intervention.[144] This degree of acceptance results from trial judges' participation in the screening of applications for leave to appeal and from their participation on the panels in cases that receive a full hearing.[145] In England, the experience of the trial court is brought to bear directly on the formulation of the guidelines.

Although the English system is relatively complex, application of the principles that underlie the scheme remains quite simple. For example, there are three stages in the process of calculating the length of a tariff sentence. Thomas lists the stages:

> [1] defining a scale of sentences in relation to the most typical instances within the general category of the offence concerned, [2] fixing by reference to that scale the level of sentence which would

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139. Regina v. Ball, 35 Crim. App. 164, 165 (1951), *quoted in* APPELLATE REVIEW STANDARDS, *supra* note 9, app. C, at 125.

140. *See* D.A. THOMAS, PRINCIPLES, *supra* note 67, at 397.

141. *Id.*

142. *See supra* text accompanying note 72.

143. *See supra* text accompanying notes 73-75.

144. *See* APPELLATE REVIEW STANDARDS, *supra* note 9, app. C, at 130.

145. *See supra* text accompanying notes 78-89.

> be appropriate to the facts of the particular offence committed by the offender and [3] making such allowance for mitigating factors as may be just by reducing the sentence below that level.[146]

The simplicity of the scheme lies in the fact that it merely reflects and formalizes the individualized practices employed by individual judges. The sentencing principles are not imposed upon the judicial process, but rather are the natural product of the operation of that process.

V. Proposed Changes in Sentence Review in Maine

A review of criminal sentencing in Maine reveals the rather stark fact that, with few exceptions, there is no law of sentencing. The discretion of the sentencing justice is virtually unrestrained when it is exercised within the statutory range of sentences. Although the appellate division curtails gross disparity in sentencing, there is need for a more effective and pervasive means of structuring sentencing discretion. The pace of the development of sentencing law through appellate review is glacial. A comparative review of the legal landscape in England demonstrates, however, that an ordinary process of appellate review can produce a rational and flexible sentencing policy.[147] Appellate review can serve as the source of sentencing law as well as the means of enforcing that law.

In the 1960's, the American Bar Association (ABA) formulated standards for criminal justice and relied heavily on a study of the English system in drafting standards for appellate review of criminal sentences.[148] The ABA recommendations and the English experience are authoritative models for a successful process of appellate review. Both sources suggest that relatively simple changes are required in the Maine system in order to permit appellate review to serve as an effective means of articulating and implementing a rational sentencing policy. A basic requirement is that both appeals against sentences and appeals against convictions must be subject to the same appellate process. In England, the Court of Appeal treats sentencing errors no differently than any other form of error committed by the trial court.[149] The ABA proposes that sentence review should be available whenever review of the conviction is available[150] and

146. D.A. Thomas, Principles, *supra* note 67, at 194.

147. The initial sentencing process in England is examined, *supra* text accompanying notes 128-34, to illustrate fully the English approach to appellate review of sentences. The Author offers no opinion as to whether Maine should adopt the English approach to sentencing.

148. *See* Appellate Review Standards, *supra* note 9. In August 1978, the American Bar Association approved the second edition of the standards. *See* Standards for Criminal Justice Standards 20-1.1 to -3.3 (2d ed. 1980 & Supp. 1982).

149. *Compare* Criminal Appeal Act, 1968, ch. 19, §§ 1-3 (appeals against conviction) *with id.* §§ 9-11 (appeals against sentence).

150. Standards for Criminal Justice, *supra* note 148, Standard 20-1.1(a).

that "[e]ach court . . . empowered to review the conviction should also be empowered to review [the sentence]."[151] Thus, the task in Maine is to modify the ordinary process of appellate review to include appeals against sentences. Practical considerations may compel certain procedural distinctions between claims of sentencing error and other forms of error, but such distinctions should be allowed only to the extent necessary to expedite the fair consideration of appeals.

A number of the deficiencies in the current Maine practice are rectified simply by transferring the function of sentence review to the Supreme Judicial Court. The separate and specialized status of the appellate division has hindered the lawmaking efforts of that tribunal. If the Law Court assumed the function of sentence review, any problem attributable to discontinuity in membership would disappear. Sentencing decisions that result from the full collegial process of review would be published in the same manner as other Law Court opinions and thus would be readily recognized as binding precedent. Publication would dispense with the problem of preserving precedent in a useful and accessible form. Moreover, a unified system of review would avoid the duplication of effort and time that occurs when a defendant appeals against both conviction and sentence. The Supreme Judicial Court, therefore, could increase its overall capacity to entertain claims of sentencing error. An increased volume of appeals is necessary for the development of a comprehensive law of sentencing, and review processes must be designed to take full advantage of available capacity.

If sentence review becomes a part of the appellate function of the Supreme Judicial Court, would it be necessary to limit, either directly or indirectly, the potential number of appeals that could be presented to the court? The Legislature already has directly limited the number of appeals against sentences by making review available only to defendants sentenced to imprisonment for one year or longer.[152] Furthermore, the Legislature has indirectly limited the use of appellate review by granting to the appellate division the authority to increase the length of a sentence.[153] The possibility of an increased sentence, which is emphasized at sentencing proceedings and on notice of appeal forms, undoubtedly contributes to defendants' reluctance to file an appeal.[154] The extent of the panel's authority to increase sentences evinces a legislative intent to discourage frivolous appeals.[155] There is no doubt that the risk of an

151. *Id.* Standard 20-2.1.

152. ME. REV. STAT. ANN. tit. 15, § 2141 (1980).

153. *Id.* § 2142.

154. *See supra* text accompanying notes 33-34.

155. There is no room to argue that the authority to increase sentences is designed to equalize lenient sentences because the prosecution is not given the right

increased sentence reduces the number of frivolous appeals, but the chance of a stiffer sanction deters meritorious appeals as well. The continued use of such a blunt procedural device is both unnecessary and unwise. Under any set of circumstances, the court is not likely to be overwhelmed by a flood of appeals,[156] and there are less draconian means of screening out frivolous appeals.

The ABA supports the principle that every sentence should be subject to appellate review, but recognizes that "reasonable controls should be applied to the length and kind of sentence subject to review" during the initial stage of appellate review.[157] Such controls are necessary in Maine at least until actual experience dispels the concern that the quantity of appeals may exceed the court's capacity for review. It is possible to limit directly the number of potential appeals by maintaining the requirement of a minimum sentence of imprisonment for a period of one year or more. Further, a screening procedure applied to all sentence appeals would eliminate non-meritorious claims. These two methods of regulating the length and kind of sentences subject to review will separate frivolous sentencing appeals from meritorious appeals in a manner that does not discourage defendants from filing meritorious appeals. Appropriate procedures ensure that any increase in the volume of appeals to the Supreme Judicial Court will not exceed a manageable level, and the value of the improvements achieved in the sentencing process will more than offset the cost of incremental burdens on the court.

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to appeal a sentence. Only the defendant can appeal and presumably he would refrain from filing an appeal if he received a truly lenient sentence.

156. It is not possible to estimate precisely the number of appeals against sentence that might be filed in the Supreme Judicial Court if the court had no authority to increase sentences. Once again, however, the English experience is a useful analogy. English courts possessed the authority to increase sentences on appeal until 1965. *See* Thomas, *Appellate Review*, *supra* note 67, at 223 & n.97. Prior to that time, approximately 10% of all possible applicants applied for leave to appeal against sentence. Immediately after 1965, the number of applicants nearly doubled. *Id.* at 223. Assuming that the current number of applicants for sentence appeal in Maine would double as a result of the absence of any possibility of an increased sentence — an assumption based on the English experience — fewer than 150 appeals would be filed. *See supra* note 41. Accordingly, a conservative estimate is that the total number of appeals prior to any screening effort would be less than 250. If the English experience holds true, approximately 30% of the appeals would survive screening and thus about 75 cases would receive an appellate hearing. *See supra* note 89.

The actual increase in the number of appeals, however, would be substantially less than 75. Nearly 50% of the sentence appeals presently brought before the appellate division involve a prior appeal against conviction. Under a unified procedure, granting leave to appeal against sentence in such a case would not generate an additional appeal. Furthermore, a sentence appeal process that effectively redresses sentence disparity might decrease the number of appeals against conviction since sentence dissatisfaction accounts for a number of appeals against conviction. *See* STANDARDS FOR CRIMINAL JUSTICE, *supra* note 148, introduction at 20.5.

157. *Id.* Standard 20-1.1(c).

The fact that appeals against sentence are discretionary in nature whereas appeals against conviction are a matter of right complicates the attempt to devise a single procedure for both kinds of appeal. Some defendants will appeal against both conviction and sentence, while other defendants will seek only sentence review. An appeal only against conviction entails no screening process. When the defendant appeals against both conviction and sentence, however, the Law Court should hear the sentence appeal only after a determination that it involves a claim of merit. Defendants might otherwise appeal against both sentence and conviction, rather than against only sentence, in order to avoid the screening process. There should be no improper incentive to choose one kind of appeal over the other, and therefore an identical screening mechanism must be employed in each case.

Screening an appeal that is based only on a claim of sentence error presents no practical difficulty. Following the practice employed in connection with other discretionary appeals, the entire court or panels of the court could render the decision to accept or reject the appeal once the sentencing record was filed. Counsel would commence briefing the appeal only after leave was granted. When a sentence appeal is coupled with an appeal against conviction, however, time becomes a more critical factor. The screening decision must be made quickly enough to give counsel sufficient time to address the sentencing issues in his brief if leave to appeal is granted. An expedited screening mechanism cannot include the entire membership of the Supreme Judicial Court, because members of the court have chambers in widely dispersed locations and convene only to hear oral arguments. Granting the authority to render final screening decisions to the single justices would create the most expeditious screening process. A fairer and more acceptable proposal, however, is to use a three-member panel that is similar to the existing appellate division. A vote to grant leave to appeal by any one of the three justices would require that the full court hear the appeal. Such a panel would be small enough to act without disrupting the briefing schedule for appeals against conviction, but would afford a fair opportunity to defendants seeking review. Moreover, the use of a three-member panel would permit justices who have the most sentencing experience to make the screening decisions.[158]

Finally, the most crucial feature of the English system, which is also the most difficult feature to replicate, is the acceptance of a broad view of the function of the appellate court. The Law Court's ability to articulate and implement a rational sentencing policy and

158. Although it is not possible to duplicate the extensive involvement that English trial judges have in the appellate process, *see supra* text accompanying notes 74-75 & 84-86, the use of former trial justices in the screening of appeals against sentences should serve to provide a less invasive form of appellate review.

to provide structure for the exercise of sentencing discretion is contingent upon the court's preparedness to abandon a restrictive standard of review. In order to ensure the proportionality of sentences and the eradication of unwarranted disparity, the court must actively involve itself in the sentencing process and be prepared to change the type of sentence as well as to reduce the length of sentence. The broad function of the Court of Appeal has been achieved, in typical English fashion, without the benefit of any explicit direction in the Criminal Appeal Act.[159] In England, however, any appeal is considered to be a new hearing and not simply a review for legal error.[160] Thus, the broad function of the appellate court is the norm rather than the exception. There is no such tradition in Maine, and it may be necessary to state the purposes of sentence review in broad terms in order to widen the scope of the Law Court's function. Incorporating the statement of the purpose of review, the scope of review, and the powers of the reviewing court suggested by the ABA,[161] the following statute is proposed:

> **Appeal to the Law Court for Review of Certain Criminal Sentences.**
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> § 1. In cases arising in the District Court or the Superior Court in which a defendant has been convicted of a criminal offense and sentenced to imprisonment for one year or more, the defendant may, except in any case in which a different sentence could not have been imposed, apply to the Law Court for review of the sentence.
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> § 2. There shall be a Sentence Review Panel of the Supreme Judicial Court to consider applications for leave to appeal from sentence, and no appeal of the sentence may proceed before the Law Court unless leave to appeal is first granted by the panel. The Sentence Review Panel shall consist of 3 justices of the Supreme Judicial Court to be designated from time to time by the Chief Justice of the Supreme Judicial Court. Leave to appeal shall be granted if any one of the three panelists votes in favor of granting leave. If leave to appeal is denied, the decision of the panel shall be final and subject to no further review.
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> § 3. The time for filing an application for leave to appeal and the manner of taking an appeal shall be as the Supreme Judicial Court shall by rule provide.[162]

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159. *See* Criminal Appeal Act, 1968, ch. 19.

160. Meador, *supra* note 67, at 1364.

161. STANDARDS FOR CRIMINAL JUSTICE, *supra* note 148, Standards 20-1.2, 20-3.2 to -3.3.

162. The exact procedure for sentence appeal should await the promulgation of a court rule. It is possible to demonstrate, however, that a feasible procedure can be designed to accommodate the review of sentence appeals. If a defendant appeals only from his sentence, his trial counsel prepares a notice of appeal and files it with the Supreme Judicial Court. The Clerk of the Superior Court automatically files the record pertaining to sentence. The record includes a copy of the (1) docket sheet, (2)

§ 4. The purposes of sentence review by the Law Court are: (a) to correct the 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; (b) to promote respect for law by correcting abuses of the sentencing power and by increasing the fairness of the sentencing process; (c) to facilitate the possible rehabilitation of an offender by reducing manifest and unwarranted inequalities among the sentences of comparable offenders; and (d) to promote the development and application of criteria for sentencing which are both rational and just.[163]

§ 5. In reviewing criminal sentences, the Law Court is authorized to consider: (a) 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; and (b) the manner in which the sentence was imposed, including the sufficiency and accuracy of the information on which it was based.[164]

§ 6. On appeal from sentence the Law Court is authorized to: (a)

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indictment, (3) judgment and commitment, (4) report of pre-sentence investigation, (5) transcript of sentencing proceedings, and (6) any other relevant material received by the sentencing court. Once the record is filed, the case is forwarded to the three-member screening panel for its consideration. If leave to appeal is denied, an order is entered to that effect, and no further action may be taken. If leave to appeal is granted, an order is entered to that effect, and counsel is appointed for the appeal if necessary. The usual time periods for the filing of briefs and perfecting the appeal commence on the date leave is granted, and the appeal is scheduled for argument at the next available term of court. In many cases, sentence appeals could be heard on briefs alone. Sentence appeals could be scheduled in larger numbers than ordinary appeals, and less time would be required for argument in each case. After hearing, the Law Court would decide the case and set forth the basis for its decision in a reasoned opinion.

If a defendant appeals both his conviction and his sentence, the procedure tracks the rules for an appeal of conviction with an additional step for screening. Trial counsel prepares a notice of appeal that refers to both sentence and conviction. If the defendant is indigent, the Superior Court appoints counsel on appeal and orders the preparation of the record at state expense. The record pertaining to the appeal against conviction is prepared in accordance with existing rules, but the Clerk of the Superior Court automatically includes a separate record of the sentencing as described above. Once the sentencing record is filed, it is forwarded to the three-member screening panel. In this instance, the screening panel is required to act and inform counsel of its action not later than 10 days after the complete record on appeal has been docketed. Counsel addresses the sentencing issues in his brief only if leave is granted. If leave to appeal is refused, an order denying leave disposes of the appeal from sentence. When the sentencing record and the complete record are filed closely in time, the time requirements for the leave procedure may place a burden on both the screening panel and defense counsel. Sentencing issues, however, are usually simple and straightforward. The time constraints, therefore, should not unduly hinder the evaluation of a request for leave to appeal against sentence or the preparation of the portion of a brief that concerns sentence. Following oral argument, a single written opinion would dispose of the entire case. Although a number of procedural details require more attention, there appears to be no major barrier to the inclusion of sentence appeals within the appellate jurisdiction of the Supreme Judicial Court.

163. STANDARDS FOR CRIMINAL JUSTICE, *supra* note 148, Standard 20-1.2.

164. *Id.* Standard 20-3.2.

> affirm the sentence under review; (b) 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 from; or (c) remand the case to the court imposing 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.[165]

The concerns for sentencing fairness that led to the creation of the appellate division are resolved more effectively by committing the full force of the judiciary to the task. The inclusion of sentencing errors in the ordinary appeal process will enhance the means of correcting sentences involving substantial disparity or improper analysis. More important, however, is the enhanced ability to create rational and flexible scales of punishment in the form of enforceable sentencing guidelines. The Maine Legislature has an opportunity to correct a significant aberration in legal history by conferring the task of reviewing criminal sentences upon the Law Court. It is hard to imagine why the proportionality in sentencing guaranteed by the Constitution of the State of Maine should be secured by anything less than the full extent of the power of the judiciary. Proportionality should not be permitted to remain a forgotten promise.

165. *Id.* Standard 20-3.3.