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J. Michael Morgan

University of Wyoming
College of Law

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Sentence disparity has for some time been the object of considerable comment and discussion. The author reviews the philosophy and suggests that disparity in sentences may have counter-productive consequences. Mr. Morgan examines the Wyoming criminal justice system for evidence of disparity and propounds and discusses a variety of remedial alternatives.

DISPARITY AND THE SENTENCING PROCESS IN WYOMING DISTRICT COURTS: RECOMMENDATIONS FOR CHANGE

*J. Michael Morgan**

> Courts, in the sentencing of convicted persons, must be something other than mechanical instruments of punishment. The symbolic blindfold on the statue of Justice was never intended to obscure from the sight of the judge an understanding of the human being who stands before him awaiting judgment. The quality of sentencing must concern us no less than the quality of the entire judicial process which precedes it.[1]

SENTENCING, and in particular the problem of sentence disparity, has recently become a focal point of discussions concerning the judicial process. Critical comments concerning sentencing disparity have come from virtually every segment of the criminal justice system, and the society in which it functions.[2] Judges themselves have come to the fore in

*Assistant Administrator, Governor's Planning Committee on Criminal Administration, State of Wyoming; B.S., J.D., University of Wyoming. Member of the Wyoming Bar.

1. Levin, *Toward a More Enlightened Sentencing Procedure*, 45 NEB. L. REV. 499, 509 (1966).
2. President Ford, in his message to the Congress of the United States on June 19, 1975, decried federal sentencing laws and procedures which allowed "widely varying sentences" for defendants who have committed similar offenses. He stated that this lack of uniformity "is profoundly unfair and

criticizing sentencing as a "dubious process", which has resulted in "law without order or limit."[3]

The sentencing issue is aggravated by the marked contrast between the panoply of rights in which the defendant is robed for the guilt determination process and the nakedness with which he must stand to face his sentencing.[4] No trial would be had without the advantages of tight procedural and evidentiary rules, and the availability of appellate review designed to detect the most minute error. Yet, sentencing is conducted with little semblance of either. The irony of this contrast is intensified when it is considered that the majority of criminal convictions are obtained by guilty pleas which bypass the process of guilt determination entirely. In some jurisdictions, 86 percent of convictions are obtained by plea of guilty[5] while in Wyoming the figure approaches a substantial 75 percent.[6] For these defendants, the severity of the punishment to be imposed is the only issue. Yet sole responsibility for sentence determination is delegated to a single judge.[7] This results in the greatest degree of uncontrolled

breeds disrespect for the law." PRESIDENT'S MESSAGE, COMBATING CRIME IN THE UNITED STATES, H.R. DOC. NO. 191, 94th Cong., 1st Sess. (1975).

3. Frankel, quoted in Korbakes, *Criminal Sentencing: Is the "Judge's Sound Discretion" Subject to Review?* 59 JUDICATURE 112 (1975).

4. Note, *Due Process and Legislative Standards in Sentencing*, 101 U. PA. L. REV. 257, 263 (1952).

5. Eighty-six percent of those convicted in federal district courts in 1971 pleaded guilty initially or changed their plea to guilty. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL OFFENDERS IN THE UNITED STATES COURTS—1971, 6 (1973).

6. GOVERNOR'S PLANNING COMMITTEE ON CRIMINAL ADMINISTRATION, CRIMINAL JUSTICE SYSTEM DATA BOOK, vol. II, WYOMING COMPREHENSIVE LAW ENFORCEMENT PLAN—1972 AND 1973. The regular yearly survey of district courts conducted by the Governor's Planning Committee on Criminal Administration revealed that for the year 1972, 72 percent of those convicted of a felony pleaded guilty. The 1973 figure was 64 percent. However, a special District Court Offense and Disposition Survey for 1973 indicated that 88 percent pleaded guilty. The difference in figures may be a result of a failure in the regular 1973 survey to take into consideration defendants who originally pleaded not guilty but who changed their plea to guilty before trial.

7. In addressing those jurisdictions in which the vast majority of criminal convictions are obtained by guilty pleas, the ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES 1-2 (Approved Draft 1967), comments:

> It is not an overstatement to say of these jurisdictions that in no other area of our law does one man exercise such unrestricted power. No other country in the free world permits this condition to exist.

See also the remarks of Judge Sobeloff in *Appellate Review of Sentences, A Symposium at the Judicial Conference of the United States Court of Appeals for the Second Circuit*, 32 F.R.D. 249, 265 (1962).

power over the lives and liberty of men that can be found in our legal system.[8]

This article will examine disparity in sentencing and its consequences. Wyoming's sentencing laws and practices will be reviewed to determine if, and to what extent, disparity is a problem. Alternative remedies will be proposed.[9]

The focus will be on the courts, although it should be understood that whether a person comes before the sentencing judge at all depends upon what may have been discretionary decisions made by arresting officers,[10] the prosecuting attorney,[11] and the grand and petit juries. It should also be recognized that discretion as to the ultimate length of incarceration is also vested in the Board of Probation and Parole[12] and the executive.[13]

OBJECTIVES OF SENTENCING

The imposition of sentences is an important mechanism through which society attempts to achieve its objectives. The difficulty lies in the fact that there is little agreement as to what those objectives are, or the best way to attain them.

8. Kadish, *Legal Norm and Discretion in the Police and Sentencing Process*, 75 HARV. L. REV. 904 (1962).
9. An interesting area which will not be directly discussed is disparity in sentencing brought about or influenced by the manner in which convictions are obtained. FEDERAL OFFENDERS, *supra* note 5, at 55, reports average sentence weights by the manner in which convictions were obtained. *See* note 30, *infra*, for a discussion of how average sentence weights are obtained.

AVERAGE SENTENCE WEIGHT				
Plea of Guilty at Arraignment	Plea of Not Guilty Changed to Guilty	Convicted By: Court	Jury	Average Total
4.7	6.6	6.3	13.5	6.1

Although these figures are not controlled for factors which may meaningfully affect them, the variance holds true for all classes of offense. They raise a serious question as to the effect which the manner of conviction has upon sentences and the weight which penitence has upon the sentencing process. *See* note 21, *infra*, for discussion of the penitence theory in sentencing.
10. NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT ON POLICE 22-23 (1973). Referring to law enforcement officers as "among the most important decision makers in society," the report calls for well defined limits for officer discretion.
11. As to juveniles, *see* WYO. STAT. § 14-115.12 (Supp. 1975). Although there is no explicit statutory language authorizing discretion for prosecutors in nonjuvenile cases, it is widely recognized that it is exercised. NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT ON COURTS 24 (1973).
12. WYO. STAT. § 7-325 (Supp. 1975).
13. WYO. CONST. art. 4, § 5.

The perspective and background which each individual actor in the process brings to bear adds emotional elements which may color his judgment regarding what is to be sought. The victim may want revenge, the offender's wife leniency, the prosecuting attorney punishment, and the law enforcement officer a stern example to others.[14]

The generally perceived goal of the sentencing process is the protection of society. The objectives which may be used in achieving that goal are many, and their relative importance has been, and is, and no doubt will continue to be, debated. Although there is a rational basis for seeking each, the objectives also appear to correspond roughly to the various emotions which the actors have brought to the sentencing process. These objectives are generally perceived to be:

1. Deterrence to the offender (special deterrence).
2. Deterrence to others (general deterrence).
3. Incapacitation.
4. Rehabilitation.
5. Punishment.

The concept of sentencing as a special deterrent is based upon the assumption that the imposition of a penalty upon the offender before the court will cause him to refrain from committing future crimes through fear of additional punishment. If this objective has indeed been sought in the sentencing process, recidivism rates would suggest that its basic assumption is at best only partially valid.

General deterrence is the attempt to impose a sentence in the case at hand which is of such a nature that potential offenders in the general public will refrain from committing crimes through fear of punishment and social condemnation.[15] Recent studies tend to confirm the effectiveness of general deterrence and cast doubt upon the common assertion that the crime rate is unrelated to the reactions of the criminal

14. Coburn, *Disparity in Sentences and Appellate Review of Sentencing*, 25 RUTGERS L. REV. 207, 208 (1971).
15. Andenaes, *General Prevention Revisited: Research and Policy Implications*, 66 J. CRIM. L. & C. 338, 341 (1975).

justice system.[16] As a measure of the deterrent effect of certainty of punishment, these studies compared crime rates with the ratio of the number of persons imprisoned for a specific offense over the number of offenses reported to law enforcement authorities.[17] Also compared was the median number of months being served for particular offenses with the number of those offenses reported to law enforcement agencies, to indicate the deterrent effect of sentence severity.

While the results indicated that imprisonment itself acts as a deterrent to crime, the difference in the length of imprisonment at the levels of use in those state courts did not seem to have a significant impact.[18] These results indicate that sentencing to accomplish general deterrence is valid only as to the decision to incarcerate.

It would appear that incapacitation is the most easily obtained objective. It represents an attempt to protect society for a period of time by removing the offender from the community. Complete attainment of this goal through this objective can be accomplished only by the imposition of extremely long periods of incarceration. The average offender who is returned to the community after a relatively short period of confinement may pose a greater risk to society than he who has never been incarcerated. This possibility represents a severe limitation on the number and type of sentences which should be imposed with incapacitation in mind.

While the offender is in custody, the state should make every effort to change his attitudes and improve his skills and capabilities so that he may cope with life in a free society without committing criminal acts. Although few will dis-

16. Few criminals believe that they will be caught. Without this belief, the nature or severity of the potential punishment cannot be a factor in the criminal's thinking at the time of the commission of the offense. In only a few cases is the criminal even aware before the offense of the nature, scope or severity of possible punishment. The rare exception to these principles is the criminal who seeks punishment for himself or his family. Seagraves, *Is Punishment an Adequate Deterrent to Crime?* 55 JUDICATURE 236, 237 (1972).

17. Gibbs, *Crime, Punishment and Deterrence*, 48 SOC. SCI. Q. 515 (1968); Logan, *General Deterrent Effects of Imprisonment*, 51 SOCIAL FORCES 64 (1974).

18. Andenaes, *supra* note 15, at 347.

agree with this stated rehabilitation concept, fewer still will agree that correctional systems have succeeded in their attempts to rehabilitate.[19] Although sentencing for rehabilitative purposes does achieve success for a certain number of defendants, it should not be expected that it can be, or is, accomplished in the majority of cases.

Every sentence is a restraint upon the offender and thus represents punishment to some degree. Sentences imposed to effect punishment[20] as an objective attempt to place a just sanction on the offender, in the sense of being in proportion to the severity of the crime and his culpability, regardless of whether such a penalty is likely to prevent further crime in the offender or others. This may tend to affect the offender by psychologically cleansing him through the feeling that penitence has been done.[21] Sentencing as punishment may also satisfy, at least partially, the retributive impulses of the community against the offender. In this way, the criminal justice system may replace lynch mobs and tar and feather parties and seeks to satisfy the psychological needs which prompted them to flourish before the criminal justice system came to be relied upon.[22] Although retribution may be inconsistent with the current rehabilitation model, it may, as a practical matter, fulfill these basic human needs of the community and the offender.

The application of these objectives has been affected by trends. Traditional sentencing theory applied these objec-

19. It has been hypothesized that there is little difference in recidivism based on differences in corrections methods imposed. In other words, of the offenders who do not repeat their offenses after a given type of sentence, most would have reacted similarly to most other types of sentences as well. However, this is not really surprising since rehabilitative treatment in penal institutions generally consists of little more than variations in the conditions of custody and since probation rarely involves more than cursory supervision. Morris & Hawkins, *Rehabilitation: Rhetoric and Reality*, 34 FED. PROBATION, 9-11 (Dec. 1970).
20. It would appear that the Wyoming Constitution prohibits the imposition of a criminal sentence for purposes of retribution. "*Penal Code to be Humane.*—The penal code shall be framed on the humane principles of reformation and prevention." WYO. CONST. art. 1, § 15.
21. Penitence may be considered as a separate objective of sentencing, or as a concommitant of retribution. The idea came to prominence in the 19th Century and never attained great popularity except in the United States. The philosophy behind penitence is that incarceration gives the criminal an opportunity to reflect on and contemplate the enormity of his crime. This leads to spiritual regeneratiin and hence rehabilitation. WILLIAMS, THE LAW OF SENTENCING AND CORRECTION 57 (1974).
22. *Id.* at 24.

tives by focusing on the crime rather than the offender. The objectives of incapacitation and punishment were applied by judges who were satisfied with reacting to past deviant behavior. Penalties were fixed and mechanically applied to fit the crime. Modern theory represents a moral commitment to the worth of the individual[23] by attempting to fit the sentence to the offender as well as to the crime. Rehabilitation and deterrence are sought in an attempt to control the future behavior of both the offender and others.

This rehabilitative treatment-oriented ideology is, and has been, the predominant theory in corrections for the better part of this century.[24] The fact that it is currently in vogue does not suggest that it has been legally imposed or is uniformly applied. State legislatures have generally failed to mandate which objective or objectives should be applied for various classes of offenses. This may be due to the fact that while criminologists have embraced the treatment-oriented ideology, society itself is still deeply divided and unable to reach a consensus.

With the legislatures standing silent, it is tacitly left to the courts to determine the applicable objectives. But the courts are not a monolithic body. The sentencing power is exercised through individual judges who often are as deeply divided on the issue as is society. These individual jurists are condemned to select objectives without the benefit of legislative or judicial policy, and the objective selected should, and does, influence the sanction imposed.[25]

23. Kadish, *supra* note 8.
24. Andenaes, *supra* note 15, at 339.
25. HOGARTH, SENTENCING AS A HUMAN PROCESS 71 (1971). In a study conducted by the author, 71 full time magistrates in the Province of Ontario were interviewed. Sixty-five out of the 71 believed their role to be the prevention of crime through sentencing. As the chart below indicates, they differed widely in the way they attempted to achieve their purpose.

IMPORTANCE GIVEN BY MAGISTRATES TO THE CLASSICAL PURPOSES IN SENTENCING

	Very Importance	Quite Importance	Some Importance	Little Importance	No Importance
Reformation	39	7	16	6	—
General deterrence	26	4	10	27	1
Individual deterrence	16	8	11	22	3
Incapacitation	9	8	21	28	2
Punishment	7	3	8	36	14

Without established policies, the objectives chosen may become personal to the judge. There is no requirement that controlling sentencing objectives be enunciated,[26] and the judge's goals in patterning a sentence are committed only to personal memory.[27] In such a system, objectives themselves may take a diminished role. Sentences may tend to be fashioned by individual judicial characteristics rather than established policy,[28] and disparity finds a fertile plot in which to exist.

DISPARITY AND ITS CONSEQUENCES

Disparity exists. There is no need to qualify that statement, and few will disagree with it. Instances of unjustified disparity are common and have been repeatedly demonstrated.[29] The federal courts serve as outstanding examples due to the volume of detailed statistical information which is collected annually by the Administrative Office of the United States Courts. The Office has developed a system of average and comparative sentence weights which accurately reflect variance in sentencing in the different United States judicial districts.[30]

See also ORLAND & TYLER, JUSTICE IN SENTENCING (1974). The authors discuss a study comparing rehabilitatively oriented juvenile court judges with those who were punitively oriented. It was found that the rehabilitatively oriented judges almost always imposed longer periods of incarceration than did their punitively oriented brethren.

26. United States v. Velazquez, 482 F.2d 139 (2nd Cir. 1973).

27. Although the Board of Parole must take into consideration the judge's comments and recommendations, the judge is in no way required to make them. The Rules and Regulations, Board of Parole, State of Wyoming, ch. 5, § 3 (1974), states that the Board in determining whether to grant parole must take into consideration "the purposes of the sentence." However, it appears that the Board must make an independent judgment as to what that purpose is. With reference to the purpose of the sentence, "the Board shall recognize that sentence is *usually imposed for one or more* of the following purposes: rehabilitation, punishment, example to others and to remove from society." (emphasis added).

28. Note, *Appellate Review of Primary Sentencing Decisions: A Connecticut Case Study*, 69 YALE L. J. 1453, 1458 (1960).

29. Harries & Lura, *The Geography of Justice: Sentencing Variations in U.S. Districts*, 57 JUDICATURE 392 (1974).

30. *Id.* at 393. In this system, developed in 1964, sentence weights range from zero for suspended sentences and probation without supervision to 50 for prison sentences over 120 months. The comparative sentence weight is a mathematical expectancy based on the national average weight value obtained for each of nine offense classes as applied to the number of defendants in the individual offense classes for the individual district.

Under this weighting system, the average comparative sentence weight was 6.1 for all United States district courts in 1971. This fluctuated in individual judicial districts from highs of 12.1 in Puerto Rico and 10.2 in western Washington to lows of 3.5 in southern Texas and 3.8 in western Texas.[31] Wyoming was slightly above average with a weight of 6.7. These figures indicate that while the "average" defendant in one jurisdiction may expect a sentence of four years imprisonment, in another jurisdiction probation or a sentence of one to six months would probably be imposed for conviction of the same crime.

This fluctuation continues when the use of probation is considered. The comparative use of probation,[32] expressed as a percentage, varied from a low of 41.8 in Puerto Rico to 66.5 in southern Georgia. These figures represent actual percentages of individuals placed on probration of 31.5 and 82.9, respectively.

These statistics are as accurate as modern practices can provide. However, statistics can never accurately portray the personal tragedy and manifest injustice which is worked by sentence disparity. One must consider the effects upon the offender, his family, and the effectiveness of the criminal justice system itself, caused by disparity such as that which James V. Bennett, former Director of the Federal Bureau of Prisons, describes:

> The first man had been convicted of cashing a check for $58.40. He was out of work at the time of his offense, and when his wife became ill, and he needed money for rent, food and doctor bills, he became the victim of temptation. He had no prior criminal record. The other man cashed a check for $35.20.

31. *Id.* A weight of 12.1 would indicate an average sentence slightly in excess of maximum sentences of between 37 and 48 months. A comparative sentence weight of 3.5 indicates an average sentence of silghtly over one to six months or probation in excess of 13 to 36 months.
32. The "comparative use of probation" is a mathematical expectancy. It is based on the application of the national average use of probation for eight offense classes to the actual offenses of defendants sentenced in separate United States district courts. It is an expected statistical probability and does not take into account the differences among defendants as to age, prior criminal record or other significant factors. FEDERAL OFFENDERS, *supra* note 5, at 115.

> He was also out of work, and his wife had just left him for another man. His prior record consisted of a drunk charge and a non-support charge. Our examination of these two cases indicated no significant difference for sentencing purposes. But they appeared before different judges, and the first man received fifteen years in prison, and the second man received thirty days.[33]

Similar disparity has been found to exist in state judicial systems.[34] The procedural climate in which sentencing occurs in Wyoming is just as permissive of disparity as that of the federal jurisdictions. The statutory structure provides only limited safeguards against unsubstantiated differentiation and is similar to the statutory schemes found in jurisdictions in which disparity has been documented.

The range of available sentences itself adds to this possibility. The records of the Wyoming State Penitentiary indicate that of those prisoners incarcerated during the fall of 1974 for burglary,[35] the sentences ranged from 12 to 13 months to 10 to 14 years. The most common sentence was 12 to 13 months which was imposed 12 times—nine times from the same judicial district. Of the 46 sentences being served, 21 were of differing terms. Thirty-five sentences for the uttering of fraudulent checks[36] ranged from a low of 12 to 13 months to a most severe sentence of four to five years. The most common sentence was 12 to 13 months, which occurred 10 times, nine of which were from the same judicial

33. Bennett, *Countdown for Judicial Sentencing*, 25 FED. PROBATION 24 (Sept. 1961).

34. A study of sentencing variances of six New Jersey judges revealed shocking disparity. Jail sentences were given in 57.7 percent of the cases when Judge #4 presided and only 33.6 percent of the cases when Judge #2 presided. Judge #6 gave only 15.7 percent of his sentences in the form of suspended sentences, while Judge #2 gave 33.8 percent in that form. No general increase or decrease in the severity of the sentencing tendencies was found to exist as the judges gained experience. Gaudet, St. John & Harris, *Individual Differences in the Sentencing Tendencies of Judges*, 23 J. CRIM. L. & C. 811 (1933).

35. WYO. STAT. § 6-129 (1957).

36. WYO. STAT. § 6-39 (Supp. 1975). The 1973 amendment to the statute reduced the maximum penalty from five years and a $5,000 fine to one year in the county jail and a $100 fine.

district. Of the 35 sentences for this offense, 12 were of differing sentence terms.[37]

It is interesting to note that the same judicial district was responsible for the high occurrence of minimum sentences in both instances. That district's[38] average sentence to the penitentiary for fraudulent checks was one year, four months, to a maximum of one year, nine months, for the 13 sentences in the sample. Another judicial district,[39] with a sample of 18 sentences, averaged sentences of one year, four months, to a maximum of three years, two months, for the same statutory offense.

When comparing these two judicial districts for sentences for burglary, the disparity becomes more pronounced. The former averaged sentences of one year, eight months, to a maximum of two years, four months, for 15 cases, while the latter averaged two years, eight months, to a maximum of five years, nine months, for 12 cases. A third district[40] averaged four years, one month, to a maximum of five years, one month, in a sample of six cases.

As indicated by the chart below, a similar variance was found to exist for grand larceny offenses as well. The former district had 24 cases in the sample for grand larceny,[41] for which the average term imposed was one and one-half years to two years, one month. The latter district was again high, imposing an average sentence of one and one-half years to three and one-half years, in a sample of 11 cases.

37. This type of presentation can continue. For instance, those incarcerated during the period surveyed for violation of breaking and entering, WYO. STAT. § 6-130 (1957), numbered 32, of which there were 20 differing terms of incarceration. The sentence ranged from one year, one day, to seven years and seven days with the most common sentence being 12 to 13 months.

38. The Second Judicial District which encompasses Albany, Carbon and Sweetwater counties.

39. The Seventh Judicial District which encompasses Natrona, Converse and Fremont counties.

40. The Fifth Judicial District which encompasses Park, Hot Springs, Big Horn and Washakie counties.

41. WYO. STAT. § 6-132 (Supp. 1975).

CURRENT AVERAGE SENTENCES OF IMPRISONMENT EXPRESSED IN MONTHS FOR SELECTED OFFENSES AS IMPOSED IN WYOMING JUDICIAL DISTRICTS*

	Judicial District		
Offense	*Second*	*Seventh*	*Fifth*
Burglary	20-28 (15)	32-69 (12)	37-61 (6)
Fraudulent Checks	16-21 (13)	16-38 (18)	-- --
Grand Larceny	18-25 (24)	18-42 (11)	-- --

*Number of cases in each sample shown in parentheses.

The small sample in each category makes the drawing of firm conclusions from the data impossible. Information was collected on eight offense categories, only three of which produced sufficient data to make any presentation possible, and then only when comparing three judicial districts.

Important factors, such as the relative use of probation and the characteristics of the average offender in each judicial district, were not controlled. Even though firm conclusions cannot be drawn, the fact remains that for all three categories containing the largest samples, sentences were markedly more severe in one judicial district than in another. If it is assumed that the aforementioned factors are indeed constant throughout the various judicial districts, the presence of disparity in the system may be presumed.

Additional examples of possible disparity can be drawn from individual cases within the three judicial districts. While it is almost impossible to take into consideration all of the factors which go into any judicial sentencing decision and objectively compare them with another apparently similar situation, there are certain cases which raise questions as to the justice dispensed in each instance.

In one such comparison, Defendant *A*, a 25 year old man, pleaded guilty to delivery of a controlled substance,[42] marijuana and amphetamines, on two different occasions. Defendant *A* was a life long resident of the community and came from a stable family which, composed of his mother, father and a married sister, was still residing there. He was

42. WYO. STAT. § 35-347.31 (a) (Supp. 1975).

divorced and had two children in the custody of their mother. No record of prior offenses could be found. After graduation from high school, he had worked six years as a heavy equipment operator until a job-related accident mangled his arm and forced him to quit work and undergo therapy. His pre-sentence investigation recommended probation.

Defendant *B*, a 23 year old man, pleaded guilty to possession with intent to deliver a controlled substance, marijuana, amphetamines and LSD, in violation of the same statute. He had been living in the community a little over one year, held a steady job, and was separated from his wife, who had custody of their two children. When convicted of possession of a controlled substance[43] the previous year, he had been placed on probation, which was in effect at the time of the commission of the present offense. The pre-sentence report cautioned against probation.

Defendant *A* received a sentence of three to seven years in the penitentiary as an example to others,[44] while Defendant *B* served 30 days in the county jail and was continued on probation for six months.

It would not be difficult to survey various jurisdictions and cull from their dockets sentence variations for the same statutory offense. This would only serve to indicate that the various jurisdictions are served by differing criminal laws and that individual offenders possess different relevant characterstics. The lack of exact uniformity is necessary if sentences are to be based at least in part on relevant differences in offenders and the severity of their offenses.

Statutory definitions of crimes are usually broad enough to allow the statute to encompass crimes of varying severity for which different sentences may be warranted. Aggravating and mitigating factors should, and usually are, taken into consideration.[45] Therefore, mere variation in the sentences

43. WYO. STAT. § 35-347.31 (c) (Supp. 1975).
44. This sentence was later reduced to one to two years on motion of the defendant's counsel.
45. Williams, *supra* note 21, lists the following as factors which should be taken into consideration:
A. The nature and circumstances of the offense.

imposed for a particular statutory crime does not indicate the presence of sentence disparity in the system. Disparity exists only when there is variance in sentences for the same statutory offense, and that variance is unrelated to the consideration of appropriate aggravating and mitigating circumstances.[46]

EFFECTS OF DISPARITY

Disparity may detract from the objectives of the criminal justice system by promoting disrespect for law and by lowering public confidence in the ability of the courts to deal justly with those who come before them. In larger jurisdictions consistent differences in sentence severity between judges promote delay by encouraging attempts to have cases tried before judges known to be more lenient.[47] Thus, the process of "judge shopping"[48] becomes common and terms such as "bargain basement justice" creep into the vocabulary.

Unjustified disparity also adversely effects the corrections process. Prisoners compare their sentences.[49] If, through this comparison, they are convinced that they have been dealt with unfairly, they may become hostile and resist correctional treatment and discipline. These same prisoners may leave the institution embittered, substantially increasing the chances of recidivism.[50] One distinguished commentator asserts that if rehabilitation is, in fact, a goal of the criminal justice system, then "the cultivation of a sense of fairdealing

B. The circumstances of the offender.
C. The age of the offender.
D. Family background.
E. Social adjustment (as measured by education, employment, group activities, responsibility, management of money, etc.).
F. Previous criminal record.
G. Marital status.

46. *Id.* at 24. *See also* REPORT ON COURTS, *supra* note 11, at 23.
47. In many jurisdictions this is accomplished by the requesting of continuances by defense counsel who hope that the rescheduling will bring their client's case before a more lenient judge. In Wyoming, where multi-judge courts are not the rule, the more direct procedure of "swearing off" a judge is used via WYO. R. CRIM. P. 23.
48. Subin, *Administration of Justice in the Recorder's Court of Detroit*, in REPORT ON COURTS, *supra* note 11, at 136.
49. Hosner, *Group Procedures in Sentencing: A Decade of Practice*, 34 FED. PROBATION 19 (Dec. 1970).
50. *See id.* In addition to the effect on prisoner morale and attitude, disparity adversely affects the attitude of their families and makes the rehabilitation process more difficult for all concerned.

in the offender would appear itself to be helpful, if not essential in attaining that avowed goal. . .".[51]

SAFEGUARDS

As long as the human element is present in the sentencing process, some disparity in sentencing will exist. The concept of individualization of sentences which is now in vogue demands a multitude of options which judges may apply in tailoring the individual sanctions for offenders convicted of the same offense. However, to be effective, this philosophy does not require the total absence of safeguards. An examination of safeguards which have been implemented in other jurisdictions indicates that disparity can be reduced without lessening the effectiveness of, or substantially inconveniencing, the judicial and correctional systems.

A. *Statutory Reform*

Possible sentences should fit the crime for which they are imposed by reflecting society's perception of the harm which the offense causes. Upon examination, it would appear that this is not always the case. Sanctions available for differing offenses are often without rational basis. For instance, if a person unlawfully enters an automobile for the purpose of removing a tape deck, it is punishable by a maximum term of 14 years under Wyoming law.[52] However, stealing the entire automobile, tape deck and all, carries a maximum sentence of 10 years imprisonment.[53] A man engaging in voluntary sexual intercourse with a 14 year old female is subject to a penitentiary term of 50 years.[54] If the same man maliciously assaulted her with a double-edged axe,[55] cut off one or several of her limbs,[56] or even administered poison with intent to kill her,[57] he could only receive a 14 year sentence.

51. Kadish, *supra* note 8, at 928.
52. WYO. STAT. § 6-129 (1957).
53. WYO. STAT. § 6-132 (Supp. 1975).
54. WYO. STAT. § 6-63 (B) (Supp. 1975).
55. WYO. STAT. § 6-70 (B) (Supp. 1975).
56. WYO. STAT. § 6-72 (1957).
57. WYO. STAT. § 6-73 (1957).

It appears then that statutory reform, insofar as it affects sentencing, must begin with the substantive law itself. Wyoming substantive law is largely a result of piecemeal construction. This manifests itself in available sanctions which are not rationally based in comparison with sanctions for other offenses, as demonstrated above, and in a ballooning number of legislatively imposed terms of incarceration. Felony statutes provide for 10 different maximum terms and 17 different ranges of possible incarceration.[58] This is not to mention the possible range of fines, narrow as it may be,[59] probation, or combinations thereof, which may be imposed. It would appear that given the large number of differing sentences, it is somewhat beyond the capability of any legislature to match them with the injury to society which the offense causes, and the needs of the community and of the offender in the correctional system.

Most studies of the problem[60] have recommended that categories of offenses be established with each statutory

58. Examples of these 17 different felony sentences are: WYO. STAT. § 6-124 (1957) arson in the fourth degree (one to two years); § 6-123 (1957) arson in the third degree (one to three years); § 6-125 (1957) arson to defraud insurer (one to five years); § 6-100 (Supp. 1975) mutilation of dead human bodies (two to five years); § 6-122 (1957) arson in the second degree (one to ten years); § 6-65 (1957) robbery (one to 14 years); § 6-18 (1957) forging public securities (one to 15 years); § 6-139 (1957) embezzlement by attorney (one to 20 years); § 6-121 (1957) arson in the first degree (two to 20 years); § 6-136 (1957) embezzlement of public funds (one to 21 years); § 6-63(B) (Supp. 1975) rape in the second degree (one to 50 years); § 6-9 (Supp. 1975) habitual criminal—three convictions of a felony (ten to 50 years); § 6-63(A) (Supp. 1975) first degree rape (one year to life); § 6-55 (1957) murder in the second degree (20 years to life); § 6-10 (Supp. 1975) habitual criminal—four convictions of a felony (life imprisonment); § 6-54 (Supp. 1975) murder in the first degree (under certain circumstances) (death).

59. *See* WYO. STAT. § 6-6 (1957), which provides that a fine of $1,000 may be assessed as part of punishment for any felony. The ALI, MODEL PENAL CODE (Proposed Off. Draft 1962) [hereinafter cited as MODEL PENAL CODE], provides for a wider range of possible fines:

> § 6.03. *Fines.* A person who has been convicted of an offense may be sentenced to pay a fine not exceeding:
>
> (1) $10,000, when the conviction is a felony of the first or second degree;
>
> (2) $5,000, when the conviction is of a felony of the third degree;
>
> (3) $1,000 when the conviction is of a misdemeanor;
>
> (4) $500, when the conviction is of a petty misdemeanor or a violation;
>
> (5) any higher amount equal to double the pecuniary gain derived from the offense by the offender;
>
> (6) any higher amount specifically authorized by statute.

60. MODEL PENAL CODE §§ 6.01, 6.06; ADVISORY COUNCIL OF JUDGES OF THE NATIONAL COUNCIL ON CRIME AND DELINQUENCY, MODEL SENTENCING ACT §§ 5-9 (1963); ABA STANDARDS—SENTENCING ALTERNATIVES AND PROCEDURES, Standard 2.1(a) (Approved draft 1968).

crime being classified according to its severity.[61] When certain prescribed criteria are met,[62] a separate, extended sentence schedule may be utilized for more serious offenses.[63] In this way, some consistency can be maintained between sentence weight and severity of the offense.

In accord with the model acts, Wyoming statutes provide for the imposition of indeterminate as opposed to straight sentences for felony convictions.[64] Indeterminate sentences in Wyoming fix maximum and minimum sentence limits within which judges must determine the offender's maximum and minimum term of imprisonment.[65] The sentencing judge[66] may impose definite terms only when sentencing to the county jail, or to the penitentiary for life. Although all the model acts advocate the use of the indeterminate sentence,

61. MODEL PENAL CODE § 6.06 (Alternate).

MODEL PENAL CODE: SENTENCE OF IMPRISONMENT FOR FELONY
Ordinary Terms

Grade of Felony	Minimum	Maximum
First Degree	1 to 10 years	20 years to life
Second Degree	1 to 3 years	10 years
Third Degree	1 to 2 years	5 years

62. MODEL PENAL CODE § 7.03. The court many sentence under the extended term schedule when it finds that it is necessary for the protection of the public, and that the defendant is a professional criminal, persistent offender, or a dangerous, mentally abnormal person. The section contains preliminary findings which may be made before the schedule can be used.

63. MODEL PENAL CODE § 6.07.

MODEL PENAL CODE: SENTENCE OF IMPRISONMENT FOR FELONY
Extended Terms

Grade of Felony	Minimum	Maximum
First Degree	5 to 10 years	Life imprisonment
Second Degree	1 to 5 years	10 to 20 years
Third Degree	1 to 3 years	5 to 10 years

64. The sentence which is statutorily authorized for any particular criminal offense determines whether violation of that statute constitutes a felony or a misdemeanor. Those crimes which are punishable by death or imprisonment in the penitentiary are felonies; all other offenses are misdemeanors. WYO. STAT. § 6-2 (1957). The minimum term of imprisonment in the penitentiary is one year. WYO. STAT. § 6-6 (1957).

65. WYO. STAT. § 7-313 (1957).

66. Sentencing by the trial judge rather than the jury is sanctioned by the MODEL SENTENCING ACT, *supra* note 60; MODEL PENAL CODE § 6.02; REPORT ON COURTS, *supra* note 11, Standard 5.1; and the ABA STANDARDS—SENTENCING ALTERNATIVES, *supra* note 60, § 1.1.
The ABA STANDARDS state one rationale, at page 45:
> Sentencing by a . . . jury at each trial is necessarily a guarantee of significant disparity between sentences. A . . . jury is to sentence only once, and . . . can hardly be expected to impose a sentence which is consistent in principle with sentences imposed by other equally disadvantaged juries.

In addition, the ABA STANDARDS take into account that much of the material

that use is their only common denominator; the manner of imposition varies.[67]

Mandatory terms statutorily remove the judge's discretion to impose noninstitutional sentence alternatives and to fix the minimum institutional term to be served upon conviction. In two specific instances the use of the indeterminate sentence has been replaced by mandatory terms. Upon conviction of murder in the first degree, the statutorily imposed sentence is life imprisonment,[68] unless certain courses of conduct are found to have existed, in which case the death sentence must be imposed. Those determined to be habitual criminals must upon their fourth felony conviction also receive a mandatory life sentence.[69]

This use of mandatory sentences conflicts with the concept of individualization of sentences by limiting the range of alternatives of the sentencing authority. It has been contended that the certainty of punishment which prompts the adoption of them is largely illusory.[70] The reduction of the

upon which the sentencing decision is made is properly inadmissible in court and cannot be considered by the jury except at a separate hearing. Sentencing by the judge alleviates the possibility that the jury may resolve doubt as to guilt by compromising on a light sentence. Finally, the jury cannot be aware of the programs and facilities available for the offender which may best serve the needs of the offender and society.

67. The ABA STANDARDS—SENTENCING ALTERNATIVES, *supra* note 60, advocate the judicial imposition of a maximum term up to the legislatively established maximum and a legislative grant of authority (not a requirement) for the setting of a minimum term within carefully prescribed legislative limits.
The MODEL PENAL CODE provides for the setting of maximum terms by law for second and third degree felonies, while the court sets the maximum term for first degree felonies. The minimum is set by the court within fairly broad legislative perimeters.
The MODEL SENTENCING ACT, *supra* note 60, divides offenders into several categories also. Upon a finding that the offender is dangerous to the public, based on any one of a number of enumerated grounds, a term of up to 30 years may be imposed. Conviction of second degree murder, arson, forcible rape, armed robbery, and bombing carry terms of 10 years or less, while life imprisonment is imposed for conviction of first degree murder. All other felony offenders may be sentenced to the penitentiary for a term of five years or less, or to a local correctional facility for up to a year.

68. WYO. STAT. § 6-54 (Supp. 1975). *See also*, Comment, *Bastard or Legitimate Child of Furman? An Analysis of Wyoming's New Capital Punishment Law*, 9 LAND & WATER L. REV. 209 (1974). Prior to 1973, Wyoming's first degree murder statute allowed a greater degree of discretion in sentencing. The current statute was enacted in response to Furman v. Georgia, 408 U.S. 238 (1972), which held discretionary imposition of the death penalty unconstitutional.

69. WYO. STAT. § 6-10 (Supp. 1975).

70. *See* Cook, *The "Bitch" Threatens, But Seldom Bites*, 8 CREIGHTON L. REV. 893, 912 (1975).

charge, the acquittal of the guilty, or the charging of an unrelated offense, are devices which may be, and probably are, used to circumvent the intent of these statutes. The alernative to these subterfuges is the imposition of a sentence which may be too harsh.[71]

Nevertheless, the concept of short mandatory terms for certain classes of offenses has recently gained increased support. Evidence of the deterrent effect of certainty of incarceration[72] recommends that any serious recodification effort examine this alternative in light of that evidence, as well as in light of the negative consequences of mandatory sentences which have been discussed. Generally, the range of sentencing alternatives available under Wyoming law is conducive to individualization. District courts are possessed of extensive probationary powers. Except for crimes punishable by death or life imprisonment,[73] and certain sex crimes,[74] the courts may, after a conviction or plea of guilty, place the defendant on probation, with or without imposing a fine,[75] for any term not to exceed the maximum term of imprisonment.[76] If the defendant consents,[77] and it is his first felony conviction, the court may, in most cases,[78] suspend the imposition of sentence and grant parole for up to five years.

Although the court may revoke probation after a hearing[79] at any time during the term, recent case law defining

71. ABA STANDARDS—SENTENCING ALTERNATIVES, *supra* note 60, at 56.
72. *See* notes 15-17 and accompanying text, *supra*.
73. WYO. STAT. § 7-318 (Supp. 1975); also WYO. R. CRIM. P. 33(e). Those offenses which are punishable by life imprisonment or death and which preclude probation are: WYO. STAT. § 6-54 (Supp. 1975) murder in the first degree; § 6-55 (1957) murder in the second degree; §§ 6-56, 6-57 (1957) murder by duel; § 6-59 (1957) kidnapping for ransom or robbery; § 6-61 (1957) child stealing or harboring; § 6-10 (Supp. 1975) habitual criminal—four convictions of a felony.
74. WYO. STAT. §§ 7-348 to -356 (Supp. 1975). There are eleven crimes to which this limitation is applicable, ranging from rape to indecent exposure.
75. WYO. STAT. § 7-318 (Supp. 1975).
76. A strict reading of the statutory language does not impose a limit upon the term of probation the court is authorized to impose. *See* WYO. STAT. § 7-321 (1957). However, in Hincklin v. State, 535 P.2d 743 (Wyo. 1975), the supreme court concluded that probation was constructive confinement and that the restraints of probation cannot exceed a period in excess of the maximum term of imprisonment authorized by law.
77. WYO. STAT. § 7-317 (1957).
78. Parole prior to sentencing may be granted upon conviction of any felony except: WYO. STAT. § 6-54 (Supp. 1975) first degree murder; § 6-63(A) (Supp. 1975) rape in the first degree; § 6-121 (1957) arson in the first degree, when it involves arson of a human habitation in the actual occupancy of a human being.
79. WYO. R. CRIM. P. 33(f).

probation as "constructive confinement" indicates that any combination of terms of probation and incarceration cannot exceed the statutorily prescribed maximum sentence for the violation in question.[80]

Sentencing procedures utilized by Wyoming judges are for the most part excellent and provide for a reasonable amount of input from the offender. Normally, a pre-sentence investigation will be made by the Department of Probation and Parole.[81] This report must be revealed to the defendant or his counsel, and they must be given the opportunity to comment on it. However, only when the court imposes probation upon a felony defendant *must* it receive and consider such a report.[82] The legislature should consider requiring the compilation and consideration of such a report for all felony offenses, and should provide for the resources to make this possible. The information revealed during the guilt determination process is by its very nature entirely too limited to provide an adequate basis for the sentencing decision.

In addition to the pre-sentence investigation, a sentencing hearing is held at which both sides may produce evidence relevant to sentencing. The rules mandate that the court afford counsel the opportunity to speak, and that the court address the defendant personally, asking him if he wishes to make a statement or present information in his own behalf. The defendant is afforded the opportunity to present "information in mitigation of the punishment"[83] and cross-examine.

80. Hicklin v. State, *supra* note 76. From the court's determination that probation cannot exceed a period in excess of the maximum term of imprisonment authorized by the statute violated, it can be inferred that any combination of probation and imprisonment cannot exceed that maximum. This can be accomplished by virtue of WYO. R. CRIM. P. 35, which allows the court to reduce a previously imposed sentence upon revocation of probation. In addition to its effect upon probation, *Hicklin* may also affect parole powers of the Board of Parole. Specifically affected will be Section 9, The Rules and Regulations, Board of Parole, State of Wyoming, ch. 5 (1974), which allows the Board, when revoking parole, to determine whether or not the parolee will have the time while on parole credited against his sentence.

81. This report will contain such information as the court may direct, including the defendant's prior criminal record and such information about his financial condition and circumstances affecting his behavior that might be helpful to the court in imposing sentence. WYO. R. CRIM. P. 33(c)(2).

82. WYO. STAT. § 7-319 (Supp. 1975).

83. WYO. R. CRIM. P. 33(a)(1).

He is not entitled to notice of what testimony will be taken at the hearing.[84]

Although it does not approach the rigors of due process, the standard for review of sentencing procedure is somewhat more stringent than that for review of the sentence itself. Sentencing procedures in criminal cases will not be disturbed on appeal unless there is a showing of an abuse of discretion, procedural conduct prejudicial to the defendant, circumstances which manifest inherent unfairness and injustice, or conduct which offends the public sense of fair play.[85]

B. *Appellate Review of Sentences*

Appellate review of legal but allegedly excessive sentences focuses on the implementation of several worthwhile objectives. It attempts to correct sentences which are excessive; promotes the rehabilitation of the offender by increasing the likelihood that he will believe that he has been dealt with fairly;[86] promotes respect for the law; encourages the development of sentencing criteria by trial and appellate courts by requiring the enunciation of findings and objectives;[87] and reduces the number of appeals which are brought on frivolous grounds for the real purpose of challenging what is seen as an excessive sentence.[88]

84. Hicklin v. State, *supra* note 76, at 750. The court stated:
> In regard to defendant's claim that he received no notice that witnesses would be produced at the sentencing hearing, nowhere in either the statutes of the state or the rules of criminal procedure is there any requirement of notice that testimony will be produced and taken at time of sentencing.

85. *Id.*

86. The morale of prisoners is closely tied to the process of rehabilitation. This morale may be adversely affected if the offender harbors the belief that he was harshly treated due to the idiosyncrasies of a particular judge. On the other hand if sentencing strives to fit the defendant as well as the crime, the concept of individualization of sentences must be adhered to, and it is probably impossible to impress that concept on the prisoners' mentalities. Prisoners tend to make shallow comparisons, and if individualization results in a sentence greater than that received by others who have committed similar offenses, regardless of the number of prior offenses or other circumstances, the prisoner may continue to feel maltreated. Note, *Statutory Structure for Sentencing Felons to Prison*, 60 COLUMBIA L. REV. 1134, 1168 (1960).

87. ABA STANDARDS—APPELLATE REVIEW OF SENTENCES, *supra* note 7, Standard 1.2.

88. Sobeloff, *supra* note 7, at 271.

Iowa[89], in 1860, became the first American[90] jurisdiction to authorize appellate review of sentencing.[91] At this writing, 25 states allow judicial review. Fourteen states have specific statutory authority for such appeals,[92] while six others have interpreted existing statutes to permit appellate courts to "reverse, affirm, or modify" the judgment of a lower court.[93] One state utilizes a rule of court,[94] while four others rely upon court decisions to review sentences which are within legal limits.[95]

89. IOWA CODE § 4925 (1860).

90. English law allowed for appellate review in misdemeanor cases as early as 1705, but it did not recognize the practice for felonies until 1907. *See* Comment, *Appellate Modification of Excessive Sentence*, 46 IOWA L. REV. 159, 160 n.2 (1960); Regina v. Paty, 2 Salk 503, 91 Eng. Rep. 431 (K. B. 1705), as to misdemeanors, and Criminal Appeals Act, 1907, 7 Edw. 7, ch. 23, § 3, as to felonies.

91. The Iowa Code commissioners, in discussing one of their reasons for the mandatory reporting of testimony in all criminal cases, stated:

> [I]n order to remedy a mischief universally admitted, we believe, to exist, viz: the inequality of punishment in cases of conviction in the different judicial Districts . . . and for this the law as it now stands affords no remedy, but the pardoning power, vested in the Governor. . . . Is this as it ought to be? We think it is not. . . .

Mueller, *Penology on Appeal: Appellate Review of Legal but Excessive Sentences*, 15 VAND. L. REV. 671, 675 (1962).

92. ALASKA STAT. § 12.55.120 (1972); ARIZ. REV. STAT. ANN. § 13-1717(B) (1956); COLO. REV. STAT. ANN. § 18-1-409 (1973); CONN. GEN. STAT. REV. §§ 51-195, -196 (1975); GA. CODE ANN. § 27-2511.1 (1972); HAWAII REV. STAT. § 641-11 (Supp. 1975); IOWA CODE ANN. § 793.18 (1975); MAINE REV. STAT. ANN. tit. 15, § 2141 (Supp. 1975); MASS. GEN. LAWS ANN. ch. 278, § 28 (1975); MONT. REV. CODES ANN. § 95-2212 (1967); NEB. REV. STAT. § 29-2308 (1956); N.H. REV. STAT. ANN. §§ 651:57-:59 (Supp. 1975); N.Y. CODE CRIM. PRO. § 450.30 (1971); ORE. REV. STAT. § 138.050 (1959) (only after plea of guilty or no contest).
Two states, Illinois and California, appear to have authorized such review, but their courts have not interpreted the statutes as doing so. The California statute reads:

> "the court may . . . reduce the degree of the offense or the punishment imposed. . . ." CAL. PENAL CODE § 1260 (West Supp. 1975).

However, the California Supreme Court has interpreted this language to allow sentence reduction only when the degree of offense is correspondingly reduced. People v. Thomas, 230 P.2d 351 (Cal. 1951); People v. Odle, 230 P.2d 345 (Cal. 1951). The California court has even deferred to habeas corpus proceedings rather than appellate review when the sentence is illegal or unconstitutional. People v. Schueren, 111 Cal. Reptr. 129, 516 P.2d 833 (1973). Illinois appellate courts may "reduce the punishment imposed by the court; . . ." ILL. ANN. STAT. ch. 110A, § 615(b) (1968). However, Illinois appellate courts have been extremely hesitant to interfere with the "discretion of the trial court." People v. Felder, 22 Ill. App. 3d 737, 317 N.E.2d 595 (1974). And, Virginia allows appellate review of sentences to work gangs only. VA. CODE ANN. § 53-164 (1950).

93. ARK. STAT. ANN. § 27-2144 (1962); IDAHO CODE § 19-2821 (1947); N.D. CENT. CODE § 29-28-28 (1974); OHIO REV. CODE ANN. § 2953-07 (1973); OKLA STAT. ANN. tit. 22, § 1066 (1971); PA. STAT. ANN. tit. 17, § 41 (1962).

94. MO. ANN. STAT. §§ 27.04—.06 (1969).

95. New Jersey: State v. Johnson. 170 A.2d 830, 836 (N.J. 1961), in which the court offers detailed reasoning for reviewability of all discretionary judgments of the trial court; Ohio: State v. Kasnett, 30 Ohio App. 2d 77, 283 N.E. 2d 636, 643 (1972), where the court relied upon the provisions of the OHIO CONST. art. IV, § 3 (B)(1)(f), which grants the court of

While Congress has specifically granted review authority to military courts,[96] no such authority has been granted the federal appellate courts. Prior to 1891, circuit courts reviewed sentences on appeal, utilizing their statutory power to "proceed to pronounce final sentence"[97] when affirming a conviction. This language was not retained in the Act of 1891 which created the courts of appeal.[98] Although the Supreme Court held that the powers vested in the federal appellate courts by the pre-1891 Act were incorporated in the new Act,[99] the Ninth Circuit in *Freeman v. United States*[100] held that the language omission had deprived the appellate courts of sentence review authority. Thus began an 85 year policy of federal nonreview of sentences.[101] This policy of nonreview also ignores statutory authority to "affirm, modify, vacate, set aside or reverse any judgment, decree, or order" of a lower court.[102] This language is similar to that which the six state courts have depended upon to authorize review.[103]

The language of Wyoming's rule[104] authorizing appeal is substantially similar to that of several states which allow

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appeals original jurisdiction in any case on review as may be necessary to its complete determination; Rhode Island: State v. Fortes, 330 A.2d 404, 411 (1975), relying on R.I. GEN. LAWS ANN. § 8-1-12 (1974), granting the supreme court the power of general supervision of all courts of inferior jurisdiction to correct and prevent errors and abuses; and, Wisconsin: State v. Tuttle, 21 Wis. 2d 147, 124 N.W. 2d 9, 16 (1963), in which the court relied upon its power of discretionary reversal on appeal as outlined by WIS. STAT. ANN. § 251.09 (1954).

96. 10 U.S.C. §§ 864, 866 (1964).
97. Act of March 3, 1879, ch. 176, § 3, 20 Stat. 354.
98. Act of March 3, 1891, ch. 517, 26 Stat. 826.
99. Ballew v. United States, 160 U.S. 187, 201-02 (1895).
100. 243 F. 353, 357 (9th Cir. 1917), *cert. denied*, 249 U.S. 600 (1919).
101. For a thorough opinion outlining the history of federal non-review, *see* United States v. Rosenberg, 195 F.2d 583 (2d Cir. 1952). In rejecting an appeal of the Rosenberg's death sentence, the court concluded:

> If there is one rule in the federal criminal practice which is firmly established, it is the appellate court has no control over a sentence which is within the limits allowed by a statute.

See also Smith v. United States, 273 F.2d 462, 467 (10th Cir. 1959); Cramer v. Wise, 501 F.2d 959, 962 (5th Cir. 1974). It is interesting to note that in *Rosenberg*, the court also rejected the argument that the death penalty violated the cruel and unusual punishment provision of the Eighth Amendment. That argument has been recently accepted by the United States Supreme Court in Furman v. Georgia, 408 U.S. 238, 240 (1972).
102. 28 U.S.C. § 2106 (1958).
103. ARK. STAT. ANN. § 27-2144 (1962); IDAHO CODE § 19-2821 (1947); N.D. CENT. CODE § 29-28-28 (1974); OHIO REV. CODE ANN. § 2953.07 (1973); OKLA. STAT. ANN. tit. 22, § 1066 (1971); PA. STAT. ANN. tit. 17, § 41 (1962).
104. WYO. R. CRIM. P. 72(c).

> Review by the Supreme Court.—A judgment rendered in whole or

review.[105] Dicta in early Wyoming cases[106] indicated that appellate review of legal but excessive sentences was available. However, recent decisions have firmly established the Wyoming Supreme Court's adherence to nonreview. The court has held to the rule that if the sentence is within the limits set by the legislature, it is exclusively within the discretion of the trial court.[107]

A primary objection of those who oppose appellate review is that it would lead to a flood of sentence appeals. This has not been found to be the case in those states in which it has been authorized.[108] Sentence review may have the effect of lowering the number of appeals brought upon the basis of minor procedural defect, since the real reason for bringing many of these appeals is to seek correction of what is perceived to be an excessive sentence.[109]

Five states—Connecticut, Massachusetts, Montana, New York and Alaska[110]—may have effectually limited the number of appeals by allowing their appellate courts to reduce *or increase* sentences on appeal. Although some commentators once doubted the constitutionality of this practice,[111] that question has now been favorably resolved.[112]

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in part, vacated or modified by the Supreme Court for errors appearing on the record.

105. ARK. STAT. ANN. § 27-2144 (1962); IDAHO CODE § 19-2821 (1947); N.D. CENT. CODE § 29-28-28 (1974); OHIO REV. CODE ANN. § 2953.07 (1973); OKLA. STAT. ANN. tit. 22, § 1066 (1971); PA. STAT. ANN. tit. 17, § 41 (1962). Seven other states have similar statutes in effect, but like Wyoming, they have failed to interpret the "reverse, affirm, or modify" language as authorizing review. *See* IND. CODE § 35-1-47-10 (1972); KAN. STAT. ANN. § 62-1716 (1963); MINN. STAT. § 605-05(1) (1971); S.C. CODE ANN. § 7-107 (1962); S.D. COMPILED LAWS ANN. § 34-51-20 (1967); UTAH CODE ANN. § 77-42-3 (1953); WASH. SUP. CT. RULES, APPEALS, 1-16 (1974).
106. State v. Sorrentino, 36 Wyo. 11, 253 P. 14, 16 (1927); Bird v. State, 26 Wyo. 532, 536, 257 P. 2, 3 (1927).
107. In Bentley v. State, 502 P.2d 203, 209 (Wyo. 1972), the court affirmed the five to 15 year sentence for manslaughter, which carries a maximum penalty of 20 years.
108. Note, *Statutory Structure for Sentencing Felons to Prison*, 60 COLUMBIA L. REV. 1134, 1166 (1960); *see also* Sobeloff, *supra* note 7, at 272.
109. Sobeloff, *supra* note 7, at 271. Judge Sobeloff contends that many appeals are brought only because of the severity of the sentence. Appellate courts, unable to tackle the real issue of sentence severity in a forthright manner, may, and often do, in their endeavor to strike down the harsh penalty, give the law the strained construction which is liable to work havoc in succeeding cases.
110. *Id.*
111. Mueller, *supra* note 91, at 679.
112. The appellant in Walsh v. Picard, 446 F.2d 1209 (1971), asserted that conditioning his sentence appeal on the state's right to ask for a sentence

It is important to note that no jurisdiction that has adopted the appellate review of legal but inappropriate sentences has ever rejected it. Although most of the American jurisdictions which have adopted appellate review have had little time to evaluate its effectiveness, others—Connecticut, Maine and Maryland—have utilized it for almost 15 years. Massachusetts has had appellate review for 30 years. Furthermore, appellate review has been an integral part of the English criminal justice system for over 65 years.[113]

The American Bar Association's Project on Standards for Criminal Justice devoted an entire volume to the appellate review of sentences and called for its adoption in all jurisdictions. The manner in which it should be adopted is set forth, but few of the 25 states which have adopted appellate review have done so in strict conformity with the ABA recommendations. Seven states[114] authorize review by panels of trial court judges rather than by appellate courts. The use of these review panels appears to be the fastest growing method of reviewing criminal sentences,[115] and this method is gaining support from at least the federal judiciary.[116] Although the judge who imposed the sentence may not sit in review, this method satisfies to some extent the feeling that trial court judges are more attuned to sentencing than are their appellate brethren. Sentence severity is used as a prerequisite to appeal in several states. Only sentences in excess of two years may be reviewed in Maryland, in excess of five years in Georgia, and, when the minimum term imposed is at least three years higher than the minimum statu-

increase constituted double jeopardy in that it unconstitutionally penalized the defendant for taking the appeal. The court agreed that such a practice might constitute double jeopardy if the defendant were faced with having to choose between staying in jail under an erroneous sentence and seeking an appeal with the possibility of sentence increase. However, the court denied the appeal and distinguished the above situation by noting that in the case at hand the defendant was not attacking the validity of his sentence but only its appropriateness. However, it is important to note that any vindictiveness in sentencing imposed in the case being appealed or any subsequent case based upon the appeal or a previous appeal would be constntutionally impermissible. North Carolina v. Pearce, 395 U.S. 711 (1969); McHoul v. Commonwealth, 312 N.E. 2d 539 (Mass. 1974).

113. ORLAND & TYLER, *supra* note 25, at 70.

114. Connecticut, Georgia, Maine, Maryland, Massachusetts, Montana, and New Hampshire.

115. Korbakes, *supra* note 3, at 116.

116. ORLAND & TYLER, *supra* note 25, at 80.

tory term, in Colorado. The scope of the review and the power to increase and decrease sentences are other devices which states have used in tailoring their own systems.

It is a strange dichotomy that United States jurisdictions, which are known for their usual emphasis on individual liberty, are unique in the Western World in failing to allow for review of sentences on appeal.[117] The American system provides for appeals from excessive money judgments yet fails to grant the same right when personal liberty is at stake.[118]

C. *The Sentencing Opinion and Policy*

It has been suggested that the trial court should be required to write a reasoned opinion to support the sentence imposed.[119] This might afford trial judges an opportunity to determine the considerations which are weighed by fellow judges, and thus contribute to reducing disparity. Opinions might foster more carefully considered sentences, since the supporting opinion would not write easily for a sentence which was too lenient or severe. However, the most pragmatic reason for requiring sentencing opinions is to facilitate appellate review.

At least five states provide for such opinions through identical statutory provisions[120] which allow the trial judge to transmit to the review division a statement of his reasons for imposing the sentence and require him to do so within seven days if requested by the review division. Absent this type of articulation the reviewing court can only surmise how the sentence was determined.

This absence of articulation may cause problems other than those concerning the appropriateness of the sentence.

117. ABA STANDARDS—APPELLATE REVIEW OF SENTENCES, *supra* note 7, at 2; Note, *Statutory Structures for Sentencing Felons to Prison*, *supra* note 108, at 1166; THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORTS: THE COURTS, at 25 (1967).
118. Sobeloff, *supra* note 7, at 269.
119. Korbakes, *Criminal Sentencing: Should the "Judge's Sound Discretion" Be Explained?* 59 JUDICATURE 185 (1975).
120. CONN. GEN. STAT. ANN. § 51-195 (1968); ME. REV. STAT. ANN. tit. 15, § 2141 (1964); MASS. GEN. LAWS ANN. ch. 278, § 28B (1968); MONT. REV. CODES ANN. § 95-2501 (1947).

In *Miller v. United States*,[121] a *Tucker*[122] problem case, the appeal was on the ground that the judge had erroneously taken into consideration three-fourths of the cases in Miller's prior criminal record in which he had not been represented by counsel. Judge Craven, who as a district judge had imposed sentence on Miller, was assigned by the circuit court on which he sat to hear Miller's petition to correct the sentence. It was thought by all that no one could know as well as Judge Craven the factors that had entered into the formulation of the sentence imposed. However, upon hearing the appeal, the judge stated:

> But memory fails. I cannot reconstruct what I thought about on May 12, 1966. The best I can do is to rely upon habit; always in the course of ten years as a trial judge (state and federal), I took into account a defendant's prior criminal record when I sentenced him. I can only assume that I must have done so with respect to Miller.[123]

The reduction of disparity, the protection of the defendant's constitutional rights,[124] and the facilitation of appellate review all suggest that reasoned sentencing opinions should be written by trial court judges.

The drafting of opinions by the review panels themselves might also be helpful to trial court judges. In a survey of the chief justices of five states which utilize sentence review panels, only two of the four chief justices responding indicated that their panels had helped to reduce unexplained disparity. However, these justices were the same two which indicated that their panels wrote opinions which were published and made available to trial court judges.[125]

121. 361 F. Supp. 825 (W.D.N.C. 1973).
122. United States v. Tucker, 404 U.S. 443 (1972). It is unconstitutional to take into consideration when sentencing a prior conviction of a defendant obtained when the defendant was unrepresented by counsel, was not advised of his right to counsel, and did not intelligently waive his right to counsel under Gideon v. Wainwright, 372 U.S. 335 (1963). The defendant is entitled to resentencing when such convictions are taken into consideration.
123. United States v. Miller, *supra* note 121, at 827.
124. *See* Berkowitz, *The Constitutional Requirements for a Written Statement of Reasons and Facts in Support of the Sentencing Decision: A Due Process Proposal*, 60 IOWA L. REV. 205 (1974).
125. Korbakes, *supra* note 119, at 191.

D. *Sentencing Councils*

The concept of judicial sentencing councils is an attempt to reduce disparity prior to the sentencing decision. The concept has gained broad based support[126] since its inception in 1960[127] when the United States District Court for the Eastern District of Michigan began to utilize the procedure.

The judges of that court meet weekly,[128] in rotating panels of three, to discuss sentencing for current cases. Pre-sentence reports are distributed to each judge one week in advance. In addition, each judge fills out a "disposition study sheet" on each of the approximately 12 cases per week, indicating his beliefs as to the important areas set forth in the pre-sentence report, factors which should be controlling in making a decision, and his specific recommendation as to penalty.[129] These opinions are then shared at the next meeting of the council. The judge having jurisdiction retains the responsibility for determining the sentence. The other judges act in an advisory capacity only.

The Eastern Michigan experiment appears to be a complete success. Since the council's inception, the judges having jurisdiction have elected to change their original sentence in 41 percent of the cases. No judge has been immune from change, and changes have not been solely in one direction.[130]

Reports indicate that the council has had three general effects. It has tended to level the sentences meted out by the participating judges and thus reduce disparity.[131] It has

126. *See* ABA STANDARDS—SENTENCING ALTERNATIVES, *supra* note 60, Standard 7.1; NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT ON CORRECTIONS, Standard 5.13 (1973); and THE COURTS, *supra* note 117, at 24.

127. Hosner, *supra* note 49, at 19.

128. One drawback to existing sentencing council procedure is that the judges meet prior to the sentencing hearing. This has two negative effects: the judges participating do not have the benefit of the information and insights presented at the hearing; and the presiding judge may be tainted by the views of his colleagues and the position he took at the council. These factors may impair the judges ability to give open-minded consideration to the information and arguments presented at the hearing.

129. Doyle, *A Sentencing Council in Operation*, 25 FED. PROBATION 29 (Sept. 1961).

130. Hosner, *supra* note 49, at 20.

131. *Id.* at 29. The author describes several cases in which the pre-council recommendations of the individual judges were quite diverse. In a case involving a defendant who filed false statements with postal authorities

fostered the development of sound sentencing criteria among the judges.[132] And, a forum has been created for the exchange of experience in the legal and correctional fields.[133]

The applicability of judicial sentencing councils in rural states such as Wyomng is limited by the remoteness of many district judges.[134] Another negative aspect is that councils alone do little to foster articulation of sentencing policies. They tend to even out sentences and reduce disparity without the production of a reasoned opinion as to why the original sentencing decision may have been abandoned in favor of a sentence closer to the mean.[135]

E. *Sentencing Institutes*

Sentencing institutes are workshops which are convened at two or three year intervals for the purpose of studying, discussing and formulating objectives and criteria for sentencing.[136] Their format may vary, but they are usually conducted as seminars, allowing as much time as possible for discussion and questions. Nonjudicial personnel, such as academicians, probation officers and other correctional personnel, may be invited to participate in order to gain the broadest possible relevant input. Institutes are practical and cost effective for every jurisdiction if they are planned to coincide with judicial conferences or other gatherings.

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in connection with an application for employment, one judge recommended probation, one an institutional sentence of three months, two others six-month terms, while another preferred incarceration for 24 months. Recommended sentences for an extortionist ranged from incarceration for observation and study to institutional sentences of two years, four years and ten years.

132. *Id.* at 22.

133. *Id.* at 21.

134. For statutory placement of Wyoming district court judges, *see* WYO. STAT. § 5-41 (1957).

135. *See* Levin, *supra* note 1, for a description of the sentencing council in operation.

136. The federal statute authorizing sentencing institutes, 28 U.S.C. § 334 (1970), sets forth the agenda for institutes. They may include:
(1) The development of standards for the content and utilization of presentence reports;
(2) the establishment of factors to be used in selecting cases for special study and observation in prescribing diagnostic clinics;
(3) the determination of the importance of psychiatric, emotional, sociological and physiological factors involved in crime and their bearing upon sentences;
(4) the discussion of special sentencing problems in unusual cases such as treason, violation of public trust, subversion, or involving abnormal

The utilization of sentencing institutes has been highly recommended by virtually every recent study of the sentencing problem.[137] At least two states[138] and the federal judiciary authorize the use of such institutes. The Governor's Planning Committee on Criminal Administration[139] has encouraged their use in Wyoming whenever practical.[140]

IV. CONCLUSION

The many factors which contribute to sentence disparity may be distilled to four:

1. The variety of sentencing alternatives available to the sentencing judge.
2. The disjunctive nature of the substantive criminal law.
3. The lack of policies and standards to be applied.
4. The delegation of the sentencing responsibilities to one individual.

The first of these provides an environment in which disparity may exist, but also serves a legitimate purpose if individualization of sentences is to remain an accepted policy. The second may be remedied by conscious legislative

sexual behavior, addiction to drugs or alcohol, and mental or physical handicaps;

(5) the formulation of sentencing principles and criteria which will assist in promoting the equitable administration of the criminal laws of the United States.

137. ABA STANDARDS—SENTENCING ALTERNATIVES, *supra* note 60, Standard 7.2; REPORT ON CORRECTIONS, *supra* note 126, Standard 5.12; THE COURTS, *supra* note 117, at 22-23.

138. CAL. GOV'T CODE §§ 68551-52 (West. Supp. 1966); N.Y. JUDICIARY LAW § 234-A-2 (McKinney 1968). *See also Proceedings of the First Sentencing Institute for Superior Court Judges*, 45 Cal. Reptr. (1965); *First Philadelphia Judicial Sentencing Institute*, 40 F.R.D. 399 (1966).

139. WYO. STAT. §§ 9-276.18:11-:17 (Supp. 1975).

140. The Governor's Planning Committee on Criminal Administration adopted the following draft goal and objectives for inclusion in its 1977 plan at a January 13, 1976, meeting in Casper, Wyoming:

GOAL: Disparity in judicial decision-making should be reduced.

1. In 1977, develop recommendations for, and seek adoption of, legislation providing for appellate review of sentences and allowing the appellate court to increase, as well as decrease, the sentence imposed.
2. Encourage within the judiciary in 1977 the use of sentencing councils and sentencing institutes, where practical.
3. Encourage within the judiciary the development of a sentencing manual for District Court judges.

effort. The last two serve legitimate functions only in that, at least in the short run, they are expedient and economical.

The safeguards which have been discussed focus on the last three factors. They are not panaceas but have all tended to reduce disparity in the jurisdictions which have implemented them. This alone does not insure their appropriateness for Wyoming. The physical nature of the state renders impractical wide use of group sentencing involving trial judges. The same is not true for statutory reform, appellate review, sentencing opinions, and institutes. There are no barriers to their importation, and the legislature and judiciary have a wealth of parallel experience on which to draw should they choose to implement any of the safeguards.

As long as disparity exists, we are one step further away from our ideal of the rule of law rather than men. It is repugnant to our sense of justice that criminal penalties be dependent upon purely fortuitous circumstances, such as the prosecutor who charges the offender, or the judge before whom he appears.

The adoption of these measures would reduce the likelihood of disparity while recognizing that sentencing is, and should be, a judicial function. The object should be to create a system where discretion is allowed necessary creative scope while subjecting it to some degree of discipline. In this way, what has become a blemish on the complexion of the judicial process can be substantially reduced.