Sentence Review in Louisiana: Appellate Review of Excessive Sentences in Non-Capital Cases

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The sentencing decision is perhaps the most overlooked stage in our criminal justice process despite its great effect on the accused. Lawyers and judges traditionally are concerned more with issues arising from arrest, search and seizure, and confession. Once the defendant's constitutional right to a "fair process" has been ensured, the lawyers and judges often feel they have all but fulfilled their roles; therefore, the actual sentencing decision is many times guided by a perceived need for expediency. This quick disposition from the legal to the penal system, however, may result in an inadequate measure of the defendant's culpability. Thus, if the criminal sentencing process is to maintain its integrity, an efficient system for the review of excessive sentences is of vital importance.

Appellate review of criminal sentences is distinct from appellate review of the defendant's conviction. Given the appropriate statutory authority for sentence review, an appellate court can alter the sentence imposed, but sentence review should never serve as a substitute for the discretion of the trial judge: Its proper role is to provide impartial guidelines to structure judicial discretion and to eliminate the subjective methodology used in arriving at sentencing conclusions. Nor should the review of sentences serve as a utilitarian mechanism for imposing absolute equality for similar offenders. "There is scope for legitimate and necessary moral variations in sentencing practice. The goal is individual propriety as well as overall equity in sentencing practices." A functional sentencing

1. When the convicted defendant perceives his sentence as being unrelated to his degree of culpability, the rehabilitative influence of that sentence is constrained. The impact of sentencing policy on the prison population is significant and historically documented.

The early 1900's, for example, had seen a series of prison riots across America. Many viewed the long, fixed sentences meted out then as a contributing factor: it was said that they left prisoners without hope. . . . "Hope" was instilled through the medium of the indeterminate sentence . . .

[The very hope of the indeterminate sentence has now been recognized as perpetuating a cruel uncertainty. . . . This situation has, moreover, undoubtedly contributed to many prison revolts.]


2. Id. at 38. "[E]quality in punishment is not an absolute principle; . . . [it] is a value to be weighed and considered among other values. . . . [T]here can be just sentences in which like criminals are not treated alike, as to either who goes to prison or for how long." Morris, Punishment, Desert and Rehabilitation, in Sentencing 257, 257 (H. Gross & A. von Hirsch eds. 1981).
guidelines system should control the abuse of discretion by legislatively mandating sentencing principles and by developing a practical and philosophical body of sentencing policies.\footnote{3}

The vehicles for sentence review vary in form from sentencing panels to peer group commissions.\footnote{4} In the past the Louisiana Supreme Court has been the body through which appeals of sentence excessiveness had to pass, but the supreme court's case load will be reduced when the lower appellate courts begin hearing criminal appeals in July of 1982 pursuant to a constitutional amendment.\footnote{5} While the constraints of time and economics may well be relieved, the future effectiveness of the judiciary as a viable means for controlling sentence disparity may be curtailed correspondingly if the appellate courts' application of sentencing policies becomes incohesive. This note will examine the historical evolution of sentence review in Louisiana, provide interpretations of the jurisprudence and the objective policy considerations therein, and finally suggest alternatives to Louisiana's sentencing guidelines system.

**The Power to Review Excessive Sentences**

The eighth amendment to the United States Constitution, prohibiting the infliction of "cruel and unusual punishments," is traditionally thought to preclude punishment which is cruel and unusual in form or substance. However, there is authority for the proposition that the eighth amendment prohibits excessive lengths of imprisonment as well. As early as 1892 some members of the judiciary adamantly maintained that the eighth amendment served as a safeguard "not only against punishments of the character mentioned, but against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged."\footnote{3}

3. The legislature's responsibility is to set criminal sanctions acceptable to the electorate. The judiciary, as an interpreter of constitutional rights, must then conform the sentencing practices to correct for legislative overreaching. "When the legislature determines sentencing ranges, it is operating at a level of abstraction far removed from individual case dispositions. . . . At that level of abstraction the symbolic quality of the criminal sanction is of great importance." Zimring, Making. the Punishment Fit the Crime: A Consumer's Guide to Sentencing Reform, in SENTENCING 327, 332 (H. Gross & A. von Hirsch eds. 1981).

4. See text at notes 96-99, infra.

5. See LA. CONST. art. V, § 10 (amended 1980).

6. O'Neil v. Vermont, 144 U.S. 323, 339-40 (1892) (Field, J., dissenting). "The whole inhibition is against that which is excessive either in bail required, or fine imposed, or punishment inflicted." Id. at 340. Compare Justice Field's opinion, id. at 339-40 (Field, J., dissenting) with the Court's assessment, authored by Justice Rehn-
This interpretation of the eighth amendment was strengthened a few years later when the United States Supreme Court announced a theory of proportioning the punishment to the offender and the offense in *Weems v. United States.* The defendant in *Weems* was convicted under Philippine law of falsifying a public document. His sentence of fifteen years included various stringent and painful conditions of imprisonment; in addition, numerous accessory penalties extended beyond the period of incarceration. The Supreme Court held that the statute under which the defendant was sentenced was "repugnant to the bill of rights" and accordingly reversed the judgment of conviction. While the criminal statute itself and not the sentence imposed thereunder was declared unconstitutional, the implicit holding of *Weems* nevertheless evidenced a broader interpretation of eighth amendment protections.

The *Weems* doctrine may be of questionable import in future eighth amendment challenges in light of the recent Supreme Court pronouncement in *Rummel v. Estelle.* The defendant in *Rummel* challenged the constitutionality of a mandatory life sentence, imposed under a Texas recidivist statute. The Supreme Court concluded that the state legislation served substantial state interests and did not impose cruel and unusual punishment. The precise holding in *Rummel* is unclear; its impact on the eighth amendment disproportionality doctrine is not fully cognizable. Future Supreme Court decisions may constrain the application of *Rummel* to only recidivist statutes; however, lower federal courts have interpreted *Rummel* to

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2. 217 U.S. 349 (1910).
3. The defendant’s punishment included a sentence of twelve years in chains and at "hard and painful labor," the loss of numerous civil rights, civil interdiction, perpetual absolute disqualification from enjoying political rights, and lifetime surveillance. *Id.* at 364-65.
4. *Id.* at 382.
5. In light of the lower courts’ assessment of *Weems,* this statement seems factually accurate. "[L]ower courts, relying on *Weems,* were deciding excessive punishment cases by assessing the proportionality of prison sentences not only as they related to offenses in the abstract, but also as applied to the circumstances of particular offenders." Gardner, *The Determinate Sentencing Movement and the Eighth Amendment: Excessive Punishment Before and After Rummel v. Estelle,* 1980 DUKE L.J. 1103, 1119.
preclude eighth amendment disproportionality challenges to sentences. The disproportionality jurisprudence prior to Rummel is limited, but this lack of jurisprudence in no way suggests that the Weems rationale was not a viable constitutional doctrine. Moreover, Weems may continue as valid precedent as some commentators have suggested that “Rummel did not overrule Weems.”

In Louisiana, it is unlikely that Rummel will have any effect. The present sentence review system is based on state constitutional guarantees which are more protective than the eighth amendment. Dependence on state constitutional provisions represents a “bold” step by the Louisiana courts towards reform of the sentencing process.

An historical breakdown of the Louisiana courts’ interpretations of state and federal constitutional prohibitions against cruel and unusual punishment reveals a reluctance to recognize any constitutional power to review a sentence for excessiveness. Early state constitutions contained verbatim reproductions of the federal eighth


13. The willingness of lower courts to examine prison sentences under the analysis emerging from Weems . . . has not resulted in frequent findings of excessive punishment. Indeed, [the disproportionality cases] are extremely rare even though the courts are constantly petitioned to overturn allegedly excessive sentences. The lower appellate courts have cautiously applied proportionality analysis to prison sentences, routinely deferring to legislative and sentencing-court decisions regarding the appropriate degrees of punishment for given offenses and offenders. That sentences are rarely overturned as excessive, however, in no way lessens the necessity of judicial review as a check on unduly harsh punishments.

Gardner, supra note 10, at 1124.


amendment. Because state courts can give different interpretations to their own state constitutions where the wording is identical to federal constitutional protections, Louisiana courts could have reviewed sentences for excessiveness under the early state constitutional provisions. Hence, the Louisiana courts could have used the proportionality doctrine of Weems and reviewed sentences for excessiveness and disproportionality. The continual growth of disproportionality case law within the federal courts parallels the period of indifference which existed within Louisiana's state courts.

When the new state constitution was adopted in 1974, the prohibition against cruel and unusual punishment was altered materially. The new provision provides that "[n]o law shall subject any person to euthanasia, to torture, or to cruel, excessive, or unusual punishment." The ban on excessive punishment was a significant addition and provided the catalyst to initiate appellate review of exorbitant sentences. The addition of the word "excessive" was thought to grant the Louisiana Supreme Court the power to review sentences notwithstanding the fact that the sanctions were imposed.

17. The state constitution has had prohibitions against cruel forms of punishment since 1812. The prohibitions have been directed at either "cruel or unusual punishment" or "cruel and unusual punishment." See L.A. Const. art. 1, § 12 (1821) ("and"); L.A. Const. art. 12 (1913) ("and"); L.A. Const. art. 12 (1898) ("and"); L.A. Const. art. 8 (1868) ("or"); L.A. Const. art. 107 (1864) ("and"). See generally L.A. Const. art. 9 (1879); L.A. Const. art. 9 (1902); L.A. Const. art. 104 (1852); L.A. Const. art. 108 (1845); L.A. Const. art. 6, § 19 (1812). Both the 1864 and 1868 constitutions contained provisions requiring that "all penalties shall be proportioned to the nature of the offence." See L.A. Const. art. 102 (1868); L.A. Const. art. 94 (1864).


19. See notes 6 & 7, supra. The Louisiana Supreme Court regressed slightly, to a position that saw state constitutional prohibitions of cruel and unusual punishment as only applicable to the form or character of the punishment. The court's assessment of the law in State v. Staub, 182 La. 1040, 162 So. 766 (1935), is incorrect insofar as it failed to recognize Weems. See also State v. Thomas, 224 La. 431, 69 So. 7d 738 (1953). The renewed significance of Weems in the seventies can be described as a product of penological and social reform. Decisions like Staub and similar ones in other states were a result of temporal concerns favoring incarceration which were less prevalent in the late sixties and the early seventies.

20. During the seventies the federal courts and several state courts were refining various proportionality tests based on the eighth amendment to review sentences in both capital and non-capital cases. See, e.g., Coker v. Georgia, 433 U.S. 584 (1977); Woodson v. North Carolina, 428 U.S. 280 (1976); Davis v. Davis, 601 F.2d 158 (4th Cir. 1979); Rummel v. Estelle, 568 F.2d 1193 (5th Cir. 1979), aff'd, 445 U.S. 263 (1980); Downey v. Perini, 518 F.2d 1288 (6th Cir. 1975); and authorities cited in note 12, supra.

within legislatively prescribed ranges. In his concurring opinion in *State v. Williams* Justice Tate stated:

The corollary provision of the previous Louisiana Constitution of 1921, article I Section 12, tracks the wording of the Eighth Amendment. Given the prior Louisiana constitution and the classic language of the Eighth Amendment to the United States Constitution, the addition of the word 'excessive'—as applying to all punishments and not limited to fines—must be considered intentional, expanding of the prior law, and significant.

From the 1900's to the mid-1970's the Louisiana judiciary did not engage ambitiously in the review of criminal sentences; however, in the late seventies a minority of the justices opined that under the authority of the 1974 Constitution the supreme court had the power to vacate a constitutionally excessive penalty. The supreme court's hesitancy to exercise this power echoed the majority's belief that the entire sentencing process should be consigned to the sole discretion of the trial judge.


23. 340 So. 2d 1382, 1385 (La. 1977) (Tate, J., concurring). Louisiana prosecutors were less likely to agree with this position.

The state strongly urges to this Court that excessive punishment is and always has been considered cruel and unusual under the proscription of the 1921 Louisiana Constitution and of constitutions in other jurisdictions. [The state] argues, therefore, that the addition of the word excessive in the 1974 Constitution does not add anything to the law.


24. "The determination of the sentence is the prerogative of the trial judge. As long as the sentence falls within the limits authorized by the Louisiana Criminal Code, this Court has no authority to review it." *State v. Folk*, 258 La. 738, 752, 247 So. 2d 853, 858 (1971) (citations omitted). See also *State v. Pebworth*, 260 La. 647, 257 So. 2d 136 (1972).

25. See *State v. Mallery*, 364 So. 2d 1283, 1285 (La. 1978) (Tate, J., dissenting); *State v. Terrebonne*, 364 So. 2d 1290, 1293 (La. 1978) (Calogero, J., concurring); *State v. Skyes*, 364 So. 2d 1293, 1298 (La. 1978) (Tate, J., dissenting); and authorities cited in note 22, supra.

26. The Louisiana courts were bound by the provisions of article 878 of the Louisiana Code of Criminal Procedure. "A sentence shall not be set aside on the ground that it inflicts cruel or unusual punishment unless the statute under which it is imposed is found unconstitutional." "The above article ... is designed to preclude attacks on
Those jurists in favor of reviewing sentences for excessiveness were concerned that undisclosed sentencing factors would not be ascertainable from the appellate record. In partial response to these misgivings the legislature enacted limited sentencing guidelines, both to assist the trial judge in personalizing the sentence and to preserve the sentencing considerations for the appellate record. This legislative process resulted in a codification of past sentencing practices pronounced in new article 894.1 of the Louisiana Code of Criminal Procedure. Article 894.1 sets out three aggravating factors which may necessitate a sentence of imprisonment; however, it also lists eleven possible mitigating factors which should be considered in determining if probation is the more appropriate alternative. Section C of article 894.1 is a mandatory provision requiring the trial judge to “state for the record the considerations taken into account and the factual basis therefor in imposing [the] sentence.” The new guidelines do not purport to restrict the discretion of a trial judge, but are “aids that enable individual judges better to structure and articulate their own judicial discretion.” The effectiveness of article 894.1 requires judges “to

the nature and severity of sentences imposed unless the law upon which the conviction and sentence is based is found unconstitutional.” LA. CODE CRIM. P. art. 878, comment (a). However, if there was a constitutional guarantee of proportionate sentences within the cruel and unusual punishment prohibition, then the legislature would have no authority to enact such a provision. See Corey v. United States, 375 U.S. 169, 171 n.3 (1963); Lambert v. California, 355 U.S. 225, 230 (1957) (Frankfurter, J., dissenting).

27. See State v. Mallory, 364 So. 2d 1283, 1288 n.5 (La. 1978) (Tate, J., dissenting). See also Hart v. Coiner, 483 F.2d 136, 149 n.2 (4th Cir. 1973) (Boremen, J., dissenting); Note, Appellate Review of Sentences and the Need for A Reviewable Record, 1973 DUKE L.J. 1357.


29. The aggravating factors include the risk of the defendant committing another crime, or the defendant’s “need [for custodial] correctional treatment,” or the belief that a “lesser sentence [would] deprecate the seriousness of the defendant’s crime.” LA. CODE CRIM. P. art. 894.1(A). The various mitigating factors include, for example, victim provocation, restitution by the defendant, the defendant’s lack of a prior criminal record, and the defendant’s character. LA. CODE CRIM. P. art. 894.1(B).

30. LA. CODE CRIM. P. art. 894.1(C).


[Sentencing guidelines systems help trial court judges to secure equity in sentencing practices—by achieving conscious and conscientious consistency over time and over an entire court system—and also to secure propriety in sentencing practices—by subjecting both case-by-case and policy decisions to constructive and informed internal and external review. Individual sentencing guidelines thus supply nonmandatory guidance and discretion to judges—a starting point, as it were, for informed sentencing.

Id.
reach [a] consensus on what their policy should be and then to structure their discretion consistent with it." Article 894.1 was never intended to wholly eliminate sentencing discretion, but was intended only to act as a mechanism for unifying sentencing policy.

The judicial proclivity to recognize a state constitutional mandate against excessive penalties had matured commensurate with a legislative provision preserving the sentencing considerations for appellate review. To justify the court's role as the agency for controlling sentencing standards required only the appropriate case.

*State v. Sepulvado* provided the opportune factual setting to implement sentence review in non-capital cases. Frankie Sepulvado was convicted of carnal knowledge of a juvenile and sentenced to serve three and one-half years at hard labor. The Louisiana Supreme Court originally affirmed the defendant's conviction but vacated the sentence because the district court failed to comply with the provisions of Louisiana Code of Criminal Procedure article 894.1—the judge did not provide written reasons for the sentence imposed. On remand, in complying with article 894.1, the trial court related its factual basis for once again imposing the three and one-half year prison term. On subsequent appeal, the supreme court held "that the imposition of a sentence, although within the...

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Historically, broad, standardless discretion was linked to a rehabilitative ideology: the sentencing judge and the parole board were thought to require wide leeway, in order to tailor the individual offender's penalty to his or her "need for treatment." The current revival of interest in standards or guidelines has coincided with growing doubts about the fairness and efficacy of rehabilitatively oriented sentencing.

*Sentencing*, supra, at 303 (editorial comments).


34. See text at note 97, infra.

35. 367 So. 2d 762 (La. 1979).

36. The Louisiana legislature had previously taken steps in 1976 to provide for appellate review in capital cases. See *La. Code Crim. P.* art. 905.1; *Note, Capital Sentencing Review Under Supreme Court Rule 28, 42 La. L. Rev. 1100 (1981).*


38. The defendant was eighteen years old and the girl involved was fifteen years of age. They had known each other for over four years. Apparently the two had planned to run away together because the girl's parents had refused to give her permission to marry the defendant. "Nothing in the record suggests that their sexual act was anything other than the voluntary act of two equally willing and infatuated teenagers." 367 So. 2d at 764.


40. 367 So. 2d at 763.
statutory limit, may violate a defendant's constitutional right against excessive punishment." The supreme court also found that the constitutional right was enforceable on appellate review of his conviction. In reaching this conclusion the supreme court emphasized that imprisonment is not necessarily obligatory when an aggravating factor exists under article 894.1. The presence of mitigating factors properly may indicate that suspension or probation is the more acceptable alternative. The court used an interjurisdictional and an intrajurisdictional analysis of other sentences imposed for the same crime as empirical proof of the defendant's excessive sentence. By examining the sentencing practices of other judicial districts within the state, the supreme court was more able to recognize the disparate treatment to which Frankie Sepulvado had been subjected.

Through Sepulvado, the sentence review process was placed within the hands of the Louisiana Supreme Court. The supreme court's role in sentence review has predominantly developed through evolving standards within Louisiana's own state constitution rather than through reliance on the proscriptions of the federal eighth amendment. Nevertheless, the safeguards afforded by sentence review exist in a symbiotic relationship with the federal constitutional rights guaranteed to all criminal defendants.

41. Id. at 767.
42. Id.
43. LA. CODE CRIM. P. art. 894.1(A).
44. 367 So. 2d at 769.
45. Id. at 768 nn. 5 & 6.
46. Id. at 772-73. The step-by-step analytical process used in Sepulvado shows a remarkable similarity to the lower federal courts' proportionality tests. See the discussion of federal proportionality tests at note 20, supra, and the cases cited therein.
47. See generally United States v. McCord, 466 F.2d 17 (2d Cir. 1972); Simon v. Woodson, 454 F.2d 161 (5th Cir. 1972); Meyer v. United States, 446 F.2d 37 (2d Cir. 1971). Justice Rehnquist acknowledged the uniqueness of the death penalty and viewed those cases as inapplicable to William Rummel's eighth amendment claim. Rummel v. Estelle, 445 U.S. at 272. Historically, the protections afforded defendants in capital cases have always paved the way for similar measures applied to non-capital cases.

The justices of the Supreme Court have specifically and repeatedly declared the death penalty to be unique. Therefore, it may be contended that the constitutional standards and concerns established in the death penalty cases are neither applicable nor capable of extrapolation to other sentencing decisions. Nevertheless, legal history records that many of the procedural rights now guaranteed to all criminal defendants were first won by those facing capital sentencing.

Louisiana's Sentencing Guidelines System

In the aftermath of Sepulvado, the Louisiana Supreme Court has reviewed hundreds of criminal sentences. Although the cases are numerous, the precedental value of the jurisprudence is still somewhat limited. However, the sentence review process used by the supreme court is structured and well defined. If the trial judge has failed to articulate the methodology of the sentencing decision, then the supreme court will remand the case with instructions to comply with article 894.1. In the event that the appellate record is complete, i.e., the trial judge has set out the factual basis for the sentence imposed, the supreme court can review the constitutionality of the penalty. Hence, the supreme court enforces the legislative guidelines by remanding sentences to comply with article 894.1 and reconciles sentence disparity by the modification of excessive penal sanctions.

The Judicial Use of Article 894.1

Many sentences cannot be reviewed because the record does not disclose the articulated facts upon which the sentence was based. Absent a factual basis for the sentence, the case is remanded to comply with article 894.1. On remand to articulate the sentencing factors, the trial judge could conclude independently that the original sentence was excessive. A lesser sentence can be imposed by the trial court, and the defendant may or may not exercise his right to appeal. The number of sentences reduced in this manner is not known.

48. While in certain contexts the court articulates a principle, or series of principles, in a systematic manner, it is frequently necessary to identify the operative principles from the examination of a considerable number of cases, none of which specifically identifies the relevant criteria, but which, when viewed collectively, clearly conform substantially to a pattern which can be described.

49. See text at note 30, supra.

50. See, e.g., State v. Jones, 386 So.2d 85 (La. 1980); State v. Kenner, 384 So. 2d 413 (La. 1980); State v. Dye, 384 So. 2d 420 (La. 1980); State v. Martin, 372 So. 2d 563 (La. 1979); State v. Terriault, 369 So. 2d 125 (La. 1979); State v. Volk, 369 So. 2d 128 (La. 1979); State v. Gist, 369 So. 2d 1339 (La. 1979); State v. Roper, 384 So. 2d 1308 (La. 1978).

51. In State v. Jacobs, 383 So. 2d 342 (La. 1980), the defendant received a lesser sentence on resentencing and appealed that sentence as also being excessive. The supreme court affirmed the sentence without hesitation, which probably suggests that the court would be less inclined to find a sentence constitutionally excessive when the trial judge, in his discretion, had lowered the sentence on remand.
If disparity in sentencing is to be curtailed, then article 894.1 must be used effectively at the trial stage. Often a trial judge will give only a verbatim recitation of the provisions of article 894.1 without incorporating the facts of the case which support the penalty. On appeal, the supreme court must remand, because the record does not provide sufficient documentation to determine if the sentence was excessive.

However, in a very limited number of cases the court is able to review the excessiveness issue despite the trial judge's failure to comply with article 894.1. In State v. Jones, the defendant was convicted of armed robbery and was sentenced to fifteen years hard labor without benefit of probation, parole or suspension of sentence. Although the trial judge failed to comply with the mandatory requirements of article 894.1, the supreme court nevertheless affirmed the conviction and sentence. The court reasoned that because the defendant's sentence was in the lower range of possible sentences it was not an "apparently severe" sentence. In State v. Day, the defendant was convicted of aggravated burglary and attempted simple rape and was sentenced to consecutive terms totaling forty-two and one-half years. The trial judge failed to state the factual basis for the sentence, but the supreme court still found no merit in the defendant's assignment of error concerning his punishment.

52. See State v. Kenner, 384 So. 2d 413 (La. 1980); State v. Little, 377 So. 2d 332 (La. 1979). In State v. Fields, 394 So. 2d 597 (La. 1981), the defendant was convicted of attempted theft after he used a credit card from a wallet he had allegedly found. In imposing a six month prison term, the trial judge used a "check-off" form listing the aggravating and mitigating circumstances outlined by article 894.1. On appeal the supreme court remanded for resentencing because the trial judge failed to articulate a factual basis for the sentence. However, in a concurring opinion, Justice Lemmon noted that the use of a standardized form was allowable if the factual basis for the sentence was included on the form. 394 So. 2d at 598 (Lemmon, J., concurring). However, the use of a standardized form could lead to a less thoughtful and reasoned articulation of the basis for the sentence imposed.

It is imperative that the reasons not simply be an expression of something already contained in the guidelines or some phrase made meaningless through rote repetition... but that they instead be a thoughtful and "reasoned" justification as to why the guideline sentence is inappropriate for the case at hand. A judge may still refer to an item in the guidelines, but rather than merely state the obvious—that the particular item was considered—the judge should explain why a different weighing was given to the item.

J. KRESS, supra note 1, at 40.

55. 391 So. 2d 1147 (La. 1980).

56. "[T]here seems little justification for a remand for resentencing when the
Both defendants, Jones and Day, engaged in criminal conduct where an individual was or could have been harmed. The continuing trend of the court seems to be to affirm those criminal sentences where the propensity of victim harm is unusually high, aside from questions of the trial judge's compliance with article 894.1.\textsuperscript{57} The courts apparently favor a policy of deterrence over rehabilitative measures when sentencing defendants convicted of violent crimes. The desire to perpetuate a "deterrent" penal philosophy may justify the supreme court's "hands-off" policy toward cases involving victim harm.\textsuperscript{58} Indeed, cases of violent crimes are presently the only judicial exception which permits a sentence to be upheld on appeal despite the fact that the sentencing rationale was not included in the record as required by article 894.1.\textsuperscript{59}

record so plainly supports the sentence imposed. In the interest of judicial economy, we decline to remand to require the trial court to restate for the record matters which are already apparent from the record." \textit{Id.} at 1151.

\textsuperscript{57.} \textit{But see State v. Cox, 369 So. 2d 118 (La. 1979), where the defendant's convictions for armed robbery and attempted murder were affirmed, but the case was remanded to clarify the reasons for imposing \textit{consecutive} sentences. For the latest statement by the court on the use of consecutive sentences see \textit{State v. Molinario}, 400 So. 2d 596 (La. 1981).}

\textsuperscript{58.} Negligent conduct considered criminal, such as negligent injuring or criminal neglect of family, are situations where victim injury may occur but incarceration of the defendant will have neither a deterrent effect nor a rehabilitative influence. Retributive sentencing in these types of victim injury cases "makes no measureable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering." Coker v. Georgia, 433 U.S. 584, 592 (1977). \textit{Accord, State v. Williams, ___ So. 2d ___ (La. 1981); State v. Goode, 380 So. 2d 1361 (La. 1980). Two examples of retributive sentencing were recently affirmed by the supreme court. In \textit{State v. Daranda}, 398 So. 2d 1053 (La. 1981), the defendant was sentenced to five years imprisonment for negligent homicide. The defendant admittedly was intoxicated when the accident occurred, but had no prior DWI convictions, had been steadily employed, and lacked the intent to inflict serious harm. Only Justice Dennis was of the opinion that probation or a lesser sentence would have been appropriate. \textit{Id.} at 1057 (Dennis, J., dissenting). In \textit{State v. Scott}, 400 So. 2d 627 (La. 1981), the defendant was convicted of cruelty to a juvenile. The defendant's negligent failure to provide his son with appropriate medical care after an accidental injury was the proximate cause of the child's death. The five year sentence was affirmed by the court with only one justice dissenting. The majority's concerns over the welfare of the other children could have been solved by more logical means than the incarceration of the defendant.}

\textsuperscript{59.} One case, not involving victim harm, was affirmed notwithstanding the lower court's omission of the sentencing guidelines in article 894.1. In \textit{State v. Russell}, 397 So. 2d 1319 (La. 1981), the defendant was convicted of receiving stolen property as the result of an extensive police "sting" operation. The trial judge made no specific application of Louisiana Code of Criminal Procedure article 894.1 in arriving at the defendant's three and one-half year sentence; nevertheless, the supreme court affirmed. The
Declaring a Sentence Excessive

When the primary sentencing decision is within the parameters of article 894.1, the supreme court can exercise its role as a review mechanism. Although the practitioner can learn a great deal from those sentences determined to be excessive as much, if not more, can be learned from the sentences which are affirmed on appeal. Only a very small percentage of the sentences appealed to the supreme court are adjudicated excessive. A sentence set aside as excessive must reveal a "manifest abuse of discretion" on the part of the trial judge. 60

As previously noted, almost all sentences imposed on violent offenders are affirmed. 61 In fact, only recently has the Louisiana Supreme Court held that a prescribed sentence for a violent offender was constitutionally excessive. 62 Even in cases where the defendant committed a non-violent crime, the supreme court is less apt to find the sentence excessive unless the facts reveal the presence of unique circumstances and the sentence imposed approaches the legislative maximum. 63 In State v. Grider 64, the defen-
dant was convicted of simple escape and sentenced to the maximum possible penalty of five years. The supreme court rescinded the sentence because of its excessiveness, and stated that the maximum sentence should be reserved for circumstances which "approach the outer limits of egregious escape." Similarly, the defendant in *State v. Jones*pled guilty to attempted distribution of marijuana after making a twelve dollar sale to an undercover police officer. Although the defendant had no previous record of dealing in contraband, his five year prison term was the maximum possible sentence. The propriety of the defendant's plea bargain was a collateral issue which unquestionably influenced the court; nevertheless, the supreme court abrogated the sentence due to its excessiveness.

These two cases indicate the trend of appellate review in Louisiana: The supreme court will seldom vacate a non-maximum sentence.

Individuals convicted of drug offenses comprise the major percentage of cases where a sentence is found constitutionally excessive. The recent efforts to decriminalize certain drugs and the availability of community drug abuse programs may be evidence of a less draconian social attitude toward these activities. The supreme court, when reviewing these sentences, might be attempting to reconcile social demands with outdated legislative penalties. After concluding that the defendant in *State v. Tilley* was only a "small fish" involved in the distribution of cocaine, the supreme court held that his twenty-one year sentence was excessive when compared with other sentences imposed in recent drug cases. The defendant in

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sentenced under the old statute, the supreme court believed that the sentences were nevertheless excessive. A lesser sentence would not deprecate the seriousness of the crime based on the empirical evaluation of the sentencing range later provided by the Louisiana legislature.

64. 380 So. 2d 611 (La. 1980).
65. Id. at 613.
67. On the original appeal, the case was remanded to comply with Louisiana Code of Criminal Procedure article 894.1. See *State v. Jones*, 386 So. 2d 85 (La. 1980). The trial judge imposed the same sentence, and the supreme court, on the second appeal, found that it was excessive. 398 So. 2d 1049 (La. 1981). In contrast, the defendant in *State v. Jacobs*, 383 So. 2d 342 (La. 1980), received a lesser sentence on remand; he had been convicted of distribution and possession of marijuana, and the supreme court affirmed. The original maximum sentence possibly could have been found to be excessive, especially in light of the publicity surrounding the case. Moreover, the publicity factor is one variable which leads to "retributive" sentences. See *State v. Forshee*, 395 So. 2d 742 (La. 1981), and note 58, supra.
68. 400 So. 2d 1363 (La. 1981).
State v. Bonanno received an identical twenty-one year prison term for distribution of cocaine; yet he intended "to open a large new cocaine market in the Shreveport area." Bonanno's sentence was affirmed and in comparison revealed the inequity inherent in Tilley's sentence. The court, absent the needed legislative guide, continually has distinguished between the profit motive of the small operator and the large-scale drug dealer.

First offenders are in the unique position of being able to challenge the trial judge's choice of incarceration. The value judgments underlying the choice between a prison term and individualized probation represent conflicting penal objectives. Although the choice of incarceration may constitute reversible error enforceable on appeal, the argument has thus far only been suggested in drug cases. In State v. Saunders, the supreme court stated in dicta that the trial court erred in not placing the defendant in a drug rehabilitation program; the defendant had been given a four year term for "altering a prescription." Concededly, extenuating factors were present in Saunders, but dicta in State v. Tilley suggest that the argument still has judicial appeal.

While [the] defendant, as a first offender, would be eligible for probation, we are not prepared to say that it was error to impose a prison sentence and not suspend it and place defendant on supervised probation. However, the fact that he did register and continued to attend the drug abuse clinic indicated that defendant is amenable to the idea, at least, of treatment and rehabilitation.

The choice of penal objectives is made by the trial court after an assessment of the elements of public policy. If the only concern was

69. 384 So. 2d 355 (La. 1980).
70. Id. at 357.
71. Roy Tilley was also a young offender, had a stable employment record, had responded to rehabilitation, and supported a physically disabled mother. On the other hand, Bonnano's profit motive was totally based on self-support. 400 So. 2d at 1367-68.
72. "[A] sentence must be proportional to the offense unless we are willing to say that individual drug traffickers may constitutionally be punished for the social harm caused by the drug traffic as a whole." Note, Disproportionality in Sentence of Imprisonment, 79 COLUM. L. REV. 1119, 1145 (1979). See Terrebonne v. Blackburn, 624 F.2d 1363, 1370 (5th Cir. 1980).
73. 393 So. 2d 1278 (La. 1981).
74. But see State v. Cain, 382 So. 2d 936 (La. 1980).
76. See the court's discussion, 393 So. 2d at 1280.
the accused's best interest then individualized treatment would be the more appropriate choice. Where public policy demands a deterrent sentence then its exact length must be calculated. "The seriousness of the offence will be considered in relation to cases of greater and less gravity . . . and eventually a sentence will be determined bearing some relationship to the accused's culpability." In both cases, Tilley and Saunders, the availability of individualized treatment—rehabilitation programs—was especially appealing; the disproportionately exorbitant sentence further augmented the defendants' cases.

The character of the defendant's record should influence the initial sentencing decisions beyond the mere superficial allowance ordinarily given for the presence or absence of prior convictions. If the offender has a previous record for offenses of one type but is being sentenced for an offense of a different category, then his prior convictions should have less influence on the sentencing decision. In State v. Saunders the defendant's five prior convictions for issuing worthless checks greatly influenced the trial court in sentencing the defendant to the maximum term for altering a prescription. The supreme court suggested that the defendant be placed on supervised probation. Saunders' present criminal conduct was under strong provocation and could be considered as an "isolated act out of character, rather than an extension of the offender's criminal activity into a hitherto unexplored field." In State v. Tilley, the defendant had two prior DWI convictions and a conviction for contributing to the delinquency of a juvenile. Neither of these offenses requires a criminal state of mind, and their effect on the present sentencing decision should have been minimal. On the other hand,

78. In many circumstances the social interest protected by incarceration of the accused greatly outweighs the goal of individualized sentencing. Breach of the public trust by elected officials, continuing criminal activity of recidivists, and violent crime are just a few examples. See note 59, supra.


81. 393 So. 2d 1278 (La. 1981).

82. See text at note 73, supra.

83. Saunders was under a doctor's care for various work-related injuries and became addicted to pain killers after extensive back surgery and the subsequent amputation of his hand. 393 So. 2d at 1280.

84. D. Thomas, supra note 79, at 178.

85. 400 So. 2d 1363 (La. 1981). See text at note 68, supra.

86. But see State v. Beavers, 382 So. 2d 943 (La. 1980), where the defendant's sentence of ten years imprisonment for his fourth DWI conviction within a five year
the legitimacy of habitual offender laws are well recognized and they serve substantial state interests in supressing criminal con-
duct. But in cases where a defendant has a prior record of criminal convictions that falls short of the application of special interest legislation, his record should be critically examined to avoid increasing the sentence simply because he is perceived as an undesirable social element.

Thus far the supreme court has been disinclined to find a sentence excessive which was imposed on a violent offender, even to the extent of not remanding the case for failure to comply with the sentencing provisions of article 894.1. In non-violent cases, the supreme court will remand if the mandate of 894.1 is not met, but the factual circumstances must clearly indicate an abuse of discretion by the trial judge before the supreme court will declare the sentence excessive; moreover, the actual term of imprisonment must approach the legislative maximum. Furthermore, if all the "excessive penalty" cases are quantified, a significant majority can be categorized as drug cases—victimless crimes. These constitutional limits formed by the supreme court may at first appear quite narrow, but the present structured and consistent review procedure forms a foundation for a broader scope of review in the future.

The two most recent supreme court opinions bearing upon the issue of excessive penalties proscribe upper sentencing limits which are binding upon the trial court on resentencing. These opinions may mark the beginning of a new trend which will be followed by the circuit courts of appeal when they begin hearing criminal appeals. The limits imposed by State v. Williams and State v.

period was upheld. Here the defendant's prior record showed a continual course of repeated criminal conduct.


88. The English courts go one step further in their examination of the prior record of the accused. Sentencing policies in England allow a "gap" in the defendant's record to serve as a mitigating circumstance.

[T]he [c]ourt makes allowance for the fact that the appellant has not committed offenses during a period of time since his last release and has made efforts to live a stable life. . . . Where the subsequent offence appears more as [a] determined return to criminal behavior, the existence of a period without conviction is likely to be ignored.

D. THOMAS, supra note 48, at 181.

89. See note 5, supra.

90. ___ So. 2d ___ (La. 1981).
Tilley were controversial among the supreme court justices and will undoubtedly receive a cold reception in the lower courts. The defendant in Williams was the least culpable participant in an armed robbery, yet received the most severe sentence. On remand, the trial judge’s discretion was limited by the supreme court’s holding that "a sentence of more than fifteen years ... in this case would be constitutionally excessive." Correspondingly, in Tilley the supreme court viewed the range of constitutionally acceptable sentences to be between "the statutory minimum to as much as ten years." Rather than merely declaring a criminal sentence to be excessive and remanding for resentencing the supreme court has begun to quantify the limits of constitutionality. This potential trend is possibly an indication of the supreme court’s dissatisfaction with the reaction of trial courts to past sentencing problems.

Conclusion

The historical progression of judicially imposed safeguards on the sentencing process was a product of modernizing standards of criminal justice. Criminal defendants in Louisiana now can have the propriety of their criminal sentences reviewed. An effective process of review must be based on objective standards. Sentence review based on less than equitable criteria subverts the goals of the sentencing guidelines system in two ways. First it perpetuates the disparity problem because the review process becomes arbitrary; in addition, the lack of uniformity fails to provide the trial court with any guidance for future sentencing problems. Properly used, the appellate review of sentences serves as a safeguard against arbitrary and capricious application of criminal sanctions.

The sentencing guidelines system in Louisiana is still in its infancy. Primarily, the supreme court has been concerned with utilizing Code of Criminal Procedure article 894.1 to its fullest extent. The large number of cases remanded to comply with article 894.1 could be reduced by the inclusion of pre-sentence reports in the appellate record. A disorganized and textually insufficient record cannot be reviewed, either for the sentence imposed or any other

91. 400 So. 2d 1363 (La. 1981).
92. Justices Marcus, Blanche, and Lemmon were of the opinion that the trial judge’s sentencing discretion on remand should not be constrained by the supreme court’s upper sentencing limits. See 400 So. 2d at 1368; ___ So. 2d at ___.
93. ___ So. 2d at ___
94. 400 So. 2d at 1368.
assignment of error. When the record is complete, the functional usefulness of the sentencing guidelines system can operate. These sentencing guidelines do not remove the sentencing discretion from the hands of the trial judge. Discretion is present throughout our criminal justice system; indeed, it is desirable if we are to have individualized justice. But discretion should be based on tangible facts and guided by a framework of rational and equitable policies. The policy formation process requires the cooperation of all trial judges; without such cooperation sentencing practices are subjectively controlled and discretion, which could be useful, can become despotic and variable.

In the past, Louisiana's sentence appeal system was administratively overworked. Cases were remanded to comply with article 894.1 only to be subsequently re-appealed. The record of sentencing factors was often just as incomplete as on original appeal. Limiting the sentencing range, as was recently done in Williams and Tilley, hopefully will foster judicial economy and greater uniformity in sentencing. If the court is to function in its role as a guardian over the sentencing process, then this practice must be encouraged. The trial judge is frequently without the benefit of an overall state-wide picture of sentencing practices and policies. Often inappropriate demographic and geographic factors influence his sentencing decision. If the sentence is simply vacated and remanded, the trial judge might impose a lesser sentence, the same sentence, or even a greater sentence.

The lower appellate courts will undoubtedly relieve much of the burden of criminal appeals bearing upon the supreme court.55 However, efforts to diminish the inequity in sentencing practices may be frustrated continually by conditions beyond the judiciary's control. Judges are often less qualified to individualize the appropriate social sanction for each defendant. Sociologists and penologists are probably more attuned to the factors which control sentencing decisions. The supreme court's efforts to establish a state-wide sentencing policy are hampered when individual judges have no policy consensus. Each of these countervailing forces can be abated or eliminated by removing the review of sentences from within the jurisdiction of the appellate courts to the hands of a quasi-administrative agency.

Various commentators have suggested the numerous advantages
which would accrue from a sentencing commission. The commission would act as the agency for sentence review in place of the supreme court and the court of appeals. In addition to reviewing decisions, the commission could "continually reevaluate the guidelines themselves, ensuring that they comported with evolving sentencing policy in the state." Furthermore, the sentencing commission could perform an invaluable research function by "the collection, analysis, and dissemination of data concerning the deterrent effectiveness of various sentencing alternatives." The commission could even be empowered to establish sentence ranges within the limits already set by the legislature. The judiciary is already overburdened with its present constitutional obligations and cannot provide the continual monitoring which any practical sentencing guidelines system requires. The commission, with a qualified staff, would collect and analyze sentencing data; disseminate the data into policy statements and communicate that policy to the judicial, legislative, and executive branches of government.

The present practice of sentence review is an effort to improve a once remote and disorganized aspect of our criminal justice process. The goal of building a statewide body of sentencing policy should not be abandoned because the means to achieve that end becomes inappropriate. The future of sentencing reform requires that the goal be maintained, but its achievement must be by a different path. The creation of a sentencing commission represents a step in the right direction.

Erick V. Anderson


97. J. KRESS, supra note 1, at 42.
98. Id.
99. The commission's guidelines would not be the same as determinate sentencing, as they would have effect only on the trial judge's discretion and would not be binding regulations. See Gardner, supra note 10.