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SENTENCING IN ENGLAND

D.A. Thomas*

The criminal justice systems of England and the United States trace their origins to a common legal tradition, and thus share many common features, such as the law of evidence, the jury, and much of the substantive law. Fundamental differences exist in post-trial procedures, however, particularly in relation to the sentencing of convicted offenders. The reasons for these differences are not hard to find. The American jurisdictions have borrowed most heavily from England in those areas of the criminal process where the framework was established in England before the late eighteenth century, but the structure of the modern English sentencing system did not begin to emerge until the mid-nineteenth century, long after the United States was established and the development of a distinct American legal tradition was under way. Despite the independent development of the modern systems of sentencing in the two countries, many of the issues which have been the subject of active debate in the United States during the last decade have interested English judges and legislators over a longer period. The English experience in dealing with the problems of sentencing therefore should be of value to Americans concerned with shaping the future of sentencing in the United States, both in providing examples of institutions or procedures that might be adapted to the American context, and in affording warnings of dead ends that may be avoided.

An understanding of the sentencing process in England requires an awareness of some of the distinctive features of the context in which it operates — especially where that context differs significantly from that of the typical American jurisdiction. The first section of this paper accordingly offers an account of four features of the English criminal justice system which are distinctively different: the existence of two modes of trial and the heavy dependence on lay magistrates, the strict limitation on plea negotiation, the central role of appellate review of sentences, and the limited scope of parole. The second section outlines the historical development of the English sentencing system from the

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point at which the two systems diverged, and then describes the legal framework of sentencing today in relation to the practical operation of the sentencing system and the overriding concern to limit the growth of the prison population. A final section offers a brief appraisal of the English experience, with a view to identifying the lessons that may be learned and the pitfalls that may be avoided.

I. THE CRIMINAL JUSTICE CONTEXT

A. Mode of Trial

The English criminal justice system provides two modes of trial: summary trial before a magistrates' court and trial on indictment before the Crown Court. The differences between the two forms are considerable. In the magistrates' court, the determination of guilt and sentence is by a bench of magistrates, who in the vast majority of cases are lay persons without formal legal training or professional qualification, sitting without a jury. In the Crown Court, trial is always by a judge and, unless there is a plea of guilty, jury; there is no bench trial in the Crown Court.

The powers of the Crown Court and the magistrates' court in relation to the various forms of sentence are substantially the same, again with a few exceptions, but magistrates are generally limited in the amount of the penalty they may impose, whether in terms of imprisonment or money. A magistrates' court may not impose more than six months' imprisonment for a single offence or an aggregate of twelve months for a series of offences, except in a few unusual situations (such as when the magistrates' court activates an existing suspended sentence). Fines are limited to £1,000 for any one offence, and similar limitations apply to compensation, although there is no limit to the aggregate of fines which magistrates may impose for multiple offences. The Crown Court may impose generally higher sentences of imprisonment, and it is unlimited as to amount when imposing fines and compensation orders. In practice, it is probable that for the same offence the sentence imposed by a magistrates' court will usually be substan-

2. This is the effect of R. v. Lamb, 52 Cr. App. R. 667, (1968), decided on different provisions.
5. The maximum terms of imprisonment which may be imposed in the Crown Court are fixed by the statute that creates the offence concerned. For a list of the maximum terms applicable to most offences triable in the Crown Court, see ADVISORY COUNCIL ON THE PENAL SYSTEM, SENTENCES OF IMPRISONMENT app. A (1978).
tially lower than that imposed by the Crown Court, although this assertion is impossible to document.

The judges who impose sentence in the Crown Court have varying degrees of experience. The most serious cases are dealt with by High Court judges of the Queen’s Bench Division, but the bulk of the more serious cases are dealt with by Circuit judges, full-time judges who devote most of their time to the Crown Court, although they will also sit in the County Court exercising civil jurisdiction. There are at present about fifty Queen’s Bench judges and about 350 Circuit judges. A large part of the judicial work of the Crown Court is entrusted to part-time judges called recorders, who hold a judicial appointment and are expected to sit judicially for a minimum of fourteen days each year, and assistant recorders (formerly known as deputy circuit judges), who do not hold an appointment but are approved to sit as and when required. All appointments and approvals are the responsibility of the Lord Chancellor; no English judge is elected. Circuit judges, recorders, and assistant recorders may sit with two or more lay magistrates for the trial of the less serious types of offence; when magistrates sit in the Crown Court they sit as judges of the court and have equal voting rights in matters within the discretion of the court, including sentencing. It is not unknown for the lay magistrates to outvote the legally qualified judge.

All judges (other than lay magistrates sitting with a circuit judge or recorder) who sit in the Crown Court are legally qualified — the majority as barristers — and most come from a background of professional practice, although not necessarily in criminal litigation. Schemes for systematically preparing lawyers to sit in the Crown Court were considered by a working party in 1978, and are now under the direction of

7. The distribution of cases between different categories of judges is governed by a Practice Direction of the Lord Chief Justice. See Practice Direction, 56 Cr. App. R. 52 (1971).
10. The qualifications for appointment as a Circuit judge are provided by Courts Act 1971, § 16(3) (10 years as a barrister or five years as a recorder); a recorder must be a barrister or solicitor of 10 years standing. Id. § 21(2). In practice, most persons appointed to be assistant recorders have between 15 and 20 years experience in legal practice.
11. The part-time appointments are increasingly used as probationary steps toward a permanent appointment as Circuit judge or High Court judge. There is no natural progression from a Circuit judge to High Court judge, and it is generally assumed that a circuit judgeship is a terminal appointment, although a small number of High Court appointments have been made from the circuit bench. The normal progression is now from assistant recorder to recorder, and then either to High Court judge or Circuit judge (or neither).
the Judicial Studies Board, a body consisting of judges, lawyers, academicians, and others. Various schemes of preparation (the word “training” is not used) are now in operation on a modest scale and a recent Parliamentary Committee recommended that they be expanded.\textsuperscript{13}

The lay magistrates who adjudicate in the overwhelming majority of magistrates’ courts throughout the country (large cities also make use of stipendiary magistrates, who are legally qualified) have no professional training, although for the last fifteen years training schemes for magistrates have been in operation in most parts of the country, with varying degrees of effectiveness. There are at present about 23,000 lay magistrates, each of whom is expected to sit for a minimum of twenty-four days each year. They are assisted by a Clerk to Justices, who will now invariably be a qualified lawyer, whose duty is to advise the magistrates on questions of law (including sentencing practice).\textsuperscript{14} In many busy court centres, the magistrates will be assisted by a court clerk, who may be professionally qualified but will not necessarily be so.

The allocation of cases between the two modes of trial was until 1978 the subject of a legal structure of bewildering complexity.\textsuperscript{15} Considerable simplification was introduced by the Criminal Law Act 1977.\textsuperscript{16} The law now divides all offences into three categories: those triable only on indictment, those triable only summarily, and those triable “either way.” In the first two categories, there is no choice to be made; the mode of trial is determined by the charge. (Although there is no empirical evidence, there can be little doubt that the implications in terms of mode of trial are likely to affect the charging decision, particularly in cases of personal violence.) The third category, offences triable either way, includes those offences that constitute the great bulk of the criminal court’s work — including theft, obtaining by deception, criminal damage, assault, all but the gravest woundings, indecent assault, and many forms of burglary.\textsuperscript{17} In all of these cases, the initiative lies with the prosecution, who may invite the magistrates’ court (where all criminal cases begin) to commit the case for trial to the Crown Court or

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\textsuperscript{14} The duties of the Clerk are now laid down in a Practice Direction by the Lord Chief Justice. See Practice Direction, [1981] 2 All. E.R. 831.

\textsuperscript{15} See Thomas, Committals for Trial and Sentence — the Case for Simplification, 1972 Crim. L. Rev. 477.


\textsuperscript{17} For a list of the most important offences in this category, see Magistrates’ Courts Act 1980, § 17, sched. 1.
\end{flushleft}
to deal with it summarily. The magistrates' court is not bound to com-
mit the case for trial on the prosecution's application (except when the
prosecutor is the Director of Public Prosecutions) but usually will do so.
The defendant is entitled to make representations, but has no right
to insist on summary trial. If the prosecution asks for summary trial by
the magistrates' court, the magistrates themselves may decide that the
case is more appropriate for trial in the Crown Court and commit it
there.\textsuperscript{18} The accused person (other than a juvenile) has an unqualified
right to insist that an either way case be tried in the Crown Court, al-
though he undoubtedly will be deterred by the knowledge that the
maximum penalty in the Crown Court invariably will be greater than
that available to the magistrates' court, and that judges in the Crown
Court are often more severe than are magistrates dealing with the same
offence. The accused person who knows he is guilty and is prepared to
plead guilty will see advantages in having the case dealt with by the
magistrates. The defendant who intends to contest the allegations may
well prefer trial by jury,\textsuperscript{19} although some defendants are believed to
insist on trial in the Crown Court, despite their intention to plead
guilty, for the sake of collateral advantages (such as a delay before the
sentence is imposed).\textsuperscript{20}

A major problem of recent years had been to adjust the court sys-
tem so that the number of defendants who exercise this right is not so
great as to produce impossible workloads in the Crown Court.\textsuperscript{21} In
practice, the overwhelming majority of cases in the either way category
are tried summarily by magistrates' courts.\textsuperscript{22}

\section*{B. Plea Negotiation}

Although plea bargaining in English courts was described by an
observer as early as 1820,\textsuperscript{23} it did not begin to receive serious judicial or

\textsuperscript{18} Magistrates' Courts Act 1980, § 21.
\textsuperscript{19} See A.E. BOTTOMS \& J.D. MCCLEAN, DEFENDANTS IN THE CRIMINAL PROCESS, ch.
\textsuperscript{4} (1976).
\textsuperscript{21} See REPORT OF THE INTERDEPARTMENTAL COMMITTEE ON THE DISTRIBUTION
OF CRIMINAL BUSINESS BETWEEN THE CROWN COURT AND THE MAGISTRATES' COURTS,
\textsuperscript{22} CMND. 6323 (1975).
\textsuperscript{22} Eighty one percent were tried summarily in 1981. CRIMINAL STATISTICS, ENGLAND
AND WALES 1981, CMND. 8668, Table 6.3 (1982). A total of 65,100 persons charged with
either way offences were committed to the Crown Court for trial. The statistics do not show
how many of these were committed on their own election, and how many on the initiative of
either the prosecution or the court.
\textsuperscript{23} For an early observation of plea bargaining in the English courts, see C. COTTU, DE
L'ADMINISTRATION DE JUSTICE EN ANGLETERRE (1820). Cottu describes a typical plea bar-
gain of the day:
academic attention until the early 1970's. The issue surfaced in a case in which an appellant claimed that he had been pressured into pleading guilty by the threat of a custodial sentence if he were convicted by the jury.\(^{24}\) The Court of Appeal laid down several rules\(^{25}\) which it has reiterated on a number of occasions since then.\(^{26}\) These rules prohibit a trial judge from giving any indication of his intentions in relation to sentence before the accused has entered a plea, unless he can say that the sentence will take the same form whether the accused pleads guilty or not guilty. The judge is not permitted to make any offer of a sentence conditional on a plea of guilty,\(^{27}\) nor is he allowed to indicate what sentence he will impose on a plea of guilty without indicating that he will impose the same form of sentence following a conviction by the jury.\(^{28}\) The judge is not permitted to indicate the *quantum* of a sentence (the term of imprisonment, the amount of a fine) in any event.\(^{29}\)

These strict limitations on what a judge may say in any pre-arraignment discussions are counter-balanced by the well-established principle that an accused person who pleads guilty normally may expect a reduction in what otherwise would be considered the appropriate

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It happens every day that a forger who is found in possession of forged notes or someone who has uttered forged notes is normally charged in two indictments. The first charges him with having forged or uttered false notes, and the second charges him with having in his possession false notes with the intention of uttering them. In this situation when the accused is in the dock ready to plead the prosecution counsel approaches the prisoner's counsel and asks him if his client would agree to plead guilty on the second indictment which doesn't involve anything more than transportation, promising him if he will, the prosecution will not proceed on the first indictment which charges a capital crime. If the accused agrees with this suggestion, he is immediately sentenced on the second indictment in accordance with his confession, and so far as the first is concerned the prosecution counsel tells the jury that he will not call any witnesses and in consequence the jury return a verdict of not guilty in the absence of evidence, and one should not think that such an incredible transaction takes place in secret. It takes place in open court in presence of the public, the judge and the jury. I even witnessed myself in Durham a most unusual case. Of three prisoners accused of uttering forged notes there was one, a woman, who could not be persuaded by any argument or exhortation either by her counsel or the prosecution counsel, or even by the judge himself, to agree on the arrangement which was proposed to her and to plead guilty on the charge of possessing forged notes with intent. As a consequence, they were obliged to try her on the charge of uttering and when this was proved she was condemned to death, but eventually her sentence was commuted to 14 years' transportation.  

*Id.* at 99 (author's translation).  
25. *Id.* at 360.  
27. "A statement that on a plea of guilty he would impose one sentence but that on a conviction following a plea of not guilty he would impose a severer sentence is one which should never be made." R. v. Turner, 54 Cr. App. R. 352, 360-61 (1970) (Lord Parker, C.J.).  
28. *Id.* at 361.  
29. *Id.* at 360.
sentence. A sentence will be reduced on appeal, in a guilty plea case, on the sole ground that the trial judge failed to give adequate recognition to the plea.30 The extent of the differentiation which should be made between the offender who is convicted by the jury and the offender who pleads guilty has not been defined in precise terms, but it normally would be between a third and a quarter of the theoretically appropriate sentence.31

The Court of Appeal no longer justifies what has become known as the “discount” by reference to the offender’s remorse or prospects of rehabilitation; the Court tends to recognize more frankly the importance of guilty pleas to the administration of justice and the saving of public expenditure.32 The Court, however, is not prepared to tolerate the imposition of a sentence that it considers disproportionate to the offence to punish an offender for pleading not guilty. For instance, if a sentence of imprisonment is imposed in a case which normally would be dealt with by a fine, because there has been a contest, the sentence will be reduced.33 The use of inappropriate language by a trial judge suggesting he has passed a disproportionate sentence because of the plea of not guilty also will lead to a reduction.34 There is a conflict of authority about whether an offender’s pleading guilty can justify the suspension of a sentence of imprisonment that otherwise would be immediate.35

The operation of plea negotiation in the Crown Court has been investigated in only one study of significance.36 These findings, which were acutely controversial, suggested widespread disregard of the rules established by the Court of Appeal. This view is supported by the occurrence of a number of appeals subsequent to the publication of this report in which clear departures from the rules were established.37 It is possible that the controversy arising from the publication of this report,
and the frequent repetition of the principles established in 1970, has diminished the extent of any direct judicial participation in any form of plea negotiation, but the "discount" for a plea of guilty remains effective, and there is some evidence to suggest that this practice is capable of being abused by defence counsel anxious to persuade a client to plead guilty by exaggerating the scale of the differences between the likely sentences.38

A major difference between plea negotiation in England and America is the limited involvement of the prosecution. The prosecution is not permitted to make any sentencing recommendation, and any appearance of direct intervention by the prosecution in the sentencing process is regarded as verging on the improper. It is the prosecution's duty, however, to outline the facts of the offence to the court on a plea of guilty, and this may lead to some negotiation of the version of the facts to be put before the judge: the defendant may indicate that he will plead guilty to the indictment if his account of the incident is accepted for the purpose of sentence. The judge is not necessarily bound by such an indication, but if the prosecution agrees with the defendant's version, the judge will have little justification for adopting a different view. Although an accused person pleading guilty who disputes the details of the prosecution evidence is entitled to present evidence after pleading to persuade the court to accept his version of the facts for the purpose of sentence,39 it is obviously more satisfactory from his point of view if the prosecution will agree to put the case forward on the same basis, rather than on the more serious basis which may be disclosed in the evidence available to the prosecution. In some cases, this process may go so far as to involve the prosecution dropping a charge and accepting a plea to a lesser offence. This is a highly visible act of which the judge may require an explanation,40 but where the graver charge is dropped, the judge must sentence on the basis that the defendant is innocent of the graver charge, however artificial the result may seem.41

C. Appellate Review of Sentences

One of the most important features of the English sentencing system is the provision for appellate review of sentences, particularly those passed in the Crown Court. Virtually every offender sentenced in the

38. J. BALDWIN & M. McCONVILLE, supra note 36, at 46-56.
Crown Court may appeal against his sentence to the Court of Appeal (Criminal Division).\textsuperscript{42} This court normally consists of the Lord Chief Justice, or an appeal court judge (Lord Justice), and one or two High Court judges. A significant number of offenders seek review of their sentences (4,571 in 1981), and in an average year the Court will deliver over 1,000 judgments in cases where the appeal is against sentence only.\textsuperscript{43}

Apart from providing for the correction of errors made by the trial judges, and in particular providing a restraint on excessive severity, the Court's work provides a case law of sentencing which serves as a system of judicially-evolved guidelines for trial judges. Appellate review provides a forum within the judicial system where questions of policy and principle can be raised and resolved, and contributes to the development of some measure of consistency in the sentencing of offenders for the more serious offences, without seriously diminishing the importance of judicial discretion in the individual case. Appellate review of sentences has been part of the English system since before any judge now sitting was born. It is accepted as an inevitable and helpful part of the sentencing process by trial judges. There is no evidence that English trial judges, unlike some American judges, resent the idea of appellate review of sentences.

1. \textit{Sentencing principles} — The principles evolved through the process of appellate review of sentences are too extensive and complex to be described in the course of an article,\textsuperscript{44} but a few general statements can be made. The decisions of the Court cover a wide range of sentencing issues: matters of general principle (when should sentences of imprisonment be ordered to run consecutively and when concurrently, how far is it permissible to distinguish between accomplices convicted of participating in the same crimes); the use of particular sentencing powers (when should a court order the payment of compensation by the offender to the victim, what criteria should be considered in making a recommendation for deportation); the sentencing of different categories of offenders (mentally disturbed offenders, dangerous offenders); and the effect of mitigation. Two topics of particular importance are the proper treatment of specific types of offences and the procedural aspects of sentencing.

A large proportion of the Court's decisions are concerned with ad-

\textsuperscript{42} See Criminal Appeal Act, 1968, ch. 19, § 10.
\textsuperscript{43} CRIMINAL STATISTICS, ENGLAND AND WALES 1981, CMND. 8668, Table 6.8 (1982).
\textsuperscript{44} For a detailed analysis, see generally D.A. THOMAS, PRINCIPLES OF SENTENCING (1979).
justing the lengths of sentences imposed in particular types of crimes. When considered collectively, these decisions provide useful indications to trial judges of what the Court of Appeal considers the appropriate sentence length for particular types of crime. Individual cases usually are not treated as binding precedents, but it is common for counsel to cite a group of similar decisions to indicate the “bracket” within which sentences for a particular type of case might be expected to fall. Occasionally the Court will formulate detailed guidelines: Recently the Lord Chief Justice, dismissing an appeal against a sentence of imprisonment for rape, indicated that a custodial sentence should be imposed in all cases of rape unless there were exceptional circumstances, and listed a series of aggravating factors which would lead to a sentence of greater than usual length. Other decisions indicate the length of sentence that should be imposed in a case of rape not affected by these factors. Another example of sentencing guidelines was given in 1980, when concern over the continuing rise of the prison population lead to a series of decisions in which the Lord Chief Justice indicated that the sentences conventionally imposed for certain types of nonviolent offence might be reduced. Although these guidelines were not as carefully thought out as they might have been, they have had some impact on the sentences passed in the trial courts: The prison population remains too large for the prison system to accommodate, it appears that at least the growth in the population has been contained for the time being.

Also of particular interest are those decisions concerned with the procedural aspects of sentencing. A whole range of procedural and evidential issues have been examined in recent years, such as the inferences that may properly be drawn from the jury’s verdict, the use in determining the culpability of a particular defendant of evidence given at the trial of his accomplice, and the procedures for settling disputed issues of fact relevant to sentence when the defendant has pleaded guilty. An increasingly sophisticated body of law is in the process of evolving in this context.

48. The sentenced population on June 30, 1981, was 36,669; on the same date in 1980 it was 36,637. See Prison Statistics, England and Wales 1981, CMND. 8654, Table 1(c) (1982).
2. *Limitations on Appellate Review* — Despite the great value of appellate review, the English system is subject to a number of limitations which reduce its effective scope. One of these is that only the offender may appeal, and the Court must not impose a sentence on appeal that is more severe than the sentence imposed in the trial court.\(^{50}\) As a result, the overwhelming majority of appeals are against sentences of imprisonment or other forms of custody.\(^{51}\) For this reason, the case law produced by the Court concentrates heavily on such questions as the proper length of sentences for particular categories of offence, the need to establish proper relationships in the sentences imposed on co-defendants, and the propriety of imposing consecutive sentences in particular circumstances. Issues relating to the proper use of noncustodial sentences — such as probation or community service — are less frequently examined, unless the Court decides to vary a sentence from imprisonment to a noncustodial measure. The case law of sentencing in England thus is relatively rich in detail in relation to all matters affecting custody, but thin and poorly developed in relation to the use of noncustodial measures.

There is some limited development of the case law in relation to noncustodial measures: In the past the Court has taken initiatives (for instance in the use of probation for habitual petty offenders) by substituting noncustodial measures on appeal for custodial sentences, but this practice is limited because many appellants originally sentenced to imprisonment have served part of the sentence before the appeal is heard (relatively few appellants are granted bail pending appeal). When the Court hears the appeal and decides that the custodial sentence was inappropriate, it often will be reluctant to substitute the noncustodial measure which should have been imposed by the trial court, because the offender already has undergone a more onerous penalty for the offence. If the Court thinks that an offender who has been sentenced to imprisonment should have been fined, there is a tendency not to impose the fine, but simply to reduce the length of the sentence to allow the offender's immediate release. The result of this kind of decision may be to give a misleading impression of what the Court really thinks the right sentence to be in such a case: the judgment of the Court may seem to indicate that the proper means of dealing with the case is a short term of imprisonment.\(^{52}\)

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50. See Criminal Appeal Act 1968, § 11(3).
51. Ninety-five percent of all applications for leave to appeal against sentence in 1981 were by persons sentenced to immediate imprisonment, borstal training, or detention. CRIMINAL STATISTICS, ENGLAND AND WALES, 1981 CMND. 8668, Table 6.9 (1982).
The only satisfactory way to provide a basis for the development of a case law of sentencing which would adequately cover the full range of sentencing options available to courts, and provide a restraint on the excessive leniency of some judges is to allow the prosecution to seek review of a sentence on the ground that it is too favourable to the defendant. The early proposals for legislation on appellate review of sentences recognized this, and many of the unsuccessful bills introduced in the late nineteenth century to create a court of appeal in criminal cases would have allowed the prosecution to challenge a sentence. Further, judicial opinion in the 1890’s was in favour of such a scheme.\(^5\) The legislation which was eventually enacted did not provide such a right of appeal, although it compromised to the extent of allowing the Court to increase the severity of a sentence when the offender appealed.\(^4\) Although this power was rarely used, it was thought to deter many potential appellants from seeking review of their sentences, and it was removed in 1966.\(^5\) Attempts have been made in recent years to amend the law to allow the prosecution to appeal against sentences (usually such proposals come to the fore in the light of a particularly controversial sentence), but it is clear that the present political climate is unfavourable — despite the acceptance of prosecution appeals as a normal part of the appellate system in other Commonwealth countries including Canada.\(^5\)\(^6\)

A second limitation on the effective contribution of appellate review to the development of sentencing principles has been (until recently) the lack of an adequate system of reporting sentencing decisions. All law reporting in England is selective, and is left to the initiative of various independent commercial publishers; there is no official reporter system. There are a number of general series of law reports: the Law Reports published by the Incorporated Council of Law Reporters (which are the most prestigious), the Weekly Law Reports, the All England Law Reports, and a number of specialist series of reports which deal only with cases related to particular topics and which include the Criminal Appeal Reports. These reports have given little attention to sentencing cases except for the relatively small number which deal with questions of law in the narrowest sense — the interpretation of statutory powers of sentence, for instance. Broader issues of sentencing policy largely have been ignored, except by a specialist jour-

\(^{53}\) See D.A. Thomas, Constraints on Judgment 75-93 (1979).
\(^{54}\) Criminal Appeal Act, 1907, §§ 4(3), 5.
\(^{55}\) Criminal Appeal Act 1966, § 4(2).
\(^{56}\) For the most recent Parliamentary Debate on this matter, see H.C. Debates 1982 vol. 23 cols. 815-33.
nal — the *Criminal Law Review* — which has carried summaries of selected sentencing cases together with commentaries. More recently a new series of reports devoted exclusively to sentencing decisions has been published and is becoming an important tool of the lawyer and sentencing judge.\(^57\) This series reports about 180 decisions each year — about one decision in six of those reached by the Court. The problem of reporting sentencing decisions is one which must be resolved if any system of appellate review is to have any impact on the sentencing process in the trial courts. Inadequate reporting means that the whole system of appellate review is a failure, so far as guidance to trial judge and the development of sentencing principles is concerned, but there is equally a danger of excessive reporting. If too many decisions are reported, most of which will be of a routine character, those that are of lasting or general significance will be lost in a mass of useless material, and as a result may be overlooked.

A third weakness of the English system of appellate review, which may be a temporary one, is a result of the continuing concern with the prison population. At one level, this has led to the development of a new sentencing strategy, but at another it has resulted in appeals being allowed where there is no real reason for criticizing the sentence imposed by the trial court, and often where the trial judge clearly has endeavoured to follow guidelines developed by the Court of Appeal in other cases.\(^58\) Often, the Court seems to see its role as that of a parole board, basing its decision on the behaviour of the appellant in prison while serving his sentence rather than on the question whether the sentence imposed by the trial judge was correct in principle and within the conventional limits for the kind of offence in question.\(^59\) This approach, which may in part be the result of the fact that many judges have served as members of the parole board, is a matter of grave concern. It is clearly capable of producing inconsistent and anomalous decisions at the Court of Appeal level, which confuse trial court judges as to the correct principle to be applied in a particular type of case. This approach also makes it impossible for lawyers to advise defendants whether they should appeal, with the result that an increasing number of defendants will appeal. This will in turn cause increasing delays in the determination of appeals. More seriously, inconsistency in the Appeal Court will undermine its authority in the eyes of the trial judges, who will come to regard the outcome of an appeal as a matter of

\(^57\) This new series is entitled Criminal Appeal Reports (sentencing) (cited as Cr. App. R. (S.)), Published since 1979 by Sweet and Maxwell, Ltd., one volume annually.


chance and look elsewhere for guidance on matters of sentencing principle. The tendency of the court to this kind of inconsistency is a relatively recent development, and there is every reason to hope that it will prove to be a temporary phase associated with general changes in sentencing practice and that the more predictable practice of the sixties and early seventies will be restored.

D. Parole

The idea that an offender might shorten his sentence by his behaviour while undergoing it, and that the promise of a reduction could provide an incentive to conformity both during the sentence and possibly afterwards, was well recognized in England by the eighteenth century. One sentence of that period — transportation (described below) — was subject to a variety of procedures that could lead to an offender securing his release from the obligation imposed by the sentence long before the term pronounced by the court had expired. The sentence that in the mid-nineteenth century replaced transportation — penal servitude — was in theory an indeterminate sentence, allowing release on licence at the discretion of the executive, although it never operated as such in practice: Release was allowed after a predeter\-mined portion of the sentence had expired. By 1948, when penal servitude and imprisonment were merged into the same form of sentence, the position was that any person sentenced to imprisonment was released automatically after serving two-thirds of the sentence. Although the language of the relevant statutory provision was (and remains) permissive rather than mandatory, in practice prisoners were considered to be entitled to be so released, unless ordered to lose remission as a sanction through the disciplinary machinery of the prison system. The only exceptions were: offenders sentenced to life imprisonment, who after 1948 were eligible for release on license at any time in their sentence without having served a stipulated minimum period, but who would remain on licence for the rest of their lives; young adult offenders sentenced to borstal training (roughly analogous to an American reform school) or to be detained in a detention cen-

60. See D.A. Thomas, Constraints on Judgment 31 (1979).
61. See infra note 92.
62. See Penal Servitude Act, 1853, 16 and 17 Vic., ch. 99.
64. See Criminal Justice Act, 1948, ch. 58, § 1.
66. The current provision is Criminal Justice Act 1967, § 61.
and persons who were sentenced to imprisonment while under the age of twenty-one. The last category normally were released after serving two-thirds of the sentence, but on licence, and there was power to continue to detain them after they had reached the two-thirds point.

The parole scheme now in operation was introduced in the Criminal Justice Act 1967. The justification for its introduction, in the words of the Home Secretary of the day, was that many offenders sentenced to imprisonment reach "a recognizable peak in their training at which they may respond to generous treatment, but after which, if kept in prison, they may go down hill." A more realistic explanation of its appearance on the statute book at that time was that its sponsors believed it would help to control the growth of the prison population which had been increasing steadily since the end of the second world war, and which was beginning to strain the capacity of the prison system.

The system introduced in 1967 involved a cumbersome three-stage procedure and made no concessions to the principles of openness, fairness, and accountability. An offender sentenced to imprisonment becomes eligible for release on licence after serving one-third of his sentence or twelve months, whichever is greater, and the scheme therefore effectively excludes about eighty percent of offenders sentenced to imprisonment, because their terms do not exceed eighteen months. The decision to release a prisoner on licence requires three stages of assessment: first by a local review committee attached to the prison where he is serving the sentence; then by the national Parole Board, operating through small panels of its membership; and finally by the Home Secretary, who has authority to deny release despite a recommendation by the Parole Board. The system inevitably takes several months to process a particular case, and the prisoner is not entitled to any hearing by a decision-maker at any stage (although he is entitled to an interview with one member of the local review committee) or to any explanation of the reason why he has been denied release. If he is released on licence he remains on licence, and subject to the possibility of being recalled to prison, until the expiration of the second third of his sentence. At this point the licence terminates and the offender is free of

68. Criminal Justice Act, 1948. Proposals to extend this scheme to offenders aged up to 26 were enacted in Criminal Justice Act, 1961, 20, but never implemented.
69. Remarks of the former Home Secretary, Mr. R. Jenkins, 738 Parl. Deb., H.C. (5th ser.) 70 (1966).
70. See Prison Statistics, England and Wales, 1981 Cmd. 8654, Table 4.2 (1982). Of 36,368 males sentenced to imprisonment in 1981, only 6,911 (19%) were sentenced to terms longer than eighteen months. Id.
restrictions except in certain cases of persistent offenders sentenced to extended terms of imprisonment, young prisoners sentenced to imprisonment before the age of twenty-one, and persons serving life imprisonment. The length of the parole selection process, coupled with the relative shortness of the majority of sentences of imprisonment, means that many prisoners released on licence are subject to licence for a relatively short period, in the majority of cases between three and twelve months.\footnote{71. The average length of licence of prisoners released on parole in 1981 was eight months and 29 days. Parole Board, Annual Report for 1981, H.C. 338 (1982).}

Despite the benevolent intentions of its promoters, the parole system has been a focus of criticism since its earliest days.\footnote{72. For a collection of papers reflecting some of the criticisms, see Parole: Its Implications for the Criminal Justice and Penal Systems (D.A. Thomas ed. 1974).}

The secrecy of the Board's processes, the absence of any effective participation by the prisoner, the lack of any clearly defined criteria for decision-making, and the fact that the ultimate decision is taken on behalf of a minister who is politically accountable — one of the few instances in the English criminal justice system where decisions are taken by elected officials — have combined to turn a substantial body of informed opinion against the system and in favour of its abolition or substantial modification. Criticism of the system has led to only one significant change in the legal framework. To expedite decision-making in selected cases, provision was made in 1972 for cases to be referred directly to the Home Secretary by the local review committee without the intervening step of review by the national Parole Board.\footnote{73. Criminal Justice Act 1972, § 35.}

About one-third of the cases where parole is granted are now handled under this procedure. The Board has resisted pressure for changes in its procedure in the direction of greater openness and accountability, and the courts have held that there is no legal obligation on the board to give reasons for declining to recommend release.\footnote{74. See Payne v. Lord Harris, [1981] 1 W.L.R. 754.}

Despite the strong body of opinion against the parole system in its present form the government recently has secured the passage of legislation which may significantly extend the scope of parole. The Criminal Justice Act 1982 contains a provision\footnote{75. Criminal Justice Act 1982, § 33.} enabling the Home Secretary to reduce the minimum period of twelve months which must be served before a prisoner becomes eligible for release, and thus extends the parole system to a much larger proportion of prisoners. This provision, one result of continuing anxieties surrounding the growth of
the prison population, has not yet been used. If the scope of the parole scheme is expanded without significant procedural changes, there can be little doubt that the problems which confront the parole system, particularly that of delay, will be gravely aggravated.

This is the context in which the modern English system of sentencing has evolved. The next section of the article describes briefly the evolution from the haphazard savagery of the late eighteenth century to the more refined procedures of the late nineteenth century, and then offers an account of the current law of sentencing, focusing on the powers of the courts and the mechanisms for their control.

II. THE SENTENCING PROCESS

A. The Historical Background

English judges did not assume anything like their modern role in the sentencing process until the middle years of the nineteenth century. The earlier common law allowed judges no formal discretion in felony cases, and an almost unlimited discretion in misdemeanor cases. Until the early nineteenth century, the standard penalty for all felonies was death. The severity of this system was mitigated to some extent, but in an arbitrary and capricious manner, by two developments, which represented the first stages of the establishment of judicial discretion as the central feature of the sentencing process.

The first of these developments was the intervention and elaboration of the concept of benefit of clergy. By this means an expanding category of offenders was entitled, on conviction for a capital offence, to be discharged without any substantial penalty upon demonstrating literacy by reciting the "neck verse," which most potential convicts would learn by heart.76 The extension of capital punishment on the English statute book during the eighteenth century was accomplished as much by the removal of benefit of clergy as by the enactment of new capital provisions.77 This tendency was balanced by the growing practice of granting a judicial reprieve or temporary stay of execution, to enable a prisoner under sentence of death to petition the king for a conditional pardon, under which the prisoner would be pardoned on condition of transportation to one of the colonies for a specified minimum period of time — seven, fourteen, or twenty-one years, or life.78

77. Id. at 469-71.
Judicial discretion in sentencing in felony cases originated in the form of the decision whether to reprieve the offender to enable him to petition for mercy — which in many cases, but not all, resulted in the expected pardon — or to leave the offender for execution, in which case he would be executed within a short time after conclusion of the assizes. The system did not provide an appeal during this period, and offered only a limited opportunity to petition for mercy. The arbitrariness of this scheme was as obvious to contemporary observers as it has been to later historians. One of the earliest discussions of judicial discretion in sentencing, and the problems of containing disparity within reasonable limits, concerned judicial discretion in this sense.

The second major development occurred in the early nineteenth century, when the campaign for the repeal of the capital statutes gained momentum, and the structure of the penalty system underwent transformation (between 1825 and 1840). In this relatively short period the foundations of the new penalty structure were laid, and the basis of the modern role of the judiciary in the sentencing process was established. Three points are worth making. First, parliamentary and public debate at this time focussed on the reduction and abolition of the death penalty, rather than on the creation of a satisfactory alternative scheme of penalties. The piecemeal process by which the death penalty was abolished, one offence at a time, meant that the nature of the penalty that replaced it owed more to the politics of that particular debate than to any overall scheme of rationalisation. Determined opposition to the abolition of the death penalty would result in the substitution of the most severe sanction under the new system: mandatory transportation for life. Where there was no serious opposition to abolition, the proponents of change would propose, and Parliament would

79. Eighteenth century practice is neatly captured in the preamble to a statute enacted in 1768 to expedite the procedure of transportation. The preamble recited that "Whereas several offenders, convicted of crimes for which they are by law excluded from benefit of clergy, are reprieved by the judge who tries them, and recommended by him to His Majesty: who generally, on such recommendation, is graciously pleased to extend the same to them, on condition of transportation to some of His Majesty's colonies and plantations in America for life, or for the term of fourteen years," but pointed out that as the convict had to remain in custody until the next assizes when the order for transportation could be made "such offenders lie several months in gaol after conviction whereby they are rendered less capable of being useful to the publick in the parts of America to which they are sent." Statute of 1768, 8 Geo. 3, ch. 5. The Act authorized the judge who had granted the reprieve to make the order for transportation outside assizes without waiting for the next session.

81. See Hay, Property and Authority and the Criminal Law, in Albion's Fatal Tree (Hay ed. 1975).
82. S. Romilly, supra note 80 at 24-25.
enact, a less severe penalty. As a result, the new penalty structure which emerged in this critical period of change was devoid of any appearance of logic or principle, a fact which was not overlooked by reformers of the period.84

The second significant point is that the alternative penalty which was replacing the death penalty on the statute book (having already largely replaced it in judicial and administrative practice through the system of conditional pardon) — transportation — was by that time obviously itself in the last stages of its existence. Transportation under conditional pardon following conviction of a capital offence originated in the early seventeenth century, and was well enough established by 1679 to be recognised in the Habeas Corpus Act.85 As a sentence imposed by the court itself (as opposed to a term of a conditional pardon), transportation became firmly established by the Transportation Act 1717. After the loss of the American colonies in 1776 caused a temporary halt to transportation, the practice was resumed with the discovery of Australia, and continued for another seventy-five years. By the 1830's, when the reduction of the death penalty was reaching its climax, the system of transportation was scrutinised and thoroughly condemned by a parliamentary committee.86 Despite doubts about the continuing viability of transportation raised by this report, the new penalty structure was created in terms of transportation. The modern structure of maximum terms of imprisonment in English criminal law is to a large extent directly derived from the terms of transportation established at this time.

The third noteworthy aspect of this period is that informed opinion of the time opposed the establishment of judicial discretion as the centrepiece of the sentencing structure. The example of the operation of judicial discretion under the eighteenth-century capital statutes was clear to the reformers, who were heavily influenced by the observations of Romilly.87 The Criminal Law Commissioners, who laboured for fifteen years to produce a draft criminal code with a rational and coherent penalty structure, were not attracted by the idea of wide-ranging judicial discretion. They preferred a system very much closer to the concept of the presumptive sentence than to the modern English sen-

84. See Fourth Report of Her Majesty's Commissioners on Criminal Law (168) (1839).
86. Select Committee on Transportation, H.C. 669 (1838).
87. S. Romilly, supra note 80, at 24-25.
tencing system.\textsuperscript{88} Their ideas on the sentencing structure disappeared from sight with their draft criminal code, which ran into political opposition in 1854 and was abandoned.\textsuperscript{89} The establishment of judicial discretion came about almost by accident. Many of the early bills which were introduced to replace the death penalty with a term of transportation made no provision for discretion in the determination of the term of transportation. Following the pattern of the Transportation Act 1717, which remained on the statute book until 1827, reform bills of the early nineteenth century usually provided transportation for a specified period. Parliament resolved disagreement about the proposed terms of transportation by substituting a formula that allowed transportation for not more than that period, and thus at the discretion of the court.\textsuperscript{90} In some cases, statutes originally enacted with provisions requiring transportation for a fixed period were subsequently amended to allow judicial discretion.\textsuperscript{91}

By the middle of the nineteenth century, the foundations of the modern sentencing structure could be discerned. Transportation had given way to penal servitude, a sentence which was in law, if not in practice, sharply distinguished from imprisonment;\textsuperscript{92} judicial discretion

\textsuperscript{88} Whilst the gradations of peremptory punishment to be inflicted without the power of mitigation are necessarily limited, the degrees and shades of guilt are infinite, and it rarely happens that a crime defined either simply or with aggravations does not admit of varieties which require distinction in respect of punishment: wherever the law constitutes an offence, which in its circumstances admits of great variety as to the degree of guilt, any certain fixed punishment is liable to great objection. If such a penalty were adapted to the highest degree of atrocity of which the crime was capable it would be far too severe, and the preventive energy of the law would be weakened by the operation of the principle already adverted to; were such fixed punishment accommodated to the slightest of the cases comprehended by the law, its preventive force would also be diminished for want of means of punishment adequate to the nature of the crime; were a fixed medium punishment to be appointed, it would partake of both defects. The only practicable mode of surmounting the difficulty seems to be by the constitution of limits sufficiently adapted to the extremes, leaving the various innumerable intermediate cases which cannot be provided for by any set definitions, to the exercise of judicial discretion. Such a course of proceeding is to a small and partial extent open to objection on the score of uncertainty of punishment. This is, however, an imperfection necessarily incident to every system of human law, and the only practical inference to be derived from the consideration is, that endeavour ought to be made to confine the mischief within the narrowest practicable limits.

\textsuperscript{89} D.A. Thomas, \textit{The Penal Equation} 34 (1978).
\textsuperscript{90} Id. at 11-18.
\textsuperscript{91} Id.
\textsuperscript{92} Penal servitude was originally intended as a form of forced labor without necessarily
had become firmly established in sentencing in all but the few remaining capital offences; and a range of maximum penalties, originally established as terms of transportation and then converted to penal servitude, had been placed on the statute book. Despite their lack of rationality, these features were entrenched in the Consolidation Acts of 1861, which were to constitute the central core of English criminal law for the next hundred years, until the beginning of the current period of criminal law reform in the 1960's.

The later part of the nineteenth century saw two principal developments. Debate on the sentencing structure during this period focussed on the problem of controlling sentencing disparities on the part of the judges. This debate was made more energetic by the development of wide and obvious differences in the treatment of persistent offenders, who had become more conspicuous to sentencers as a result of the successive decline of the capital statutes and the system of transportation — "the stoppage of that great sewer which for so many years carried away the dregs of our population." A variety of suggestions for the control of judicial sentencing discretion were canvassed, many of them embrionic forms of ideas that have been revived in the current American debate on sentencing reform. Sentencing commissions, the development of conventions through informal and formal processes of consultations among judges, sentencing conferences, appellate review, and a crude form of the "guidelines" system based on a statistical analysis of actual sentencing practice, all had their advocates.

94. For an account of the currents of debate in the late nineteenth century, see D.A. Thomas, Constraints on Judgment (1979).
100. See Crackenthorpe, Can Sentences be Standardised?, 47 The Nineteenth Century 103 (1900). Crackenthorpe proposed that six judges should be invited to indicate "what are the average sentences he would pronounce, apart from special circumstances, on an adult male who had been convicted of those offences which most commonly recur," and a similar exercise would be carried out for hypothetical offenders with several prior convictions. The
This period saw the publication of what is almost certainly the first attempt at a systematic textbook on sentencing. By the turn of the century, appellate review of sentences as a means of securing some measure of consistency had become the idea most attractive to judicial and political opinion, and it was eventually established in 1907, although its real impact was not felt for several decades.

The other main current of thought during the late nineteenth century was the rehabilitative ideal. From 1870 onwards the English statute book began to reflect the idea that criminals either should be reformed by training or detained for the protection of society. The impact of these ideas on the legal structure of sentencing became obvious in 1907 with the enactment of the Probation of Offenders Act and in the following year with the Prevention of Crime Act, creating the concepts of borstal training and preventive detention of habitual offenders. The marked distinction between English and American sentencing law which began to emerge at this time was the separation in England of punitive and therapeutic concepts into different forms of sentence. Possibly as a result of the unambiguously punitive terminology of long-term incarceration — known as penal servitude until 1948 — the idea of incarceration as a rehabilitative process was rejected, except in special institutions under special sentencing structures. Imprisonment and penal servitude remained firmly punitive in concept and judicial sentencing practice, and also remained determinate (subject to the practices of remitting a predetermined portion of the sentence for good behaviour) until the introduction of the parole system in 1967.

The rehabilitative ideal was reflected in a variety of special forms of sentence, which were added to the statute book one by one over a period of sixty-five years: probation (imposed in lieu of any other

"average of those averages" would then form the basis of "a table of units forming an approximate scale of punishment which would be *prima facie* appropriate to certain named crimes." Judges would retain discretion to determine the sentence to be imposed in any actual case; but "any deviation from the normal limits would have to be justified by him in open court, if only out of respect for the table."


102. Criminal Appeal Act, 1907. For the background to the Act, see D.A. Thomas, *Constraints on Judgment* 75-93 (1979).

103. Probation of Offenders Act, 1907.


105. See infra note 130 and accompanying text.

106. Originally introduced for offenders in general by the Probation of Offenders Act, 1907, the legislation establishing probation was re-enacted in the Criminal Justice Act, 1948, and subsequently was consolidated in the Powers of Criminal Courts Act 1973, §§ 2-13.
sentence); borstal training;\(^{107}\) corrective training\(^{108}\) (abolished in 1967); hospital orders,\(^{109}\) which together with various forms of preventive confinement such as preventive detention for habitual offenders,\(^{110}\) underwent various modifications of form and name to become the current extended sentence;\(^{111}\) and the judicially evolved use of life imprisonment as a means of dealing with dangerous offenders.\(^{112}\) Until relatively recently, the two systems have been kept distinct in the legal framework. Most forms of sentence, both in their legislative form and in the judicial concept of their proper scope, have been identifiable either as punitive sentences governed by concepts of proportionality, just deserts, and culpability, or measures — whether therapeutic or preventive — based on a prediction of the offender’s likely future behaviour and not limited by reference to his culpability. The result has been the evolution of a two-sided sentencing system, through both legislative and judicial development, offering the sentencer the choice between a punitive sentence, reflecting the concepts of desert, and a forward-looking sentence resting on an assessment of the offender’s needs.\(^{113}\) The existence of appellate review of sentences has provided a forum, subject to the limitations discussed earlier, for the articulation of principle in both of these contexts — on the one hand the development of a series of conventions regulating the use of imprisonment and the determination of the lengths of sentences of imprisonment, informally but misleadingly known as the tariff, and on the other hand (but to a lesser extent) a series of criteria for the use of therapeutic sentences such as borstal training.

B. The Modern Legal Framework

1. **Imprisonment** — Although the maximum terms of imprisonment that may be imposed for the most common criminal offences were established in the nineteenth century as terms of transportation or penal servitude, most of the statutes under which sentences of imprisonment are imposed have been the subject of revision within the last twenty

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\(^{107}\) Borstal training was introduced by the Prevention of Crime Act, 1908, §§ 1-9, amended by the Criminal Justice Act, 1948, § 48, and the Criminal Justice Act, 1961, §§ 11-13, and is now to be abolished by Criminal Justice Act 1982.

\(^{108}\) Corrective training was introduced by the Criminal Justice Act, 1948, § 21, sched. 3, and abolished by the Criminal Justice Act 1967, § 103(2), sched. 7.

\(^{109}\) Hospital orders were introduced by the Mental Health Act, 1959, §§ 60-80.

\(^{110}\) Preventive detention was introduced by the Prevention of Crime Act, 1908, § 10, and substantially amended by the Criminal Justice Act, 1948, § 21, and by the Criminal Justice Act 1967, §§ 37-38.


\(^{112}\) *See* D.A. Thomas, *Principles of Sentencing* 300-07 (1979).

\(^{113}\) *Id.* at 8-14.
years. The Theft Act 1968 was designed to provide traditionally high maximum penalties, within which judicial discretion would set the operating levels,\textsuperscript{114} and the same principle was adopted in the penalty structure of the Criminal Damage Act 1971.\textsuperscript{115} The Sexual Offences Act 1956 is a consolidation of nineteenth-century statutes, and retains the anomalies of that period: for example, the maximum penalty for indecently assaulting a male person is ten years, while indecent assault on a female over thirteen is punishable with a maximum of two years. Many of the other statutes under which sentences of imprisonment are commonly imposed (including the Misuse of Drugs Act 1971) have been the subject of parliamentary consideration in modern times. The only part of substantive criminal law contributing significantly to the prison population that has not been the subject of legislation in the last twenty years is that of personal violence (Offences against the Person Act 1861). Proposals for revision of the relevant legislation, and its penalty structure, are under discussion at the present time.\textsuperscript{116}

In practice, the maximum penalties provided by legislation have little impact on the day-to-day operation of the sentencing process,\textsuperscript{117} which is much more closely regulated by the practice of the Court of Appeal and by conventions shared by the judiciary. With the exception of a few offences for which the maximum sentence is set at a level which is lower than many judges would wish, the majority of sentences imposed are far below the permitted maximum sentence. In a system empowering courts to impose life imprisonment for a wide range of offences, the average length of sentence imposed for indictable offences in the Crown Court in 1981 was 17.9 months.\textsuperscript{118} Average sentences in particular cases reflect this gap between the statutory maximum and routine practice.\textsuperscript{119}

The mechanism by which the lengths of sentences of imprisonment are controlled in practice is known as "the tariff." Although this term was first applied to sentencing by a high court judge,\textsuperscript{120} and is at least a century old in this usage, it is not favoured by judges, although

\begin{itemize}
\item \textsuperscript{114} See Criminal Law Revision Committee, Eighth Report, Theft and Related Offences, CMND. 2977, ¶¶ 10-12 (1966).
\item \textsuperscript{116} See Criminal Law Revision Committee, Fourteenth Report, Offences Against the Person, CMND. 7844 (1980).
\item \textsuperscript{117} See Advisory Council on the Penal System, Sentences of Imprisonment 34 (1978).
\item \textsuperscript{118} See Criminal Statistics, England and Wales 1981, CMND. 8668, Table 7B (1982).
\item \textsuperscript{119} See id.
\item \textsuperscript{120} See D.A. Thomas, Constraints on Judgment 65 (1979).
\end{itemize}
it occasionally slips into judgments of the Court of Appeal. The objection to the use of this term is that for some it implies that the imposition of a sentence of imprisonment is nothing more than the mechanical application of a fixed scale, without the need for discretion or the consideration of the individual circumstances of the offender. In practice, neither of these suggestions is generally true of the imposition of sentences of imprisonment, and the term “tariff” is an unfortunate one.

The term conveys two ideas: (1) a set of conventions regulating the relationship between particular classes of crime and corresponding sentences, descending in some cases to a high level of detail; and (2) a set of more general principles relating, for example, to the treatment of multiple offences and personal mitigation.\(^{121}\) The unifying concept is that the application of the conventions and the general principles will produce a sentence reflecting the culpability of the offender in relation to the culpability of other offenders.

The origins of the tariff in the broad sense can be traced back at least to the late nineteenth century.\(^{122}\) They evolved as unwritten conventions imparted to the newly appointed judge in informal conversations and consultations with his more experienced brethren. A more formal tariff emerged in an attempt at the turn of the century to articulate an agreed set of conventions for sentence lengths, in a memorandum which was to be circulated among judges.\(^{123}\) Later, the development of appellate review of sentences, in 1907, was expected to provide a means of harmonising the use of imprisonment by sentencer.\(^{124}\) The precise impact of these mechanisms is difficult to assess, because until relatively recently the decisions of the Court of Appeal on sentencing matters have been sparsely and unsystematically reported, and have not been the subject of academic analysis. The maintenance of sentence lengths at a particular level probably owes as much to the older processes of informal consultation and instruction of junior judges by their seniors as it does to the formal processes of appellate review, although the appellate court clearly provides ceilings beyond which sentence lengths will not go, and identifies the criteria which serve to distinguish the graver from the less serious versions of the same offence. The informal processes described by judges of the late nine-

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teenth century\textsuperscript{125} have long since been supplemented by formal sentencing conferences for sentencers of varying levels of seniority, but the decisions of the Court of Appeal play an important part in the examination of sentencing problems at these conferences.\textsuperscript{126}

A comparison of the sentences approved by the Court of Appeal for a particular class of crime with the statistics of sentences imposed for that class of crime in the Crown Court suggests that the Crown Court is operating generally at a significantly lower level of sentence than the Court of Appeal would allow. One reason for this disparity is that there is no mechanism for the upward revision of sentences that in the eyes of the Court of Appeal appear too lenient.\textsuperscript{127}

2. Young Adult Offenders: Custodial Sentences — Since 1908 English law has provided special forms of sentence for offenders in what has come to be known as the young adult offender group. The age limits for this group have varied from a minimum of fifteen to a maximum of twenty-three; since 1961 the age range has been from fifteen to twenty-one. These special sentencing provisions were designed in the first instance to provide a therapeutic alternative to imprisonment for young adult offenders considered likely to become recidivists.\textsuperscript{128} Until 1961 imprisonment remained generally available, subject to a general legislative requirement that a court should not impose imprisonment on an offender in this age group unless there was no satisfactory alternative.\textsuperscript{129} The alternative form of sentence, known as borstal training,\textsuperscript{130} was imposed without any term specified by the court. An offender sentenced to borstal training would be required by statute to serve a minimum of six months and a maximum of two years in custody in a borstal institution, followed by a period on licence with the possibility of a further period in custody if he were recalled.\textsuperscript{131} This sentence was treated by the courts as a therapeutic measure which was not limited by

\textsuperscript{125} See Stephen, Variations in the Punishment of Crime, 2 The Nineteenth Century 75-93 (1885).
\textsuperscript{126} Personal experience of author.
\textsuperscript{127} See Thomas, Increasing Sentences on Appeal—a Re-Examination, 1972 Crim. L. Rev. 288.
\textsuperscript{128} See Advisory Council on the Penal System, Young Adult Offenders ch. 6 (1974).
\textsuperscript{129} Criminal Justice Act, 1948, § 17(2), now re-enacted as Powers of Criminal Courts Act 1973, § 19(2).
\textsuperscript{130} The first such institution was located outside of Rochester, Kent, close to the village of Borstal, from whence its name was derived. For an account of the development of borstal training, see R.G. Hood, Borstal Reassessed (1965).
\textsuperscript{131} Prison Act, 1952, § 45(2), (4). Until 1961, the minimum was nine months and the maximum was three years. See Criminal Justice Act 1961, sched. 6.
the concept of just deserts and proportionality. The Court held that a sentence of borstal training could be imposed for an offence for which the maximum term of imprisonment was less than the minimum period of detention under a sentence of borstal training, and that a sentence of borstal training could be imposed for an offence for which a sentence of imprisonment would not have been imposed at all.

The use of borstal training by the courts was complicated by the enactment in 1961 (effective in 1963) of legislation designed to encourage courts to use borstal training rather than imprisonment unless the offence was so grave that a sentence of borstal training would fail to reflect societal concern with the offence. The effect of the legislation was to raise the minimum age for imprisonment to seventeen (previously it was fifteen), and to prohibit a court from imposing a sentence of imprisonment for any period between six months and three years. Parliament's original intention was to phase out the shorter sentences of imprisonment as detention centres for short-term custody of offenders in this age group became available, but these centres were not built on a sufficiently large scale for this intention to be realised.

The result of this legislation was that borstal training came to be seen by the courts in two different lights: (1) as a therapeutic sentence, imposed for the benefit of the offender, and therefore not subject to the constraints of proportionality; and (2) as a punitive sentence imposed as a deterrent on offenders who were not necessarily in need of training but who had committed an offence of substantial gravity which (before 1963) would have attracted a sentence of between six months and three years. As a result of this duality in the role of borstal training, the courts have applied two different sets of principles to the sentence, according to the purpose for which it was imposed in the particular case. A sentence which would be considered appropriate if imposed as a treatment measure would be varied if the appellate court felt that it had been imposed as a punitive measure, or vice versa. Declining confidence in the idea of custodial treatment of offenders, reflected in disappointing reconviction rates for discharged borstal trainees has led to

138. Sixty-five per cent of trainees between 17 and 20 were reconvicted within two years of discharge in 1978, compared with 69% of young prisoners discharged from prison.
a re-examination of the system of custodial sentences for young adult offenders by the Advisory Council on the Penal System, who reported in 1974.\textsuperscript{139}

Legislation which will abolish borstal training and imprisonment and replace them with a new form of sentence ("youth custody") has now been enacted and is expected to become effective in 1983.\textsuperscript{140} The form of the new sentence will resemble that of a sentence of imprisonment, except that there will be no power to suspend a sentence of youth custody corresponding to the power to suspend a sentence of imprisonment. The sentence for the most part will be served in "youth custody centres" (the old borstal institutions renamed).

3. **Noncustodial Sentences** — In the late nineteenth century, the idea of a noncustodial sentence had not gained much of a foothold in the English sentencing system. "I have wished often that some kind of punishment could be invented for such offenders which, while making them feel that crime cannot be committed with impunity, might save them from the degradation of prison associations. That, I fear, is a hopeless prospect," wrote E.W. Cox in his textbook on sentencing in 1877.\textsuperscript{141} Fines were for the most part available only in cases of misde-meanour, and the only means of dealing with a felon without imprisonment was to bind him over to come up for judgment — strictly speaking a procedural device for postponing sentence. The use of this procedure in conjunction with supervision by volunteers led to the creation of the probation order as a statutory measure to be imposed instead of a sentence,\textsuperscript{142} which was followed, over a period of seventy years, by the enactment of a number of procedures for dealing with offenders without incarceration.\textsuperscript{143} The development of noncustodial measures, together with a series of changes in the law that made fines available, instead of or in addition to imprisonment, for all other offences except murder and treason, resulted in the majority of offenders being dealt with without custody.\textsuperscript{144}

\textsuperscript{139. ADVISORY COUNCIL ON THE PENAL SYSTEM, YOUNG ADULT OFFENDERS 21-27 (1974).}
\textsuperscript{140. Criminal Justice Act, 1982.}
\textsuperscript{141. E.W. COX, PRINCIPLES OF PUNISHMENT 44 (1877).}
\textsuperscript{142. Probation of Offenders Act 1907.}
\textsuperscript{143. See ADVISORY COUNCIL ON THE PENAL SYSTEM, NON-CUSTODIAL AND SEMI-CUSTODIAL PENALITES (1970).}
\textsuperscript{144. In 1981, 22\% of offenders convicted of indictable or either way offences received custodial sentences. See CRIMINAL STATISTICS, ENGLAND AND WALES 1981, CMND. 8668, Figure 7.5 (1981).}
Despite the popularity of noncustodial measures, the law and practice relating to them is not free from controversy or difficulty, and a review of the major forms of measure is appropriate. Although almost all forms of noncustodial measure derive from a single statute, the Powers of Criminal Courts Act 1973, they were enacted in a series of stages: in 1907, and 1948, with further measures added in 1967 and 1972, and the recently implemented provision for sentences held partially in suspense in 1977. The appearance of coherence presented by the consolidation of the relevant statutory provisions in Powers of Criminal Courts Act 1973 conceals the fact that they reflect ideas which were current at different times, and are therefore to some extent in conflict with each other. Another result of the piecemeal development of noncustodial measures are numerous minor legal differences which confuse the practitioner and the offender alike.

The process by which new noncustodial measures have been added to the statute book has been a haphazard one, reflecting a general optimism that any new form of sentence can do little harm and may do some good, but seldom attempting to resolve questions relating to the relationship of the new measure to those in existence already, or to identify the underlying purpose and philosophy of the new measure. The result is that several noncustodial measures have produced effects exactly opposite to those that were intended, and others have suffered seriously from the lack of any agreed view of their proper scope and application.

a. **Probation** — Probation was the first statutory form of disposal to recognise the concept of treatment. It developed out of the practice of binding an offender in a recognizance to come up for judgment when called (in other words, postponing sentence), on the basis that the offender would accept the supervision of a volunteer social worker. It was given a limited statutory recognition in 1887, and made available on a broader basis in 1907. The legislation was re-enacted in 1948 with minor amendments, and then re-enacted again in the consolidating Powers of Criminal Courts Act 1973.

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146. Probation of Offenders Act, 1907.
151. See generally 1982 CRIM. L. REV. 288 (discussion of the partly suspended sentence).
152. Probation of First Offenders Act, 1887.
The court makes a probation order instead of sentencing the offender, and no other sentence may be imposed for the same offence, although the offender may be ordered to pay compensation or may be disqualified from driving. For the period of the order (a minimum of six months and a maximum of three years), the probationer is under the supervision of the probation officer, and must comply with any requirements that have been inserted in the order (and to which he must express his consent). If he fails to comply with the order's requirements, or commits a further offence, he may be brought before a court and sentenced for the original offence as if he had just been convicted of it (the court has all its original powers and may make a further probation order if it chooses to do so). Probation officers exercise considerable discretion in deciding whether to take court action against a probationer who fails to comply with the requirements of the order. If there is a further conviction, however, the decision to initiate proceedings for the original offence will rest with the court.

For many years, probation was the predominant noncustodial measure, but its use, in both relative and absolute terms, has dropped considerably over the last ten years. A number of reasons are advanced for this decline: the growing number of alternative noncustodial measures (including suspended sentences of imprisonment, available since 1968, and community service orders, available generally since 1975), a decline in confidence in the idea of rehabilitation through supervision (reflected in reconviction rates not significantly better than those for custodial sentences), and the controversies within the probation service surrounding the identity and purpose of the service itself (which have emerged in a number of disputes, some of which have affected the work of the courts).

b. Suspended Sentences — Suspended sentences were introduced in the Criminal Justice Act 1967, effective in 1968. The concept of a suspended sentence is distinguished from probation in English law in a

156. Id. §§ 2(4), 35.
159. See Lawson, The Probation Officer as Prosecutor (1978).
161. In 1969, 96,000 persons were subject to probation orders or analogous measures. By 1970, against the background of a substantial rise in the number of persons convicted, the number of persons subject to such measures had declined to 62,000. See Criminal Statistics, England and Wales 1979, CMND. 8098, paras. 6.9, 6.10 (1980).
number of important respects. The law indicates that a suspended sentence is to be treated in all respects as a sentence of imprisonment. The measure should not be used unless the court would be prepared to impose effective imprisonment in the absence of a power to suspend, and the Court of Appeal on many occasions has indicated that the fact that a sentence is to be suspended does not mean that it may be any longer than if it were to take effect immediately. These restrictions emphasize the fact that suspended sentences were introduced in the hope that they would help to contain the growth of the prison population. Many critics agree that they probably have had the opposite effect, or at least that whatever savings they have produced in one kind of case have been offset by increases in the use of imprisonment in others as a result of their availability.

The procedure of suspending a sentence of imprisonment requires the sentencing court first to comply with all statutory rules and judicial conventions governing the imposition of an effective sentence of imprisonment. In particular the court must consider and reject other forms of sentence such as fines and probation. Having decided that imprisonment is the appropriate sentence, it must then determine the length of the sentence, considering all relevant factors, such as the gravity of the offence and the mitigating factors that apply to the particular offender. When this point has been reached, if the sentence is for less than two years, the court may suspend the sentence for a period of between twelve months and two years (the operational period).

The logical difficulty of complying with this set of principles is that if a sentencing court complies properly with every stage in the process, it will have exhausted all relevant considerations before the question of suspension is reached. The court will then be forced either to take some factors into account for a second time, or to invent some new criteria. Despite these logical difficulties, the suspended sentence has become a popular measure with both the Crown Court and magistrates' courts. The over-popularity of the suspended sentence has been one

164. See the cases discussed in D.A. Thomas, Principles of Sentencing 240-41 (1979).
167. In 1981 38,400 suspended sentences were imposed, 85% of which were of six months or less. Criminal Statistics, England and Wales 1981, Cmd. 8668, Table 7.21 (1982). The statistics for the decade 1969 to 1979 show a decline in the use of the suspended sentence, however, partly because from 1968-72 the suspension of sentences of less than six months imprisonment was mandatory in a high proportion of cases, and partly because sentencers have been frequently warned of the dangers of excessive use of suspended sentences.
of the reasons why it probably has failed to contribute to the contain-
ment of the prison population growth rate. There is a body of impres-
sionistic and anecdotal evidence which suggests that some courts,
contrary to the declared policy of the appellate court, have imposed
suspended sentences with terms longer than would have been imposed
if the sentences were to take effect immediately, and then, when the
offenders committed additional offences, imposed further immediate
terms of equivalent length and ordered the two terms to be served con-
secutively. Consequently, an offender who, for example, might have
received two immediate terms of one month, with an interval between,
has eventually served two consecutive terms of six months for the same
offences. This problem has been aggravated by the tendency of some
courts to use suspended sentences where an immediate sentence would
not have been contemplated, despite the statutory rule against so doing.

The tendency of the suspended sentence to lead at least in some
cases to inflated sentences of imprisonment has been enhanced by the
strict enforcement policy laid down in the statute and reinforced by the
appellate court. The legislation provides that if an offender who is sub-
ject to a suspended sentence is convicted of a further offence punish-
able with imprisonment within the operational period, the original
sentence must be activated unless the court dealing with the matter
considers it unjust to do so having regard to matters arising since the
suspended sentence was imposed, in which case it may make a number
of alternative orders. This statutory rule is backed up by a judicially
created rule stating that when an offender is ordered to serve a sus-
pended sentence, the sentence normally should be consecutive to any
sentence that is imposed for the later offence, subject to a reduction if
the result is an excessively long aggregate sentence.

c. Partly Suspended Sentences — A variation on the theme of the
suspended sentence is the partly suspended sentence. Legislation em-
powering courts to impose a sentence of imprisonment while requiring
the offender to serve only part of it with the rest held in suspense was
enacted in 1977, but did not come into effect until 1982. The stat-
ute allows a court which imposes a sentence of between six months and

168. See Bottoms, supra note 166, at 6-7.
173. CRIMINAL STATISTICS, ENGLAND AND WALES 1981, CMND. 8668, Table 7.29 (1982).
two years to require the offender to serve a portion of the sentence (between one quarter and three quarters), after which he may be released, subject to the liability to serve the balance of the sentence if convicted of a further offence during the whole term of the original sentence. The idea of this measure is to allow a court to mark the gravity of an offence, or to make a gesture of general deterrence with a substantial sentence, while requiring the offender (probably a person who has not previously been incarcerated) to serve only such period in prison as the court considers sufficient to provide a personal deterrent to him. The government expects this new measure to contribute to the relief of the prison population by effectively shortening some sentences. Most commentators, however, believe it probably will have exactly the opposite effect, as judges will find it more attractive than the fully suspended sentence, and will use it in cases where previously they would have used a fully suspended sentence.

In addition to this difficulty, the new measure is extraordinarily complicated to apply, particularly in light of the relationship between partial suspension, parole, remission, and credit for time served prior to trial. The interaction of the various provisions, which clearly has not been fully thought through by the proponents of this measure, is such that cases can arise in which the offender would be better off with an immediate sentence than with a partly suspended sentence of the same nominal length, and others in which an offender would be better off with a partly suspended sentence than a fully suspended sentence of the same nominal length.

Despite these doubts, the Parliament has recently enacted legislation that will make the partly suspended sentence more widely available, in particular to magistrates' courts. These provisions became effective early in 1983.

d. Community Service — The community service order, widely available since 1975, is modelled in part on the probation order. It is

173. The provisions came into effect in March 1982. They have been amended by the Criminal Justice Act 1982, with effect from January 1983.
174. For a discussion of these points see Thomas, The Partly Suspended Sentence, 1982 CRIM. L. REV. 288.
175. Id. at 291.
176. Id. at 292.
imposed in place of any other sentence for the offence concerned, and in the event of a failure to comply with the order, or a subsequent conviction in the Crown Court, the order may be terminated and the offender sentenced for the original offence. The order requires the offender to perform a specified number of hours of unpaid work, between 40 and 240, under the direction of the supervising officer (almost always a probation officer). The nature of the work is determined by the probation officer rather than the court (partly because of the difficulties in finding suitable kinds of work without interfering with other people’s employment). The offender must consent to the order generally, but has no right to limit his consent to any particular form of work.

Community service orders are administered by local probation services, and their success in the eyes of sentencers depends to a large extent on the ability of particular community service organisers to develop convincing schemes and persuade the local judges and magistrates of their credibility. Nationally, community service orders (which are restricted to persons aged seventeen or over) have made considerable headway since becoming available generally. There is reasonably widespread agreement that community service was a desirable innovation, but there is confusion and disagreement about its proper purpose, the criteria which should govern its use by the courts, and the terms in which it should be evaluated. Is its function to provide an acceptable punitive alternative to imprisonment, and if so, how is an equation to be established between a period of community service measured in hours and a term of imprisonment measured in days? Or is the primary purpose of the order therapeutic, so that it should be used only if the offender is thought to be in need of treatment in this way? Is the number of hours of service to be determined by the length of a sentence of imprisonment, or by reference to the treatment needs of the offender? These issues have not been clarified in pronouncements of the Court of Appeal, which has rarely discussed the use of community service, although recent decisions suggest that the Court is now prepared to take a greater interest.

180. See W. Young, Community Service Orders (1980).
e. *Deferment of Sentence* — A further provision, introduced in 1972, is the deferment of sentence.182 Strictly speaking, this is a procedural step which allows a court to delay its determination of sentence for up to six months, with the consent of the offender. The power to defer sentence is in addition to the court's normal power to adjourn for inquiries, which would not normally be for more than twenty-eight days. The procedure for deferment of sentence on the whole has proved superfluous and a frequent source of confusion, particularly when the offender appears before a different judge or bench of magistrates from the one that deferred sentence.183

The purpose of the deferment is to allow the court to consider the offender's behaviour in the interval, but there is no provision for formal supervision of the offender or the recording of specific requirements. Although the Court of Appeal has stated that a sentencer deferring sentence should record his reason for doing so — for the benefit of the sentencer who eventually deals with the offender184 — research shows that this is frequently neglected.185 It is not uncommon to find a case in which one judge has deferred the sentence of an offender, who then tried for six months to satisfy the expectations of the first judge, only to return to court before a different judge who takes the view that the offender should have been sentenced to imprisonment in the first instance, and imposes a custodial sentence. Although the Court of Appeal has now established that this should not be done,186 and that the deferment of a sentence in effect constitutes a bargain with the offender that if he complies with the expectations of the sentencer, he will not be committed to custody when he appears, the procedure is still unsatisfactory and unnecessary.

4. *Fines and Financial Measures* — Fines have been part of the sentencing system for many years, but they did not become widely available in felony cases until the present century, and the removal of restrictions on the use of fines was not completed until 1948.187 In more recent years, they have been joined by a number of other orders

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183. The heavy reliance on part-time recorders and deputy circuit judges in the Crown Court, and the use of lay magistrates in the Magistrates Court means that this is a frequent occurrence. See Corden & Nott, *The Power to Defer Sentence*, 20 BRIT. J. CRIM. 358, 364-66 (1980).
185. See Corden & Nott, supra note 183, at 364.
concerned with financial or property aspects, some punitive, some preventive, and some directed toward compensation. For the most part, these measures are ancillary and may be imposed only in conjunction with some other form of sentence (except the fine, which normally can stand either alone or in conjunction with almost any other penalty).\textsuperscript{188} As in the case of noncustodial measures, they have been added to the statute book without much obvious regard to their relationship to other measures, and have in many cases produced difficulties which were not anticipated by their promoters.

a. \textit{Fines} — Fines have been available for all offences other than treason or murder since 1948, either as the sole penalty or in addition to any other measure that is not in lieu of a sentence (such as a probation order). The Crown Court is not subject to any maximum limit as to amount;\textsuperscript{189} the magistrates' courts are in most cases subject to a maximum of £1,000 for offences triable either way,\textsuperscript{190} but there is specific provision for larger fines in certain cases (such as regulatory offences liable to be committed by corporations). The maximum fines for summary offences are stipulated in the provision creating the offence.\textsuperscript{191} In imposing a fine, courts in most cases must grant time for payment and may order payment by installments. There are restrictions on the committal to prison of offenders for inability to pay fines, but the power to commit for nonpayment is available as a last resort if the court is satisfied that there has been wilful fault or neglect.\textsuperscript{192} Other methods of enforcement of fines — distress and garnishment orders in particular — are available, but not widely used. Fines are by far the most frequently used penal measure.\textsuperscript{193}

The major problem affecting the use of fines is their differential impact on offenders of differing financial standing. The statutory provisions governing the imposition of fines by magistrates' courts require a court before imposing a fine to have regard to the means of the of-

\begin{itemize}
\item \textsuperscript{188} The Criminal Justice Act 1982, contains provisions which will allow a compensation order to be imposed as a sentence in its own right, but these provisions are not yet in force.
\item \textsuperscript{189} Criminal Law Act 1977, § 32(1).
\item \textsuperscript{190} Magistrates' Courts Act 1980, § 32(9).
\item \textsuperscript{191} The Criminal Justice Act, 1982, § 37 establishes a new scheme of maximum fines for summary offences.
\item \textsuperscript{192} See Magistrates' Courts Act, 1980, § 76(1). Approximately 20,000 male fine defaulters were received into prison in 1981, although most were committed for short periods: 75\% of males committed in default were committed for periods of not more than one month. About 1,000 defaulters were in prison on any one day. See Prison Statistics, England and Wales 1981, Cmnd. 8654, Tables 7(b), 7(c), 7(d) (1982).
\item \textsuperscript{193} Forty-five percent of all indictable offences resulted in a fine in 1981. Criminal Statistics, England and Wales 1981, Cmnd. 8668, Figure 7.5 (1982).
\end{itemize}
Although there is no equivalent statutory provision governing the Crown Court, the Court of Appeal has stated many times that a fine should not be imposed unless the court is satisfied that the offender has the means to pay the fine, if necessary by installments, within a period not exceeding twelve months (except in unusual cases). The Court of Appeal has now established that it is a wrong exercise of discretion to impose a fine at a level above that which is customary for the offence in question because the offender is of above average financial means, although it is clearly accepted that the amount may be reduced where the offender does not have the means to pay the usual amount. There are considerable difficulties in dealing with unemployed persons who come before the courts for offences that normally would attract a fine, but the Court has not yet given adequate guidance to lower tribunals on how to deal with this problem.

Because relatively few cases involving fines are the subject of appeals to the Court of Appeal, there are no tariffs or judicially approved conventions for determining the amount of fines in relation to particular types of offences. Their place is taken, so far as motoring offences are concerned, by a series of guidelines issued by the Magistrates' Association, an independent body to which most lay magistrates belong. These guidelines have no legal standing (although they have recently received a qualified judicial recognition), and they are intended to provide starting points rather than a complete system of prescribed penalties. They are subject to adaptation in various localities in response to particular local problems.

A second problem affecting the use of fines is that of their effective enforcement. No data exists to show how many fines are eventually paid by the offenders on whom they are imposed, but many courts have very large outstanding amounts. The number of persons committed in default is not an accurate indication of the extent of default, because many defaulting offenders will escape commitment for one reason or another.

198. For one recent case dealing with this problem, see R. v. Ball, 3 Cr. App. R. (S.) 283 (1981).
199. The guidelines are published in their current form in Note, Suggestions for Court's Assessment for Main Traffic Offences, 146 JUSTICE OF THE PEACE 128 (1982).
b. **Compensation** — Provision for compensation to be paid by the offender to the victim has been part of the law since 1870, but in practice compensation orders have been used widely only since the introduction in 1972 of a general power to order compensation.\(^{201}\) Compensation orders should be distinguished from the expression "restitution order," which in English law relates to an order for the return of stolen property, or other property into which the stolen property has been converted, rather than compensation in a more general sense.\(^{202}\) The provisions which allow a criminal court to order a convicted person to pay compensation to a person who has suffered loss, damage, or injury as a result of his offence also should be distinguished from the system of publicly financed compensation to victims of crimes of violence (whether or not the offender is detected or convicted) through the Criminal Injuries Compensation Scheme.\(^{203}\)

The current legislation empowers a criminal court, in addition to dealing with the offender in another way, to order him to pay compensation for any loss, damage, or injury suffered by the victim as a result of the offence. Magistrates' courts are limited to a maximum limit of £1,000 per offence and all courts must consider the means of the offender before making a compensation order.\(^{204}\) The Court of Appeal has interpreted this requirement to mean that the court must be satisfied that the offender has or will have the resources to discharge the order within a period of about two years.\(^{205}\) Compensation may be ordered to be paid by installments, and the powers of enforcement include the power to commit the defaulter to prison.\(^{206}\)

Although compensation orders have proved popular with sentencers in the magistrates' courts and the Crown Court, they have produced a considerable number of disadvantages which outweigh their value, and which appear to be inherent in any scheme to order offenders to compensate victims. As a system of compensating victims of crime generally, the present scheme is hopelessly deficient. Any system that relies on the detection and conviction of the offender, and payment by him out of his resources while undergoing a penal measure whether in or out of custody, is bound to leave very large numbers of

\(^{201}\) The current provision is Powers of Criminal Courts Act 1973, § 35.

\(^{202}\) The statute authorizing restitution orders is the Theft Act 1968, § 28.

\(^{203}\) For an account of the working of the Criminal Injuries Compensation Scheme, see CRIMINAL INJURIES COMPENSATION BOARD, SIXTEENTH REPORT, CMND. 8081 (1980).


\(^{205}\) See, e.g., R. v. Bradburn, 57 Cr. App. R. 948 (1973). (Court allows limited compensation order despite defendant's lack of means where defendant is physically healthy and capable of earning some income).

\(^{206}\) See Administration of Justice Act 1970, sched. 9 (part 1).
victims uncompensated. Either the criminal justice system will fail to
detect or to convict the offender, the offender generally will lack means,
or his sentence will be incompatible with the payment of compensation
out of income. The English system is no exception — although victims
of crimes of violence are reasonably well-provided for out of public
funds (provided their injuries attract more than the minimum amount
of compensation, which is currently £400) — other victims do not do
well out of the system of court-ordered compensation. In 1981, com-
ensation orders were made in only about six percent of all burglary
cases.207 How many of these compensation orders were fully paid is
not known, because there is no systematic published data on default on
compensation orders. One research study found, however, that fifty-
four percent of orders for the payment of more than fifty pounds were
not paid within eighteen months of the order.208 Even if there is no
default, the majority of compensation orders are paid by installments
over a period of twelve months or two years, and can be of little value
to those victims whose need of compensation is immediate.

The power to order compensation can be a source of considerable
disparity between offenders. Many courts, particularly magistrates’
courts, find themselves in difficulties when faced with an offender who
normally ought to be sentenced to imprisonment, but who informs the
court that he will be in a position to pay compensation if he is left at
liberty. Often the court will decide to take the course suggested, and
will impose a noncustodial sentence coupled with a compensation or-
der, with the result that the more affluent offender — or the offender
who appears to be more affluent — is able to buy his way out of prison,
often without actually paying. (There is no power to make a noncus-
todial sentence conditional on payment of the compensation ordered
by the court.) The offender who is unable to convince the court of his
ability to pay compensation will have a justifiable sense of grievance if
he is sent to prison for a similar offence. The worst abuse of the com-
ensation order system is where the offender, usually in the Crown
Court, presents himself as having the means to pay compensation, and
persuades the sentencing court to make a compensation order coupled
with a noncustodial sentence, usually a suspended sentence. He then
appeals against the compensation order, alleging that his financial cir-
cumstances have changed, or that the evidence put before the Crown
Court was mistaken. The appeal court normally will be compelled to
quash the compensation order, but cannot interfere with the suspended

208. P. SOFTLEY, COMPENSATION ORDERS IN MAGISTRATES’ COURTS (Home Office Re-
search Study No. 43, 1978).
sentence which was imposed on the assumption that compensation would be paid. Consequently, the offender escapes all effective penal consequences and the victim receives nothing.

5. **Other Ancillary Measures** — English law provides a further group of ancillary measures, most of which were introduced in 1972.\(^{209}\) They include the power to deprive an offender of his rights in any property that has been used to facilitate the commission of a crime,\(^{210}\) the power to disqualify from driving an offender who has used a motor vehicle in the commission of a crime,\(^{211}\) and the power to make a criminal bankrupt if his combined offences have resulted in losses to the victims of £15,000 or more.\(^{212}\) These measures have been affected by a number of difficulties that were not in the minds of the legislators who enacted them. In part the problems arise from the way the relevant statutory provisions were drafted, and these problems could be cured by amendment of the law, but others are more deeply rooted. The problem that affects most of these measures is whether they are to be considered part of the normal penalty for the offence, or an addition to it. There is a real possibility of their being used in combination to produce a total imposition that is gravely disproportionate to the offence. A further difficulty is whether the court should make an order — particularly of disqualification from driving in a case where the offence was not a traffic offence — that will limit the offender's employment opportunities on his release from prison. The Court of Appeal has been reluctant to uphold disqualifications that will last beyond the date of the offender's release from prison, and thus limit his employment potential, even though it is clearly an express object of the statutory provision to disqualify such offenders.\(^{213}\)

III. **Appraisal**

For the last two decades, English penal policy has been dominated by a single theme: the need to control the growth of the prison population. Continuous increases in the volume of crime recorded by the police, and in the number of persons arraigned before the courts, have led to a significant growth in the average population of penal institutions (although the growth in the penal population has not been so great as

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\(^{210}\) *See* Powers of Criminal Courts Act 1972, § 43.

\(^{211}\) Id. § 44.

\(^{212}\) Id. § 39.

\(^{213}\) *See* R. v. Wright, 1 Cr. App. R. (S.) 82 (1979). (Court of Appeal quashed sentence of disqualification from driving where the offender was a taxi driver).
the growth in the number of persons indicted). This problem had led to the enactment of a succession of new kinds of measures, each of which has been thought to be the means of solving the problem, or at least gaining a temporary respite. As at other critical periods of penal history, there has been no overall strategy; one expedient has followed another, without any obvious consideration of the relationship of the new element to the whole. The latest penal legislation, the Criminal Justice Act 1982, follows this pattern. The result has been the development of an extensive range of different penal measures, which may seem impressive when considered in the abstract, but which are not significantly different from each other in practice. The imposition of one as opposed to the other does not necessarily make any immediate difference to the offender. Part of the price of this legislative activity has been the erosion of some of the judicially evolved principles, as Parliament has seldom troubled to make any assessment of the extent to which the new development will mesh with existing judicial sentencing conventions. Recent statutory developments (such as the reduction of the minimum period that must be served before a prisoner can become eligible for parole) seem certain to cut across judicial initiatives to reduce sentence lengths.

Of particular interest to American observers is the tariff and the mechanisms by which it is maintained, particularly appellate review. The English system of appellate review has been one of the strongest and most valuable features of her criminal justice system over the last thirty years, despite the limitations under which the system has laboured — in particular inadequate reporting and the paucity of academic interest. At present, the Court of Appeal is passing through a difficult phase and many of its current decisions are open to serious criticism. There can be no question that the institution is sound and has provided a better mechanism for structuring sentencing discretion than has legislation. If appellate review of sentences can work effectively in England and Wales, which is a larger jurisdictional unit than any individual American state, there is every reason to suppose it could work effectively in the American context.