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In Search of a Rational Sentence: A Return to the Concept of Appellate Review

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In Search of a Rational Sentence: A Return to the Concept of Appellate Review

ARTICLE OUTLINE

	PAGE
I. INTRODUCTION _____	463
II. ORIGIN AND DEVELOPMENT OF THE NON-REVIEW DOCTRINE _____	464
A. Appellate Jurisdiction: Early Judicial Construction _____	464
B. Supreme Court Precedents: Emerging Requirement of "Individualized" Sentences _____	471
C. Current Circuit Positions on "Individualized" Sentences _____	476
D. Abandonment of the Non-Review Doctrine _____	481
III. SOURCES FOR A DOCTRINE OF APPELLATE REVIEW OF SENTENCING _____	488
A. Existing Statutory Exceptions _____	488
B. Pending Legislation _____	490
C. Reexamination of Judicial Arguments Against Review _____	494
1. Does the Trial Judge Have an Advantage? _____	494
2. Should the Trial Judge State His Reasons? _____	496
D. Other Non-legislative Recommendations _____	499
E. Recent Congressional Hearings _____	503
IV. CONCLUSION AND RECOMMENDATION _____	510
POSTSCRIPT _____	513
APPENDIX _____	517

I. INTRODUCTION

At one time, federal circuit courts routinely reviewed the propriety of criminal sentences. Since approximately the turn of this century, however, it has been axiomatic that criminal sentences are beyond the scope of appellate review. By 1930, the principle

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that appellate courts have no control over a sentence which is within statutory limits was referred to as the "one rule in the federal criminal practice which is firmly established . . ."¹ Thus, in a relatively short period, criminal sentences have become an anomaly. Of the myriad exercises of judicial discretion, the sentencing decision stands in virtual isolation² as the only area in which the trial judge truly has no one peering over his shoulder. It is the purpose of this article to examine the background, development and future of this doctrine.

An understanding of this unique phenomenon must begin with a review of its legislative and common law origins. Traditional applications of the doctrine by federal courts and more recent responses to the problems created by it are the next step toward a clarification of the present status of the principle of non-review. The recommendations of various public and legal committees which have addressed themselves to this issue, and thereby influenced its present posture, must also be examined. On at least two occasions, Congress has clearly established exceptions to the non-review doctrine. A review of those exceptions and of certain currently pending legislative proposals to eliminate the anomaly constitutes the remainder of this article.

II. ORIGIN AND DEVELOPMENT OF THE NON-REVIEW DOCTRINE

A. Appellate Jurisdiction: Early Judicial Construction

In 1879, Congress granted to the circuit courts jurisdiction, upon

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1. *Gurera v. United States*, 40 F.2d 338, 340-41 (8th Cir. 1930). For another definition of the concept which will hereinafter be referred to as the "non-review doctrine," see note 84 and accompanying text *infra*.
 2. An illustration of the incredulity produced by the explanation of this anomaly to someone unfamiliar with it may be found in the following exchange during a Presidential discussion of an alleged remark by Mr. E. Howard Hunt that he would be "out [of jail] by Christmas." [H: Mr. Robert Haldeman; D: Mr. John Dean; P: Former President Richard Nixon]:
 - H Can't you appeal an unjust sentence as well as an unjust? [sic]
 - D You have sixty days to ask the Judge to review it. There is no appellate review of sentences.
 - H There isn't?
 - P The Judge can review it.
 - H Only the sentencing Judge can review his own sentence?
 Submission of Recorded Presidential Conversations to the Committee on the Judiciary of the House of Representatives by President Richard Nixon, April 30, 1974, 227-8.

writs of error, in all criminal cases in which imprisonment or a fine in excess of \$300.00 was imposed (hereinafter "1879 Act").³ The enactment conferring this jurisdiction also provided that "in case of an affirmance of the [conviction] . . . the circuit court shall proceed to pronounce final sentence and to award execution thereon."⁴ This particular statutory language, however, was omitted from the 1891 act creating the courts of appeals (hereinafter "1891 Act"). Instead, Congress provided:

[A]ll provisions of law now in force regulating the methods and system of review, through appeals or writs of error, shall regulate the methods and system of appeals and writs of error provided for in this act in respect to the circuit courts of appeals . . .⁵

One "provision of law" in force at the time the courts of appeals were established had been adopted in 1872 (hereinafter "1872 Act"):

The appellate court may affirm, modify, or reverse the judgment, decree, or order brought before it for review, or may direct such judgment, decree, or order to be rendered, or such further proceedings to be had by the inferior court as the justice of the case may require.⁶

The broad authority of the 1872 Act to examine and alter lower court decisions was not curtailed by the 1879 Act nor was it restricted by the 1891 Act. Indeed, it appears that the basic jurisdictional authority to modify judgments in civil cases, adopted in 1872, was expanded to include criminal sentences within the ambit of permissible review in 1879 and was transferred to the newly created courts of appeals by section 11 of the 1891 Act.

The most widely cited judicial interpretation⁷ of the effect of the variation in phraseology between the 1879 Act and the 1891 Act is *Freeman v. United States*.⁸ This decision arose from the appeal of a conviction for fraudulent use of the mails. After affirming the conviction, the court cited two earlier decisions in which a request for sentence modification, similar to that made

3. Act of March 3, 1879, ch. 176, § 1, 20 Stat. 354.

4. *Id.* § 3.

5. Act of March 3, 1891, ch. 517, § 11, 26 Stat. 829.

6. Act of June 1, 1872, ch. 255, § 2, 17 Stat. 197.

7. *E.g.*, *Woosley v. United States*, 478 F.2d 139 (8th Cir. 1973); *United States v. Rosenberg*, 195 F.2d 583 (2d Cir. 1952); Coburn, *Disparity in Sentences and Appellate Review of Sentencing*, 25 RUTGERS L. REV. 207 (1971) [hereinafter cited as Coburn]; Comment, *Appellate Review of Sentences and the Need for a Reviewable Record*, 1973 DUKE L.J. 1357. Commentaries and judicial opinions which discuss this subject without citation of *Freeman* are extremely rare.

8. 243 F. 353 (9th Cir. 1917), *cert. denied*, 249 U.S. 600 (1919).

by Freeman, had been granted. These cases were distinguished with the following comment:

[T]hose rulings were made in view of the peculiar language of the third section of the act of March 3, 1879

There is no such provision in the act creating the Circuit Court of Appeals. Those courts are given only appellate jurisdiction to review, by appeal or by writ of error, final decision in the District Court.

We find no error. The judgment is affirmed.⁹

In the *Freeman* opinion, the court did not refer in any way either to the language of section 11 of the 1891 Act or to the broad authority to modify lower court decisions contained in the 1879 Act.

*Jackson v. United States*¹⁰ is another decision thought by some commentators to interpret the 1891 grant of authority¹¹ as precluding appellate sentence modification. Jackson was convicted of assaulting several vigilantes intent upon bringing him to justice. A sentence of "ten years at hard labor" was imposed and the plaintiff asserted that this sentence was excessive.

The court considered the legality of a sentence "at hard labor" and, after concluding that such a qualification upon a sentence to confinement was unauthorized, made the following observation:

The courts are not entirely uniform as to the particular manner in which the correction in the sentence should be made,—whether by the court that imposes the sentence, or by the appellate court. The difference in this respect, however, seems to depend upon the particular way in which the question is raised—whether by habeas corpus or by writ of error; but all the authorities agree that the defendant is not entitled to a new trial, and that the error can be corrected by striking out the illegal part of the sentence.¹²

Accordingly, the conviction and the confinement portions of the sentence were affirmed and the qualification of "at hard labor" was stricken.

This decision is obviously focused upon the question of an illegal, rather than an excessive, sentence. The court appears to reject the "at hard labor" proviso not because it is inappropriate under the circumstances, but rather because it is beyond the range of punishments permitted by the applicable statute.¹³ Thus, what is

9. *Id.* at 357. The two cases distinguished were *United States v. Wynn*, 11 F. 57 (C.C.E.D. Mo. 1882) and *Bates v. United States*, 10 F. 92 (C.C.N.D. Ill. 1881).

10. 102 F. 473 (9th Cir. 1900).

11. Note 5 *supra*. While *Jackson* may be slightly less widely cited than *Freeman*, it is far more common to find them both in a single citation.

12. *Id.* at 490.

13. *Jackson* might properly be contrasted with *Weems v. United States*,

relied upon as a primary authority for the non-review doctrine is, in fact, a case in which the sentence imposed was simply beyond the court's statutory authority.

In the *Jackson* opinion, however, the court alluded briefly to the question of a "legal," but allegedly "excessive," sentence. The court noted that Jackson's punishment was not "so out of all proportion" to the offense for which he was convicted as to "shock public sentiment and violate the judgment of reasonable people."¹⁴ The obvious implication of this statement is that if the sentence were "so out of all proportion" even the fact that it was within statutory limits, and therefore "legal," would not prohibit appellate modification. If the court believed its own suggestion that it lacked jurisdiction to alter any sentence which was within the statutory limits, the fact that a particular sentence "shocks the public sentiment" would be wholly irrelevant.

At the time the 1891 Act was adopted, in addition to the broad authority granted by the 1872 Act, another "provision . . . in force regulating the method . . . of review through appeal" was, of course, the explicit authority of the 1879 Act to "pronounce final sentence" when a conviction was affirmed. However, neither the "affirm, modify or reverse" language of the 1872 Act nor the "final sentence" language of the 1879 Act is expressly repeated in the 1891 Act. The question of whether Congress intended by the "all . . . methods and system" language of section 11 of the 1891 Act to preserve the existing practice of appellate review of sentences arises, as the *Freeman* opinion notes, solely from this variation in phraseology.

Strong support for an affirmative answer to this inquiry is found in the report concerning the then proposed legislation submitted by the House Committee on the Judiciary in 1890. The Committee advised Congress that the 1891 Act "provides that the circuit courts of the United States shall exercise such jurisdictions . . . as they have and exercise under existing laws."¹⁵ The report also states that the 1891 Act

destroys the "judicial despotism" of the present system by creating an intermediate appellate court, with power to revise the final judgments of the district courts in all cases, civil and criminal,

217 U.S. 349 (1910) in which a legal sentence was found to be so excessive as to constitute denial of the constitutional prohibition against cruel and unusual punishment. In both cases the concern is with the sentence's "legality" rather than its subjective propriety.

14. 102 F. at 488.

15. H.R. REP. No. 1295, 51st Cong., 1st Sess. 1 (1890).

except . . . where the fine is not over \$300 and does not involve imprisonment.¹⁶

Less than five years after its adoption, the 1891 Act was thoroughly examined by the Supreme Court. *Ballew v. United States*¹⁷ arose from criminal convictions upon one count of wrongfully withholding a pension check and a second count of receiving a greater commission for obtaining the pension than was permitted by statute. The Court found error in the instructions upon the first count but affirmed the conviction upon the second count; it then turned its attention to the sentence which had been based upon convictions of both counts. After a scholarly discussion of the English precedent establishing that an appellate court had no common law authority to enter a proper judgment, the Court reviewed the English and American statutory authority for appellate review of sentences. The Court concluded that "[t]he statutes in reference to the power of Federal appellate tribunals have from the beginning dealt with the subject [of sentence modification]."¹⁸ The general authority to "modify . . . the judgment . . . or direct such [further] judgment . . . as the justice of the case may require,"¹⁹ granted to appellate courts in 1872 (as well as to their predecessors)²⁰ was also noted. This analysis was followed by an examination of section 11 of the 1891 Act which prompted the Court to hold:

It thus conclusively appears that the authority of this court to reverse, and remand with directions to render such proper judgment as the case might require . . . was confessedly conferred by express statutory provisions, and that a like power was conferred upon the Circuit Courts of Appeals²¹

Following this conclusion concerning its authority over judgments generally, the Court examined whether it could take the same "action as the ends of justice might require" in criminal cases arising upon a writ of error from the courts of appeals as it could in civil cases. Despite the apparent lack of express statutory authority, the Court nevertheless concluded that it did have such jurisdiction. The reason for this conclusion was that, since the 1891 Act conferred jurisdiction to hear criminal cases upon writs of

16. *Id.* at 3.

17. 160 U.S. 187 (1895).

18. *Id.* at 198.

19. Act of June 1, 1872, ch. 250, § 2, 17 Stat. 197.

20. "[S]uch court shall proceed to render such judgment or pass such decree as the District Court should have rendered or passed" Act of Sept. 24, 1789, ch. 20, § 24, 1 Stat. 85; quoted in *Ballew* at 198.

21. 160 U.S. at 201-02 (1895).

error to the courts of appeals, Congress must have intended for the Supreme Court to exercise the same powers in deciding criminal cases that it had exercised for several years in deciding civil cases arising upon writs of error. In reference to the 1891 Act, the Court held:

[T]he entire history of the legislation . . . demonstrates that the general grant of power to render a proper judgment on writs of error was evidently not reiterated in express terms when new subjects [*sic*]—matter of jurisdiction [*i.e.*, criminal] were vested in this court, because such authority was deemed to be already adequately provided by the general statutes on the subject.²²

The Court then found that “substantial justice requires . . . that the general judgment rendered by the court below should be reversed, and the cause be remanded to that court with instructions to enter judgment upon the second count”²³

Approximately fifteen years before the *Freeman* decision, the United States Court of Appeals for the Second Circuit had also concluded that the 1891 Act authorized review of sentences. In *Hanley v. United States*,²⁴ several state court decisions were cited for the proposition that “where a wrong judgment is pronounced . . . an appellate tribunal, in the absence of express statutory authority, cannot pronounce the appropriate judgment.”²⁵ The court then quoted section 11 of the 1891 Act and held that “[t]he statutory authority conferred upon this court is abundantly sufficient to prevent a failure of justice through any such technicality.”²⁶ This conclusion is reached by a determination that the “final sentence” authority granted by the Act of 1879 was among the “methods and system” in force at the time of the adoption of section 11. Finally, citing *Ballew*, the court held: “This legislation gives the Circuit Court of Appeals abundant authority to correct an error in the sentence without disturbing the conviction.”²⁷ The sentence was reversed and the case remanded with instructions to the district court that a single sentence be imposed for all three counts upon which the defendant was convicted.

22. *Id.* at 202.

23. *Id.* at 203. “In view of the discussion by the Supreme Court in *Ballew* . . . it is difficult to understand the reason for the [non-review] doctrine having taken such a strong root in the federal court system in such a short period of time” Comment, *Criminal Law and Procedure—Federal Appellate Review of Sentences*, 7 SUFFOLK U.L. REV. 1128, 1131 n.19 (1973).

24. 123 F. 49 (2d Cir. 1903).

25. *Id.* at 854.

26. *Id.*

27. *Id.* at 855.

A third case supporting the conclusion that the non-review doctrine is mistaken is *Bryan v. United States*.²⁸ The Supreme Court began by noting: "The extent of the power of federal appellate courts to enter judgment when reversing and remanding cases in the lower federal courts has been defined by statutes from the assumption of our system of courts."²⁹ Explaining that the authority and practice of the courts of appeals had been "roughly parallel" to their own, the Court quoted that portion of section 10 of the 1891 Act which provided that upon reversal "the cause shall be remanded to the said district or circuit court for further proceedings to be there taken in pursuance of such determination."³⁰ In a footnote to this comment, Justice Minton noted that "[t]he succeeding section [i.e., section 11] provided that existing methods of review should regulate the system of appeals and writs of error in the Circuit Courts of Appeals . . ."³¹ The Court cited *Ballew* as one of the cases holding section 11 equally applicable to the Supreme Court and courts of appeals. The history of sections 10 and 11, through their codifications as sections 876 and 877 of Title 28 of the United States Code and their merger into section 2106 of Title 28 of the United States Code (hereinafter "section 2106"), was also traced in the *Bryan* opinion. Finally, the Court reasoned that the issue was whether the court of appeals decision was "just and appropriate" within the scope of section 2106;³² the Court answered this question in the affirmative.

A comprehensive analysis of the 1891 Act, as interpreted by *Ballew*, *Hanley* and *Bryan*, inevitably diminishes the significance and authority of both *Freeman* and *Jackson*. Although *Ballew*, *Hanley* and *Jackson* were decided before *Freeman*, none of them is cited therein. The *Freeman* conclusion that the 1891 Act contained no such provision as the "final sentence" authority in the 1879 Act contradicts both the applicable precedent and the language of the relevant statutes. Although *Freeman* is correct in observing the absence of the "final sentence" terminology from the 1891 Act, the legislative history of that statute and the holdings of both *Ballew* and *Hanley* compel the conclusion that the transition from circuit courts to courts of appeals did not in any way diminish the sentence reviewing authority of the intermediate federal appellate courts. Thus it appears that what is universally recognized as the basic authority for the development of the non-review doctrine is, in fact, dicta uttered without recognition of controlling contrary authority.

28. 338 U.S. 552 (1950).

29. *Id.* at 554.

30. Act of March 3, 1891, ch. 517, § 10, 26 Stat. 826.

31. 338 U.S. at 554 (1950).

32. *Id.* at 560.

The *Jackson* decision is an even less persuasive authority for the non-review doctrine. Although *Ballew* fully analyzed the question of appellate authority to modify sentences, it is not cited in *Jackson*. While the *Jackson* decision is primarily focused upon devices for correction of an illegal sentence, the court's remark about sentences which "shock the public sentiment" strongly suggests the belief that jurisdictional authority was available to alter such sentences even though they might be within statutory limits. Thus, this familiar precedent for the non-review doctrine could easily be asserted as authority for the contrary position.

The observation that the 1891 Act itself does not include "final sentence" terminology similar to the 1879 Act is unassailable. The significance of that omission, however, can be accurately evaluated only by examining the substantive provisions and Congressional history of the 1891 Act. Section 11 of that Act, by its incorporation and continuation of methods of appeal inaugurated by the 1872 Act, empowered the newly created courts of appeals to "modify" judgments or "direct such judgment . . . or such further proceeding . . . as the justice of the case may require." In addition, there is no evidence to suggest that section 11 of the 1891 Act was not also intended to incorporate the "final sentence" language of the 1879 Act. Finally, the legislative history of the 1891 Act expressly states that Congress intended to continue appellate authority to revise sentences. Thus, the variation in phraseology which is the foundation of the non-review doctrine is devoid of any legal significance.

B. Supreme Court Precedents: Emerging Requirement of "Individualized" Sentences

A discussion of the non-review doctrine would not be satisfactorily concluded even by an unequivocal concession that the 1891 Act continued, rather than terminated, the statutory authority of federal appellate courts to review and modify criminal sentences. In addition to cases construing the 1891 Act, several other Supreme Court decisions have been cited as support for this legal anomaly; *Blockburger v. United States*³³ is certainly among the most prominent.³⁴ In that case, Blockburger was convicted on five counts

33. 284 U.S. 299 (1932).

34. *Blockburger* has been heavily relied upon in, e.g., *Woosley v. United States*, 478 F.2d 139 (8th Cir. 1973); *United States v. Daniels*, 446 F.2d 967 (6th Cir. 1971); *Smith v. United States*, 273 F.2d 462 (10th Cir. 1959); *United States v. Rosenberg*, 195 F.2d 583 (2d Cir. 1952); *Coburn*, *supra* note 7; Comment, *supra* note 7; Comment, *Daniels v.*

of selling morphine and sentenced to the maximum period of confinement on each count. He asserted that the parcels alleged in two counts were sold simultaneously to a single buyer and therefore constituted a single offense. The opinion does not indicate whether the argument was raised that the sentence constituted an abuse of discretion. Rather, the only discussion of the sentence was compelled by Blockburger's attack upon the number of offenses for which he could properly be convicted. He argued that if the Court accepted his contention that he had committed only four offenses, rather than five, the combined maximum penalty should be reduced by the amount of the maximum penalty provided for one offense. In holding that each offense was separate and subject to a separate penalty, the Court noted that only Congress could direct a merger of separate acts into a single offense in the manner Blockburger requested. Apparently as an afterthought, the Court added:

[I]mposition of the full penalty of fine and imprisonment upon each count seems unduly severe; but there may have been other facts and circumstances before the trial court properly influencing the extent of punishment. In any event the matter was one for that court, with whose judgment there is no warrant for interference on our part.³⁵

Another multiple count narcotic conviction, and a request to re-examine *Blockburger*, confronted the Supreme Court in *Gore v. United States*.³⁶ Selling, repackaging and concealing narcotics were again held to be separate offenses, and the *Blockburger* holding that a separate sentence might be imposed for each offense, notwithstanding that all were committed at the same time and place, was expressly followed. The Court, in the last paragraph of its opinion, volunteered the thought that the *Gore* appeal was motivated by a desire to have the federal appellate courts "enter the domain of penology."³⁷ After citing the statutes authorizing Scottish and English courts of appeals to revise sentences, the opinion concluded that "[t]his court has no such power."³⁸ No authority was cited for this disclaimer, but it was apparently made in reference to the preceding sentence concerning revision of criminal punishment by appellate courts. Interestingly, each of the three dissenting opinions, like the majority opinion, was primarily directed to the question of whether multiple convictions for a single

United States: Appellate Review of Criminal Sentencing—Limiting the Scope of the Non-Review Doctrine, 33 U. PITT. L. REV. 917 (1972).

35. 284 U.S. at 305.

36. 357 U.S. 386 (1958).

37. *Id.* at 393.

38. *Id.* at 393.

act will be permitted; none contained any reference to the question of jurisdiction to review the propriety of a criminal sentence.

Against this background of the legislative authority for appellate review of sentences and the judicial creation of the non-review doctrine, it is appropriate to examine briefly a recently developed sentencing standard which has opened at least the back door to appellate review. This standard, possibly better recognized as a sentencing concept, is that each criminal sentence should be "individualized." More particularly, it is now accepted that there must be some discernible relationship between the particular facts of each case and the sentence imposed.

The concept of an individualized sentence has provided the foundation for a growing number of appellate determinations to intervene in the basic sentencing judgment under the guise of examining the sentencing "process." The stated rationale is that a deficient "sentencing process," by itself, deprives the defendant of a sentence based upon the particular circumstances of his case. But, unless the trial judge is legally obligated to "tailor" his sentence to the particular facts of each case, the sentencing process, as well as the sentence itself, becomes, from the appellate perspective, inconsequential.

The most frequently cited source of the requirement for "individualized" sentences is the Supreme Court's decision in *Williams v. New York*.³⁹ In accordance with a state statute, the trial court had considered a probation report and several other extra-judicial sources in reaching its decision to impose a death sentence. Significantly, the judge disclosed all the facts which he had considered and the defendant did not request an opportunity to rebut or discredit the extra-judicial sources. In holding that due process does not render a sentence void because a judge considers out-of-court information, the Court made the following comment:

Highly relevant—if not essential—to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics. And modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information

Undoubtedly the New York statutes emphasize a prevalent modern philosophy of modern penology that the punishment should fit the offender and not merely the crime. The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender.⁴⁰

39. 337 U.S. 241 (1949).

40. *Id.* at 247 (citation omitted).

This language, or its progeny, has provided the primary foundation for the recent appellate review of sentences. Implementation of the individualized sentencing doctrine must, therefore, be recognized as the stated objective of all recent decisions analyzing the sentencing "process."

Perhaps the first unmistakable Supreme Court authority for evaluation of the sentencing "process" is *Townsend v. Burke*.⁴¹ This appeal arose because the trial judge's remarks at a pre-sentence hearing had clearly indicated his belief that all arrests shown on the defendant's criminal record had resulted in convictions. In fact, the defendant had been tried and acquitted of two of the charges for which he had previously been arrested. The primary contention on appeal was that denial of appointed counsel represented a violation of due process.⁴² Although it set the sentence aside and remanded the case for resentencing, the Court was obviously concerned about the non-review doctrine:

We would make clear that we are not reaching this result because of the petitioner's allegation that his sentence was unduly severe. The sentence being within the limits set by the statute, its severity would not be grounds for release here even on direct review of the conviction, much less on review of the state court's denial of *habeas corpus*. It is not the duration or the severity of this sentence that renders it constitutionally invalid; it is the carelessness . . . of [a] sentence on a foundation so extensively and materially false . . . that renders the proceedings lacking in due process.⁴³

Townsend is the apparent source and certainly the most widely recognized authority for the device of purportedly reviewing the sentencing "process" while expressly refusing to engage in any form of "substantive" review of sentence imposed. *Townsend* creates the vehicle through which *Williams* is implemented. From the defendant's perspective, this is equivalent to a forthright review of the sentence itself. From the perspective of the courts, however, each decision to deal with an unacceptable sentence by examining the sentencing process entails a departure from the traditional desire to exercise judicial tact and to avoid unsatisfying controversy over insignificant procedural questions.

The first recent case in which the Supreme Court actually determined and imposed a criminal sentence appears to be *Yates v.*

41. 334 U.S. 736 (1948).

42. With the clear vision of hindsight, it is very apparent that the court was deeply concerned with the same concepts which ultimately produced *Gideon v. Wainwright*, 372 U.S. 335 (1963).

43. 334 U.S. at 741.

United States.⁴⁴ This case is notable because on three prior occasions the Supreme Court had ruled upon some facet of it. This fourth appeal contested the trial court's determination that Mrs. Yates had been guilty of eleven separate acts of contempt and the resulting imposition of eleven consecutive one year sentences. After determining that, in fact, only one contempt had occurred, and noting that sentence adjustments "normally ought not be made by this court"⁴⁵ the following rule was established:

However, when in a situation like this the District Court appears *not to have exercised its discretion . . .* but, in effect, to have sought merely to justify the original sentence, this Court has no alternatives except to exercise its supervisory power over the administration of justice in the lower federal courts by setting aside the sentence of the District Court

[T]his Court is of the view, exercising the judgment that we are now called upon to exercise, that the time that petitioner has already served in jail is an adequate punishment for her offense . . . and is to be deemed in satisfaction of the new sentence herein ordered formally to be imposed.⁴⁶

The idea of utilizing this generalized supervisory authority to modify a criminal sentence has not gone unnoticed.⁴⁷ Despite attempts to distinguish it as limited to crimes for which no statutory penalty is provided, recent cases suggest the *Yates* decision has played a crucial role in the emerging appellate awareness of both responsibility and authority with regard to criminal sentences.

A more recent example of the internal inconsistency suggested in *Jackson*⁴⁸ may be found in *United States v. Tucker*.⁴⁹ The Supreme Court seized upon the *Townsend* rationale that the sentencing "process" was defective because prior invalid convictions were considered⁵⁰ and upheld a court of appeals decision to remand the case for resentencing. In reaching this result, however, the following observation was volunteered: "The Government is also on solid ground in asserting that a sentence imposed by a federal dis-

44. 356 U.S. 363 (1958).

45. *Id.* at 366.

46. 356 U.S. at 366 (emphasis added).

47. *Wosley v. United States*, 478 F.2d 139 (8th Cir. 1973); *United States v. Daniels*, 446 F.2d 967 (6th Cir. 1971); Comment, *supra* note 7; Comment, U. PITT. L. REV., *supra* note 34; Note, 23 CASE W. RES. L. REV. 430 (1972).

48. See notes 10-14 and accompanying text *supra*.

49. 404 U.S. 443 (1972).

50. The convictions were invalid under *Gideon v. Wainwright*, 372 U.S. 335 (1963). Therefore, the defendant was sentenced "on the basis of assumptions concerning his criminal record which were materially untrue." 334 U.S. at 741.

trict judge, if within the statutory limits, is generally not subject to review."⁵¹ The precedential value of this remark is diminished by both its obviously superfluous nature and its essential incompatibility with the result reached.

Thus, careful analysis of *Blockburger* and *Gore* raises serious doubt about the basic relevance of either decision to any discussion concerning appellate review of sentences. Both cases are directed to questions of statutory interpretation and the due process and double jeopardy validity of multiple convictions resulting from simultaneous violations of a single criminal statute. Conversely, *Townsend*, *Yates* and *Tucker* each set aside a criminal sentence imposed by a federal district court judge. While there are significant differences in the rationale for the three latter decisions, each of them includes at least an implicit reference to the *Williams* requirement for "individualized" sentences and, on a pragmatic level, each results in the substantive appellate review of a criminal sentence. Collectively, these cases form the basic foundation for virtually all of the judicial examples of substantive sentence review.

C. Current Circuit Positions on "Individualized" Sentences

The development of the *Williams* mandate for individualized sentences has required the courts of appeals to resort to a wide variety of circumlocutions for avoiding the harsh realities of the non-review doctrine. In general, current decisions demonstrate increasing reliance upon various fictions to avoid the anomaly of non-review without encountering the difficulties inherent in either a comprehensive analysis of the origins of the non-review doctrine or a forthright rejection of it. One observer, in summarizing the cases which purport to examine the sentencing "process," concluded that "if manipulated by a well-intentioned and moderately artful court of appeals, [this precedent] is no bar to effective review of the severity of a sentence."⁵²

A typical appellate reaction to the conflict between *Williams* and the non-review doctrine is the decision in *United States v. Wilson*.⁵³ In this case, the defendant claimed both an abuse of discretion and an inadvertent failure to utilize the special sentencing procedures available for youthful offenders. The following introductory remarks illustrate this court's very traditional conception of the non-review doctrine:

51. 404 U.S. at 447.

52. Comment, *supra* note 7, at 1363.

53. 450 F.2d 495 (4th Cir. 1971).

It is normally not an appellate court's function to review sentences . . . [W]e are committed to the view that our power in this regard is sharply curtailed. The statutory authority to review sentences, exercised on appeal from 1789 to 1891, is thought to have been removed by implication when appellate jurisdiction was transferred from the federal circuit courts to the newly created courts of appeals. [Citing *Freeman*.] Thus, until the Supreme Court or the Congress restores our power, we cannot modify sentences even when we deem them unwarranted.⁵⁴

Notwithstanding the professed belief that such activity is "not their function" and that their statutory authority "is thought to have been removed," the court nevertheless vacated the sentence and remanded this case for resentencing. The stated justification for this resolution was an inability to determine, on the basis of an ambiguous record, whether the judge deliberately elected not to utilize the available special youth statute or simply overlooked it. The remand, however, was not attributed to the usual considerations of an individualized sentence,⁵⁵ a defective sentencing "process"⁵⁶ or the failure to exercise discretion.⁵⁷ Rather, the court atypically concluded that "[i]n the interests of justice, the District Judge should be afforded further opportunity to consider and reimpose sentence."⁵⁸ In view of both the result and the rationale, it seems highly unlikely that either Mr. Wilson or the judge who sentenced him will be convinced that the United States Court of Appeals for the Fourth Circuit "cannot modify sentences even when [they] deem them unwarranted."⁵⁹

Another typical example of the piecemeal creation of vehicles through which appellate review may be accomplished is found in *United States v. Weston*.⁶⁰ The trial judge furnished a copy of the pre-sentence report to Weston's counsel who vigorously objected to its allegation that the defendant controlled a state-wide illegal drug wholesale business. In response to these objections, the trial judge offered the defendant an opportunity to present any available evidence which would contradict the damaging factual assertions. In addition, the probation officer was directed to submit the confidential documents upon which the report was based for *in camera* inspection. The appellate court began its discussion by pointing out "[i]t has long been the rule in this circuit

54. *Id.* at 498 (citations omitted).

55. *See, e.g., Williams v. New York*, 337 U.S. 241 (1949).

56. *See, e.g., Townsend v. Burke*, 334 U.S. 736 (1948).

57. *See, e.g., Yates v. United States*, 356 U.S. 363 (1958).

58. 450 F.2d at 498.

59. *Id.*

60. 448 F.2d 626 (9th Cir. 1971).

that this court 'has no authority to review the sentence so long as it falls within the statutory limits.'⁶¹ A scholarly review of the various decisions concerning the "process" by which a sentence is determined was undertaken with the preface that "[t]here is a difference between reviewing a sentence and deciding that certain types of information should not, for various reasons, be considered in sentencing."⁶² After distinguishing *Williams v. New York* on the ground that *Williams* admitted the accuracy of the extra-judicial materials considered while *Weston* violently denied their credibility, the court examined the source of the protested portion of the pre-sentence report and found it to be highly speculative, unsupported and factually barren.⁶³ The court of appeals remanded for resentencing with the following holding:

In *Townsend* . . . the Supreme Court made it clear that a sentence cannot be predicated on false information. We extend but little in holding that a sentence cannot be predicated on information of so little value as that here involved. A rational penal system must have some concern for the probable accuracy of the informational inputs in the sentencing process.⁶⁴

Several courts have been unwilling to continue creating new permutations of the *Townsend* focus on the sentencing "process." They have, however, out of their dissatisfaction with the awkward anomaly of non-review, resorted to the same type of ingenuity evident in *Wilson* and *Weston*. Rather than focusing upon the sentencing "process," they have developed what might be accurately labeled the "gentle hint" approach. For example:

While it is not the function of this court to review the length of sentences imposed by district courts, it is observed that the appellant has served a substantial part of his period of alternate service Considerations based on compassion and mercy are to be determined by the trial court. We are confident that the distinguished trial judge in this case will give due consideration to all legitimate factors to be considered if a reduction in sentence is sought.⁶⁵

61. *Id.* at 631.

62. *Id.* It should be noted that *Weston* was decided by the same court of appeals which produced both *Jackson* and *Freeman*.

63. *E.g.*

In essence, then, what we have is a conviction at a trial providing all of the safeguards required by the Constitution This is followed by a determination, based on unsworn evidence detailing otherwise unverified statements of a faceless informer that would not even support a search warrant or an arrest, and without any of the constitutional safeguards, that *Weston* is probably guilty of additional and far more serious crimes

448 F.2d at 631.

64. *Id.* at 634.

65. *United States v. Johnson*, 476 F.2d 1251, 1263 (5th Cir. 1973). The

Another court of appeals has demonstrated a similar aptitude for "encouraging" modification of a sentence by the trial court. After expressing its collective "sense of uneasiness" with the arguments advanced in support of the sentence imposed, the court concluded:

Perhaps reconsideration would produce the same decision but, though unable to do more, we suggest . . . that appellant move for a reduction of sentence . . . so that the district court may have an opportunity to reconsider this matter.⁶⁶

In the unlikely event its feelings were not made apparent by this remark, the Court cited *United States v. Daniels*⁶⁷ in support of its decision.

Additional examples of these two mechanisms, as well as an illustration of the variety of responses currently being produced by requests for appellate review, can be found in three recent decisions from a single court of appeals. In *United States v. Espinoza*,⁶⁸ before announcing sentence, the trial judge had pointed out to one defendant: "[Y]our record is bad, your record for threats and assaults."⁶⁹ A subsequent request for an opportunity to rebut this factual assertion was denied. After stating that "we are not asked to review the length of the sentence,"⁷⁰ the court of appeals nevertheless vacated the sentence and directed that the defendant be given an adequate opportunity to rebut the factual assumptions explicitly relied on by the trial court. This disposition followed a holding that the "defendant retains the right not to be sentenced on the basis of invalid premises."⁷¹ The trial judge's refusal to permit rebuttal of the information upon which he relied in assessing sentence was deemed to be contrary to "fundamental fair-

Yates court admitted utilizing this device in reponse to dilemma of the non-review doctrine:

[W]hen this Court found that only a single offense was committed by petitioner, and not eleven offenses, it chose not to reduce the sentence, but to leave this task, with *gentle intimations of the necessity for such action*, to the District Court.

356 U.S. at 366 (emphasis added).

66. *United States v. Walker*, 469 F.2d 1377, 1381 (1st Cir. 1972).

67. 446 F.2d 967 (6th Cir. 1971). See note 99 and accompanying text *infra*. For examples of district courts which failed to perceive the unstated motivation for appellate remand until a second appellate decision articulated those motives, see *United States v. Wiley*, 278 F.2d 500 (7th Cir. 1960) and *Leach v. United States*, 334 F.2d 945 (D.C. Cir. 1964).

68. 481 F.2d 553 (5th Cir. 1973).

69. *Id.* at 554.

70. *Id.*

71. *Id.* at 555.

ness"⁷² and to be "an abuse of discretion . . . inconsistent with the need for enlightened sentencing."⁷³ Despite its decision to change the sentence, the court expressed the traditional view that "appellate courts have little if any power to review substantially the length of sentence."⁷⁴ The logical inconsistency within this decision was apparently overlooked. As in *Jackson*,⁷⁵ if this court of appeals had no power to review the length of sentence, whether the "process" by which that sentence was determined was either "fair" or "enlightened" appears to be irrelevant.

In *United States v. Hartford*⁷⁶ the same court eloquently articulated the trial judge's broad discretion in sentencing but pointed out that "the careful scrutiny of the *judicial process* by which the particular punishment was determined . . . is . . . a necessary incident of what has always been appropriate appellate review of criminal cases."⁷⁷ This opinion considered three appeals consolidated for review and resulted in the vacation and remand of two sentences but the affirmation of the third. The sentence in the first case was vacated because the judge's statement that the statutory maximum sentence was an insufficient punishment was thought by the appellate court to be improper and to have led the trial court into utilizing the indeterminate sentencing provisions of the Federal Youth Corrections Act for punitive purposes. The second sentence was remanded because the appellate court found a failure by the trial court to impose an individualized sentence in accordance with *Williams v. New York*.⁷⁸ This determination was based upon the judge's statement that "[t]his is one man that is lucky that he only has a maximum of a five year sentence because if there was any more I would give it to him."⁷⁹ In the third case, the majority found that the judge properly exercised the discretion afforded to him. The expressed disbelief of the dissent "that the only time an abuse of sentencing discretion may be shown is when the judge's statements indicate that he has a predetermined sentencing policy"⁸⁰ clearly emphasized the potential consequences of candor by the trial court.

The concluding note in this trio was sounded in *United States*

72. *Id.* at 556.

73. *Id.* at 558.

74. *Id.*

75. See notes 10-14 and accompanying text *supra*.

76. 489 F.2d 652 (5th Cir. 1974).

77. *Id.* at 654 (emphasis original).

78. 337 U.S. 241 (1949).

79. *Id.* at 655.

80. *Id.* at 657.

v. Trevino.⁸¹ An appeal from a denial of a motion for reduction of sentence was rejected because:

Unlike *Townsend* . . . there is no showing of reliance on information acknowledged to be materially untrue; unlike . . . *Weston* . . . appellant has not directly . . . denied the truth of hearsay information . . . and unlike *United States v. Espinoza* . . . appellant has not requested an opportunity to rebut the information relied upon by the trial judge.⁸²

Several common features of these cases must be recognized to appreciate the Fifth Circuit's present posture. None of these three decisions directly addressed the basic jurisdictional issue. While *Espinoza* impliedly disclaims authority to review sentences, both *Espinoza* and *Hartford* found such authority in *Townsend* and other "process" cases. No apparent consideration was given to *Freeman*, *Jackson* or the origins of the non-review doctrine in any of the three opinions. The provisions of section 2106 and the arguments supporting the authority of a court of appeals to engage in substantive review were also omitted from all three opinions. Finally, the variety of circumstances presented in these appeals distorted beyond recognition the concept of a valid sentencing "process" articulated in *Townsend*.

In this context, the boundary between procedural due process and substantive due process has faded beyond ready discernability. So long as appellate courts continue to limit their consideration to the sentencing "process," to the exclusion of the propriety of those sentences, they will also ensure that trial records remain barren of evidence concerning the considerations and analysis by which the sentence was determined. The natural responses of the trial bench to the position outlined in *Espinoza*, *Hartford* and *Trevino*, as well as their companions in other circuits, demand that more candid and effective procedures for substantive appellate review be made available.

D. Abandonment of the Non-review Doctrine

Adherence to the non-review doctrine by the various courts of appeals was the natural and predictable consequence of the early failure to recognize the significance of section 11 of the 1891 Act and *Ballew*. Within the past five years, however, nearly every court of appeals has significantly altered its position on this subject.

81. 490 F.2d 95 (5th Cir. 1974).

82. *Id.* at 96. "[I]t appears that the *Townsend* rule, if manipulated by a well-intentioned and moderately artful court of appeals, is no bar to effective review of the severity of a sentence." Comment, *supra* note 7, at 1363.

Unquestionably the most comprehensive and carefully reasoned judicial analysis of the appellate review issue since *Ballew v. United States v. Rosenberg*.⁸³ Judge Frank, writing for the court, directly addressed the claim of Julius and Ethel Rosenberg that imposition of the death penalty in their case was an abuse of judicial discretion. He began his analysis by succinctly stating the non-review doctrine: "Unless we are to overrule sixty years of undeviating federal precedent, we must hold that an appellate court has no power to modify a sentence."⁸⁴ Judge Frank pointed out that *Ballew* and *Hanley* "strongly suggest that the statutory powers given in the 1879 law to circuit courts had been incorporated by reference in the 1891 statute setting up the circuit courts of appeal."⁸⁵ Furthermore, he drew attention to the fact that the authority of courts of appeals to "affirm, modify or reverse" judgments, found in section 2106,⁸⁶ had not been utilized by noting: "No decision by the Supreme Court or any federal court of appeals seems to have cited or considered this statute in passing on the question of the power to reduce a sentence when a conviction is affirmed."⁸⁷ Notwithstanding the novel and refreshing perceptions found in this opinion, the majority of the court in *Rosenberg* concluded:

Because . . . for six decades federal decisions, including . . . *Blockburger* . . . , have denied the existence of such authority, it is clear that the Supreme Court alone is in a position to hold that Section 2106 confers authority to reduce a sentence which is not outside the bounds set by valid statute. As matters now stand, this court properly regards itself as powerless to exercise its own judgment concerning the alleged severity of the defendants' sentences.⁸⁸

Despite the court's apparent incapacity to embrace the existing authority for substantive appellate review, the *Rosenberg* decision

83. *United States v. Rosenberg*, 195 F.2d 583 (2d Cir. 1952).

84. *Id.* at 604. Immediately following this pronouncement, Judge Frank quotes the well-known rule of *Gurera v. United States*, 40 F.2d 338, 340 (8th Cir. 1930); see note 1 and accompanying text *supra*.

85. 195 F.2d at 604 n.25 (2d Cir. 1952).

86. Originally adopted as Act of June 25, 1948, ch. 646, 62 Stat. 963, this statute provides:

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the case and direct the entry of such appropriate judgment, decree or order or require such further proceedings to be had as may be just under the circumstances.

Portions of what had formerly been 28 U.S.C. §§ 344, 876 and 877 (1940 ed.) are incorporated in this legislation.

87. 195 F.2d 583, 605 (2d Cir. 1952).

88. *Id.* at 605-07.

is, nevertheless, comparable to the 1891 Act and *Ballew* as one of the significant steps in the development of the appellate review concept. The opinion appears to be the first attempt in this century to analyze the jurisdictional provisions of the 1891 Act and to acknowledge the existence of statutory authority for substantive sentence review. Perhaps more importantly, the *Rosenberg* decision is the first candid expression of appellate dissatisfaction with the non-review doctrine. Judge Frank's obvious frustration with having the court perpetuate the error of its ways, principally because it was such a long standing error, would have prompted speculation that the issue would soon reappear. Surprisingly, however, twenty years elapsed before another court of appeals openly acknowledged either its disagreement with a criminal sentence or the jurisdictional nature of the non-review doctrine.

In 1954, however, two years after the *Rosenberg* decision, the Solicitor General of the United States presented an eloquent argument in support of a candid system of appellate review in a speech presented to the annual meeting of the American Bar Association Section on Criminal Law:

I suggest a study of the desirability of providing for appellate review of sentences.

. . . .

The judicial process should have the internal means of overcoming its own mistakes.

. . . .

The possibility of review would make itself felt even in cases not actually appealed. The existence of the power would make its exercise unnecessary in all but a few cases.

. . . .

[P]recisely because the trial judge is forced to operate with so little guidance in the legal rules a second glance at the product is all the more indicated

. . . .

To the sentencing judge in serious cases it should be a source of comfort to know that any error he may have committed in this most crucial step of the whole trial is subject to correction on appeal Moreover, when affirmed on appeal, the trial judge would have the satisfying assurance . . . that his judgment on the most momentous question in the case has been upheld.⁸⁹

Another five years elapsed before the thrust of Judge Frank's scholarship in *Rosenberg* and the force of, by then Judge, Sobeloff's pragmatic analysis was recognized in a judicial opinion. The

89. Sobeloff, *The Sentence of the Court—Should There be Appellate Review?*, 41 A.B.A.J. 13, 16-17 (1973).

majority opinion in *Smith v. United States*⁹⁰ cited *Gore* and *Blockburger* for the proposition that three sales of prohibited substances may result in conviction on fourteen separate counts. While the en banc court candidly expressed its opinion that the fifty-two year sentence was "greater than should have been imposed,"⁹¹ it concluded that "appellate courts are without power to control or modify a sentence which is within the limits fixed by a valid statute."⁹² Although section 2106 was quoted, the majority pointed out no case had held that this statute authorized modification of a sentence within statutory limits; thus, the court's conclusion paralleled that of Judge Frank in *Rosenberg*: "Until the Supreme Court sees fit to hold that section 2106 applies in such cases, we think this court should apply what appears to be the fixed rule."⁹³

In a widely cited dissent to this decision, Chief Judge Murrah effectively countered the majority interpretation of section 2106 with the succinct argument that "no federal court has ever said that the statute does not mean what it plainly says."⁹⁴ By his brief and forceful dissent, Chief Judge Murrah reinforced the disquietude over the non-review doctrine and gave further impetus to the arguments articulated by Judge Sobeloff.

Several commentators have suggested that *United States v. Wiley*⁹⁵ is the next step in the development of current thinking concerning the anomaly of non-review. In its first consideration of this case⁹⁶ the court pointed out that although the defendant had played a minor role, was younger and had no prior criminal record, he had been sentenced to three years imprisonment while the "ringleader" who was older and had been previously convicted of other offenses was sentenced to only two years. The expressed

90. 273 F.2d 462 (10th Cir. 1959).

91. *Id.* at 467.

92. *Id.*

93. *Id.* at 468.

94. *Id.* at 469. Chief Judge Murrah, after agreeing that sentencing discretion is best exercised by the trial court, argues that this thesis "does not mean that the appellate courts should abnegate a duty imposed by statute when manifest justice requires the exercise of that power." *Id.* Chief Judge Murrah's analysis of 28 U.S.C. § 2106 (1974) is vaguely reminiscent of the statement of the Lord Chief Justice in *Rex v. The Minister For Drains*: "[I]f Parliament does not mean what it says it must say so." A. HERBERT, UNCOMMON LAW at 313 (1935).

95. 278 F.2d 500 (7th Cir. 1960). See, e.g., Comment, *supra* note 7; Comment, *Present Limitations on Appellate Review of Sentencing*, 58 Iowa L. Rev. 469 (1972); Comment, *Appellate Review of Sentences: A Survey*, 17 Sr. Louis U.L.J. 221 (1972); Comment, *supra* note 23.

96. *United States v. Wiley*, 267 F.2d 453 (7th Cir. 1959).

reason for the initial remand of this sentence was a determination that the trial judge's fixed policy of not considering probation for persons who chose to plead guilty and stand trial was contrary to the *Williams* mandate for "individualized" sentences. The trial court's reimposition of the same sentence resulted in a second appeal.

In *Wiley II*, the court remanded the case a second time with directions to impose "a proper sentence not inconsistent with the views herein expressed."⁹⁷ The court expressly stated, however, that this disposition was an exercise of its "supervisory control of the district court in aid of its appellate jurisdiction."⁹⁸ In neither opinion did the court cite or refer to section 2106. Thus, while *Wiley II* represents a refreshing departure from the technique of reviewing only the sentencing "process," or giving the lower court a "gentle hint" to reduce the sentence, this decision fails to acknowledge the express statutory authority to engage in substantive review of criminal sentences.

If selection of the most significant recent case considering the anomaly of non-review were to be based solely upon the number of published comments, the choice would undoubtedly be *United States v. Daniels*.⁹⁹ In an earlier opinion, the court upheld Daniels' conviction for failing to report to his Selective Service Board for alternate service but remanded the case for "review of this sentence."¹⁰⁰ On remand the trial judge imposed the same sentence and stated that "for over thirty years" he had imposed the maximum sentence in all cases of this type. A second appeal followed. Not surprisingly, *Daniels II* began with the traditional reference to the non-review doctrine: "The severity or duration of punishment imposed by a trial court is not subject to modification where the sentence imposed is within requisite legislative limits."¹⁰¹ After reviewing *Williams* and *Townsend*, however, the court concluded that discretion of the trial judge

will be subject to appellate scrutiny under limited circumstances, such as: the reliance by the sentencing court on improper factors or the failure of the sentencing court to "evaluate the available information in light of the facts relevant to sentencing."¹⁰²

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97. *United States v. Wiley*, 278 F.2d 500, 504 (7th Cir. 1960).
 98. *Id.* at 503. Cf. *Leach v. United States*, 334 F.2d 945 (D.C. Cir. 1964). As might be expected, an extensive quotation from *Yates* precedes this conclusion.
 99. 446 F.2d 967 (6th Cir. 1971). See Comment, *supra* note 47; Comment, U. PRR. L. REV., *supra* note 34.
 100. *United States v. Daniels*, 429 F.2d 1273, 1274 (6th Cir. 1970).
 101. *United States v. Daniels*, 446 F.2d 967, 969 (6th Cir. 1971).
 102. *Id.* at 970 (citing *Scott v. United States*, 419 F.2d 264, 266 (D.C. Cir. 1969)).

The court of appeals defined three separate errors in the district court decision. The first was a conventional objection to the failure to "individualize" the defendant's sentence rather than routinely adhering to an unswerving policy for particular types of cases. The second basis for reversal represented an undisguised substantive judgment upon the propriety of a five year sentence. After a succinct factual review, the court stated:

We believe that under the mitigating circumstances present here the District Court's mechanical sentencing of the appellant to five years in the penitentiary defies the United States Congress' implied legislative will to impose a lesser sentence where appropriate.¹⁰³

The third error cited was an equally candid form of substantive review: "Third, we are disturbed by the district court's failure to conceive of the sentencing procedure in the terms of . . . modern penological philosophy . . ."¹⁰⁴

In addition to its open acknowledgement of substantive review, the *Daniels II* decision included a second significant departure from the customary disposition of modern appellate review cases. Rather than the typical remand for "reconsideration in light of our opinion," the court of appeals entered an order suspending the sentence, placing the defendant upon probation and specifying the conditions of that probation. Not surprisingly, *Yates*¹⁰⁵ is cited as the authority for this disposition.

Thus, while *Daniels II* does not acknowledge statutory jurisdiction, it at least makes explicit the fact of substantive judicial review. The number of courts which had engaged in this practice *sub rosa*, and the variety of ways they had disclaimed what they were doing, in fact, makes *Daniels II* distinctive primarily for its candor. It is difficult to imagine a more dramatic means of expressing a willingness to substitute its own judgment for that of the trial judge than for the court of appeals to enter an order setting the approved sentence.

In 1972, this same court of appeals was again confronted with the appellate review anomaly. *United States v. McKinney*¹⁰⁶ (hereinafter referred to as "*McKinney III*") had previously been remanded as a result of the court's determination that the sentence was "excessive and out of proportion to the offense."¹⁰⁷ On

103. *Id.* at 972.

104. *Id.*

105. See notes 42-44 and accompanying text *supra*.

106. 466 F.2d 1403 (6th Cir. 1972).

107. *United States v. McKinney*, 427 F.2d 449, 455 (6th Cir. 1970).

remand, the trial court imposed the same sentence and the court of appeals returned the case a second time because at the time of the resentencing, the district court did not "have the benefit of our subsequent decision in *United States v. Daniels*"108 At the second resentencing, the maximum five year punishment was imposed for a third time.

The court of appeals began its third consideration of *McKinney* by summarizing the defendant's exemplary record prior to this conviction for violation of the Selective Service Act. The thesis of the district court "that he had absolute, uncontrollable, and unreviewable discretion to impose any sentence he saw fit to impose so long as it did not exceed the statutory limit, and that an appellate court had no jurisdiction to do anything about it"109 was also noted. Then, without further discussion of its rationale, or any stated consideration of its jurisdiction to do so, the court of appeals concluded that the latest decision of the trial court "constituted a gross abuse of discretion as well as a violation of our mandates."110 An order reducing the sentence to one year, allowing credit for a confinement previously served, and directing release of the defendant from custody was entered by the appellate tribunal. Probably the most significant aspect of *McKinney III* is that, although it represented an opportunity to retreat from *Daniels II*, it unmistakably affirmed that decision, including entry of a similar order articulating the court's substantive determination of the appropriate sentence.

Unquestionably the most comprehensive analysis of the non-review doctrine since *Rosenberg* is found in *Woosley v. United States*.111 After reviewing the effect of the 1891 Act and the various Supreme Court decisions traditionally thought to support the non-review doctrine, the Eighth Circuit Court of Appeals concluded "the Supreme Court's support for the rule that federal appellate courts generally may not review a sentence is pure dicta."112 Then, on the basis of the *Williams* mandate for individualized sentences, the court held that when the district court followed a fixed sentencing policy in cases of a particular type, it failed to exercise any discretion. Therefore, substantive appellate

108. *United States v. McKinney*, 466 F.2d 1403 (6th Cir. 1971). It should be noted that both the order directing the second remand of this case and the opinion rendered following the case's third appearance in the court begin at 1403; however, the order was entered in 1971 and the opinion published in 1972.

109. *United States v. McKinney*, 466 F.2d 1403, 1404 (6th Cir. 1972).

110. *Id.* at 1405.

111. 478 F.2d 139 (8th Cir. 1973).

112. *Id.* at 142.

review of that sentence would be no more than "according to defendant the judicial discretion to which he is entitled."¹¹³

Having thus surmounted the two great historical barriers to substantive review of criminal sentences, the *Woosley* court turned to the difficult question of what standards should be utilized in a system of express substantive review. Tragically, at this point, the court of appeals snatched defeat from the jaws of victory. The standard selected was "whether the imposition of a maximum sentence was in itself an *abuse* of discretion under the circumstances presented . . ." ¹¹⁴ Thus, while the court established its authority to modify the severity of a criminal sentence, it abnegated its responsibility for all such modifications except those "within narrow limits where the court has manifestly or grossly abused its discretion."¹¹⁵ Such a standard gives the trial court no guidance and, worse, permits the perpetuation of the same seemingly erroneous practices that prompt appellate court intervention at this point.¹¹⁶

The foregoing criticism must be tempered by recognition that this court, more than forty years previously, rendered the decision in *United States v. Gurrera*. By contrast, *Woosley* expresses a major shift in philosophy about the non-review doctrine. The opinion in *Woosley* is certainly the most comprehensive example of what one court has referred to as "a growing body of precedent supporting appellate review of sentencing."

III. SOURCES FOR A DOCTRINE OF APPELLATE REVIEW OF SENTENCING

A. Existing Statutory Exceptions

Entirely apart from both the existence of section 2106 and the development of several mechanisms for judicial review of criminal sentences, Congress has enacted two significant statutory procedures for appellate review.¹¹⁷ One is applicable to the armed

113. *Id.* at 144-45.

114. *Id.* at 146 (emphasis original).

115. *Id.* at 147.

116. Although the court believed the severity of this sentence "shocks the judicial conscience" and could "find no basis by any rational criteria to justify *Woosley's* punishment in this case" it nevertheless elected to remand for resentencing rather than impose a sentence itself.

117. For an analysis of the non-review doctrine in the federal courts as well as a comprehensive survey of state statutes and decisions permitting appellate review of criminal sentences, see Comment, *St. Louis U.L.J.*, *supra* note 95. See also ABA PROPOSAL, *infra* note 178 at 67, *et seq.*

forces. No sentence imposed by a military court-martial becomes final until it has been reviewed by the Convening Authority.¹¹⁸ The Convening Authority

may approve only such findings of guilty, and the sentence or such part or amount of the sentence, as he finds correct in law and fact and as he in his discretion determines should be approved.¹¹⁹

In addition, the Judge Advocate General of each service is required to appoint and maintain a Board of Review.¹²⁰ This Board "may affirm only . . . such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved."¹²¹ Finally, the United States Court of Military Appeals, consisting of three judges appointed by the President with the advice and consent of the Senate for fifteen year terms, may "set aside the findings [of guilt] and sentence" ¹²² Thus, each sentencing decision of the military trial judge must be scrutinized by three distinct entities, each having express statutory authority to alter that decision. In addition, an appellate court composed of civilian judges appointed in the same manner as judges of the courts of appeals may also alter the sentence in cases which come before it. The non-review doctrine, an anomaly unique to sentencing,¹²³ is nonexistent in the military criminal justice system.

A more recent, and far more significant, Congressional endorsement of the appellate review procedure is found in Title X of the Organized Crime Control Act of 1970.¹²⁴ Basically intended to permit longer periods of confinement for persons involved in major, organized criminal activities,¹²⁵ this legislation established, for a very limited number of cases, both appellate sentence review and several other devices which represent equally significant departures from current sentencing procedures.

For the increased confinement provisions to be used, it must be established that the defendant is "a dangerous special of-

118. 10 U.S.C. § 860 (1956).

119. *Id.* § 864.

120. *Id.* § 866(a).

121. *Id.* § 866(c).

122. *Id.* § 867(e).

123. In *Pearce*, the Court held that whenever a second or subsequent trial resulted in a more severe sentence than was imposed following the original trial, a statement of the reasons for imposition of the greater sentence would be required to ensure that the sentence was not motivated by constitutionally impermissible reasons.

124. 18 U.S.C. § 3575, *et seq.* (1970).

125. 119 CONG. REC. 1783 (daily ed. Feb. 1, 1973).

fender."¹²⁶ This determination can be made by the district court only after a full hearing including an opportunity by counsel for the defendant "to inspect the pre-sentence report sufficiently prior to the hearing as to afford a reasonable opportunity for verification."¹²⁷ The trial court is required to place in the record a statement identifying the information relied upon in making its decision and the reasons for the sentence imposed.

Either the defendant or the United States may appeal from a sentence imposed pursuant to this procedure. Upon such appeal, "[r]eview of the sentence shall include review of whether the procedure employed was lawful, the findings made were clearly erroneous, or the sentencing court's discretion was abused."¹²⁸ The court of appeals may affirm, modify or vacate the sentence and may impose "any sentence which the sentencing court could originally have imposed, or remand for further sentencing procedures."¹²⁹ If the United States has initiated the appeal, the sentence may be increased, affirmed or reduced; but if the defendant initiates the appeal, the sentence may only be affirmed or reduced. Finally, regardless of its disposition, "the court of appeals shall state in writing the reason for its disposition of the review of the sentence."¹³⁰

It is obvious that this legislation represents a major departure from all the current doctrines regarding sentencing. Unlike any other criminal penalty provision in the United States Code, a defendant may not be confined under this section unless the trial judge informs him of the particular facts which were relied upon in determining the sentence. The defendant is also made privy to the analysis of those facts which brought the judge to the particular sentence imposed. Furthermore, again unlike a person sentenced under any other statute, the "dangerous special offender" is entitled to have the reasons for the sentence reviewed by an appellate body which has been furnished with adequate information to make a determination of its propriety. Depending upon which party takes the appeal, the court may or may not be permitted to increase the sentence. But, in either event, the court is required to state the reasons for whatever disposition it makes.

B. Pending Legislation

Although the appellate review concept represented by the Or-

126. 18 U.S.C. § 3575 (a) (1970).

127. *Id.* § 3575 (b).

128. *Id.* § 3576.

129. *Id.*

130. *Id.*

ganized Crime Control Act was not adopted by Congress until 1970, proposed legislation to establish a comprehensive system of sentence review was introduced in Congress as early as 1955. In that year, Senator Kefauver introduced S. 1480¹³¹ which would have permitted an "appeal against the sentence" and allowed a court of appeals to "impose any sentence which it deems appropriate."¹³² In virtually every subsequent session of the Congress, Senator Hruska has introduced some form of appellate review legislation.¹³³ Although one of these proposals was passed by the Senate in 1968,¹³⁴ no proposal broader in scope than the provision in Title X of the Organized Crime Control Act has yet been enacted. Several significant legislative proposals to revise the entire federal criminal code, including its sentencing provisions, are currently pending before Congress. The Senate versions of these proposals have been the subject of extensive hearings in the past two years. It is anticipated that the Senate Committee on the Judiciary will report one of these bills, in all likelihood with substantial amendments, by the end of 1974 with the goal of enactment by the 94th Congress.

The most comprehensive bill providing for appellate review is S. 716 introduced by Senator Hruska on February 1, 1973.¹³⁵ In his introductory remarks, the Senator pointed out that "this legislation is identical to S. 2228 and S. 1501, which I introduced respectively in the 92nd and 91st Congresses, and to S. 1540 which was passed unanimously by the Senate in the 90th Congress."¹³⁶

The initial impact of S. 716 would be that the appellate court would receive substantially more information concerning the sentence imposed. In each case directing imprisonment, the trial judge would be required to state "his reasons for selecting that particular sentence."¹³⁷ In addition, the courts of appeals could require by either rule or order that any transcript, record, report, document, or "other information relating to the offense . . . and to the sentence" be transmitted to them.¹³⁸ S. 716 incorporates the American Bar Association position that such sentencing infor-

131. S. 1480, 84th Cong., 1st Sess. (1955).

132. *Id.*

133. *See, e.g.*, S. 3914, 86th Cong., 2d Sess. (1960); S. 1692, 87th Cong., 1st Sess. (1961); S. 2879, 87th Cong., 2d Sess. (1962); S. 823, 88th Cong., 1st Sess. (1963); S. 2722, 89th Cong., 1st Sess. (1965); S. 1540, 90th Cong., 1st Sess. (1967); S. 1561, 91st Cong., 1st Sess. (1969); and, S. 2228, 92d Cong., 1st Sess. (1971).

134. S. 1540, 90th Cong., 1st Sess. (1967).

135. S. 716, 93d Cong., 1st Sess. (1973) [hereinafter cited as S. 716].

136. 119 CONG. REC. S. 1776 (daily ed. Feb. 1, 1973).

137. S. 716, *supra* note 135, at (e).

138. *Id.*

mation would, on appeal, be available to the defendant only to the extent that such materials were available in the district court.

S. 716 would also allow the courts of appeals discretion in determining whether a sentence appeal would be heard. Denial of a request for appellate sentence review would be "final and not subject to further judicial review."¹³⁹ For those cases in which review was granted, the appellate function would be to "determine whether the sentence is excessive."¹⁴⁰ The reviewing court would be empowered to take any action the sentencing court might have taken except that, under this proposal, "the defendant's sentence shall not be increased as a result of an appeal."¹⁴¹ Unless the sentence was affirmed or the appeal dismissed, the court would be required to "state the reasons for its actions."¹⁴²

Finally, under S. 716, the probability of a significant increase in the case load of the appellate courts is drastically reduced by the provision that this statute would become effective "six months after its approval and shall apply only to sentences imposed thereafter."¹⁴³ The vast flood of appeals from persons currently under sentences which might otherwise be expected to follow adoption of a system of sentence review would not be permitted under S. 716; only sentences imposed more than six months after its approval would be eligible for review. During the six-month period between adoption and implementation, trial courts would necessarily review their sentencing procedures in preparation for the requirement that they state the reasons for their decisions. This review itself should, in many cases, lead to improved sentencing policies. In addition, necessary alterations to existing appellate procedures could easily be implemented during this period. This very effective solution to what some believe to be a major disadvantage of appellate review¹⁴⁴ is found only in S. 716.

Another appellate review measure was introduced by Senator McClellan on January 4, 1973 as a part of one proposal to revise the federal criminal code.¹⁴⁵ The bill, S. 1, is a modified version of the recommendations of the National Commission on Reform of Federal Criminal Laws.¹⁴⁶ The general sentencing provisions

139. *Id.* at (b).

140. *Id.*

141. *Id.* at (c).

142. *Id.*

143. *Id.* at (i).

144. See note 213 and text accompanying *infra*.

145. S. 1, 93d Cong., 1st Sess. (1973) [hereinafter cited as S. 1].

146. Cf. note 192 and accompanying text *infra*. A brief description of the major differences between the Brown Commission recommendations

of S. 1 require that all sentences "be accompanied by appropriate findings of facts and statements of reasons."¹⁴⁷

The subchapter of S. 1 directed to criminal appeals also contains a section establishing a form of appellate review. The appellate review provisions of S. 1 are limited to sentences of "upper-range imprisonment for dangerous special offenders."¹⁴⁸ "Dangerous special offender" is defined generally to include persons having previously been convicted of felonies, persons posing a serious danger to the safety of others, persons engaged in a major conspiracy and persons using firearms in the commission of a felony.¹⁴⁹

The standard to be applied in reviewing this limited class of cases is "whether the procedure employed was lawful, the findings made were clearly erroneous, or the sentencing court's discretion was abused."¹⁵⁰ The appellate court could impose any sentence which the trial court was empowered to levy except that the sentence could be increased only upon a review initiated by the United States. Regardless of their decision, the courts of appeals would be required to "state in writing the reasons" for their disposition.

An alternative comprehensive recodification of the federal criminal code was introduced on March 27, 1973 by Senators Hruska and McClellan. S. 1400¹⁵¹ was basically drafted by the Criminal Code Revision Unit established within the Department of Justice pursuant to a Presidential directive issued following submission of the Brown Commission report.¹⁵² Among the many significant differences between S. 1 and S. 1400 is that the latter does not contain any provision for appellate review of sentences. In addition, it does not require the trial judge to reveal either the factual considerations which form the basis of his sentence or the analysis of those considerations which produced the sentence imposed. Notwithstanding S. 1400, it may be reasonably assumed that the bill reported by the Senate Judiciary Committee will include some form of the appellate review concept. The Senate hearings, as well as previous Senate actions, clearly point in this direction.

and S. 1 has been prepared by the Commission's Director. 1973 *Hearings, infra* note 194 at 5382.

147. S. 1, *supra* note 145 § 1-4A.1(a).

148. *Id.* § 3-11E3(a).

149. *Id.* § 1-4B2(b)(2).

150. *Id.* § 3-11E3(a). This standard is identical with the standard adopted in Title X of the Organized Crime Control Act of 1970. See note 124 and accompanying text *supra*.

151. S. 1400, 93d Cong., 1st Sess. (1973).

152. A very informative discussion of the history and development of this legislation may be found in the testimony of Mr. Joseph T. Sneed, Deputy Attorney General, 1973 *Hearings, infra* note 194 at 5218.

C. Re-examination of Judicial Arguments Against Review

1. Does the Trial Judge Have an Advantage?

The arguments customarily relied upon by courts not openly accepting the concept of substantive appellate review center upon two points. The first is that

[t]he sentencing judge is in a superior position, because of his personal involvement in the transaction, to determine the most appropriate type and degree of penal sanction.¹⁵³

While examples supporting this reasoning are legion, one of the most succinct statements originated in *United States v. Latimer*¹⁵⁴ and was reaffirmed in *United States v. Lowe*:¹⁵⁵ "The sentencing of one convicted of a crime is largely dependent upon matters which are within the knowledge, experience and judgment of the sentencing court."¹⁵⁶ The view of the district court in *Daniels* that it was "qualified by experience, temperament [and] knowledge of law . . ."¹⁵⁷ to determine an appropriate sentence appears to be a typical expression of this position.

In support of this thesis it is argued that, having considered the enormous problems of sentencing on a far greater number of previous occasions, a trial judge is more likely to reach a rational and appropriate conclusion than an appellate judge. This argument discounts the probability that appellate judges have had experience at the trial court level before their appointment. It likewise glosses over the fact that most trial judges come to the bench with no previous sentencing experience. In addition, if appellate courts were regularly to engage in the substantive review of sentences, this argument would obviously become invalid. The importance of the sentencing judge's past experience is further diminished by the *Williams* mandate for individualized sentences—the sentence imposed upon the last bank robber to appear before the court is infinitely less material than the particular circumstances of the present bank robber's case. Perhaps the most damaging evidence of the thesis' invalidity is the unfortunate number of cases in which an appellate court has been required to apply *Williams* and remand a sentence expressly imposed in accordance with a fixed policy.¹⁵⁸

153. Coburn, *supra* note 7, at 216.

154. 415 F.2d 1288 (6th Cir. 1969).

155. 482 F.2d 1357 (6th Cir. 1973).

156. *Id.* at 1358.

157. *United States v. Daniels*, United States District Court for the Eastern District of Kentucky, Transcript of Sentencing Hearing; quoted in *United States v. Daniels*, 446 F.2d 967 (6th Cir. 1971).

158. *E.g.*, *United States v. Hartford*, 489 F.2d 652 (5th Cir. 1974); *Woosley v. United States*, 478 F.2d 139 (8th Cir. 1973); *United States v. Mc-*

The second point frequently cited in opposition to appellate review of sentences is that the trial court's personal observations of a defendant's appearance and demeanor lead it to a more appropriate sentence. The potential hazards of this well-established notion can be found in *Williams*.¹⁵⁹ The defendant appealed the state court's imposition of the death penalty because in determining an appropriate sentence, the judge expressly considered, as permitted by state law, several extra-judicial sources of information. The Court pointed out it was concerned with the propriety of considering extra-judicial material during sentencing, stating:

It is conceded no federal constitutional objections would have been possible if the judge here had sentenced appellant to death because appellant's trial manner impressed the judge that appellant was a bad risk for society, or if the judge had sentenced him to death giving no reason at all.¹⁶⁰

During the course of a lengthy criminal trial, the trial judge has an opportunity constantly to observe the defendant and his reactions to various developments occurring in the presentation of evidence. The strength of any assertion that these observations are helpful in determining the most appropriate sentence would seem to increase in direct proportion to the length of the opportunity for such observation. It is entirely reasonable to suggest that a perceptive judge who has spent five to seven hours each day for several days in the same room as the defendant may be more capable of analyzing the defendant's interests, motivations and values than even those appellate judges having the time to digest a trial transcript of that length.

This conventional wisdom is questionable upon three grounds. "In some localities as many as ninety-five percent of the criminal cases are disposed of by [pleas of guilty]. . . ."¹⁶¹ In every case in which a plea of guilty is entered, even the most scrupulous

Kinney, 466 F.2d 1403 (6th Cir. 1972); *United States v. Daniels*, 446 F.2d 967 (6th Cir. 1971); *United States v. Wiley*, 278 F.2d 500 (7th Cir. 1960).

159. 337 U.S. 241 (1949).

160. *Id.* at 252. After alluding to the non-review doctrine, one court formulated this classic statement of the special vantage point enjoyed by the trial judge:

This historic deference [to the trial judge's discretion], premised in great measure on the proximity of the trial judge to the criminal defendant, thus affording the court the opportunity of first-hand observation and impressions which together with many other considerations must be weighed in passing sentence continues unabated and remains uncompromised. . . .

United States v. Hartford, 489 F.2d 652, 654 (5th Cir. 1974).

161. ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STAND-

compliance with Rule 11¹⁶² and the defendant's right of allocation are unlikely to afford the trial judge an opportunity for any significant personal observation of the defendant. Thus, in all such cases, the argument that the trial judge's personal observations have materially enhanced his ability to determine an appropriate sentence does not apply because there has been no opportunity for such observation.

In those infrequent cases in which a significant opportunity for personal observation exists, the unstated and necessarily subjective impressions based upon the defendant's courtroom demeanor seem of such questionable validity as to be untrustworthy. As Judge Sobeloff has stated:

Not always can a sentencing judge gain a balanced insight of a man by observing him when he is undergoing one of the greatest stresses to which he can be subjected [the criminal trial]. Unless the judge takes special pains, the impression so formed can become grotesquely distorted.¹⁶³

Finally, it may be legitimately asked whether observations of the defendant's courtroom behavior made during a trial should be entitled to judicial consideration in the sentencing determination. This consideration is particularly relevant if courtroom exposure is limited to the brief arraignment and sentencing hearings. With stakes so high, the defendant should not be required to take the risk of a mistaken impression.

2. *Should the Trial Judge State His Reasons?*

Analysis of an additional aspect of appellate review is necessary to understand why there has been such a reluctance, not to say inability, to change current sentencing policies. The *Williams* philosophy requires the collection of data prior to a determination of sentence. The Federal Rule of Criminal Procedure concerning pre-sentence reports¹⁶⁴ is perhaps the most visible means by which this policy is implemented. An illustration of the emphasis given to the formulation of a sentence based on all available information is found in the one case considered in *Hartford*¹⁶⁵ in which the sen-

ARDS RELATING TO PLEAS OF GUILTY (Approved Draft, 1970). See note 210 *infra*.

162. FED. R. CRIM. P. 11.

163. *Hearings on S. 2722 before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. 37 (1966). [Hereinafter cited as 1966 *Hearings*].

164. FED. R. CRIM. P. 32(c).

165. *United States v. Hartford*, 489 F.2d 652 (5th Cir. 1974); see notes 76-80 and accompanying text *supra*.

tence was not vacated. The court of appeals praised the district court because it had

permitted testimony at the sentencing proceedings by both [the defendant's] father and minister, despite the existence of an apparently comprehensive pre-sentence report The record . . . indicates that the judge had examined the pre-sentence report in addition to correspondence from the appellant's minister, and before sentencing, the judge allowed considerable testimony concerning [the defendant's] particular circumstances.¹⁶⁶

Although criminal sentences are expected to be based upon factual considerations, the first general requirement for disclosure of these facts has only recently appeared. On April 24, 1974, the Chief Justice transmitted to Congress proposed amendments to the Federal Rules of Criminal Procedure.¹⁶⁷ Although the effective date of these rules has been postponed until August 1, 1975, one of the proposed rules requires that the district courts must "upon request permit the defendant . . . to read the report of the pre-sentence investigation . . ." ¹⁶⁸ While there are significant limitations to this requirement, it nevertheless represents an important departure from the rule that release of a pre-sentence report was entirely discretionary with the trial judge.¹⁶⁹

Of far greater significance is the fact that virtually all recent decisions vacating criminal sentences have appeared to be the consequence of a trial judge's candid statement of the reasons for his selection of a particular sentence. For example, each of the following remarks during the sentencing process has resulted in appellate reversal:

[I]t wouldn't make any difference if there were fifty other charges. If this man pleaded guilty to distributing LSD he would get the maximum penalty¹⁷⁰

[I]n cases of this kind, [people who refuse to report for induction] deserve a five year sentence¹⁷¹

When you consider a man has just willfully neglected to serve and refused to serve his country, it would seem to be a travesty that he would serve less time at confinement, even under a maximum sentence, than a man who went on and served.¹⁷²

166. *Id.* at 656.

167. 119 CONG. REC. 3517 (daily ed. May 2, 1974).

168. Proposed Rule 32(c) (3) (A), *Id.* at 3521.

169. See FED. R. CRIM. P. 11. Rule 32 permits the Court to state orally or in writing "a summary of the factual information contained [in the pre-sentence report] to be relied on in determining sentence . . ." in lieu of making the report available. In addition, the Proposed Rule exempts from disclosure certain confidential information and diagnostic opinions.

170. *United States v. Hartford*, 489 F.2d 652, 655 (5th Cir. 1974).

171. *United States v. Daniels*, 446 F.2d 967, 969 (6th Cir. 1971).

172. *United States v. Charles*, 460 F.2d 1093, 1095 (6th Cir. 1972).

It has been my policy, and I don't intend to change it at this point, . . . you have not even asked for conscientious objector status You would not serve in any noncombatant work.¹⁷³

Notwithstanding the substantial disincentive for such candor by the sentencing judge, several courts have described the great utility of expressing the sentencing rationale:

Had the court below stated reasons . . . or, in the alternative, disclosed in some greater detail the basis for imposing the rather long sentence, the posture of this appeal would be different. Rather, we are faced with a disturbing record that discloses only that defendant was given a lengthy sentence on the basis of possible erroneous information and that the district court, without stating reasons, refused to permit rebuttal of the factual assumption.¹⁷⁴

One court has required that reasons for the sentencing decision be articulated. After the conviction on one of four counts was reversed, the district court in *United States v. McGee*¹⁷⁵ refused a request to reduce the sentence and reimposed the original sentence. Upon an appeal asserting an abuse of discretion, the court of appeals responded:

[T]he trial judge has "very broad discretion," and he is generally under no obligation to give reasons for his sentencing decisions. . . . In this particular case, though, we have determined that . . . the initial sentencing process with respect to the valid counts was . . . affected by the conviction on the far more serious count To purge this possible taint . . . we believe the trial judge should either have reduced the sentences . . . or have given at least a summary explanation of his reasons for declining to do so If the original sentences on the valid counts are to stand, we think the latter is the minimum necessary to impart integrity to those sentences¹⁷⁶

With the exception of *Pearce v. North Carolina*¹⁷⁷ and cases

173. *Woodsley v. United States*, 478 F.2d 139, 140 (8th Cir. 1973).

174. *United States v. Espinoza*, 481 F.2d 553, 557-58 (5th Cir. 1973). For a very forceful argument that the trial court should disclose the reasons for their sentences, see, Coburn, *supra* note 7, at 217. Perhaps the most persuasive argument for disclosure found in a recent opinion is contained in *United States v. Brown*, 479 F.2d 1170, 1172 (2d Cir. 1973).

175. *United States v. McGee*, 344 F. Supp. 442 (S.D.N.Y. 1972).

176. *McGee v. United States*, 462 F.2d 243, 247 (2d Cir. 1972).

177. 395 U.S. 711 (1969). "[W]henver a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear." *Id.* at 726. The significance of this decision to a system of appellate review, however, goes far beyond the requirement that the sentencing rationale be articulated in this limited class of cases. See note 183 *infra*. While the imposition of a similar requirement for all sentences would undoubtedly be of great benefit, the relationship between the mental processes which, in fact,

arising thereunder, no instance has been found in which the trial judge was forced to choose between either specifying the reasons for his sentencing decision or having that sentence vacated by an appellate court. The discretion presently granted the sentencing judge to remain silent as to the information considered and the reasons for selection of the sentence imposed appears to be a virtually insurmountable obstacle to effective appellate review. Meaningful review of criminal sentences will never be possible without an adequate and open record of the sentencing considerations and rationale.

D. Other Non-legislative Recommendations

The American Bar Association ("ABA") Project on Standards for Criminal Justice published a tentative draft of Standards Relating to Appellate Review of Sentences (hereinafter "ABA proposal") in April, 1967. With one significant exception, that draft was approved by the ABA House of Delegates in February, 1968. The ABA position, as finally adopted, begins with the premise that "judicial review should be available for all sentences imposed in cases where provision is made for review of the conviction."¹⁷⁸ The appellate court would be provided with the pre-sentence report and all other documents "available to the sentencing court as an aid in passing sentence."¹⁷⁹ These materials would be reviewable by the defendant "only to the extent that such examination was permitted prior to the imposition of sentence."¹⁸⁰ In addition, the sentencing judge "should be required in every case to state his reasons for selecting the particular sentence imposed."¹⁸¹ Under the ABA

produced a sentence and the articulated rationale is, however, likely to be very tenuous. As one writer has recently observed, true candor about the sentencing decision may not reasonably be expected because "[t]he psychological roots of a judge's sentence reach into a bog where most judges fear to tread. To trespass there is to risk unsettling discoveries, to confront demons they would sooner avoid." D. JACKSON, *JUDGES* at 370 (1974). [hereinafter cited as JACKSON]. Judge Frankel agrees that "accidents of birth and biography . . . [generate] the guilts, the fears, and the rages that affect almost all of us at times and in ways we often cannot know." *Id.* at 367. Finally, a psychiatrist who has been extensively involved in courses and seminars for trial judges over the past decade has concluded that "[judges] have all kinds of explicit rationales for not thinking about their own involvement." *Id.* at 370.

178. ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, *STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES*, Standard 1.1(a) (Approved Draft, 1968) [hereinafter cited as ABA PROPOSAL].

179. *Id.* Standard 2.3(a) (iii).

180. *Id.*

181. *Id.* Standard 2.3(c).

proposal, appellate review would extend to "the propriety of the sentence, having regard to the nature of the offense, the character of the offender, and the protection of the public interest."¹⁸²

While its Advisory Committee on Sentencing and Review recommended that the appellate court be limited to affirming or reducing the sentence, the ABA ultimately concluded that the appellate court should be able to "substitute for the sentence under review any other disposition that was open to the sentencing court."¹⁸³

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182. *Id.* Standard 3.2(i). In the draft proposal of the Advisory Committee on Sentencing and Review, the word "excessiveness" was used rather than the word "propriety."
183. ABA PROPOSAL, *supra* note 178, Standard 3.3(ii). The Advisory Committee's Comment concerning Draft Standard 3.4 begins with the following observation: "Perhaps the most controversial question involved in the decision to provide for sentence review is whether the reviewing court should be authorized to increase the penalty imposed by the sentencing court." This commentary contains an excellent summary of most constitutional and policy arguments which have been raised concerning this aspect of an appellate review system. *Id.* at 55-64. While neither the Advisory Committee nor the Special Committee took a position on the issue, each noted "the prospect of serious constitutional difficulties if an increase is allowed on an appeal by the State." *Id.* at 56.

A thorough analysis of the applicability of the Constitutional double jeopardy prohibition to an appellate review system permitting sentences to be increased was prepared by the United States Department of Justice during the Congressional consideration of the Organized Crime Control Act of 1970. In a letter to the House Judiciary Committee, Assistant Attorney General Will Wilson specifically reviewed *North Carolina v. Pearce*, 395 U.S. 711 (1969), *Green v. United States*, 355 U.S. 184 (1957) and *Specht v. Patterson*, 386 U.S. 605 (1967) as well as several related Supreme Court decisions. Speaking for the Justice Department, Mr. Wilson concluded that an appellate court's imposition of an increased sentence upon a "dangerous special offender" (See note 124 and accompanying text *supra*) would be Constitutionally permissible. 2 U.S. Code Cong. & Ad. News 4068-70 (1970).

Another excellent treatment of the development of the double jeopardy doctrine in the American courts is found in CONGRESSIONAL RESEARCH SERVICE, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION (1973). Citing *Pearce*, this treatise states: "[T]he double jeopardy clause does not restrict a trial judge from imposing a lawful sentence more severe than the sentence originally imposed . . ." *Id.* at 1099.

The basic origins of the doctrine are discussed in a highly informative opinion by Judge Friendly. In *United States v. Jenkins*, 490 F.2d 868 (2d Cir. 1973), observations by Demosthenes, Blackstone, and the 1st Congress are all noted before the more recent cases are analyzed. Although its facts limit the application of this decision with respect to the problem of increasing sentences on review, it does provide a scholarly examination of the double jeopardy clause in general.

As the ABA Special Committee pointed out in its recommended amendments to the Advisory Committee draft, "except for this one point of disagreement, both committees are unanimously in favor of the concept of appellate review of sentences and are unanimously in support of the Advisory Committee Report as written."¹⁸⁴ Finally, the appellate court would not be required to specify the basis for its disposition in a written opinion unless doing so "would substantially contribute to the achievement of the objectives of sentence review Normally, this should be done in every case in which the sentence is modified or set aside by the reviewing court."¹⁸⁵

Another analysis of the appellate review issues was published in 1973 by the National Advisory Commission on Criminal Justice Standards and Goals.¹⁸⁶ In a comprehensive report prepared by the National Advisory Commission's Task Force on Corrections it is recommended that:

Appeal of a sentence should be a matter of right . . . the issues should include:

- a. Whether the sentence imposed is consistent with statutory criteria.
- b. Whether the sentence is unjustifiably disparate in comparison with cases of similar nature.

On May 28, 1974, the Supreme Court granted applications for writs of certiorari in *Jenkins* and in *United States v. Wilson*, 492 F.2d 1345 (3d Cir. 1973). 42 U.S.L.W. 3652 (U.S. May 28, 1974). Unless the Supreme Court reverses the trend, the clear weight of authority runs in the direction of holding the increase of a criminal sentence by an appellate court would not constitute being "twice placed in jeopardy" and, therefore, would be Constitutionally permissible. The Constitutional issue aside, the ABA Proposal's policy argument is persuasive. "[I]t is just as appropriate for the reviewing court to have the power to correct an excessively low sentence as it is for the court to have the power to correct an excessively high one. It is in general unsound to restrict the discretion of courts in a manner which may prohibit them from reaching the result dictated by justice in the particular case." Special Committee on Minimum Standards for the Administration of Criminal Justice, Recommended Amendments 2 (1968), reprinted in ABA PROPOSAL, *supra* note 175 (Supp. 1968).

184. Special Committee on Minimum Standards for the Administration of Criminal Justice, Recommended Amendments, 2 (1968); reprinted in ABA PROPOSAL, *supra* note 178 (Supp. 1968).
185. ABA PROPOSAL, *supra* note 178 Standard 3.1 (b).
186. Hereinafter referred to as "The National Advisory Commission." This Commission was appointed by the Administrator of the Law Enforcement Assistance Administration in October, 1971 for the purpose of formulating a national goals and standards for crime reduction and prevention at both the state and local level. The Commission formed Task Forces on several topics including one to examine Corrections and another to examine the Courts.

c. Whether the sentence is excessive or inappropriate.

d. Whether the manner in which the sentence is imposed is consistent with statutory and constitutional requirements.¹⁸⁷

The National Advisory Commission's Task Force on the Courts also recommended that a single unified review of every criminal conviction should extend to "the legality and appropriateness of the sentence."¹⁸⁸ Further, the Corrections Task Force recommended that the trial court be required to articulate the reasons for selecting the particular sentence imposed; however, it took no position on whether the reviewing court should be allowed to increase the sentence.¹⁸⁹ The Courts Task Force, on the other hand, followed the ABA position regarding appellate increase of a sentence and recommended that "the reviewing court, for stated reasons, [should be empowered] to substitute for the sentence imposed any other disposition that was open to the sentencing court, if the defendant has asserted the excessiveness of his sentence as error"¹⁹⁰ Neither National Advisory Commission report recommended that the trial judge be required to state his reasons for selecting the particular sentence imposed.

As noted earlier, an extensive study of the entire federal criminal system was initiated in 1966 by the Brown Commission.¹⁹¹ The Brown Commission recommended that the basic statute which establishes the jurisdiction of courts of appeals be amended as follows: "Such review shall in criminal cases include the power to review the sentence and to modify or set it aside for further proceedings."¹⁹² In its comment accompanying this proposal, the Brown Commission noted the ABA endorsement of the appellate review concept. The Brown Commission did not go as far as the ABA, preferring, as its choice of words indicates, the more conservative view that the power to change should be limited to the power to decrease the sentence. The Brown Commission also pointed out that features of the comprehensive sentencing system proposed by the report would "depend in large measure for their effectiveness on uniform interpretations by appellate courts."¹⁹³

187. NATIONAL ADVISORY COMMISSION, REPORT ON CORRECTIONS, Standard 5.11(4) [hereinafter cited as NAC REPORT ON CORRECTIONS].

188. NATIONAL ADVISORY COMMISSION, REPORT ON COURTS, Standard 6.1(2) (1973) [hereinafter cited as NAC REPORT ON COURTS].

189. NAC REPORT ON CORRECTIONS, *supra* note 184, at 178-79.

190. NAC REPORT ON COURTS, *supra* note 185, Standard 6.3(6).

191. The popular name for the National Commission on Reform of Federal Criminal Laws is derived from the name of its Chairman, former Governor Edmund G. Brown.

192. The National Commission on Reform of Federal Criminal Laws, Final Report 317 (1971).

193. *Id.*

Finally, perhaps the most significant nonlegislative proposal is the draft of a proposed amendment to Rule 35 of the Federal Rules of Criminal Procedure prepared by the Subcommittee on Administration of the Criminal Law of the Judicial Conference of the United States. As proposed, this Rule would empower a panel composed of three district judges to "modify or reduce" those sentences deemed to be "excessive."¹⁹⁴ The current draft of the amended Rule would not require a sentencing court to state either the facts it considered or its reasons for imposing a particular sentence. The reviewing panel also would not be required to state the reasons for its determination. Sentences could be reviewed under this Rule only if the trial court had denied a motion to reduce the sentence, a term of imprisonment for two years or more had been imposed and the defendant requested review within thirty days following denial of his motion for sentence reduction.¹⁹⁵

The significance of this proposal is obviously enhanced by the prestige of its originators. The fact that the Judicial Conference found it advisable to promulgate such a rule should remove the doubt about the degree to which sentence disparity exists. No such rule would be needed for random or isolated cases. On this issue the adamant believers in the workability of the status quo have been pleaded out of court by the Judicial Conference. Furthermore, although Standard 5.11 of the National Advisory Commission's Corrections Task Force acknowledges the possibility that an administrative review board could be created as an alternative to review of sentences through normal appellate procedures, only the draft Rule 35 recommends as a desirable alternative an entirely new tribunal whose sole function would be to review sentences. It likewise stands alone in perpetuating, without exception, the mystery which currently conceals the sentencing process. Under the Judicial Conference proposal, the trial court would not be required to state its reasoning with respect to the sentence and the reviewing panel would not be required to disclose the rationale for whatever action may be taken. It is, indeed, the least satisfactory solution that has been proposed.

E. Recent Congressional Hearings

The Senate Subcommittee on Judicial Machinery held public

194. The entire text of the proposed rule and related materials submitted by the Administrative Office of the United States Courts has been reprinted in *Hearings on the Reform of the Federal Criminal Laws (S.1, S.716, S.1400 and S.1401) Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 5335 et seq. (1973) [hereinafter cited as *1973 Hearings*].

195. *Id.* at 5337.

hearings on S. 2722 in 1966.¹⁹⁶ As earlier noted, this bill was introduced by Senator Hruska and, like the pending S. 716, it would have permitted an appeal "upon the ground that the sentence, although lawful, is excessive."¹⁹⁷ The requirement that each trial judge state "as part of the record his reasons for imposing that particular sentence"¹⁹⁸ and the provisions postponing the implementation of this practice for a period of six months following its approval were also included in S. 2722.

The Senate Subcommittee on Criminal Laws and Procedures heard testimony on S. 716 in 1973.¹⁹⁹ One of the few points upon which there was a unanimity of opinion at the hearings, both in 1966 and 1973, was the vital necessity for some form of appellate review. Judge Simon E. Sobeloff began his testimony in 1966 with a reaffirmation of the thoughts underlying his speech of twelve years earlier:²⁰⁰

It seems to me that the basic weakness of our criminal appellate system is that it encourages concentration on the trivia of the trial and ignores the most momentous decision; namely, the sentence. The tribunal that hears the appeal ought not only to inquire into whether the indictment was properly drawn . . . but also into the crucial problem of what the sentence should be.²⁰¹

Seven years later Judge J. Edward Lumbard pointed out that "although there still remains considerable division among the federal judges as to whether there should be review and the form it should take,"²⁰² the Advisory Committee on Criminal Rules of the Judicial Conference "is convinced that there should be some form of review of sentences in criminal cases."²⁰³ Professor Livingston Hall of Harvard Law School observed "[A]ll the commentators that I know of who have spoken on or written on appellate review of sentences favor it."²⁰⁴

Unquestionably, the most eloquent and forceful argument in support of the adoption of some form of appellate review presented during the 1973 hearings was contained in a statement submitted by Judge Marvin F. Frankel.²⁰⁵ After pointing out the present unavailability of review, Judge Frankel stated:

196. 1966 *Hearings*, *supra* note 163.

197. S. 2722, 89th Cong. 1st Sess. (1965).

198. *Id.*

199. 1973 *Hearings*, *supra* note 194.

200. Sobeloff, *supra* note 89.

201. 1966 *Hearings*, *supra* note 163 at 25.

202. 1973 *Hearings*, *supra* note 194 at 5348.

203. *Id.*

204. *Id.* at 5370.

205. *Id.* at 5649.

I cannot know whether the reader finds this [lack of available review procedures] as horrendous as I do Consider that a civil judgment for \$2,000 is reviewable in every state at least once, possibly on two appellate levels. Then consider the unreviewability of a sentence of 20 years imprisonment Consider that a distinguished committee of the American Bar Association, not normally an agency of revolution, when it urged appellate review of sentences . . . pointed out 'that in no other area of our law does one man exercise such unrestricted power.'²⁰⁶

This agreement upon the necessity for adding a system of sentence review to the federal criminal process is certainly impressive. Of far greater significance is that, in all of the testimony given, neither the practicability nor the simple justice of a system of appellate review has been seriously denied.²⁰⁷

As previously noted,²⁰⁸ there have been assertions that appellate judges lack the resources or the aptitude which, by some undefined means, enables their brethren on the trial bench to discern the most appropriate sentence. In the words of Judge Lumbard:

There is a feeling on the part of the circuit judges themselves, as well as on the part of the district judges, that the circuit judges really don't know enough about this sentencing business. They are uncomfortable with it . . . the *most unpleasant thing* that a federal judge does is to impose sentence in a criminal case. It is a *very difficult, disturbing experience* and it is one that ought to have the talents of those who have had experience in it.²⁰⁹

206. *Id.* at 5650.

207. The clear focal point of attack upon the concept of appellate review has been the practicality of such a system and its effect upon court workloads. See note 213 and accompanying text *infra*.

208. See notes 153-58 and accompanying text *supra*.

209. 1973 *Hearings*, *supra* note 194 at 5350 (emphasis added). It would obviously be abnormal to expect circuit judges to enthusiastically solicit such an onerous burden. An eloquent statement of one reason the sentencing task is so disquieting to judges is found in a recent analysis of the American judiciary:

It is one of the transcendent ironies of our system of criminal justice that at sentencing, precisely the point where most is at stake, the judge is unceremoniously out adrift from all the moorings of law and principle that restrict him at every other point in the process. He is afloat in the dark, with little to guide him, no codified set of criteria, nothing to help him with the most important decision he has to make. His conduct of a trial is circumscribed by dozens of rules, precedents, and statutes. He may comment on evidence only in carefully specified circumstances, and only in jurisdictions (such as federal courts) that permit it. He rules on the admissibility of evidence in accordance with a body of law refined through centuries of courtroom combat. His charge to a jury must hew to limits prescribed by the nature of the offense, the available options, and hallowed precedent. But in sentencing, nothing—one to fourteen, five to life, thirty days to two years, and only his mind and heart to go on.

JACKSON, *supra* note 177 at 360.

The response by Judge Frankel to this frequently advanced notion puts the matter in more accurate perspective:

A huge percentage of sentences are imposed after guilty pleas. The trial judge, who hears the defendant in a brief sentencing proceeding, knows little of the defendant beyond what he obtains from the presentence report The appellate court . . . can usually have substantially the same pertinent material as that available to the trial judge. Moreover, the first-hand knowledge, normally cursory and superficial, is almost as much a danger as it is a benefit. Too many trial judges fancy themselves as amateur psychologists and function all too verily as amateurs.²¹⁰

[T]he conventional assertion that the trial judge has the unique and unreproducible advantages of seeing the defendant, "sizing him up" and possessing from daily exposure a seasoned wisdom in the use of such first-hand impressions . . . [can be fairly described] as minor and largely phony. The trial judge's keen eyes and ears have been mythologized . . . the uses of the trial and sentencing hearing for appraising the defendant in relevant respects are much overrated. The trial judge's powers of effective observation are likewise exaggerated . . . but the whole subject is overblown and the conclusion against appellate review does not follow in any event.²¹¹

During the 1966 hearings, another federal district court judge actively engaged in criminal trials expressed a similar denial of the special aptitude attributed to him:

There are those who contend that appellate judges are not qualified to pass sound judgment in determining whether a trial judge has abused discretion in the sentence imposed. This contention seems to me to be singularly devoid of merit. For one thing, many judges of the U.S. courts of appeal serve there after long experience on the trial bench The mere passage of time between sentencing and review may present a better perspective

My admiration for my brothers on the federal trial bench . . . and for their exceptional insights into human beings is second to none. But it has not convinced me that they or I possess some wholly innate capacity to make the punishment fit the crime because of their or my personal observation of a defendant during the course of his trial.²¹²

If the trial judge possesses any "advantage" in the sentencing process, it lies in the non-disclosure of the facts and reasons which influenced the sentence imposed. Unless the trial judge chooses to express those facts and reasons, only he can know if the sen-

210. *Id.* at 5655.

211. *Id.* at 5652-53.

212. Testimony of Honorable Stanley A. Weigel, Judge of the United States District Court for the Northern District of California, 1966 *Hearings*, *supra* note 163 at 75-76.

tence is appropriate; the rest—the defendant, the prison administrator and the appellate court—can only second-guess. This questionable “advantage” would be largely eliminated by the requirement, contained in the ABA proposal, S. 1, S. 716 and the National Advisory Commission proposal that the trial judge state the reasons for his sentencing decision. With such a record, the trial judge’s “unique opportunity to size up the defendant” would assume no greater importance in the review of sentences than it now has in the review of a limitless number of other exercises of judicial discretion.

Unquestionably the most widely voiced reservation about a system of appellate review is that such a system would impose too great a burden on the existing courts of appeals. Critics of appellate review have focused upon this argument virtually to the point of excluding all other considerations. In his analysis of federal jurisdiction, Judge Friendly has referred to appellate review as the “worst spectre of all.”²¹³ His concerns about excessive work load are stated as follows:

But I hope there will be enough good judgment in Congress to realize that adoption of [appellate review] would administer the *coup de grace* to the Courts of Appeals as we know them. The problem of volume is not so much with the cases where a sentence is imposed after a trial, since most of these will be appealed anyway and the sentence would be just one more point to be considered, although sometimes an important and difficult one, but with the great mass of convictions, nearly 90% of the total, obtained on pleas of guilty or *nolo contendere*. If the sentence in only half of these were appealed . . . [and] most proponents of appellate review of sentences reject out of hand . . . a possible increase of sentence . . . [as a] limiting effect, the case load of the Courts of Appeals would be doubled by this means alone. While there would not be an equivalent increase in burden, . . . if even a small percentage of those convicted on pleas of guilty should appeal their sentence, “the courts would be swamped.”²¹⁴

The concern expressed by Judge Friendly was anticipated by Judge Weigel in the 1966 hearings. After listing the many state jurisdictions in which appellate courts are empowered to review and reduce sentences, he pointed out:

Experience in these states has not confirmed the fears of those who urged that appellate courts would be overwhelmed with new appeals The same has been true of the experience in England where appellate courts have long had and exercised powers like those which would be provided to the U.S. Court of Appeals by S. 2722.²¹⁵

213. H. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 36 (1973).

214. *Id.* at 36-37.

215. *1966 Hearings, supra* note 163, at 74.

Judge Frankel referred to Judge Friendly's concern and, while agreeing that the work load argument "has merit," he found it to have

far less than decisive weight We do not know . . . how large the burden would actually be, my own hunch is that the usual attack upon a sentence would be short work (which means . . . most would be affirmed, but does not lessen the need for allowing appeals).²¹⁶

Fears similar to those expressed by Judge Friendly have prompted several proposals for avoiding the potential increase in appellate work load. Judge Lumbard pointed out in his testimony that

[i]t would greatly relieve whatever system [of appellate review] is adopted if it could be explicitly provided that in cases where the sentence is imposed after [a plea bargain] . . . the defendant . . . need not have the right to appeal from sentence.²¹⁷

During his Senate testimony, Professor Daniel J. Meador was not prepared to agree that such a system should be formalized, but he concurred that "where the negotiated plea includes an agreement about sentence and . . . the agreement is included in the record . . . the appellate court is not going to touch the sentence."²¹⁸ The alternative found in S. 176 of allowing review only of those sentences imposed more than six months after its passage would, of course, be another method of limiting the predicted change in the appellate work load following adoption of a system of sentence review.

Another relevant consideration in any evaluation of the potential effect of a sentencing review system upon appellate work load is the manner in which appeals having no significant merit may be identified and disposed of. Appellate court judges soon develop the skills to take an accurate measure of the pleadings coming to them. Those lacking substantial merit are quickly identified. As Judge Lumbard testified: "I think the fact is that most of the petitions for review . . . can be decided very speedily by looking at the papers"²¹⁹ He estimates that 80 per cent of sentence review cases could be disposed of by this initial review and that further consideration or hearings would be required for only the remaining 20 per cent. Judge Hoffman believes the number of sentence appeals which could be rapidly disposed of would be even

216. 1973 *Hearings*, *supra* note 194, at 5655.

217. *Id.* at 5351.

218. *Id.* at 5569.

219. *Id.* at 5352.

higher: "We visualize that probably 95 out of every 100 of these cases will be of little or no merit."²²⁰

The possibility must be acknowledged that a sentence review system could actually reduce appellate work loads. Judge Sobeloff has observed that "when judges sense that injustice has been done, they strain to magnify minor defects in a search for reversible error."²²¹ The painstaking manner with which appellate courts occasionally search the non-sentence aspects of criminal cases to find a justifiable basis for overturning what is considered to be an unreasonable sentence has been observed by Judge Frankel:

[T]he appellate judges will search out some strained species of "error" in the trial, not because they genuinely deem it a proper ground for a reversal, but as a pretext for setting aside the intolerable sentence.²²²

Judge Hoffman readily concurs:

[W]hen the matter hits the appellate court there is frequently a compromise of differences by one judge saying, well, I won't reverse if you will cut the sentence down from 10 years to 2 years, I will go along and vote affirmance I don't approve of that. That has been done I am confident it is probably done on the appellate level in many, many instances.²²³

As Judges Sobeloff, Frankel and Hoffman have observed, and the line of cases based upon *Williams* confirms, significant amounts of appellate time are now devoted to seeking means of camouflaging substantive sentence review. A system openly permitting such review would obviously eliminate the necessity for these creative enterprises. It is likely in many instances, therefore, that any of the currently proposed appellate review systems would reduce, not increase, existing appellate work load.

Finally, the most obvious response to any suggestion that an appellate review system would overload the court structure is that such suggestions are simply irrelevant. "[I]f the work requires an additional law clerk, that is little enough for the government to provide."²²⁴ Or, as Professor Hall stated:

Anything that gives any judge extra work is a burden on the courts, but our courts exist to do justice, and I am convinced [appellate review] is a very important thing. If it puts an extra burden on the courts, it must be borne.²²⁵

220. *Id.* at 5358.

221. 1966 *Hearings*, *supra* note 163, at 25.

222. 1973 *Hearings*, *supra* note 194, at 5652.

223. *Id.* at 5360.

224. 1966 *Hearings*, *supra* note 163, at 30.

225. 1973 *Hearings*, *supra* note 194, at 5371-72.

Judge Frankel agrees. "Considering all the things on which appellate judges ponder, the effort to make sentences more rational and just would hardly seem unworthy of their labors."²²⁶

Nearly fourteen years ago, the then chairman of the House Committee on the Judiciary acknowledged that the most frequent objection to a sentence review system is that it would "over-burden the appellate courts with a flood of appeals."²²⁷ His response to that objection remains unanswerable. "This objection completely evades the issue of whether an appeal procedure is needed to insure the quality of justice that should characterize our courts."²²⁸

Finally, the voice of Senator McClellan also must be counted among those rejecting the concern of excessive work load as a prohibition to appellate sentence review. At the conclusion of his remarks concerning the introduction of S. 176, Senator McClellan provided the perfect summation on behalf of an effective system of appellate review:

We must be careful that we do not overload our courts. At the same time, we must keep our perspective. We must not refuse to do justice for a lack of courts. Court congestion is reason to move with care. It is not a reason to fail to act.²²⁹

IV. CONCLUSION AND RECOMMENDATION

Despite repeated disclaimers and resourceful attempts to obscure its existence, a system of appellate review of criminal sentences is in operation in virtually every court of appeals. Those who oppose the basic concept can neither cope with the pressures which have forced the courts of appeals to exercise some form of review nor, as has generally been the case, continue to ignore them. The record of the irrational or disparate sentence is too well documented to be dismissed or put out of mind. The debate which persisted for so many years is no longer germane. The inquiry is not whether there should be a system of appellate review, but rather how that system should be established and what form it should take.

No issue is more crucial to this inquiry than the extent of the record to be prepared by the trial judge with respect to his sentencing decision. Unless the trial judge is required to state the rele-

226. *Id.* at 5651.

227. Statement by Representative Emanuel Celler, *Appellate Review of Sentences: A Symposium at the Judicial Conference of the United States Court of Appeals for the Second Circuit*, 32 F.R.D. 249, 309 (1962).

228. *Id.*

229. *Supra* note 125, at S. 1783.

vant facts and to disclose his reasons for selecting the sentence imposed, no system of appellate review will have an opportunity to become effective.

The second crucial issue is whether the reviewing body should be required to disclose its reasons for the action it takes with respect to the sentence. The need for disclosure at this level is nearly as compelling as at the trial level. Even if the concept of individualized sentencing continues to prevail, a "common law" of sentencing can nevertheless be developed. The appellate court's grounds for disagreement with the trial judge should be delineated for the guidance they will give future sentencing courts.

The third issue of major importance is whether the review system should be closed to particular categories of cases. An attempt to review every criminal sentence currently in force would be an overwhelming and possibly self-defeating enterprise. Further, it is inevitable that the early decisions in the area of sentence review will have a very great impact on the future development of the doctrine. Accordingly, no review should be attempted in the absence of an acceptable record for such review. The provision of S. 716, which permits review prospectively so that the reasons for imposition will be available, is extremely desirable. Other restrictions upon the access to a sentence review system, however, are inimical to the basic concept and should be accepted only with the greatest caution.

The next inquiry must be directed at whether the appellate court should have the discretion to increase, as well as to decrease or otherwise modify, a criminal sentence. The case can be made that such a power, if statutorily given, does not contravene the fifth amendment. So, at least, the teaching of *Pearce* would dictate. In that decision, the court cited *Williams* and specifically held that, following a retrial and second conviction, the trial judge was not constitutionally precluded from imposing a sentence either greater or lesser than the original sentence. At the same time it must be acknowledged, as Judge Friendly has made clear in the *Jenkins* case, that the law in the area of double jeopardy is far from being settled. Until the Supreme Court speaks further, there appears to be no constitutional prohibition against statutorily empowering appellate courts to increase sentences. Certainly in the pursuit of a wholly logical system of appellate review, the power to increase sentences becomes an indispensable corollary of the power to decrease them.

The most serious objection to adoption of such statutory authority is the "chilling effect" the power to increase sentences might have upon the criminal defendant's exercise of his right to sentence

review. If such review were to occur upon the defendant's initiative, he would be represented by counsel both in making that decision and in pursuing the appeal; by such representation, the hazards would be largely overcome. It is fair to add that if the courts of appeals are to be accorded the presumption that they act responsibly and conscientiously, the compelling interest in obtaining a full, fair and balanced review would seem to offset whatever risk the defendant attaches to the initiation of an appeal.

One further observation is appropriate. Empowering appellate courts to increase sentences might also have a constructive influence on the sentencing judge. Rather than deciding a close question against the interests of the defendant, with the thought that an appellate court could reduce his sentence if it is appealed, he would realize that a total review is available. Any tendency to increase the sentence in contemplation of review would be mitigated by the knowledge that the appellate court can increase an inadequate sentence just as it can reduce an excessive one. In short, the logic of the ABA Advisory Committee is unassailable in urging that the appellate court be empowered to make any disposition which was available to the sentencing court. Once past the Constitutional question, the statutory scope of review cannot reasonably exclude the power to increase, as well as decrease, the sentence.

The final inquiry must be directed to the grounds upon which an appeal should lie. It would indeed be laudable if some formula could be articulated which would ensure the attainment of a rational sentence in every case. But that goal, if not wholly illusory, may be beyond present capabilities. The most which might be hoped for is a recognition of the principles of individualization which are inadequately, but plainly, conveyed by the familiar maxim that "punishment should fit the criminal, not the crime." As long as this doctrine retains validity, grounds such as "excessiveness," "inappropriateness" and "unreasonableness" must remain the applicable standards. While there is no assurance that sentences will be less irrational by the establishment of such criteria, in the case-by-case review of sentencing decisions, more precise guidelines will be developed for the trial judge. How his broad discretion should be properly exercised may always be elusive in a society with evolving standards of decency—but the search will be immeasurably enhanced, and pursued more intelligently, by the availability of appellate review.

It appears that ample authority and precedent now exist for appellate review. Without further legislation, it is impractical at this late date to expect the courts of appeals to be unaffected by

the body of case law founded upon *Freeman* and *Jackson* whenever the exercise of their authority is invoked. Moreover, any system of appellate review developed in reliance upon the resolution of individual cases would be uneven and unsatisfactory; a fact evidenced by the disposition on review of sentences analyzed herein. Our criminal justice system should not permit—and the concept of appellate review does not deserve—such a protracted and uncoordinated development. Under the circumstances, legislation is the most desirable solution.

POSTSCRIPT

From an analysis of the judicial treatment of the nonreview doctrine subsequent to *Yates*, if not *Williams*, one could have concluded that the concept of appellate review of sentencing was rapidly moving toward universal recognition. Perhaps more importantly, that concept was being applied, although in slightly varying manners, in virtually all of the federal courts of appeals. In fact, it had been so well recognized and so widely applied that a very viable case could have been made against the further pursuit of legislation. The inadvisability of seeking legislative enactment of what appeared to be a judicially accepted concept was underscored by the absence of any argument about the desirability of the objectives which that concept would achieve. Since only the mechanics by which a system of appellate review might be implemented remained subject to current debate, Congress might have hesitated to take any action at this time and chosen instead to await the final product of the ongoing judicial experimentations with this principle.

This contentment regarding the general recognition of and experimentation with the concept of appellate review was abruptly ended on June 26, 1974. On that date the United States Supreme Court entered its opinion in *Dorszynski v. United States*.²³¹ In this opinion, the Court served notice that there was no authority for the principle of appellate review of sentences in the federal judicial system and that implementation of the principle, by whatever means might be devised, was unwarranted. A ruling so surprising in light of the unmistakable trend of recent years and so contrary to the apparent disposition of virtually all of the courts of appeals requires both examination and comment.

231. *Dorszynski v. United States*, 94 S. Ct. 3042 (1974).

The issue in *Dorszynski* is simple: When a trial court chooses to impose a sentence inconsistent with the alternative sentencing procedures of the Federal Youth Corrections Act²³² upon a defendant who, by virtue of his age, is eligible for treatment pursuant to that Act, does section 5010(d) of Title 18 of the United States Code²³³ require a specific finding that the defendant "will not benefit" from those sentencing procedures or is imposition of the sentence itself an adequate "finding"? The Court, speaking through Chief Justice Burger, held that there must be an express finding of "no benefit."²³⁴ The five member majority, however, declined to require that the trial court disclose the reasons for entry of the required finding. The four remaining members, while concurring that a specific finding was required, would also have the trial court state those reasons.²³⁵

The opinion might have ended without more. The questions raised by the Court's grant of certiorari as well as those inherent in the facts of the case had been resolved. Such disposition, however, would have suggested at least implicit approval of the appellate review concept. Citation by the Court of the "process" cases²³⁶ in support of its holding that there must be an express finding would argue strongly for this conclusion. Anticipating such an interpretation, the Court accordingly began its opinion with a denial of the existence of any judicial authority for the concept of appellate review.²³⁷ In no uncertain terms it then disclaimed the availability of the doctrine for itself and for the courts below.

The motive for this disclaimer other than to avoid the logical implications of its own holding must be left to speculation. The

232. 18 U.S.C. § 5005, *et. seq.* (1970).

233. "If the court shall find that the youth offender will not derive benefit from treatment under subsection (b) or (c), then the court may sentence the youth offender under any other applicable penalty provision." Subsections (b) and (c) generally provide for commitment of the youth offender to the Attorney General.

234. *Dorszynski v. United States*, 94 S. Ct. 3042, 3053 (1974).

235. *Id.* at 3054.

236. *Id.* at 3052-53. See note 43 and accompanying text *supra*.

237. The intent of Congress was in accord with long-established authority in the United States vesting the sentencing function exclusively in the trial court.

"If there is one rule in the federal criminal practice which is firmly established, it is that the appellate court has no control over a sentence which is within the limits allowed by a statute." *Gurera v. United States*, 40 F.2d 338, 340 (CA8 1930).

[I]f a court imposed a sentence within that range [i.e., established by statute] his exercise of discretion as to where within the permissible range sentence should be fixed was not subject to challenge.

Id. at 3051.

effect of such action is, however, not speculative. The *Dorszynski* decision will unquestionably have a "chilling effect" upon the efforts of courts of appeal to recognize, apply and expand the basic principle of appellate review of criminal sentences. It must be frankly recognized that by such an emphatic denial the Court has effectively thwarted for the foreseeable future any acceptance of this concept throughout the federal judicial system. Ironically, the concept of appellate review has been, by this case, denied not only an opportunity to be developed, but even a "day in court" in which the question of its availability could be heard. Since the issue of appellate review had not been briefed, the Court expressed its position without the benefit of an examination of the precedent for, legal history, or current philosophy of the doctrine.

The advent of *Dorszynski* can only mean that another forum must be sought in which to review, and if necessary, renew, the basic debate as to both the availability and the advisability of appellate review of sentences. Fortunately, that forum is at hand; and even more fortunately, several vehicles for that debate are already before it. *Dorszynski*, more than any other decision (certainly including those decisions which have actually analyzed the non-review doctrine and candidly rejected it), will force Congress to acknowledge that it must address this question. But for this decision, Congress may well have deferred action upon the issue to allow the courts additional opportunity to explore and analyze all aspects of appellate review. But by any reasonable view of legal theory, however, such explorations now are effectively foreclosed to the appellate judge. Hence it is for Congress to revive the principle of appellate review of sentences and, indeed, to mandate its operation in an orderly system of criminal justice.

APPENDIX

Proposed Statute

S. 716 would establish an appellate review system incorporating virtually all of the features suggested by the preceding conclusions. Thus, the bill is an excellent foundation for any legislative solution. To take into account a number of recommendations which have been proposed, certain amendments to S. 716 would be appropriate.²³⁰ Accordingly, it is suggested that consideration be given to the following changes in the bill currently pending in the Senate:

1. Deletion of the phrase "application for leave to" from the first sentence of subparagraph (a) of the proposed section 3742 together with corresponding deletions from subparagraph (b), subparagraph (d) and subparagraph (e). The purpose of these amendments would be to eliminate an unnecessary and undesirable restriction upon access to appellate sentence review. Review of the sentence would become a "right" in the same sense that a "right" to appellate review of all other facets of the criminal process currently exists. The rationale for this change is two-fold. First, there is no logic for distinguishing between appellate consideration of the sentence and appellate consideration of any other aspect of a criminal proceeding. Second, the reduction of appellate workload, if any, which is the apparent objective of the "leave to review" device, would be far too insubstantial to justify the perpetuation of such an anomalous distinction. The appellate court system either currently is, or certainly could easily become, capable of resolving in an expeditious manner all sentence appeals.

2. Deletion of the phrase "of imprisonment or death" from the first sentence of subparagraph (a) and the final sentence of subparagraph (e). It is not difficult to imagine cases in which a particular fine or other type of sentence, short of imprisonment, would be just as inappropriate as a sentence which included confinement. In addition, there is again no reasonable basis for distinguishing between various types of sentences in defining the eligibility for appellate review.

3. Deletion of the phrase "with the clerk of the district court" from the first sentence of subparagraph (a) for the reason that this qualification is redundant with the provisions of subparagraph (d) concerning the application of normal appellate procedures.

230. S. 716 is reproduced with the amendments and deletions herein recommended *infra* at page 519.

4. Deletion of the phrase "it is excessive" from the first sentence of subparagraph (b) and substitution therefor of the following: "the sentence is inconsistent with statutory criteria or requirements, is unjustifiably disparate in comparison with cases of a similar nature, or, having regard to the nature of the offense, the character of the offender, and the protection of the public interest, is inadequate, excessive, unreasonable, or inappropriate under the circumstances." These reviewable issues are a composite of the ABA and National Advisory Commission proposals. They would mandate the broadest possible examination of the entire sentencing process and decision.

5. The last sentence of subparagraph (b) is deleted because it is concerned with procedural requirements for sentence review while the remainder of this subparagraph articulates the basic substantive standard to be applied.

6. From the first sentence of subparagraph (c), delete the comma following "cause" and insert a comma following the phrase "or order." The purpose of this amendment is to clarify the appellate court's authority to remand a case and direct that the trial court enter a particular order or, in the alternative, impose a particular sentence.

7. Addition of the word "increase" to the enumeration of available appellate dispositions in the first sentence of subparagraph (c) and deletion of the final sentence of the proposed subparagraph (c) pertaining to increases of the sentence upon appeal. While the most egregious examples of inappropriate sentences have been those which are unduly severe, examples of unduly lenient sentences are certainly not unknown. No argument in favor of the adoption of a system of appellate review becomes inapplicable because that system includes the authority to increase, as well as decrease, sentences. The second sentence of subparagraph (c) has been restructured to clarify the court's obligation to explain its action except in the two cases specified.

8. Subparagraph (d) has been revised to include all procedural aspects of sentence review. In addition a provision has been added to ensure that the Supreme Court could, of its discretion, address sentencing issues and enhance the development of useful sentencing guidelines. This revision is also a product of the logical conclusion there is no reason to distinguish between the appellate review of a sentence and of any other issue.

9. Deletion of the word "felony" from subparagraphs (a) and (e) and the addition in subparagraph (e), after the words "particular sentence", of the following: "and the factual considerations

upon which it is based." The rationale for this amendment is to enhance the effectiveness of an appellate review system by increasing the amount of information available to the appellate court. No statement of the "reasons for selecting that particular sentence" can be meaningful without disclosure of the information upon which those "reasons" are based.

Thus, with recommended deletions inclosed in brackets and additions italicized, the amended bill would provide as follows:

S. 716

§ 3742. Appeal from Sentence

(a) An [application for leave to] appeal from the district court to the court of appeals of *any* [the] sentence [of imprisonment or death] imposed may be filed by a defendant [with the clerk of the district court] in any [felony] case in the following instances:

(i) after a finding of guilt by a judge or jury, whether following a trial or the acceptance of a plea;

(ii) after the revocation or modification of an order suspending the imposition or execution of a sentence or placing the defendant on probation;

(iii) after a resentence under any other applicable provision of law.

(b) [Upon granting leave to appeal,] The court of appeals may review the merits of the sentence imposed to determine whether [it is excessive.] *the sentence is inconsistent with statutory criteria or requirements, is unjustifiably disparate in comparison with cases of a similar nature, or, having regard to the nature of the offense, the character of the offender, and the protection of the public interest, is inadequate, excessive, unreasonable, or inappropriate under the circumstances.* This power shall be in addition to all other powers of review presently existing or hereafter conferred by law. [If the application for leave to appeal is denied by the court of appeals, the decision shall be final and not subject to further judicial review.]

(c) Upon consideration of the appeal, the court of appeals may dismiss the appeal, affirm, reduce, *increase*, modify, vacate, or set aside the sentence imposed, remand the cause[,] and direct the entry of an appropriate sentence or order, (note: comma added) or direct such further proceedings to be had as may be required under the circumstances. [If the sentence imposed is not affirmed on the appeal dismissed,] The court of appeals shall state the reasons for its action *except when the appeal is dismissed or the sentence is*

affirmed. [The defendant's sentence shall not be increased as a result of an appeal granted under this section.]

[(d) The application for leave to appeal from sentence shall be regarded as a notice of appeal for all purposes, and the procedure for taking an appeal under this section shall follow the rules of procedure for an appeal to a court of appeals. A denial of the application for leave to appeal on the ground that the sentence imposed is excessive shall not prejudice any aspect of the appeal predicated on other grounds. If the application is granted all issues on appeal shall be heard together.]

(d) The procedure for taking an appeal under this section shall follow the rules of procedure for an appeal to a court of appeals. A dismissal of an appeal brought under this section shall not prejudice any aspect of the appeal brought under any other section. The decision shall be subject to further judicial review in the same manner as all other decisions of the courts of appeals in criminal cases.

(e) When an [application for leave to] appeal is filed, the clerk of the district court shall certify to the court of appeals such transcripts of the proceedings, records, reports, documents, and other information relating to the offense or offenses of the defendant and to the sentence imposed upon him as the court of appeals by rule or order may require. Any report or document contained in the record on appeal shall be available to the defendant [only] to the extent that it was in the district court. In each [felony] case in which sentence [of imprisonment or death] is imposed the judge shall state for the record his reasons for selecting that particular sentence[.] *and the factual considerations upon which it is based.*

(f) When a judge has adopted the sentencing procedure set forth in section 4208 (b) of title 18, United States Code, an [application for leave to] appeal may only be filed after a judgment or order is entered by the judge following the completion of the study provided by such section.

(g) The provisions of section 3568 of title 18, United States Code, shall be applicable to any defendant appealing under this section.

(h) This section shall not be construed to confer or enlarge any right of a defendant to be released following his conviction pending a determination of his application for leave to appeal or pending an appeal under this section.

(i) This section shall become effective six months after its approval and shall apply only to sentences imposed thereafter.

(j) The analysis of chapter 235 of title 18, United States Code, is amended by adding at the end thereof the following new item:
“3742. Appeal from sentence.”