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APPELLATE REVIEW OF SENTENCES: PENOLOGY ON THE JUDICIAL DOORSTEP*

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INTRODUCTION

It is an irony of the American criminal justice system that while every jurisdiction allows a defendant to appeal a conviction on a wide variety of grounds, a sentence which falls within the prescribed statutory range cannot be appealed in the federal courts and in most states. While it is possible for a defendant to challenge the constitutionality of a severe sentence because it might constitute cruel and unusual punishment, the courts will usually not view a sentence which falls within the statutory limits as a violation of the eight amendment. In civil actions resulting in an award of monetary damages, the award can always be appealed on grounds that it is either excessive or inadequate. But in a criminal case in which the penalties exacted against a defendant are likely to be far more costly to him than monetary damages, the trial judge's discretion in formulating the sentence is unreviewable in most jurisdictions. This is true even if the defendant has pleaded guilty, and the severity of the punishment is the only issue in the case. While serving on the Sixth Circuit Court of Appeals, Mr. Justice Stewart observed that:

It is an anomaly that a judicial system which has developed so scrupulous a concern for the protection of a criminal defendant throughout every other stage of the proceedings against him should have so neglected this most important dimension of fundamental justice.¹

The United States is among the few countries which adhere to the rule of non-reviewability of

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¹ *Shepard v. United States*, 257 F.2d 293, 294 (6th Cir. 1958).

sentences. Most European countries consider the sentence to be a matter of law and, as such, reviewable.² In England, appellate review of sentences is a well recognized practice, and from 1907 until 1966 that power was exercised by the Court of Criminal Appeals. Since 1966, when the judiciary was reorganized in that country, the Criminal Division of the Court of Appeals has regularly heard a steady though manageable stream of sentence appeals. Like its predecessor, this court enjoys a strong reputation for its ability to correct discrepancies in sentences and, to some extent, to develop policies for the guidance of lower courts.³

Modern penological thinking has caused increasing concern in legal circles in the United States for methods of individualizing sentences so that they can be made to fit the criminal as well as the crime.⁴ In the context of this development, it was perhaps inevitable that the doctrine of non-reviewability of sentences would eventually be reconsidered, and today this is an area of the law characterized by change, both recent and impending. The clearest sign that the doctrine would soon undergo widespread reconsideration was the publication in 1968 of a report of the American Bar Association's Advisory Committee on Sentencing and Review which advocated the adoption of appellate review of sentences on both the state and federal levels.⁵ This report served to publicize the arguments against the doctrine of non-reviewability of sentences that had been advanced for

² Mueller & Le Poole, *Appellate Review of Legal But Excessive Sentences; A Comparative Study*, 21 *VAND. L. REV.* 411, 423 (1968).

³ Criminal Appeal Act, 1968, c. 19 §§ 9-11, replacing Criminal Justice Act, 1967, c. 80, § 97, consolidating Criminal Appeal Act, 1907, 7 *Edw. 7*, c. 23, § 4(3) and Criminal Appeal Act, 1966, c. 31, § 4(2).

⁴ The case most frequently cited in the evolution of this development is *Williams v. New York*, 337 U.S. 241 (1949).

⁵ ABA ADVISORY COMM. ON SENTENCING AND REVIEW, *STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES* (1968) [hereinafter cited as ABA STANDARDS].

years by such critics as Judge Simon E. Sobeloff, a member of the United States Court of Appeals for the Fourth Circuit and the chairman of the ABA's advisory committee.

Almost immediately after publication of the ABA's report, appellate review of sentences became a popular topic of research for law review purposes. In a number of states the idea was seriously considered, by either legislative or judicial bodies. In Alaska, for example, the practice was instituted for the first time by legislative act,⁶ and in other states, like Missouri and Tennessee, a provision authorizing sentence review was incorporated in proposed revisions of their criminal code.⁷ Perhaps most significantly, a provision for sentence review was included in the proposed codification of the federal criminal laws now pending in Congress.⁸ If Congress should pass this provision, it will furnish the states with a highly visible model for appellate review of sentences.

This research is intended as a necessary first step to any effort to study the response of the appellate courts to the opportunity to engage in penological policy-making and ultimately to assess the ability of a system of sentence review to realize its promises. It is essentially a description of the current status of appellate review of sentences in the United States both as an ongoing practice and as an idea for possible adoption. The first part is addressed to the need to determine the extent to which appellate review of sentences exists in the United States and to explain the variations in the practices that are discernible from state to state. The second part of the study provides a brief account of the experience of the federal courts with the doctrine of non-review and in this context the principal arguments against the practice are summarized. Finally, the functions of the practice are reviewed and some questions by reference to which it can be evaluated as a judicial function are identified.

I.

Table 1⁹ indicates that some form of sentence review is available to some extent, at least, in

⁶ ALASKA STAT. §12.55.120 (1973).

⁷ TENN. CRIM. CODE AND CODE OF CRIM. PRO. (proposed) ch. 24, § 40-2410 (1973); MO. CRIM. CODE (proposed) § 2.070 (1973).

⁸ S. 1, 94th Cong., 1st Sess. § 3725 (1975).

⁹ Any attempt to compile an accurate description of the current status of appellate review of sentences in

twenty-three states. In the remaining states and in the federal courts a sentence which falls within the range of punishment prescribed by the statute is final. Availability of this form of review cannot be equated with actual use, however, and various factors severely limit the practice in some states. The total number of states listed contrasts with the findings of another survey of this subject conducted in 1962 which found that a total of only fourteen states permitted appellate review of sentences at that time.¹⁰ In its 1968 study the ABA's Committee on Sentencing and Review examined twenty-one states, not all of which are listed in Table 1.¹¹ The relatively rapid increase in the total number of states in recent years is undoubtedly a reflection of the increased interest in sentencing policies in general and in appellate review of sentences in particular.

In eighteen states the power to review sentences is based on explicit statutory authority.¹² In eight of these states the authority, while explicit, is usually briefly given within the context of a general grant of appellate power.¹³ The Supreme Court of Hawaii, for example, derives its authority from a statute authorizing it, among other things, "to affirm, reverse or modify the order, judgment, or sentence of the

the United States is risky. There is a danger that findings will almost immediately be rendered inaccurate by new legislation or judicial decisions. In addition, it is sometimes difficult for researchers, judges and practicing attorneys alike to distinguish between an appeal against sentence on the ground that it is excessive but not illegal, and an appeal on the ground that it is illegal because not authorized by statute or because imposed as the result of unfair procedure or because it offends the constitutional guarantee against cruel and unusual punishment. Factors like these explain the differences in the findings of this and previous studies. In order to compile as accurate a description as possible, this survey is based on both library research and on the results of a questionnaire circulated by mail to the Attorneys General in all fifty states, to which 45 responses were received. See Mueller, *Penology on Appeal: Appellate Review of Legal but Excessive Sentences*, 15 VAND. L. REV. 671 (1962); Comment, *Appellate Review of Sentences: A Survey*, 17 ST. LOUIS U. L. J. 221 (1972).

¹⁰ Mueller, *supra* note 9, at 671.

¹¹ ABA STANDARDS, *supra* note 5, at 13-66.

¹² Alaska, Arizona, Colorado, Connecticut, Florida, Hawaii, Idaho, Illinois, Iowa, Maine, Maryland, Massachusetts, Montana, Nebraska, New Hampshire, New York, Oregon, and Tennessee. Citations to the individual statutes are provided in Table 1.

¹³ Florida, Hawaii, Idaho, Illinois, Iowa, Nebraska, Oregon and Tennessee.

TABLE I
STATES IN WHICH APPELLATE REVIEW OF SENTENCES IS PERMITTED

State	Citation	Year Initiated	Estimate of use	Basis of Authority	Increase Authorized	Review by
Alaska	ALASKA STAT. § 12.55.120, (1972); State v. Chaney, 477 P.2d 441 (Alas. 1970)	1970	Moderate	Statute	Yes	Supreme Court
Arizona	ARIZ. REV. STAT. §§ 13-1713-1717 (1956); State v. Valenzuela, 98 Ariz. 189, 403 P.2d 286, (1965)	1939 ¹	Moderate	Statute	No	Supreme Court
Colorado	COLO. REV. STAT. § 18-1-409 (1973)	1971	Seldom	Statute	Yes ²	Supreme Court
Connecticut	CONN. GEN. STAT. § 51-194-51-197 (1958)	1957	Moderate	Statute	Yes	Three judge panel of Superior Court
Florida	FLA. STAT. ANN. § 924.41 (West 1974)	1891	Almost Nil	Statute	No	Circuit Court (from Municipal Court only)
Hawaii	HAW. REV. STAT. § 641-24 (1968); State v. Kui Ching, 46 Haw. 135, 376 P.2d 379 (1962)	1895	Almost Nil ³	Statute	No	Supreme Court
Idaho	IDAHO CODE §§ 19-2803 (1948); State v. O'Callaghan, 2 Idaho 156, 9 P. 414 (1886); State v. Neal, 13 Idaho 539, 90 P. 860, <i>reh. denied</i> 13 Idaho 539, 91 P. 318 (1907); State v. Ledbetter, 83 Idaho 451, 364 P.2d 171 (1961)	1886	Seldom	Statute	No	Supreme Court
Illinois	ILL. ANN. STAT. ch. 110A, § 615(b) (Smith-Hurd 1976)	1963	Moderate	Statute	No	Appellate Court
Iowa	IOWA CODE ANN. § 793.18 (West 1950); State v. Bruntlett, 240 Iowa 338, 36 N.W.2d 450 (1949)	1860	Seldom	Statute	No	Supreme Court
Maine	ME. REV. STAT. tit. 15, §§ 2141-2144 (Supp. 1975)	1965	Moderate	Statute	Yes	Appellate Division, Supreme Judicial Court
Maryland	MD. ANN. CODE, art. 27 §§ 645[A-645]G (1976)	1966	Moderate	Statute	Yes	Three judge panel of circuit court
Massachusetts	MASS. GEN. LAW ANN. ch. 278, §§ 28A-28D (West 1968)	1943	Moderate	Statute	Yes	Three judge panel of superior court
Montana	MONT. REV. CODES ANN. §§ 95-2501-2504 (1947)	1968	Moderate	Statute	Yes	Three district judge division of Supreme Court
Nebraska	NEB. REV. STAT. 29-2308 (1975); State v. Orner, 192 Neb. 523, 222 N.W.2d 819 (1974)	1887	Seldom	Statute	No	Supreme Court

		1975	Unknown	Statute	Yes	Three judge panel of superior court Supreme Court
New Hampshire	N.H. REV. STAT. ANN. § 657-661 (1975)	1975	Unknown	Statute	Yes	
New Jersey	State v. Johnson, 67 N.J. Super. 414, 170 A.2d 830 (1961); State v. Laws, 51 N.J. 494, 242 A.2d 333 (1968), cert. denied 393 U.S. 971 (1968)	1968	Moderate	Statute	No	Supreme Court
New York	N.Y. CRIM. PROCEDURE LAW, §§ 450.30, 470.15 (McKinney 1971)	1882	Moderate	Statute	No	Intermediate court
Oklahoma	OKLA. STAT. ANN. tit. 22, § 1066 (West 1958); Hooper v. State, 70 Okla. Crim. 43, 121 P. 1087 (1912); Dumbar v. State, 150 Okla. Crim. 513, 178 P. 699 (1919); Murnand v. State, 180 Okla. Crim. 426, 195 P. 787 (1921)	1912	Seldom	Judicial Decision	No	Supreme Court
Oregon	ORE. REV. STAT. §§ 138.040-138.050 (1975); State v. Montgomery, 237 Ore. 596, 392 P.2d 643 (1964)	1945	Almost Nil ⁴	Statute	No	Supreme Court
Pennsylvania	PA. STAT. ANN. tit. 17, § 211.504 (Purdon Supp. 1976); Commonwealth v. Garramone, 307 Pa. 507, 161 A. 733 (1932); Commonwealth v. Pauls, 198 Pa. Super. Ct. 595, 182 A.2d 261 (1962)	1932	Almost Nil	Judicial Decision	No	Supreme Court
Rhode Island	R.I. CONST. amend. art. 12, § 1; R.I. GEN. LAWS § 8-1-2 (1956); State v. Fortes, 330 A.2d 404 (R.I. 1975)	1975	Almost Nil	Judicial Decision	No	Supreme Court
Tennessee	TENN. CODE ANN. § 40-2711 (1975)	1919	Almost Nil ⁵	Statute	No	Supreme Court
Wisconsin	Wis. STAT. ANN. § 251.09 (West 1971); State v. Tuttle, 21 Wis. 2d 147, 124 N.W.2d 9, (1963)	1963	Seldom	Judicial Decision	No	Supreme Court

¹ In Arizona appellate review of sentences was originally initiated by supreme court rule. See Dix, *Judicial Review of Sentences: Implications for Individual Disposition*, L. AND THE SOC. ORD. 375, (1969).

² In Colorado a sentence may be increased only on proof of aggravation.

³ In Hawaii appeals are limited to sentences given for misdemeanors and to the question of probation or incarceration in felonies.

⁴ In Oregon only sentences to pleas of "guilty" or "no contest" may be appealed.

⁵ In Tennessee review is limited to the question of concurrent or consecutive service of multiple sentences.

trial court."¹⁴ This type of statute is not addressed exclusively or directly to the review of sentences and in most cases treats the subject only cursorily.

In the remaining states the authority to review sentences is given in a statute that addresses itself elaborately and sometimes exclusively to the subject of sentence review. As a group, these statutes tend to be of much more recent date than the others. While not as elaborate as some, the Arizona statute is typical of those explicitly authorizing sentence review. It provides:

Upon an appeal from the judgment or from the sentence on the ground that it is excessive, the court shall have the power to reduce the extent or duration of the punishment imposed, if, in its opinion, the conviction is proper, but the punishment imposed is greater than under the circumstances of the case ought to be inflicted. In such a case, the supreme court shall impose any legal sentence, not more severe than that originally imposed, which in its opinion is proper. Such sentences shall be enforced by the court from which the appeal was taken.¹⁵

In the five remaining states: New Jersey, Oklahoma, Pennsylvania, Rhode Island and Wisconsin, appellate review of sentences is based on judicial interpretation of a general jurisdictional statute.¹⁶ It is not unusual for appellate courts to be empowered by statute to "affirm, reverse or modify" the judgments which they review on appeal, and the courts in such states have found that this sort of authorization is broad enough to serve as a basis for the power to review sentences on appeal. The Oklahoma Supreme Court, for example, traces its authority to review sentences to a statute which reads in part: "The Appellate Court may reverse, affirm or modify the judgment appealed from, if necessary or proper, and may order a new trial."¹⁷ The Supreme Court of Arkansas has held that a similarly general statute¹⁸ constituted authority to review legally erroneous sentences on appeal, but that the Arkansas legislature's attempt to grant the court

express authority to review legal sentences violated the state's constitution.¹⁹

In other instances the courts have found implied authority to review sentences in statutes that were quite general indeed. In 1963 the Wisconsin Supreme Court decided that it had the authority to review sentences for an abuse of discretion by the trial judge.²⁰ That decision was grounded on a statutory provision describing the court's discretionary reversal power, under which the court may direct that a proper judgment be entered when it appears from the record that a miscarriage of justice has occurred.²¹ Apparently realizing the tenuousness of its statutory grounds, the court was careful to stipulate at the time that it would "be a rare case where the power will be used,"²² and indeed the Wisconsin Supreme Court has reversed very few sentences on appeal. It was not until eight years later, in 1971, that it again reversed a sentence on the ground that the trial judge had abused his discretion.²³ The Wisconsin experience appears to reflect an incipient national trend among appellate courts to review sentences without explicit statutory authority.²⁴ In 1961, the appellate division of the New Jersey Supreme Court held that it had the authority to modify a sentence without being able to cite any statutory authority.²⁵

As might be expected, sentence review tends to be a less well-established practice in those states in which the authority to review has been judicially implied from statute than when sentence review is unequivocally authorized by statute. While the practice seems to have taken root and flourished in New Jersey, in the other states in this group it is used considerably less often. There is room to doubt, for example, whether appellate review exists in a meaningful sense in Pennsylvania where the practice is based in part on a statute authorizing an appeal

¹⁴ *Abbott v. State* 256 Ark. 558, 508 S.W.2d 733 (1974).

¹⁵ *State v. Tuttle*, 21 Wis. 2d 147, 124 N.W.2d 9 (1963).

¹⁶ WIS. STAT. ANN. § 251.09 (1971).

¹⁷ 21 Wis. 2d at 151, 124 N.W. 2d at 11.

¹⁸ *McCleary v. State*, 49 Wis. 2d 263, 182 N.W.2d 512 (1971). See Note, *Appellate Review of Sentences in Wisconsin*, 13 Wis. L. Rev. 1190 (1971).

¹⁹ MUELLER, *supra* note 9, at 677-687.

²⁰ *State v. Johnson*, 67 N. J. Super. 414, 170 A.2d 830 (App. Div. 1961); See also *State v. Laws*, 51 N. J. 494, 242 A.2d 333 (1968).

¹⁴ HAW. REV. STAT. tit. 35 § 641-24 (1968).

¹⁵ ARIZ. REV. STAT. ANN. § 13-1717(B) (1956).

¹⁶ Case citations for each state are provided in Table 1.

¹⁷ OKLA. STAT. ANN. tit. 22, § 1066 (West 1958).

¹⁸ ARK. STAT. ANN. § 43-2725.2 (Supp. 1975); *Abbott v. State*, 256 Ark. 558, 508 S.W.2d 733 (1974).

by right in all murder convictions²⁶ and has been limited mainly to sentences imposing the death penalty. Although there is authority supporting appellate review of other sentences,²⁷ sentence review appears to be a rarely used avenue of appeal in that state.

Even the existence of explicit statutory authority is not *prima facie* proof of the vitality of sentence review in any jurisdiction. In several states the remedy is severely limited by statute. In Florida, sentence appeal is allowed only to the circuit courts from sentences imposed by municipal courts.²⁸ In Oregon, appeal is permitted only from sentences imposed following a plea of guilty and, since the courts in that state render indeterminate sentences, the only question that can be raised on appeal is the reasonableness of the maximum term.²⁹ In Tennessee, appeal is permitted only on the question of whether the sentences for more than one offense ought to be imposed cumulatively or consecutively.³⁰ In Hawaii, sentence review is explicitly authorized by statute, but because the courts there have no control over the length of sentences, review is limited to sentences imposed for misdemeanors and to the question of probation or incarceration for felonies.³¹ If those states in which sentence review is available on a severely limited basis are omitted from the list, it would appear that the remedy obtains in only seventeen states, and only in ten or so of these does it appear that appellate review of sentences is practiced as an on-going, well recognized post-conviction remedy offering reasonable expectations of success. Appellate review of sentences appears to take root and flourish best in jurisdictions in which it is explicitly authorized by statute and the function is given to a special, easily identifiable court.

In some states in which sentence review is grounded on judicial interpretation of a general statute, and in those in which it stems from an expressed but brief grant of statutory au-

thority, the practice of sentence review is likely to operate with a minimum number of restrictions. Any appellate court which has jurisdiction over the case can review virtually any sentence and can dispose of the case on whatever basis and by whatever means it chooses. In jurisdictions where the statutory authority is more explicit, it is not uncommon for procedures to be carefully governed. In Connecticut, for example, the statute even requires that the clerk of court notify the defendant of the right to appeal his sentence.³² In some states sentence review is made the exclusive province of a particular court, which is often a lower court. In Connecticut, Maine, Maryland, Massachusetts, Montana, and New Hampshire, sentences are reviewable only by a specially created appellate division of one of the lower courts or by a special panel of trial judges convened for this purpose. The ABA's special committee voiced opposition to the special court plan as an undesirable division of the appellate function, a hardship on litigants and a hindrance to the formulation of sentencing policies.³³

It is not uncommon for statutes to permit an appeal only from sentences of a certain duration. In Alaska, for example, only sentences of at least one year are appealable,³⁴ while Colorado only allows defendants to appeal felony sentences which exceed three years.³⁵ Limitations of this sort are thought necessary to prevent the court from being deluged with minor appeals. Sentences that are mandatory by statute are, of course, not appealable.

In seven of the states which allow for sentence review, the original sentence can be increased on appeal if the court should find that the original sentence was overly lenient. In Alaska the state is permitted to initiate an appeal to have a sentence declared deficient.³⁶ Some states—Illinois, Hawaii, Arizona and Nebraska—expressly forbid a sentence to be increased on appeal. In Colorado a sentence can be increased only upon the introduction of new evidence of aggravation.³⁷

The right of the state to appeal the leniency of a sentence is one of the most controversial

²⁶ PA. STAT. ANN. tit. 19, §§ 1186-1187 (Purdon 1964).

²⁷ Commonwealth v. Pauls, 198 Pa. Super. Ct. 595, 182 A.2d 261 (1962).

²⁸ FLA. STAT. ANN. § 924.41 (1974).

²⁹ ORE. REV. STAT. § 138.050 (1975); State v. Gust, 218 Ore. 498, 345 P.2d 808 (1959).

³⁰ TENN. CODE ANN. § 40-2711 (1975).

³¹ State v. Kui Ching, 46 Haw. 135, 376 P.2d 379 (1962), State v. Sacoco, 45 Haw. 288, 367 P.2d 11 (1961).

³² CONN. GEN. STAT. ANN. § 51-195 (1958).

³³ ABA STANDARDS, *supra*, note 5, at 33.

³⁴ ALASKA STAT. § 12.55.120(a) (1972).

³⁵ COLO. REV. STAT. ANN. § 18-1-409(2) (1973).

³⁶ ALASKA STAT. § 12.55.120(6) (1972).

³⁷ COLO. REV. STAT. ANN. § 18-1-409(3) (1973).

aspects of appellate review of sentences. A majority of the committee which formulated the ABA's guidelines concerning sentence review rejected the power to increase sentences on the ground that it would discourage defendants from challenging sentences they considered excessive.³⁸ Others argue that only in this way can the courts be spared a deluge of frivolous appeals against sentencing. The British experience indicates, however, that when the Criminal Division of the Court of Appeals was deprived of the power to increase sentences in October, 1966, after more than half a century of experience with the practice, the ensuing increase in the number of appeals (which has since abated) did not hamper the work of the court.³⁹ As one commentator concluded, "When the power to increase sentences existed in England, it was rarely used, and since it has been abolished it has rarely been missed."⁴⁰

One other feature of appellate review of sentences in the United States deserves special mention. Seldom is an attempt made by statute to provide the court with guidelines concerning the scope or purpose of its review. Colorado, a rare exception, instructs the reviewing court to have regard for "the nature of the offense, the character of the offender, and the public interest, and the manner in which the sentence was imposed, including the sufficiency and accuracy of the information on which it was based."⁴¹ In most states, however, the courts must develop their own ideas concerning the validity of sentences and the purpose of sentence review. Since the sentencing decision is an inherently difficult one, and since the appellate courts do not have the first-hand knowledge of the case that the trial judge is in a position to acquire, most appellate courts in the United States—and particularly those that do not specialize in the review of sentences—are prone to treat the sentence of the trial court as being prima facie valid and unreviewable, unless a clear abuse of discretion can be shown. In their determination not to "meddle with the sentence" imposed by the exercise of a presumably sound discretion on the part of the trial judge,

the reviewing courts tend to limit their function to correcting only the most glaring abuses. As a result, they deprive themselves of their ability to set sentencing policy or to develop a body of precedent; and in doing so they discourage further appeals.

II.

It is difficult to explain why so few states have chosen to depart from the rule of non-reviewability of sentences. Reluctance to do so is easy to find however, and in state after state the appellate courts have rejected with little or no explanation the suggestion that they have authority to review sentences on appeal. In order to lay the foundation for an effort to identify the sorts of factors that have served to discourage the adoption of sentence review in the states, it is instructive to examine in some detail the experience of the federal courts with the doctrine of non-reviewability of sentences.

Before 1891 the circuit courts possessed and exercised the authority to correct harsh sentences. The Judicature Act of 1879 contained a provision that "in case of an affirmance of the judgment of the district court, the circuit court shall proceed to pronounce final sentence and to award execution thereon."⁴² When the new appellate courts were created in 1891, this provision of the old act was omitted, and the omission was shortly taken to mean that the courts of appeal no longer had authority to review sentences. In *Freeman v. United States*,⁴³ the Ninth Circuit Court of Appeals rejected the suggestion that it could modify sentences and explained that earlier decisions modifying sentences, which had been cited as precedent, were based on the "peculiar language of the third section of the Act of March 3, 1879."⁴⁴ Since there was "no such provision in the act creating the Circuit Court of Appeals" the court concluded that it had been "given only appellate jurisdiction to review, by appeal or by writ of error, final decisions in the District Court."⁴⁵ This conclusion has been shown to be inconsistent with the legislative history of the act,⁴⁶ but it

⁴² Judicature Act of 1879, ch. 176, § 1, 20 Stat. 354.

⁴³ 243 F. 353 (9th Cir. 1917), cert. denied, 249 U.S. 600 (1919). See also *Jackson v. United States*, 102 F. 473 (9th Cir. 1900).

⁴⁴ 243 F. at 357.

⁴⁵ *Id.*

⁴⁶ See the analysis by Kutak & Gottschalk, *In Search of a Rational Sentence: A Return to the Concept of Appellate Review*, 53 NEB. L. REV. 463 (1974).

³⁸ ABA STANDARDS, *supra* note 5, at 58.

³⁹ Meador, *The Review of Criminal Sentences in England*, in ABA STANDARDS, *supra* note 5, at 144.

⁴⁰ Thomas, *Appellate Review of Sentences and the Development of Sentencing Policy: The English Experience*, 20 ALA. L. REV. 193, 224 (1968).

⁴¹ COLO. REV. STAT. ANN. § 18-1-409(1) (1973).

has formed the basis of the federal rule of this point ever since.⁴⁷

It should be noted that unlike some state courts, the federal courts have consistently avoided finding authority for sentence review implicit in their own general authority "to affirm, modify or reverse the judgment, decree or order brought before it for review."⁴⁸ The federal courts have steadfastly held that the remedy for an unduly harsh sentence "must be afforded by Congress, not by judicial legislation under the guise of construction."⁴⁹ By 1937 the Court of Appeals for the Eight Circuit concluded that:

If there is one rule in federal criminal practice that is firmly established it is that the appellate court has no control over a sentence which is within the limits allowed by a statute.⁵⁰

In *Gore v. United States*,⁵¹ the United States Supreme Court was presented with one of its few opportunities to review a sentence. The Court noted that it was being "asked to enter the domain of penology, and more particularly that tantalizing aspect of it, the proper apportionment of punishment." Noting that "these are peculiarly questions of legislative policy," the Court concluded that it had "no such power."⁵²

Although firmly established, the doctrine of non-reviewability has frequently been questioned.⁵³ In discussing the question of whether the imposition of the death penalty in case of Julius and Ethel Rosenberg in 1952 was an abuse of judicial discretion, Judge Jerome Frank noted both the argument that the power

⁴⁷ See *Bryan v. United States*, 338 U.S. 552 (1950); *Ballew v. United States*, 160 U.S. 187 (1895). See also *Hanley v. United States*, 183 F. 49 (2d Cir. 1903).

⁴⁸ Act of June 1, 1872, ch. 255, § 2, 17 Stat. 197.

⁴⁹ *Blockburger v. United States*, 284 U.S. 299, 305 (1932).

⁵⁰ *Gurera v. United States*, 40 F.2d 338, 340-41 (8th Cir. 1937).

⁵¹ 357 U.S. 386 (1958).

⁵² *Id.* at 393.

⁵³ The most persistent advocate of appellate review of sentences has been Simon E. Sobeloff, former Chief Judge of the United States Court of Appeals for the Fourth Circuit. See, for example, his remarks in *Appellate Review of Sentences: A Symposium at the Judicial Conference of the United States Court of Appeals for the Second Circuit*, 32 F.R.D. 249, 264 (1962); and his articles *A Recommendation for Appellate Review of Criminal Sentences*, 21 BROOKLYN L. REV. 2 (1955); and *The Sentence of the Court: Should There Be Appellate Review?* 41 A. B. A. J. 13 (1955).

to review sentences formerly exercised by the circuit courts "had been incorporated by reference in the 1891 statute setting up the Courts of Appeal,"⁵⁴ as well as the argument that the court could review sentences under the authority given to it by 28 U.S.C. §2106 "to affirm, modify or reverse" a judgment. In the face of sixty years of established practice, however, Judge Frank concluded 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 a 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.⁵⁵

In *Smith v. United States*,⁵⁶ the Court of Appeals for the Tenth Circuit in Oklahoma held that while a fifty-two year sentence for multiple unaggravated violations of the marijuana and narcotics statutes was greater than should have been imposed, the court was without power to modify the sentence. Chief Judge Murrain wrote a vigorous dissent, arguing that the court should assume the authority to review sentences as part of its power to modify judgments. He noted that "no federal court has ever ruled that the statute does not mean what it plainly says."⁵⁷

In addition to these instances in which the doctrine of non-reviewability has been questioned, the federal courts have developed a large body of law which permits the courts to review the sentencing process for possible violation of due process. The development of this line of cases may be regarded in part as a response to the inability of the courts to review the merits of the sentences. In *Townsend v. Burke*,⁵⁸ an early case, the Supreme Court set aside a sentence on the grounds that it was based on incomplete information and that erroneous inferences had been drawn from that information by the trial judge. The *Townsend* case has been considered as authority for lower courts to adjudicate complaints concerning the process by which a sentence has been reached.⁵⁹

⁵⁴ *United States v. Rosenberg*, 195 F.2d 583, 604 n. 25 (2d Cir. 1952).

⁵⁵ 195 F.2d at 606-607.

⁵⁶ 273 F.2d 462 (10th Cir. 1959).

⁵⁷ *Id.* at 469.

⁵⁸ 334 U.S. 736 (1948).

⁵⁹ *Kutak & Gottschalk, supra* note 46, at 474.

Recently, for instance, the Court of Appeals for the Fourth Circuit⁶⁰ vacated a sentence and remanded a case for resentencing because it did not appear that the judge had given proper consideration to certain alternative methods of disposing of the case. Similarly, the Court of Appeals for the Ninth Circuit⁶¹ vacated a sentence because the presentence report contained allegations concerning the defendant's past activities that were speculative and unsupported by factual evidence.⁶² Another exception to the doctrine of non-reviewability occurs in cases involving an offense for which no maximum penalty has been prescribed by statute (e.g., criminal contempt), where the absence of limitations on the sentencing power gives the appellate courts "a special responsibility for determining that the power is not abused. . . ."⁶³

There are at least two instances in which the appellate courts have undertaken to review sentences directly, regardless of the status of their authority to do so. In *United States v. Wiley*,⁶⁴ the Court of Appeals for the Seventh Circuit remanded a case in which one defendant, who had pleaded not guilty, had been given a more severe sentence than his accomplices, who had pleaded guilty. When the same sentence was reimposed, the court set aside the sentence and again remanded the case on the ground that the district court had "without any justification arbitrarily singled out a minor defendant for the imposition of a more severe sentence than that imposed upon the co-defendants."⁶⁵ Since the district court had failed to heed the "gentle intimations" of the previous remand, the Court of Appeals felt that it had "no alternative but to

exercise its supervisory power over the administration of justice in the lower federal courts by setting aside the sentence of the District Court."⁶⁶ In response the district court reimposed the same sentence, but this time suspended its execution. In *United States v. Daniels*⁶⁷ the Court of Appeals for the Sixth Circuit remanded the sentence of a draft evader for reconsideration because the sentencing judge admitted that the five-year sentence was dictated solely by his long standing personal policy of always sentencing draft evaders to five years. When he refused to alter the sentence on remand, the Court of Appeals vacated the sentence, and ordered the trial court to place the defendant on probation.

The latest statement concerning the federal doctrine of non-reviewability of sentences was written in 1974 by the Supreme Court in *Dorszynski v. United States*.⁶⁸ Although the issue of sentence review was never argued by counsel in this case, in the course of the majority opinion Chief Justice Burger declared that there is no authority for appellate review of sentences in the federal judicial system. This statement may be interpreted as a pointed reminder addressed to the judges of the federal courts of appeal. The expectation that cases like *Wiley* and *Daniels* would soon lead to the establishment of a firm judicial policy permitting sentence review has presumably been laid to rest by the Chief Justice's remark in *Dorszynski*. The hopes of the proponents of sentence review in the federal courts are now focused on the sentence review provision of the pending revision of the criminal code.⁶⁹ This provision enjoys wide support, even though its adoption is presently being delayed by the controversial nature of some of the other provisions of the bill.

Although none of the states has developed as voluminous a body of law concerning the non-reviewability of sentences as exists in the federal courts, there is clearly a good deal of reluctance to depart from the common law rule of non-reviewability, either by means of statute or by judicial interpretation. The height of judicial reluctance was probably reached in Florida, where the courts declined to accept two sepa-

⁶⁰ *United States v. Wilson*, 450 F.2d 495 (4th Cir. 1971).

⁶¹ *United States v. Weston*, 448 F.2d 626 (9th Cir. 1971).

⁶² Other cases in this series come even closer to examining the merits of the sentence itself. *See United States v. Trevino*, 490 F.2d 95 (5th Cir. 1974); *United States v. Hartford*, 489 F.2d 652 (5th Cir. 1974); *United States v. Espinoza*, 481 F.2d 553 (5th Cir. 1973); *United States v. Johnson*, 476 F.2d 1251 (5th Cir. 1973); *United States v. Walker*, 469 F.2d 1377 (5th Cir. 1972). All of these cases are analyzed in Kutak & Gottschalk, *supra* note 46.

⁶³ *Green v. United States*, 356 U.S. 165, 188 (1958).

⁶⁴ 278 F.2d 500 (7th Cir. 1960). *See also* Comment, *Present Limitations on Appellate Review of Sentencing*, 58 IOWA L. REV. 469 (1972); Comment, *Appellate Review of Sentences: A Survey*, 17 ST. LOUIS U.L.J. 221 (1972).

⁶⁵ 278 F.2d at 503.

⁶⁶ *Id.* at 503-04.

⁶⁷ 429 F.2d 1273 (6th Cir. 1970), *remanded with instructions*, 446 F.2d 967 (6th Cir. 1971).

⁶⁸ 418 U.S. 424 (1974).

⁶⁹ S.1, 94th Cong., 1st Sess. §§ 3721-3726 (1975).

rate and explicit statutory authorizations to review excessive sentences, interpreting one statute as encompassing only illegal sentences, and the other as being insufficiently precise.⁷⁰ More recently, the Supreme Court of Arkansas interpreted an attempt by the state legislature to vest the court with the authority to reduce excessive sentences as an unconstitutional infringement upon the governor's clemency powers.⁷¹

Criminal defendants are not a politically influential group in any jurisdiction, and that fact alone undoubtedly goes a long way toward explaining why the idea of sentence review is seldom raised in the state legislatures. Only in relatively recent years have influential groups such as bar associations attempted to press for appellate sentence review before state legislatures and Congress. What is especially unclear is why more appellate judges who have been confronted with the problems created by the lack of this power have not sought to establish it based on the statutory authority at hand. This is an important question that the ABA's Committee on Standards poses but does not attempt to answer. The committee observed:

It is no surprise, of course, to see appellate courts insisting upon statutory authority before exercising such power. What is not so clear, however, and what must await an examination of the history of sentence review . . . is why the courts have been so reluctant to construe general authority to review criminal judgments as including authority over the sentences.⁷²

Without hazarding a definitive answer to this question, it is possible to identify a number of factors that conceivably have been influential in discouraging the courts from interpreting existing authority to permit sentence appeals.⁷³ First, the courts have shown a tendency to accept the idea that the appropriateness of a sentence is not really a proper question for the judiciary. The doctrine of non-reviewability has

been said to be a product of classical penological thinking which stressed the ability of the legislature to find an appropriate punishment to fit every crime and de-emphasized the role of the individual judge in the formulation of particular punishments.⁷⁴ An acceptance of this idea can be found, for example, in the statement of the United States Supreme Court in *Gore v. United States*⁷⁵ that sentencing questions "are peculiarly questions of legislative policy." The idea is also reflected in the willingness of the federal courts of appeal to review the exercise of a trial judge's discretion in imposing a sentence for an offense for which no maximum penalty has been prescribed by statute.⁷⁶ The same concern for the proper definition of the judicial function can be seen in the decisions of the courts holding that an appeal of an allegedly excessive sentence is in the nature of a plea for clemency, which is most appropriately handled by the executive.⁷⁷

Second, even admitting the necessity of judicial involvement in the process of devising appropriate criminal sanctions in individual cases, appellate courts have often been reluctant to admit that this is their proper function, and they have shown great respect for the sentencing discretion exercised by lower court judges. As one commentator suggested, "the 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."⁷⁸ There is some evidence that lower court judges resent the suggestion that their sentencing discretion ought to be subject to review on appeal,⁷⁹ and given the continuing relationship that exists between lower court judges and the judges to whom their decisions are usually appealed, this factor may very well be the primary one operating to discourage the appellate courts from adopting sentence review.

Third, the fear that appellate review of sentences would expose already overcrowded

⁷⁰ *Infante v. State*, 197 So. 2d 542 (Dist. Ct. App. Fla. 1967); *Florida Real Estate Comm. v. Rogers*, 176 So. 2d 65 (Fla. 1965).

⁷¹ *Abbott v. State*, 256 Ark. 558, 563, 508 S.W.2d 733, 736 (1974); cf. *People v. Odle*, 37 Cal. 2d 52, 230 P.2d 345 (1951).

⁷² ABA STANDARDS, *supra* note 5, at 14.

⁷³ Cf. Walsh, *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, 276 (1962).

⁷⁴ Mueller & Le Poole, *supra* note 2, at 411.

⁷⁵ 357 U.S. 386, 393 (1958).

⁷⁶ See, e.g., *Green v. United States*, 356 U.S. 165, 188 (1958).

⁷⁷ *Abbott v. State*, 256 Ark. 558, 563, 508 S.W.2d 733, 736 (1974); *People v. Odle*, 37 Cal. 2d 52, 58 (1951).

⁷⁸ Coburn, *Disparity in Sentences and Appellate Review of Sentencing*, 25 RUTGERS L. REV. 207, 216 (1971).

⁷⁹ There are intimations to this effect, for instance, in the remarks of Walsh, *supra* note 73, at 276.

dockets to a deluge of additional appeals has perhaps played a part in discouraging the courts from establishing this practice for themselves. This might well have been an operative factor in the mind of Chief Justice Burger when, in *Dorszynski*, he reminded lower federal judges that there is no appeal of sentences in the federal courts. Like most other appellate courts today, the United States Supreme Court does not wish to induce a drastic increase in its workload.

Fourth, it is argued by the opponents of sentence review that appellate review of sentences would establish a line of "acceptable sentences" for given criminal situations, and would discourage trial judges for thinking for themselves.⁸⁰ Similarly, it is sometimes said that sentence review would expose the appellate courts to the corrupting influence of the sort of extralegal and emotional arguments that are involved in the process of arriving at a correct sentence.⁸¹ Although these latter two arguments are perhaps not highly plausible as factors that have actually induced appellate judges not to adopt sentence review, they deserve mention as sources for testable hypotheses concerning the actual operation of sentence review.

Although there is not much evidence that reluctant courts have been willing to heed countervailing arguments, the proponents of sentence review have developed answers to all of the foregoing concerns.⁸² They argue, for instance, that intervention by the executive occurs too seldom to serve as a substitute for sentence review as an established appellate practice. The fear of suddenly overcrowded dockets is not borne out, it is argued, by the experience of those states which have adopted sentence review. They argue that the inability to review sentences directly has led some courts to attempt to do justice in individual cases by adjudicating them on some other grounds. In short, the lack of sentence review does not spare the court's docket; it only obscures the real issue in some cases. To the argument concerning the primacy of the trial judge's discretion in formulating a sentence, they respond that the argument loses much of its force when it is realized that in all jurisdictions the vast

majority of cases are disposed of by guilty pleas. In these cases the trial judge is furnished with little or no opportunity for first hand observation of the defendant. Moreover, there are numerous instances in which judges have either not used their discretion and imposed sentences by reference solely to a pre-determined policy,⁸³ or in which they have abused it by allowing improper factors to influence their decisions. To the argument that sentence review would result in the development of "price tags" for almost every criminal situation which would be mindlessly applied by sentencing judges, the advocates of sentence review respond that their goal is not uniformity of sentences but rather a "uniformly fair and equitable approach" to sentencing.⁸⁴ Finally, they argue that there is no reason to believe that appellate courts cannot learn to survive an encounter with the raw facts and emotionalism involved in sentencing and emerge with their capacity for accurate and dispassionate evaluation of the case intact.

There is not much evidence that these countervailing arguments have actually had much effect in changing the minds of reluctant courts. The future of appellate review of sentences is likely to depend more on the validity of the positive arguments that can be made in favor of this practice.

III.

The purposes of sentence review have been summarized by the ABA's Advisory Committee on Sentencing and Review as follows:

- (1) to correct the sentence which is excessive in length, having regard to the nature of the offense, the character of the offender, and the protection of the public interest;
- (2) to facilitate the rehabilitation of the offender by affording him an opportunity to assert grievances he may have regarding his sentence;
- (3) to promote respect for law by correcting abuses of the sentencing power and by increasing the fairness of the sentencing process; and
- (4) to promote the development and application

⁸⁰ *See, 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. McKinney*, 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). These cases are cited by Kutak & Gottschalk, *supra* note 46, at n. 158.

⁸⁴ *See Sobeloff, supra* note 53, at 273.

⁸⁰ *Id.* at 281-82.

⁸¹ *Id.*

⁸² *See, e.g.*, Kutak & Gottschalk, *supra* note 46, at 494.

of criteria for sentencing which are both rational and just.⁸⁵

There is little room for doubt that sentence review is capable of directly accomplishing some of its stated goals. It is an effective means, for example, of combating the clearly excessive sentence, such as the fifty-two year sentence for an unaggravated marijuana and narcotics conviction given to a youthful first-time offender which a frustrated federal court of appeals let stand because it could not legally do otherwise.⁸⁶

Sentence review can also be an effective means of combating some of the disparity found among sentences. A typical example is furnished by *People v. Steg*,⁸⁷ where three defendants pleaded guilty and were convicted of an armed robbery. One of the defendants, who admitted to being the instigator of the crime, was sentenced to two-to-ten years. Later, another judge sentenced each of his accomplices to the substantially greater terms of five-to-twenty years imprisonment. Such disparities, particularly when sentences are imposed by different judges for the same or similar crimes, are not at all uncommon. In most states, sentencing judges have little or no way to determine how other judges are responding to similar sentencing situations. The ABA Committee on Standards saw a considerable need for developing a sentence review procedure, since the disparity in sentences is a major source of bitterness and disillusionment among prisoners and a serious impediment to rehabilitation.⁸⁸

Debate concerning the purposes of sentence review centers mainly on the ability of the courts to develop sentencing criteria. The courts have proven themselves very capable of making policy concerning the integrity of the sentencing process, yet serious doubts have been expressed about their ability to develop policies concerning the substance of sentences.⁸⁹ A survey of decisions reviewing sentences imposed in narcotics cases, for example, would disclose that the courts have considered

as particularly relevant such factors as the defendant's criminal record, his previous involvement with the offense, his family background, age, educational record, employment record, and ability to change.⁹⁰ Nonetheless, it is difficult to formulate a systematic idea of the relative weight given to these factors in any particular jurisdiction. In part this is due to the paucity of decisions in which sentences were reviewed and to the frequent—and perhaps characteristic—failure of the courts to discuss the theoretical bases that underly their decision to uphold or to reverse a sentence. The extent to which judges visualize this as a part of their review function has yet to be established.⁹¹ As a result, lower courts are not furnished with precedents useful in formulating sentences. The ability of the appellate courts to develop sentencing policies for the guidance of the lower courts is a crucial element in the case favoring sentence review, and it is this precise concern which makes sentence review of particular relevance to students of the judicial process.

In conducting research into this problem, it is important to bear in mind that there are actually several policy-making levels involved in the sentencing process. Modern penology recognizes four general aims of sentencing: (1) retribution, (2) general deterrence, (3) individual deterrence, or isolation of the offender and (4) rehabilitation, and a decision must be made concerning which of these goals are to be achieved by the sentence.⁹² The nature of the crime will figure as a large factor, along with the personal characteristics of the offender and the circumstances of the particular offense. If the effectiveness of the courts in formulating sentencing policies is to be properly analyzed, the policy-making function of the courts in this area must be viewed with regard to each of the four aims of sentencing.

The literature suggests that courts are better at pursuing some goals than others, and difficulties may differ from one stage of policy-making to another. In a 1937 detailed analysis of sentence review decisions, Professor Livingston Hall found that the courts had proved

⁸⁵ ABA STANDARDS, *supra* note 5, at 21.

⁸⁶ *Smith v. United States*, 273 F.2d 462 (10th Cir. 1959).

⁸⁷ 69 Ill. App. 2d 188, 215 N.E.2d 854 (1966).

⁸⁸ ABA STANDARDS, *supra* note 5, at 25-26.

⁸⁹ Comment, *Appellate Review of Primary Sentencing Decisions: A Connecticut Case Study*, 69 YALE L. REV. 1453 (1960).

⁹⁰ See 45 A.L.R.3d 812.

⁹¹ See generally Halperin, *Appellate Review of Sentencing in Illinois—Reality or Illusion*, 55 ILL. BAR ASS'N J. 301 (1966).

⁹² S. REID, CRIME AND CRIMINOLOGY 492-504 (1976).

themselves adept at making the primary decision between the alternative aims of sentencing.⁹³ His research uncovered a discernible pattern of sentencing policies formulated in terms of the nature of the crimes: first, crimes against the person were punished primarily to achieve retribution. Second, in punishing crimes against property, the courts were chiefly interested in preventing a repetition of the crime. As a result, they were receptive to factors tending toward mitigation or indicative of the defendant's capacity for change. Rehabilitation was most frequently practiced with regard to these crimes. Finally, crimes not involving personal harm or damage to property, such as liquor violations, were punished to achieve general deterrence. Mitigating factors tended to be ignored, and the sentence was used to affirm the values implicit in the statute.

The same adeptness at making the primary policy decision is presumed by a 1968 recommendation of the President's Commission on Law Enforcement and the Administration of Justice, which urged judges to take account of four groups of drug offenders whose crimes differed in seriousness: (1) smuggling or sale of large quantities of narcotics; (2) smuggling or sale of small quantities of narcotics; (3) possession without intent to sell; (4) marijuana offenses.⁹⁴

Whether the courts are equally adept at formulating policies to implement their initial policy decision may well be another question. While it may be relatively easy to formulate guidelines concerning the precise manner of implementing the goal of retribution or deterrence, it seems that courts do not succeed nearly as well in formulating guidelines to

achieve rehabilitation. Here they may encounter the frontiers of their judicial expertise. There are those who contend in fact that this is a problem that necessarily affects any attempt to implement initial sentencing policies. "The utter failure to develop a system of precedents for sentence reduction both in the United States and in England," Lester Orfield contends, "is very likely strong evidence that the problem is not soluble by an appellate court." Orfield explains:

Appellate courts as well as trial courts are wholly unsuited by training and methods of work to pass on the propriety of sentences. What the appellate courts are eminently fitted for is to pass on the correctness of the conviction of the defendant. It is their peculiar province to enforce compliance with the rules of substantive law and procedure. The problem of sentencing involves wholly different considerations. The question no longer is, is the defendant guilty or innocent? It is, what shall be done with him?⁹⁵

Given the momentum that sentence review seems to have gathered in recent years, arguments like this one against the practice will probably be viewed as premature. As long as penology remains within the orbit of the law it will be argued that "it is obviously the duty of the appellate courts to see to it that the law is properly served."⁹⁶ The continued growth of this avenue of appeal depends largely on the passage of additional statutes explicitly authorizing sentence review and a willingness on the part of the appellate courts to review the exercise of the trial judge's discretion in formulating sentences. The continued growth of this practice will furnish students of the judicial process with an increasing fund of data with which to participate in the evaluation of the courts' role in applying penology on appeal.

⁹³ Hall, *Reduction of Criminal Sentences on Appeal: I*, 37 COLUM. L. REV. 521, 529-547 (1937).

⁹⁴ PRESIDENT'S COMM. ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 513 (1968).

⁹⁵ L. ORFIELD, *CRIMINAL APPEALS IN AMERICA* 117-18 (1939).

⁹⁶ Mueller, *supra* note 2, at 686.