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THE RULE OF NONREVIEW: A CRITICAL ANALYSIS OF APPELLATE SCRUTINY OF CRIMINAL SENTENCES

Within the federal judicial system and the majority of state courts, decisions as to the type and length of sentence imposed on a criminal defendant are solely for the discretion of the trial court.¹ The courts have therefore formulated a "rule of nonreview" which states that criminal sentences are unreviewable on appeal except to determine whether they fall within statutory limits.² Thoughtful courts and legal commentators, however, recognizing that where the exercise of discretion exists, there also exists a potential for its abuse,³ have diluted the

1. The Supreme Court spoke of "traditional sentencing doctrine" when it stated recently that there exists in the federal system "long-established authority . . . vesting the sentencing function exclusively in the trial court." *Dorszynski v. United States*, 94 S. Ct. 3042, 3051 (1974) (footnote omitted). See generally Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 HARV. L. REV. 904 (1962). For a survey of the status of the review of criminal sentences by state appellate courts, see Mueller, *Penology on Appeal: Appellate Review of Legal but Excessive Sentences*, 15 VAND. L. REV. 671, 688 apps. A & B (1962).

2. As noted by the Supreme Court, the cases have held that "if a court [has] imposed a sentence within [the permissible statutory] range, his exercise of discretion as to where within the permissible range sentence should be fixed [is] not subject to challenge." 94 S. Ct. at 3051. See also *United States v. Hetterington*, 279 F.2d 792, 796 (7th Cir. 1960). See note 18 *infra*. The rule has been stated variously throughout this century: "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, 340-41 (8th Cir. 1930). See also 2 C. WRIGHT, *FEDERAL PRACTICE AND PROCEDURE* § 533 (1969). The federal courts refuse to review sentences, not because they quarrel with the merits of the procedure, but because they feel they lack the power to do so. The following deferral to the superior authority of Congress is common in the entire area of federal criminal sentencing:

[In this case] we are asked to enter the domain of penology, and more particularly that tantalizing aspect of it, the proper apportionment of punishment. Whatever views may be entertained regarding severity of punishment, whether one believes in its efficacy or its futility . . . these are peculiarly questions of legislative policy. Equally so are the much mooted problems relating to the power of the judiciary to review sentences. . . . This Court has no such power.

Gore v. United States, 357 U.S. 386, 393 (1958). Accord, *Blockburger v. United States*, 284 U.S. 299, 305 (1932).

3. See generally Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635 (1971). A few scattered opinions represent authority for review upon a showing that the trial court has abused its discretion. The holding is generally made, however, without any discussion of the nature of the abuse. See, e.g., *Hood v. United States*, 469 F.2d 721 (8th Cir. 1972); *United States v. King*, 420 F.2d 946 (4th Cir.), cert. denied, 397 U.S. 1017 (1970); *United States v. Wiener*, 418

rule of nonreview by annexing to it a significant set of exceptions. Though the theme binding these scattered exceptions focuses upon abuse of sentencing discretion, few courts have thoroughly considered the nature of discretion or the acts which may constitute its abuse. This Comment argues that, consistent with protection of individual rights throughout the criminal judicial process in the federal courts, a more structured framework is needed within which discretion may be exercised and reviewed.⁵

HISTORY AND CURRENT STATUS OF THE RULE OF NONREVIEW

Authority for the rule that federal courts of appeals cannot review sentences imposed by district courts resides in unconvincing logic supported by insubstantial legislative history. Under the Judicature Act of 1879,⁶ the old circuit courts explicitly were authorized "to pronounce final sentence."⁷ The Act of March 3, 1891,⁸ in reorganizing the federal court system, deleted the reference to sentencing, and stated in its stead that the circuit courts of appeals were to "exercise appellate jurisdiction to review by appeal or by writ final decision in the district court . . ."⁹ This change in wording was interpreted by the courts as abrogating their power to review sentencing decisions.¹⁰

F.2d 849 (5th Cir. 1969); *United States v. Latimer*, 415 F.2d 1288 (6th Cir. 1969); *Leach v. United States*, 334 F.2d 945 (D.C. Cir. 1964); *Livers v. United States*, 185 F.2d 807 (6th Cir. 1950); *Tincher v. United States*, 11 F.2d 18 (4th Cir.), *cert. denied*, 271 U.S. 664 (1926).

4. See notes 45-89 *infra* & accompanying text.

5. This Comment is concerned with the review of sentencing discretion as it operates in the federal context, where sentencing following trial either to judge or jury is conducted solely from the bench. For an analysis of problems inherent in jury sentencing see Note, *Jury Sentencing in Virginia*, 53 VA. L. REV. 968 (1967).

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

7. *Id.* § 3.

8. Act of March 3, 1891, ch. 517, 26 Stat. 826.

9. *Id.* § 6.

10. Noting that the changed wording of the 1891 statute was the impetus for its decision, the court in *Freeman v. United States*, 243 F. 353 (9th Cir. 1917), held that it could not review any sentences which fell within statutory limits. *Freeman* distinguished two earlier, contrary cases as having been decided under the 1879 statute. *Id.* at 357, citing *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) (circuit court may alter sentence imposed below even though it affirms the judgment). The court in *Freeman* stated: "There is no [similar] provision in the Act creating the Circuit Court of Appeals. Those courts are given only appellate jurisdiction to review [a] final decision in the District Court." 243 F. at 357. See also *Jackson v. United States*, 102 F. 473 (9th Cir. 1900) (court implies that sentences within statutory limit are unreviewable). But see *Ballew v. United*

Though few courts actually considered the validity of this interpretation of the 1891 statute,¹¹ the position was not unreasonable in light of the statute's wording and the inclusion of a repealer clause invalidating all prior inconsistent statutes.¹² The statute was revised once more,¹³ however, in 1948, during the codification of the judicial code.¹⁴ Now section 2106 of Title 28, the statute provides that federal courts 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 cause and direct the entry of such appropriate *judgment*, decree, or order, or require such further proceedings as may be just under the circumstances."¹⁵ The Supreme Court has stated that, "[f]inal judgment in a criminal case means sentence. The sentence is the judgment."¹⁶ Literal construction of section 2106 therefore yields the conclusion that circuit courts of appeals do have the authority to review sentences.¹⁷

States, 160 U.S. 187 (1895) (all powers extant under Judicature Act held preserved in later act, even though not reiterated in express terms).

An alternative statement of the nonreview rule forbids appellate scrutiny of a criminal sentence unless it amounts to a cruel and unusual punishment under the eighth amendment to the United States Constitution. See *Rodriguez v. United States*, 394 F.2d 825 (5th Cir. 1968); *Richards v. United States*, 193 F.2d 554 (10th Cir. 1951). This formulation, however, is no more conducive to review than the stricter rule, because courts of appeals consistently have held that a sentence within the statutory limits is not cruel and unusual punishment. See, e.g., *Castle v. United States*, 399 F.2d 642, 652 (5th Cir. 1968); *Hendrick v. United States*, 357 F.2d 121, 124 (10th Cir. 1966); *Smith v. United States*, 273 F.2d 462, 468 (10th Cir. 1959).

A convicted defendant, faced with a sentence which he believes to be excessive in spite of its legality, must direct his constitutional attack not against the lawful sentence, but against the statute which authorizes it. *United States v. Rosenberg*, 195 F.2d 583, 607 (2d Cir.), *cert. denied*, 344 U.S. 838 (1952), *citing* *Hemans v. United States*, 163 F.2d 228 (6th Cir.), *cert. denied*, 332 U.S. 801 (1947); *Johnson v. United States*, 126 F.2d 242 (8th Cir. 1942); *Beckett v. United States*, 84 F.2d 731 (6th Cir. 1936). Appellant's task thus becomes monumental, and his prospect for relief, tentative at best.

11. Coburn, *Disparity of Sentences and Appellate Review of Sentencing*, 25 *RUTGERS L. REV.* 207, 214-15 (1971).

12. The clause states, in pertinent part: "[A]ll acts and parts of acts relating to appeals or writs of error inconsistent with the provisions for review by appeals or writs of error in . . . this act are hereby repealed." Act of March 3, 1891, ch. 517, § 14, 26 Stat. 829, 830.

13. 28 U.S.C. § 2106 (1970).

14. Act of June 25, 1948, ch. 646, 62 Stat. 869.

15. 28 U.S.C. § 2106 (1970) (emphasis supplied).

16. *Berman v. United States*, 302 U.S. 211, 212 (1937); *Miller v. Aderhold*, 288 U.S. 206, 210 (1932); *Phillips v. United States*, 212 F.2d 327, 335 (8th Cir. 1954).

17. Legislative history does not aid in the inquiry. See generally Coburn, *supra* note 11, at 213-15. The inquiry should end, however, if the statute is unambiguous on its

The majority of courts, however, content to rest upon precedent, have refused to examine critically section 2106 in regard to the rule of nonreview.¹⁸ This reliance upon precedent is curious since the rule was formulated under the earlier and completely different version of the statute. Moreover, precedent was easily disregarded in the analogous case of civil judgments, when, during the 1950's, the courts, with little more

face. *Caminetti v. United States*, 242 U.S. 470, 485 (1917). *Accord*, *Hamilton v. Rathbone*, 175 U.S. 414, 421 (1899). See 2A SUTHERLAND'S STATUTORY CONSTRUCTION § 45.02, at 4 (4th ed. C. Sands 1973).

Under section 2106, a court of appeals is allowed to order a new trial when it deems the evidence insufficient to support a conviction. *Bryan v. United States*, 338 U.S. 552, 554-58 (1950). "Aside from this rather restricted use of section 2106, the [Supreme] Court has never applied it in its full scope." Note, *Daniels v. United States: Appellate Review of Criminal Sentencing—Limiting the Scope of the Non-Review Doctrine*, 33 U. PITT. L. REV. 917, 926 (1972).

The Court of Appeals for the Second Circuit, noting that "[n]o 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," stated that "[w]here this question *res nova*, this court should give [section 2106] serious consideration." *United States v. Rosenberg*, 195 F.2d 583, 605 (2d Cir.), *cert. denied*, 344 U.S. 838 (1952). The court, however, deferred to "six decades [of] federal decisions, including that of the Supreme Court" and denied the power of sentence review. *Id.* Stated the court: "[I]t is clear that the Supreme Court alone is in a position to hold that Sec. 2106 confers authority to reduce a sentence which is not outside the bounds set by a valid statute." *Id.* at 606-07 (footnote omitted).

18. Most recently, in *Dorszynski v. United States*, 94 S. Ct. 3042 (1974), the Court, examining the propriety of a sentence under the Federal Youth Corrections Act, 18 U.S.C. §§ 5005-5026 (1970), stated: "We begin with the general proposition that once it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end." *Id.* at 3047. Authority cited by the Court for this proposition included only one case decided subsequent to the codification of section 2106: *Gore v. United States*, 357 U.S. 386 (1958), *cited at* 94 S. Ct. at 3042. Therein the Court merely referred to the issue of sentence review as a problem "much mooted," and one for the legislature. 357 U.S. at 393. Surely such a cursory disposition of this issue suggests that the Court overlooked the import of the new language of section 2106. See note 100 *infra*.

In *Smith v. United States*, 273 F.2d 462 (10th Cir. 1959), the court, concluding that a sentence within statutory limits imposed upon a drug offender was "greater than should have been imposed," *id.* at 467, noted the neglected potential of section 2106, but nonetheless continued: "This section has been on the books since the Judiciary Act of 1789, but we have been cited to no case in which it has been held authority for the modification or vacation of a sentence within the statutory limits." *Id.* (footnote omitted). The court then relied upon several leading cases as support for the non-review rule. See, e.g., *Blockburger v. United States*, 284 U.S. 299 (1932), *cited at* 273 F.2d at 467; *United States v. Rosenberg*, 195 F.2d 583 (2d Cir.), *cert. denied*, 344 U.S. 838 (1952), *quoted at* 273 F.2d at 467 and *discussed in* note 17 *supra*; *Gurera v. United States*, 40 F.2d 338 (8th Cir. 1930), *cited at* 273 F.2d at 468. The validity of this logic, which is sustained by a series of one line holdings, some of which were actually interpreting the review statute before the 1948 codification, is questionable. See *Smith v. United States*, *supra* at 469 (dissenting opinion).

than an apology to then existing precedent, rejected the longstanding rule that the size of civil awards, even when alleged to be excessive, would not be reviewed except for errors of law.¹⁹ Given the rejection of the rule of nonreview of civil judgments, and in light of the less than substantial basis upon which the rule of nonreview in criminal cases was formulated,²⁰ the latter rule should also be discarded.²¹ Unfortunately, the entrenched status of the rule may be such that only legislative action specifically authorizing sentence review will effect a change.²²

It is possible, though, that the developing doctrine of appellate supervisory power could influence courts of appeals to reject the rule of nonreview in the absence of specific legislative action. This doctrine holds that appellate courts have the duty to assure that actions of the district courts comport with just administration of the laws. In *McNaff v. United States*,²³ Justice Frankfurter, rejecting the contention that the role of the

19. See generally Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751, 752-58 (1957). See, e.g., *Southern Ry.—Carolina Div. v. Bennett*, 233 U.S. 80, 87 (1914); *Scott v. Baltimore & O. R.R.*, 151 F.2d 61, 64-65 (3d Cir. 1945). In *Bucker v. Krause*, 200 F.2d 576 (7th Cir. 1952), *cert. denied*, 345 U.S. 997 (1953), precedent holding that verdicts are not reviewable for excessiveness was dismissed as "an old procedural impediment." *Id.* at 586. See also, *Hulett v. Brinson*, 229 F.2d 22, 25-27 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 1014 (1956); *Southern Pac. Co. v. Guthrie*, 186 F.2d 926 (9th Cir.), *cert. denied*, 341 U.S. 904 (1951); *Virginian Ry. v. Armentrout*, 166 F.2d 400, 407-09 (4th Cir. 1948).

20. See Coburn, *supra* note 11, at 215.

21. The demise of the rule of nonreview in civil cases, and perpetuation of the rule in criminal cases, ironically permits review of tort damages but not of sentences, thereby providing greater protection for property rights than for individual liberty. Note, *Statutory Structures for Sentencing Felons to Prison*, 60 COLUM. L. REV. 1134, 1166 (1960).

22. See, e.g., *Gore v. United States*, 357 U.S. 386, 393 (1958); *Blockburger v. United States*, 284 U.S. 229, 305 (1932); *Richards v. United States*, 193 F.2d 554, 556 (10th Cir. 1951). The views of several federal judges are presented in *Appellate Review of Sentencing: A Symposium*, 32 F.R.D. 249 (1962). A few judges have recognized the potential of section 2106 as obviating the need for specific legislation. *Smith v. United States*, 273 F.2d 462, 468-69 (10th Cir. 1959) (dissenting opinion); *United States v. Rosenberg*, 195 F.2d 583, 605-07 (2d Cir.), *cert. denied*, 344 U.S. 838 (1952). For a discussion of alternative interpretations of section 2106, see Comment, *Appellate Review of Sentences: A Survey*, 17 St. Louis L.J. 221, 230-31 (1972).

Though congressional committees have studied the problem of the rule of nonreview, no laws on the subject have yet been passed. See, e.g., S. 27722, 89th Cong., 2d Sess. (1966). Discussion by co-sponsors of a bill allowing sentence review may be found in Hruska, *Appellate Review of Sentences*, 8 CRIM. L.Q. 10 (1969) and Tydings, *Ensuring Rational Sentences—The Case for Appellate Review*, 53 J. AM. JUD. Soc'y 68 (1969). For a scholarly treatment of similar legislation, see Burr, *Appellate Review as a Means of Controlling Criminal Sentencing Discretion—A Workable Alternative?*, 33 U. PITT. L. REV. 1 (1971).

23. 318 U.S. 332 (1943).

federal appellate courts in the review of criminal judgments is limited to ascertaining their constitutional validity, stated: "Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence."²⁴ Though federal courts have recognized this principle,²⁵ it has not yet been used to provide authority for the power to review sentences.

Significantly, a few appellate cases do provide some precedent for sentence review where there is involved a violation of the defendant's constitutional rights,²⁶ or a misrepresentation²⁷ or misuse²⁸ of the relevant sentencing provision. Courts also are sensitive to sentencing errors where no statutory maximum sentence exists²⁹ and where a defendant is subject to an increase in sentence on retrial.³⁰

Moreover, several statutory provisions allow review in limited circumstances at the trial level. Section 2255 of Title 28 of the Judicial Code,³¹ for example, provides general relief from illegal or unconstitutional sentences upon petition to the trial court that originally set the sentence.³² Additionally, under Rule 35 of the Federal Rules of Crim-

24. *Id.* at 340.

25. *See, e.g.,* *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957) (supervisory power and act under review gave courts of appeals power to issue writs of mandamus in particular instances); *Dellinger v. Mitchell*, 442 F.2d 782 (D.C. Cir. 1971) (appellate court has jurisdiction to review stay of proceeding in district court).

26. *See, e.g.,* *Townsend v. Burke*, 334 U.S. 736, 738-41 (1948) (denial of due process of law where sentence based in part on presentence report which either contained misinformation or was misread by sentencing judge).

27. *See, e.g.,* *United States v. Lewis*, 392 F.2d 440 (4th Cir. 1968) (sentence vacated and case remanded where trial judge misunderstood statute to require imposition of maximum sentence as prerequisite for early parole consideration).

28. *See, e.g.,* *United States v. Hartford*, 489 F.2d 652 (5th Cir. 1974) (sentence vacated and remanded with instructions where trial court believed statutory maximum sentence was too lenient and instead imposed longer sentence under FYCA in violation of its clear rehabilitative purpose).

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

30. *Patton v. North Carolina*, 381 F.2d 636 (4th Cir. 1967); *Marano v. United States*, 374 F.2d 583 (1st Cir. 1967); *Short v. United States*, 344 F.2d 550 (D.C. Cir. 1965).

31. 28 U.S.C. § 2255 (1970).

32. The provision states in part:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255 (1970). For examples of the appropriate uses of section 2255, see

inal Procedure,³³ a convicted defendant may seek correction of an illegal or excessive sentence by petitioning the trial court.³⁴ Neither of these remedies, however, provides for a change of forum or for a different judge, either of which may be crucial to the success of such an appeal.³⁵ And ironically, Rule 35 has been cited to restrict the scope of appellate review.³⁶

ABUSE OF DISCRETION AS AN EXCEPTION TO THE RULE

During the last decade, appellate courts have begun to develop a common law of sentence review³⁷ aimed at thorough examination of the sentencing process, as opposed to review of the sentence itself. The impetus for this development is found in the Supreme Court decision of *Williams v. New York*,³⁸ which marked a shift from the nineteenth century penal theory emphasizing retribution, to the modern view that criminals should

Thomas v. United States, 368 F.2d 941 (5th Cir. 1966) (section 2255 is appropriate remedy where trial judge has abused his sentencing discretion) and Russell v. United States, 507 F.2d 1029 (4th Cir. 1974) (section 2255 is appropriate remedy where sentencing judge has misapprehended the relevant sentencing statute).

33. FED. R. CRIM. P. 35.

34. The rule provides in pertinent part: "The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence." *Id.* For a case on the proper application of Rule 35, see United States v. Ellenbogen, 390 F.2d 537 (2d Cir.), *cert. denied*, 393 U.S. 918 (1968). The *Ellenbogen* court held that: "Rule 35 is intended to give every convicted defendant a second round *before the sentencing judge*, and at the same time it affords the judge an opportunity to reconsider the sentence in light of any further information about the defendant or the case which may have been presented to him in the interim." *Id.* at 543 (emphasis supplied). See generally 5 L. ORFIELD, CRIMINAL PROCEDURE UNDER THE FEDERAL RULES §§ 35:6-42 (1967).

35. The correction of a sentence under Rule 35 must occur in the sentencing federal district court. Cook v. United States, 171 F.2d 567, 569 (1st Cir.), *cert. denied*, 336 U.S. 926 (1948). The court of appeals may not reverse a refusal of the district court to correct a sentence alleged to be illegal. Roth v. United States, 255 F.2d 440 (2d Cir.), *cert. denied*, 358 U.S. 886 (1958).

36. In United States v. Adams, 449 F.2d 122 (5th Cir. 1971), for example, although the Court of Appeals for the Fifth Circuit implied that the sentence before it was "unduly harsh," it refused to review the sentence because Rule 35 provided a remedy at the trial court level. *Id.* at 124. Cases decided prior to the passage of the Federal Rules held that the courts of appeals could modify an illegal sentence, see, e.g., Simmons v. United States, 89 F.2d 591 (5th Cir.), *cert. denied*, 302 U.S. 700 (1937); Johnson v. United States, 32 F.2d 127 (8th Cir. 1929); Goode v. United States, 12 F.2d 742 (8th Cir. 1926), or remand the case for resentencing, see, e.g., Millich v. United States, 282 F. 604 (9th Cir. 1922); Salazar v. United States, 236 F. 541 (8th Cir. 1916).

37. The absence of statutory standards for appellate review has, until recently, inhibited the development of a common law in this area. See Weigel, *Appellate Revision of Sentences: To Make the Punishment Fit the Crime*, 20 STAN. L. REV. 405, 410 (1968).

38. 337 U.S. 241 (1949).

be treated in a manner which will prepare them for a productive return to society.³⁹ This rehabilitative approach, implemented through "individualized sentencing", holds that "sentencing functions best when the judge [accounts for] the offender's needs."⁴⁰

The rationale for individualized sentencing is 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."⁴¹ This theory therefore demands that the trial court have as thorough an understanding as possible of the defendant's criminal history, and past and present mental condition.⁴²

It is this need for accurate presentence information⁴³ in the context of individualized sentencing which has led some courts of appeals to examine the procedures⁴⁴ followed by district courts in their deliberations prece-

39. *Id.* at 248. Classical penology, "which [sought] to assess for each crime its 'just' punishment, began to wither away with the growth of the conviction that no statutory definition of a crime is narrow enough to encompass only one class of evil acts or evil doers." Mueller, *Penology on Appeal: Appellate Review of Legal but Excessive Sentences*, 15 VAND. L. REV. 671, 674 (1962). At present, there are four recognized goals of criminal corrections: deterrence, protection of society, retribution, and rehabilitation. *Williams v. New York*, 337 U.S. 241, 248-49 n.13 (1949).

40. NATIONAL COUNCIL ON CRIME AND DELINQUENCY, GUIDES FOR SENTENCING 4-5 (1957). In adopting the standard of individualized sentencing, the federal courts have not abandoned consideration of the other functions of criminal corrections. "There thus remains room, even when imposing an acceptably 'individualized' sentence, for a judge to look beyond the offender to the sentence's presumed effect on others." *United States v. Foss*, 501 F.2d 522, 528 (1st Cir. 1974). See also *Powell v. Texas*, 392 U.S. 514, 526-31 (1968) (deterrence remains valid consideration in sentencing). But cf. *United States v. Walker*, 469 F.2d 1377, 1380-81 (1st Cir. 1972) (defendant urged to seek a reduction in sentence under Rule 35 of the Federal Rules of Criminal Procedure where it appeared that trial court imposed maximum sentence solely for its deterrent effect).

41. 337 U.S. at 247 (citations omitted).

42. In *Townsend v. Burke*, 334 U.S. 736 (1948), sentencing on the basis of inaccurate information was held to be a denial of due process. In *Williams*, however, it was held that information considered by the sentencing judge, though required to be free of error, may include evidence not admissible at trial. 337 U.S. at 250-51. Such evidence may include "all of the mitigating and aggravating circumstances involved in the crime." *Williams v. Oklahoma*, 358 U.S. 576, 578 (1959).

43. In the federal courts, most of this information is contained in a presentence report which is prepared by the United States Probation Office and presented to the trial judge prior to sentencing. FED. R. CRIM. P. 32(c). Additionally, through the exercise of the right of allocution, both defendant and his counsel may offer information in mitigation of punishment. *Id.* 32(a)(1).

44. Procedure in this context refers to all of the acts of a trial court judge in gathering and assimilating information concerning a defendant he is about to sentence. It includes both the mechanical and the mental processes leading to imposition of punishment.

dent to sentencing. Although not stated as such, these decisions have created a loosely-formulated exception to the nonreview rule allowing appellate review of sentences for abuse of discretion in the trial court. The abuses which thus far have been recognized may be separated into two general categories.

Nonexercise of Discretion

The exercise of discretion requires choice and decision by the trial court among available alternative dispositions.⁴⁵ A proper sentence may not be reached through a mechanical process in which factors other than those significant to individualized sentencing dictate the answer.⁴⁶ In point is the case of *United States v. Daniels*,⁴⁷ wherein defendant was convicted of willfully failing to report to his local selective service board for instructions to perform work consistent with his status as a conscientious objector. The Court of Appeals for the Sixth Circuit affirmed a conviction for violation of the Selective Service laws, but remanded the case for reconsideration of the five year sentence, suggesting that the district judge consider suspending sentence and granting probation on the condition that defendant, under order of the court, perform the conscientious objector work he had refused to perform under orders of the Selective Service Board.⁴⁸ The District Court for the District of Kentucky, defending the concept of insulated sentencing discretion in the trial court, reimposed the same sentence.⁴⁹ In a second appeal, the appellate court again remanded the case, this time with instructions to enter a 25 month probationary period.⁵⁰

The court in *Daniels II*, impressed by the "peculiar facts"⁵¹ of the case, found that the trial judge had imposed on the sentencing process his own philosophical view of the nature of the crime, had failed to adopt the theory of individualized sentencing, and had failed to exercise his discretion by levying the maximum sentence in every case of this nature.⁵² The district court was chastised for failing to gather, assimilate, and evaluate information about the defendant which would have been relevant

45. In his dissent to *Gryger v. Burke*, 334 U.S. 728 (1948), Justice Rutledge referred to the exercise of discretion as "the very essence of judicial process." *Id.* at 734.

46. See *Woosley v. United States*, 478 F.2d 139, 143 (8th Cir. 1973).

47. 429 F.2d 1273 (6th Cir. 1970).

48. *Id.* at 1274.

49. *United States v. Daniels*, 319 F. Supp. 1061 (E.D. Ky. 1970).

50. *United States v. Daniels*, 446 F.2d 967, 972 (6th Cir. 1971).

51. *Id.* at 968.

52. *Id.* at 968-72.

to his rehabilitation. In failing to consider mitigating circumstances, and in choosing instead to follow a fixed policy of sentencing,⁵³ the district court was found to have abused its discretion by refusing to exercise it.⁵⁴

Another case illustrating a trend toward remand for resentencing upon a finding of abuse of discretion in the form of nonexercise is *United States v. Wilson*.⁵⁵ Therein, the defendant, a youth convicted of forgery and eligible for sentencing under the Young Adult Offenders Act,⁵⁶ was sentenced to three years imprisonment. The record and opinion at trial, however, did not indicate whether the district court had considered the lenient rehabilitative provisions of that Act in rendering sentence. On appeal, the court noted that the sum in question, less than one hundred dollars, did not seem to warrant such a severe sentence, especially in the absence of aggravating circumstances and the presence of mitigating ones, including the recommendation for probation by the probation officer.⁵⁷ After offering token words of deference to the nonreview rule, the Court of Appeals for the Fourth Circuit, stating that it had authority to "scrutinize a sentence to ascertain whether there [had] indeed been an exercise of discretion," and concluding that if the sentence was "the product of sheer inadvertance, then it would not be a deliberate exercise of judicial discretion,"⁵⁸ remanded the case for resentencing so that all

53. In oral argument during the resentencing, the district court judge stated that in the thirty years he had spent on the federal bench, he had always felt that "cases of this kind [a refusal to obey an order of the local draft board] . . . deserve a five year sentence" because the crime "strikes at the very foundations and fundamentals . . . of our whole governmental system." Hon. Mac Swinford, District Judge for the District of Kentucky, *quoted in* 446 F.2d at 969.

54. An exercise of discretion clearly was required by the language of the statute under which defendant was punished, providing for a sentence of "not more than five years." 50 U.S.C. App. § 462 (1970). By imposing the same sentence on all draft offenders, the district judge exhibited an inflexibility contrary to the legislative will that lesser sentences be given where appropriate.

In *United States v. Charles*, 460 F.2d 1093 (6th Cir. 1972), the court again found that the Kentucky district court had abused its discretion by imposing a maximum statutory sentence. Although the judge "took pains to suggest" that he was sentencing on an individual basis, the appellate court stated that it was "evident that the real basis for sentencing was simply the District Judge's belief that no person charged with a draft offense should serve less time in prison than he would have served in the military had he accepted induction." *Id.* at 1095. This belief, the court held, was not "a proper basis" for sentencing. *See also* *United States v. Baker*, 487 F.2d 360 (2d Cir. 1973) (court's disapproval of standard sentencing policy extends to the practice "of never incarcerating, as well as . . . always incarcerating." *Id.* at 361).

55. 450 F.2d 495 (4th Cir. 1971).

56. 18 U.S.C. § 4209 (1970).

57. 450 F.2d at 496.

58. *Id.* at 498. *See also* *United States v. Noland*, 510 F.2d 1093 (1975) (sentencing

sentencing options available to the defendant could be considered.⁵⁹

Yet another case where nonexercise of discretion was held to constitute an abuse requiring remand for resentencing is *Coleman v. United States*.⁶⁰ Therein, a statute⁶¹ expressly permitted, but did not require, a district court to consider mitigating and aggravating factors in the context of reducing a sentence of death to one of life imprisonment. Where a defendant convicted of first degree murder was sentenced to death and where there was no indication that significant mitigating factors had been considered,⁶² the appellate court vacated the sentence and remanded the case with instructions that a sentence of life imprisonment be imposed.⁶³

The court held that, despite his broad discretion, "a sentencing judge must always conform with the law governing the sentencing function."⁶⁴ The fact that "incorrect standards" were followed by the district court precluded "the application . . . of the well settled rule that an appellate court will not disturb a sentence imposed by a trial court within the latitude allowed by statute."⁶⁵

A similar result obtained under *Leach v. United States*,⁶⁶ wherein the Court of Appeals for the District of Columbia affirmed a conviction of armed robbery, but vacated the sentence because the trial court apparent-

judge's statements concerning Young Adult Offenders Act illustrated use of necessary discretion); *United States v. Bowser*, 497 F.2d 1017 (4th Cir.), *cert. denied*, 95 S. Ct. 105 (1974) (where possibility existed that sentencing judge misunderstood the presentence report, and disparity existed between sentence under review and lesser sentences of more violent second offenders, discretion was improperly exercised).

59. 450 F.2d at 498.

60. 357 F.2d 563 (D.C. Cir. 1965).

61. D.C. CODE ANN. § 22-2404 (Supp. IV 1965).

62. The single aggravating factor was that the victim of the crime was a policeman. Several important mitigating factors existed: defendant had no prior criminal record and an acceptable military and employment record; defendant's brother had instigated the crime; defendant was unarmed when he first met the victim; defendant committed the crime in a panic; the crime was committed with the policeman's gun indicating no premeditation as to homicide; defendant was mentally retarded; defendant surrendered himself to authorities; prison chaplains and a probation officer considered defendant a model prisoner who would benefit from parole. 357 F.2d at 563-69 (*passim*).

63. *Id.* at 573. The court relied on 28 U.S.C. § 2106 (1970) as authority for its decision to instruct the entry of a particular sentence rather than merely remanding the case for resentencing. *Id.* at 572.

64. *Id.* at 570.

65. *Id.* (footnote omitted). See also *Briscoe v. United States*, 391 F.2d 984 (D.C. Cir. 1968) (where defendant, an alien, was found guilty of housebreaking, and sentenced to imprisonment, case was remanded so that the sentencing judge could consider whether rehabilitation was more likely to result from deportation than from imprisonment).

66. 320 F.2d 670 (D.C. Cir. 1963).

ly had not employed or even considered a statutory provision authorizing a presentence mental examination⁶⁷ despite defendant's request for one. On remand,⁶⁸ the district court reimposed the same sentence, stating that its decision was based on all relevant individual factors.⁶⁹ The Court of Appeals was not impressed and again set aside the sentence, remanding the case with instructions that defendant undergo a mental examination prior to resentencing.⁷⁰ The appellate court noted that defendant's record, which indicated habitual criminality, and the presentence report, which described defendant as the classical picture of the psychopathic offender, warranted a psychiatric examination.⁷¹ Stating that the district court's refusal to so order an examination constituted an abuse of discretion, the court ruled "that the sentencing judge should use some of the resources which Congress has provided and that he may not arbitrarily ignore the data properly obtained thereby."⁷² Although the court in *Leach* stated explicitly that it did not question the rule of nonreview, the case represents a significant exception to the rule: district courts must consider all relevant statutory sentencing provisions prior to rendering a final sentence.⁷³

67. D.C. CODE ANN. § 24-106 (1961).

68. *United States v. Leach*, 218 F. Supp. 271 (D.D.C. 1963).

69. The district judge stated that the following reasons justified reimposing the same sentence without first ordering a psychiatric examination of the defendant: the seriousness of the crime, defendant's extensive prior criminal record, the fact that the probation officer assigned to the case chose not to recommend defendant for a mental examination, and the fact that no competent evidence was received to indicate that defendant suffered from mental illness. *Id.* at 274.

70. *Leach v. United States*, 334 F.2d 945 (D.C. Cir. 1964). On the second remand, the District Court for the District of Columbia complied with the instructions of the Court of Appeals. *United States v. Leach*, 231 F. Supp. 544 (D.D.C. 1964), *aff'd*, 353 F.2d 451 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 917 (1966).

Two statutes provided for psychiatric evaluation of defendant prior to sentencing. D.C. CODE ANN. § 24-301(a) (1973); D.C. CODE ANN. § 124-106 (1973). Additionally, Rule 35 of the Federal Rules of Criminal Procedure provides for a period within which a judge, after further consideration, may reduce the severity of an initial sentence. FED. R. CRIM. P. 35. See notes 33-36 *supra* & accompanying text.

71. The Court of Appeals was influenced, as it had been in *Briscoe v. United States*, 391 F.2d 984, 986-87 (D.C. Cir. 1968), with the fact that if the sentencing judge did not consider fully all of the alternative dispositions, defendant would not receive such consideration elsewhere. 334 F.2d at 948.

72. 334 F.2d at 951.

73. Similarly, a sentencing court may not arbitrarily refuse the defendant an opportunity to present the court with a presentence report in mitigation of punishment. *Peters v. United States*, 307 F.2d 193, 194 (D.C. Cir. 1962), *citing*, FED. R. CRIM. P. 32(c) (court affirms conviction but vacates sentence and remands per 28 U.S.C. § 2106 (1970)).

Inclusion of Improper Factors

The proper exercise of discretion assumes not only that all relevant information will be considered, but also that incorrect information or standards will not be followed. Illustrating this point is the recent case of *United States v. Espinoza*,⁷⁴ in which the defendant, convicted of narcotics violations, argued on appeal that he was not allowed, at the lower level, to rebut erroneous information contained in his presentence report.⁷⁵ In remanding the case for resentencing, the Court of Appeals for the Fifth Circuit framed the issue as involving "the right of a defendant to at least minimal safeguards to insure that the sentencing court does not rely on erroneous factual information when assessing sentence."⁷⁶

The court in *Espinoza* first recognized that the majority of federal jurisdictions do not give defendants an absolute right to view their presentence reports.⁷⁷ Nonetheless, the court stated that when the sentencing court relies upon a report containing allegedly erroneous information, "fundamental fairness requires that [the] defendant be given at least some opportunity to rebut that information."⁷⁸ The refusal of the trial court to afford this opportunity was "tantamount to an abuse of discretion and . . . inconsistent with the need for enlightened sentencing."⁷⁹

74. 481 F.2d 553 (5th Cir. 1973). *But see* Blockburger v. United States, 284 U.S. 299 (1932) (appellate court defers to decision of trial court though no reasons given).

75. The information related to defendant's prior criminal record. Defense counsel stated that he believed defendant had never been convicted of a felony. The trial judge, however, during sentencing, referred to a "bad record" for threats and assaults, although he was not sure himself whether defendant in fact had ever been convicted. 481 F.2d at 553.

76. *Id.* at 555.

77. *See, e.g.,* United States v. Frontero, 452 F.2d 406 (5th Cir. 1971); United States v. Dockery, 447 F.2d 1178 (D.C. Cir.), *cert. denied*, 404 U.S. 950 (1971); United States v. Crutcher, 405 F.2d 239 (2d Cir. 1968), *cert. denied*, 394 U.S. 908 (1969); Thompson v. United States, 381 F.2d 664 (10th Cir. 1967). *See also* United States v. Tucker, 404 U.S. 443 (1972) (sentencing court relied on invalid convictions); Townsend v. Burke, 334 U.S. 736 (1948) (sentence based on materially untrue assumptions concerning criminal record); Marano v. United States, 374 F.2d 583 (1st Cir. 1967) (substantial consideration given to legally impermissible factors).

78. 481 F.2d at 556.

79. *Id.* at 558. Although the court did not require it of the district court on remand, it was noted in the appellate opinion that the lower court did not state its reasons for denying the attempted rebuttal. Because of this, the court of appeals was unable to tell if fully informed discretion had been exercised. *Id.* at 557-58. The argument for lower courts providing appellate courts with a formal statement of the reasons supporting a particular sentence often has been stated. *See, e.g.,* Berkowitz, *The Constitutional Requirement for a Written Statement of Reasons and Facts in Support of the Sentencing*

In accord with this view is the case of *United States v. Thompson*.⁸⁰ The defendant in *Thompson*, a self-declared black militant charged with a Selective Service violation, had filed an affidavit at the district court level seeking to disqualify the scheduled judge from presiding at his upcoming trial.⁸¹ The affidavit charged that the scheduled judge had a stated policy of giving draft violators he deemed "good people" 30 month sentences, as opposed to black militant violators, who were given sentences of four and one-half years.⁸² The motion was denied by the very judge against whom it was directed.⁸³ The defendant's subsequent conviction and sentence of 30 months imprisonment was reversed on appeal and the case remanded for retrial under a different judge.⁸⁴ In addition to holding that a fixed policy of sentencing which did not consider the individual needs of the defendant was error, the Court of Appeals for the Third Circuit found that the judge's policy indicated an impermissible bias against the defendant as a member both of a particular racial class and of a class of criminal violators. The bias was of "such a nature and intensity to prevent the defendant, when convicted, from obtaining a sentence uninfluenced by the court's prejudgment concerning Selective Service violators generally."⁸⁵

A recent decision in the Fourth Circuit, *United States v. Maples*,⁸⁶ involved a related problem. Therein, Maples, after receiving a greater sentence for the crime of bank robbery than the minor female co-defendant who had pleaded guilty to the charge along with him, appealed on the grounds that the trial judge exercised an admitted discrimination on the basis of age and sex.⁸⁷ The Court of Appeals for the Fourth Circuit,

Decision: A Due Process Proposal, 60 IOWA L. REV. 205 (1974). But see, Hoffman, *Conducting the Sentencing Hearing* in SEMINARS FOR NEWLY APPOINTED UNITED STATES DISTRICT JUDGES 362, 330 (1971). See also *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957). See note 102 *infra* & accompanying text.

80. 483 F.2d 527 (3d Cir. 1973).

81. Defendant moved pursuant to 28 U.S.C. § 144 (1970) which establishes three criteria for a disqualification affidavit: 1) the facts alleged must be material and stated with particularity, 2) the facts must be sufficient to convince a reasonable man of the bias of the judge, and 3) the bias must be personal, not judicial.

82. Notwithstanding the racial aspect of this case, the judge's standard sentencing policy was clearly an abuse of discretion. See notes 47-59 *supra* & accompanying text.

83. 483 F.2d at 528.

84. *Id.* at 529.

85. *Id.*

86. 501 F.2d 985 (4th Cir. 1974).

87. The district judge, during sentencing, had stated that he did not accept "these modern philosophies . . . about women's liberation . . ." *Id.* at 986, quoting the remarks of the Chief Judge of the District Court for the Western District of North

noting that in certain circumstances age could be a permissible ground for disparity of sentences, stated that such could not be the case with sex.⁸⁸ The court denied a general power to review sentences, but stated that it had authority to correct those sentences imposed by an unconstitutional process.⁸⁹

STRUCTURED DISCRETION: TOWARD REJECTION OF THE RULE OF NONREVIEW

As shown by the above analysis, the rule of nonreview has created serious problems for the postadjudicatory stage of the criminal judicial system. Before the inception of the concept of individualized sentencing, criminals, though treated unfairly, were treated uniformly in that sentences usually were predicated solely upon the crime in question.⁹⁰ Rejection of the standard sentencing policy has accorded criminals a more equitable system of sentencing, but also has created a greater potential for abuse in the sentencing decision; the modern standard of individualized sentencing invariably leads to greater opportunity for error, bias and negligence.⁹¹ Recent commentary has noted that the present sys-

Carolina. Describing himself as "old-fashioned," the judge told Morrow, the female co-defendant: "Because of your age and the fact that you are a woman, the Court will not incarcerate you for quite as long as I did your codefendant." *Id.* There was evidence of aggravating factors in Morrow's case which would have justified giving her a harsher sentence than her co-defendant. For example, the idea of the robbery apparently had been hers. Although it was not stated clearly by the appellate court, implicit in its decision to vacate was the fact that the trial court had not considered these factors in determining Morrow's sentence.

88. The court stated: "Under current law, and absent any proof that rehabilitation or deterrence are more easily accomplished in the case of females rather than males, we deem the factor of sex an impermissible one to justify a disparity in sentences." *Id.* at 986.

89. Relying on *Frontiero v. Richardson*, 411 U.S. 677 (1973), the court held that sex alone, even in combination with other proper factors "is an impermissible basis for disparity in sentence" 501 F.2d at 985. The court considered but rejected the idea of eliminating the disparity by increasing Morrow's term of imprisonment. Both sentences were illegal because one resulted from undue preference and one from undue discrimination. The only appropriate remedy was held to be resentencing of Maples. *Id.* at 987. See also *United States v. Wiley*, 267 F.2d 453, 504 (7th Cir. 1959) (court rejected policy that one who elects to defend himself in court and is subsequently convicted deserves a harsher sentence than a defendant who admits guilt in his plea).

90. See generally McGuire & Holtzoff, *The Problems of Sentence in the Criminal Law*, 20 B.U.L. REV. 423 (1940). See notes 39-41 *supra* & accompanying text.

91. Burr, *Appellate Review as a Means of Controlling Criminal Sentencing Discretion—A Workable Alternative?*, 33 U. PITT. L. REV. 1, 2-4 (1971).

tem does not adequately protect the criminal from arbitrary,⁹² excessive,⁹³ or disparate⁹⁴ sentences.⁹⁵ This lack of protection necessarily fosters an adverse psychological impact counterproductive to effective rehabilitation of those sentenced.⁹⁶

Perhaps the most serious criticism of the rule of nonreview focuses upon its impropriety in a judicial system which otherwise guarantees criminal defendants a high degree of procedural protection. For example, the Court of Appeals for the Ninth Circuit has stated that discretion "is abused only where no reasonable man would take the view adopted by the trial court."⁹⁷ It is patently illogical to require intricate safeguards during apprehension and arrest procedures, and to require a standard for conviction of guilt beyond a reasonable doubt, and then to require only a "reasonable assurance" that the resultant sentence is not improper.⁹⁸ Certainly criminal justice, with its awesome potential for restricting human liberty, merits greater safeguards against misapplication.⁹⁹

92. Dix, *Judicial Review of Sentences: Implications for Individual Disposition*, 1969 LAW & SOC. ORDER 367, 371.

93. Mueller, *Penology on Appeal: Appellate Review of Legal but Excessive Sentences*, 15 VAND. L. REV. 671, 688-97 (1962).

94. See, e.g., Burr, *supra* note 91, at 8-9; Rubin, *Disparity and Equality of Sentences: A Constitutional Challenge*, 40 F.R.D. 55, 56 (1967). Not only do sentencing policies vary significantly among judges, but there is also evidence that the sentencing behavior of an individual judge is subject to fluctuation. Burr, *supra* at 4.

95. Additionally, the isolated instances of review which have been identified often have occurred where the trial court was unusually candid about its reasoning. The current review situation appears to indicate to a trial court that its sentences are more inviolate the less it attempts to explain them. See, e.g., *United States v. Hartford*, 489 F.2d 652, 655 (5th Cir. 1974); *Woosley v. United States*, 478 F.2d 139, 140 (8th Cir. 1973); *United States v. Daniels*, 446 F.2d 967, 969 (6th Cir. 1971).

96. NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS & GOALS: CORRECTIONS 146 (1973). See Dix, *supra* note 92, at 371.

97. *Delno v. Market St. Ry.*, 124 F.2d 965, 967 (9th Cir. 1942).

98. One commentator has observed:

After a trial in which the rights of the accused are protected by elaborate procedural rules which are themselves protected from official infringement by the Constitution, the accused stands before a single person, the trial judge, to learn what punishment society will exact for the crime he has committed. Traditionally, that single person has virtually unassailable discretion to award an exceedingly broad range of punishments.

Berkowitz, *The Constitutional Requirement for a Written Statement of Reasons and Facts in Support of the Sentencing Decision: A Due Process Proposal*, 60 IOWA L. REV. 205 (1974) (footnotes omitted).

99. The Court of Appeals for the Sixth Circuit recognized this problem when it stated in regard to sentencing procedures: "It is an anomaly that a judicial system which has developed so scrupulous a concern for the protection of a criminal de-

As noted previously, there is little indication that the rule of nonreview will be abolished in the near future.¹⁰⁰ Consequently, it is submitted that the role of appellate courts should be expanded by making efficient use of the rule's one exception, review for abuse of discretion. This expansion may be facilitated by "structuring" discretion.

In developing a system of structured discretion in the criminal sentencing process, useful guidelines may be borrowed from the field of administrative law. The sentencing expertise developed at the trial court level may be likened to the expertise developed by an administrative agency in the exercise of its duties. The trial court's direct encounters with criminal defendants, law enforcement officials, and experts in many areas of penology enable it to draw on a more varied experience in sentencing than is available to appellate courts. Recognizing the analogous relationship between administrative agencies and trial courts, Professor Kenneth C. Davis has recommended that the following administrative tools of structuring be adapted to the criminal sentencing process: informed appellate scrutiny of the sentencing judge's decisionmaking process, development of policy statements, and adherence to precedent.¹⁰¹

Informed appellate scrutiny of the sentencing judge's decisionmaking process would be facilitated by demanding that the judge state all find-

fendant throughout every other stage of the proceedings against him should have so neglected this most important dimension of fundamental justice." *Shepard v. United States*, 257 F.2d 293, 294 (6th Cir. 1958). See Sobeloff, *A Recommendation for Appellate Review of Criminal Sentences*, 21 BROOKLYN L. REV. 2, 2-3 (1954).

100. The recent Supreme Court decision in *Dorszynski v. United States*, 94 S. Ct. 3042 (1974), was a disappointment to many who had observed a trend toward increasing sentence review. The Court firmly denied the existence of any judicial authority for appellate sentence review. *Id.* at 3051. See note 18 *supra*.

Although federal legislation authorizing appellate review would end the problems surrounding the rule of nonreview, the passage of such a bill in the near future, based on the failure of several in the past, appears unlikely. See, e.g., S. 716, 93d Cong., 1st Sess. (1973); S. 2228, 92d Cong., 1st Sess. (1971); S. 1450, 90th Cong., 1st Sess. (1967); S. 823, 88th Cong., 1st Sess. (1963); S. 3914, 86th Cong., 2d Sess. (1960). To date, none of these have been enacted. See note 22 *supra*.

A further disappointment for the advocates of appellate sentence review has been the performance of sentencing institutes authorized by a 1958 federal statute. 28 U.S.C. § 334 (1970). This statute authorized joint councils of judges "for the purpose of studying, discussing, and formulating the objectives, policies, standards, and criteria for sentencing." *Id.* These institutes have not contributed significantly to the rationalization of sentencing procedures, and have, in fact, been criticized in this regard by some of their participants. See, e.g., Devitt, *How Can We Effectively Minimize Unjustified Disparity in Federal Criminal Sentences?*, 42 F.R.D. 218, 220 (1967).

101. K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 133 (1969).

ings of fact and reasons for his decision in the record. This suggestion is not new;¹⁰² although courts have been unwilling to follow this suggestion, critics of current sentencing procedures have included similar requirements in their proposals for change. For instance, the American Bar Association has stated, per section 5.6 of its Standards Relating to Sentencing Alternatives and Procedures, that in imposing sentence, the court "should make specific findings on all controverted issues of fact which are deemed relevant to the sentencing decision"¹⁰³ and "normally should state for the record in the presence of the defendant the reasons for selecting the particular sentence to be imposed."¹⁰⁴ It is submitted that the word "normally" dilutes the force of the provision. More extreme and consequently more desirable with regard to the trial judge's statement of reasons, is the ABA's Standards Relating to Appellate Review of Sentences: "The sentencing judge should be required in every case to state his reasons for selecting the particular sentence imposed."¹⁰⁵ Quite obviously, implementation of the above Standard necessarily would increase the incidence of sentence review by exposing improper factors which would otherwise remain undetected.

In advocating use of policy statements to guide the decisionmaking process in sentence review, Davis focuses upon a need for the development of a consensus within jurisdictions on specific issues regularly encountered by courts.¹⁰⁶ Policy statements, notes Davis, should be formulated by sentencing institutes rendering formal opinions on hypothetical fact situations.¹⁰⁷ Most importantly, such statements need not confine discretion; rather policy guidelines can add structure to the exercise of discretion by providing, for example, that in particular fact situations, specific factors will be determinative.

Finally, imposing upon the courts the duty to state findings and give reasons for sentencing decisions will, in time, create a body of sentencing

102. See generally Berkowitz, *supra* note 98. See K. DAVIS, *supra* note 101, at 140.

103. AMERICAN BAR ASSOCIATION, PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURE § 5.6(i) (1968).

104. *Id.* § 5.6(ii).

105. AMERICAN BAR ASSOCIATION, PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES § 2.3(c) (1968). Cf. *Model Penal Code* § 7.07(6).

106. For example, within a jurisdiction, answers to questions such as the following could be developed: "whether a heavy sentence should even be imposed without a pre-sentence investigation; . . . whether probation should be allowed in 20 percent of felony cases or in 50 percent or in 80 percent; whether the characteristics of cases suitable for probation can be identified" K. DAVIS, *supra* note 101, at 139.

107. *Id.* at 139-40.

law which will provide thoughtful analysis and precedent for courts confronting similar situations. It should be emphasized, however, that the sentencing judge should utilize precedent only as a tool to reach a more informed opinion. Precedent in the law of sentencing should not be binding, as this would create a rigidity fraught with all those deficiencies inherent in a standard sentencing policy.

Implementation of the above discretion structuring devices has multiple benefits. First, it would encourage a well-reasoned, generally unbiased sentencing decision. Second, it would improve the image of the sentencing process as being open, fair, and reasonably predictable. Third, and most importantly, it would provide appellate courts with a sharper lens with which to focus upon potential abuse of discretion in the sentencing process at the trial level. Improper sentences would be detected more easily; the incidence of review under the current exception to the rule of nonreview, review for abuse of discretion, inevitably would be increased.

Remedial action responsive to the concerns expressed in this Comment may be initiated in various ways. Perhaps the most expeditious action would be the amendment of Rule 10(a) of the Federal Rules of Appellate Procedure.¹⁰⁸ It is submitted that in the interim, appellate courts should create local rules to guide their respective district courts. An advantage to this latter approach is that the social and economic problems peculiar to defendants in a particular area could be reflected in the standards as they are developed. And of course, congressional action remains a viable alternative.¹⁰⁹

In formulating a body of rules structuring discretion in the criminal sentencing process, the rulemaker will have to distinguish between procedural discretion and substantive discretion. The former term refers

108. The rule, titled "Composition of Record on Appeal", now provides that the record on appeal shall consist of the original papers and exhibits filed in the district court, a transcript of the proceedings if one is made, and certified copies of all relevant docket entries. FED. R. APP. P. 10(a). It is proposed that the rule be amended by inserting the following as § 10(a)(2):

Composition of the Record on Appeal—Criminal Appeals.

In a criminal case, the record on appeal shall include a statement of the district court's findings of fact and law with regard to sentencing, a statement of the court's reasoning with regard to the sentence imposed, and citation to any precedent which was relied upon during sentencing.

A parallel amendment to Federal Rule of Criminal Procedure 32(a), which would impose on the trial court a duty to prepare a statement of findings and reasons for its sentences, would assure an adequate record on appeal. FED. R. CRIM. P. 32(a).

109. *But see* notes 22 & 100 *supra*.

to the range of factors considered by a court in its sentencing decision. The determination of whether a court has legitimately exercised procedural discretion is objective: did the court consider all proper factors and exclude from its consideration all improper factors? The latter term refers to the subjective use by a court of the factors which it considers in reaching a sentencing decision. That is, once a court has exercised procedural discretion by choosing the various factors it will consider in rendering a sentence, the court exercises substantive discretion by weighing the factors in arriving at a final disposition.

With this distinction in mind, it is necessary to ask to what degree trial court sentencing discretion should be circumscribed. Should the rulemaker attempt to structure procedural discretion only, by providing a framework of standards in which judges will continue to exercise substantive discretion, or should the rulemaker provide both the questions and the answers, leaving trial courts to conduct the ministerial function of fitting defendants into the specific categories established by the sentencing standards? Individualized sentencing would appear to require the former; structuring substantive discretion creates the dangers of inflexibility inherent in a standard sentencing policy. Perhaps the best solution lies between these extremes. The rulemaker should develop specific standards to control the exercise of procedural discretion, and issue statements of policy to guide the exercise of substantive discretion.

Until the rule of nonreview is abandoned, or rules are developed which will allow a closer appellate scrutiny of the sentencing decision, the approach of a few enlightened courts remains the only hope for a defendant who believes his sentence is the product of abuse. The principles of our criminal justice system conflict with this haphazard approach, and it is expected that the legal community will tolerate its existence only as long as is necessary to develop a proper solution.