APPELLATE REVIEW OF SENTENCING: RECOMMENDATION FOR A HYBRID APPROACH

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It is a pleasure to participate in this Symposium, which explores a broad range of problems and possible solutions in the field of sentencing. Few subjects could be more significant or thought-provoking at this date. It is my sincere hope that this collection will contribute to the reform of our criminal justice system. However, those interested in reform of American criminal law should beware of developing tunnel vision. The ultimate purposes of sentencing and of appellate review of sentences cannot be accomplished without a serious effort to correct the problems of society which have made prisons necessary. The cost of building and maintaining prisons is astronomical, as is the cost of housing inmates. Reform measures, such as mandatory minimum sentences, the imposition of lengthier sentences, and the right of the prosecutor to appeal sentence length, will further aggravate these costs. Whether the cost of these alternatives is warranted in light of the substantial gains that could be made through applying these resources to eradication of the causes of crime is questionable. Rather than solely addressing the incarceration of society’s wrong-

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1. For a description of the purposes of sentencing, see text following note 15 infra; Note, Appellate Review of Primary Sentencing Decisions: A Connecticut Case Study, 69 YALE L.J. 1453, 1454-55 (1960). For a description of the purposes of appellate review, see text accompanying note 63 infra; ABA STANDARDS RELATING TO THE ADMINISTRATION OF JUSTICE: APPELLATE REVIEW OF SENTENCES Standard 20-1.2 & Commentary at 4-5 (Approved Draft 1978). The ABA is currently undertaking a complete revision and codification of the standards originally promulgated by its Project on Minimum Standards for Criminal Justice. Chapter 20 of this new codification, Standards 20-1.1 to -3.3, sets forth standards for appellate review of sentences and is hereinafter cited as 1978 ABA APPELLATE REVIEW STANDARDS.

doers, more energy and resources should be devoted to the reduction of crime through alternatives to incarceration and meaningful community service.

INTRODUCTION

This Article is limited to discussion of appellate review of sentences. For at least the last decade, there has been increasing discussion of this subject by those involved in the criminal justice system. Much disagreement exists concerning how much power the appellate court should have: Should the appellate court be empowered to increase the sentence or merely decrease it? I believe that appellate review should be made available, but only to reduce sentences at the request of the defendant. The controlling principle behind sentencing must be that to err on the side of leniency is far less grievous than to err on the side of severity. Trial judges should state their reasons for the sentences they impose. This would provide a proper basis for appellate review and would better inform defendants and the public of the rationale for sentencing decisions.

This Article first surveys the arguments advanced for and against appellate review of sentences. It then discusses proposals that have circulated with regard to this issue. Finally, it presents the approach I favor, the hybrid approach. This alternative would permit only defendants to appeal sentences and would not allow


4. This disagreement is graphically illustrated by the contradictory positions taken by the ABA Special Committee on Minimum Standards for the Administration of Criminal Justice and its subordinate committee, the Advisory Committee on Sentencing and Review. The Advisory Committee recommended that no increase of sentence be permitted on appeal or remand. See ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Appellate Review of Sentences § 3.4 & Comments a-g at 55-66 (Tent. Draft 1967) [hereinafter cited as 1967 ABA Tentative Appellate Review Standards]. The Special Committee, and ultimately the House of Delegates, rejected this recommendation. On February 19, 1968, the House of Delegates voted 95 to 75 to delete § 3.4. The Supplement to the Approved Draft of the 1968 Standards explains this decision. See 1968 ABA Appellate Review Standards, supra note 3, §§ 3.1-3, Comments a-c at 2-5 (Approved Draft Supp. 1968). This rejection of the Advisory Committee’s recommendation has been often overlooked by commentators. See, e.g., P. O’Donnell, M. Churgin & D. Curtis, Toward a Just and Effective Sentencing System 62 & n.16 (1977).
the appellate court to increase the sentence imposed at the trial court level.

**PROS AND CONS OF APPELLATE REVIEW**

The origin of the rule of nonappealability of sentencing decisions has been attributed by some to historical accident and by others to the automatic nature of penalties mandated by the common law. Congress conferred jurisdiction upon the appellate circuit courts in 1879 to pronounce final sentence in case of the affirmation of a conviction. The language granting jurisdiction to “pronounce final sentence” was omitted from the 1891 Act creating the courts of appeals.

Courts have interpreted this variation in phraseology between the two acts to eliminate appellate review of sentencing. However, the legislative history of the 1891 Act reveals that Congress intended to retain appellate authority to review sentences, despite its omission of the “final sentence” language. Thus, the rule of nonappealability is an anomaly: It is the result of an historical accident and devoid of any principled significance.

Some commentators assert that the rule evolved during the common law period, the result of a general loss of interest in the criminal defendant once convicted. At that time trial judges had virtually no discretion when imposing sentences. Approximately

7. Freeman v. United States, 243 F. 353 (9th Cir. 1917), cert. denied, 249 U.S. 600 (1919); Jackson v. United States, 102 F. 473 (9th Cir. 1900). For a recent case relying on Freeman, see United States v. Wilson, 450 F.2d 495, 498 (4th Cir. 1971).
8. See Kutak & Gottschalk, supra note 3, at 467-68. For an analysis of the implications of the 1891 Act for the rule of nonappealability, see id. at 463-471.
two hundred offenses were punishable by death; thus uniformity of sentences hardly presented a problem. After conviction, "the judge acted merely as a channel through which the Law expressed its predetermined and impartial decision." Review of the sentence would have been of no consequence.

Although the rule of nonappealability is the result of historical accident, rationalizations for the rule have evolved. The most commonly relied upon justification is that trial judges are in a better position than appellate judges to carry out the sentencing process. In the words of Judge Frankel,

> It is said often that sentencing is a matter of “discretion,” as distinguished from “law,” and hence is unsuited for inclusion among the “questions of law” that comprise the domain of appellate courts. Interwoven with this theme is the conventional assertion that the trial judge has the unique and unreproducible advantages of seeing the defendant, “sizing him up” and possessing from daily exposure a seasoned wisdom in the use of such firsthand impressions. Appellate judges studying a “cold record” are in this light unable to contribute, but will only impair the sentencing process with their second guesses.

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12. Coburn, supra note 10, at 207-08.
13. Id. at 207 (quoting Morris, Sentencing Convicted Criminals, 27 Austl. L.J. 186 (1953)).
14. M. Frankel, Criminal Sentences 82-83 (1973). This argument has been similarly described by other commentators. “[S]entencing is not a matter of facts or truth, it is a matter of judgment.” Hruska, supra note 9, at 14.

The word “sentence” derives from the Latin verb sentire, to feel. The derivation is apt, for in fashioning a criminal sentence the judge, more than in any other judicial task, must draw upon his own values, insight, and intuition, respond to the parameters of the situation and the character of the individual before him, and strive to achieve what he can only sense will be a just and fair disposition. ... [A]t heart, sentencing decisions are more inductive than deductive, more a product of creative inference than of scientific proof, and far more impressionistic than we like to admit.

Renfrew, Sentence Review by the Trial Courts: A Proposal to Amend Rule 35, 51 Ind. L.J. 355, 355-56 (1976) (emphasis in original). “Since sentencing is meant to be a discretionary decision, review would be a useless interference with that discretion.” P. O’Donnell, M. Churgin & D. Curtis, supra note 4, at 61.

[P]ersonal observations of a defendant's appearance and demeanor lead ... [the court] ... to a more appropriate sentence.

... [T]he trial judge has an opportunity constantly to observe the defendant and his reactions to various developments occurring in the presentation of evidence ... [and] may be more capable of analyzing the defendant's interests, motivations and values than even those appellate judges having the time to digest a trial transcript.

Kutak & Gottschalk, supra note 3, at 495. “[T]he sentencing judge is in a superior position, because of his personal involvement in the transaction, to determine the
A more convincing corollary to, or perhaps rationale for, this notion of the trial judge's discretion is that there is no consensus on the objectives of criminal sanctions. This has forced the process to be a subjective rather than a rational one.\(^5\) Rehabilitation, isolation, deterrence, community condemnation, and retribution have all been invoked as goals of the sentencing process.\(^6\) To make a reasoned sentencing decision, a judge must ascertain which objective has priority and the relationship between the objectives in each particular case.\(^7\) The absence of any consensus on the relationship between conflicting objectives makes this task difficult.

Those who favor appealability of sentences question the factual basis of the "better position" argument and call for limiting the broad discretion given the sentencing authority by establishing articulated standards which must be followed when sentence is imposed. They argue that the vast majority of criminal cases are disposed of on guilty pleas; thus, in most cases, the trial judge does not observe or interact with the defendant for any prolonged period.\(^8\) Even when the trial judge does have the opportunity to observe the defendant throughout a trial, courtroom demeanor can be grotesquely distorted and may be an invalid consideration in the sentencing decision.\(^9\) The notion that "trial judges are invited to proceed by hunch, by unspoken prejudice, by untested assumptions, and not by 'law,'"\(^10\) argues in favor of judicial review rather than against it.\(^11\) As stated by Judge Frankel,

Correctly understood, the "discretion" of judicial officers in our system is not a blank check for arbitrary fiat. It is an authority, within the law, to weigh and appraise diverse factors (lawfully

\(^{15}\) Most appropriate type and degree of penal sanction." Coburn, supra note 10, at 216 (footnote omitted). For cases succinctly stating this position, see United States v. Lowe, 482 F.2d 1357 (6th Cir. 1973); United States v. Latimer, 415 F.2d 1288 (6th Cir. 1969).

\(^{16}\) See Morris, The Future of Imprisonment: Toward a Punitive Philosophy, 72 Mich. L. Rev. 1161 (1974); Renfrew, supra note 14, at 356 n.2; Note, supra note 1, at 1454-55.

\(^{17}\) Id. at 1455 (citing Hart, The Aims of the Criminal Law, 23 Law & Contemp. Prob. 401, 404-06 (1958)).

\(^{18}\) See M. Frankel, supra note 14, at 82-83; P. O'Donnell, M. Churgin & D. Curtis, supra note 4, at 61; Kutak & Gottschalk, supra note 3, at 495-96.

\(^{19}\) Kutak & Gottschalk, supra note 3, at 496 (quoting Hearings on S. 2722 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 89th Cong., 2d Sess. 37 (1966) (statement of Judge Sobeloff)).

\(^{20}\) M. Frankel, supra note 14, at 84.

\(^{21}\) Id.
knowable factors) and make a responsible judgment, undoubtedly with a measure of latitude and finality varying according to the nature and scope of the discretion conferred. But "discretionary" does not mean "unappealable." Discretion may be abused, and discretionary decisions may be reversed for abuse.

... One way to begin to temper the capricious unruliness of sentencing is to institute the right of appeal, so that appellate courts may proceed in their accustomed fashion to make law for this grave subject.  

The process of evolving general sentencing principles will require a judicial consensus on the interrelationship of the various objectives of sentencing. However, because judges have little control over the quality of facilities and the nature of services available to those convicted of crimes, these objectives are, to some extent, determined by the other branches of government.

Another frequently voiced objection to making sentences subject to appeal is the potential impact that such a change might have on the dockets of appellate courts. Appellate judges have expressed concern that their tribunals will be flooded with frivolous appeals. In the words of Judge Friendly:.

But I hope there will be enough good judgment in Congress to realize that adoption of [appellate review] would administer the coup de grace to the courts of appeals as we know them. The problem of volume is not so much with the cases where a sentence is imposed after a trial, since most of these will be appealed anyway and the sentence would be just one more point to be considered, although sometimes an important and difficult one, but with the great mass of convictions, nearly 90% of the total, obtained on pleas of guilty or nolo contendere. If the sentences in only half these were appealed, and that seems a con-

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22. Id. (emphasis in original). A judge's powers over a person convicted of a crime include the following options: (1) He or she can sentence the person to a definite term of years, chosen from the minimum-maximum range set by the legislature; (2) at times a sentence can be imposed for an indeterminate term; (3) the defendant can be placed on probation; (4) a split sentence can be imposed; (5) at times youth correction procedures can be used; (6) at times a sentence under the juvenile delinquency acts can be imposed; or (7) he or she may use variables including fines, suspended sentences, deportation, etc. Hruska, supra note 9, at 10-11. See Estelle v. Gamble, 429 U.S. 97, 104-06 (1976) (deliberate indifference to serious medical needs constitutes cruel and unusual punishment in violation of eighth amendment, but Court expressed no view on constitutional status of inattention which failed to rise to that level).

23. See P. O'DONNELL, M. CHUHGIN & D. CURTIS, supra note 4, at 60-61; Coburn, supra note 10, at 218; Dix, supra note 3, at 372; Kutak & Gottschalk, supra note 3, at 507-10.
servative figure since most proponents of appellate review of sentences reject out of hand the main device, a possible increase of sentence on an appeal by the defendant, that may have a limiting effect, the caseload of the courts of appeals would be doubled by this means alone. While there would not be an equivalent increase in burden, ... if even a small percentage of those convicted on pleas of guilty should appeal their sentence, "the courts would be swamped." 24

Commentators have attempted, somewhat successfully, to allay these fears by pointing out that such concerns are no more than abstract speculation: Available empirical data indicates that there has not been a drastic increase in appeals where review of sentences is allowed. 25 These commentators suggest that many present appeals, although by necessity couched in terms of objections to the process by which the conviction was obtained, are in fact sought because of dissatisfaction with length of sentence. 26 Allowing defendant to appeal the sentence directly relieves pressure placed on the system by misdirected attempts to set aside just convictions on frivolous grounds. Moreover, courts of appeals are presently powerless to reduce a sentence without setting aside the conviction. Consequently, reviewing courts, trapped and bound by the rule of nonreviewability, overscrutinize cases. This increases their workload, produces bad law, forces new trials, and may let guilty people go free. 27

24. H. Friendly, Federal Jurisdiction: A General View 36 (1973) (citations omitted) (quoting Carrington, Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law, 82 Harv. L. Rev. 542, 578 (1969)). The ABA, however, a strong proponent of appellate review, has not rejected possible increase of sentence on appeal by the defendant as a limiting factor on the number of appeals taken. On the contrary, the ABA believes that the possibility of an increase in sentence will have just this effect. For discussion of the ABA's position, in the context of their deletion of Proposed § 3.4, 1967 ABA Tentative Appellate Review Standards, supra note 4, § 3.4, see 1968 ABA Appellate Review Standards, supra note 3, §§ 3.1-3, Comments a-c at 2-5 (Approved Draft Supp. 1968); note 4 supra.

25. P. O'Donnell, M. Churgin & D. Curtis, supra note 4, at 60-61; Coburn, supra note 10, at 218-19; Dix, supra note 3, at 372-74.

26. P. O'Donnell, M. Churgin & D. Curtis, supra note 4, at 60; Coburn, supra note 10, at 218 (citing 1968 ABA Appellate Review Standards, supra note 3, at 3); Hruska, supra note 9, at 12.

27. "[S]traight-forward review of sentences would eliminate the well-known charade ... of searching through a trial record and making new (and not necessarily wise) law about the conduct of trials for the purpose of reversing a conviction and remanding for a complete new trial because the sentence imposed was excessive." P. O'Donnell, M. Churgin & D. Curtis, supra note 4, at 60. See Nash v. United States, 54 F.2d 1006 (2d Cir. 1932); Hruska, supra note 9, at 12 ("I am acquainted
Workload concerns should not stand in the way of appealability, even at the risk of more crowded dockets. In every instance of expanded judicial power, courts are confronted with the spectre of floodgates opened wide. However, it is our duty and responsibility to press on where justice requires. This is our singular mission.

Opponents of appellate review maintain that the right to appeal a sentence is unnecessary because the executive branches of state and federal governments have the power to pardon; this can serve to remedy gross violations of fairness. Proponents correctly respond that the judiciary should have its own mechanism to remedy injustice and thereby cure its own abuses. The courts should not have to rely on other branches of government to ensure that justice is done. Moreover, the pardoning power cannot be relied on to determine the fairness of every sentence imposed by every trial judge in the nation. A more systematic approach is necessary.

Some who oppose appellate review also fear that making sentences reviewable may cause appellate judges to barter votes. For example, if a defendant appeals his or her conviction on the basis of a procedural error, and the government cross appeals to increase the sentence, there could be a difference of opinion regarding the disposition of the appeal among the three judges on the appellate panel: One judge might favor reversing the conviction; two might support an affirmance, one with an increased sentence, the other with a decreased sentence. The judge who advocates a reduced sentence has the swing vote. He or she could either induce the judge favoring an affirmance to agree not to increase the sentence, or persuade the judge supporting reversal to vote to affirm with a reduction of sentence. However, as the common law of sentencing evolves, if such trading should occur, it will not necessarily distort the law as much as the present inability of courts of appeals to redress excessive sentences except by challenging the validity of the conviction. Moreover, granting courts of appeals power to review sentencing would remove the pressure on judges to find technicalities. This should lead to more consistency in the

29. Sobeloff, supra note 9, at 17.
30. See M. Frankel, supra note 14, at 79-82.
31. See notes 26 & 27 supra and accompanying text.
law and is a goal toward which we should strive.

A further objection to the appealability of sentencing decisions is that if an increase of sentence is permitted on appeal, such increase is unconstitutional. Opponents of increased sentences on appeal make three constitutional objections. First, they argue that such a provision would deny equal protection. Essentially, this argument is that the scheme discriminates against defendants seeking a new trial, because only those seeking a new trial would be exposed to the risk of a more severe sentence. Those in favor of increased sentences on appeal rely on \textit{North Carolina v. Pearce}, in which a defendant received a more severe sentence on retrial, after his conviction had been set aside by the court of appeals. In \textit{Pearce} the Supreme Court stated that “[i]t simply cannot be said that a State has invidiously ‘classified’ those who successfully seek new trials, any more than that the State has invidiously ‘classified’ those prisoners whose convictions are not set aside by denying the members of that group the opportunity to be acquitted.” The reasoning of \textit{Pearce} suggests that equal protection would not be violated by permitting an increased sentence on appeal.

A second constitutional argument is that due process would be violated because those exercising their right to appeal would be penalized by the possibility of an increased sentence on appeal. This issue is not resolved in the \textit{Pearce} opinion, but language in the opinion seems to indicate that such a scheme may violate due process. The Court in \textit{Pearce} stated that “avenues [of appellate review] must be kept free of unreasoned distinctions that can only impede open and equal access to the courts.” However, state schemes that allow an increase of sentence on appeal have been upheld by federal courts on several occasions. Nevertheless, such a scheme raises serious due process issues, and on that ground alone should be avoided.

A third constitutional objection claims that any increase of sentence on appeal would violate the double jeopardy clause of the fifth amendment because a trial judge's sentencing decision constitutes an "implicit acquittal" of any harsher sentence. Thus, an

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\item 32. P. O'DONNELL, M. CHURGIN & D. CURTIS, supra note 4, at 62 & n.19.
\item 33. 395 U.S. 711 (1969).
\item 34. \textit{Id.} at 722-23 (emphasis in original).
\item 35. \textit{See} P. O'DONNELL, M. CHURGIN & D. CURTIS, supra note 4, at 62.
\item 36. 395 U.S. at 724 (citations omitted).
\item 37. Robinson v. Warden, 455 F.2d 1172 (4th Cir. 1972); Walsh v. Picard, 328 F. Supp. 427 (D. Mass.), aff'd, 446 F.2d 1209 (1st Cir. 1971).
\item 38. P. O'DONNELL, M. CHURGIN & D. CURTIS, supra note 4, at 63 & n.24. \textit{See} Green v. United States, 355 U.S. 184 (1957), in which the Court ruled that the de-
increased sentence would be multiple punishment for the same offense. In recent cases, the Supreme Court appears to be defining double jeopardy to refer only to the right of defendants not to be subjected twice to a trial on the question of guilt or innocence. Thus, appellate review of sentence on appeal by the prosecution would not involve any intrusion on this protected interest of the defendant. I believe, however, that such a provision approaches the bounds of what is not permissible under the double jeopardy clause, and therefore should not be enacted.

Another concern of those opposed to appellate review of sentences is that the government will use the power to appeal sentences as a tool of intimidation to discourage defendants from exercising their right to appeal. This possibility of abuse makes intolerable any right of the government to seek a heavier sentence on appeal. Such a right would open the whole system to wide criticism and add unnecessarily to the present vast powers of the state.

The remainder of this Article first discusses the evolution of the American Bar Association Standards Relating to the Administration of Criminal Justice, which now advocate allowing both the defendant and the prosecution to appeal the sentencing decision of the trial judge. It then suggests why there should be a right to appeal sentences by defendants, but no appellate right to increase sentences, especially on appeal by the government. In addition, it explicates the importance of articulation by trial judges—in writing and on the record—of the reasons for the sentences they pronounce.

**The American Bar Association Approach: 1967 to 1978**

In 1967, the ABA Advisory Committee on Sentencing and Review recommended appellate review of sentences with two qualifications: (1) The right to appeal should be limited to defendants; defendant could not be retried for first-degree murder after his conviction for second-degree murder was set aside, because the conviction for second-degree murder was an “implicit acquittal” of the first-degree murder charges. Id. at 190.

39. See P. O’DONNELL, M. CHURGIN & D. CURTIS, supra note 4, at 63.


41. See P. O’DONNELL, M. CHURGIN & D. CURTIS, supra note 4, at 63; 1978 ABA APPELLATE REVIEW STANDARDS, supra note 1, Standard 20-1.1, Commentary at 2. Contra, 1967 TENTATIVE ABA APPELLATE REVIEW STANDARDS, supra note 4, § 3.4, Comment b at 56.

42. P. O’DONNELL, M. CHURGIN & D. CURTIS, supra note 4, at 63.

43. 1967 ABA TENTATIVE APPELLATE REVIEW STANDARDS, supra note 4, § 3.4(a) & Comment b at 56.
and (2) there should be no appellate power to increase sentences on appeal, nor should the trial court be permitted to increase sentences on remand. This second limitation was embodied in section 3.4 of the 1967 tentative draft of the ABA Standards Relating to Appellate Review of Sentences. This provision is further expanded in the commentary to the tentative Standards:

The Advisory Committee has concluded that the state should not be permitted an appeal that could result in an increase of the sentence. One objective of subsection (a) is thus to reflect this conclusion.

. . . [T]here is the prospect of serious constitutional difficulties if an increase is allowed on an appeal by the state. Persuasive arguments can be advanced both under a due process and a double jeopardy provision. While there appears to be no United States Supreme Court precedent directly on point, there is a trilogy of cases which can be read to indicate that an appeal by the state which resulted in an increase would violate the double jeopardy provision of the fifth amendment. See Ocampo v. United States, 234 U.S. 91 (1914); Trono v. United States, 199 U.S. 521 (1905); Kepner v. United States, 195 U.S. 100 (1904). Similar problems would no doubt arise under many state constitutions.

On February 19, 1968, the ABA House of Delegates adopted the bulk of the Advisory Committee's recommendations, but rejected section 3.4. The Standards as approved limited appellate review of sentences to appeals initiated by the defendant, but empowered the appellate court to increase sentence on such appeals. The 1968 Standards did not, however, permit appeal of sentence by the prosecution. This would change.

Two years later, the president of the American Bar Associa-
tion, Edward L. Wright, addressed a letter to then-Congressman Richard H. Poff of the House Committee on the Judiciary concerning whether the government should have the right of appeal in a criminal case.\textsuperscript{50} This arose in the context of whether section 1001(a) of Title X of the Organized Crime Control Act of 1970,\textsuperscript{51} then before the Congress, was consistent with the ABA Standards Relating to Appellate Review of Sentences. This section of Title X contained a provision allowing the government to appeal sentences in organized crime cases. The letter, in substance, clearly indicated that the ABA supported the government’s right to appeal.\textsuperscript{52}

In August 1978, the House of Delegates approved new standards allowing the prosecution to appeal a trial judge’s sentence. Standard 20-1.1(b) provides, in part, that “[a]ppeal should be available on the initiative of the defendant or the prosecution or, in case of cross-appeals, on the initiative of both parties.”\textsuperscript{53} The commentary to this section explains that the ABA altered its view of this crucial issue because of a perceived change in events since 1968:

\begin{quote}
The number of jurisdictions in this country in which appellate review of sentences is available is steadily growing. Over half of the states now permit review of the merits of sentences in some circumstances. . . . The National Advisory Commission on Criminal Justice Standards and Goals strongly endorsed the concept of appellate review of sentences in its 1973 report on Courts. . . .

. . . In August 1976, the Committee on Rules of Practice and Procedure and the Advisory Committee on Criminal Rules . . . concluded that (1) review of a criminal sentence should be in a court of appeals and (2) there should be a right of appeal by both the defendant and the prosecution. . . . Meanwhile Congress has been actively considering a major revision of the Federal Criminal Code. The Senate version of that legislation, familiarly known as the Kennedy-McClellan Bill, contains a broad right of review of sentences at the initiative of defendants or the government.\textsuperscript{54}
\end{quote}

\textsuperscript{51} Pub. L. No. 91-452, § 1061(a), 84 Stat. 950 (codified in U.S.C. § 3576 (1976)).
\textsuperscript{53} 1978 ABA APPELLATE REVIEW STANDARDS, supra note 1, Standard 20-1.1(b).
\textsuperscript{54} Id. Standard 20-1.1, Commentary at 1-2 (citations omitted). The reference to the Kennedy-McClellan bill is to S. 1437, 95th Cong., 2d Sess. (1978).
Perhaps, however, the most influential factor in the ABA's decision was the approach taken by the Supreme Court on the double jeopardy issue. In United States v. Wilson, the Court remarked: "The development of the Double Jeopardy Clause from its common-law origins thus suggests that it was directed at the threat of multiple prosecutions, not at Government appeals, at least where those appeals would not require a new trial." The Court thus appeared to define double jeopardy only as the right of defendants not to be tried twice on the question of guilt or innocence. Because appellate review of sentences on appeal by the prosecution allegedly does not involve any intrusion on this protected interest of defendants, the ABA regrettably concluded that the new Standard 20-1.1 would withstand constitutional scrutiny.

In deciding to permit the prosecution to appeal a sentence, the ABA reasoned that if appeals from sentencing could only be initiated at the behest of the defendant, "there would be no other way to provide even partial implementation of the desideratum of evenhandedness in appellate review." The defendant would appeal sentences which were unreasonably high, but the prosecution would be helpless to appeal those which were unreasonably low.

A HYBRID APPROACH TO THE NEED FOR APPELLATE REVIEW: NO INCREASE IN SENTENCE

The reasons supporting the 1978 ABA standards for appellate review of sentencing provide a firm foundation for adoption of a general principle of appellate review of sentences. However, they do not overcome the strong reasons, founded on social policy and experience, against providing the government with the right to seek increases of sentences in appellate proceedings initiated by either the government or the defendant.

The ABA's primary justification for its position on appellate review is the need to moderate the wide disparity in sentences

56. Id. at 342.
57. See notes 38-41 supra and accompanying text.
58. 1978 ABA APPELLATE REVIEW STANDARDS, supra note 1, Standard 20-1.1, Commentary at 2.
59. Id.
60. Id.
61. For proposed federal legislation similar to this approach, see H.R. 13959, 95th Cong., 2d Sess. § 101 (1978) (to be codified, if enacted, in 18 U.S.C. § 30103).
imposed for similar crimes. This disparity is produced by a criminal justice system which requires individual judges to exercise their discretion in choosing an appropriate sentence within the wide range of current statutorily authorized sanctions. The purposes of appellate review, as set forth in Standard 20-1.2, are:

(i) 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;

(ii) to promote respect for law by correcting abuses of the sentencing power and by increasing the fairness of the sentencing process;

(iii) to facilitate the possible rehabilitation of an offender by reducing manifest and unwarranted inequalities among the sentences of comparable offenders; and

(iv) to promote the development and application of criteria for sentencing which are both rational and just.

The present system of sentencing by trial judges, the 1978 commentary suggests, permits the idiosyncrasies and errors in judgment of sentencing judges to affect the sentencing process to an intolerable degree. Trial judges have engaged in this broad discretionary exercise without explaining the reasons for the sentences they have imposed. The result has been a lack of uniformity and predictability in the decisions of sentencing judges. There exists no real body of wisdom based on well-reasoned decisions of many judges in a variety of circumstances. In addition, and central to the ABA's view, imposing divergent sentences for similar crimes under similar circumstances gives the system an appearance of arbitrariness and produces an increase in hostility on the part of the public and sentenced offenders. The ABA's conclusion that the delineation of rational principles for the fair and consistent imposition of sentences would improve the effectiveness and moral validity of the criminal justice system is absolutely correct. This end is better achieved through effective appellate review of sentences, sought by the defendant, than through the harsh alternative of mandatory minimum sentences. Adequate review is dependent on trial courts providing explanations for their sentencing deci-

62. 1978 ABA APPELLATE REVIEW STANDARDS, supra note 1, Standard 20-1.2, Commentary at 4.
63. Id. Standard 20-1.2.
64. Id. Standard 20-1.2, Commentary at 4-5.
65. Id. Standard 20-1.2, Commentary at 5.
66. Id.
Review from the relatively detached position of appellate courts can further legitimize the sentencing process by fostering the development of a coherent body of legal principles and factual precedents to which trial judges may look for guidance. However, permitting appellate courts to increase sanctions imposed by the original trial court would undermine the desired goal of increasing the sense of fairness and equality with which offenders and the public view the sentencing process. Any procedure which appears to allow the government to have "two bites at the apple" increases the sense of frustration and alienation felt by criminal defendants.67

The commentary which accompanies the tentative 1967 ABA Standards concerning appellate review of sentencing cited as authority for its rejection of the power to increase sentences on appeal, either by the defendant or the state, the report of the Donovan Commission.68 The ABA's Advisory Committee found implicit in the Donovan Commission's report the conclusion that "in the rare case in which it is invoked, exercise of the power [to increase sentences on appeal] may do more harm with respect to rehabilitation of the defendant than the good it does to the ends of justice."69 Any further deterioration in the fairness of the criminal justice system, as perceived by defendants, far outweighs the advantages reaped by society in the few cases in which appellate power to review the leniency of sentences would remedy the most egregiously inadequate sentences imposed under the current system.

Furthermore, as is indicated by the data relied upon by the Advisory Committee in its tentative 1967 Standards, it is unlikely that appellate power to increase sentences would correct the most extreme cases of excessive leniency in sentencing. These abuses probably occur in the context of bargained-for guilty pleas: If sentencing increases were permitted, such bargains would undoubtedly soon include prohibitions of government appeals of the sentences, thereby precluding appellate increase of sentences where it is most needed. Appellate increase of sentences would therefore not sig-

67. It should be noted that the government has no constitutional right to appeal a sentence. The Bill of Rights only protects the defendant's rights—not the government's.


nificantly contribute to the stated purposes of sentence review, as proposed in the most recent ABA standards.70

Finally, appellate increase of sentences would pose a substantial threat to other significant rights of the criminal defendant. In particular, the defendant’s right to appeal his or her conviction on the merits would be threatened, as would the right to appeal possibly erroneous rulings by the trial court on pretrial suppression motions and substantive matters arising during the trial itself. For example, a defendant who, in good faith, doubts the validity of a trial court’s adverse ruling on a novel search and seizure question could well be faced with the possibility that the prosecution will seek an increase in his or her relatively lenient sentence unless the defendant foregoes appeal of the fourth amendment question. Thus, the prosecution would be in a position to indirectly prevent the vindication of important constitutional rights. A similar scenario could occur in the context of a defendant’s appeal on the merits or appeal of sentence: The defendant could be deterred from appealing a doubtful conviction or severe sentence because of the possibility that a reviewing court would impose a more severe sentence, rather than overturn the original conviction or decrease the sentence. Such a course would indeed render illusory the right of appeal against an unfair sentence, a right essential to development of a higher regard for the sentencing process. A defendant who, seeking to take advantage of the appeal process, is instead subjected to an increased sentence, will consider the right to appeal a trap set to encourage him or her to give the government a second chance at securing a heavy sentence, a “stacked deck” indeed.71

CONCLUSION

As we consider solutions to the numerous moral, as well as legal, problems raised by the sentencing issue, whether raised by appellate review or otherwise, we must be ever mindful that we are dealing with human beings, no matter what the nature of their

70. 1978 ABA APPELLATE REVIEW STANDARDS, supra note 1, Standard 20-1.2.

71. It is arguable that to require a defendant seeking to appeal his sentence to expose himself to increased liability would counter the increase in court dockets caused by the new right to appeal sentences on behalf of defendants. The problem of crowded dockets, however, is better dealt with through the appointment of more judges. Better work at the time of sentencing by courts, prosecution, and the defense bar will insure that there will be few sentences from which defendants or the state wish to appeal.
crimes. We would do well to be guided by the principles set forth by the Philadelphia Society for Alleviating the Misery of Public Prisons, an organization founded in the early days of our Republic by the Philadelphia Quakers, with the participation of such leaders as Benjamin Franklin, Benjamin Rush, and William Bradford:

Our obligations are not cancelled by the crimes of the guilty.
We must extend compassion to the guilty.
Undue suffering must be prevented.
The links which bind the human family together must under all circumstances be preserved unbroken—there must be no criminal class.
Such punishments may be devised as will restore them to virtue and happiness.\textsuperscript{72}

With these principles in mind, trial judges should strive to impose sentences that are fair and appropriate. Review of these sentences should be initiated only at the urging of the defendant to avoid creating a system of justice which appears "stacked" against an accused. Without this limitation, harm to society caused by this "stacking" will well outweigh the benefit to society of appellate review at the request of the prosecution.

\textsuperscript{72} J. BENNETT, I CHOSE PRISON 71 (1970).