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United States v. Schwarz

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UNITED STATES v. SCHWARZ

CRIMINAL LAW—Appellate review of sentencing—abuse of discretion—fixed and mechanical approach—judge's comments at sentencing that defendant was not a "dumb kid" were susceptible to the meaning that he used this factor in a fixed and mechanical way requiring reversal and vacation of the sentence and remanding the case to a different judge for resentencing. 500 F.2d 1350 (2d Cir. 1974).

The federal system is apparently moving closer towards incorporating a statutory framework providing for appellate review of criminal sentences.¹ The reality of the current situation, however, is that our criminal justice system affords no remedy to a sentenced criminal with regard to an unjustly harsh sentence.²

* The author gratefully acknowledges the cheerful and energetic support of Professor Leon Friedman in the preparation of this note.

1. See, e.g., 2 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 533, at 455-56 (1969); M. FRANKEL, CRIMINAL SENTENCES—LAW WITHOUT ORDER passim (1972) [hereinafter cited as FRANKEL].


Courts of appeals are powerless to vacate or modify a sentence absent a showing of (1) a violation of the statutory parameters for the imposition of sentence, (2) evidence that there was judicial reliance on impermissible factors or (3) evidence that the sentencing judge employed a fixed or mechanical approach in arriving at a sentence and thus abused his discretion. Consequently, these courts, in order to reverse a sentence which either offends them because of its harshness or does not comport with a particular sentencing philosophy, must be able to rely on one of the three exceptions to the general rule of no review. Not surprisingly, the exception most commonly seized upon is the "abuse of discretion" line of reasoning; the other two are too easily dismissed on a strictly factual analysis of a case.


6. United States v. Hartford, 489 F.2d 652, 655 (5th Cir. 1974); Woosley v. United States, 478 F.2d 139 (8th Cir. 1973) (en banc), noted in 23 Drake L. Rev. 191 (1973); United States v. Baker, 487 F.2d 360, 361 (2d Cir. 1973) (dictum); United States v. Daniels, 446 F.2d 967 (6th Cir. 1971). This type of sentencing procedure is struck down because it sentences for the crime only or the type of individual only, rather than requiring the sentencing judge to make a case by case determination on sentencing that blends all of the relevant criteria. See Williams v. Oklahoma, 358 U.S. 576 (1959); Williams v. New York, 337 U.S. 241 (1949).

The abuse of discretion concept seemingly exists in this area as a repository for appellate notions of equity and justice. To right sentencing wrongs, which by law probably should be left untouched, a court of appeals may make a finding that the sentencing judge was fixed and mechanical in sentencing. Often this is done at the cost of clarity in reason and intellectual honesty.\(^8\)

The recent Second Circuit case of *United States v. Schwarz*\(^9\) is an excellent example of how federal appellate courts are forced to struggle with a sentence which in reality they are impotent to tamper with: frustration coupled with emotional outrage are often the underpinnings of appellate reversals of sentences such as that in *Schwarz*. Over a strong dissent,\(^10\) and under the guise of a finding that the district court employed a fixed and mechanical approach in sentencing,\(^11\) the court of appeals reversed and vacated the sentence of Linda H. Schwarz, remanding the case to a different judge for resentencing.

Since the court of appeals based its reversal upon the conclusion “that the court employed a fixed and mechanical approach in imposing sentence rather than a careful appraisal of the variable components relevant to the sentence upon an individual basis,”\(^12\) the facts of the case deserve particular scrutiny. On Feb-

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\(^8\) It is relevant to note that our rule of nonappealability of sentences is maintained at some uncertain cost in hypocrisy and evasion. Deferring to the rule, appellate judges, being at least somewhat subject to “emotion and sympathy,” are periodically horrified by cases in which the sentences, though within maximum limits, seem cruelly excessive in the circumstances. The most common response is a sorrowful wringing of the hands, some wistful observations, and a futile reaffirmation of the appellate court’s powerlessness to right the evident wrong. Not infrequently, however, the appellate judges will search out some strained species of “error” in the trial, not because they genuinely deem it a proper ground for reversal, but as a pretext for setting aside the intolerable sentence. Sometimes the appeals court will slip into the inelegant role of supplicant before the trial judge. Confessing impotence to review the sentence and finding no plausible ground for reversal, the appellate opinion will suggest that the sentence seems, perhaps, a bit barbarous and would the trial judge perhaps, when the case comes back to him, please be willing to have another look.

FRANKEL, *supra* note 1, at 81-82. For an example of such a suggestion and how a judge might react to it, see the case history of *United States v. Driscoll*, 496 F.2d 252 (2d Cir. 1974), set forth in the text accompanying notes 59-62 infra and in note 62 infra. See also Burr, *supra* note 2, at 13.

\(^9\) 500 F.2d 1350 (2d Cir. 1974) (per curiam).

\(^10\) Id. at 1352-54.

\(^11\) Id. at 1152.

\(^12\) Id.
January 19, 1974, Linda H. Schwarz pled guilty to the crime of knowingly possessing with the intent to distribute approximately four ounces of cocaine. Sentencing was set for March 25, 1974, one day prior to her twenty-sixth birthday. This enabled the sentencing judge to retain the option to sentence her under the Federal Youth Corrections Act. The sentencing judge denied the defendant’s request to be sentenced under the provisions of the Act and sentenced her to a term of four years imprisonment with three years special parole. This sentence was imposed only after the sentencing judge had studied the probation report; read character letters from employers, relatives and the defendant’s fiance; read a note from Schwarz herself, conferred with the presentencing panel (consisting of the Chief of Probation and two other district court judges), and participated in an extended colloquy with Schwarz and her attorney.

Although the court of appeals rested its reversal upon the ground that the sentencing court employed a fixed and mechanical approach in sentencing the defendant, such ground, in fact, did not exist. Seizing upon a few selected phrases, taken out of context, it concluded that, in effect, the district court had used improper factors in determining what sentence was justified in this case. Specifically, the court of appeals was of the opinion that the defendant was summarily denied Youth Corrections Act treatment because she was well educated and had a “first class background.” Indeed, it is incontrovertible that:

... the district court made much of the fact that the appellant came from a privileged background rather than from “the ghetto” and was not the “usual dumb kid.” The court referred to her as one “far above the average, so that she knew what she was doing.” Understandably, the appellant has been left with

13. Id.
19. Id. at 1353 (Moore, J., dissenting). Schwarz was an honor student in college and a first offender. Id. at 1351.
20. Id. at 1351.
the impression, . . ., that her intelligence and privileged background were counted against her as pejorative factors disentitling her to treatment under the Youth Corrections Act.

However, the inference drawn by the court that appellant’s background automatically militated against the grant of the defendant’s request for sentencing under the Act is not supported by the record. It is, rather, the consequence of the court laboring to construct a foundation upon which to rest its reversal. The facts of the case are clear. Nowhere in the record did the district court ever state that it was following a particular sentencing policy. And nowhere in the record is there any language supportive of a conclusion that because of appellant’s wealth or education, she was denied treatment under the Act. The record merely indicates that the district court recognized the defendant as one who was less susceptible to the lure of criminal activity than the typical defendant before it. In fact, an inference opposite to that drawn by the court of appeals is suggested by the record; that is, that the court properly considered appellant’s background when deciding upon the sentence. As the judge, within his discretionary powers, could have sentenced Schwarz to an even longer sentence than he did, it could be inferred that these factors were actually counted in her behalf.

Although the proper approach in the sentencing area would not seem to suggest that only express evidence of a mechanical approach to sentencing may support a reversal, the limited supervisory capacity in which courts of appeals sit, allowing only for corrections of errors of law, compels a certain reluctance by appellate courts to interfere with district court determinations, especially if there are factors which would tend to support those determinations. In this case, there was not only a permissible inference that the district court understood the background of the defendant before it and used this background to help fashion a

22. The “camouflaging” of the true reasons for a sentence reversal is not uncommon practice in the appellate courts. Kutak & Gottschalk, supra note 2, at 509. See also note 8 supra.
23. See United States v. Brown, 470 F.2d 285 (2d Cir. 1972), where it was held that a stated judicial policy of never disclosing the contents of a presentence report to a defendant was an abuse of discretion requiring reversal.
25. See note 3 supra.
sentence, but also evidence that the court did not sentence in the vacuum of judicial isolation. In commenting upon the process by which it came to a decision, the district court stated:

I have read this presentence report maybe five times already. I read every letter that was sent to me by a number of people . . .

I think as a result of a thorough consideration of this report and all these letters I have received, I think I have been informed pretty much . . . of the pertinent facts relating to this young lady . . . . And I must say, too, that I have discussed this case with my colleagues who are part of the so-called presentencing panel and I thought about it very thoroughly—very thoroughly.

It seems clear that the district court was sentencing the individual27 for the particular crime that was committed.28 There is no evidence that the district court used appellant's excellent background negatively in arriving at its sentencing determination. While it is true that the district court dwelled upon the issue of appellant's background, only a strained reading of the record can support the court's conclusion that this factor automatically served to deny Schwarz treatment under the Act.29 Undoubtedly, the fact that the appellant was intelligent, well educated and aware of the criminality of her acts did not necessarily count in her favor with the judge.30 Yet there is no basis in reason or in law for imposing on the sentencing judge a requirement that a defendant's education or wealth ipso facto mitigates his guilt.31 Appel-

28. The facts here presented completely refute, in my opinion, the charge that the Court "employed a fixed and mechanical approach in imposing sentence." To the contrary, they show careful consideration of the individual before him. United States v. Schwarz, 500 F.2d 1350, 1354 (2d Cir. 1974) (Moore, J., dissenting).
29. The majority's holding would imperil every sentence preceded by the trial judge's comments, "you had a good education. You should have known better." Or, since the majority "are constrained to disapprove of the manner in which this [the sentencing] was done," does this mean that a sentencing judge cannot excoriate a narcotics vendor without fear of having his sentence invalidated?
Id. at 1353 (Moore, J., dissenting).
30. The court referred to her as one "far above the average, so that she knew what she was doing."
Id. at 1351.
31. If, indeed, the district court had applied or did apply an across-the-board presumption that the educated or the wealthy deserved more lenient treatment than other
lant nevertheless argued that these two factors all but established an irrebuttable presumption that she did not deserve the severity of sentence (adult treatment) she received.Absent statutory mandate, presumptions, irrebuttable or otherwise, deserve little if any place in the sentencing process. By their nature, they work to standardize what should be an individualized decisional process. Therefore, the district court was correct in evaluating appellant’s background as it did. For the court of appeals to take the district court’s thorough analysis of appellant and use it as a device with which to support a reversal indicates the very real frustration that appellate courts suffer in the sentencing area.

With Schwarz, the Second Circuit went significantly beyond sectors of society, it would have been sentencing in violation of law. Such sentencing technique would surely have been fixed and mechanical in nature and consequently would “result in a sentencing policy unfair to disadvantaged defendants.” Brief for Appellee at 6, United States v. Schwarz, 500 F.2d 1350 (2d Cir. 1974) (per curiam).

32. . . . the length of the adult sentence imposed on appellant and the decision to forego the other various rehabilitation alternatives was still the result of expressed irrational sentence criteria, a fixed sentence policy based on the type of crime and the absence of ghetto experience in appellant’s background, a kind of reverse bias against intelligence and good family background that in the judges order of things, called for a shockingly severe sentence on a female first offender.

Brief for Appellant at 16, United States v. Schwarz, 500 F.2d 1350 (2d Cir. 1974) (per curiam) (emphasis added).

33. An example of such a statutorily mandated presumption is found in the required “no benefit” finding by a judge in sentencing a person who is eligible for Youth Corrections Act treatment, 18 U.S.C. § 5005 et seq. (1970), under an adult provision of the law. Dorszynski v. United States, 418 U.S. 424 (1974). See United States v. Kaylor, 491 F.2d 1133, 1137-39 (2d Cir. 1974) (en banc). The presumption is that someone under the age of 22 (and thereby within the Act’s scope, 18 U.S.C. § 5006(e)) is more likely to be rehabilitated than an older criminal and thus:

Quite evidently Congress intended to prefer treatment under the Youth Corrections Act for youth offenders . . . .


34. Yet the avoidance of their use is virtually impossible.

Interviews revealed that most magistrates were guided in choosing among various sentencing alternatives by a number of self-imposed guidelines and rules of thumb. These normally came into play as presumptions for and against probation, or for or against imprisonment for offences of different kinds. Presumptions tend to simplify the decision-process. They save the magistrate from the time consuming task of having to figure out de novo how to deal with the case before him.

J. HOGARTH, SENTENCING AS A HUMAN PROCESS 77-78 (1971).


36. See note 31 supra.
the usual interpretation of the "fixed and mechanical" doctrine as understood and applied by other federal courts of appeals. For instance, reversal in the Fifth Circuit case of United States v. Hartford\textsuperscript{37} was supported by the district court's statement: \textsuperscript{38}

\begin{quote}
[I]t wouldn't make any difference if there were fifty other charges. If this man pleaded guilty to distributing LSD he would get the maximum penalty . . . .
\end{quote}

Similarly, the Sixth Circuit reversal in United States v. Daniels\textsuperscript{39} and the Eighth Circuit reversal of Woosley v. United States\textsuperscript{40} were based on the courts' reactions to a policy of the district courts to sentence draft resisters in an across-the-board, harsh manner. These cases suggest that the doctrine is meant to encompass specifically those situations where a rigidity in attitude towards a particular crime or type of defendant is clearly evidenced. Schwarz does not have the explicit earmark of sentencing rigidity. A pattern of rigidity is also not reflected by an examination of the past record of the sentencing judge. As Circuit Judge Moore noted in dissent, there was no proof offered in the case tending to indicate that the district court routinely sentenced in a mechanical fashion.\textsuperscript{41}

The court of appeal's discussion of what it termed a joint request by the defense attorney and the government attorney "that the district court make a specific finding that appellant would not derive benefit from treatment under the Act, . . . ."\textsuperscript{42} is a further example of the frustration which appellate courts experience in the area of sentencing. Although the court hedges somewhat by admitting that the refusal by the district court to make the requested "no benefit" finding was not the controlling factor in the reversal,\textsuperscript{43} the clear inference that must be drawn from this discussion is that the district court's denial of the request was in some way thrown into the balance by the court of appeals. The court had good reason to hedge.

The "no benefit" finding at issue in Schwarz is required under the Youth Corrections Act by a judge who denies a "youth

\begin{footnotes}
37. 489 F.2d 652 (5th Cir. 1974).
38. Id. at 655.
39. 446 F.2d 967 (6th Cir. 1971).
40. 478 F.2d 139 (8th Cir. 1973).
41. United States v. Schwarz, 500 F.2d 1350, 1354 (2d Cir. 1974).
42. Id. at 1351-52.
43. Id. at 1352.
\end{footnotes}
offender" the special rehabilitative provisions of the statute.\textsuperscript{44} Schwarz, however, was not automatically eligible for treatment under the Act because, at age 25, she was a "young adult offender"\textsuperscript{45} to whom Youth Corrections Act treatment was available only in the broad discretion of the sentencing judge. A "no benefit" finding was, therefore, not mandated.\textsuperscript{46} In fact, the sole reason that the government attorney made such a request was to avoid an appellate issue in the event that the applicability of the Act's "no benefit" finding was held by the court of appeals to extend to "young adult offenders."\textsuperscript{47} Therefore, the government's request was irrelevant from a legal standpoint and not the least bit probative as to the district court's sentencing procedure; it did not in any way reflect an attitude toward the severity of sentence to be imposed.\textsuperscript{48} For the court of appeals to so imply is untenable.

Assuming \textit{arguendo} that the prosecution's request did exhibit an actual preference for a more lenient sentence, it is questionable what legal weight such an expression should carry. The responsibility for sentencing ultimately is vested in the sentencing judge.\textsuperscript{49} He typically will rely on such things as probation reports, character references, and his observance of and conversations with the defendant\textsuperscript{50} before determining the sentence to impose. Certainly requests for leniency from the prosecution are another useful source from which a judge might find guidance before sentencing. Nevertheless, as the final decision is the sentencing judge's alone, such requests need not be granted. The district court's express refusal to grant the request of the prosecution in Schwarz was therefore improperly made the focus of appellate disapproval.

\textit{Schwarz} epitomizes the dilemma facing a federal appellate court offended by the harshness of a particular sentence. It repre-

\textsuperscript{44} See note 33 supra.
\textsuperscript{46} See United States v. Kaylor, 491 F.2d 1133, 1137 (2d Cir. 1974) (en banc).
\textsuperscript{47} Interview with Assistant United States Attorney Joan S. O'Brien conducted at the United States Attorney's Office for the Eastern District of New York on January 22, 1975.

\textsuperscript{48} Classically, at sentencing, government attorneys refrain from participation in colloquy with either the judge, defendant, or the opposing attorney. This practice of remaining silent has been judicially criticized, however. See Frankel, supra note 1, at 36-37.

\textsuperscript{50} Id.
sents an emotional reaction\(^5\) to an arguably unwarranted sentence.\(^2\) Indeed, the district court admitted that it did not "take sentences lightly."\(^5\) And in fact, there appears to have been more than usual tension between this district court and the court of appeals. If that is correct, the supposition that the court of appeals perhaps used \textit{Schwarz} as a vehicle with which to reprimand the district court for its sentencing philosophy is not unsound.\(^5\)

In previous appeals from this district court, the Second Circuit had merely noted with some displeasure the court's sentencing. For example, in \textit{United States v. Brown},\(^5\) this district court was assigned to sentence a draft evader who had won a reversal of a sentence imposed by a different district court. The reversal was based upon the fact that the sentencing judge had a policy of never disclosing the contents of presentence reports to defendants.\(^6\) The resentencing of the defendant by the \textit{Schwarz} dis-

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51. To some, the belief that sentencing is an emotional matter provides an excellent rationale for appellate review of sentencing.

The notion that sentencing involves "emotion and sympathy," and thus could pollute the appellate process, reverberates with disturbing implications. If the thought has validity, what qualifies our trial judges to be trusted with this responsibility? Are matters of emotion and sympathy uncheckable—unreviewable? Are appellate judges really free in their daily work from emotion and sympathy? Among the answers to these questions is the vital point that the power to send people to prison for long stretches ought to be exercised in a system of law on grounds more objective and rational than vague sentiment. Insofar as decisions of this kind are likely to involve feeling as well as intellect, this is a factor adding to the need for a second look by the relatively detached appellate tribunals. If emotion and sympathy are inevitable factors it would not really hurt appellate judges to suffer these qualities of the human experience. What is more to the point is that the virtues of a higher court include its separation from the face-to-face forensics of the trial court, promoting a useful quality of cool objectivity, even about matters that generate intense feeling in their immediate occurrence.

FRANKEL, \textit{supra} note 1, at 79.

52. Even Judge Moore, in dissent, noted that the sentence was quite harsh. The author, who clerked at the United States Attorney's Office for the Eastern District of New York and assisted in the preparation of the government's brief in this case, was equally offended by the striking severity of the sentence he was required to justify. Indeed, the experience of writing the brief was one marked by more than just passing moments of emotional anxiety. Thus the author received news of the court of appeals reversal on July 23, 1974 with less than total displeasure.


54. [W]e direct that the case be reassigned for sentence by another judge "both for the judge's sake and the appearance of justice . . . ."

\textit{United States v. Schwarz}, 500 F.2d 1350, 1352 (2d Cir. 1974) (citations omitted).

55. 479 F.2d 1170 (2d Cir. 1973).

District court to an identical two and one half year prison sentence drew sharp criticism in the dissent from affirmance of Circuit Judge Feinberg. 57

Even the majority in Brown, while affirming the district court’s sentence, indicated that it would have been happier had the district court seen fit to supply it with a statement of reasons supporting its decision to reinstate the original sentence in the case. 58 Similarly, in United States v. Driscoll, 59 the Second Circuit, while affirming the Schwarz district court’s imposition of two consecutively imposed prison sentences, stated “[i]n view of the apparently unwarranted harshness of the consecutive sentences imposed, a statement of reasons would have been welcomed by us in the present case.” 60 The court even went so far as to suggest that “the conscientious district judge may wish sua sponte to again review the record and determine whether there should not be a reduction in the sentence imposed upon appellant.” 61 The district court did not follow the suggestion. 62

While Schwarz might be narrowly viewed as the culmination of a vendetta against the district court by the court of appeals, a broader interpretation that the court of appeals no longer feels

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57. United States v. Brown, 479 F.2d 1170, 1175-76 (2d Cir. 1973). Judge Feinberg was in the majority in Schwarz.
58. Id. at 1173.
59. Id. at 1175-76.
60. Id. at 1173.
61. Id.
62. The appeal in Driscoll was predicated on an unsuccessful attempt by Driscoll’s attorneys on motion pursuant to Rule 35 of the Federal Rules of Criminal Procedure to have his sentence reduced or modified. When the decision in this case came down, Driscoll’s attorneys, undoubtedly encouraged by the Second Circuit’s dicta in the opinion, wrote to the district court requesting that it review the sentence imposed. The court replied:

Your application on behalf of the defendant was heard by me and in the exercise of my discretion it was decided by me. On behalf of the defendant you exercised his right to appeal from my decision and the Court of Appeals saw fit to affirm my decision. The awesome responsibility of sentencing is the job of the district judge as the Court of Appeals alluded to in its decision. It is true that the Per Curiam decision of the Court of Appeals suggests that I may wish, sua sponte, to again review the record and determine whether there should be a reduction in the sentence imposed. That, of course, I have the right to do.

If I, for a moment, thought that I should not have denied your motion, I would not have done so. With all due respect, I do not intend to follow the suggestion of the Court of Appeals.

United States v. Driscoll, 72 CR 1186, United States Courthouse, E.D.N.Y.
helpless to react against unduly harsh sentences is more intellec-
tually satisfying. It may well be that Schwarz portends appellate
activism in the sentencing area, at least in the Second Circuit.
Although technically it is virtually powerless to intervene in sen-
tencing matters, the Second Circuit may do so in the future even
if such practice requires an intellectually dishonest approach.
The question of whether such a phenomenon is necessarily desir-
able is, however, an open one. While not touching on all of the
merits and disadvantages of appellate review of sentencing, a few
significant points should nevertheless be noted. One of the possi-
able drawbacks to Schwarz is that it may forebode a shifting of
power away from the trial judge and toward the court of appeals
in sentencing matters with the result that the circuit court might,
in effect, become the sentencing tribunal. The idea that trial
judges are in a uniquely excellent position to mete out sentences
because of their opportunity personally to observe and converse
with defendants is still very much at the heart of current sentenc-
ing philosophy. It is, therefore, questionable whether such a
shift, which suggests exclusive reliance upon sterile transcripts
and briefs for the determination of a sentence, is in fact a desira-
ble development. Furthermore, the potential reality of the court
of appeals replacing a district court's philosophy with its own is
an inherently dubious procedure, as such a replacement would
necessarily imply that one philosophy is less valid than another.
Philosophies are not easily valued; and a substitution of philoso-

63. Extensive discussion of the various pros and cons of appellate review of sentencing
may be found in the sources cited in note 2 supra.

64. The President's Commission on Law Enforcement and Administration of Justi-

65. Yet it would seem that any type of legislative guide in this area would, of necess-
ity, incorporate a "philosophical replacement" theory. A proposal of The American Bar
Association, for instance, provides for review based upon the reviewing court's conception
of what is "excessive":

1.2 The Purposes of the Review. The general objectives of sentence review 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 protec-
tion of the public interest . . .

ABA Appellate Review, supra note 2, at 7 (emphasis added). See also id. at 11-12. See
generally sources cited in note 2 supra.

66. This is strikingly evident in the area of sentencing. The question of determining
a sentence is puzzling not only in this country but in others as well. A Canadian study of
sentencing practices observed:

Problems in penal philosophy have exercised the minds of legal philosophers,
phies, as was done in *Schwarz*, will not necessarily yield the "correct" result. It is thus doubtful whether *Schwarz*'s possible effect of "philosophy replacement" is the best path to follow. At the very least, such a loosely structured, emotional and, to some extent, arbitrary procedure highlights the need for legislative delineation of what is and what is not proper in the review of sentencing.

Competing arguments in defense of *Schwarz* similarly deserve comment. It may be advanced that *Schwarz* will not significantly alter appellate practice as concerns sentencing. Courts of appeals will continue to remain extremely reluctant to override the discretion exercised by the district court, in recognition of the fact that they do not possess all the subtle knowledge that the courts below do when arriving at a sentencing decision, and that members of royal commissions, academics, and essay writers of all sorts. Most of the writing in this area is about what "ought to be" the purpose of sentencing, and most of the arguments revolve around the merits of the classical doctrines of retribution, deterrence, reformation, and incapacitation. These arguments are rarely supported by empirical evidence, either as to the way in which these doctrines find expression in the sentencing behavior of the courts, or as to the relative merits of them, in terms of the more general and agreed purpose of the penal system, i.e., the protection of society.

Hogarth, supra note 34, at 68.


68. Another argument occasionally made against appellate review of sentences is that the courts of appeals will, among themselves, participate in the unscholarly practice of trading off votes of affirmation against votes reducing a sentence in a case. *Id.* at 25.

69. The sentencing process is infused with the biases, political orientations and irrationality that individual judges bring to the bench with them. For an interesting study (which includes numerous interviews with judges) of the process, see W. Gaylin, *Partial Justice—A Study of Bias in Sentencing* (1974).


The problems highlighted by *Schwarz* indicate that guiding legislation is desperately needed to give the tremendously important sentencing process a bit more structure and scholarly integrity than has heretofore been evident. Kutak & Gottschalk, *supra* note 2, at 510-13; Franke, *supra* note 1, *passim*. But the need for such legislation goes well beyond simply furnishing guidelines or fostering legal precision. The need finds its real genesis in bringing uniform justice to this area of the criminal law (see *Task Force Report, supra* note 64, at 25); to provide, to the extent possible, consistent standards against which all defendants may be judged, and to furnish a more substantive procedural remedy to the aggrieved. See McNabb v. United States, 318 U.S. 332, 347 (1943) (Frankfurter, J.) ("the history of liberty has largely been the history of observance of procedural safeguards").
they sit in a purely supervisory capacity. Additionally, from the standpoint of judicial economy and feasibility, the "philosophy replacement" practice conceivably could result in an insurmountable administrative burden that would make such a practice impossible to follow. Finally, it may be advanced that the Schwarz result was justified because the four year sentence imposed was, indeed, too harsh and did not comport with most judges' concepts of justice. Therefore, the argument continues, the court of appeals acted correctly in reversing the sentence regardless of whether "legal" grounds actually existed.

To many, the result of Schwarz probably has strong emotional appeal — that is, it was a reversal dictated by justice if not by law. Yet it is distressing when in the search for justice, bad law is created that will have the effect of impeding justice. Unfortunately, that may be the legacy of Schwarz.

It is submitted that if the judge had not engaged in an extended colloquy with the defendant and her attorney but instead had patiently listened to their pleas, and then, without any excess verbiage, had imposed the same four year sentence, it would have been very difficult for the court of appeals to reverse the sentence. The law is clear, though not uncriticized, that a judge need not list reasons for imposing a particular sentence. Although there is dicta in the Second Circuit cases of McGee v. United States, United States v. Brown and United States v. Driscoll urging

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71. Lawlessness, supra note 2, at 28-27. See note 3 supra.
72. See TASK FORCE REPORT, supra note 64, at 26. But see FRANKEL, supra note 1, at 75. Judge Frankel does not view this as a valid argument, however stating that "[t]he solicitude to which appellate judges refer is the effort to make sentences more rational and just would hardly seem unworthy of their labors." Id. at 78. Moreover, most of the sentence appeals would likely be frivolous, not requiring substantial additional work for the courts. See Kutak & Gottschalk, supra note 2, at 507-10.
73. The proposition that common notions of justice must be considered in the exercise of judicial power and should not, as a matter of course, be subordinated to rigid legal constructions, was put forth by Mr. Justice Frankfurter in Watts v. Indiana, 338 U.S. 49, 52 (1949):

And there comes a point where this Court should not be ignorant as judges of what we know as men.
75. 462 F.2d 243, 247 (2d Cir. 1972).
76. 479 F.2d 1170, 1175 (2d Cir. 1973).
77. 496 F. 2d 252, 254 (2d Cir. 1974).
district courts to state reasons for sentences when the sentence might appear to be harsh, unfortunately the practice does not seem to have been adopted.78 This is probably due, at least in part, to a recognition by district court judges that the more that is said with regard to a sentence, the more likely there is to be a reversal.79

_Schwarz_ will intensify this recognition with the possible consequence of further shrouding the already mysterious sentencing process. Noting that the sentencing judge's remarks in _Schwarz_ scarcely deserved the label "abuse of discretion," other district judges may more closely monitor their words at sentencings than would have been the case before. They may even limit what they might otherwise have said to a defendant in order to guard against possible reversal. Yet this is certainly not the kind of sentencing practice that should be encouraged.

Sentencing has traditionally been one of the most inscrutable aspects of our criminal justice system. Paradoxically, it is the

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78. Adoption of the practice of judges stating reasons for deciding upon a particular sentence is strongly urged by the American Bar Association:

5.6 Imposition of Sentence

In addition to reaching the conclusions required as a prerequisite to imposition of the sentence selected when sentence is imposed the court:

(i) should make specific findings on all controverted issues of fact which are deemed relevant to the sentencing decision;

(ii) normally should state for the record in the presence of the defendant the reasons for selecting the particular sentence to be imposed. In the exceptional cases where the court deems it in the best interests of the defendant not to state fully in his presence the reasons for the sentence, the court should prepare such a statement for inclusion in the record; . . .

ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE—STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES (Approved Draft, 1968).

A judicial statement of reasons would foster greater appellate efficiency in sentencing review in this "pre-review" era and certainly would appear to have to be an integral part of any statutory scheme for review. See generally ABA APPELLATE REVIEW, supra note 2.

79. There is no . . . requirement [for a statement of reasons] in the announcement of a prison sentence. Sometimes judges give reasons anyway, or reveal in colloquy the springs of their action. The explanations or revelations sometimes disclose reasoning so perverse or mistaken that the sentence, normally unreviewable, must be invalidated on appeal. Most trial judges . . . say little or nothing, certainly far less than a connected "explanation" or rationale of the sentence. Many, aware of their unreviewable powers, and sharing a common aversion to being reversed, are perhaps motivated by the view (not unknown on trial benches) that there is safety in silence.

_Lawlessness_, supra note 2, at 9-10 (footnotes omitted).
area which uncontrovertibly has the most immediate and dra-
matic consequence upon a defendant. \(^8\) Therefore, it would seem
that measures that shed light on this phenomenon are to be wel-
comed; conversely, measures which cloak the process in even
more mystery are to be avoided. Judges should not feel inhibited
to speak freely at sentencing. It is often through extemporaneous
remarks at a sentencing, or in a discussion\(^8\) with the defendant
or defendant’s attorney, that judicial use of an impermissible
sentencing technique will be revealed. \(^2\) The effect of Schwarz
might very well be to conceal actual abuses of discretion which
before Schwarz might likely have been detected.

It is, indeed, regrettable that the Second Circuit might have
actually worsened the plight of the defendant facing sentence.
Reacting emotionally to a harsh sentence, the court acted in my-
optic fashion. Rather than carefully gauging the consequences of
its decision, it acted brusquely in reversing what, on balance,
should not have been reversed. With the very real possibility that
Schwarz will “gag” the mouths of district court judges, in its zeal
to save one defendant from a very harsh sentence, the Second
Circuit may have lost many others.

\textit{Michael H. Berns}

\(^8\) The imposition of sentence in a criminal case is probably the most
weighty action taken by a judge. No other type of final order or judgment may
be said to equal a judgment fixing sentence in its far reaching effect, both on
society and on the individual immediately concerned.
McGuire & Holtzlof, \textit{The Problem of Sentence in the Criminal Law}, 20 B.U.L. Rev. 423,
426 (1940).

\(^8\) Kutak & Gottschalk, \textit{supra} note 2, at 497.

\(^2\) See, \textit{e.g.}, United States v. Daniels, 446 F.2d 967 (6th Cir. 1971).