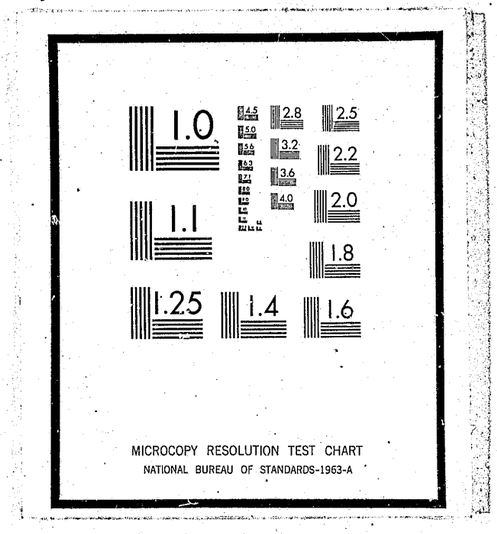

APPELLATE

1975

Volume III: Criminal Justice on Appeal

To Be Discussed January 25

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CRIMINAL JUSTICE ON APPEAL
(to be discussed January 25)

edited by

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*Material selected by Wilfred Feinberg, assisted by Vivian Berger.

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THE PRICE OF PERFECT JUSTICE

Macklin Fleming*

THE fuel that powers the modern theoretical legal engine is the ideal of perfectibility—the concept that with the expenditure of sufficient time, patience, energy, and money it is possible eventually to achieve perfect justice in all legal process. For the past twenty years this ideal has dominated legal thought, and the ideal has been widely translated into legal action. Yet a look at almost any specific area of the judicial process will disclose that the noble ideal has consistently spawned results that can only be described as pandemoniac. For example, in criminal prosecutions we find as long as five months spent in the selection of a jury; the same murder charge tried five different times; the same issues of search and seizure reviewed over and over again, conceivably as many as twenty-six different times; prosecutions pending a decade or more; accusations routinely sidestepped by an accused who makes the legal machinery the target instead of his own conduct.

Why, we ask ourselves, have such diligent attempts to create a perfect legal order fared so poorly in practice? If a physicist or engineer or musician or cabinetmaker seeks perfection in his work, he may not achieve it, but in making the effort he will elevate his standards and improve the quality of his performance. Should not the same hold true in the operation of a legal order?

The answer, perhaps, may be found in the reason given by Macaulay for the failure of ambitious governments: the government that attempts more than it ought ends up doing less that it should. The contradiction of more producing less in the quest for perfection derives from the nature of perfection as complete conformity to an absolute standard of excellence. Perfection itself carries little meaning until we ask the question—perfection for what? And in pondering the answer we come to realize that perfection implies limitation and selectivity, that the ideal of perfection implies movement in a limited and selective direction. The law cannot be both infinitely just and infinitely merciful; nor can it achieve both perfect form and perfect substance. These limitations were well understood in the past. But today's dominant legal theorists, impatient with selective goals, with limited objectives, and with human fallibility, have embarked on a quest for perfection in all aspects of the social order, and, in particular, perfection in legal procedure.

There is nothing esoteric or mystical about legal procedure. Essentially, it amounts to nothing more than a compilation of means and techniques that have proved effective over the years in handling legal business. Why then, the reader may ask, cannot the subject of legal procedure be left to the lawyers to set to rights at their leisure? A short answer is that more is involved than legal mechanics, for the ubiquitous and expansive nature of modern legal procedure makes it a serviceable vehicle with which to achieve continuing and effective control over modern social policy.

Excerpts from a book of the same title published by Basic Books in 1974.

Today's use of legal procedure is no longer limited to adjudication of private controversies and interpretation of traditional legal rights, but extends to the resolution of almost all public issues of the day, which can be brought to life as legal causes and then made to run the gantlet of legal procedure. The process is not only feasible for issues traditionally considered juridical, such as abortion and capital punishment, but it can be brought to bear on issues of general government policy, such as operation of welfare laws, development of natural resources, use of public property, expenditure of public money, management of the armed forces—indeed almost any public policy a partisan desires to challenge. If the legal perfectionists find themselves unable to persuade a majority of voters or legislators of the verity of their particular cause, they may seek to paralyze traffic by an accusation of imperfect procedure. Once in control of a system or function by means of the device of legal procedure, they can then direct the course of subsequent events by imposing impossible procedural demands, in much the same fashion that the king in *Rumpelstiltskin* directed the miller's daughter to spin straw into gold. Since the accordionlike nature of legal procedure can be expanded to cover practically any matter of substance, the perfectionists have acquired a powerful weapon to shape policy and effect change in society along lines of their desire.

Current manifestations of this perfectionist technique are found in every sphere of social activity. In most areas we can muddle along with the consequences of legal perfectionism—welfare moneys can be wasted, construction of new power plants indefinitely delayed, issuance of franchises and licenses postponed, construction of highways and drainage of swamps halted, service in the armed forces avoided—and catastrophe will not engulf the activity involved. But in the field of criminal law, where the impact of this phenomenon has been greatest and where the concept of effective procedure has been almost completely displaced by the ideal of perfect procedure, the consequences have been disastrous.

What happens to criminal procedure when we begin to think in terms of absolutes, in terms of perfect procedure? Perfect procedure requires a perfect tribunal, which in turn demands perfection in court and counsel. Therefore, every criminal cause must be prosecuted by a Thomas Dewey, defended by a James Otis, and tried before a John Marshall. The jury must never have heard of the cause, the parties, the witnesses, and the issues, and must be wholly free from opinions or preconceptions about any proposition of law or fact likely to arise in the trial. The parties must be free to present their contentions to the fullest extent and to best advantage. Each legal and factual contention of possible relevancy must be explored in depth, both exhaustively and repetitively, in order to eliminate the possibility of error from the proceeding. If the trial does not satisfy each of these requirements, then the cause must be tried again.

Yet the elements of effective procedure are interrelated, and perfection in one aspect of procedure can only be achieved at the expense of other elements that go into procedure:

Ideally, perfect procedure encompasses the right to be heard to best advantage by a tribunal wholly indifferent to every aspect of the cause; practically, an unlimited insistence on a perfectly impartial tribunal, unaffected by any preconception on any aspect of the cause, amounts to a denial of the competency of any tribunal whatever to sit on the cause.

Ideally, a party should be given an unlimited right to develop his side of the cause; practically, an unlimited opportunity to be heard may foreclose the tribunal from rendering a timely decision.

Ideally, all evidence and witnesses presented to the tribunal should be of unimpeachable integrity as to content, source, and impartiality; practically, society must often rely on disreputable informers, for the strongest protection against organized thievery lies in the fact that thieves sell each other out.

Ideally, the correctness of the tribunal's result should be demonstrable; practically, demonstration of the correctness of any human activity always remains subject to the limitations of human frailty.

The quest for perfection in procedure is comparable to the experience of a man who blows up an inner tube and tries to stuff it into a tire too small for the tube. Just as he gets one side in place, out pops the other. In our pursuit of the will-o'-the-wisp of perfectibility, we necessarily neglect other elements of an effective procedure, notably the resolution of controversies within a reasonable time, at a reasonable cost, with reasonable uniformity, and under settled rules of law.

And here we confirm Macaulay's observation that a system which attempts too much achieves too little. For when we aim at perfect procedure, we impair the capacity of the legal order to achieve the basic values for which it was created, that is, to settle disputes promptly and peaceably, to restrain the strong, to protect the weak, and to conform the conduct of all to settled rules of law. If criminal procedure is unable promptly to convict the guilty and promptly to acquit the innocent of the specific accusations against them, and to do it in a manner that retains public confidence in the accuracy of its results, the deterrent effect of swift and certain punishment is lost, the feeling of just retribution disappears, and belief in the efficacy of the system of justice declines. An overload of court machinery with retrials, rehearings, and collateral proceedings gives us an unworkable system unable to function, like the ostrich that has wings but can't fly, or like the beautiful mockup of the SST that never got off the ground.

The ideal of perfectibility denies the existence of price and cost, and, at least in criminal procedure, relies heavily on the argument that no sacrifice is too great when human life or liberty is involved. Better that a hundred guilty men should go free than that one innocent man be convicted, is the rallying cry of the perfectionists. But this slogan gets us no further than does its obverse—better that one life should be sacrificed that a hundred others may be saved. The plain fact of the matter is that in human affairs we balance the cost of human life against other considerations in almost everything we do, and it is incorrect to say that the sacrifice of human life to attain particular ends is never justified. The real question is one of relative values—is the end in view worth the price it is likely to cost?

But, the perfectionists argue, no sacrifice is too great to assure that in a given case perfect justice will be done. Ignored is the sacrifice of the legal order itself and of the life, liberty, and property of those that the legal order is designated to protect. Ignored also is the necessity that the procedure we follow lend substance to the moral and ethical idea that those who take up the sword shall perish by the sword.

Each time the criminal process is thwarted by a technicality that does not bear on the innocence or guilt of the accused, we trumpet abroad the notion of injustice; and each time a patently guilty person is released, some damage is done to the general sense of justice. Most unfortunate, the perfectionists reply, but we must strive for perfect procedure no matter what the consequences. Repeated enough times the slogan gains currency and becomes dogma. In this way the ideal of justice is transformed into an ideal of correct procedure.

What has occurred during the past twenty years is that the legal theorists in their zeal for perfection in procedure have become prisoners of their own concepts, and in their preoccupation with techniques they have lost sight of the ultimate objectives of a legal system. This Holy Grail of perfectibility has been sought before, and with equally disastrous results. Gibbon tells us that under Roman law at the time of Justinian the expense of the pursuit of law sometimes exceeded the value of the prize, and the fairest rights were abandoned by the poverty or prudence of the claimants.[9] Holdsworth tells us that in nineteenth century England the equity rules aimed at doing complete justice regardless of any other consideration.[10] In describing the collapse of the system he said: "But we have seen that the delays need not have been so great if the ideal of completeness had not been so high. By aiming at perfection the equity procedure precluded itself from attaining the more possible, if more mundane, ideal of substantial justice."

Trial judges, court clerks, and court reporters procrastinate. Consider a routine example, *People* v. *Grant*.[9] Grant was sentenced to prison for robbery on 4 May 1969. On the day of his sentence he filed a notice of appeal. Although Rule 35 of California Rules of Court requires that the record of the trial be filed in the appellate court within thirty days, the record was not filed until 22 September 1969, a delay four times as long as that contemplated by the rule. The reporter's transcript was of average length (260 pages), and no reason for the delay was apparent other than procrastination.

Lawyers procrastinate. Procrastination is the occupational disease of the legal profession. Consider the further progress of *People* v. *Grant* after the record was filed with the court of appeal. The briefing of this appeal, instead of the eighty days contemplated by the California Rules of Court,[10] took fourteen months. Meanwhile Grant continued to languish in state prison.

Such lawyer procrastination is ordinary, not extraordinary.

Judges procrastinate. As erstwhile lawyers, judges bring habits of procrastination with them when they assume the bench. The California Constitution requires a cause to be decided within ninety days of its submission, and a judge who does not comply with this provision is not entitled to collect his salary.[11] But the effect of the requirement may be avoided by resubmission of a cause or by delayed submission of a cause.

In particular cases judicial procrastination can be profligate. In *Castro* v. *Superior Court* petitioners were charged in March 1968 with offenses arising out of demonstrations at public high schools.[12] In January 1969 petitioners applied to the court of appeal for an extraordinary writ to prevent the superior court from proceeding to trial on their indictment. Eighteen months later in July 1970 the court of appeal decided the petition for the writ, holding invalid and insufficient on constitutional grounds some but not all the charges brought against petitioners. The court itself conceded:

> "As a result of our decision in this writ proceeding and the passage of time, several of the petitioners who, according to the evidence presented to the grand jury, clearly committed or aided and abetted in the commission of several misdemeanors, may never be tried for those crimes. We share the view of anyone who thinks that this is a most undesirable result." (9 Cal. App. 3d 675, at p. 677)

Judicial procrastination is not limited to California. In *Harrison* v. *United States* defendant's appeal from his second conviction was argued in the federal appellate court in the District of Columbia in December 1963. The cause was reargued in June 1965, and remained under submission in the court of appeals until December 1965, a period of two years between initial argument and decision.[13]

Excuses for failure to meet legal deadlines tend to be sympathetically received by the courts. Although under the California Rules of Court a notice of a criminal appeal must be filed within sixty days of the judgment,[14] acceptance of delay of a year or more is common.[15] On one occasion the sixty-day period to file an appeal was extended to almost ten years. This occurred in *People* v. *Flores*, where defendant was convicted in 1961 of participation in an armed robbery.[16] In 1970 the California Supreme Court granted his petition for delayed appeal on the ground that he had not learned the English language until after he had spent some years in prison and therefore had not known of his right to appeal. On his delayed appeal his conviction was affirmed in March 1971.

When all these delays are put together in one case the legal process, like Joshua's sun, appears to stand still. In *People* v. *Dobson*, a routine assault and battery, two-and-one-half years elapsed between arrest of the defendant and affirmance of his conviction on appeal.[17] At no stage did the proceedings conform to time schedules established by statute and by rules of court. It must be emphasized that this was a routine representative case, in no way extraordinary.

DELAY ON APPEAL

Warren E. Burger*

The public is tired of the spectacle of appeals tha lag for years ...

... appeals move at a glacial pace because we are using the "cracker barrel" methods ... to process vastly expanded volumes of cases.

* Chief Justice of the United States; reproduced from The State of The Federal Judiciary, 57 A.B.A.J. 855, 859 (1971)

MEDIAN TIME INTERVALS IN FEDERAL CRIMINAL APPEALS

Administrative Office of the U.S. Courts*

Table B 4

U. S. Courts of Appeals
Median Time Intervals in Cases Terminated after Hearing or Submission
During the Fiscal Year Ended June 30, 1972, by Circuit

Circuit	From filing of complete record to final disposition		From filing of complete record to filing last brief		From filing last brief to hearing or submission		From hearing or submission to final disposition	
	Cases	Interval (months)	Cases	Interval (months)	Cases	Interval (months)	Cases	Interval (months)
Total	9,779	6.4	8,575	2.7	8,575	1.8	9,779	1.1
District of Columbia	601	11.7	587	4.7	587	4.4	601	1.0
First	223	5.1	196	2.8	196	0.4	223	1.2
Second	958	4.8	936	2.9	936	0.4	958	0.7
Third	723	8.9	685	3.0	685	3.3	723	0.7
Fourth	1,168	5.8	496	2.9	496	1.1	1,168	1.9
Fifth	2,092	4.9	1,955	2.0	1,955	1.8	2,092	0.7
Sixth	745	7.0	746	2.9	746	2.1	745	1.2
Seventh	630	11.1	627	4.5	627	2.6	630	2.2
Eighth	556	4.5	509	1.6	509	1.3	556	1.2
Ninth	1,347	7.3	1,344	2.7	1,344	2.1	1,347	1.2
Tenth	736	6.3	494	3.0	494	1.8	736	1.3

Table B 5

U. S. Courts of Appeals
Median Time Intervals in Civil and Criminal Cases Terminated After Hearing or Submission
During the Fiscal Year ended June 30, 1973, by Circuit

Circuit	From Filing Notice of Appeal in Lower Court to Filing of Complete Record in Appellate Court				From Docketing in Lower Court to Final Disposition in Appellate Court			
	Civil		Criminal		Civil		Criminal	
	Cases	Interval (months)	Cases	Interval (months)	Cases	Interval (months)	Cases	Interval (months)
Total	5,728	1.3	3,104	1.7	5,728	19.0	3,104	15.8
District of Columbia	237	1.2	282	1.8	237	26.1	282	22.5
First	138	0.4	60	0.2	138	15.4	60	17.2
Second	420	1.2	434	1.3	420	17.3	434	15.8
Third	415	1.3	220	1.3	415	24.1	220	19.9
Fourth	889	0.9	238	1.4	889	14.0	238	13.3
Fifth	1,445	1.3	484	1.5	1,445	18.6	484	13.6
Sixth	459	1.3	205	2.7	459	18.3	205	16.5
Seventh	354	1.3	207	2.3	354	21.8	207	22.3
Eighth	327	2.5	162	2.5	327	19.7	162	13.2
Ninth	536	2.0	646	2.3	536	26.4	646	13.5
Tenth	508	1.4	166	2.3	508	14.9	166	12.8

*From 1973 Annual Report of the Director.

THE RIGHT TO A SPEEDY DISPOSITION

James D. Hopkins*

We have rightfully admitted the need for a speedy trial in a criminal case as the Constitution requires.[36] The need for a speedy termination of the appellate process has not received similar recognition. Yet the values both to the individual and to the community are nearly the same. We must recognize that for the individual there is greater urgency that his innocence be proclaimed by the verdict of the jury in rapid order, after accusation, and most certainly greater urgency for the community that the guilty be swiftly punished. It is highly important, however, that a guilty verdict obtained through error should be rectified quickly by appeal. The justice to the individual is evident, and though it may be less obvious, the reversal is advantageous to the community, for it attests to the integrity of the legal system.

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* Justice, New York Supreme Court, Appellate Division, Second Department; reproduced from Small Sparks From A Low Fire: Some Reflections on The Appellate Process, 38 BROOKLYN L.REV. 551 (1972).

FOR A SWIFTER CRIMINAL APPEAL - TO PROTECT THE PUBLIC AS WELL AS THE ACCUSED

Albert V. Bryan*

My proposal, predictably controversial, is that twenty-five (25) days—and not the prevalent six (6) months—ought to be sufficient time to ready a Federal criminal appeal for submission to the reviewing court. I would count it flattering indeed, if the ways and means I suggest may be disturbing and galvanize discussion.

The urgency for expedition of the criminal appeal is the protection of not only the defendant but the public as well. After sentence the *accused* though on bail may suffer severely from his change of status in society while awaiting the result of his appeal, but the *public* may in the same interval also suffer a threat to its peace and good order. These considerations raise a conflict between the individual's right of appeal with bail and the public's right in the interim to assurance of security. The only resolution of these competing privileges appears to be dispatch of the review process—at least the nearest approach to an accommodation of the two.

Ordinarily, and more frequently now when hourly there is violence on the streets, how often does the layman upon reading the account of a front page criminal trial and hoping for a just outcome, find at the end the words "An appeal has been noted"? What is the citizen's usual response? His or her interest immediately lags and soon dies. For the end is no longer in sight; the final determination of guilt or innocence passes behind an opaque curtain. The reader muses, "This case will be tied up in the courts for months."

The observation is true, regrettably, and more regrettably disappointment in the suspense is merely a surface distress. Though perhaps unconsidered, there is a much more profound reason to regret the delay. The convicted person whether or not his appeal succeeds can be hurt by the passage of time. If not guilty, a quick pronouncement is rightly his due. But the public, too, is subjected and exposed by the delay to the possible menace of continued criminal activity. An accused is, of course, not a convict until the appeal process has ended and gone against him. But the break between the trial and the appeal creates an incongruous status for the accused and a natural apprehensiveness in the public. These problems may not be wholly removed but they can be greatly mitigated by shortening the delay.

To begin with, an immediate question is whether the defendant should be kept in custody pending appeal. If he has been released on bond during trial, the trial judge is confronted with the issue of whether or not the defendant should continue free. One of the factors in this decision is how long will it be before completion of the appeal.

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* Senior Circuit Judge, United States Court of Appeals for the Fourth Circuit. Reproduced from 25 W.& L. L.REV. 175 (1968)

Additionally, the presumption of innocence, if theoretically still obtaining, has certainly been devalued after a jury of his peers and the court have adjudged him guilty beyond a reasonable doubt. His ability to maintain himself and his family pending appeal will be impaired; his prospect of procuring or retaining employment while his status is unresolved is doubtful. For instance, if his previous work has included the collection or retention of money or has been a position of trust, he may be suspended even before trial. These possible consequences must be considered in the knowledge that not all persons tried for crime are dangerous desperadoes without a sense of responsibility to their families or their communities. Many of them entertain a conscientious desire to clear their names, or to begin again to reclaim their place in society if their appeal fails. For example, an income tax evader may have been led into his transgression by an overweening zeal to advance the style of living of his family or the education of his children. He does not believe himself guilty, or if so, that circumstances tempered the turpitude of his deportment.

On the other hand, the public has a very sensitive concern. After a conviction, certainly of some violent or traumatic offense, like robbery or burglary, the public naturally fears or is apprehensive of the perpetrator while he is at liberty on bond. Indeed, a victim of robbery may each day face on the street his recent robber who is on bail pending appeal from conviction of assaulting him at gun- or knife-point. The victim has in the defendant's mind caused his arrest, incarceration and conviction, and each recognizes the other. Reprisals are reasonably to be anticipated. Imagine meeting your attacker or burglar constantly after his crime! That is what can happen, and at least the period for these possibilities should be lessened so far as may be legally done.

Further, all criminals are not of so obvious a threat. There are bribers of jurors or public employees; narcotic "pushers"; forgers of checks, notes and credit cards; there are counterfeiters and embezzlers; there are car thieves; and there are pilferers of a lighter touch who take one's driver's license, shopping cards and auto registrations from accessible pocketbooks, wallets and car glove compartments. Until their convictions are final, these violent or soft operators may continue their depredations. A bail bond is but a slight restraint, and these plunderers can rarely be imprisoned before the ultimate determination of guilt.

There is no infamy in appeal. It is a privilege never to be thwarted in the slightest degree. Nor should bail be denied, for the Eighth Amendment of the Constitution vouches its availability. In the United States, trial and appeal today almost merge as one. Envisioning a trial, we at once contemplate an appeal with bail. Therefore, when the Sixth Amendment assures an accused a "speedy and public trial," it is only fair to apply this commandment to the appeal, although technically it may not be a step within the demand of Constitutional due process. It is equally fair, however, to include the public within the assurance, thus awarding it an expedited trial-appeal. The public is a party to every criminal prosecution, and it has been authoritatively declared entitled to the benefit of the companion requirement of a public trial. A speedy appeal should be no less an entitlement of the public.

To repeat, between these two just but opposing considerations—the hardships sufferable by a pre-appeal convict and, on the other side, the hazard to public safety of appellants enlarged on bail—seemingly the only reconcilement is to cut sharply the intermission between the trial and the appeal's submission.

NEW HINGES FOR OLD DOORS

Edward A. Tamm*

As judges we move forward too slowly, we reform too little, we discard too little and we change too little. Unfortunately, we seem to prefer old error rather than new truth. Yet our very belief in the merit of the judicial system requires us to search out and recognize areas in which the effectiveness of our procedures may be improved and enhanced. We should place high priority on improvements in our methods and our judicial machinery. The noblest legal principles will be sterile and meaningless if they cannot be made to work.

Unfortunately, as lawyers, and as judges, we favor progress but we are opposed to change. Yet in an era of ever-increasing case loads and mounting delinquencies, it is better to live one day as a lion than a hundred years as a sheep. The basic problem is not that judges, for the most part, fail to work hard enough, but rather that their labor is dissipated and wasted by outmoded and inefficient procedures. Problems of congestion and delay cannot be solved on a crisis basis by emergency tinkering, but only with fundamental reforms.

Chief Justice Burger has challenged the comfortable assumption that "while our adversary system may be inefficient, it is still the best that could have been devised," with the sobering assessment that "in many places it is breaking down. It is not working." Former Chief Justice Warren concluded "that our situation in the judiciary is not unlike that confronting General Marshall, who in testifying in support of the Marshall Plan said, 'The patient is sinking while the doctors deliberate.'" We judges must give up our efforts to resist the Twentieth Century. Let us look at some specifics.

* * * *

Criminal Appeals: Street crime would be substantially diminished if the entire criminal process from arrest to appellate disposition were completed in 60 days. I have recommended this limit as a standard for the American Bar Association to guide all judges. An appeal from criminal cases should be heard within one week from the jury verdict. In most criminal cases the appeal can be heard without briefs, and a majority of our appellate rulings in criminal cases should be oral from the bench, rather than by a tardy written opinion. I shall have some further observations upon opinion writing.

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*Circuit Judge, United States Court of Appeals for the District of Columbia; remarks included in a speech at Reno, Nevada in 1971 and first published in JUDGES' JOURNAL in 1972.

TOWARD A MORE EFFICIENT FEDERAL APPEALS SYSTEM

Griffin B. Bell*

The pace of the federal appellate process can only be described as leisurely. The Federal Rules of Appellate Procedure permit this. Prevailing attitudes and practices also contribute.

The fact is that courts can do better. The efficiency of the appeals system can be substantially improved, even assuming no change in the rules. This improvement will follow from changes in attitude and through innovation.

Improvement is already taking place in several of the federal courts of appeals. For example, in the period 1968-70, the fifth circuit adopted new policies and procedures to this end. The District of Columbia, second, fourth, sixth, and tenth circuits are also using valuable new methods. The sum of the experience and the results which are accruing from these changes in approach should redound to the benefit of the entire federal appellate court system.

... a goal of disposition within a median time of six months between notice of appeal and final disposition is feasible. It is a goal which is possible of accomplishment through the employment of some or all of the innovative means which have been and are being developed. The goal could clearly be attained if some of the leisure in the times now allowed under the Federal Rules of Appellate Procedure could be removed.[23]

A median time of six months, with provision under case expediting procedures for emergency hearing in those cases warranting such treatment, would constitute the federal courts of appeals as an acceptable appellate system.

23. In this connection, Rule 31(a), Fed. R. App. P., was amended by the Supreme Court on March 30, 1970, effective July 1, 1970, to add the following provision:

". . . If a court of appeals is prepared to consider cases on the merits promptly after briefs are filed, and its practice is to do so, it may shorten the periods prescribed above for serving and filing briefs, either by rule for all cases or for classes of cases, or by order for specific cases."

This will enable courts with current calendars to reduce the times allowed for filing briefs under Rule 31(a) by local rule

* Circuit Judge, United States Court of Appeals for the Fifth Circuit; reproduced from 54 JUDICATURE 237 (1971)

REPORT ON COURTS: DISPOSITIONAL TIME IN REVIEWING COURT*

In a reviewing court functioning under flexible procedures with a professional staff, a criminal case should be ready for initial action within 30 days after the imposition of sentence. Cases containing only insubstantial issues should be finally disposed of within 60 days of imposition of sentence. Cases presenting substantial issues should be finally disposed of within 90 days after imposition of sentence.

Commentary

American appellate courts typically take months to dispose of appeals. It is not uncommon for a year or more to elapse from conviction to appellate disposition. For example, a detailed study of all criminal cases processed in one of the California courts of appeals during 1970 showed that the average dispositional time was 16 months. For a variety of reasons, a State appellate court rarely disposes of criminal appeals in less than 6 months. These are unacceptably long periods of time. They result from the courts' efforts to adjudicate ever-growing caseloads under traditional procedures that leave the perfecting of the appeal to the parties and provide for a sequence of written briefs from both sides, oral argument, and full-length written opinions in almost all cases. Such protracted procedures often are not necessary for a meaningful review.

A growing body of opinion holds that the time can and should be drastically shortened. Judge Albert V. Bryan has suggested procedures designed to place a criminal appeal before the appellate court within 25 days. Judge Shirley Hufstedler has proposed a review arrangement that would allow for hearing and disposition within 30 days of trial. Judge Edward Tamm has said that a criminal appeal should be heard within 7 days of verdict. As those judges recognize, none of these proposed time schedules could be complied with under traditional appellate procedures. The flexible procedures and professional staff proposed in these standards, which are similar in various respects to some of the ideas advanced by those judges, make a much shorter timetable feasible.

The imposition of sentence is the most realistic point from which to clock the review process. It is often not until sentence is imposed that a defendant decides whether to seek review. But there is no need to allow more than 10 days for a defendant to decide whether to ask for review. This is the time prescribed in the Federal Rules of Appellate Procedure, Rule 4(b). Under these standards new procedures can be devised to get the case quickly before the court so that it can receive at least initial staff attention in another 20 days. For example, a statement of points could be required from the defendant promptly. The trial court file could be sent forward immediately. By providing adequate court reporters and typists, or by utilizing currently feasible computer innovations, the reviewing court could be furnished at the same time a complete transcript of the trial court proceedings. Thus, no later than 30 days from the sentence the reviewing court staff could give the case an initial study.

Further steps would be guided by the circumstances of the case and the nature of the defendant's contentions. Normally some time would be consumed in the kind of probing for latent issues discussed in Standards 6.2(3) and 6.3(3). In cases where no issues of substance are revealed either in the defendant's papers or as a result of staff probing, a recommended per curiam could be prepared by the staff, accompanied by an explanatory memorandum for the judges' use. The case could then be disposed of by the judges within another 30 days. Other cases would require more time for briefing, oral argument, or decisionmaking. But in any event, another 60 days —or a total of 90 days from sentence—is a reasonable period within which to conclude the litigation in the reviewing court, except in the most unusual cases.

* A recommendation of the National Advisory Commission on Criminal Justice Standards and Goals published in 1973 (Professor Daniel J. Meador, Reporter).

REPORT ON COURTS: FLEXIBLE REVIEW PROCEDURES*

The reviewing court should utilize procedures that are flexible and that can be tailored in each case by the staff and the judges to insure maximum fairness, expedition, and finality through a single review of the trial court proceeding.

4. Internal flexibility permitting the reviewing court to control written briefs and oral argument, including leeway to dispose of the case without oral argument or on oral argument without written briefs on some or all of the issues;

Commentary

American appellate practice currently operates under fixed, uniform rules. These rules prescribe definite times for such steps as the filing of the transcript and the filing of briefs by the parties; the length of oral argument also is fixed. Such rules usually apply to both civil and criminal appeals, and they apply regardless of whether the case is simple or complex or whether there are substantial issues. Cases that take months to work their way through the process could be disposed of, in many instances, in a fraction of the time because they contain either no issues of substance or only one or two relatively simple issues. This standard abandons such fixed rules for the various steps and leaves to the court, utilizing its staff as provided in Standard 6.2, the authority to tailor proceedings individually to the needs and complexities of each case. The principle here is that a case should consume the amount of time and attention that it deserves, but no more.

These standards contemplate distinctive procedures to be employed in reviewing criminal cases, procedures different from those in civil appeals. Special characteristics of criminal review justify this. The cases are relatively less complex than civil appeals. Criminal litigation is financed almost entirely out of public funds. There is an unusually strong public interest in expeditious disposition. A high percentage of the cases present no issues of substance. Moreover, the English experience in devising special procedures for criminal appeals has proven useful there. These standards do not contemplate specialized judges deciding only criminal cases; the review procedures are specialized, but the judges are not.

Flexible and distinctive procedures for criminal review are especially important in implementing the concept of unified review, under which provision must be made for receiving evidence outside the record and spotting issues not asserted by the defendant. There is an interrelationship between the flexible procedures provided for in this standard and the staff functions contemplated in Standard 6.2. Each is dependent on the other.

Subparagraph 4

To achieve maximum expedition of review without sacrificing fairness to the defendant, it is necessary for the review process to be free of fixed rules prescribing a uniform treatment for all cases. The assistance of a professional staff makes it easier for a reviewing court to tailor procedures to fit the cases. A defendant has no right to any particular review procedure, so long as he is given a full consideration and is not treated in an arbitrarily different fashion from other litigants in the same posture. A defendant, for example, has no right to present his contentions in writing instead of orally, or vice versa. His right extends only to submitting his contentions and the supporting information by some reasonable means to the reviewing court.

* A recommendation of the National Advisory Commission on Criminal Justice Standards and Goals published in 1973 (Professor Daniel J. Meador, Reporter)

CRIMINAL APPEALS - ENGLISH PRACTICES AND AMERICAN REFORM

Daniel J. Meador*

EXPEDITION AND DELAY IN THE ENGLISH APPELLATE PROCESS

Americans are curious about English appellate efficiency. The speed of the English process is legendary. But what is the reality? Quality is elusive and difficult to evaluate; but expedition and delay are susceptible at least to quantitative measurement, assuming adequate data are available.

The matter can be viewed in two ways. One is to look at the time consumed in each of the successive stages of the appellate process. This would reveal the degree of expedition with which cases progress step-by-step through the system--at least in terms of average time or of a typical range of time consumed at each step. The other is to look at the total flow of cases over a given period--for example, a year--to ascertain how many cases are filed, how many are disposed of, and what backlogs, if any, accumulate from year to year. The English process should be examined in both of these ways in order to get a reasonably complete picture of how expeditiously it functions in comparison with American systems of criminal appeals.

Time Consumed in Successive Stages. The sequence of key steps in the typical English criminal appeal, from the point of conviction in the trial court through the single judge's action on the appellate application, is as follows:

1. Defendant files application for leave to appeal.
2. Registrar requests trial court to furnish trial documents.
3. Registrar orders transcript from shorthand writer.
4. Registrar receives trial documents.
5. Registrar receives transcript.
6. Registrar refers case to single judge for action.
7. Single judge grants or refuses leave to appeal.

Though the Registrar's office maintains a sizeable quantity of statistics about the volume and nature of the work of CACD, complete data on time lapses between these steps are not assembled. To obtain such at present it would be necessary to examine the files in every case, an enormous task which has not yet been undertaken by anyone. Thus it is not possible here to give a solidly accurate set of figures. However, from samples and random information and from opinion among the Registrar's staff a rough picture of the time patterns can be derived.

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*Monroe Professor of Law, University of Virginia. Reproduced from a book of the same title published by the University of Virginia Press in 1973.

The estimated average time consumed from conviction to action by the single judge runs thus:

From conviction to application	28 days
From application to transcript	58 days
From transcript to single-judge action	10 days
Total	96 days

The validity of a figure produced by adding averages is questionable. But in the absence of complete data it may be at least suggestive. A study of 103 cases terminated in July, 1970, by action of the single judge, showed that over half took more than four months from application to termination.[4] The Registrar, however, thinks that the process has been accelerated in more recent months. This view is substantiated by a sampling of over 100 cases terminated in December, 1971, by the single judge's refusal of leave. In those cases the average elapsed time from the application for leave to the single judge's action was approximately 49 days. If 28 days be added for the time from conviction to application, the total comes to 77 days--or almost 2 1/2 months.[5] This is only through the single judge's action; if leave is granted of course more time will be taken for the hearing.

In the United States, the appeal systems most closely comparable to the English system are those in Virginia and West Virginia. Those are the only states in which all criminal appeals are structured on a discretionary, leave-granting basis.[7] In Virginia--used here for comparative purposes--a defendant who wishes to obtain appellate review of his conviction first files a notice of appeal, and he then must file a petition for writ of error in the state supreme court. He may, and usually does, submit a brief with the petition. This brief deals with the merits; it is essentially the same as the document filed later as the appellant's brief if the petition is granted. The petition may be granted by a single justice or by the court. If the petition is granted, designated portions of the record are printed, written briefs are filed, and the appeal is set for oral argument before the full court of seven justices. A single justice cannot finally refuse a petition. A single justice cannot finally refuse a petition. Though the court's internal

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[4]Zander, Legal Advice and Criminal Appeals: A Survey of Prisoners, Prisons, and Lawyers, [1972] Crim.L.R. 132, 167-68.

[5]These figures include both sentence and conviction appeals. Sentence appeals are typically disposed of more expeditiously than conviction appeals.

[7]Virginia appellate procedure is governed by Rules 5:1 through 5:15 of the Rules of the Supreme Court of Virginia (following Title 8 of the Virginia Code, 1950). West Virginia appellate practice is governed by W.Va. Code, Secs. 58-5-1, 58-5-6, 59-5-9, 58-5-10 and by Rule II of the Rules of Practice of the West Virginia Supreme Court, W.Va. Code Appendix.

practice is not clearly known, apparently a refusal--in effect an affirmance of the conviction--must be agreed to by two or more justices in order to be final. If the appellant so desires, a transcript of the entire trial proceeding is typed and forwarded to the appellate court for use in passing upon the petition for writ of error.[8]

To provide suggestive comparative data on expedition, 30 criminal cases brought to the Virginia Supreme Court during 1970 were randomly selected as a sample.[9] The average time lapses, in days, in these cases were as follows:

From conviction to notice of appeal	70
From conviction to petition for writ of error[10]	230
From petition for writ of error to state's brief in opposition	33
From brief in opposition to court's grant or refusal of petition	96

If one wishes to add averages, the total here for the time from conviction to the court's action on the petition is 359 days.

As is typical in American appellate procedures, the times within which these various steps must be taken are fixed by rules. The maximum time, under the Virginia rules, which should elapse from final judgment of conviction to the point where the petition for writ of error is ready for appellate court action is 134 days. Yet these figures (using the total of the averages of each stage) show an average of 263 days being consumed before the petition is ready for the court's action--129 days (4 months) beyond the date where the petition should in theory be ready for action. Either the rules were not complied with or the court freely granted extensions of time.

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[8]For a detailed discussion of the Virginia Supreme Court's work, see Lilly and Scalia, Appellate Justice: A Crisis in Virginia?, 57 Va.L.Rev. 3 (1971).

[9]The docket numbers of all criminal cases in which petitions were filed from Jan. 1 to Dec. 31, 1970, were put into a computer programmed to produce random numbers. The first 30 of those random numbers were taken as the sample cases. The data were then collected from the files on each of those cases in the clerk's office.

[10]This was also the average time from conviction to the filing of the transcript in the appellate court. Common practice appears to be that defendants' lawyers file petitions for writs of error and trial transcripts at the same time.

A closer look reveals that appellant's delay in filing the petition for writ of error is responsible for much of this protracted time. Under the Virginia rules, the convicted defendant is required to file his petition in the state supreme court within 4 months from judgment (120 days in round figures). But as seen above, the average time lapse in this step is 230 days--nearly twice the officially specified time. This excessive delay could be due to delay in the reporter's preparation of the typed transcript, which normally includes the entire trial court proceedings. The data show that the transcript and the petition are typically filed at the same time. This apparently results from a practice in the bar of awaiting the transcript before preparing the petition. Given this practice, the date of filing the petition will be determined by the reporter's completion of the transcript. On the other hand, the delay could result from a peculiar Virginia practice whereby trial judges often do not enter an appealable judgment until a new trial motion is disposed of; that may be weeks after the conclusion of the trial court proceedings.

In any event, if these figures reflect reality in the Virginia leave-granting process, the Virginia procedure takes approximately four times as long to function as the English leave-granting procedure.[11]

Three features of the Virginia procedure probably account for much of this comparative delay. First, the defendant is allowed four months in which to file his petition, whereas in England the counterpart step--filing the application for leave to appeal--must be taken within 28 days (the only time limitation fixed by law in the English appellate process). However, since the Virginia transcript is being prepared during this four-month period, a portion of this time may be comparable to that consumed in England in assembling the papers after the application is received by the Registrar. Second, in Virginia the defendant has an option to order a complete transcript of the trial proceedings (whether or not it is really essential) and he usually does just that. The court, unlike its English counterpart, has no control over transcript contents. Whatever length of transcript the defendant orders must be typed before the petition is ready for appellate consideration. More than that, lawyers generally think that the transcript must be typed before the petition can even be prepared. Third, the petition itself is often in effect a full-length brief for appellant, and this requires time to prepare. Beyond these three features, it should be mentioned also that, while the Virginia court has a staff attorney who assists with criminal appeals, there is nothing comparable to the comprehensive staff management provided by the English Registrar.[12]

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[11]Persons familiar with the Virginia court's work have suggested that the process has been accelerated somewhat since the 1970 cases used as the source of these data. But more recent, comparable figures are not presently available.

[12]Under the Appellate Justice Project of the National Center for State Courts, a professional staff was set up in 1972 in the Supreme Court of Virginia. Staff work and the new procedures which flow from it might substantially change the time patterns in that court.

Consider now the additional time which is consumed in the appellate process beyond the point where the court grants leave to appeal. In the English court the figures of 2 1/2 or 3 months given earlier cover only the elapsed time from the conviction through the action of the single judge. Where the single judge refuses leave, added time may still be taken in the approximately 35 to 40% of the cases in which defendants can be expected to renew their applications, as earlier figures shoed. Defendants have 14 days within which to take that step. Those renewed applications will then be referred to two judges for action. From one to three weeks usually elapse before a ruling is made. If the application is again refused, the case is terminated. If it is granted, the appeal is set for a hearing. Thus a renewal will extend the dispositional time by something like a month at a minimum.

Where leave to appeal is granted, the time lapse from that point to the date the hearing is actually held is typically from one to two months. There is no clear explanation for that delay other than the large volume of cases. Normally the date of the hearing is also the date of final termination of the case. Thus four to six months is a common length of time consumed in the disposition of appeals heard on their merits by the full court.[13]

In the English Court of Appeal approximately six months seem to be an average length of time from conviction to appellate disposition, where leave to appeal is granted. In Virginia the overall time in these sample cases, for the comparable stage of the appeal, was over three times as long. Indeed, an average of a year's lapse came between the granting of the petition (leave to appeal) and the appellate decision. It seems clear, whatever the reason, that if the data from the 1970 cases are representative, the "discretionary" approach to appeals does not operate to expedite appeals in Virginia.

Features in the Virginia procedures, after grant of the petition, not found in the English system, which appear to contribute substantially to delay are the following: (1) the requirement that the record be printed, (2) the time allowed for the filing of written briefs, and (3) the time taken by the court following oral argument to decide the appeal and to prepare a written opinion before announcing the decision. The absence of these features permits the English appeals process to move with relative rapidity.

Expedition and delay in the English and Virginia leave-granting systems may be compared briefly with time consumed in systems where every appeal comes as a matter of right, and there is no leave-granting mechanism. The Appellate Division of the Superior Court of New Jersey

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[13]In a sample of 50 cases disposed of by the full court in December, 1971, either as appeals or as applications determined by the full court, the average time which elapsed from application for leave to appeal to final disposition was 26 weeks, or approximately 6 1/2 months.

is an example.[17] Based on data from 30 randomly selected cases docketed in that court in 1970 the average number of days elapsing between the key steps was as follows:[18]

From sentence to notice of appeal	68
From notice of appeal to appellant's brief	160
From appellant's brief to appellee's brief	60
From appellee's brief to oral argument	119
From oral argument to decision	22

The average total time which elapsed from sentence to appellate decision was 409 days--or approximately 13 1/2 months. According to official statistics based on all appeals disposed of by this court in 1970-71, the average time elapsed from the taking of the appeal to the appellate decision was 12.1 months.[19] These periods are approximately twice that of the overall English time, but substantially less than the Virginia time.

The California Court of Appeal is an intermediate appellate court with criminal appeal jurisdiction similar to the New Jersey Appellate Division. However, the California court is divided into district benches, each of which exercises appellate jurisdiction within a defined geographical region. A study of 253 criminal appeals processed in 1970 in the First Appellate District revealed the average number of days elapsing between various points in those appeals to be as follows:[20]

From conviction to notice of appeal	0
From notice of appeal to filing of record in appellate court	99

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[17]This is an intermediate court of statewide jurisdiction. The Supreme Court of New Jersey has jurisdiction to review the Appellate Division's decisions; in some cases the review is obligatory, in others discretionary. Practice in both of these courts is pursuant to Part II of the Rules Governing the Courts of the State of New Jersey.

[18]The sample cases were randomly selected by a computer in the same fashion that the Virginia sample cases were selected. See note 9, supra. An average figure on time consumed in filing the transcript in the appellate court is not given because the information readily available on that point was not sufficient to allow a meaningful computation.

[19]Annual Report of the Administrative Director of the Courts, New Jersey, 1970-71, p. 16.

[20]The results of this study, from which the figures in the text are drawn, are reported in detail in Christian, Delay in Criminal Appeals: A Functional Analysis of One Court's Work, 23 Stan.L.Rev. 676 (1971).

Preparation of appellant's brief[21]	133
From appellant's brief to appellee's brief	100
From appellee's brief to decision	133

The average overall elapsed time from conviction to appellate decision was 498 days, over 16 months.

The striking aspect of the time consumption in all three of these American appellate courts is that at every stage in the appellate process the time was much longer--sometimes drastically longer--than that authorized by the court's governing rules.[22] In none of these courts, during the period from which the data were drawn, was there a central staff. Thus the progress of the appeal was left almost entirely to the pull and haul of the adversary process. That is the typical American system. If an opponent does not insist on compliance with the time limitations in the rules, a court is not apt to do so. Since the courts are without staffs, they really have no effective way of operating otherwise. There is no court official charged with affirmatively monitoring the appeal, and the judges themselves hardly have time for such a job. The judges could help by not granting extensions of time as freely as they do. Extensions of time constitute a significant factor in delay, but the largest single factor is the absence of central court control. The figures from these three courts make a compelling case for the concept of English staff management.

The English are, of course, not free of problems. Some are peculiar to that system; others they share with American appellate courts. The evidence suggests that expedition in adjudicating English criminal appeals is retarded chiefly by the following, though not necessarily in equal measure:

1. Extensions of time to file applications for leave to appeal;
2. Transcript preparation time;
3. Opportunities to submit new evidence to the appellate court and to call witnesses;
4. Time required for the appellate court to reach an appeal for hearing, once the appeal is ready for hearing.

By comparison, a summary list of the major factors producing delay in American criminal appeals would have to include at least the following:

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[21]For privately retained counsel this time was measured from the filing of the record. For appointed counsel this time was measured from the appointment. Id. at 692, note 109.

[22]The California appellate rules are described in the study cited in note 20, supra. For the Virginia rules and the New Jersey rules, see notes 7 and 17, supra.

1. New trial motions with appellate machinery suspended until disposition made of the motion in the trial court;
2. Transcript preparation time;
3. Brief writing time consumed by lawyers for both sides;
4. Opinion writing time, and reserved decision time, i.e., time spent by judges following oral argument in reaching decisions and in preparing written explanations of the decision.

Of the major delay-producing factors in the English and American appellate courts, there is only one common to both countries--transcript preparation time. This appears to be about equally plaguing, but it also appears to be nearing a solution.[23] Though precise comparisons are difficult, it is reasonably clear that the peculiarly American delay-producing procedures--new trial motions, written briefs, reserved decisions, and written opinions--consume more time collectively than the delay-producing procedures in the English system. The absence of these features, apart from anything else, should give the English Court of Appeal a substantial advantage in speedy adjudication over its American counterparts. Indeed an American might wonder why an English appeal is not disposed of in less than the six months which seems to be common, since the procedure there is free of the very substantial time-consuming procedures built into the American system.

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Comparing the workloads of CACD and the United States Courts of Appeals may be interesting if not especially helpful. During fiscal 1971 there were 12,788 appeals filed in all eleven Courts of Appeals throughout the United States. There were 97 authorized judgeships for those courts. Thus there was an approximate annual caseload of 130 appeals, civil and criminal, per judge. In CACD, prior to 1972, approximately 50 judges sat part-time on criminal appeals. With 8,280 applications filed in 1970, the load was approximately 165 per judge. In 1971, with 6,309 applications filed, the load was 126 per judge. These comparisons may be misleading for at least two reasons, both stemming from incomplete data. One is that the case filings are not adjusted to take out appeals abandoned or disposed of at an early stage with no significant judicial involvement. The other is that the civil appeal and trial loads of the English judges are not known. They add very substantially to their work burdens. The data would need refining in other respects even to approach meaningful comparisons.

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[23] See Short and Ruthberg, A Study of Court Reporting Systems, Vol. 1 (NBS Report 10 641, Dec. 1971). Computerized production of transcripts seems close to being perfected. However, the monetary costs will probably retard widespread utilization for some time. Though transcript preparation time may be drastically reduced, the problem of transcript bulk as it affects the judges' reading time must still be considered.

Nevertheless, putting together the annual productivity of CACD with the figures on time lapses between the various stages of appeals, one gets a picture of expedition and delay in that court which looks as good as any and better than most to be found in the United States. And if consideration is given to the fact that every one of the CACD judges is devoting a substantial portion of his time to other judicial affairs, the court's quantitative performance becomes one that any American court is apt to envy.

APPELLATE EXPERIMENTATION IN THE UNITED STATES

Much has been said in previous pages about efficiency and expedition. Mounting docket pressures, coupled with long-time failures to modernize court processes, have fed a growing search for more expeditious means of handling litigation. Concurrently, though, a view has developed that efficiency is at odds with due process.[1] The argument seems to be that a full and fair consideration of a case, with ample time for judgment, is not likely to be had through procedures that are "efficient." Surely that is not so.

On the contrary, due process today is threatened by the inefficiencies which afflict courts all across the country. Unless antiquated, wasteful, and cumbersome procedures are replaced by those more rational and expeditious, the courts may find themselves unable to afford deliberative, due process adjudication to any litigants. The machinery may simply grind down under the overload, while public respect for legal institutions erodes correspondingly. The legal order is not powerless to deal with this threat. The whole point of introducing more efficient and better structured appellate processes is to make it possible for the courts to have time for reflection and study and hence sound judgment on contested issues of substance, in the face of unprecedented caseloads. Efficiency is a means, not the end. Properly understood, it is a rubric for new ways in court procedures of eliminating steps which serve no purpose, of eliminating long lapses of time where nothing happens, of eliminating pages of written material which contribute nothing of value to the judge's deliberations, of relieving judges of chores which do not require judicial attention, and so on, all to the end of making it possible for the indispensable process of judgment to function on an informed basis and within some acceptable period of time. Thus, viewed in proper perspective, efficiency and expedition are the handmaidens of due process.

It is in that perspective that the English criminal appeals system has here been examined. In a quest for fresh ideas for American appellate reforms, answers have been sought primarily to two questions: (1) What are the procedures and machinery which enable the English Court of Appeal to adjudicate its extraordinarily large volume of criminal appeals? (2) Which, if any, features of that English system might arguably be tried in American courts to work improvements in our criminal appeals process?

Agenda for American Experimentation

While the adaptability of English procedures cannot be established on present data, this study has assembled an array of ideas for appellate experimentation. American adaptation of a particular idea may call for considerable variation from the precise English version. Imaginative

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[1] See, e.g., Bazelon, New Gods for Old: "Efficient" Courts in a Democratic Society, 46 N.Y.U.L.Rev. 653 (1971). For a more balanced discussion, see Greene, Court Reform: What Purpose?, 58 A.B.A.J. 247 (1972).

thought is needed. It is possible that some of the English devices might inspire a creative American court to develop an entirely novel way of handling appeals, different from that currently employed in any Anglo-American court.

To provide a convenient checklist of experimental possibilities, the distinctive features of the English criminal appeals system are summarized here in outline form.

English Criminal Appeals: The Key Features

I. The Appellate Court: Structure, Staff, and Procedures

- A. Numerous and non-specialized judges, sitting in shifting panels of three.
- B. Substantial involvement of trial judges.
- C. Central professional and administrative staff handling all cases.
- D. Procedures specially designed for criminal appeals, distinct from civil appeals procedures.
- E. Comprehensive official forms covering every step in the process.
- F. Blending of new trial motion, direct appeal, and post-conviction proceeding into a single review.

II. Transition from Trial to Appellate Court

- A. Initial paper filed by defendant in appellate court setting out grounds for reversing conviction.
- B. Affirmative professional staff management, at the appellate level, displacing the adversary process and operating without fixed rules in defining and assembling the record and in placing the case before the court for action.
- C. Transcript content determined through tailor-made staff decisions based on the grounds of appeal in each case; reliance on trial judge's summing up, dispensing with all or part of the transcript of the evidence.
- D. Immediate transfer of all issues to appellate court, whether or not revealed by the record; no new trial motion; no collateral attacks on convictions.

III. Decisional and Dispositional Techniques

- A. Initial single-judge screening to determine arguable cases to be heard by three-judge panel; opportunity in defendant to renew a refused application before two judges.
- B. Heavy reliance by screening judges on trial judge's summing up.
- C. No written briefs.
- D. Flexibility in obtaining additional information and in receiving evidence, including testimony of witnesses.

E. Blending of appellate review with new trial motion practice and post-conviction hearing.
F. Open conference nature of the hearing.
G. Reliance on oral presentation by counsel; no fixed time limit.
H. Prompt decision from the bench, announced orally with a statement of reasons.
I. Wide leeway allowed trial judge.
J. Review of case as a whole, as distinguished from review for error in the record.
K. Emphasis on doing justice, with no more law-making than inescapable.
L. The proviso, permitting court to uphold convictions where there may be error, if no miscarriage of justice occurs.
M. The "unsafe or unsatisfactory" verdict provision, permitting court to quash a conviction even though there is no error and the evidence is sufficient to support the verdict.
N. Finality of appellate disposition.

IV. The Personnel and the Law

A. A competent, professional judiciary, selected on non-political considerations.
B. A competent bar, representing defense and prosecution interchangeably and presenting cases in court with candor and detachment.
C. Mutual trust among judges and lawyers.
D. Trust in and reliance on the court's professional staff.
E. Small body of decisional law.

Some of these practices or devices can be found here and there in American appellate courts. But there is no single American court which employs them all or even a substantial number. And no one of these English features has yet gained wide popularity among appellate courts in the United States. As the need for reform becomes more urgent and more apparent, perhaps more of these features will be tested. Then the useful can be retained and the unworkable discarded.

Designs for Criminal Appeals

To go beyond this checklist of ideas, specific designs are tendered below for new criminal appeals procedures in American courts. The designs draw upon features of the English system, but they are not precise copies. They draw also on ideas put forward in this country in recent years. In addition, they may contain some altogether new elements. These proposals furnish blueprints for structures and procedures which, though novel as a whole in this country, might fit into the existing structure of any number of state or federal appellate courts, with perhaps minor modifications to accommodate to local conditions. The purpose in spelling out these procedures here is to furnish models for interested courts, which, if not adopted entirely, can nevertheless provide a beginning point for designing a locally acceptable scheme.

1. Within Existing Framework--Review Limited to the Record

Presented first is a design which continues most of the basic scope and form of appellate review as it currently operates in the United States. The new trial motion remains available and separate from the direct appellate procedure, as do post-conviction collateral attacks. Direct appellate review remains limited to the record. The novelties of the design are aimed not at changing the basic structure of review, but at speeding up review within the existing structure.

The main thrust of the proposal is to bring a criminal appeal before the reviewing court not later than 30 days after the conviction. Final disposition can be made of insubstantial cases within a short time thereafter. Those of more substance would get further attention, and would, in any event, be disposed of within two to three months of the conviction. The plan strikes at the major causes of delay in the traditional style of direct appellate review: lack of adherence by the parties to prescribed time limitations, transcript preparation time and unnecessary transcript bulk, lawyers' brief writing time, and judicial opinion writing time. The central feature of the plan is a staff of lawyers within the appellate court; around the staff a procedural arrangement is designed to overcome those major delay-producing features.

This plan is designed for an appellate court in which the first review of a conviction takes place. The court could be the highest in the state or it could be a state or federal intermediate appellate court. Whether the forum's governing law labels the appeal "of right" or "discretionary" is not controlling for this purpose. The point is that the proposed procedures are intended for any court to which a convicted defendant may present his case for review, directly from the trial court.

For these procedures to function, at least through the early stages, it is essential that defendant's trial counsel handle the appeal. His knowledge of the proceedings is indispensable to launching the case in the appellate court. This idea, like some other features of the design, is not novel. The Judicial Conference of the United States has recommended it, and at least some appellate courts already follow this practice.[2]

The plan begins with the premise that there are sound reasons for having special procedures for criminal appeals, unlike those for civil appeals, even within the same court. The main features are these.

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[2] Report of the Proceedings of the Judicial Conference of the United States, Oct. 28-29, 1971, p. 56. The Fifth Circuit for some time has followed this practice, to the extent feasible. The Second Circuit has adopted this as a policy in its Plan to Expedite the Processing of Criminal Appeals, promulgated in response to the Judicial Conference resolution.

A. Professional Staff. The procedures hinge on a central staff of permanent, full-time attorneys within the appellate court. Staff size will, of course, vary with the volume of appeals. Any appellate court in the United States, with jurisdiction over criminal appeals, would need a minimum of two staff attorneys. Typically three or four would probably be required. The number could be much larger in a high-volume court. The staff should include attorneys who are reasonably experienced in the law; some but not all could be on the model of a judge's personal law clerk, just out of law school.

Heading this professional group should be a Chief Staff Attorney, a lawyer of substantial experience and solid professional credentials. He would be responsible for supervising the entire work of the staff; he would be the point of contact and line of communication between the staff and the court. Depending on how working relationships developed, however, it might be convenient for individual staff attorneys to deal directly with the judges in connection with specific cases.[3]

B. Procedure. Given the central professional staff, the procedures for criminal appeals could be as outlined below. Obviously not all of the details set out here are essential; this is simply one way the process can be designed. Variations can be made while preserving the essence of the scheme.

1. Taking the Appeal. The initial step by the convicted defendant to set an appeal in motion should be required within a short time, say 10 days, after sentence. This step should be accomplished by filing a simple written statement (notice of appeal) that an appeal is being taken from the specified conviction. Copies should be filed simultaneously in the trial and appellate courts, with a copy sent to the prosecuting attorney. It is crucial to the concept of central appellate staff management that the professional staff in the appellate court know immediately when an appeal has been taken. The case can then be formally entered in the appellate court files and staff monitoring commenced.

2. Readying the Appeal for Staff Action

a. Immediately upon receipt of a notice of appeal the trial court clerk shall notify the judge who presided over the trial that an appeal has been taken. The judge, within 10 days of the filing of the notice of appeal, shall transmit to the appellate court (with a copy to the clerk of the trial court) a copy of his instructions to the jury, or, in a non-jury case, a copy of his findings of fact and conclusions of law. If the judge's instructions or findings do not include a reasonably full summary of the evidence, the judge shall prepare and file such a summary in addition to the instructions or the findings.

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[3]The experiences gained in the Appellate Justice Project of the National Center for State Courts should shed light on the possible roles of staff lawyers and the procedures which can be employed with staff assistance.

b. Immediately upon receipt of a notice of appeal the trial court clerk shall transmit to the appellate court the originals of all papers and exhibits in the trial court files. In addition the clerk shall transmit to the appellate court a photo-copy of the docket entries or other formal records maintained in the trial court concerning the case.

c. Within 7 days after the notice of appeal is filed, the appellant shall transmit to the appellate court, with a copy to the prosecuting attorney, an Appellant's Statement of Points. This shall be a brief typewritten document, not exceeding three legal size pages double-spaced. This statement shall list succinctly the points the appellant desires to present on appeal--that is, the grounds on which he asserts that his conviction should be overturned. Each point should be accompanied by a brief indication of the facts essential to its consideration, if these are not revealed by the statement of the point itself. Argument should not be included, but an indication of the legal theory supporting each point may be given. Citations to statutes and decisions deemed to support directly the appellant's contentions may be included (limited perhaps to 3 decisions per point).

d. Within 7 days after the filing of the Appellant's Statement of Points, the prosecuting attorney shall transmit to the appellate court an Appellee's Statement, with a copy to appellant. This statement, in content and length, shall be subject to the rules governing the Appellant's Statement, as outlined above. It shall respond directly to each of appellant's points.

e. If, by the date the Appellee's Statement is filed, there is available a transcript of any or all of the trial court proceedings or a statement of facts agreed to by both parties, it may be filed in the appellate court. But no delay in the other steps outlined above will be allowed for that purpose.

3. Staff Action. The professional staff will monitor the appeal from the point that notice of appeal is filed, so that in instances of non-compliance with the time limitations prompt follow-up can be taken. In monitoring the appeal to insure adherence to the rules the staff will deal directly by telephone with the persons involved (trial clerk, lawyers, trial judge). Effective sanctions should be available to the appellate court for delinquencies without compelling justification.

When all of the steps outlined above have been taken, the appeal is ready for initial consideration by the professional staff. A case normally will be assigned to a specific staff attorney, subject to supervision by the chief staff attorney in whatever degree seems appropriate in the particular setting.

a. The staff attorney will promptly study the Appellant's Statement of Points and the Appellee's Statement in light of all the information contained in the trial court entries, the trial judge's summary of the evidence, and the papers and exhibits from the trial court

file. He will undertake legal research, if necessary, to enable him to form a judgment about the possible merits of appellant's points. Based on this study, the staff attorney will then take one of the steps below.

b. If the staff attorney can determine from the papers then available to him that no one of appellant's contentions has sufficient merit to justify argument or to require a transcript, he shall write a memorandum (for the judges' use only) setting forth his conclusions and the reasons for them; he shall also prepare a recommended per curiam opinion affirming the conviction. This opinion, though brief, should indicate the reasons why there is no merit in appellant's points. All the papers in the case, along with the staff memorandum and the draft opinion, shall then be sent to the three judges to whom the case has been assigned for decision.[4] If all three judges agree with the staff attorney's conclusions, the conviction will be affirmed and the per curiam opinion will be issued. The judges of course may edit the per curiam as they please. However, if any one of the judges objects to disposing of the appeal in that posture or by that means, the case will be returned to the staff attorney where further steps will be taken, as described below for cases of more substance.

c. If after his initial study of the case the staff attorney is of the opinion that the appeal cannot appropriately be disposed of by per curiam opinion without more, as outlined above, he may take any one or all of the steps described hereafter. Such steps will also be taken if the staff attorney had originally recommended per curiam disposition and the case was returned because one or more judges disagreed; in that event the judges may have directed the steps that they desired to be taken. Thus, though the following steps are discussed in terms of staff attorney decisions, they may also be taken by the staff pursuant to judicial direction.

d. If the staff attorney deems all or part of the transcript of trial proceedings to be essential to a sound decision of the issues, he shall order the necessary portions of the transcript. He should use the most expeditious means of doing this, whether that be by dealing directly with the court reporter, or the trial court clerk, or the lawyers.

e. If the staff attorney deems adversary argument to be essential to a sound disposition of the appeal, he shall recommend, subject to the approval of the court, whether such argument should be presented by written briefs or by oral argument, or both. For experimental purposes some cases might be set for oral argument without briefs, while other cases would be dealt with on briefs without oral argument;

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[4]It is assumed here that the court normally decides appeals in three-judge panels. The procedure could be the same whatever the size of the deciding panel.

the experience would be valuable. In any event, the staff attorney shall notify the lawyers for both sides of the precise issues on which argument is to be presented and in what form. If briefs are to be filed, a due date shall be specified; in no event should more than 30 days be allowed. Simultaneous filings of briefs by both sides might be tried experimentally. If oral argument is to be held, an early date shall be fixed.

f. If the staff attorney has called for either a transcript or written briefs, or both, he shall prepare a memorandum for the court's use, after the receipt of these items. This memorandum shall present the substance of the staff attorney's research and conclusions on the issues, and shall make recommendations as to the disposition of the case. The staff attorney's recommendations may be as follows:

1. If he has not already directed oral argument, he will recommend that such argument be held or not be held. If he recommends oral argument, he will inform the clerk's office and send the case to the judges.

2. If he concludes that the appeal can be disposed of without oral argument and without a full-length opinion, he shall prepare a recommended per curiam opinion deciding the case, with reasons stated, and send the case to the judges.

3. If he concludes that the case requires a full-length opinion (with or without oral argument), he shall so recommend, but he shall not undertake to draft the opinion. The case then goes to the judges.

C. <u>The Court's Role in Relation to the Staff</u>. The concept which must be preserved in any appellate staff arrangement is that judges, not staff, decide cases. The staff's role must be limited to assisting the judges. Consistently with this conception, a professional staff can make many decisions connected with the shaping of the appeal for judicial consideration, and a staff can make recommendations as to how a case should be handled. The specific procedures suggested above are constructed along that line. They give the staff an important role in the appellate process, but they leave the judges in control.

Ultimate judicial control can be seen in each of the potential staff actions outlined above. If the staff recommends per curiam affirmance on the initial papers, without argument or transcript, any one judge can call for more. If the staff recommends no oral argument, a judge can disagree and have argument heard. If the judges think written briefs desirable, even though the staff has concluded otherwise, briefs can be ordered. If the judges think that more transcript is necessary than the staff has ordered, the additional transcript can be obtained. The judges can write a full-length opinion even though the staff has suggested a per curiam. Thus on every aspect of the appeal the judges remain the decision makers, as to both procedure and substance. With a competent staff, attuned to the court's jurisprudence, however, there should be a relatively high degree of agreement between staff recommendations and judicial views.

Staff action on a case, generally speaking, will terminate once the case is in the judges' hands. After staff action is completed, the judges normally will proceed either to decide the case and issue the staff's recommended per curiam opinion (or an edited version of it), or they may decide the case with a full-length opinion of their own, or they may hear oral argument and then agree upon the appropriate type of opinion to be issued.

Flexibility is a characteristic of this plan. Plenty of room is left for experimentation and for tailoring the procedure to the case at hand. For example, the staff and the judges might agree to channel some cases promptly to oral argument, without transcripts or briefs, with a determination to be made by the judges from the bench as to the appropriate next step, if any. After argument such a case could be decided on the spot, with a brief per curiam opinion delivered orally from the bench. Or the judges might conclude after hearing argument that written briefs, directed to specified issues, would be necessary to insure an informed, fair decision; they could issue oral directions to the lawyers accordingly. Or the judges might direct that certain portions of the transcript be supplied, with decision reserved until they are received. It is impossible, and undesirable, to attempt to spell out all the variable ways in which a court with a competent staff, not strapped in by rigid rules, can deal with appeals.

The plan reflects several of the key features in the English system. Flexibility is one. Another is affirmative staff management with considerable departure from the adversary system. But there are modifications: the adversary process is left operative up to a point in shaping the appeal, and fixed time limits are prescribed in the early stages to insure that the basic papers get to the appellate court quickly so that staff control can come into play. The Appellant's Statement of Points is a beefed-up counterpart of the English application for leave to appeal. The proposed per curiam dispositions without transcripts or oral arguments resemble the English single-judge procedure, except that here three judges make a final decision, with no renewal possibility, and the merits of the case are looked at more carefully. The option of oral argument without briefs is of course drawn from the English practice, as is the option of orally announced decisions from the bench.

EXPEDITING REVIEW OF FELONY CONVICTIONS AFTER TRIAL*

I. GENERAL PROPOSITIONS

An appeal is the last stage in the criminal process which begins with arrest or indictment and ends with the appellate disposition. The appellate phase of criminal cases now takes much too long. The time from filing of notice of appeal to decision by the appellate court can be radically cut without lowering the quality of justice. There is a strong public interest in expeditious review in criminal cases. It is widely believed that the deterrent impact of criminal law is blunted by protracted adjudication. The guilty defendant should promptly be placed under supervision and, when appropriate, taken off the streets and incarcerated. The innocent defendant should be cleared without delay. To achieve a fair and expeditious review, to be completed within 90 days from imposition of sentence, the Committee endorses and recommends acceptance of the following propositions:

1. Procedures for criminal appeals should be distinctively designed in light of the special considerations presented by review in criminal cases. These procedures may differ from those in civil appeals.[1]

2. Criminal appeals should be monitored or proctored by the appellate court to insure that they progress without unnecessary delay and within the times required by the governing rules.

3. A central staff of lawyers, similar to that used in England, should be provided in the appellate court to assist the judges in the ways specified hereafter.[2] The Committee at present takes no position on the composition or precise duties of the staff, other than as indicated below. The head of the staff should be an able, experienced lawyer. The staff might also be used to process civil appeals if the particular court considers that desirable.

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[1]This is the English view, which has been praised for demonstrated soundness in practice. It proceeds from the premise that "features unique to appeals in criminal cases . . . give a distinctive character to [such] litigation and justify the tailoring of appellate proceedings in ways that might be inappropriate or unnecessary in civil litigation." D. Meador, Criminal Appeals, English Practices and American Reforms (The University Press of Virginia, 1973) p. 13 [cited here as Criminal Appeals].

[2]Professor Meador has lucidly described the make-up and duties of the central staff of permanent full-time attorneys utilized in the English Court of Appeals, Criminal Division. See Criminal Appeals, ch. III.

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*A report of the Committee on Criminal Appeals to the Advisory Council for Appellate Justice published by the Federal Judicial Center and the National Center for State Courts in 1973. The Committee was led by Hon. Wilfred Feinberg.

4. In order to prevent delay which comes from discontinuity of representation between trial and appeal there should be continuity of representation for appellants to the maximum extent feasible. Continuity does not necessarily require that the same individual lawyer handle both the trial and the appeal, although this may be desirable in many circumstances. Institutionalized counsel, such as a public defender's office and a prosecutor's office, can provide the desired continuity even though different lawyers in the office are utilized in trial and appellate work. In any event, to prevent a "no-man's land" in which appeals languish with no counsel for appellant after a notice of appeal is filed, trial counsel should be required to stay in the case unless and until relieved by the appellate court.[3]

5. If feasible, a complete transcript of the trial court proceedings should be made available to the appellate court in every appeal within 30 days or less from the imposition of sentence. This will eliminate the problems raised by efforts to adjudicate appeals on less than a full transcript. Many judges and appellate counsel believe that the potential for uncertainty as to what occurred in the trial court, with consequent injustice, is too large to risk a criminal appeal without the complete transcript. To make available a full transcript without delay in all cases will require substantial funding, either to provide for such technological innovations as computerized transcription or for the additional work to be done by reporters and typists. But to allow transcript problems to frustrate our goal of moving criminal appeals with dispatch is intolerable. The money outlay must be compared with the social expense of lethargic criminal appeals and with the total sums now spent to administer criminal justice. Some of the cost dimensions of implementing this recommendation throughout the federal system are indicated by Appendix I attached hereto. Under an experiment in the federal district courts for the Southern and Eastern Districts of New York, immediately after a guilty verdict is returned a transcript is ordered by the prosecutor in every case in which he thinks an appeal is likely. Because there is usually a time lag between verdict and sentence for preparation of a pre-sentence report, the routine preparation of transcripts in cases in which an appeal seems likely insures that a transcript is available in the appellate court by the time a notice of appeal is filed or very shortly thereafter. Consideration should be given to introducing that practice in all jurisdictions. As a corollary of the basic recommendation in this paragraph, each jurisdiction should supervise the operation of the court reporters to maximize efficiency.

II. PROCEDURES

Building on the foregoing propositions, the Committee recommends the following procedures for criminal appeals, to achieve the objective of a 90-day disposition:

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[3]This was urged nearly two years ago by the Judicial Conference of the United States. See Report of the Proceedings of the Judicial Conference of the United States, Oct. 28-29, 1971, pp. [56] 61-62.

1. At the time of imposing sentence the trial judge should inform the defendant orally, on the record, of his right to appeal, and of his right to counsel on that appeal. Notification and explanation of these rights should also be provided defendant at that time by a printed form.

2. Immediately upon imposition of sentence the clerk of the trial court should send to the appellate court a completed form which shows the style and number of the case, the names of counsel for the prosecution and the defense, the name of the reporter, and the name of the trial judge. The telephone number and address of all but the last should be included. This form should be transmitted to the appellate court promptly even though it is not then known whether an appeal will be taken. This information will make it possible for the appellate court to commence monitoring the appeal in all respects from the outset. This practice is presently followed in the United States District Court for the Southern District of New York; samples of forms used in that court are attached as Form A and Form B.

3. If the defendant desires to appeal he must file a notice of appeal within ten days after sentence. Copies of the notice should be filed simultaneously in the trial and appellate courts and a copy sent to the prosecuting attorney. Although this is a shorter period of time than presently allowed in some states,[4] long experience under the federal rules indicates that a ten-day period is workable and generally operates fairly to defendants. Moreover, the public interest in expeditious disposition of appeals outweighs whatever inconvenience there may be to lawyers.

4. In those courts in which a full transcript of the trial can be made available in the appellate court by the time a notice of appeal is filed, or shortly thereafter (as recommended in Proposition 5, supra) and in which cases can be brought on for oral argument quickly, a brief should be required from appellant within 30 days from the filing of notice of appeal and a brief from appellee required within 30 days thereafter. The case should be set for argument on the earliest available date thereafter, within a week or ten days, if possible. This procedure will consume roughly 65-70 days from the time the notice of appeal is filed. If it is combined with the practice of summary dispositions in cases where this is justified, whether written or (as in the United States Second Circuit) orally announced from the bench, the overall time for disposition of appeals should not exceed an average of 90 days.

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[4]The problems of criminal justice involve many persons and institutions besides the courts. All must cooperate in achieving the goals delineated here. We recognize that the particular constraints and needs of local practices, procedures or traditions may give rise to difficult problems. Nevertheless, the burden of justifying any departure from a targeted goal rests heavily upon those responsible for the administration of criminal justice in the system involved. Hopefully, however, whatever modifications in the various steps suggested here are found necessary should not interfere with the overall objective of concluding appeals in 90 days from sentence.

5. As an alternative to the foregoing procedures, in these appellate courts where a complete trial transcript cannot be made available at or shortly after the filing of the notice of appeal, the procedures outlined below are recommended to achieve a 90-day disposition.

A. Within 30 days after sentence the following items should be filed in the appellate court:

i. An appellant's statement setting out the points which he intends to assert on appeal, together with supporting citations and a brief indication (not exceeding one paragraph) of the theory supporting each point. Appellant would have 7 days from the notice of appeal (i.e., not more than 17 days from sentence) within which to file this statement.[5]

ii. A similar statement from the appellee (the prosecution) responding briefly to each of the appellant's points, to be filed within 7 days after appellant's statement.[6]

iii. All papers and exhibits in the trial court files and a photocopy of the docket entries.

iv. A copy of the trial judge's instructions to the jury, or, in a non-jury case, a copy of the trial judge's findings of fact and conclusions of law. (The Committee has taken no position on who has the duty to file items iii and iv.)

v. Such record of the trial proceedings as can be made available by that time--e.g., either a typed transcript of all or part of the proceedings, a tape recording of the proceedings, or a video tape.

B. Upon the receipt in the appellate court of all the foregoing items, a staff attorney shall review the record and report to the court:

i. Recommending any additional record of the trial proceedings that may be needed.

ii. Recommending procedures to be followed thereafter in disposing of the case.

The foregoing procedures would make it possible for an appellate court, through its staff, to take effective cognizance of a case within approximately 30 days after imposition of sentence. A final disposition should be feasible within another 60 days.

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[5]For a description of this kind of statement, see Criminal Appeals, p. 170.

[6]See Criminal Appeals, pp. 170-71.

FORM TO BE USED AT TIME OF SENTENCING AND TRANSMITTED TO CHIEF JUDGE OF COURT OF APPEALS

1. Case Title (including names of all defendants) and docket number(s): (USE SEPARATE SHEET FOR EACH DEFENDANT)

2. Defendant and Address:_____

3. Date of Verdict:_____ Jury____ Nonjury____

   Crime(s):_____

   Length of Trial:_____

4. Bail disposition:_____

5. Sentence and Date Imposed:_____

6. Date Notice of Appeal filed:_____

7. Date trial minutes ordered:

   By counsel:_____ By District Court:_____

   Reporter in charge:_____

8. Trial counsel, address and telephone number:

   _____

   Trial counsel was: 1.___appointed 2.___retained

   Does defendant's financial status warrant appointment of counsel on appeal? _____

   Affidavit of financial status filed?_____

   Is there any reason why trial counsel should not be appointed as counsel on appeal? _____

9. Assistant United States Attorney:_____

10. Additional comments:

_____
U.S.D.J.

Form A

FORM TO BE COMPLETED BY CHIEF COURT REPORTER OR PERSON DESIGNATED BY HIM UPON TRANSCRIPTION OF MINUTES IN CRIMINAL CASES AND FORWARDED WITHIN FIVE DAYS THEREAFTER TO CHIEF JUDGE OF COURT OF APPEALS

1. Case Title (list names of each defendant and docket number(s):

_____

_____

2. District Judge: _____

3. Date of sentencing (list several dates and defendants if appropriate):

_____

4. Date trial minutes ordered and by whom: _____

_____

5. Name of each Court Reporter in attendance and dates of attendance (including pre- and post-trial motions):

_____

6. Date transcription of minutes complete: _____

7. Total length of transcribed minutes: _____

8. Additional comments:

Dated: _____

By: _____

FORM B

NEW GODS FOR OLD: "EFFICIENT" COURTS IN A DEMOCRATIC SOCIETY

David L. Bazelon*

With these points in mind, I would like to take a look at some of the current proposals for judicial reform. The American Bar Association is returning from its London meetings carrying a host of proposals that we restructure our courts in line with some of the features of the English system. I find it somewhat depressing to note that those aspects of English criminal justice that I find particularly appealing—virtual elimination of capital punishment, humane treatment of narcotics addicts, allocation of prosecutorial responsibility among the entire Bar, shorter sentences and jury trials for juveniles—seem *not* to have been included in the package.[7] I also find it interesting to note that, notwithstanding the speed with which the English system operates, crime seems to be on the increase there as well as here. But I would like to say a few words about some of the reforms that have been urged.[8]

First, we are told that we should do all in our power to discourage appeals. "Frivolous" appeals are to be screened out by submitting the papers to a single appellate judge, who will reject them without hearing unless he finds them meritorious. If—heaven forbid!—we should have to hear an appeal, we should whenever possible dispense with transcripts or even briefs and hear and decide the appeal on the basis of the oral argument. So far as we can, we should eschew writing opinions that explain why we did what we did. And what the courts have put together, let no court put asunder. Habeas corpus is to be stripped to its constitutional bones.

I intend no comment whatsoever on the constitutionality *vel non* of any or all of these proposals. But so far as their effect on the judicial process is concerned, I think they are viciously wrong-headed. Devices of this kind will certainly allow cases to be more quickly disposed of. Appeals deemed "frivolous" by a single judge will not be seen by another one. One only has to open the reporters, however, to find a host of situations where dissenting judges have made it entirely clear that they would reject the majority's position as being totally without merit.[9] Whatever gain there may be in speed will be more than counterbalanced by a loss in the quality of decisions. Proposals of this kind are not proposals that we solve our problems; they are nothing more than calls for ignoring them.

* Chief Judge, United States Court of Appeals for the District of Columbia; reproduced from 46 N.Y.U.L.REV. 653 (1971)

They are nothing short of proposals for judicial abdication, proposals that judges stop dealing with trivialities like constitutional legality and get on with the serious business of putting and keeping people in jail. That this is a harsh judgment, I know. But we can never forget that problems come to the courts only when every other social institution we possess has failed to solve them. Almost by definition these are hard problems—cruelly hard problems. Speeding up the process of decision doesn't make them any easier to solve. And proposals of the kind I have just discussed will speed up the process only at the sacrifice of the most important functions that courts can serve in a democratic society.

* * *

What I think is important to recognize about the function of courts, then, is this. The judicial process is at its core a fundamentally inefficient process. This must be so, for inevitably problems that are brought before the courts are the problems that no other social institution has solved. The courts themselves, of course, cannot solve these problems. What they can do, however, is take a close look indeed at the situation before them, to bring out factors that have previously remained hidden and to insure that the responsible agencies are making a genuine effort to deal with the problems instead of simply acting out of ignorance, fear or prejudice.

It is too easy for all of us to look at the surface of things and ignore the depths below. But as Justice Cardozo once wrote, "[t]he subject the most innocent on the surface may turn out when it is probed to be charged with hidden fire."[21] The judicial process is a social institution designed to guarantee that this probing will be done. We strike at its very reason for being if we seek to eliminate this aspect of the judicial function as a sacrifice on the altar of the Great God Efficiency.

21 B. Cardozo, Law and Literature 130 (1931).

B. THE RECORD ON APPEAL

PREPARATION OF THE RECORD

Winslow Christian*

A. *Preparation of the Transcripts*

When a notice of appeal is filed,[11] the *California Rules of Court* require the trial court clerk to prepare the clerk's transcript and immediately to notify the court reporter to prepare a transcript of the trial testimony.[12] The reporter is to complete his transcript within 20 days after the filing of the notice of appeal;[13] within 25 days the clerk is to deliver the two transcripts to the trial judge for certification.[14] The parties to the action then have 5 days to propose corrections.[15] If no corrections are made, the trial judge certifies the transcripts and returns them to the clerk, who then transmits the entire record to the appellate court.[16] While preparation of the record should normally be completed within 30 days, the appellate court can extend the limit to 80 days from the filing of the notice of appeal if good cause is shown.[17]

The results of the survey[18] demonstrate that court reporters and clerks are not meeting these standards. The average time between the notice of appeal and the first indication that the reporter's transcript was ready was 72 days (54 days median),[19] with only 20 of 233 reporters' transcripts ready within the 20-day limit. Although the appellate court may extend the limit to 80 days, reporters failed to complete their transcripts within this longer period in 59 of the 233 cases surveyed. Moreover, most of the reporters who exceeded the 20-day limit did so without any extension from the appellate court: Reporters requested extensions in only 34 of 138 such cases.[20]

Although no rule expressly sets a maximum time for the preparation of the clerk's transcript, the requirement that the clerk forward the entire record to the trial judge within 25 days of the notice of appeal[21] implies that his transcript is due 5 days after the reporter's transcript is due,[22] assuming no extensions. Trial courts in the survey received the clerk's transcript within 5 days of the reporter's transcript in 87 percent of the cases, with an average delay of 2 days. Thus, while the clerks also have some responsibility for prompt completion of the record, their contribution to delay is far less significant than the court reporters'.

Once the trial judge has received the transcripts, he is to certify them

* Justice, California Court of Appeal, San Francisco; reproduced from Delay in Criminal Appeals: A Functional Analysis of One Court's Work, 23 STAN.L.REV. 676 ,678-89 (1971).

within 5 days unless the parties propose corrections.[23] In the sampled cases, however, the average time between completion of the last transcript and the trial judge's certification was 21 days (15 days median). Furthermore, there was an average delay of 4 days in the transmission of the full record to the appellate court after the trial court's certification.[24] Combining the delays at these three stages—preparation of the transcripts, trial court certification, and transmission of the record to the appellate court—the average time from notice of appeal to filing of the record in the higher court was 99 days (81 days median),[25] considerably longer than the 30 days allowed by the *Rules of Court*.

1. *Supervision of court reporters and clerks.*

Although it is not clear where primary responsibility lies for monitoring the work of court reporters and clerks, both the trial and appellate courts bear some responsibility for exercising control. The trial judge has close contact with both the reporter and clerk and may supervise their daily courtroom activities.[26] The reporter is appointed by the trial judge and serves at his pleasure.[27] Although the 1943 revision of the *Rules of Court* supposedly shifted responsibility for supervising preparation of the reporter's transcript from the trial judge to his clerk,[28] the judge nonetheless retains ultimate control. Furthermore, there are reported decisions suggesting that the trial court has primary jurisdiction over certain remedies for delay.[29]

The notice of appeal transfers jurisdiction over a case from the trial court to the appellate court,[30] and the appellate court assumes some responsibility to supervise the preparation of the record. For example, extension of the time for preparation of the transcripts beyond 25 days theoretically is allowed only by order of the appellate court.[31] This jurisdiction is not being exercised effectively in the First Appellate District because, under present procedures, the filing of a notice of appeal in the trial court does not inform the appellate court that an appeal has been taken.[32] If an appellate court wished to exercise effective control over delay in preparation of the record, it would first have to obtain reliable information about the commencement of all criminal appeals within the district.[33]

The results of the survey show that in the first district the court of appeal has in fact exercised only nominal control over the preparation of records. Court reporters rarely request extensions, and trial court clerks never do so. When a court does grant an extension, it is typically on an *ex parte* application, and in no surveyed case did the court deny such a request. Indeed, contrary to the *Rules*,[34] several extensions allowed delays exceeding 80 days from the notice of appeal.[35] The usual "good cause"[36] offered by reporters seeking extensions is a general reference to the "pressure of court business."[37] Even this meager excuse apparently is not necessary; the appellate court routinely grants extensions on the mere declaration that the transcript cannot be ready on time.

Counsel are also unlikely to oversee preparation of the record. Trial counsel usually considers his work done when the court pronounces judgment.[38] Appellate counsel might be expected to take an interest in expediting the preparation of the record, but the majority of criminal appellants are indigent,[39] and counsel for an indigent is not appointed until after the record has been filed.[40] Typically, then, the indigent appellant has no counsel while the record is being prepared, unless trial counsel voluntarily extends representation.[41] The Attorney General, like appellants' counsel, does not participate effectively in controlling delays in the preparation of records. Although the trial court clerk must send a copy of the notice of appeal to the respondent in criminal cases,[42] the Attorney General never resists applications for extension of the time for preparation of the record, if for no other reason than that he normally does not receive notice of such applications.[43]

2. *Sanctions presently available.*

It appears that clerks and reporters are, with impunity, regularly violating time limitations on preparation of the record. This gap between law and behavior is probably attributable to three factors: lack of manpower, inefficiency, and simple inattention to the *Rules*. Accordingly, in devising methods to reduce delay, the contributions of each of these factors to the problem must at some point be evaluated. While there are no empirical studies of the adequacy of manpower in preparation of the record, there is reason to believe that this factor is responsible for only a minor part of the overall delay found in the study. For example, most superior court departments have a full-time deputy clerk and a court reporter who may increase his productivity by employing additional transcribers.[44] In any event, given the time and expense necessary to determine the significance of manpower needs and the funds necessary to remedy this problem if it is a cause of delay, it is reasonable to focus first on the contributions of inefficiency and inattention to the *Rules*. If changes in present practices and exercise of existing sanctions could reduce the delay attributable to these two factors, remaining delay could be attributed to lack of manpower, and

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39. In the 175 full appeals examined, appellant was represented by counsel appointed by the appellate court in 130 cases and by the public defender in 9 others. Thus, 79% of the appellants in the sampled cases were indigent with 74% represented by appointed counsel. This figure is somewhat higher than the statewide average. "Five years ago there were 1,330 criminal appeals in California. The courts appointed counsel in 734 of these cases. Last year there were 2,120 criminal appeals and counsel had to be appointed in 1,335 cases. Thus, the number of appeals and appointments has almost doubled in the last five years." ASSEMBLY INTERIM COMM. ON CRIMINAL PROCEDURE, REPORT ON PROPOSED STATE-WIDE PUBLIC DEFENDER'S OFFICE, 1970 Reg. Sess. 3 [hereinafter cited as 1970 ASSEMBLY COMM. REPORT]. *See generally* Note, 55 CORNELL L. REV. 632, 632 n.2 (1970).

44. Some court reporters assigned to busy trial courts do not themselves transcribe the notes they have taken in court. Rather, they dictate from their notes into a recording machine; the recording is then transcribed by a typist who is the employee of the court reporter. Thus, some delay at this stage can be eliminated if reporters hire additional or more efficient typists. Hiring additional typists to expedite a particular case should not increase the court reporter's costs, for these typists are normally paid on a per-page basis. The system of electronic court reporting presently used in Alaska may offer a more effective solution to this problem. *See* Reynolds, *Alaska's Ten Years of Electronic Reporting*, 56 A.B.A.J. 1080 (1970). *See also* Madden, *Illinois Pioneers Videotaping of Trials*, 55 A.B.A.J. 457 (1969). *But see* Rodebaugh, *Sound Recording in Courts: Echoes from Anchorage and Washington*, 50 A.B.A.J. 552 (1964); Rodebaugh, *Sound Recording in the Courtroom: A Reappraisal*, 47 A.B.A.J. 1185 (1961).

Many of the clerks' transcripts examined in the survey were prepared by photographic processes. Such methods are more efficient than typewriting, and a more accurate record usually results. *See* CAL. CT. R. 40(i) and (*l*); CAL. GOV'T CODE § 69,844.5 (West 1964).

appropriate remedial action could be undertaken. Hence, this section outlines several available remedies for inefficiency and inattention to the *Rules*.

Appellants may be able to take direct action to compel clerks, reporters, and trial judges to comply with time limitations on preparation of the record. When a full record has not been delivered to the appellate court within the prescribed period, the appellant may move to have the appellate court order immediate completion of this task.[46] There is also authority implying that an appellant may obtain a writ of mandamus from the appellate court to direct compliance.[46] However, the success of either control technique depends upon the appellant's initiative in seeking relief in the court of appeal—a rare event among indigent appellants for whom appellate counsel is appointed only after the record is filed.[47]

The trial and appellate courts may act on their own initiative to apply sanctions of graduated severity to compel timely preparation of the record. The simplest method is to order immediate compliance with the *Rules* or a showing of good cause for failure to comply.[48] Contempt proceedings are authorized for "[m]isbehavior in office, or other wilful neglect or violation of duty by . . . [a] clerk . . . or other person, appointed or elected to perform a judicial or ministerial service."[49]

Furthermore, special sanctions are available to control delay caused by court reporters. First, the *California Government Code* provides that until a reporter has filed transcripts for all cases reported by him in which a notice of appeal has been filed, he "is not competent to act as official reporter in any court."[50] The statute apparently authorizes a trial or appellate court to exclude a delinquent reporter from covering new cases until he has completed preparation of overdue appellate records.[51] While no reported decision has dealt with the statute, one court did use it to secure immediate filing of a delinquent transcript by ordering the reporter to show cause why he should not be declared incompetent.[52]

Vigorous application of existing sanctions might eliminate much of the delay in preparation of appellate records. Under present circumstances however, the probability of intensive enforcement is quite low. Parties to the action are unlikely to invoke these sanctions: Indigent appellants usually have no counsel during the period of preparation of transcripts;[53] appellants represented by private counsel or by the public defender may be ignorant of established patterns of delay and of existing remedies;[54] and finally, the Attorney General has shown no interest in ensuring the speedy preparation of appellate records.[56] Furthermore, the trial courts cannot be expected to speed up the process on their own initiative. A trial judge who regularly works with the same reporter and clerk may hesitate to apply sanctions for fear of creating strained working relationships. Appellate courts cannot act effectively to prevent delay so long as they remain unaware that an appeal has been commenced.[56] Thus, new methods of control are necessary in order to reduce delay in preparation of the record.

3. *Recommendations.*

Although everyone involved in the preparation of appellate records shares some responsibility for reducing delay, the California courts of appeal are best positioned to prevent unnecessary delay in this first stage of the appellate process. There are two major reasons for placing primary responsibility on the intermediate appellate courts. First, for the reason mentioned above, trial courts are not likely to apply sanctions against their own reporters and clerks. Furthermore, the primary responsibility of trial judges is the trial of cases, and they should not be additionally burdened with duties related to an appellate court function. Second, the appellate courts are more capable of administering extensions and sanctions on a uniform basis. Even though some variations of policy might develop among appellate districts, consistent treatment within an appellate district could readily be obtained by charging the administrative presiding justice[57] with responsibility to exercise control.[58]

A number of reforms should be adopted in order to facilitate assumption of this responsibility by the appellate courts. First, there should be statutory confirmation of the jurisdiction of the courts of appeal both to hear motions for enforcement of time limitations on preparation of appellate records and to entertain contempt proceedings against trial court clerks, reporters, and judges.[59]

Second, the *California Rules of Court* should be amended to require that a copy of the notice of appeal be sent to the appellate court and that the clerk of the court of appeal open a docket page immediately upon receiving such notice. Thereafter, the clerk of the appellate court should investigate the cause of any delay in the filing of appellate records and bring delinquencies to the attention of the court for possible sanctioning.[60]

Third, continuous representation should be provided for the indigent appellant. The appellate court does not need to see the full record to determine whether appointment of counsel is warranted;[61] therefore the court should inform the appellant immediately upon receiving a copy of the notice of appeal that it will entertain a request for appointment of counsel. It would even be possible to require the trial court, after pronouncing judgment, to inform the defendant of his right to appeal and right to appellate counsel and to provide a combined form of notice of appeal, declaration of indigency, and request for appointment of counsel.[62] In order to guarantee continuous representation, trial counsel should not be permitted to withdraw from a case until appellate counsel has been appointed. In addition, trial counsel should be required to perform such preliminary tasks as filing a notice of appeal if so instructed by his client, seeking bail on appeal, and requesting obviously necessary augmentations of the record

during the interim.[63] In its appointment letter, the appellate court should mention the time limits for record preparation and emphasize that one of the responsibilities of appointed counsel is to assist in enforcing compliance.[64]

Fourth, appellate courts should examine requests for extensions by court reporters and clerks far more carefully and should exercise discretion to deny such requests when not meritorious. Since trial court clerks and reporters perform the bulk of the work involved in preparing the record on appeal, it is essential that they conform whenever possible to applicable time limitations. The present practice of uncritically accepting claimed pressure of routine work as "good cause" for granting an extension undermines the purposes of the *Rules* and should be ended.

Finally, to avoid placing on the appellate courts the full burden of routine supervision, clerks, reporters, and trial judges should be required to declare that they have completed preparation or certification of all appellate records within the authorized time before receiving their monthly pay or any further per diem pay.[65] Another technique would be to reduce reporters' per page stipend when preparation of the record is delayed without proper extensions.[66] In addition, the *Government Code* should be amended to provide expressly that a reporter may not report any additional hearings if he has an overdue criminal transcript.[67] These proposals, if adopted, would assure maximum efficiency in the process of record preparation and eliminate any need for routine supervision by the appellate courts.

B. *Augmentation of the Record*

The record on appeal normally contains a clerk's transcript of specified papers in the trial court's file and a reporter's transcript of the oral proceedings.[68] Upon filing notice of appeal, appellant may request inclusion in the record of a number of additional items—any written motion and supporting affidavit, any written opinion on any motion to suppress evidence, the voir dire examination of the jury, opening statements, arguments to the jury, and any oral opinion or comments on the evidence by the court.[69] Within 5 days of a request for augmentation, the judge is to order inclusion of any requested additions he thinks "proper to present fairly and fully the points relied on by appellant in his application."[70] Thus, in the interests of economy, the appellant must demonstrate some rational connection between requested additions and the points he desires to raise on appeal.[71]

71. This restriction is limited by the constitutional requirement that indigent appellants be given free records of sufficient completeness to permit proper consideration of their claims, even if the trial judge believes the claims to be frivolous. *See* Draper v. Washington, 372 U.S. 487 (1963). In *Rinaldi v. Yeager*, 384 U.S. 305, 310 (1966), the Court stated: "This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." *See also* Williams v. Oklahoma City, 395 U.S. 458 (1969).

Once the notice of appeal is filed, later augmentation may come only by order of the appellate court, acting on its own motion or at the request of either party.[72] Appellate courts liberally grant augmentation to avoid determining issues on a fragmentary view of the proceedings below.[73]

A request for augmentation rarely is made on the trial court level, for such a request must accompany the notice of appeal,[74] which is most often given on the same day as the judgment. Since trial counsel customarily do not plan appellate strategy or consider useful additions to the normal record, any thought of augmentation usually is delayed until the record has been filed in the appellate court and appellate counsel has begun work on his brief. Still more time passes while the appellate court acts upon the request for augmentation and, if it is granted, while the appropriate clerk or reporter complies. Since orders for augmentation routinely grant appellant's counsel 30 days from the filing of the augmented record to complete his brief, the later stages of the appellate process are also delayed.

The survey results clearly demonstrate the delay to the appellate process caused by current augmentation procedures. Augmentation occurred in well over one-third of the cases fully appealed.[75] The delay in requesting augmentation varied considerably between private and appointed counsel. Private counsel requested augmentation an average of 142 days (122 days median) after the normal record was filed. Appointed counsel averaged 57 days (68 days median) from the date of their appointment to a request for augmentation. The average delay in requesting augmentation for all appellants was 77 days (72 days median).[76] While in the majority of cases the appellate court ordered augmentation within one day of receiving appellant's request, the time between the order for augmentation and the filing of the augmented record averaged 50 days (36 days median) in cases of major augmentation, which required preparation of new transcripts.

75. The record was augmented in 77 of the 175 full appeals. For purposes of the survey, "major" augmentation was considered to have occurred only when counsel requested an addition to the record that had not previously been transcribed by the reporter of the proceedings below. In addition to 50 cases of this type, there were 27 cases in which counsel requested an addition to the record of a portion of the proceedings that had already been transcribed. For example, although augmentation is technically necessary to obtain a transcript of the preliminary hearing, this transcript has been prepared earlier. Thus, when all that is required to augment the record is transmittal of an already prepared document from one place to another, augmentation is rarely a source of delay, except for the delay that may result from the 30-day extension for preparation of the brief that normally follows orders for augmentation.

76. In only one of the nine cases where appellant was represented by the public defender was a request for augmentation filed in the appellate court. Furthermore, this was not a request for major augmentation, but for addition of a transcript that had been prepared earlier. Since the public defender represents the appellant at trial, he may be more likely to recognize the need for augmentation before the record is filed in the appellate court.

Appellate counsel appear to be taking far too long to request augmentation. It is difficult to believe that a diligent attorney would reasonably require nearly three months to recognize a need for additions to the transcript. Any attempt to reduce this delay, however, must take account of serious due process constraints. For example, to deny a request for augmentation as unseasonably filed would punish the appellant for his attorney's neglect.[28] Likewise, to apply sanctions against counsel might deter a necessary request for augmentation—a result that would be as unfair to the appellant as a denial of the request by the court.

There are, however, at least two ways of reducing delay at this stage within these constraints. First, if appellate counsel were appointed immediately after the filing of a notice of appeal, as recommended above,[28] it would then make sense to allow requests for augmentation to be made in the trial court until the record is certified. In many cases, appellate counsel might determine that the normal record is inadequate simply by examining the court's file and by interviewing the trial attorney. The trial judge would then be able to make a prompt, reasonably informed decision on the request based on his knowledge of the case. Such a procedure should not prejudice either party since a denial of augmentation would be subject to review in the appellate court.[29]

Once the reporter has completed the transcript, appellate counsel should be allowed to request of the trial court any obviously necessary augmentations during the 5-day period allowed for correction of the record.[30] After the record has been certified and filed in the appellate court, requests for additions should be made there as under present practice.[31] By adopting this approach, the functions of preparation and augmentation of the normal record would be made concurrent rather than consecutive, hopefully reducing the time necessary to complete both tasks.

A second method of reducing delays would be to expand the content of the normal record on appeal.[32] While a survey of only 77 requests for augmentation is not sufficient to prescribe the proper content of the normal record, the sample does suggest that some requests are more common than others.[33] Broadening the normal record to include such material involves balancing the expense of including material that will not be relevant in every case against the costly delays of the augmentation process. A proper balancing requires that a full-scale survey of requests for augmentation be undertaken. On the basis of this survey, the costs of inclusion of a particular item in the normal record could be compared to a more accurate measure of expected benefit—elimination of requests for that item via augmentation.

PREPARATION OF TRANSCRIPTS

Griffin B. Bell*

One of the fifth circuit policies has to do with eliminating delays in the preparation of the record which is to form the basis of the appeal. The court, acting in its supervisory role as a judicial council under 28 U.S.C.A. § 332,[8] recently adopted a restrictive policy for the district courts in giving extensions under Rule 11(a) of the Federal Rules of Appellate Procedure beyond the original 40 day period for transmitting the record to the court of appeals. Rule 11(d) allows the district court to extend this period of time up to a total of 90 days for cause shown. The judicial council policy restricts this power to a showing of extraordinary circumstances. The council adopted a further policy that the court of appeals will not grant extensions for transmitting the record, as it is empowered to do under the same rule, except in the rare case and then only upon a strict showing of good cause.

The usual reason for delay in filing records is the failure of the court reporter to prepare transcripts within the allotted time. This new policy regarding records is a further implementation of Local Rule 8 of the court which requires a court reporter to explain the reasons for the request for an extension and also requires approval of the trial judge or chief judge of the district.[9]

The result of this new approach is that very few extensions are being granted in the court of appeals. The court reporters in the circuit are finding it possible to comply with the rules, although on one occasion, it was necessary for a court reporter to employ a substitute reporter at his own expense in order to comply. Most of the reporters are now employing typists and some are making use of stenotype notereaders who are also typists. This latter system has proven to be very efficient. Moreover, the ease of training notereaders has been adequately demonstrated in two districts in the circuit.

This rather drastic change in approach was justified by facts indicating a near abuse of the rules. There have been delays of many months and even up to more than a year in filing records in criminal cases in the fifth circuit, but the new policy has alleviated this type of delay. The new record policy should also bring about a reduction in the median time now being taken to file records in the court, a time gap which compares unfavorably with some of the other circuits.[10]

Two additional causes of delay in preparing transcripts were discovered in a study made by the Federal Judicial Center. Rule 10(b) of the Federal Rules of Appellate Procedure, which requires that an appellant order the transcript from the reporter within ten days, is not always enforced by the district courts. In other instances, the district court clerks are failing to give prompt notice to the court reporters when the appeal is in *forma pauperis*. These two areas are fertile ground for improvement.

8. "Each judicial council shall make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit. The district judges shall promptly carry into effect all orders of the judicial council."

9. Local Rule 8 in pertinent part:

"(c) Application for Enlargement. Any motion the granting of which will result in an aggregate extension of time in this Court totalling more than thirty days for filing a transcript of testimony in any case on appeal shall be accompanied by a letter from the court reporter containing an explanation of the reasons for any previous delay, the necessity for the further extension requested, and a statement verifying that the request has been brought to the attention of, and approved by, either the District Judge who tried the case, or the Chief Judge of the District."

* Circuit Judge, United States Court of Appeals for the Fifth Circuit; reproduced from Toward a More Efficient Federal Appeals System, 54 JUDICATURE 237, 238-9 (1971)

DESIGNATION AND PREPARATION OF THE RECORD

Herbert M Schwab & Robert D. Geddes*

Delay in preparation of the trial transcript is one of the most frequently cited barriers to expeditious disposition of criminal appeals, and Oregon was, and to some degree remains, no exception. Prior to S.B. 66, Oregon litigants were required to depend solely upon a system of official court reporters who attended and recorded court proceedings in shorthand or by stenotype and transcribed the proceedings upon request and agreement to pay them the prescribed fee. Electronic recording was authorized in Oregon only as a supplement to the reporter's shorthand or stenotype notes.[17] The record on appeal was designated at the same time as filing of the notice of appeal, but in a separate document, and counsel ordered necessary portions of the transcript from the reporter and filed the transcript with the trial court.

It was recognized that the nature of the court reporter's job and increased demands upon individual reporters inevitably produced a certain delay between order of transcript and delivery. Some court reporters were found to be remarkably diligent and to have never required an extension for completion of transcript. Others consistently required thirty- to ninety-day extensions and more, even in routine cases. The Oregon State Bar's committee on electronic reporting found that extensions were granted in 1965 in 129 of the cases pending before the supreme court, for a total delay of 13,490 days.[18] In eighty of those cases, extensions totaled more than sixty days, and in a substantial number, extensions amounted to many months or even years. The average delay attributable to extensions for filing transcript was more than 100 days.[19] The situation did not substantially improve in the intervening years. An average of ninety-two days was required to secure a transcript in a criminal case during the first year of the court's existence.[20] In approximately seventy per cent of the cases, more than sixty days were required to secure transcript. Only eighteen transcripts were filed within the thirty-day period allowed by the statute.[21]

Causes of delay. These delays were found to be generated by a variety of factors. When manual techniques are used by the reporter, the speed with which a transcript can be prepared is obviously limited. Once a trial is so recorded, it is extremely difficult for another person to produce an accurate, usable transcript from original notes or stenotype tapes. The manual reporter must therefore either personally type the transcript or dictate the transcript from his notes for someone else to type. The recording reporter thus has a virtual monopoly upon transcription and the income that accrues from it.[22] Although transcription of trial proceedings generates additional income for the reporter, economic pressures work against prompt preparation and delivery. Reporters were and are permitted to take outside work, and the rate for such work is approximately forty per cent higher than that for transcripts. The economic advantage of outside work coupled with the threat of its loss if prompt service is not given relegates trial transcription to a low priority.

A second factor contributing to delay was the absence of effective official sanction to compel prompt delivery of transcript. Trial court judges could apply pressure and ultimately dismiss a dilatory reporter, but the shortage of qualified reporters and personal friendships frequently interfered with the exertion of substantial pressure. Counsel, while responsible for delivery of transcript, was without authority to compel such delivery. If the reporter failed to prepare a transcript within the thirty-day time allowed by statute, counsel's only recourse was to seek extensions of time for delivery.[23] In this context, it is not surprising that production in some instances became a matter of the reporter's convenience and discretion rather than that of the court's and the litigants'.

As an initial matter, it seemed desirable to eliminate some of the procedural red tape surrounding designation and preparation of the record. The designation of record was incorporated in the notice of appeal, and the combined notice and designation must now be served upon the reporter to constitute the appellant's order for transcript.[24] Now after counsel has filed his notice of appeal and designation of record, he has no further obligation for filing of the transcript other than payment of the reporter's charges.

Expediting preparation of the record. It was recognized that expediting actual preparation and delivery of the transcript could be accomplished in several ways. To some extent delay was simply a result of inattention by trial court judges to their reporters' work. Pending development of more effective sanctions, trial court judges were encouraged to be much more diligent in the administration and policing of preparation of the appellate record. Some limited success was achieved with this approach, but it was a marginal and short-term solution. So long as authority existed to grant extensions, some trial court judges were tempted to do so, frequently because of their reliance upon the reporter involved. The reporter was equally tempted to delay transcription and to request extensions so long as it was to his economic benefit and there were no real sanctions for unexcused delay.

In lieu of these informal techniques, S.B. 66 eliminated counsel's responsibility for delivery of transcript upon service and filing of the combined notice of appeal and designation of record.[25] The reporter is responsible for delivery of the transcript within the allotted time to the court in which the appeal is pending. The existing thirty-day period for production of transcript was retained, but the power to grant extensions was transferred from the trial court to the court of appeals and to the supreme court.[26]

* Herbert Schwab is Chief Judge of the Court of Appeals of Oregon and Robert Geddes is an Assistant Attorney General in that state; reproduced from Expediting Disposition of Criminal Appeals in Oregon, 51 ORE.L.REV. 650 (1972)

It is now appropriate for the court of appeals and the supreme court to consider rules implementing their authority to grant extensions. Such rules should probably provide an initial extension upon affidavit of the reporter showing unanticipated circumstances precluding completion of the transcript within the thirty-day statutory period. The rules should make it clear that the pressures of outside work accepted after the trial in question will not be a basis for extension. Where extensions are required beyond an initial reasonable period, the appellate courts might well reserve the right to require personal appearance by the reporter and a showing that the trial in question was of such length and complexity that additional time is required when other trial court duties are considered.

Although transfer of authority to grant extensions and limitations upon their availability was desirable, an effective means of enforcing compliance was also required. Reporters were therefore made officers of the appellate courts for purposes of any appeal in which the reporter's transcript is required. As officers of the court hearing the appeal they are, of course, subject to the full range of the court's disciplinary powers.[28] Such authority in the appellate court will, in most cases, be sufficient to guarantee performance by the reporter, except when the reporter has left the court's jurisdiction. To cover such cases it seems desirable to consider further legislation, which would require that reporters furnish a bond guaranteeing performance of their duties in accordance with the orders of the court.

Electronic reporting. It was evident from the outset that more rigorous controls over existing reporter services might not be sufficient to eliminate the delays at this point in the appellate process. The demand for reporter services in depositions and administrative proceedings was rapidly outstripping the supply of competent reporters. An inadequate number of skilled individuals were joining the occupation each year, and substantially higher salaries in other jurisdictions tended to drain Oregon's already inadequate supply. Competent court reporters were particularly difficult to secure for smaller, more remote counties of the state. Electronic reporting was therefore authorized, in the discretion of the trial court, as a reporting alternative.[29] The decision to permit electronic recording as a reporting alternative was based upon a variety of considerations. Although several mechanical alternatives to manual reporting were available, only electronic recording offered immediate availability and practicality. A substantial body of literature was available on the advantages and disadvantages of mechanical reporting of trial proceedings. It is sufficient to note here that controlled studies by disinterested parties consistently demonstrated that electronic reporting was *at least* as economical and as accurate as manual reporting. The 1966 Oregon State Bar committee report on electronic reporting[30] was the most definitive study of the system's feasibility in this state. The committee recorded all varieties of trial proceedings, comparing in each case the work product of the manual reporter with that of the electronic system. A careful comparison of the typed transcript prepared by each method disclosed little difference in accuracy of the record.[31] While the report concluded that electronic reporting did not offer significant savings, the cost projections of the report indicated a twelve and one-half to twenty-five per cent annual savings to Multnomah County with comparable savings projected for the other counties of the state.[32]

Even when cost advantage was ignored, however, electronic reporting still offered a significant opportunity to eliminate inexcusable delays in transcription time. The Bar committee did not find a significant difference in transcription speed between manual methods and electronic systems.[33] That conclusion, however, missed the point. The delay problem was not related to transcription speed but rather to the reporter's failure to commence transcription. Electronic reporting, of course, will make it possible for any trained typist to directly transcribe required portions of the trial proceedings. Since the in-court reporter's expertise is not required to transcribe the electronic record, the pressures of court duties and outside work need not interfere with the job of preparing transcripts. It is simply necessary to hire and train a sufficient number of skilled typists to produce the required transcripts within the prescribed time period. In larger counties permanent transcription pools could be established with extra part-time typists on call for particularly busy periods. In smaller counties the in-court reporter, aided by other court personnel or part-time workers, might be able to carry the transcription load.

In addition to eliminating the step which appears primarily responsible for delay in preparation of transcripts, electronic recording offered a number of other advantages. These advantages have already been described in the Bar committee's report,[34] and are only summarized here.

1. *Availability of transcript for post-conviction proceedings.* It is anticipated that the need for transcripts of long-dead legal proceedings will increase substantially in the future. Reporting techniques vary sufficiently from reporter to reporter so that it is frequently impossible to secure a transcript if the reporter originally recording the proceedings is unavailable. Electronic recording, of course, assures the availability of accurate transcripts for as long as the tapes are preserved.

2. *Immediate access to trial court proceedings by counsel and court.* When manual recording techniques are used, the daily transcript is available only under special arrangements and is prohibitively expensive in all but the most important cases. Since electronic recording produces an immediately understandable record of the proceedings, counsel, with the aid of relatively inexpensive replay machines, can review proceedings on a day-to-day basis without the expense of transcription, and review selected portions of the record to determine whether or not an appeal should be prosecuted. Judges may also review all or portions of testimony before passing on motions for new trial or for judgment n.o.v. Electronic reporting thus has substantial usefulness quite apart from any transcript that might be prepared, and the availability of electronic tapes of proceedings might avoid the necessity for transcription altogether.

3. *Transcription pools.* The existence of a record that can be transcribed by third persons could conceivably make regional or state-wide transcription pools possible. Concentration of equipment and trained personnel in regional or state-wide transcription pools should offer substantial cost savings in preparation of transcripts, particularly for outlying counties.

4. *Settlement of record.* Errors of the manual reporter are hidden in his notes, indecipherable to third persons, and therefore for all practical purposes there is no appeal from the manual reporter's work. Assuming acceptable levels of audibility, electronic tapes offer an objective record to which counsel and the court may refer in settling controversies regarding transcripts.

5. *Hearings on appeal.* The availability of an immediately under-

standable record of trial proceedings also offers the opportunity for de novo and appellate review on the basis of the electronic recording without transcription. Where a case can be reviewed without transcription, significant time savings are of course possible. Authority now exists under ORS 19.069 to hear appeals without transcription. The feasibility of this technique, however, remains to be verified.

The economic readiness of counties to convert to electronic reporting, plus sharp differences in need and appropriate facilities for electronic reporting, dictated that the statutory authority be phrased in the broadest terms, allowing discretion with respect to the choice between available systems of manual and electronic reporting. It was recognized that the technology of electronic recording and its application to court reporting and the preparation of transcripts was a rapidly developing and changing art and that it was important to retain flexibility. Therefore, no specific program was frozen into the statute.

It would appear that minimum standards for electronic reporting should provide for equipment which allows a constant monitoring of the material being recorded, provide for training of those who will serve as in-court monitors of electronic equipment and transcribers of electronic tapes, and provide standards for logging all material being recorded. It also seems desirable that where a given court has a number of in-court monitors and transcribers, the transcription and monitoring duties should be rotated among the personnel. Such rotation would assure that those transcribing the tapes would retain constant familiarity with actual court proceedings and would require that accurate logs be kept of the material going on the tape. In most cases, by rotation, it should be possible for the person who has monitored the recording in court to transcribe or supervise transcription of any proceedings he has monitored.

The supreme court was given the power to establish by rule the qualifications to be met by reporters and the standards to govern the use of electronic reporting in the state.[34] We emphasize that we do not think it necessary or even desirable that manual reporting be discouraged or eliminated. The manual system has served well in many cases and should continue to do so. At some point in the near future consideration must be given to increasing reporters' compensation to the levels necessary to attract and retain competent personnel in the field. Rules governing reporter qualifications have yet to be formulated, but it may well be appropriate to consider the reporters' long-standing request for adoption of the national certification procedures for all manual reporters.[35]

WHAT WOULD TRANSCRIPTS FOR EVERYONE COST?

Wilfred Feinberg*

If feasible, a complete transcript of the trial court proceedings should be made available to the appellate court in every appeal within thirty days or less after the imposition of sentence. This will eliminate the problems raised by efforts to adjudicate appeals on less than a full transcript. Many judges and appellate counsel believe that the potential for uncertainty as to what occurred in the trial court, with consequent possibilities of injustice, is too great to risk a criminal appeal without the complete transcript. To make available a full transcript without delay in all cases will require substantial funding, to provide either for technological innovations such as computerized transcription or for the additional work to be done by reporters and typists. But to allow transcript problems to frustrate the goal of moving criminal appeals with dispatch is intolerable. The money outlay must be compared with the social expense of delay in criminal appeals and with the total sums now spent to administer criminal justice.

Some of the cost dimensions of implementing this recommendation throughout the federal system are outlined in an appendix attached to the committee report, which examines the additional cost likely to be encountered in ordering transcripts in cases that might not be appealed. Two factors limit this potential waste in the federal system: (1) the criminal case appeal rate is already about 67 per cent and rising, and (2) the government will pay transcript costs in the bulk of those cases, in any event, under the Criminal Justice Act. As to the latter group, the proposal merely advances the time for incurring the cost, except for those instances in which the indigent would choose to appeal on less than the full trial transcript.

As to those cases that would not be appealed, the waste can be sharply reduced by a procedure that has been in use since late 1971 on an experimental basis in the federal district courts for the Southern and Eastern Districts of New York. Under that procedure, immediately after a guilty verdict is returned, a transcript is ordered by the prosecutor in every case in which he thinks an appeal is likely. Because there is usually a time lag between verdict and sentence to allow for preparation of a presentence report, the routine preparation of transcripts in cases in which an appeal seems likely ensures that a transcript is available in the appellate court by the time a notice of appeal is filed or very shortly thereafter. Consideration should be given to introducing that practice in all jurisdictions.

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* Circuit Judge, United States Court of Appeals for the Second Circuit; reproduced from Expediting Review of Felony Convictions, 59 A.B.A.J. 1025 (1973)

Based on figures of the Administrative Office of United States Courts for the year ended June 30, 1972, the bulk of potential "wastage" is best indicated by the difference between the 5,910 defendants convicted after trial and the 2,845 whose appeals were heard or submitted. This figure is 3,065. But some defendants were tried jointly and one transcript would serve all. The figure of 446 criminal appeals disposed of by consolidation indicates that 446 is a fair minimum estimate of defendants tried jointly. Subtracting 446 from 3,065 gives a possible "wastage" of transcript expense in the cases of 2,619 convicted defendants.

The key figure for translating this into dollars is an average unit cost per trial transcript. This figure is hard to pin down. The Administrative Office estimates an average trial transcript of six hundred to six hundred fifty pages at a cost of one dollar per page. This is based on a one-month sampling of requests for full transcripts under the Criminal Justice Act. A check by the office of the court reporters for the Southern District of New York for the year 1971 (283 trials transcribed) showed an average trial transcript length of five hundred pages.

A unit cost of $500-$650 multiplied by 2,619 defendants gives a figure of about $1.31 to $1.7 million. This is the bulk of additional annual transcript cost caused by preparation of transcripts in all criminal cases.

If the rate of criminal appeals increases over the 67 per cent in fiscal year 1972--and the trend has been going up--then mandatory expenditures by the government under the Criminal Justice Act will increase. Every increase will reduce the "wastage" of preparing transcripts in every case. In addition, the procedure now used in the Southern and Eastern Districts affords a check against ordering unnecessary transcripts. These "guesstimates" should reduce the net cost of the recommendation substantially.

In any event, against this element of increased cost one should consider the following for comparative purposes: (1) the Criminal Justice Act appropriation for fiscal year 1972 was roughly $14.5 million; (2) the proposed federal budget for fiscal year 1973 for the judiciary alone is approximately $188 million; and (3) a rough estimate by a committee of the Committee for Economic Development of the total annual expenditures of all federal criminal justice functions in fiscal year 1969, including courts, prosecution and defense, police and corrections, was approximately $1.1 billion.

This includes no estimate of how many additional reporters or typists would be required to put the proposal for expedited availability of transcripts into effect in the federal system because there is a difference of opinion regarding how much the output of court reporters can be increased by a change in their organization and practices, for instance, by requiring their efforts to be pooled. But as a corollary to Proposition 5, each jurisdiction should supervise the operation of the court reporters to maximize efficiency.[2]

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[2] See generally, EBERSOLE, IMPROVING COURT REPORTING SERVICES (interim report, Federal Judicial Center, February 1, 1972).

REPORT ON COURTS: TRANSCRIPT PREPARATION*

It is recommended that major efforts be made toward developing means of producing trial transcripts speedily. Funding should be made available promptly for this purpose.

It is further recommended that, where technological innovations in transcript production are not employed, funds should be provided to employ a sufficient number of reporters and note typists to insure that a transcript of the evidence, or at least the necessary portions of the evidence, is available within 30 days of the close of trial.

Commentary

The need or desire for a transcript of the proceedings in the trial court underlies much of the delay in the existing criminal appeals process. It also will impede the implementation of the standards in this chapter. Many American lawyers and judges think that a transcript of the entire trial proceedings is necessary for every criminal review. Others assert that a verbatim transcript is necessary for at least those portions of the trial that give rise to contested issues at the review stage. There is a reluctance to have the review process function on some other basis, as, for example, a trial judge's summary of the evidence (as is used in English criminal appeals). Some of this reluctance is justifiable; some of it rests simply upon familiarity with existing practice. But whatever the roots of these attitudes, the widespread belief in the necessity of a transcript is a factor to be reckoned with in any realistic effort to expedite and reform criminal review. Efforts to dispense with transcripts do not appear promising.

Rapid production of transcripts might be achieved through technological innovations. Methods holding some promise include computer-aided stenotyping, sound recordings, and videotaping. Exploration of their use is recommended by the American Bar Association Special Committee on Crime Prevention and Control in *New Perspectives on Urban Crime* 90-91 (1972). (See also Chapter 11 of this report.) Perhaps creative technological experimentation can develop other devices. It is recommended that funding be devoted promptly to this purpose. An excellent, up-to-date study of court reporting systems, including current technological possibilities, is National Bureau of Standards, *A Study of Court Reporting Systems* (4 vols., December 1971).

An accelerated production of transcripts also can be achieved in some jurisdictions through an increase in the number of court reporters. In some places there simply are not enough reporters to attend all the trials and also see to the typing of the transcripts without protracted delays. This difficulty can be met in some jurisdictions by providing more clerical personnel to type the reporter's notes. In other words, the problem may not be an inadequate number of reporters but rather an inadequate number of note typists. Where technological innovations in transcript production are not employed, it is recommended that funds be provided to employ a sufficient number of reporters and note typists to insure that a transcript of the evidence, or at least of the necessary portions of the evidence, is available in every case within 30 days of the close of the trial.

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* A recommendation of the National Advisory Commission on Criminal Justice Standards and Goals published in 1973 (Professor Daniel J. Meador, Reporter)

COURT REPORTING

Delmar Karlen*

CHAPTER ONE: INTRODUCTION AND SUMMARY

Background of This Study

In early 1972, the National Center for State Courts commissioned the writer to make a study of electronic court reporting in Alaska and Australia. It arose out of the Center's concern with the great and growing delay in the appellate courts of the United States, and was part of a larger effort to understand and appraise various approaches to solving that many-faceted, complex problem.

One of the recognized bottlenecks in the appellate process is the procedure whereby the reviewing judges are informed of what transpired in the court below. The standard procedure is to prepare a typewritten, stenographic transcript of proceedings. This is a step which must precede other steps in the appellate process--the submission of a complete record (including pleadings, orders, judgments, etc., in addition to the transcript), the filing of briefs, the hearing of oral arguments, and the preparation and promulgation of opinions. If the first step is delayed, so inevitably are the other steps.

The task of preparing transcripts of trial is today in most courts of the United States entrusted to court reporters, who are either shorthand writers or stenotype-machine operators. Some reporters type their own notes, while others dictate them, usually by means of tape recorders, to other typists for transcription.

Court reporters are in short supply almost everywhere, and they are growing more scarce in relation to the volume of litigation. Those who are available are unable to cope with the ever-increasing flood of appeals. Delays of many months in the preparation of transcripts are all too common. Judges and lawyers are dissatisfied. Litigants are also and even more vitally affected, even though few of them are able to identify the cause of their distress. Finally, the general public is adversely affected, particularly by delays in the final disposition of criminal cases. The deterrent and rehabilitative effect of criminal justice is seriously impaired by delay.

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In addition to being slow, court reporting is expensive. It calls for highly trained and highly skilled personnel, who must be and are compensated accordingly.

In these circumstances, it is not surprising that a quicker, and possibly cheaper, way of producing the raw materials needed for appellate review is being sought. There is presently widespread interest in electronic sound recording among judges, lawyers and court administrators as a possible substitute for traditional methods of court reporting.

There are other possible alternatives, notably "computer-assisted" transcription, whereby tapes produced from stenotype machines operated by court reporters can be automatically transcribed by computer, and videotape recording. Such alternatives, however, are beyond the scope of this report. It is concerned exclusively with electronic sound recording, and only as practiced in two jurisdictions which have had long experience with it. They are Alaska and Australia. In effect, they have served as experimental laboratories for other common-law jurisdictions. The experience they have accumulated is worth considering.

Men and Machines

Before summarizing the experience of Alaska and Australia, a few general observations about men and machines are in order.

When one first considers the possibility of switching from traditional court reporting to electronic sound recording, he tends to concentrate too much on equipment and too little on people. He worries unduly about acoustics and electronics--as if those were the main, perhaps the only, problems. His concern is misplaced, at least partially. He should devote equal attention, perhaps more, to the problem of recruiting persons who have the skills and temperament necessary to operate the machines properly.

The best machines in clumsy hands are likely to produce bad results. In skillful hands, machines which are presently available commercially can produce excellent results. Sound recording of courtroom proceedings need not await the development of ideal equipment.

Poor acoustics interfere as much with manual or stenotype shorthand as with electronic sound recording. It makes no sense, therefore, to wait for perfect acoustics in courtrooms before considering a switch away from traditional methods of court reporting.

Machines tend to become Frankenstein monsters, exercising a subtle tyranny over those responsible for their operations. People tend to get carried away by the capabilities of their machines. They record material that does not need to be recorded, transcribe tapes which do not need to be transcribed, and strive mightily to produce cosmetically-perfect transcripts when plainer, rougher versions would do equally well. They do such things not so much because there is need for them as because they feel a compulsion to demonstrate what their machines can do.

The threat posed by electronic court reporting to traditional court reporters is more psychological than economic. Since court reporters are scarce almost everywhere, there is no shortage of work for them to do. Electronic sound recording cannot be introduced overnight. It takes a considerable amount of time to adequately train typists and monitors for courtroom work. Machines can be used to cover courts not adequately covered by shorthand writers without displacing any of those presently at work, or to produce transcripts more quickly than can be produced by traditional methods. Courtrooms can be converted to sound one by one over a period of years.

Nevertheless, court reporters resist electronic recording because of the affront to their egos. Having devoted years of their lives to acquiring very special skills, they are understandably resentful of the idea that those skills can be replaced by a combination of machines and persons who possess a much lower order of skills and training. Full employment can be guaranteed to court reporters as long as they wish to work. Those not needed for the traditional tasks of court reporting can be used to supervise the process of sound recording, check transcripts made by audio-typists, and so forth.

Whatever the economic and psychological interests of court reporters may be, the desires of so small a group cannot be allowed to stand in the way of the public need for greater speed and accuracy in producing records.

Court reporters are not the only persons standing in the way of the spread of electronic sound recording. Many lawyers and judges resist changes that they fear might upset their long-established habits and courtroom styles. They are comfortable with familiar methods, even though aware of their shortcomings. As Arthur T. Vanderbilt remarked, "Judicial reform is no sport for the short-winded," an observation as applicable to court reporting as to other aspects of judicial administration. Rationally there is little for lawyers and judges to fear from electronic sound recording. All that is required of them is that they become conscious that voices in the courtroom are being picked up by microphones--a burden no greater than the one they now bear in making sure that the same sounds are recorded by a court reporter.

Government officials, particularly those having responsibility for preparing and approving court budgets, are also prone to resist change. It is easy for them to insert in next year's budget the same items for salaries that appeared in last year's budget; more difficult for them to authorize a new item for a capital outlay for the purchase of equipment, even though the expenditure would reduce the traditional salary items and result in net savings.

These psychological hurdles, though not inconsiderable, can be overcome. They have been in Alaska, and they are well on the way to being overcome in Australia. In that country, with its federal form of government and numerous independent judicial systems, electronic court recording has replaced traditional shorthand in some courts and is rapidly spreading to others.

How Electronic Reporting Works

The essentials of a sound recording system are simple, and can be stated briefly:

Voices in the courtroom are picked up by one or more microphones;
The sounds are channeled into a tape recorder;
The tapes are played back through earphones to typists who produce written transcripts of the proceedings; or, alternatively, they are played back directly to the reviewing judges. (In the discussion which follows, it will be assumed, unless otherwise noted, that written transcripts are made. This is the more common procedure.)

Eliminated is the step of having a court reporter produce an extra intermediate writing, consisting of his shorthand or his stenotyped notes, halfway between the courtroom sounds and the typewritten transcript. From the elimination of this step follows the elimination also of human errors in the process of first translating sound into written form.

An additional safeguard against error is provided by the fact that tapes produced electronically can be replayed as often as necessary to check the accuracy of the finished transcript against the original courtroom sounds. With traditional court reporting, no such check on accuracy is possible. Courtroom sounds are lost forever once the words have been spoken; all that remains is the court reporter's version of what was said and the recollection of others who were present in the courtroom.

Variations on the Theme

The basic concept of sound recording, outlined above, is capable of being implemented in many different ways. The different approaches, illustrated by Alaskan and Australian experience, can conveniently be discussed under two main headings: recording and transcribing.

Recording

Variations in recording have to do with the number of microphones used, the type of recording equipment, its placement, and the way the machines are monitored.

Microphones

At least four microphones are needed--one on the witness stand, another on the bench, another in front of the plaintiff's counsel or prosecutor, and another in front of the defense counsel. Additional microphones, however, are used in some courts. For example, in Canberra, the capital city of Australia, 11 microphones are used. In addition to those already mentioned, there is one microphone at the jury box, two in front of the dock, where the accused persons sit during trial, another microphone at the counsel table, a "roving" microphone (one which can be easily moved from place to place)--to be used wherever needed (to accommodate an interpreter, for example, or to pick up the

words spoken by lawyers who wander around the courtroom)--and finally, one for the use of the monitor of the recording machine in giving instructions to typists. Four additional microphones can be connected if needed.

Recording Equipment

Whatever the number or type of microphone used, the sounds received are carried by wire to a recorder. The simplest type is a machine using a single channel, on which the sounds coming from all microphones are mixed together. A more complex type, such as is used in the more sophisticated installations in both Alaska and Australia, has multiple channels, one for each microphone, with separate volume controls. When the tape produced by such a machine is replayed, either to enable persons in the courtroom to hear again something that was said earlier or to enable typists to prepare a transcript of proceedings, all channels can be combined into a single sound, or any one channel can be played back separately with other channels tuned out. This allows the hearer to distinguish individual voices--an obvious aid if several persons are speaking at once or if extraneous noises such as coughing or paper-rattling intrude. It should be noted, however, that the monitor of a recording machine has as much right as a court reporter to request the judge to halt the proceedings if they are becoming too confused to enable a proper record to be made.

When only one tape recorder is used, as is the practice in some courts delays are sometimes encountered. If the machine breaks down, proceedings have to be suspended until a replacement can be installed. If a tape is completed in the middle of a trial, minutes are lost while the monitor replaces it with a new one. Because of such potential difficulties, many courts in Alaska and Australia have two recorders available, one of them a stand-by machine ready to be switched on immediately in the event of a breakdown or the completion of a tape on the other machine.

When only one machine or one and a standby are used, the transcription process cannot be started until a tape is completed and ready to be handed over to a typist. As a practical matter, this means the end of the entire proceeding or at least the end of a single session of court. If fast copy is desired, as it often is in Australia, two more recording machines are needed to produce short tapes, running from two to six minutes each. Although the primary recorder runs continuously, the transcription recorders are run alternately. While one is running, the operator removes from the other a completed short tape and replaces it with a new tape. Then the machine is turned on and the other is stopped and its completed tape replaced with a new one by the operator. As each tape is finished, it is given to a typist to be transcribed. As many as six typists may be working simultaneously on a transcript, each doing about two pages at a time. The transcription process and the machines used in it will be described in greater detail later.

Remarkably fast transcriptions are produced in Australia by this procedure. In several courts of that nation, less than an hour elapses between the time words are spoken in the courtroom and the time they are available in written form. Within an hour of the court's rising for the day, the entire transcript of that day's proceedings is in the hands of the judge and counsel.

Placement of Recorders

The preferred, almost inevitable, location for the primary recorder and its standby, if any, is in or immediately adjacent to the courtroom. It may be housed in a specially built glass-enclosed booth, from which the monitor can see what is happening and communicate with the judge if necessary. This is the pattern for newly constructed or remodeled facilities in Australia. But a special enclosure is not necessary. In all courts in Alaska and some in Australia, the machine and its operator are in the open courtroom.

Within the courtroom, several locations are possible. In Alaska, where the monitor of the equipment does double duty as clerk of court, he (or she, usually) and the equipment are located in the front part of the courtroom, immediately adjacent to the bench, where the clerk-monitor may mark exhibits, announce the opening and closing of court, confer with the judge and attend to other clerical duties. In most Australian courts, the monitor is not expected to do double duty as a clerk, and in consequence he and the equipment are likely to be located inconspicuously at the back or side of the courtroom.

When additional transcription recorders are used to produce short tapes for fast transcription, these machines may be housed in the courtroom or at a remote location where the transcripts are produced. In the courts of New South Wales where electronic recording is used, the transcription recorders are located in the courtroom and are operated by the same person who monitors the primary machines. As he removes each completed short tape from one of the transcription machines, he places it in a receptacle located in the courtroom wall. It can be opened from the other side of the wall, where there is a corridor. Typists periodically go into this corridor and remove the tapes from the outer opening of the receptacle as they are ready to transcribe them. This avoids the disturbances which might otherwise be caused by typists coming and going in the courtroom.

In the High Court of Australia and in the Supreme Court of the Australian Capital Territory, a more sophisticated system is used to accomplish the same end. The transcription recorders are remote from the courtroom (about two blocks distant in one case, a mile or more in another), but connected by underground wires to the primary recorder. They receive simultaneously exactly the same sounds as are being recorded on the primary recorder in the courtroom. They are monitored by another person, who changes the short tapes at frequent intervals and hands them to typists for transcription in the same or an adjoining room.

Monitors

Whatever type of recording equipment is used, it must be monitored. One purpose is to detect any malfunctioning of the machines and to change tapes when necessary. Another purpose, equally important in some courts, is to provide a "log" to guide the typists who will later make a transcription from the recording. The log is a brief, handwritten notation of proceedings, keyed to a counter on the machine similar to a speedometer on an automobile. In this document, the speakers are identified, the time of direct, cross-and re-examination noted, difficult medical or scientific terms and proper names spelled, and other information given which will be helpful to the typists. By reference to the log, the relevant portions of the tape needed for playback in the courtroom or for transcription can be quickly located.

It is possible to combine the duties of monitoring the machines with other duties such as serving as judge or court clerk. This is done to a limited extent in both Alaska and Australia. In Tasmania, an Australian state where sound recording is in its infancy, only one recording machine is used in a magistrate's court, operated by the magistrate himself. Since the tapes are seldom transcribed, the magistrate seldom bothers to try to make any log that would be useful in transcription. In Alaska, where sound recording is well developed, the duty of monitoring is assigned to a clerk of court, commonly known as the "In-Court Deputy." This person, usually a woman, attempts to make a log of proceedings and pay careful attention to the quality of sound being recorded, but she cannot devote full attention to the job of monitoring. She must mark exhibits and attend to other clerical duties while the recording is in progress. The attempt to save money by combining monitoring with other duties is probably false economy, at least in a court from which many appeals are taken.

The monitor is a critically important person in the recording operation and ideally should be able to pay undivided attention to the job of producing as clear a record as possible. Some special training is needed, perhaps lasting no longer than about a month, so that the monitor does not become flustered in the face of what might appear to be complicated equipment and so that he develops enough confidence to ask the judge to halt the proceedings in the case of a malfunctioning of the machines or confusion in the courtroom which interferes with proper recording. A practical solution of the problem which is appealing is found in Canberra. There the girls who ordinarily act as typists in transcribing the tapes take turns at monitoring the machines in court. As typists, they realize the problems that arise in transcription and hence are able to make meaningful logs and also to offer oral comments to the typists through the recording machine itself. When stereo tapes having multiple channels are used, the monitors' instructions can be separated from the words spoken by witnesses, judges and lawyers. The Canberra practice also has the advantage of relieving tedium on the part of the typists. It is helpful for them to go to court from time to time and see what is happening instead of having to spend all their time listening to tapes and trying to reconstruct what transpired in the courtroom. In short, using typists as monitors improves both the recording process and the transcription process.

Transcription

Just as there are differences between jurisdictions in the recording process, so also there are differences in the transcribing process.

Most important of all, the personnel involved in electronic recording are the typists who receive sounds from tapes and convert them into written transcripts. They must be carefully recruited, because audio-typing requires a special temperament and special skills. Those who are recruited must be made aware in advance of the nature of their work and the difficulties they will encounter. Audio-typists, while working, are almost removed from normal human contact. They have to employ high intelligence to distinguish voices and to figure out what was going on in the courtroom which produced the sounds they hear. This is a more difficult task than that of taking ordinary dictation, because they must sort out the sounds and make sense of them rather than rely on the dictater to do that for them. They must have the arts of spelling and punctuation, because they cannot merely copy words already written. Nevertheless, given proper recruiting, audio-typists for court work can be trained in four to eight weeks.

Frequency of Transcription

In some courts, all proceedings are transcribed as well as recorded. This happens in several trial and appellate courts of Australia, where lawyers and judges are accustomed to the luxury of daily transcripts in all proceedings in which they participate. Judges use the transcripts to prepare delayed judgments, and lawyers use them to prepare for future sessions. In Australia, as in England, some appeals are lengthy, lasting for several days or even weeks--hence the practice, which seems strange to American eyes, of recording and immediately transcribing appellate proceedings.

A dramatically opposite approach is found in the District Court of Alaska, where no transcripts are made from the recordings. Instead, when an appeal is taken to the Superior Court, the reviewing judge listens to the tape. He is assisted by the log prepared by the monitor, but normally does not have a transcript. If he feels that he specially needs one, he can order part or all of the proceedings transcribed; but this hardly ever happens.

Midway between the extremes just described is the more common practice, found in both Alaska and Australia, of making a transcript only when an appeal is taken or some other future proceeding contemplated at which a record of prior proceedings is necessary. This parallels the practice of most American courts served by traditional court reporters; shorthand or stenographic notes are not transcribed unless an appeal is taken or unless other special need appears. In short, the production of transcripts is selective rather than routine.

Even where selective transcription is customary, there are some cases where daily copy is produced, but these are exceptional, involving very rich clients or an unusual degree of public interest. To the limited extent that daily transcripts are called for in the United States, the procedure for producing them resembles the procedure for producing daily transcripts in Australia, except for the fact that the original recording in Australia is electronic rather than by court reporters.

Time of Transcription

For reasons just noted, most transcripts are delayed until the time comes to take a further step in which a record of preceding events is necessary--typically an appeal. When a litigant decides that he is going to appeal, he files a notice of appeal and orders a transcript. This may be 20 or 30 days after the conclusion of proceedings. That amount of time, together with whatever time it will take to type the transcript, is the measure of how long it will be before further steps can be taken.

If electronic sound recording is used, the only workers needed to produce a transcript are typists. If a shorthand reporter is used, his services are necessary. Time must be found by him to read back his notes and (1) type them himself, (2) dictate to a typist or (3) dictate to a machine which will ultimately be used by one or more typists. In view of the fact that most court reporters are in court all day long every working day, they must find time on evenings or weekends or during vacation periods to do their share of the necessary work. Delays are understandable, almost inevitable. With sound recording, typists have already available, in form that can be used by them, all the material that they need for transcription--the finished tapes and accompanying logs.

If daily copy has to be produced through traditional shorthand or stenotype methods, several court reporters are needed for a single case. They have to change places in the courtroom frequently. When one has finished his stint, he leaves the courtroom and starts dictating or typing as another court reporter takes his place in the courtroom. No less than three or four court reporters are needed to produce a completed transcript of a day's proceedings in time for the opening of court on the following day.

When sound recording is used in place of shorthand or stenotype, daily copy can be produced much faster. Transcribing can start almost as quickly as the proceedings themselves if short transcription tapes of the type described above are used. In Australia, a completed daily transcript is ordinarily ready within an hour of the time the court rises for the day, and partial transcripts are available (for whoever has time to read them) even sooner--every half-hour or so as the case progresses.

Mechanics

If only ordinary (not daily) copy is required, there is no need to use several typists simultaneously. A single typist can transcribe an entire tape or series of tapes. She uses a recording machine of the same basic type as that which produced the tapes. It is equipped with earphones and a foot-pedal control which allows her to start, stop and replay the tape as often as necessary. She is assisted by the log of proceedings, helping her to identify voices, get the correct spellings of names and difficult words, and so forth.

When daily copy is required, it is customary to use a battery of typists on a single case. As explained earlier, this involves the production of short tapes, each with its own log. When several typists are so employed, each acts in much the manner of a single typist transcribing an entire case, except for the fact that she is concerned with only a short segment of proceedings, perhaps five or six minutes' worth of recording, producing about two pages.

This presents problems in pagination. In some courts in Australia, each typist is assigned pages in advance for each tape, and she numbers the pages as she goes along, on the assumption that each short tape will produce the assigned number of pages. If it happens to produce only one, instead of using assigned numbers 18 and 19, she numbers the one page "18-19." If, on the other hand, her tape yields three pages, she numbers them "18," "19" and "19a". Sometimes the typing stops in the middle of a page, and the next typist's page starts at the top. This results in a somewhat slipshod appearance of the manuscript, but presents no difficulties in understanding.

The Final Product

After typing is completed, someone normally looks it over for accuracy. In some courts, this is done only by the typist herself, who may listen to the tape again while looking at her first draft. If she discovers errors, she may make the corrections either by retyping or by handwritten insertions, deletions and changes between the typed lines. This is common practice in Australia.

In other courts, notably in Alaska, a more elaborate system is used. All manuscripts are read not only by the typists who produced them, but also by a supervisor, who listens to the recording and makes any further corrections deemed necessary. Elaborate checking in Alaska is accompanied by an elaborate retyping procedure. The transcripts are originally typed on an IBM Selectric typewriter having an "automatic memory" which stores the typed material. When an error is discovered, the typist, using the same machine, retypes the corrected material only and then has the machine rerun the entire pages on which the errors appeared. This produces very handsome manuscripts, but is an expensive process; and it adds little or nothing to clarity.

In some places, checking for accuracy is left to the lawyers. Being themselves involved, it is believed that they can be relied upon to point out any errors they consider significant. Corrections are made with the consent of opposing counsel, or if necessary by court order. Sometimes both lawyers and even the judge may listen to the tapes again, attempting to resolve disagreements.

The method of producing whatever number of copies is required varies from jurisdiction to jurisdiction. In some places, ordinary carbons are made; in others, stencils are cut and as many copies run off as necessary.

Speed

Electronic sound recording can produce either daily or ordinary transcripts more quickly than traditional court-reporting methods. With electronic sound recording, no court reporter is needed to translate courtroom sounds into language from which a typist can work. When shorthand or stenotype is used, the court reporter normally is the only person who can decipher the resulting notes. For each hour he spends in court, he must spend an additional two or three hours translating his notes. Those hours are hard to find in the life of a busy court reporter. Delays are common and substantial, even when the court reporter does not type his own notes but dictates directly or indirectly via a machine to another typist. Dictation takes almost as much time as direct typing.

When electronic sound recording is used, typing can start almost as soon as the proceedings themselves or, if daily copy is not required, as soon as a transcript is ordered. There is no need for a typist to wait for the services of an intermediary.

Judicial Control

Under traditional court reporting methods, the preparation of transcripts is done on a private contractual basis between the court reporter and the persons ordering the transcripts. The state has little or no effective control. It can make rules as to when transcripts have to be filed, but can do little to enforce them without being arbitrary and unfair to litigants. Such rules are honored in the breach more often than in the observance. Extensions of overly liberal time schedules are granted all too freely.

With a sound recording system, the possibility of effective judicial control is greatly enhanced. The entire process of recording and transcribing can be regarded as a single procedure under judicial control. This is the pattern in Alaska and in most (although not all) states of Australia. With courts having control, judges can do more than complain about delays.

Accuracy

Sound recording, if properly managed, is more accurate than traditional court reporting. Poor acoustics are at least as much of an impediment to traditional court reporting as they are to sound recording. In the open courtroom, a witness, lawyer or judge may not speak loudly enough or clearly enough for all to hear; but if his voice is picked up by a nearby microphone, it can be amplified and made distinct.

If any question is raised as to the accuracy of a transcript, it can be resolved by replaying the tape. If only shorthand or stenotype notes are available, there can be no authoritative check on the court reporter's accuracy. Those who disagree with his version of what was said have nothing to support their position beyond their own fallible recollection.

With traditional methods, there can be no effective check on the accuracy of an interpreter's translation. Only the English words spoken by the interpreter are included in the shorthand or stenotype notes, not the original foreign words spoken by the witness. With sound recording, the original words of the witness are preserved along with the interpreter's words, so that the latter may be compared with the former.

With sound recording, the likelihood of having every word reproduced as spoken is enhanced. There is little danger of editing by some unauthorized person making a judgment as to what is important or unimportant, what should be taken down or not. All court reporters, it is believed, edit the proceedings to some degree. Some judges and lawyers like this, because it makes for a more compact transcript. Others fear to entrust such power to a court reporter. They would prefer an accurate, truly verbatim record of everything that was said.

If a recording is listened to by a reviewing judge rather than reduced to the form of a written transcript, it preserves some of the "demeanor evidence" which was present in the original proceedings but which ordinarily escapes an appellate court. Such evidence is important, as Judge Learned Hand observed:

> ". . . It is true that the carriage, behavior, bearing, manner and appearance of a witness--in short, his "demeanor"--is a part of the evidence. The words used are by no means all that we rely on in making up our minds about the truth of a question that arises in our ordinary affairs, and it is abundantly settled that a jury is as little confined to them as we are. They may, and indeed they should, take into consideration the whole nexus of sense impressions which they get from a witness. This we have again and again declared, and have rested our affirmance of findings of fact of a judge, or of a jury, on the hypothesis that this part of the evidence may have turned the scale. Moreover, such evidence may satisfy the tribunal, not only that the witness' testimony is not true, but that the truth is the opposite of his story; for the denial of one, who has a motive to deny, may be uttered with such hesitation, discomfort, arrogance or defiance, as to give assurance that he is fabricating, and that, if he is, there is no alternative but to assume the truth of what he denies."
>
> --Dyer v. MacDougall, 201 F.2d 265 (C.A. 2, 1952)

Reliability

Machines can break down or malfunction, but so can human beings.

If a tape recorder is not functioning properly, that fact can be quickly detected and the machine replaced by another--provided only that spare machines are kept readily available. Such machines are not in short supply, and it is no great feat of planning to provide spare machines along with competent monitors to operate them.

If a court reporter is absent or unable to perform his duties, he also must be replaced. But court reporters are in short supply. It may be extremely difficult to find a competent replacement quickly.

Moreover, a court reporter may die, leave the jurisdiction or become incapacitated after he has taken his shorthand or stenotype notes but before he has transcribed them. If so, his labors are probably lost forever, because ordinarily no one else is capable of deciphering his notes. The result is likely to be a new trial or a reluctant settlement brought about by the pressures of time and expense.

With sound recording, a completed tape (and accompanying log) can be transcribed by any competent typist. No intermediate translation is necessary.

Expense

Sound recording is cheaper than traditional court reporting. The cost of purchasing, installing and monitoring the machines is more than recouped by savings in the compensation of court reporters for their work in and out of the courtroom.

The cost of producing a transcript of a single day's proceedings by traditional methods involves compensation of the court reporter for his time in court, plus the time he spends in typing or dictating his notes and checking the resulting manuscript. If we assume that his compensation works out to $100 per day, and that he spends three days typing his notes, his compensation will amount to $400. If instead of typing the notes himself, he dictates them to a typist, the process will probably require two days of his time and two days of her time. Assuming that she is paid half his rate, or $50 per day, her compensation will be $100. This will be added to the court reporter's compensation, to arrive at the same total labor cost of $400.

The cost of producing the same transcript by electronic sound recording involves compensation of the monitor for one day and compensation to a typist for three days. If we assume that the monitor and the typist are both paid at the rate of $50 per day--half the assumed rate for a court reporter--the total labor cost will be $200. To this must be added the cost of the machines, amortized over their useful life, and the cost

of maintaining them. Estimating such cost at the high figure of $50, we arrive at a total cost of $250--slightly more than half of what it would cost to produce the same transcript by traditional methods.

These are hypothetical figures, necessarily somewhat arbitrary, but it is believed that they are reasonably representative of the relative costs of the various types of labor involved and the cost of installing and maintaining machines in most parts of the United States. More specific comparative cost estimates are given in subsequent parts of this report dealing with Alaska, Canberra, Queensland and Western Australia.

It is important to compare like with like. The cost of producing daily transcript by sound recording can be fairly compared only with the cost of producing daily copy by conventional court reporting; and the cost of producing ordinary copy by either method can be fairly compared only to the cost of producing the same type of copy by the other method. Daily copy, requiring a more massive deployment of manpower, is more expensive than ordinary copy, regardless of the method used.

Either manual shorthand or electronic sound recording can be unduly expensive if wastefully used, as by recording material that does not need to be recorded or by producing transcripts that are not needed.

Effect on Trial Procedure

However a record of proceedings is made--whether by conventional methods or sound recording--some restrictions upon the conduct of the court and counsel are necessarily imposed. In either case, they must be conscious that a record is being made. This sometimes involves stopping the proceedings, so that a court reporter can catch the words spoken or so that the sounds coming into a recorder are clear. There is little to choose between one method as against the other. A monitor can signal the judge to halt proceedings just as well as a court reporter.

On occasion, the judge, a lawyer or one of the jurors may want to hear again some of the proceedings that have already taken place. This is accomplished in a conventional system by having the shorthand writer read back his notes. It takes him a few minutes to find them and to read them back. When a tape recorder is used, the same purpose is accomplished by playing back a portion of the tape. Again it takes the monitor a few minutes to find the relevant portion and play it back. There is little to choose between the two methods in this regard.

One aspect in which sound recording may have an advantage over court reporting is its unobtrusiveness. The monitor of a tape recorder may be located in a soundproofed booth apart from the regular courtroom, rarely seen or heard. He attends to the entire day's proceedings and does not have to change places in the courtroom with anyone. If court reporters are employed to produce daily copy, they have to work in shifts and

change places during the proceedings. Furthermore, they have to be placed strategically in the forepart of the courtroom to hear everything that is going on; they cannot be in back of the room or in a soundproofed booth. Inescapably, at least a slight amount of commotion is caused by the coming and going of court reporters.

Another salutary consequence of sound recording is its effect on the conduct of lawyers and judges. Everything they say is reproduced for possible review by an appellate court. Also reproduced are the tones of their voices and their manner of speaking--part of the "demeanor evidence" so highly prized by Judge Learned Hand, quoted earlier.

Effect on Appellate Procedure

The main effect of sound recording on appeals is to speed up the appellate process. Transcripts can be produced in time to allow appeals to get underway promptly in accordance with court rules. If recording and transcribing is under the control of the appellate judges, they can effectively demand transcripts as fast as they are needed for any situation.

Since all other steps in the process of deciding an appeal must take place after the preparation of the transcript, this is a critically important stage of proceedings. If delay can be eliminated here, the entire process can be accelerated.

CHAPTER TWO: SOUND RECORDING IN ALASKA

Alaska has a fully integrated statewide system of courts. Included in it, under the control of the Administrative Office, is a statewide system of court reporting. There are no manual-shorthand writers in the state courts. All recording is done electronically.

History

Alaska became a State in 1959. In February of the following year, the new Supreme Court adopted a rule making electronic recording the exclusive method of preserving the record of proceedings in all courts of record of the State. This measure was adopted because of the extreme shortage of court reporters in Alaska and a most unsatisfactory experience with the few who had been available in territorial days. Interminable delays had characterized the production of transcripts for the territorial courts. The two leading spirits in introducing electronic recording were Buell A. Nesbett, then Chief Justice of the State, and Warren Olney III, then Director, Administrative Office of the United States Courts.

The system has now been in operation for over twelve years. Improvements have been made in equipment, personnel and procedures, but the basic concept remains unchanged. Criticisms of the system have abounded, most of them emanating from court reporters and their professional associations, but they have not stemmed the tide of electronic recording. Judges and lawyers of the State are generally agreed that there can and should be no return to the old system of manual or stenotype shorthand. Further improvements are in order, as this paper will suggest, but any abandonment of electronic court-reporting in favor of a return to older systems seems unthinkable.

* * * *

Transcribing in Anchorage

Most completed tapes are simply stored without transcription. In only about five percent of the cases heard are transcriptions made. A transcript is always ordered when an appeal to the Supreme Court is taken. About twenty percent of grand jury proceedings are transcribed. Additionally, a transcript of a preliminary hearing may be ordered in preparation for an important criminal trial, or in any kind of case by a judge who has reserved decision. Counsel who need a precise record of what has transpired in preparation for further steps in the case may also order transcriptions. Partial, rather than complete, transcripts are sometimes ordered, e.g., the testimony of a single key witness or of a doctor in a personal injury case, the evidence relating to damages, certain rulings on evidence, or only the judge's instructions to a jury--depending, of course, on the issues to be pursued either on appeal or in future trial proceedings. The majority of appeal transcripts are lengthy, running from 500 to 3,000 pages, whereas non-appeal transcripts commonly run less than 200 pages, so that page-wise roughly seventy percent of all pages transcribed are appeals. However, in terms of <u>number</u> of transcripts requested, only ten to fifteen percent are appeals.

Facilities are available for counsel to listen to a tape before ordering a transcript. This helps to cut down the volume of typed material sent to the Supreme Court in a record on appeal. Sometimes, it also results in a decision not to order a transcript or not to take an appeal.

When a transcript is ordered, the portions of the proceeding to be transcribed are specified by log numbers or obtained by reference to the case file. Then, the selected tapes are given to a transcription typist. She has available for her use a recorder of the same type that produced the recording (Dictaphone or Soundscriber, as the case may be), which is equipped with earphones and a foot pedal to enable her to start, stop and replay the recording at will and, as often as necessary, to decipher the sound. If it is a Dictaphone tape, she can listen to the mixed sound coming from all microphones (this is the normal procedure) or select one channel to listen to a particular voice.

With the tape comes the log of the case to assist her in following the proceedings, identifying speakers, spelling proper names and difficult expressions, etc. Typing is done on an IBM Magnetic Tape/Selectric Typewriter (MTST). This machine has what can be called an "automatic memory," so that if a correction is made, the entire transcript does not have to be manually retyped--only those portions where changes are needed.

When the initial draft of the transcript is complete, it is handed to the supervisor or assistant supervisor of the transcription department for "soundproofing". This involves listening to the tape while simultaneously reading the draft transcript and making any corrections needed. The draft transcript with inked corrections is then returned to the typist who produced it. She makes corrections manually on the keyboard, as she runs the final copy with as many carbons as necessary on the MTST. It automatically retypes all portions which remain unchanged. When the typing is completed, the final copy is "sound-proofed" by supervisory personnel for typographica and format errors; then, the pages are numbered, and a title page, table of contents and certificate of accuracy prepared; the end product is put into a plastic cover and bound with brads. Finally, the finished manuscript, along with the tape or tapes from which it was made and related papers, is returned to the supervisor for distribution and filing.

The procedure just described is slow and costly. Its outcome is a handsome and extremely accurate transcript, but at a high price in time, effort and equipment. One <u>hour</u> of recording in the courtroom produces on the average about 45 pages of transcript. A transcription typist can turn out on average about 35 pages per <u>day</u>. To produce a transcript covering

one day's court proceedings of about five hours' duration requires about two weeks of work in the transcription department. Six days are devoted to typing the first draft, another day to soundproofing it, two more to retyping it by means of the IBM machine, and one final day is spent on collation, numbering pages, indexing and preparing the title page and binding.

It is no wonder, then, that the transcription department is far behind in its work. There is a three months' backlog in <u>starting</u> to fill requests for ordinary appellate transcripts and, of course, an even greater backlog in <u>actually filling</u> them. If a transcript is ordered on August 1st, no typing is likely to start until about November 1st.

Yet, according to court rules, a record on appeal should be ready 40 days after the notice of appeal is filed. Thirty of these days are available for the preparation of the transcript, and the ten additional days are allowed to enable the clerk to get the pleadings and other papers in shape. These time intervals, however, are entirely theoretical. The Superior Court can extend the time for the preparation of a transcript by as much as 60 days, and the Supreme Court can further extend the time indefinitely. Extensions of time are routinely asked and routinely granted. Thus, one of the main purposes of having electronic court-reporting--speed--is frustrated. The entire appellate process is stalled until a transcript os ready. Only after it is ready can briefs be written, oral arguments prepared and delivered and the process of appellate decision-making started.

The reasons for delay are several. First, some of the recordings and logs are of poor quality because of inadequate monitoring as discussed above. This slows down typing, as the same portions of the tape may have to be played over and over again. Second, the transcription staff is too small to handle the volume of work. Although the typists are well-qualified (they have to be able to type 70 words per minute accurately and possess a better-than-average vocabulary and krowledge of spelling), and are conscientious and well-trained (they have the benefit of a special Manual of Transcription Procedures and are not expected to become fully proficient for six months to a year), there are only eight of them to handle all of the appeals and special requests for transcription arising out of the work of ten Superior Court judges. Theoretically, the transcription department serves the District Court as well as the Superior Court, but as will be shown later, it does almost no District Court work as a practical matter. The fact that there are too few typists is aggravated by the State's unwillingness to pay them overtime in order to increase and expedite their production.

Finally, delays are caused by an over meticulous concern with producing letter perfect transcripts. If soundproofing and double-typing were eliminated, many hours and weeks could be saved. Attorneys could be relied upon to point out claimed errors in the once typed manuscripts, and if corrections were found necessary as a result of replaying the tapes or stipulations by counsel, they could be made in less time and with less effort than are now devoted to producing cosmetically-perfect transcripts.

With its present staff and procedures, the transcription department is seldom able to produce daily or even accelerated copy. It can and does occasionally give priority to special requests, as for grand jury hearings or preliminary hearings in criminal cases. But when this happens, the normal work of making transcripts for appeals is further slowed down. Generally speaking, if a lawyer or party requires daily transcription or is unwilling to take his turn in the normal production line of the transcription department, he must seek the services of a commercial reporting company. There are several such companies in Anchorage, doing mostly civil deposition work (all by means of their own electronic recording) but making themselves available to produce transcripts of in-court proceedings, when more speed is needed than can be generated in the official transcription department. These companies employ part-time as well as permanent workers and are thus capable of quickly expanding their staffs as required to do particular jobs. Furthermore, they are not precluded from paying overtime for work done beyond normal hours. If a transcript of all or part of a proceeding in court is ordered from such a company, arrangements must be made for its employees to use the official tapes and logs. One company is allowed to borrow them for use in its own offices. Others are allowed to use them after hours in the offices of the official transcription department. Furthermore, if daily copy or anything approaching it is required, arrangements have to be made in advance for the In-Court Deputy to produce shorter tapes than are normally used and to turn them over to commercial typists at relatively short intervals--say, at the mid-morning break, at noontime, at the mid-afternoon break, and finally at the conclusion of the day's testimony. Full daily transcript is extremely rare, but partial daily transcript--more often than not the testimony of a doctor in a personal-injury case--is not uncommon. Even so, it is a euphemism to call what is produced with relative speed by a commercial company "daily" copy. At best, the transcript becomes available at 10 or 11 o'clock the following morning as the result of long hours of overtime extending well into or through the night.

Transcribing Outside of Anchorage

The optimum transcription system in Alaska is that just described for Anchorage. The man in charge there is the transcription supervisor for the whole state, and the equipment there is the most advanced in the state. The same procedures that prevail in Anchorage are supposed to be followed elsewhere in Alaska and probably are in Fairbanks, where similar personnel and equipment are available. In other cities, however, there are no IBM Magnetic Tape/Selectric Typewriters or full-time supervisors or transcription typists. In such places, transcripts are produced by less expert typists, and soundproofing and retyping are done on a less elaborate scale. As for delays in the production of transcripts, they are no greater in other parts of the State than in Anchorage. That is because outside of Anchorage the volume of litigation is very much lower, with the result that far fewer transcripts are required.

The Supreme Court

The only court in Alaska not yet considered here is the Superior Court. There is no need to record its hearings for purposes of appellate review. If further review of an Alaskan case takes place in the Supreme Court of the United States, the arguments of counsel and the colloquies of the judges in the Alaska Supreme Court do not become part of the record on appeal. Only the judgment becomes relevant to the deliberations of the United States Supreme Court.

Nevertheless, some arguments in the Supreme Court of Alaska are electronically recorded. This is not done regularly as a matter of course, but can be done at the special direction of the court when it is anticipated that some members of the court might want to have a record of what was said. The court sits mostly in Anchorage, but sometimes in Juneau or Fairbanks. Three of the five justices who compose the court live in Anchorage, one in Juneau and one in Fairbanks. Sometimes, because of the great distances in Alaska and because weather conditions often make air travel difficult, all of the justices are not present to hear oral argument at the time and place scheduled. When this occurs, the absent justices can still participate substantially in the decision of the case so heard, either by listening to the tapes or by having them transcribed and then studying the transcript. Sometimes, too, it is helpful to members of the court to refresh their recollections of oral arguments when they are writing opinions weeks or months later.

When electronic recording takes place in the Supreme Court, the same general procedures of recording are used as are followed in the Superior and District Courts. In the relatively few instances when the recordings are transcribed, the work is done in the transcription department of the Third Judicial District in accordance with the procedures generally followed, as outlined above.

Overview

Some of Alaska's difficulties with electronic recording have already been noted, i.e., delays in producing transcripts, inadequate monitoring, limited transcription staff, and preoccupation with the cosmetic appearance of transcripts. One more difficulty deserves mention here: equipment. The Dictaphone recording equipment is superior to the Soundscriber equipment because of its six-channel reception, but is less sturdy and subject to more frequent breakdowns. Neither machine is specially engineered for courtroom work, both being merely adapted from general commercial use. The equipment now in use in Alaska was purchased by lawyers and administrators, not electronic technicians. For that reason, State officials

were at the mercy of equipment salesmen, being unable to exercise an independent and informed judgment as to the quality of machines offered them. Recently, however, the State appointed an electronics technician, whose primary task is to repair and maintain the machines now owned by the State but who is also available to offer expert advice as to the equipment that should be purchased and installed. Another hopeful development is the fact that the Dictaphone Corporation has been made aware of the defects in its machines and is attempting to correct them. The company is also studying seriously the marketing potential of a machine specially designed for courtroom use in Alaska and elsewhere. If it finds that an adequate market potential exists, it will probably develop such a machine.

The other noted defects can also be overcome through the employment of better qualified and better-trained monitors, an increase of staff in the transcription department, and simpler and faster procedures for transcription. Present defects can fairly be regarded as only growing pains.

It is the belief of the writer of this report that the production of the transcription department could be doubled in two simple steps. The first would be to hire four additional audio-typists. Added to the eight present typists, they should increase output of the department by 50 per cent. The second step would be to eliminate soundproofing and retyping, which now consume about 30 percent of the time and labor presently used to complete a transcript. Lawyers could be relied on to point out any errors. Since 30 percent of 150 percent is approximately 50 percent, output would be doubled. Consequently, the transcription department would soon be able to eliminate its backlog of requests for transcripts and be able to start work on a request within a week after it was made, instead of waiting three months, as at present. Once the backlog was eliminated, the department could probably meet whatever demands might exist for daily transcripts, while still keeping up with its normal work of preparing delayed transcripts for appeal.

If, in addition, a single transcript were typed and additional copies were produced as needed by Xerox or stencil, another saving in the time of the typists' inserting and correcting carbon copies would be effected. This assumes that the tyranny of the IBM typewriters will be ended.

Finally, if overtime compensation for audio-typists were authorized, a reserve of womanpower could be created, capable of flexibly expanding the production of the transcription department as required.

Even subject to its infirmities, electronic court reporting in Alaska today is far superior to the manual-shorthand reporting that prevailed before the territory became a state. Then an appeal was sometimes delayed as long as two or three years while parties awaited the preparation of a transcript. And sometimes, the court reporter died or moved away before he could transcribe his notes. Since no one else could decipher them, no appeal could be taken and the case would have to be either settled or retired.

The transcripts produced from electronic tapes are more accurate than those produced from shorthand notes.. Court reporters indulge in a good deal of editing, sometimes guessing at what was said, sometimes omitting what they consider meaningless, unimportant or irrelevant. Transcription typists do practically no editing. Their goal is to reduce to written form as accurately as possible what was said by each witness, and to indicate that the speech was indistinguishable when such is the case. The only editing permitted is when a judge or lawyer in effect stutters. As the official Manual of Instructions for Transcription Typists states:

> TYPE WHAT YOU HEAR: Don't clean up incorrect grammar or word usage. . . . (pages 4-5)
>
> Every witness will be transcribed exactly as he speaks. However, if a judge or an attorney in his speech repeats words or partial phrases, only the first repeated word or partial phrase need be transcribed. Changes of thought containing whole phrases are transcribed in full.
>
> a. "did--did--did you know" is transcribed as "Did you know?"
> b. "Did you go--well let me ask you this" involves the whole phrase and is transcribed as it is spoken. (page 23)

According to Robert H. Reynolds, writing in the November 1970 issue of the American Bar Association Journal, numerous tests have verified the observation that electronic court-reporting produces a more accurate transcript than does manual shorthand or stenotype.

Should a dispute arise between lawyers as to what was said at a particular point in the proceedings, it can be resolved by listening once more to the tapes. If only manual shorthand or stenotype notes were available, there would be no way of challenging their accuracy.

When a witness speaks in a foreign language through an interpreter (there are many Eskimos and Indians in Alaska), only the interpreter's speech is transcribed, but the taped record remains available for challenging the accuracy of the translation through another interpreter. No such means of challenge is available when the proceedings are reported manually by shorthand or stenotype.

Appeals from District Courts and magistrates are greatly simplified and accelerated by the elimination of transcripts and the reviewing judges listening to the tapes directly. No such procedure would be possible with manual shorthand or stenotype reporting.

Because of the electronic system, the Supreme Court of Alaska, through its administrative powers and machinery, can effectively control the time element in the production of appellate records by employing as many transcription typists as are necessary. If it had to rely on shorthand writers or stenotype operators, it would be dependent upon the cooperation of outside contractors who were not subject to effective control.

Money is saved through electronic recording. The exact amount is not known, for no adequate scientific accounting study has been made. However, the former Administrative Director of the Alaska courts, Robert H. Reynolds, in the article in the American Bar Association Journal cited earlier, estimated the annual savings for the fiscal year 1970 at $257,174, as compared with what manual or stenotype recording would have cost. Considering the size of Alaska and its limited volume of litigation, this is a sizable portion of the total judicial budget (less than $4,000,000 for the fiscal year 1970). Today, with a rapidly-expanding population, increasing urbanization and a fast-growing volume of litigation, the savings are probably more.

Mr. Reynolds' figures, though not scientific, are buttressed by simple logic and calculation. A court reporter's salary is two or three times that of an In-Court Deputy. At the end of a day's proceedings, the In-Court Deputy's work is finished, whereas a court reporter would have to spend three times as much time dictating or typing his notes as he spent in court making them. The cost of typing is probably about the same whether manual shorthand, stenotype or electronic recording is used. The cost of the machines is modest: $2,500 to $5,000 per courtroom, amortized over their life, conservatively calculated at about ten years--or $250 to $500 per year. The cost of maintenance of the machines is minimal. The savings effected by electronic court-reporting undoubtedly are substantial, even though they are not now capable of precise calculation.

More important than any of the advantages thus far enumerated is the fact that the Alaska court system could not operate without electronic court-reporting. There are no court reporters in Alaska, except the few who serve the federal courts. Should a large number of them suddenly and miraculously appear on the horizon, their services will not be needed.

STREAMLINING THE RECORD ON APPEAL

James D. Hopkins*

One of the sighs frequently exhaled by appellate judges occurs upon viewing the mass of paper composing the record on appeal. Seldom does the appeal really furnish good cause for the necessity of a complete record in the consideration of the merits. Usually the points raised by the appellant refer to only small parts of the record, yet the whole record is usually printed. The appendix method,[56] although authorized, is distinguished by its rarity. Moreover, in my experience, I have seen only one appeal presented by means of an agreed statement in lieu of a record.[57]

Almost as a matter of ritual the record contains the total material before the court which made the judgment, even though the issues submitted to the appellate court do not require reference to the bulk of the material. I suspect that this waste arises either because the appellant is not sure of the points on appeal until he sees the record, or because it is simply easier to print the whole record rather than attempt to sift it and select those parts necessary for a consideration of the points.

Presently there is no power to compel the record to be condensed,[58] even though prior to the Civil Practice Law and Rules that power existed.[59] The power should be restored to the court even though the exercise of the power may place a burden on the respondent—or the court—to set in motion the procedure whereby the abbreviation is ordered.

The availability of the record in compact form is of course a convenience to the parties as well as to the court in searching the record. The alternative of using one set of original papers manifestly retards the consideration of an appeal in a multi-judge court; and the original file is sometimes hard to handle and to read. Yet in the case of a litigant who would be financially pressed to reproduce the record but is not eligible for indigent relief, the court may waive the printing and permit the appeal to be heard in the original papers.[60] A study might well be instituted to ascertain whether in fact the use of original papers does impede significantly the disposition of the case or makes the work of the individual judge markedly longer or more difficult in deciding the appeal.

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[56] *See* N.Y. CIV. PRAC. L. & RULES § 5528 (McKinney 1964).
[57] *See* N.Y. CIV. PRAC. L. & RULES § 5527 (McKinney 1964).

* Justice, New York Supreme Court, Appellate Divsion, Second Department; reproduced from Small Sparks From A Low Fire: Some Reflections on The Appellate Process, 38 BROOKLYN L.REV. 551 (1972).

Such a study could consider whether a summary procedure could be provided by rule so that applications might be made on notice to the opposing party (but without the need of a formal motion) to obtain the approval of the court to a record either abbreviated to suit the questions raised, or to hear the record on the original papers. That procedure should be aimed at two objectives: (1) to insure an adequate readable record, and (2), to obtain a rapid resolution of the case. The staff of the appellate court in the first instance might entertain the application where the feasibility of abridging the record might first be explored with the parties, and probably in many instances a stipulation as to the record would be reached by the parties with the aid of the staff. If no agreement could be made, then the application would be referred to the court for decision.

STANDARDS RELATING TO CRIMINAL JUSTICE:

CRIMINAL APPEALS - THE RECORD ON APPEAL

American Bar Association*

3.3 The record on appeal.

(a) Continuing efforts should be exerted to improve techniques for the preparation of records for appeals. Methods should be adopted that will minimize the cost of preparation in terms of money and time. The traditional requirement of a printed record should be abandoned completely. Developing technology should be watched; and, as promising new processes are perfected, they should be accepted as soon as they provide more rapid and efficient preparation of records.

(b) For defendants appealing in forma pauperis, transcripts of the testimony and other elements of the record should be supplied at public expense.

Commentary

a. Simplifying preparation of records

There is a variety of methods of preparation of the record of trial court proceedings that can be used by the appellate court. They differ in their usefulness to the appellate judges and in the cost to the litigants. No one proposal has yet won universal acceptance as the best adjustment of the needs of the court with the expense of preparation. See INSTITUTE OF JUDICIAL ADMINISTRATION, CRIMINAL APPEALS, Tables IV, V and VI (1954).

A major unresolved question is how much of the usually single-copy trial court record should be reproduced in multiple copies for the use of the appellate court and how that reproduction should be arranged. Everyone would agree that the portion of the record reproduced should be no greater than is necessary for the court to comprehend and decide the questions that will be presented by the litigants. Accomplishing that is difficult.

Various devices have been employed to reduce the amount of the trial court proceedings reproduced for the appellate court's use. The simplest conception requires the parties separately to designate what

* This standard was approved by the House of Delegates in 1971. It was prepared by a committee led by Hon. Simon E. Sobeloff and served by Professor Curtis R. Reitz, Reporter.

portions of the trial record should be included. This designation is made soon after appeal is instituted and the appellate court record is prepared from the joint selections before the parties complete and file briefs. The practice of compiling the record before the briefs is quite common in appellate courts today.

The next logical step in the drive to reduce the size and expense of the record was the development of the appendix system. The aim was to postpone reproduction of any of the record until counsel for the appellant had finished his brief, on the sound theory that a markedly longer record would be designated if the determination of its content had to be made before the arguments were crystallized. Under this practice, each party prepared an appendix to his brief containing only that part of the record relevant to his argument. While the savings to the litigants of this separate appendix system are significant, it has some serious drawbacks from the standpoint of the court. The judges may have to skip back and forth from one appendix to the other to try to get the evidence into perspective. Sometimes both appendices together would still not be adequate; and the judges would have to refer to the appendices and to portions of the record not reproduced at all.

A variation of this system, providing for a joint appendix, was adopted in the recently approved Federal Rules of Appellate Procedure. It is provided that the appellant shall file an appendix at the same time as his brief is due. During the preceding month, the parties are encouraged to agree on the contents of the appendix. Failing agreement, after appellant has given notice of the issues he intends to present and the parts of the record he intends to include, the appellee can direct the appellant to include additional parts of the record and the appellant must comply.[14] FED. R. APP. P. 30(a) and (b). The joint appendix is thus filed with appellant's brief and before appellee's brief. The latter has no separate appendix.

An alternative joint appendix system, the deferred appendix, is also authorized by the new federal rules. Preparation of the appendix can be deferred, at the option of appellant or by court order, until both briefs have been filed. The principal disadvantage to this arrangement is the difficulty of making references in the briefs to the pages of the still-to-be-prepared joint appendix. This problem is not insoluble. Pagination of the appendix can be based upon the underlying entire record,

14. If appellant considers the parts of the record so designated to be unnecessary for the appeal, he may require appellee to advance the cost of including those parts. Otherwise, appellant pays for the appendix in the first instance, subject to later recovery of the expense as a part of costs to be taxed. FED. R. APP. P. 30(b).

so that references can be made to it even before the appendix is compiled, or the appendix references in the briefs can be inserted later, after the appendix has been completed. FED. R. APP. P. 30(c).

Another procedure exists that carries the desire to economize on the reproduction of the trial record to its logical conclusion. In several state and federal courts, there is essentially no abstracting of the record at all. The appellate court uses the original record as compiled in the trial court. There are no appendices to the briefs, and no appellate record in any form. A sufficient number of copies of the court stenographer's typewritten transcript is filed so that each judge hearing the case has one copy. Other documents are likewise filed in these few copies. Objections have been raised that this procedure will produce records so much larger than an appendix or abstract system that the judges will be burdened in using them, not only because of the bulk, but because portions relevant to issues on appeal might be harder to locate. Reducing the number of copies of the record to the number of judges also means that the judges' law clerks cannot have copies from which to work. However, the procedure has been used and found successful. The United States Court of Appeals for the Ninth Circuit has been using such a procedure since 1962 and recently adopted a rule abolishing the printed record altogether. The judges have expressed complete satisfaction with the practice. The new federal rules permit it to continue. FED. R. APP. P. 30(f).

b. Reducing the costs of record preparation

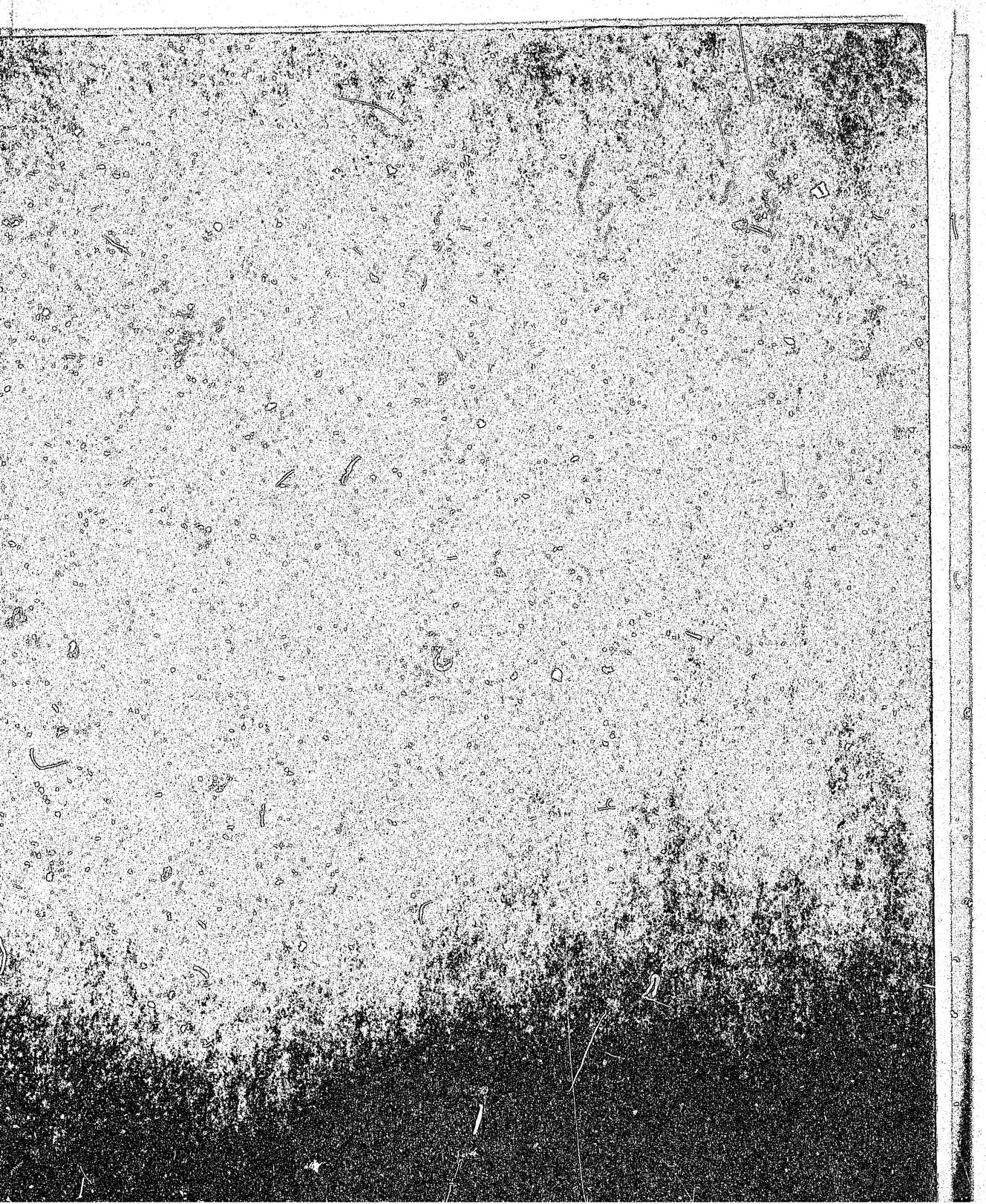
Unless the procedure to utilize the entire trial court record in its original form in the appellate court is adopted, there will be a need to choose the method of reproduction for that part of the record to be incorporated into an abstract or appendix. Again, views vary, but one principle that is becoming more and more accepted is the elimination of printed records. ABA SECTION OF JUDICIAL ADMINISTRATION, THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE 85 (4th ed. 1961). For the limited number of copies of a record required for the appellate process, printing is economically unfeasible. Techniques for reproduction of typescript in multiple copies are now sufficiently widespread and less costly than printing that there is no longer justification for the more expensive method. Printed records are still in use, however. See, *e.g.*, the Revised Rules of the Supreme Court of the United States, adopted June 12, 1967: Rule 36 and Rule 53(6) provide for printing even in proceedings in forma pauperis. A committee of the ABA Section of Criminal Law reported recently that: "At least 17 States still require printing of the record or at least a portion of it." *Report of the Committee on Appellate Delay in Criminal Cases*, 2 AM. CRIM. L.Q. 150, 153 (1964). Most courts, however, have abandoned the requirement of a printed record. The Federal Rules of Appellate Procedure provide: "Briefs and appendices

may be produced by standard typographic printing or by any duplicating or copying process which produces a clear black image on white paper." FED. R. APP. P. 32(a). If typescript is reproduced, the documents are to be 8.5 × 11 inches, normal letter size paper. And see Willcox, Karlen & Roemer, *Justice Lost—By What Appellate Papers Cost*, 33 N.Y.U. L. REV. 934, 961, 967-69 (1958). See also Note, *The High Cost of Appellate Litigation*, 1953 WIS. L. REV. 152.

c. Prospects for further simplification

Utilization of reproduction techniques other than printing has worked a major reduction in the costs of a record; but stenographic costs remain as an increasingly expensive element. The expense of ordering a transcript is often prohibitive. Efforts are being made to automate the preparation of the original transcript of trial court hearings. Whether such a process will become feasible, and how soon, are questions that cannot yet be answered. Another possibility is to utilize sound recording of the trial proceedings without transcribing it in advance of the appellate court hearing. The appellate court could determine, in light of argument, how much of the proceedings need to be reduced to typescript. This may be particularly valuable in minor offense cases, where costs quickly outrun the value of the controversy. It has been visualized even that trials will be recorded on video-tape. See BRENNAN, COST OF THE AMERICAN JUDICIAL SYSTEM, 128-34 (1966).

Another important dimension in the preparation of appellate court records is time. Substantial delay in compilation of the record can introduce serious distortions into the administration of criminal justice. There are indications that a major problem of delay exists in some areas because of backlog in the preparation of the stenographers' transcripts. In the United States Court of Appeals for the District of Columbia Circuit, it was reported recently that the court reporters have a backlog running to some 17,000 pages. Holmes v. United States, 383 F.2d 925 (D.C. Cir. 1967). A committee created by the ABA Section of Criminal Law undertook a study of the problem of appellate delay. The Committee reported in 1964 that the average length of time involved in preparation and filing of the record on appeal varied between 20 days in Georgia to two years in Minnesota. *Report of the Committee on Appellate Delay in Criminal Cases*, 2 AM. CRIM. L.Q. 150, 153 (1964). The explanation for the lengthy period in Minnesota was the time required for the preparation of the transcript by the court reporters, due to a shortage of reporters. The Minnesota Supreme Court recently denied a prisoner's claim that he should have his conviction reversed because of the long delay incurred in the preparation of the trial transcript for his appeal. State *ex rel.* Mastrian v. Tahash, 277 Minn. 309, 152 N.W.2d 786 (1967).



A by-product of delay in the preparation of the record in some cases is to make appellate review effectively unavailable at all. Where the defendant is not released pending appeal from a sentence of total confinement, or where the sentence is probation, the case may become moot before the appeal can be heard. St. Pierre v. United States, 319 U.S. 41 (1943); Desrosiers v. State, 189 So. 2d 834 (Fla. Dist. Ct. App., 1st Dist., 1966); *cf.* Jacobs v. New York, 388 U.S. 431 (1967) and Tannenbaum v. New York, 388 U.S. 439 (1967) (Supreme Court held cases moot, even though jail sentences had been suspended, because maximum time for revocation of suspension had already passed).

e. Indigent appellants and provision for appellate records

Many states are now providing that appellants proceeding in forma pauperis shall have a trial transcript as a matter of course. See, *e.g.*, FLA. STAT. ANN. § 924.23 (1944); Ill. Sup. Ct. Rule 605, ILL. ANN. STAT. ch. 110A, § 605 (Smith-Hurd 1968); IOWA CODE ANN. § 793.8 (1950), see Entsminger v. Iowa, 386 U.S. 748 (1967); KAN. STAT. ANN. § 62-1304 (1964); MO. ANN. STAT. § 485.100 (Supp. 1966); TEXAS CODE CRIM. PROC. ANN. art. 40.09(5) (1966); VA. CODE ANN. § 17-30.1 (Supp. 1968); WYO. STAT. ANN. § 7-282.1 (Supp. 1967) (if defendant sentenced to state penitentiary). Others still retain provisions that transcripts are to be made available in whole or in part in the discretion of the trial judge. See, *e.g.*, ALA. CODE tit. 15, § 380(20) (Supp. 1967); OHIO REV. CODE ANN. § 2301.24 (Supp. 1967); ORE. REV. STAT. § 138.500 (1967); WASH. RULES ON APPEAL, Rule 46(c)(2)(i) (1967).

In state cases, the Supreme Court has developed a body of constitutional law under the Equal Protection Clause dealing with provision of transcripts to indigent appellants. The initial decision struck down an Illinois procedure that made a bill of particulars a condition of access to the appellate courts without providing any machinery whereby an indigent could obtain a transcript. Griffin v. Illinois, 351 U.S. 12 (1956). Two years later, the Court held invalid a Washington procedure that, like Illinois, made a transcript a necessary condition to appeal. Unlike the situation in Illinois, indigent Washington defendants could obtain transcripts at state expense, but only if the trial judge found that, in his opinion, justice would thereby be promoted. Eskridge v. Washington, 357 U.S. 214 (1958).

Following *Griffin* and *Eskridge*, Washington adopted a new set of rules, whereby a trial court hearing was required on the necessity of a full transcript, or a partial transcript. The trial judge had to evaluate the merits of the indigent's appeal; he also had to determine whether a less expensive narrative statement might serve as well as a transcript. For want of effective means of appellate review of the trial court's power to deny a needed record, the Court declared the procedures unconstitutional. Draper v. Washington, 372 U.S. 487 (1963).

The Court has also refused to countenance a procedure that permits a public defender, rather than the trial court, to exercise the power to determine whether an indigent will obtain the transcript that is indispensable to his appeal. Lane v. Brown, 372 U.S. 477 (1963). Likewise, the Court held unconstitutional an Iowa procedure whereby a court-appointed attorney, by failing to obtain an available full transcript, shunted an indigent appellant's case into a summary form of appellate review, without briefs or argument as well as without a transcript. Entsminger v. Iowa, 386 U.S. 748 (1967).

The course of developments on appeals by indigents in the federal system is instructive. Until 1944 there was no statutory authority for providing defendants in criminal cases with transcripts at government expense. The basic scheme adopted then is still in effect. 58 STAT. 6 (1944). Section 1915(a) of the Judicial Code provides:

> Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.
>
> An appeal may not be taken *in forma pauperis* if the trial court certifies in writing that it is not taken in good faith.

28 U.S.C. § 1915(a). Section 753(f) provides:

> Fees for transcripts furnished in criminal or habeas corpus proceedings to persons allowed to sue, defend, or appeal *in forma pauperis* shall be paid by the United States . . . .

Id., § 753(f). See Sokol, *Availability of Transcripts for Federal Prisoners*, 2 AM. CRIM. L.Q. 63 (1964).

The Supreme Court has not interpreted this statutory structure to require that the government furnish a full transcript in all appeals by indigents. Such a transcript has been held to be necessary where counsel on appeal is different from counsel in the trial court. Hardy v. United States, 375 U.S. 277 (1964). Otherwise, however, the indigent on appeal is entitled to receive, at public expense, only the transcript relevant to the points of error assigned. See Farley v. United States, 354 U.S. 521 (1957); Ingram v. United States, 315 F.2d 29, 31 (D.C. Cir. 1962).

In 1963 an Attorney General's committee proposed the enactment of federal legislation which would provide the convicted defendant

with a transcript of the trial proceedings whenever the defendant files a notice of appeal and is found to be financially unable to pay the costs of a transcript. Existing federal practice was criticized for denying full and equal protection to the interests of the financially incapacitated defendant in the appellate process. The committee also found that the screening processes are largely self-defeating and that they can be abandoned without creating unmanageable burdens of costs or necessitating undue expenditures of judicial time. REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE 112-15 (1963). Although four Justices concurred in *Hardy* v. *United States* to state their view as to the soundness of this proposal, it has not yet been implemented in the federal system. The recently adopted Federal Rules of Appellate Procedure do not alter the pattern as it existed after the decision in *Hardy*. See FED. R. APP. P. 10(b), 24.

The wish to control availability of transcripts to indigents seems doomed to fail. If the appellate courts are not open to review lower court decisions denying transcripts, a violation of the Equal Protection Clause has occurred. If the appellate courts are open to review such lower court decisions, the history of the federal litigation shows that the result is an appeal within an appeal. ". . . [T]he burden of prosecuting, defending and deciding appeals, though it is greater, is not inordinately greater than the burden of prosecuting and deciding disputes . . . . over the question of whether an appeal should be made possible." Cash v. United States, 261 F.2d 731, 740, 741 (D.C. Cir.) (Edgerton, C.J., dissenting), *jgt. vacated*, 357 U.S. 219 (1958).

TRANSCRIPTS AND BRIEFS

Albert V. Bryan*

As just noted, the outstanding obstacles are two: the procurement of the transcript and the preparation of briefs. If these obstructions to dispatch could be dissolved or minimized, appeal delay would be contracted. I think these are not insurmountable impediments and can be removed. A suggested remedy is the prescription of the following steps:

To escape the wait for the stenographic transcript for inclusion in the official record, ask the District Judge:

One: *To include in his jury charge a full review of the evidence, prefaced by a narrative of the uncontested facts.* This would add little to the present practices of the trial judge.

He is now required to instruct on the law,[13] and customarily in this he will recount the evidence or the facts to which a legal principle applies. To present the case squarely and helpfully to the jury, the judge will ordinarily state the undisputed facts, pose the factual disputes and then set out the evidence on each side of the contested issues. Thus the charge will contain a recitation of almost the entire relevant evidence. If requested by the appellate court, the judge, I am sure, would willingly expand his references to the evidence and the facts.

Two: *In cases tried without a jury, ask the judge to make findings of fact.* This is altogether permissible. The rules require him "on request [to] find the facts specially."[14] A short oral opinion would usually be enough. Here, again, every judge would conscientiously comply if his Court of Appeals made the request a standing rule.

Three: *In either instance, have the judge file an addendum of not more than a page, containing the citations (not quotations) of the authorities relied on by the parties or the court in the case.* This information probably would already have been incorporated in written or oral rulings on pre- or post-trial motions.

Four: *The judge would file his charge or findings and the addendum in multiple copies, and do so simultaneously with sentence and commitment.* Obviously, this step would exact no extra effort by the District Judge. His words would necessarily have been uttered and recorded before sentence, and hence could be readily made available for transmission at once to the Court of Appeals.

* Senior Circuit Judge, United States Court of Appeals for the Fourth Circuit; reproduced from For a Swifter Appeal - To Protect the Public as Well As The Accused, 25 W. & L. L.REV. 175, 181-186 (1968)

Five: *The judge would direct the Clerk to forward immediately upon receipt of the appeal notice and without awaiting arrival of the stenographic transcript, all of the foregoing papers to the Court of Appeals,* along with all other papers then on file, arranged chronologically with a photostat of the docket entries. (The index can be made up later by the District Court Clerk from these entries, or be prepared subsequently by the Clerk of the Court of Appeals.)

All of these aims can be effectuated within a few days after final judgment. The stenographic transcript would be forwarded as soon as received.

What Would Be Achieved

What would this new procedure accomplish? It would be of inestimable value in advancing the appeal in these particulars: The appeals judges would be at once apprised of the case's nature, issues and proof. The indictment would disclose the accusation and, most importantly, the facts and a condensation of the evidence would appear in the jury charge or the special findings, all far more prominently and sharply than in a brief. Of course, if there were trial briefs, they as well as written opinions of the court would be sent on. If desired, counsel could insert citations of other precedents he wished to be considered.

Furthermore, at this early stage the record could produce these results:

Frivolous Cases Screened

First: The utter insubstantiality of an appeal would be revealed within a month and the case could be summarily dismissed. Conventionally, unworthy appeals possibly might not come to the attention of the court until the expiration of the 40 days allowed for the transcript, plus the 30 days thereafter for the appellant's brief.

Prompt dismissal of the appeal would save both sides the cost in money and time, and the public as well as the appellant would each be spared the preparation and presentation of a brief.

Dispensing with Briefs

Second: With the record perfected through the measures just spelled out, and the issues so outlined, even meritorious cases could often be argued without briefs. The oral argument would come from counsel's fresh recollection of the case, instead of from a stale record and impersonal briefs. More recent authorities could be listed in a letter or other informal memo handed up at the time of argument.

Omission of briefs is an aspect of the proposed procedure that will not be easily accepted by the bar or the bench. Briefs have long been revered and held an esteemed place in appeals. But when the issues are starkly and simply framed in the record, with the evidence and facts in the foreground, no need exists for briefs. Here the English practice is precedent.

But experienced counsel will ask at once, how he can open the argument and follow through without a brief as a starter and guide. The immediate response is that he will present his argument just as he did in the trial court when the case came to an end. He had no brief then and needed none. On a prompt appeal memory will not

have dimmed and he will have at hand the same tools as he used at the conclusion of the trial. Nor would argument time have to be allowed beyond the present limitations. The absence of briefs, too, would transform the hearing into an oral advocacy, always far more impressive than the printed page. Argument would then bare the controversy to the bone. It could no longer be only a rehearsal of the briefs.

Our existing procedure involves too much repetition. First, we have the facts outlined in two opening statements of counsel to the jury. Then the facts are restated in one form or another by the trial judge in his charge or findings. Next, this same material is recited in the briefs, with a substantial part of it simultaneously carried into the appendices of the briefs. Afterwards it is narrated to the court in oral argument, and lastly it is recorded on the tapes in the appellate court. Surely in most cases briefs would not be missed.

Third: If briefs were not required, an appeal could be put before the Court on Appeals within 20 days from the filing of the appeal notice.

Simultaneous Briefs

The following suggestion is also urged: use concurrent briefs. They could be made ready within 15 days, with 5 additional days to each side for replies, if desired. Experience has proved this procedure entirely feasible and successful. Indisputably it saves appeal time. The appellant certainly could not be hurt, for 15 days is abundant time, if printing is waived. He would prepare precisely the same type of brief as he would ordinarily. Only the negative side—the Government as appellee—could complain, possibly for lack of advance notice of what the appellant would assert for reversal. But this is hardly a grievance; the Government knows well beforehand the appellant's points, having heard them at trial. Anything not anticipated could be met in its reply brief.

Briefing Time Too Long

On the other hand, if briefs are to be used and are to be consecutive, the space between trial and the appeal could still be drastically shortened. As already noted, briefs account for the greater portion of the interval between the appeal notice and the submission. The period allowed for briefs could be sharply shrunken without hardship, even to the busiest lawyer. The lavishness of time now permitted for briefs—2½ months—is an expensive indulgence.

It is not needed. Trial counsel is fully informed of the evidence, the facts and the legal issues long before the sentencing. His knowledge, at least in general, starts with the arrest. Greater acquaintance is gained at the preliminary hearing. It is improved in the days between this hearing and the return of the indictment. The subsequent lag awaiting trial provides further opportunity. Even if some of these stages are skipped, ample time is still left. True, the accused does not always consult counsel at once, but if he is without a lawyer, one will be promptly assigned and not later than the arraignment.

Thereafter the trial is an unstraitened exposure of the prosecution's whole case, in fact and in law. The truth is that when sentence is pronounced, defense counsel is more advantageously situated to press the appeal than at the end of the customary wait of weeks or months for the transcript. In actuality, he knows before the expiration of the whole 10 days allowed for the appeal notice whether he will seek it. Thus even these days are available in the preparation of a brief. With the judge's charge or findings before him, the defense attorney may readily assemble his brief with assurance of its accuracy.

Transcript Not Indispensable

Nor does counsel have to defer his labors on the brief until the stenographic transcript finally comes in. This is probably the most difficult concession for seasoned counsel to grant. The inescapable and dire necessity for having the transcript at hand has become an *idée fixe*. It is emphatically posed in connection with an assignment on appeal of the insufficiency of the evidence to convict. But even then everything necessary will be found in the judge's charge or findings. The same contention will necessarily have been pressed upon the District Judge. Moreover, if one of the special findings is disputed, the opposing evidence will doubtlessly appear earlier in the defendant's motion to amend or the judge's ruling upon it. Actually, stipulations or concessions usually avoid the need for any particular part of the transcript. In addition, doubtlessly the transcript will have arrived by the time of argument or decision.

Of the necessity for the transcript the late John J. Parker, for many years the distinguished Chief Judge of the Fourth Circuit, said in his address to the American Political Science Association, "Improving Appellate Methods":

> As every lawyer of experience knows, there is *no sense in printing the entire record* [the transcript]. *Nobody reads it or ought to read it.* After a case has been threshed out in the trial court, the facts are pretty well established; and the matters in which the appellate court is interested are either questions of law or broad questions of fact which have little to do with the weighing of one piece of evidence against another.[12]

While the jurist was speaking to the requisite of printing, he was at the same time evaluating the urgency of a transcript. He finds no prejudice in its omission. Doing without the transcript is but another advance in expedition. At one time even a transcript was not acceptable. Lawyers were required to draft a narrative of the testimony from the transcript. This requirement was later repealed but still the whole transcript had to be printed. Subsequently this rule was relaxed in favor of putting in an appendix to the brief such portion of the transcript as the party deemed necessary.

25 Days for Briefs

If simultaneous briefs not be utilized, let the opening brief be filed within 10 days after the appeal notice, the Government's within 10 days thereafter and the appellant's rebuttal, if any, within the 5 days following. The Government, to repeat, is quite aware of the appellant's contentions long before his brief arrives. Its preparation requires but a short time, particularly if printing is not necessary.

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[12] 25 N.Y.U.L. Rev. 6 (1950).

Waive Printing

Printing of briefs certainly should not be expected. As the new Fed. R. App. P. 32(a) recognizes, typographic or other good copies from reproduction machines are an entirely adequate substitute. Typewritten sheets, if clear, ought to be acceptable. Time and effort in proof reading would thus be spared, together with a large saving in expense.

In sum, it should be the exceptional case where the appeal could not be readied for argument *before 30 days* after the appeal is noted. Since there is a will among the Federal judges, trial and appellate, to speed the criminal appeal, the procedure now urged can readily be adopted.[13] Furthermore, the object can be achieved without harm to the defendant or the public.

TRANSCRIPTS

David L. Bazelon*

I have a similar view of the other proposals. No criminal trial lawyer worth his salt would take an appeal without a full transcript of the case, unless he had no other choice. Legal memories are sufficiently poor that, from the bench, I often find that even *with* a transcript the opposing attorneys cannot agree over the question of whether a particular bit of information is or is not in the record. How we are to have any reasonable assurance of what went on at the trial if transcripts are not available for consultation is entirely beyond me. Of course, cutting transcripts out of the process will save time. It will save money. It will also prevent the courts from knowing what went on at the trial, so that they can provide meaningful review. And finally, it will prevent anyone else from being able to judge the performance of the judges themselves, for no one not present at the time will be able to reconstruct with certainty what went on or find out what testimony or other issues the judges chose to ignore. The same applies to the proposal that courts dispense with written opinions. If a case is genuinely frivolous, of course, it can be disposed of by order—or by a one or two paragraph opinion. I agree that, in a limited number of cases, there is even no bar to affirming the case from the bench except for the effect that such action may have on the feelings of counsel. Once again, however, if this kind of disposition were to become common, I fear it would be only an excuse to duck the hard questions. If this proposal is combined with the previous one, appeal to a higher court would be virtually impossible: there would be no transcript, no briefs and not even an explanation of why the court below took the action it did. Moreover, the process itself would suffer in a number of ways. Trial courts would know that they had been affirmed or reversed, but would have no idea why. They would be just as much in the dark as anyone else. And, even more importantly, there would be no way an outsider to the process could hope to evaluate its quality. Not only would he be unable to find out *why* a particular action was taken, he would not even be able to determine precisely what was at issue.

* Chief Judge, United States Court of Appeals for the District of Columbia; reproduced from New Gods for Old: "Efficient"Courts in a Democratic Society, 46 N.Y.U. L.REV. 653, 661-62 (1971)

C. DELAY OF COUNSEL

APPOINTMENT OF COUNSEL

Winslow Christian*

When the record finally is received by the court of appeal, the clerk sends the appellant a notice informing him when his brief will be due and that, if he is indigent, he may submit a request for appointed counsel.[84] Most criminal appellants are indigent,[85] and in most cases an attorney, usually a new member of the bar, is appointed to conduct the appeal. The court permits appointed counsel to withdraw from the case for reasons such as illness, change of state residence, or the demands of other work.[86] If the court grants such a withdrawal, it will appoint substitute counsel immediately.

Appointed counsel conducted 74 percent of the full appeals in the sample. The average time between the filing of the record and the request for appointment of counsel was 22 days (14 days median). In almost half the cases, the court appointed counsel on the same day appellant's request was received; the average time between request and order was three days.

Appointed counsel eventually withdrew in 20 of 130 fully-appealed cases.[87] The average delay from filing of the record to appointment of final counsel for these 20 cases was 166 days,[88] with an average period of inaction between appointment of first counsel and appointment of final counsel of 137 days (81 days median). Thus the average delay in appointing final counsel in appeals involving withdrawal was more than five times the delay in appeals pursued fully by one attorney.[89]

The survey results demonstrate two of the primary sources of delay at this stage of a criminal appeal: the indigent appellant who neglects to request appointment of counsel promptly,[90] and the appointed counsel who, perhaps after prolonged neglect, finally withdraws from the case. A number of approaches are available to reduce these sources of delay. At minimum, the appointment and withdrawal decisions should be accelerated. Under present practice, an indigent appellant does not receive the clerk's letter informing him of his right to counsel until immediately after the record on appeal is filed. If he does not communicate his desire for appointment of counsel within 30 days, he receives notice that his appeal will be dismissed after the passage of 30 more days unless an appellant's opening brief is filed or good cause is shown for relief from default.[91] In practice, the court will, if requested, appoint counsel even though 30 days may have

* Justice, California Court of Appeal, San Francisco;
reproduced from Delay in Criminal Appeals: A Functional Analysis of One Court's Work, 23 STAN.L.REV. 676, 689-92 (1971)

passed since the second notice was mailed to appellant.[92] Thus, although it may not be in his interest to do so, an appellant may, with impunity, delay requesting appointment for 60 days.[93] While there seems to be no practical method of sanctioning indigent appellants for delay in requesting appointment of counsel, it is likely that if the need for speedy appointment of counsel and the possibility of dismissal after 60 days under Rule 17(a) were fully explained in the original letter sent by the clerk of the appellate court, indigent appellants would file their requests for appointment more promptly.

Under existing rules the appellate court may exercise a variety of controls over attorneys who inexcusably delay their requests for withdrawal. At the outset, the court should emphasize in its letter of appointment that it will allow withdrawal only in unusual circumstances and that a request delayed without good cause may be grounds for application of sanctions.[94] An attorney who seeks to withdraw some time after his appointment, perhaps 30 days, could be required to show cause before his request is allowed.[95] If no meritorious cause is shown, he could be ordered to complete the appeal with diligence[96] or be held in contempt[97] or subjected to professional discipline.[98] Occasional application of these remedies would induce appointed counsel to evaluate his ability and willingness to conduct the appeal and, if he decides to withdraw, to do so as promptly as possible.[99]

Delay could be further reduced by adopting a recommendation made earlier in this Article: amendment of the *Rules of Court* to provide for immediate notice to the appellate court of the pendency of an appeal.[100] This minor alteration in appellate procedure would facilitate rapid appointment of counsel by making such appointment and preparation of the record concurrent activities, thus allowing the accelerated appointment and withdrawal functions to begin at an earlier point in the process.

Finally, a more encompassing and promising approach would be to create a state public defender office responsible for representing indigents in criminal appeals. The Judicial Council of California has recommended such action to the legislature,[101] citing such trends as the steadily increasing number of criminal appeals by indigents, the growing difficulty of recruiting counsel for this financially unattractive work, and the prevalence of inexperienced attorneys among appointed counsel.[102] Creation of a state public defender office would make it possible to eliminate delays now caused by late requests for appointment of counsel and late withdrawals by appointed counsel. Under competent administrative direction appellants normally could file briefs within a few days of the filing of the record rather than months later, as is now common.[103] Furthermore, the improved quality of representation likely to come from an office staffed by experts would speed the work of the appellate courts; much time is now lost by the court's research staff as it struggles with substantial issues that have been poorly presented. For these reasons . . . creation of a state public defender office to handle appeals of indigents would be the strongest suitable remedy for delay in the initial stages of the appellate process.

STANDARDS RELATING TO CRIMINAL JUSTICE:

CRIMINAL APPEALS - TRIAL COUNSEL'S DUTIES

American Bar Association*

2.2 Trial counsel's duties with regard to appeal.

(a) Trial counsel, whether retained or court-appointed, should continue to represent a convicted defendant to advise on whether to take an appeal and, if the appeal is sought, through the appeal unless new counsel is substituted or unless the appellate court permits counsel to withdraw in the interests of justice or for other sufficient cause.

Commentary

a. Need for counsel at close of trial court proceedings

A major problem in the administration of criminal justice today is the hiatus in proceedings as a case moves from the trial to the appellate court. This period is, in many ways, of crucial importance to the defendant; yet it frequently happens that no legal representation exists, sometimes for months, at this juncture. Lawyers, whether retained or assigned at trial, all too often take the view that their responsibilities have ended with the final judgment of the trial court. See Buxton v. Brown, 222 Ga. 564, 150 S.E.2d 636 (1966). Indeed, this Advisory Committee has felt it necessary to stress that the lawyer's task extends beyond the verdict, and includes the process leading to determination and imposition of sentence. ABA STANDARDS, SENTENCING ALTERNATIVES AND PROCEDURES § 5.3 (Approved Draft, 1968). Once a final judgment is rendered, communication between the defendant and his appointed attorney frequently ceases. Whatever the cause, the effects

Beyond awareness of the impact of the judgment, a defendant should have competent, professional assistance to guide his thinking about the possibility of appellate review. The available grounds for appealing should be explored by the lawyer and discussed fully with the defendant, to the end that the latter can make an intelligent judgment about seeking further review. If, after deliberation, the defendant decides to appeal, the lawyer should be responsible for setting the necessary machinery in motion.

*These standards were approved by the House of Delegates in 1971. They were prepared by a committee chaired by Hon. Simon E. Sobeloff; Professor Curtis R. Reitz was its reporter.

Cases are accumulating, mainly through post-conviction litigation, where defendants have been substantially abandoned by their lawyers at the conclusion of the trial proceedings so that the defendants lost the opportunity in normal course to have appellate review. See comment c to § 2.1, *supra*.

A gap in representation is peculiarly critical in connection with timely invocation of the jurisdiction of the appellate court; but it has other important ramifications as well. These include the necessary participation by counsel in the preparation of the record on appeal without undue delay and the arrangement, where possible, of release on bail pending appeal. The time periods are sometimes substantial. A study by the Junior Bar Section of the D.C. Bar showed that, until January 1967, there was typically a delay of two to three months, and sometimes six months, between judgment of conviction and appointment of appellate counsel. D.C. JUNIOR BAR SECTION, REPORT OF THE COMMITTEE TO STUDY THE OPERATION OF THE CRIMINAL ment of appellate counsel. D. C. JUNIOR BAR SECTION, REPORT OF JUSTICE ACT IN THE DISTRICT OF COLUMBIA 33 (May 1967). It is also significant for an appellate court supervising the processing of appeals to be aware at all times of the status of the defendant's representation by counsel.

b. Continuing trial counsel's responsibility through appeal

The hiatus in legal representation would not occur if assigned trial counsel were routinely assigned to serve for any appeal that may be taken. Such a scheme does exist in some jurisdictions. The U.S. Court of Appeals for the Second Circuit has adopted Rule 4(b), supplementing the Federal Rules of Appellate Procedure, which provides a comprehensive scheme for administering the continued duty of trial counsel, retained or appointed, so as to prevent a gap in representation of the defendant. The Rule also ensures the appellate court's knowledge at all times of the status of the legal representation. The Rule is set forth in Appendix A, *infra*. PA. R. CRIM. P. 318(c) provides: "Where counsel has been assigned, such assignment shall be effective until final judgment, including any proceedings upon direct appeal"; see also WASH. RULES ON APPEAL, Rule 46(c)(i). The New Jersey Supreme Court has issued a rule that trial counsel will continue on appeal unless the appellate court finds it advisable to assign a new attorney. N.J. CT. R. 1:12-9(a) and (b). A Florida District Court of Appeal, by decision, has indicated that it expects trial counsel to serve also as appellate counsel; therefore, the court noted that it looks with disfavor on applications for discharge. Smith v. State, 192 So. 2d 346 (Fla. App., 2d Dist. 1966). The Advisory Committee on the Prosecution and Defense Functions in this Project has recommended that: "Counsel initially appointed should continue

to represent the defendant through all stages of the proceedings [including sentencing, appeal, and post-conviction review] unless a new appointment is made because geographical considerations or other factors make it necessary." ABA STANDARDS, PROVIDING DEFENSE SERVICES § 5.2 (Approved Draft, 1968). And see Holmes v. United States, 383 F. 2d 925 (D.C. Cir. 1967).

c. Providing new counsel on appeal

The counter position, appointment of new counsel on appeal, seems to be the one found now in practice in most jurisdictions. The cause in fact may not be a rational decision to use different counsel but simply the accident that each court, trial or appellate, has had its own isolated procedure for selection of attorneys and tends to use, as the raw material, lawyers who regularly appear in the court. The study by the Junior Bar Section of the D.C. Bar Association, referred to above, shows that, in the District of Columbia, there is no coordination among the several trial and appellate courts on assignment of counsel. ". . . [T]he appointments systems remain islands of activity with no effective coordination among them. Each court has its own list of attorneys, developed and maintained through its own efforts with no effective consultation with any other court." D.C. JUNIOR BAR SECTION, REPORT, *supra* 12. Indeed, when the District Court began to supplement its list of lawyers from the names of those appointed by the U.S. Court of Appeals, the latter stopped sending copies of its assignment orders to the court below. *Id.* at 31. Of 93 appellate cases studied by the Junior Bar Section, trial counsel appeared at the appellate stage in only three. *Id.* at 33-34.

Despite the advantages of trial counsel continuing in the case, some assert that the selection of new counsel on appeal rests upon a rational and important principle, not mere historic accident. This was the position of a panel of the Court of Appeals for the District of Columbia Circuit. That court is faced with a serious backlog in stenographic transcription of trial court proceedings; in May 1967 the reporters were 17,000 pages behind in their work. To alleviate this, Judge Burger suggested that, if they began the practice of having the same counsel serve at trial and appellate stages, the lawyer could perhaps pursue the latter without a full transcript.[9] Chief Judge Bazelon and

9. See Hardy v. United States, 375 U.S. 277 (1964); Tate v. United States, 359 F.2d 245, 253-254 (D.C. Cir. 1966).

Judge Leventhal rejected the suggestion in part because of the overriding virtues they found in fresh appellate counsel, versed in appellate practice. Holmes v. United States, 383 F.2d 925 (D.C. Cir. 1967).[10]

Oregon and Wisconsin have established a public defender to provide legal services only on appeal. ORE. REV. STAT. § 138.770 (1965); WIS. STAT. ANN. § 957.265 (Supp. 1968). Where public defender offices of large size handle both trials and appeals, a division of function between appellate lawyers and those who deal with cases at the trial phases is likely to be created for administrative efficiency.

NEW COUNSEL ON APPEAL

Warren E. Burger*

Another large factor in the excessive cost and excessive delay in criminal appeals is the tendency to appoint a new lawyer on appeal. The average criminal trial takes two and one-third days to complete, and except in a rare case no trial lawyer who represented the defendant in the trial, and who is worth his salt, needs a full trial transcript to conduct the appeal. But when a new lawyer is appointed, he has no efficient way to prepare an appeal except to secure the entire transcript of testimony. Requiring the trial lawyer to conduct the appeal will thus save both time and money. No lawyer should be appointed by the court in any criminal case in any federal court unless he is competent and willing to conduct the case to its final disposition if there is an appeal. This should be made the subject of an agreed policy within each circuit, or the Congress should direct it.

* Chief Justice of the United States; reproduced from The State of the Federal Judiciary, 57 A.B.A.J. 855, 858 (1971)

REPORT ON COURTS: PROBLEMS OUTSIDE COURTS*

It is recommended that ongoing studies be conducted to identify causes of delay in review and that steps be taken to eliminate those causes as they are uncovered. In particular, it is recommended that adequate personnel be provided the prosecution and the defense to enable the lawyers to function in the review process in the manner and time contemplated by the standards in this chapter.

Commentary

Delay in review often stems from causes external to the courts. Protracted transcript preparation already has been mentioned. Another factor is overburdened lawyers who participate in the process. This may be particularly significant where counsel is institutionalized as it is in much of the criminal process, with one side always represented by either a prosecutor's office or the State attorney general's office and the other side represented in a majority of cases by a public defender or legal aid office. If those offices are not manned efficiently or by enough lawyers to stay current with the work, the judicial process will be delayed regardless of what the judges do.

There may be other less obvious—even unsuspected—sources of delay in review not traceable to the courts themselves.

* A recommendation of the National Advisory Commission on Criminal Justice Standards and Goals published in 1973 (Professor Daniel J. Meador, Reporter)

NEW COUNSEL ON APPEAL

David L. Bazelon*

. . . In addition, courts often remain blissfully ignorant of an attorney's ineffective performance at trial unless it leaps out of the record, because appeals in criminal cases are often handled by the lawyer who represented the defendant at trial. It would be surprising if these lawyers recognized their own errors. It would be even more surprising to find them urging their own mistakes upon an appellate court.

My own court has long followed a policy of appointing new counsel in criminal appeals. There are many reasons for this. Until this year, our local public defender was not authorized to do appellate work. Many of our local trial lawyers are unwilling or unable to handle an appellate case. When private counsel have been appointed to defend a client for no or a limited fee, we have sought to spread the burden by asking someone else to shoulder the load of appeal. And finally, we have found it helpful to have new counsel look with a fresh eye at the proceedings at trial. But now our policy is under severe attack in the name of judicial efficiency. We are urged to appoint trial counsel to prosecute the appeal wherever possible. The argument is that trial counsel will need less time to prepare the case, because he will know without studying the transcript what points to raise. It is said in addition that trial counsel, having expended considerable effort on the case, will feel less obligation than new counsel to manufacture an appealable claim and that he will therefore not clutter the courts with frivolous claims.

I find these arguments less than convincing. The briefs I have seen where trial attorneys have handled the appeal are ample demonstration that trial attorneys are as able as anyone else to argue endlessly on points devoid of merit. Only a foolish attorney would think that he can serve his client effectively without reviewing the transcript before he takes an appeal. And in any event, since an attorney has the duty to file an appeal if requested by his client and to argue it in any doubtful case, there is little reason to believe that frivolous appeals would be reduced. In my view, there is only one important difference. Trial counsel will almost never explicitly urge that his client was deprived of the effective assistance of counsel. Nor is he likely to raise the issue implicitly by arguing new points that he did not raise at trial. The resulting saving of time is wholly illusory. If the defendant raises either a previously ignored constitutional claim or the issue of inadequate assistance of counsel on habeas corpus, the result is more litigation, not less. And if the issues are never raised at all, what have we gained? One thing, and one thing only. We've swept a few more problems under the rug. The result is that we injure not only the individual defendant, but the whole criminal justice system. For when appellate courts correct errors in past trials, they are preventing similar errors in the future by making trial courts and lawyers more sensitive to the proper handling of difficult issues. And in the long run, the second function may well be far more important.

* Chief Judge, United States Court of Appeals for the District of Columbia; reproduced from New Gods for Old: "Efficient" Courts in a Democratic Society, 46 N.Y.U. L.REV. 653, 667-68 (1971)

BRIEFING SCHEDULES AND REHEARINGS

Herbert M. Schwab & Robert D. Geddes*

BRIEFING SCHEDULES

When the court of appeals was formed and for the first year of its operation, thirty days were allowed for filing appellants', respondents', and reply briefs. One of the court's first steps was to reduce the period for filing to twenty-five days for appellants' and respondents' briefs and ten days for reply briefs.[34]

Prior to the change of rule, briefing schedules were seldom met. Extensions were granted on minimal showing in personal affidavits by counsel because the caseload in the supreme court simply did not permit hearing, even if briefing schedules were met. Although statistical evidence was difficult to develop, it was generally agreed that counsel were accustomed to the availability of repeated extensions and took advantage of that fact by giving other work priority over the duty to file briefs within the time limits fixed by the court. The docket study disclosed that an average of seventy-three days were consumed in filing the appellant's brief and an average of sixty-eight days in filing of respondent's brief.[35] In the cases studied, only twenty-six per cent of appellants' briefs and twenty-four per cent of respondents' briefs were filed within the thirty-day rule period. Sixty to ninety days were required by twenty-one per cent of the appellants and twenty-five per cent of the respondents. Seventeen per cent of appellants and ten per cent of respondents required more than 120 days to complete their briefs.[36]

It remains to develop firmer control over counsel's requests for extensions. It is recognized that occasions will arise when counsel, for circumstances beyond his control, will be unable to complete a brief within the twenty-five-day period allowed. Limited extensions of ten to fifteen days should be available on personal affidavit of counsel explaining the valid reasons for delay. When an attorney consistently abuses the extension privilege, the court should consider requiring personal appearance before the court or its representative to show the circumstances precluding preparation and filing within the time allotted.

The value of reply briefs in criminal appeals has been seriously questioned since the formation of the court of appeals. Frequently, the privilege to file a reply brief is waived. In a sample of 167 cases where appellants' briefs were filed, reply briefs were filed in only twenty-nine cases. In those cases where reply briefs were filed, they appeared to add little to that which was already before the court. It seems desirable for the court to consider elimination of reply briefs as a privilege and to permit their filing only in those circumstances where the court finds them necessary and specifically requests additional briefing of a specific point.

* Herbert Schwab is Chief Judge of the Court of Appeals of Oregon and Robert Geddes is an Assistant Attorney General in state state; reproduced from Expediting Disposition of Criminal Appeals in Oregon, 51 ORE.L.REV. 650, 660-62 (1972)

The docket study disclosed that a substantial number of criminal defendants moved for rehearing following adverse decision in the court of appeals. While the docket study was not designed to evaluate delays at this level, it appeared that approximately eighty additional days were consumed in the rehearing and review process. This estimate seems reasonably accurate since a total of fifty days is allowed for filing of the necessary petitions for rehearing and review.[40] When the time for decision at each step is allowed, the eighty-day estimate does not seem unreasonable.

Provision for rehearing at the court of appeals level is subject to legitimate question. Rehearing permits the parties to direct the court's attention to alleged errors of fact or law in its decision, and to matters which the court may have overlooked or failed to consider. Although the rationale for rehearing is plausible, in practice it seems to generate only further delay. In any event, few of the petitions filed result in rehearing, and fewer still result in any change of decision.[41] There is no evidence to indicate that the rehearing procedure reduces the number of litigants seeking review by the supreme court. The petition for rehearing in the court of appeals is thus only a procedural step intervening between that court's decision and final petition for review by the supreme court. Since rehearing is not a very meaningful tool for correction of error, and since the opportunity for correction remains available in the supreme court, it was suggested that rehearings by the court of appeals be abolished. That suggestion was rejected by the 1971 Legislature.[42] It seems appropriate to renew that request when the legislature convenes again in 1973.

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41 Between July 1969 and December 1971, 388 petitions for rehearing were filed. During the same period rehearing was granted in four instances and one opinion was modified as a result of rehearing.

PREPARATION OF BRIEFS

Winslow Christian*

A. *Appellant's Opening Brief*

An appellant's opening brief must be filed in the court of appeal within 60 days of the filing of the record.[103] The time for filing briefs in criminal cases cannot be extended by stipulation of the parties;[104] however, the presiding justice of a division may extend the time for filing,[105] and the court may relieve a party from default in failing to file on time.[106]

1. *Survey findings.*

Appellants' counsel consumed an average of 133 days (120 days median) in preparing their clients' briefs.[107] In the few cases where county public defenders continued representation beyond the trial, the results were much better: Public defenders took, on average, 66 days (68 days median) to file their briefs. Private counsel required an average of 105 days (97 days median) for preparation, while appointed counsel filed their briefs an average of 145 days (125 days median) after their appointment.

2. *Sources of delay.*

There appear to be a number of reasons for the significant delay in preparation of appellants' opening briefs. First, appointed counsel often encounter difficulties in obtaining a copy of the trial record. When the record on appeal is filed with the trial court clerk, the appellant's copy is sent immediately to the appellant or his attorney. Because an indigent appellant usually has no attorney at this point, he is the one who receives the record. Thus, before appointed counsel can begin to prepare a brief, he must obtain the record from the appellant, a task that can be time consuming. This procedure, which is required by the *Rules of Court*,[110] is often cited by counsel as a reason for requesting an extension.[111]

Second, most appointed counsel are inexperienced and spend a great deal of time floundering over problems of research and preparation that would be routine to an experienced lawyer.[112] The Clerk of the Court of Appeal, First Appellate District, estimated that half of the attorneys appointed in his district are in their first year of practice and that 90 percent are in their first three years of practice.[113] The committee report on the bill proposing creation of a state public defender office explained the consequences of the inexperience of most appointed counsel:

* Justice, California Court of Appeal, San Francisco; reproduced from Delay in Criminal Appeals: a Functional Analysis of One Court's Work, 23 STAN.L.REV. 676, 692-99 (1971)

> All too often, these young lawyers lack even the most fundamental knowledge of the criminal law. For many of them an appellate appointment means that they must learn everything from scratch. Untold hours are spent researching the most basic issues and many of them will waste time and effort simply because they are not even aware of the limited issues that can be raised on appeal. It is not at all unusual for a fresh young lawyer to spend hours searching for new evidence because no one ever told him that a criminal appeal must be limited to the issues raised in the trial record. Appeals that should take no more than 10 to 15 hours to prepare are often 40 to 80 hours in preparation. Briefs that should have been filed within a month are often filed five or six months after they are due.[114]

Third, indigent appeals are unlikely to have high priority in the work of most appointed counsel. While the commonly deficient quality of briefs filed in indigent criminal appeals may charitably be attributed to inexperience, the survey results disclose firm evidence of a less easily excused characteristic of appointed counsel. Examination of requests for compensation from appointed counsel indicated they spent an average of 61 hours (50 hours median) on each indigent appeal. Assuming, for example, that 75 percent of this time is devoted to the preparation of the opening brief,[115] appointed counsel spend, on the average, approximately 45 hours over a period of almost five months to complete this task. I suggest that this figure exceeds the time that a competent lawyer would need to brief the average criminal appeal. The fact that these hours are spread over so long a period suggests that many appointed counsel prepare their briefs in a fashion that can hardly be call diligent.

Fourth, appellate courts have established a well-known practice of liberally granting extensions, particularly to appointed counsel. A striking example of this practice is the letter sent by the clerk to appointed counsel at the time of appointment, automatically granting him an unrequested 30-day extension.[116] The survey was able to detect only part of the delay attributable to extensions in the First Appellate District because the clerk normally discards records of extensions once the briefs have been filed.[117] Nonetheless, records of extensions were found in 24 of the 175 full appeals, with one appellant receiving five extensions. Typically, counsel's assertion that he was "pressed" by other business was sufficient to gain him an extension.[118]

Finally, delay in requesting augmentation of the record makes some contribution to the average delay of 133 days in preparing the appellant's opening brief. In those cases in which no augmentation was requested, delay in preparing the brief averaged 119 days. Where augmentation is requested, the deadline for filing the brief is extended; hence delay is compounded by suspending the already sluggish process of briefing until an augmented record has been filed.

3. *Recommendations.*

While the court of appeal bears the principal responsibility for regulating appointed counsel, there are certain limitations on its ability to exercise control. First, the court cannot attempt to accelerate preparation of the brief by employing sanctions that would in reality punish the indigent appellant for his attorney's neglect. Thus, drastic remedies such as dismissal of the appeal,[119] while perhaps appropriate for appellants represented by private counsel over whom they exercise some control,[120] are unacceptable for the indigent appellant[121] who does not select or compensate his attorney and does not have the freedom to dismiss him.[122] Second, there is little that the courts can do to increase the level of diligence of appointed counsel in indigent cases, for this indifference is largely the product of factors beyond the courts' control.[123] Renewed pleas to the Bar for more able and experienced attorneys and for more diligence in preparing appellants' briefs are unlikely to be of consequence because of the disparity between fees charged by private lawyers and those paid to appointed counsel.[124] Increasing the compensation of appointed counsel to compete with fees earned in private practice is probably not feasible.

Finally, any effort to exert greater control over appointed counsel must fully consider the risk that tighter procedures and exposure to sanctions will discourage some attorneys from volunteering for indigent appeals work. Acceleration of the appellate process would be useless if, as a by-product, it were to dry up present sources of indigent representation.

At minimum, certain alterations of present procedures should be made. The present delay in transmitting the record from the appellant to his counsel could be eliminated if, as recommended above, counsel could be appointed before the record has been completed; the record could then be sent directly to counsel as soon as it has been completed and certified. The court should inform newly appointed counsel that it will insist on expeditious filing of the opening brief.[125] In addition, the strange practice of granting an unsolicited 30-day extension should be discontinued, and the courts should refuse to grant extensions unless there is a showing of valid cause. Finally, when an appellant has not filed his brief on time, the court should not hesitate to remove the attorney and appoint substitute counsel.[126] The court should then refer the dismissed attorney to the Bar for discipline,[127] as well as refuse to compensate him for any time spent on the appeal.[128]

While there is some basis for concern that such alterations would discourage volunteer work in criminal appeals, it seems unlikely that these reforms would turn away significant numbers of volunteer lawyers. First some portion of present volunteers seek the experience and income provided by indigent appeals and presumably would continue to participate. Second, there is some degree of social pressure within the organized Bar and within some law firms to encourage young attorneys to accept the responsibility of making the system of criminal justice work for indigents as well as for those who can afford to pay legal fees.[129] Finally, one would expect some of the lawyers now serving to recognize the need for increasing the speed of the criminal appellate process and hence to react positively to the court's initiative in requiring better performance.

Adoption of these minimal reforms, however, is unlikely to solve the problem completely. Because courts are ill-suited to carry on a campaign of indefinite duration to obtain volunteer counsel, new responses must be sought to the challenge of providing adequate representation for indigents. one such response would be the creation of a state public defender office charged with the duty of handling all appeals of indigents. Such an agency promises not only increased efficiency throughout the appellate system, but perhaps more importantly, increased quality in the representation received by indigent appellants.[130] While establishment of such an organization would not eliminate every source of unnecessary delay in the appellate system, it would make possible the elimination of most delays caused by the inexperience, inefficiency, and indifference of attorneys appointed under the present system.

Should the legislature fail to create a state public defender office, the courts should take the initiative to meet their constitutional duty of providing adequate representation for indigent appellants.[132] Through creative use of their powers to appoint and compensate counsel for indigent appeals,[133] the courts of appeal could establish, without further legislation, the functional equivalent of a public defender office for criminal appeals. The State Bar could be invited to sponsor an experimental office in one appellate district that would be staffed by lawyers handling indigent appeals on a full-time basis. The court of appeal and a committee of the Bar could consult to create internal controls on recruitment and management and develop a compensation schedule based on productive norms derived from the experience of public law offices.[134] By ordering appointment of the new office in each indigent appeal and by fixing compensation separately in each case, the court could better fulfill its responsibility to provide adequate representation for indigent appellants.

120. Discharge of a private attorney for slowness would probably be a sufficient justification for granting an extension to prepare an appellant's opening brief. *See* CAL. CT. R. 17(a), 30, 43, 45(c), 45(c), 53.

121. *See In re* Smith, 2 Cal. 3d 850, 87 Cal. Rptr. 687, 471 P.2d 8 (1970). Indigent appellants occasionally request appointment of new counsel because of their attorney's slowness. Sometimes a phone call to the lawyer by the clerk of the court inquiring as to the reason for delay solves the problem. In some cases, however, new counsel is appointed. Interview with Lawrence R. Elkington, Clerk, California Court of Appeal, First Appellate District, in San Francisco, Cal., Dec. 17, 1970.

132. *See* Douglas v. California, 372 U.S. 353 (1963).

133. In *Rowe v. Yuba County*, 17 Cal. 62, 63 (1860), the Supreme Court stated: "[I]t is part of the general duty of counsel to render their professional services to persons accused of crime, who are destitute of means, upon the appointment of the Court, when not inconsistent with their obligations to others; and for compensation, they must trust to the possible future ability of the parties." *See* CAL. BUS. & PROF. CODE § 6068(h) (West 1962). Counsel appointed to represent indigents appealing criminal convictions receive "a reasonable sum for compensation and necessary expenses, the amount of which [is] determined by the court and paid from any funds appropriated for that purpose." CAL. PENAL CODE § 1241 (West 1970).

B. *Respondent's Brief*

The Attorney General is required to file his brief within 30 days after the appellant files his opening brief.[135] However, the survey indicates that the average interval between the filing of the appellant's opening brief and the filing of the Attorney General's brief was 100 days (92 days median). This is less than the average time spent by appointed counsel (145 days), about the same as the time spent by private counsel (105 days), and longer than the time required for county public defenders (66 days).[136] Although the office of the Attorney General is more prompt than most appellant counsel, it is, nonetheless, a significant source of delay in criminal appeals.

One cause for this delay may be the prevailing view that because a criminal judgment cannot be reversed without argument,[137] the respondent must file a brief in every criminal appeal.[138] While this requirement guarantees the people representation whenever a convicted criminal might be freed by an appellate court, it also creates unnecessary delay in those cases that could be disposed of by summary affirmance or reversal without waiting for a brief from the Attorney General.[139] Accordingly, the *Penal Code* should be amended to permit the court to take an appeal under submission without opposition, and reverse if necessary, whenever the Attorney General, without good cause, fails to file his brief on time or decides that no respondent's brief is warranted. This amendment would strengthen the court's hand in dealing with delay and would eliminate one unnecessary and time-consuming step in many uncomplicated cases. At the same time, one would expect the Attorney General to file a brief in any case of importance.

A second reason for delay at this stage is the liberal policy of the courts in granting extensions. Courts granted the Attorney General extensions in 35 of 175 full appeals surveyed, with three or more extensions granted in approximately two-thirds of these cases. The Attorney General requests extensions by submitting a form that has been used without substantial change for more than 20 years. The form states, in part, that "due to the stress of business in this section of the Office of the Attorney General" he has been unable to prepare the brief within the time required by law.[140] The survey results indicate that various divisions of the court treat these requests differently, apparently producing varying performance by the Attorney General. Division Three grants the Attorney General only one extension, while other divisions routinely grant three extensions. The average time for preparation of the respondent's brief in Division Three was 64 days, while average times of 114, 112, and 112 days were found in Divisions One,

139. It is impossible to estimate the percentage of criminal appeals in which no respondent's brief would be necessary. In another context, the Judicial Council has noted: "Many appeals, particularly in criminal cases, raise no substantial legal issues and the present practice of writing a full opinion in each case, regardless of its merits, is not an optimum use of judicial time." 1970 JUDICIAL COUNCIL REPORT, *supra* note 4, at 27.

Two, and Four, respectively. These results clearly suggest that the promptness of the Attorney General's office will depend upon the liberality of court policy in granting extensions. Appellate courts should therefore demand more diligent performance by the Attorney General. Some inexperienced lawyers are on the staff of the Attorney General, but these attorneys have access within the office to more experienced deputies, an advantage not shared by appointed counsel.[140a] Furthermore, the bulk of criminal appeals handled by the Attorney General are not so complex as to require more than 30 days for briefing, especially where appeals turn on issues that the same office briefs repeatedly. Finally, the application of stricter standards to the Attorney General—unlike application of such standards to appointed counsel—does not risk reduction of the manpower available to provide necessary legal services.

Courts should no longer routinely dispense extensions of time for the preparation of respondents' briefs. Specifically, a court should not grant any extensions except in very difficult cases involving novel legal questions or requiring extensive research. Should the Attorney General find it difficult to comply with these time limitations, the courts at least will have demonstrated that a significant part of the problem is inadequate manpower. If that should be the case, closer control by the courts might actually assist the Attorney General in demonstrating to the legislature his present inability to comply with court rules, and hence his need for staff augmentation.

D. MONITORING: A ROLE FOR APPELLATE COURT STAFF?

MONITORING APPEALS

Warren E. Burger*

.. A simple aspect long overlooked is that we must develop a way for the courts of appeals to take active direction and full responsibility for every appeal from the day the notice of appeal is filed. When that notice is filed, the district court loses jurisdiction, of course, and understandably loses interest. Up to now there has been a tendency for the appellate judges to assume that the lawyers will push the cases along, but we should know by now that this is not always a safe assumption.

An appeal, like a ton of bricks, moves when it is pulled or pushed.

* Chief Justice of the United States; reproduced from The State of the Federal Judiciary, 57 A.B.A.J. 855, 858 (1971)

THE NECESSITY OF CONTROL BY THE APPELLATE COURT OVER THE APPEAL

James D. Hopkins*

The plain fact is that in New York we do not know the number of appeals pending in the courts. This is so because in civil cases the appellant does not file his notice of appeal in the appellate court, and there is no requirement that a duplicate notice be filed in the appellate court.[31] Although the rules of the Court of Appeals and the four departments of the Appellate Division provide for the time in which the record and the briefs should be filed,[32] since the pendency of the appeal is not known to the court, the enforcement of the rules becomes optional for the parties. The respondent may indulge the appellant by overlooking the time limitations; the court's attention is not drawn to the default of the appellant until the respondent moves to enforce the rules.

Perhaps the reason for this procedure rests on the analogy to the trial of the action. New York—and for that matter, the other American jurisdictions in general—allows the litigants to control the pace of the proceedings. Once a suit is started, how quickly it is brought for trial is left to the inclination (and motions) of the parties. Indeed, whether the action is ever tried depends on the parties, for the court, unless the action comes to its attention by a motion, is ignorant that the action exists. The principle has been embedded in our system that the courts are put in motion by the parties and their attorneys, and that the judicial process awaits their exigencies and convenience.

This principle may have been useful in the laissez-faire climate of the early days of our government, but it falls short of its objective today. There is an interest of the community in the settlement of disputes, and certainly an interest of the community in preventing the machinery of the courts from becoming clogged by actions which suddenly spring to life after years of quiescence. The recent development of the use of statements of readiness in placing cases on the trial calendar evinces the court's concern that actions must follow a pattern of issue-defining and fact-discovery before the court's time is spent at a trial; and I think that we must insist on a more forceful role in the future by the courts in securing the termination of a suit.

[31] *See* N.Y. CIV. PRAC. L. & RULES § 5515 (McKinney 1964), which governs appeals in civil cases. In criminal cases, *see* N.Y. CRIM. PROC. L. § 460.10 (McKinney 1971).

[32] *See* N.Y. C.R.R., tit. 22, for Court of Appeals: §§ 500.2, 500.31 for First Department, *see* §§ 600.5, 600.6, 600.8, 600.11; Second Department: §§ 670.8, 670.10, 670.15, 670.19; Third Department: §§ 800.2, 800.8, 800.13; Fourth Department: §§ 1000.05, 1000.7.

*Justice, New York Supreme Court, Appellate Division, Second Department; reproduced from Small Sparks From A Low Fire: Some Reflections on The Appellate Process, 38 BROOKLYN L. REV. 551 (1972).

If the analogy to the older trial practice is the basis for the present lack of control by appellate courts over the progress of an appeal, the analogy likewise fails under modern conditions. Most appeals now come to argument by the energy of the parties, but not as speedily as in the English practice.[33] Very frequently, the respondent must move to dismiss the appeal for lack of prosecution, and it is only at this point that the appellate court takes charge of the appeal by fixing a date for argument.[34] In the event that the respondent makes no motion, the appeal lies in a state of arrested animation, ready for argument at the convenience of the appellant.[35] On occasion (which happens more often than might be supposed), an appeal will not reach the appellate court for disposition until more than a year after the judgment had been filed, and sometimes the delay will reach as much as two years or longer beyond the judgment.

It is not necessary that the statute be amended to provide for the filing of the notice of appeal in the appellate court rather than in the court in which the judgment was obtained. By rule of court, it could be provided that upon the filing of the notice of appeal in the original court the clerk of that court shall make a facsimile copy and forward it to the clerk of the appellate court. This would supply the appellate court with the information as to the number of appeals pending in the court. More important, it would enable the appellate court, through its staff, to oversee that the appeal was processed according to the rules. If, for example, delay in the transcript of the trial minutes occurred, the staff could ascertain the reason for the delay and take steps to expedite the preparation of the transcript.[36] The enforcement of its own rules by the court would insure the more prompt disposition of cases, and vindicate its own interest, as a representative of the community, in maintaining the integrity of the appellate process.

[33] D. KARLEN, APPELLATE COURTS IN UNITED STATES AND ENGLAND 150-54 (1963).

[34] Rarely is an appeal dismissed outright. Generally, the motion to dismiss is denied on condition that the appellant notice the appeal for argument at a given term.

[35] *Cf.* People v. Kiernan, 6 N.Y.2d 274, 160 N.E.2d 503, 189 N.Y.S.2d 215 (1959), where an appeal lay dormant for 18 years.

[36] I understand that this procedure has been used by the United States Court of Appeals for the Second Circuit and by the Michigan Court of Appeals.

STANDARDS RELATING TO CRIMINAL JUSTICE:

CRIMINAL APPEALS - COURT SUPERVISION

American Bar Association*

3.1 Supervision during the preparation of cases.

(a) Continuing, authoritative supervision of criminal cases on appeal, from docketing through hearing and submission, should be exercised. It may be desirable to assign each case to a single judge who, with an appropriate aide, is authorized to resolve the procedural questions that arise. Under such an arrangement, the judge could delegate to the administrative aide authority to handle most questions, with recourse always available to the judge in charge.

(b) Illustrative of matters that can be administered by such a process would be questions arising in the preparation and filing of the record of the proceedings below; the appointment of counsel and, where necessary, changes in assignment of counsel; granting of stays of execution and admission to bail, at least until the full court can act in due course; and employing practices designed to expedite the appeals by detecting and eliminating unnecessary causes of delay.

Commentary

Judicial administration in appellate courts suffers from the lack of simple machinery that can authoritatively and efficiently oversee the progress of cases from the institution of an appeal to the submission of the controversy to the court for decision. To a large extent, the preparatory stage is left to the parties themselves, without any active supervision by the court or any agency of the court. The clerk of the court, to varying degrees, intervenes to move the cases toward expeditious decision. But the clerk usually has limited status vis à vis the lawyers in appellate cases and no authority to issue orders or decide disputes. There seems to be an increasing number of subsidiary questions that arise, especially in criminal appeals; and these are typically presented to the full court for decision by motion of one of the parties.

* These standards were approved by the House of Delegates in 1971. They were prepared by a committee led by Hon. Simon E. Sobeloff; Professor Curtis R. Reitz was its reporter.

In light of the sharply increasing volume of appeals and the urgent need to streamline the processing of appellate cases, it may be very useful to adopt here a variant of the administrative organization of appellate courts in Europe. In the Supreme Court of Sweden (Högstra Domstolen), for example, there are 24 judges who sit in panels of five to hear cases. Review is discretionary with the court; and the decision to take up a case is made by a panel of three judges. After leave to appeal is granted, one of the three judges is appointed *referent*. He, in conjunction with the Court's secretariat, attends to the pre-hearing preparation of the case. The *referent* does not sit as one of the hearing panel when the case is ready for decision. See GINSBURG & BRUZELIUS, CIVIL PROCEDURE IN SWEDEN 328-31 (1965).

The virtues of having a judicial officer follow a case from beginning to end are manifest. He can issue the needed rulings on the preliminary questions that may arise, thus relieving the court and counsel of the needless effort expended in formal motion practice. With the assistance of a capable secretariat, the burden upon the judge himself can be confined to a minimum. Questions concerning the settlement of the record, assignment or reassignment of counsel, stay of execution, release pending review, and the like, can be competently and expeditiously handled.

In fact, some appellate courts in the federal system are working toward such an arrangement through the presiding judge taking on special administrative responsibilities, with the assistance of a law clerk specially assigned to criminal cases. If it seems desirable to continue the evolution in the direction of a court secretariat, with substantive expertise in the matters coming before the court, the seed is there to grow.

Commentary

Note should be taken of a procedure, developed in the United States Court of Appeals for the Second Circuit, which has significantly speeded up the processing and disposition of appeals in criminal cases. When notice of appeal is filed, the trial court provides the appellate court with certain information about the case, including the names of counsel. As assistant in the appellate court immediately contacts the relevant persons to fix dates for completion of the various steps required for perfecting the appeal, and a week is then assigned during which the appeal will be argued. The various dates are then incorporated in an order, signed by the chief judge.

REPORT ON COURTS: PROFESSIONAL STAFF*

The reviewing court should have a full-time professional staff of lawyers, responsible directly to the judges, to perform the following functions in review of criminal cases:

1. Monitoring. The staff should affirmatively monitor each case to insure that the court's rules are complied with and that there is no unnecessary delay in the review process.

2. Shaping the Record. The full trial transcript should be expeditiously provided the reviewing court, and the staff should take action to insure that those portions of transcripts, trial court papers, and other matters that are essential to a full and fair adjudication of the issues are put before the judges.

3. Identification of Issues. The staff should take affirmative steps to discover all arguable issues in the case, even though not asserted by defendant and not apparent on the record, so that all matters that might be asserted later as a basis for further review can be considered and decided in the initial review proceeding.

4. Screening. The staff should review all cases before they are considered by the judges and recommend appropriate procedural steps and disposition; the staff should identify tentatively those cases that contain only insubstantial issues and should prepare recommended dispositional orders so as to permit the court to dispose of them with a minimum involvement of judicial time, thereby leaving for fuller judicial consideration those cases of arguable merit.

The function of this staff should be to supplement rather than replace the work of attorneys representing the prosecution and the defendant in each case.

Commentary

As appellate caseloads have grown, so has the realization that the judges need more assistance than can be provided by their personal law clerks and the court clerk's office. Judges' time should be devoted primarily to deliberation on the legal problems and the writing of opinions on substantial, important issues. Many administrative and procedural details do not require the direct attention of judges. Such matters can be handled by a central professional staff. Moreover, in criminal cases, leaving all matters to the pull and haul of the adversary process has produced delays and made judges' jobs more time-consuming. Staff attorneys are useful to any appellate court, but they are essential to the concept of a single review of the case, embodied in these standards, if such review is to be expeditious and is to embrace all issues heretofore asserted in new trial motions and postconviction proceedings.

Although the use of a central professional staff is still novel to many American courts, there is sufficient experience with the device to establish its worth. The Michigan Court of Appeals has effectively utilized a staff of lawyers since its creation in 1965. More recently a staff has been established in the California Court of Appeals. For many years a large professional staff has been employed successfully in the English criminal appeals process; indeed, the staff there is the key to the ability of the court to handle an extraordinarily large volume of criminal appeals under proceedings similar in some respects to those contemplated in these standards. The National Center for State Courts recently has launched a project in four State appellate courts, where there has been no staff, to demonstrate the utility of a professional staff and to test new review procedures.

All staff work in the court is and should be under the ultimate control of the judges. The staff has essentially a recommending function, although it can exercise a considerable initial authority over certain administrative details involved in getting the case ready for judicial attention.

* A recommendation of the National Advisory Commission on Criminal Justice Standards and Goals published in 1973 (Professor Daniel J. Meador, Reporter)

Monitoring

The staff should affirmatively monitor each case from the moment the initial step is taken by the defendant to seek review of his conviction or sentence. This is a departure from traditional appellate practice where the progress of an appeal is left entirely to the adversary process.

Failure to comply with the court's rules as to the times within which various steps must be taken has been checked only if the opponent has cared to make an issue of the matter. The result is that in many appellate courts the average time for taking the various steps substantially exceeds the time allowed by the rules. This is a major factor in delaying review. To overcome this problem the staff should be responsible for seeing that the case moves along, even though the parties might be willing to let it lag, if left to their own devices. The staff, or clerical personnel under staff direction, should deal directly by telephone with the persons involved—lawyers, clerks, trial judges, or reporters. The reviewing court should back up its staff's actions by providing for sanctions for failure to comply with rules or to cooperate with the staff. The principle of monitoring is endorsed in the American Bar Association, Project on Minimum Standards for Criminal Justice, *Standards Relating to Criminal Appeals*, Standard 3.1 (Approved Draft, 1970).

Shaping the Record

The staff should oversee the preparation and shaping of the papers to be put before the judges to insure that, on the one hand, the judges have all the information essential to a meaningful decision of the issues and that, on the other hand, the judges are not burdened with an unnecessary volume of material. While the lawyers for the parties should make the initial determination as to what data go before the reviewing court, the staff also should exercise an affirmative role, both in insuring completeness and in protecting the court from needless information. This staff function is especially important under the single review concept where matters outside the record may be considered.

This expansive scope of review is characteristic of English criminal appeals, and the staff there provides a working model of control over the record, for both inclusion and exclusion, subject to judicial control. That experience and the growing necessity for greater judicial control suggest that the American Bar Association's House of Delegates was wise in placing brackets around that portion of Criminal Appeals Standard 3.3(b) that asserted that normally the court should not be involved in determining the content of the record.

While the English system of tailoring the transcript to the issues presented on appeal has some merit, American judges and lawyers want the entire transcript of the trial proceedings in most criminal appeals. This is desirable—indeed necessary—if the unified review proceeding is to be fully effective. Delay in transcript preparation could delay the review proceeding. But it is possible that transcript preparation can be accelerated substantially. (See the section of this chapter on Recommendations.)

Identification of Issues

The staff should take affirmative steps to identify all potential issues in the case, even though they were not asserted by the defendant and are not apparent on the face of the record. Performing this function effectively is essential if further review is to be limited. As to alleged constitutional defects in proceedings leading up to conviction and sentence, there is a widely accepted notion that the defendant at some point should be provided an opportunity for a hearing. Failure to provide that opportunity in the regular course of trial and appeal has been one of the causes of growth in postconviction litigation. This standard contemplates that once review is sought, the reviewing court, through its staff, will probe the entire case to spot any arguable issues that may be beneath the surface. Such issues then will be resolved in the review proceeding, thereby making it feasible and fair to preclude a later assertion of the same points.

Various procedures might be devised for carrying out this function. The judges and the court staff, for example, might design a checklist type of questionnaire to be submitted to each defendant and his lawyer. The questionnaire would attempt to list all the typical contentions made by defendants in criminal cases—especially those which abound in postconviction proceedings. On every point the defendant and his lawyer could be asked to indicate whether they claim any irregularity or illegality; a space could be provided for them to state the factual basis of any such claim. The form could carry the advice that this was the sole review to which the defendant had a right and that only in exceptional circumstances would points not asserted be reviewable thereafter.

Where points disclosed by this means, or other sorts of probing, are not presented by the trial record, the staff would take necessary steps to get before the court the information necessary to decide the issues. The staff, for example, could direct or invite the lawyers to submit relevant matter by documentary evidence, affidavits, or the testimony of witnesses.

Screening

A screening function should pervade the staff work. Every case coming to the reviewing court would be reviewed by the staff before being seen by any judge. One purpose is to insure completeness in all the papers, as described above in the description of the process of shaping the record. Another purpose is to recommend further steps. For example, if there is an issue on which a decision by the trial judge is appropriate, as contemplated by subparagraph 2, the staff could frame a recommended order to that effect for the reviewing court's action. If written briefs or oral argument (or both) appear desirable, the staff could make that recommendation to the judges with a suggested limitation as to the issues to be treated.

Another purpose is to identify cases where there are no issues of substance; for example, a recommended per curiam affirmance could be prepared. In all these matters, if any judge disagrees with the staff recommendation, additional procedures or steps can be directed. But if the staff is competent and aware of the general views of the reviewing court, there should be a high degree of harmony between staff recommendations and judicial views.

On its face this screening process may appear in some respects to be at odds with the American Bar Association's Criminal Appeals Standard 2.4, which argues against preappeal screening. But in spirit and substance there is no inconsistency. Both endorse the need for a decision on the merits at the earliest practical stage.

CHAPTER 6 TERMINATING CRIMINAL LITIGATION: THE PROBLEM OF POST-CONVICTION PROCEEDINGS*

*Materials selected and edited by Jerold Israel.

A. THE GOVERNING LAW

(1) Statutory Provisions (28 U.S.C. 2441, etc.)

§ 2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

§ 2242. Application

Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf.

It shall allege the facts concerning the applicant's commitment or detention, the name of the person who has custody over him and by virtue of what claim or authority, if known.

It may be amended or supplemented as provided in the rules of procedure applicable to civil actions.

If addressed to the Supreme Court, a justice thereof or a circuit judge it shall state the reasons for not making application to the district court of the district in which the applicant is held.

§ 2243. Issuance of writ; return; hearing; decision

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

§ 2244. Finality of determination

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus and the petition presents no new ground not theretofore presented and determined, and the judge or court is satisfied that the ends of justice will not be served by such inquiry.

(b) When after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States or a justice or judge of the United States release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus in behalf of such person need not be entertained by a court of the United States or a justice or judge of the United States unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

§ 2245. Certificate of trial judge admissible in evidence

On the hearing of an application for a writ of habeas corpus to inquire into the legality of the detention of a person pursuant to a judgment the certificate of the judge who presided at the trial resulting in the judgment, setting forth the facts occurring at the trial, shall be admissible in evidence. Copies of the certificate shall be filed with the court in which the application is pending and in the court in which the trial took place.

§ 2246. Evidence; depositions; affidavits

On application for a writ of habeas corpus evidence may be taken orally or by deposition, or, in the discretion of the judge, by affidavit. If affidavits are admitted any party shall have the right to propound written interrogatories to the affiants, or to file answering affidavits.

§ 2247. Documentary evidence

On application for a writ of habeas corpus documentary evidence, transcripts of proceedings upon arraignment, plea and sentence and a transcript of the oral testimony introduced on any previous similar application by or in behalf of the same petitioner, shall be admissible in evidence.

§ 2248. Return or answer; conclusiveness

The allegations of a return to the writ of habeas corpus or of an answer to an order to show cause in a habeas corpus proceeding, if not traversed, shall be accepted as true except to the extent that the judge finds from the evidence that they are not true.

§ 2249. Certified copies of indictment, plea and judgment; duty of respondent

On application for a writ of habeas corpus to inquire into the detention of any person pursuant to a judgment of a court of the United States, the respondent shall promptly file with the court certified copies of the indictment, plea of petitioner and the judgment, or such of them as may be material to the questions raised, if the petitioner fails to attach them to his petition, and same shall be attached to the return to the writ, or to the answer to the order to show cause.

§ 2250. Indigent petitioner entitled to documents without cost

If on any application for a writ of habeas corpus an order has been made permitting the petitioner to prosecute the application in forma pauperis, the clerk of any court of the United States shall furnish to the petitioner without cost certified copies of such documents or parts of the record on file in his office as may be required by order of the judge before whom the application is pending.

§ 2251. Stay of State court proceedings

A justice or judge of the United States before whom a habeas corpus proceeding is pending, may, before final judgment or after final judgment of discharge, or pending appeal, stay any proceeding against the person detained in any State court or by or under the authority of any State for any matter involved in the habeas corpus proceeding.

After the granting of such a stay, any such proceeding in any State court or by or under the authority of any State shall be void. If no stay is granted, any such proceeding shall be as valid as if no habeas corpus proceedings or appeal were pending.

§ 2252. Notice

Prior to the hearing of a habeas corpus proceeding in behalf of a person in custody of State officers or by virtue of State laws notice shall be served on the attorney general or other appropriate officer of such State as the justice or judge at the time of issuing the writ shall direct.

§ 2253. Appeal

In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had.

There shall be no right of appeal from such an order in a proceeding to test the validity of a warrant to remove, to another district or place for commitment or trial, a person charged with a criminal offense against the United States, or to test the validity of his detention pending removal proceedings.

An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause.

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

§ 2255. Federal custody; remedies on motion attacking sentence

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.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

(2) Issues Cognizable in Challenging a Conviction

FAY v. NOIA

In Fay v. Noia, 372 U.S. 391 (1963), the Court described the issue before it as "whether the respondent Noia may be granted federal habeas corpus relief from imprisonment under a New York conviction now admitted by the State to rest upon a confession obtained from him in violation of the Fourteenth Amendment, after he was denied state post-conviction relief because the coerced confession claim had been decided against him at the trial and Noia had allowed the time for a direct appeal to lapse without seeking review by a state appellate court". While the court's primary concern related to the consequences that should attach to petitioner's "procedural forfeiture" at the state level, both the majority and dissenting opinions discussed at length the types of issues cognizable in a habeas corpus application by a state prisoner. The majority opinion, per Brennan J., included the following:

I.

We do well to bear in mind the extraordinary prestige of the Great Writ, *habeas corpus ad subjiciendum,* in Anglo-American jurisprudence. Received into our own law in the colonial period, given explicit recognition in the Federal Constitution, Art. I, § 9, cl. 2, incorporated in the first grant of federal court jurisdiction, Act of September 24, 1789, habeas corpus was early confirmed by Chief Justice John Marshall to be a "great constitutional privilege." Although in form the Great Writ is simply a mode of procedure, its history is inextricably intertwined with the growth of fundamental rights of personal liberty. For its function has been to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints. Its root principle is that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release. * * *

History refutes the notion that until recently the writ was available only in a very narrow class of lawless imprisonments. For example, it is not true that at common law habeas corpus was exclusively designed as a remedy for executive detentions; it was early used by the great common-law courts to effect the release of persons detained by order of inferior courts. The principle that judicial as well as executive restraints may be intolerable received dramatic expression in *Bushell's Case*, 124 Eng.Rep. 1006 (1670). Bushell was one of the jurors in the trial * * * of William Penn and William Mead on charges of tumultuous assembly and other crimes. When the jury brought in a verdict of not guilty, the court ordered the jurors committed for contempt. Bushell sought habeas corpus, and the Court of Common Pleas, in a memorable opinion by Chief Justice Vaughan, ordered him discharged

from custody. The case is by no means isolated, and when habeas corpus practice was codified in the Habeas Corpus Act of 1679, 31 Car. II, c. 2, no distinction was made between executive and judicial detentions.

Nor is it true that at common law habeas corpus was available only to inquire into the jurisdiction, in a narrow sense, of the committing court. *Bushell's Case* is again in point. Chief Justice Vaughan did not base his decision on the theory that the Court of Oyer and Terminer had no jurisdiction to commit persons for contempt, but on the plain denial of due process, violative of Magna Charta, of a court's imprisoning the jury because it disagreed with the verdict * * *.

Thus, at the time that the Suspension Clause was written into our Federal Constitution and the first Judiciary Act was passed conferring habeas corpus jurisdiction upon the federal judiciary, there was respectable common-law authority for the proposition that habeas was available to remedy any kind of governmental restraint contrary to fundamental law. In this connection it is significant that neither the Constitution nor the Judiciary Act anywhere defines the writ, although the Act does intimate, 1 Stat. 82, that its issuance is to be "agreeable to the principles and usages of law"—the common law, presumably. We need not pause to consider whether it was the Framers' understanding that congressional refusal to permit the federal courts to accord the writ its full common-law scope as we have described it might constitute an unconstitutional suspension of the privilege of the writ. There have been some intimations of support for such a proposition in decisions of this Court. * * * But at all events it would appear that the Constitution invites, if it does not compel, * * * a generous construction of the power of the federal courts to dispense the writ conformably with common-law practice.

* * * In *Ex parte Lange*, 18 Wall. 163, 21 L.Ed. 872 [1873], * * * a case of direct application to this Court for the writ, the Court ordered the release of one duly convicted in a Federal Circuit Court. The trial judge, after initially imposing upon the defendant a sentence in excess of the legal maximum, had attempted to correct the error by resentencing him. The Court held this double-sentencing procedure unconstitutional, on the ground of double jeopardy, and while conceding that the Circuit Court had a general competence in criminal cases, reasoned that it had no jurisdiction to render a patently lawless judgment.

This marked a return to the common-law principle that restraints contrary to fundamental law, by whatever authority imposed, could be redressed by writ of habeas corpus. The principle was clearly stated a few years after the *Lange* decision by Mr. Justice Bradley, writing for the Court in *Ex parte Siebold,* 100 U.S. 371, 376–377, 25 L.Ed. 717 (1879):

". . . The validity of the judgments is assailed on the ground that the acts of Congress under which the indictments were found are unconstitutional. If this position is well taken, it affects the foundation of the whole proceedings. An unconstitutional law is void, and is as no law. * * * A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment. It is true, if no writ of error lies the judgment may be final in the sense that there may be no means of reversing it. But personal liberty is of so great moment in the eye of the law that the judgment of an inferior court affecting it is not deemed so conclusive but that . . . the question of the court's authority to try and imprison the party may be reviewed on *habeas corpus*. . . ."

The course of decisions of this Court from *Lange* and *Siebold* to the present makes plain that restraints contrary to our fundamental law, the Constitution, may be challenged on federal habeas corpus even though imposed pursuant to the conviction of a federal court of competent jurisdiction. * * *[a]

We do not suggest that this Court has always followed an unwavering line in its conclusions as to the availability of the Great Writ. Our development of the law of federal habeas corpus has been attended, seemingly, with some backing and filling. * * * Although the remedy extends to federal prisoners held in violation of federal law and not merely of the Federal Constitution, many cases have denied relief upon allegations merely of error of law and not of a substantial constitutional denial. * * * Such decisions are not however authorities against applications which invoke the historic office of the Great Writ to redress detentions in violation of fundamental law. * * * It was settled in *Brown v. Allen*, 344 U.S. 443, 73 S.Ct. 397, 97 L.Ed. 469 (1953), that the use of a coerced confession in a state criminal trial could be challenged in a federal habeas corpus proceeding. * * * Under the conditions of modern society, Noia's imprisonment, under a conviction procured by a confession * * * which the State here concedes was obtained in violation of the Fourteenth Amendment, is no less intolerable than was Bushell's under the conditions of a very different society; and habeas corpus is no less the appropriate remedy.

II.

But, it is argued, a different result is compelled by the exigencies of federalism, which played no role in *Bushell's case*.

We can appraise this argument only in light of the historical accommodation that has been worked out between the state and federal courts respecting the administration of federal habeas corpus. Our starting point is the Judiciary Act of February 5, 1867, which first extended federal habeas corpus to state prisoners generally, and which survives, except for some changes in wording in the present statutory codification. Although the Act of 1867, like its English and American predecessors, nowhere defines habeas corpus, its expansive language and imperative tone, viewed against the background of post-Civil War efforts in Congress to deal severely with the States of the former Confederacy, would seem to make inescapable the conclusion that Congress was enlarging the habeas remedy as previously understood, not only in extending its coverage to state prisoners, but also in making its procedures more efficacious. In 1867, Congress was anticipating resistance to its Reconstruction measures and planning the implementation of the post-war constitutional Amendments. Debated and enacted at the very peak of the Radical Republicans' power * * *, the Act of 1867 seems plainly to have been designed to furnish a method additional to and independent of direct Supreme Court review of state court decisions for the vindication of the new constitutional guarantees. Congress seems to have had no thought, thus, that a state prisoner should abide state court determination of his constitutional defense—the necessary predicate of direct review by this Court—before resorting to federal habeas corpus. Rather, a remedy almost in the nature of *removal* from the state to the federal courts of state prisoners' constitutional contentions seems to have been envisaged. * * *

* * * [I]n *Ex parte Royall*, 117 U.S. 241, 253, 6 S.Ct. 734, 741, 29 L.Ed. 868 [1886], a case in which habeas had been sought in advance of trial, * * * the Court held that even in such a case the federal courts had the *power* to discharge a state prisoner restrained in violation of the Federal Constitution, * * * but that ordinarily the federal court should stay its hand on habeas pending completion of the state court proceedings. This qualification plainly stemmed from considerations of comity rather than power, and envisaged only the postponement, not the relinquishment, of federal habeas corpus jurisdiction, which had attached by reason of the allegedly unconstitutional detention and could not be ousted by what the state court might decide. * * *

The reasoning of *Ex parte Royall* and its progency suggested that after the state courts had decided the federal question on the merits against the habeas petitioner, he could return to the federal court on habeas and there relitigate the question, else a rule of timing would become a rule circumscribing the power of the federal courts on habeas, in defiance of unmistakable congressional intent. And so this Court has consistently held, save only in *Frank v. Mangum*, 237 U.S. 309, 35 S.Ct. 582, 59 L.Ed. 969 [1915]. In that case, the State Supreme Court had rejected on the merits petitioner's contention of mob domination at his trial, and this Court held that habeas would not lie because the State had afforded petitioner corrective process [on appeal before the State Supreme Court] * * * The majority's position in *Frank*, however, was substantially repudiated in *Moore v. Dempsey*, 261 U.S. 86, 43 S.Ct. 265, 67 L.Ed. 543 [1923], a case almost identical in all pertinent respects to *Frank*. Mr. Justice Holmes, writing for the Court in *Moore* (he had written the dissenting opinion in *Frank*), said: "if in fact a trial is dominated by a mob so that there is an actual interference with the course of justice, there is a departure from due process of law; . . . [if] the State Courts failed to correct the wrong, . . . perfection in the machinery for correction . . . can [not] prevent this Court from securing to the petitioners their constitutional rights." * * *

[The majority opinion noted that subsequent decisions had not "deviated" from the position that a habeas petitioner could relitigate a constitutional challenge decided against him in the state courts.[b]]

[a] In *Johnson v. Zerbst*, the petitioner was permitted to challenge his custody pursuant to a conviction in which he was deprived of his Sixth Amendment right to the assistance of counsel. The Court noted: "Since the Sixth Amendment constitutionally entitles one charged with crime to the assistance of counsel, compliance with this constitutional mandate is an essential jurisdiction prerequisite to a federal court's authority to deprive an accused of his * * * liberty. * * * A court's jurisdiction at the beginning of trial may be lost 'in the course of the proceedings' due to failure to complete the court—as the Sixth Amendment requires—by providing counsel for an accused who is unable to obtain counsel. * * * The judgment of conviction pronounced by a court without jurisdiction is void and one imprisoned thereunder may obtain release by *habeas corpus*." *Waley v. Johnston* discarded the jurisdictional "touchstone" in holding that petitioner "could * * * by habeas corpus attack his sentence on the ground that his guilty plea was coerced." The Court noted that petitioner's claim was based on "facts * * * dehors the record and their effect on the judgment was not open to consideration and review on appeal. In such circumstances, the use of the writ * * * to test the constitutional validity of a conviction is not restricted to these cases where the judgment of conviction is void for want of jurisdiction of the trial court to render it. It extends also to those exceptional cases where the conviction has been in disregard of constitutional rights of the accused, and where the writ is the only effective means of preserving his rights [citing *Moore v. Dempsey*]."

[b] The majority cited, inter alia, the opinion of Justice Frankfurter in *Brown v. Allen*, supra, as recognizing "the breadth of the Federal court's power of independent adjudication on habeas corpus." Justice Frankfurter stated in his *Brown* opinion: "Congress could have left the enforcement of federal constitutional rights governing the administration of criminal justice in the States exclusively to the State courts. These tribunals are under the same duty as the federal courts to respect rights under the United States Constitution. * * * [But] as Mr. Justice Bradley * * * commented not long after the passage of [The Habeas Corpus Act of 1867], 'although it may appear unseemly that a prisoner, after conviction in a state court, should be set at liberty by a single judge on habeas corpus, there seems to be no escape from the law' * * *. In exercising the power thus bestowed, the District Judge must take due account of the proceedings that are challenged by the application for a writ. * * * But the prior State determination of a claim under the United States Constitution cannot foreclose consideration of such a claim, else the State court would have the final say which the Congress, by the Act of 1867, provided it should not have. * * *"

In Schneckloth v. Bustamonte, 412 U.S. 218 (1973), the respondent was convicted in a state court of unlawfully possessing a check with intent to defraud. At each level of the state proceeding, he had objected to the introduction of certain evidence as acquired through an unconstitutional search and seizure. His objection was rejected on the ground that he had consented to the search. Respondent thereafter sought a writ of habeas corpus in a federal court, and was successful in the Court of Appeals. A divided Supreme Court reversed. The majority opinion dealt only with the issue of consent and ruled against the respondent. Footnote 38 of the majority opinion, noted, however: "The State also urges us to hold that a violation of the exclusionary rule may not be raised by a state or federal prisoner in a collateral attack on his conviction, and thus asks us to overturn our contrary holdings in Kaufman v. United States, 394 U.S. 216; Whiteley v. Warden, 401 U.S. 560; Harris v. Nelson, 394 U.S. 286; and Mancusi v. De Forte, 392 U.S. 364. Since we have found no valid Fourth and Fourteenth Amendment claim in this case, we do not consider that question". Mr. Justice Powell, joined by the Chief Justice and Mr. Justice Rehnquist, wrote a separate concurring opinion responding to the State's argument.[a] Justice Powell noted:

> While I join the opinion for the Court, it does not address what seems to me the overriding issue briefed and argued in this case: the extent to which federal habeas corpus should be available to a state prisoner seeking to exclude evidence from an allegedly unlawful search and seizure. I would hold that federal collateral review of a state prisoner's Fourth Amendment claims—claims which rarely bear on innocence—should be confined solely to the question of whether the petitioner was provided a fair opportunity to raise and have adjudicated the question in state courts. In view of the importance of this issue to our system of criminal justice, I think it appropriate to express my views.
> * * *

a) Justice Blackmun added the following concurring opinion: "At the time *Kaufman v. United States* was decided, I, as a member of the Court of Appeals (but not of its panel) whose order was there reversed, found myself in agreement with the views expressed by Mr. Justice Harlan, writing for himself and my Brother Stewart in dissent. My attitude has not changed in the four years that have passed since *Kaufman* was decided. Although I agree with nearly all that Mr. Justice Powell has to say in his detailed and persuasive concurring opinion, I refrain from joining it at this time because, as Mr. Justice Stewart's opinion reveals, it is not necessary to reconsider *Kaufman* in order to decide the present case."

The three dissenting Justices (Douglas, Brennan and Marshall) did not respond to Justice Powell's opinion in their separate dissents.

II

* * * Much of the present perception of habeas corpus stems from a revisionist view of the historic function that writ was meant to perform. * * * [R]ecent scholarship has cast grave doubt on *Noia's* version of the writ's historic function [as extending to all cases involving "an allegation of unconstitutional restraint"]. * * * [The opinion here notes that these studies establish that: (1) at the time of the adoption of the constitution, "a court disposing of a habeas petition could not go behind the conviction for any purpose other than to verify the formal jurisdiction of the committing court," and (2) "there is no evidence that Congress intended (the Habeas Corpus Act of 1867) to jettison the respect theretofore shown by a reviewing court for prior judgments by a court of proper jurisdiction."] * * *

Much, of course, has transpired since that first Habeas Corpus Act. See *Fay v. Noia*, (Harlan, J., dissenting). * * * No one would now suggest that this Court be imprisoned by every particular of habeas corpus as it existed in the late 18th and 19th centuries. But recognition of that reality does not liberate us from all historical restraint. The historical evidence demonstrates that the purposes of the writ, at the time of the adoption of the Constitution, were tempered by a due regard for the finality of the judgment of the committing court. This regard was maintained substantially intact when Congress, in the Habeas Act of 1867, first extended federal habeas review to the delicate interrelations of our dual court systems.

III

Recent decisions, however, have tended to depreciate the importance of the finality of prior judgments in criminal cases. See *Kaufman v. United States; Sanders v. United States; Fay v. Noia.* This trend may be a justifiable evolution of the use of habeas corpus where the one in state custody raises a constitutional claim bearing on his innocence. But the justification for disregarding the historic scope and function of the writ is measurably less apparent in the typical Fourth Amendment claim asserted on collateral attack. In this latter case, a convicted defendant is most often asking society to redetermine a matter with no bearing at all on the basic justice of his incarceration. * * *

I am aware that history reveals no exact tie of the writ of habeas corpus to a constitutional claim relating to innocence or guilt. Traditionally, the writ was unavailable even for many constitutional pleas grounded on a claimant's innocence, while many contemporary proponents of expanded employment of the writ would permit its issuance for one whose deserved confinement was never in doubt. We are now faced, however, with the task of accommodating the historic respect for the finality of the judgment of a committing court with recent Court expansions of the role of the writ. This accommodation can best be achieved, with due regard to all of the values implicated, by recourse to the central reason for habeas corpus: the affording of means, through an extraordinary writ, of redressing an *unjust* incarceration. * * *

IV

This unprecedented extension of habeas corpus far beyond its historic bounds and in disregard of the writ's central purpose is an anomaly in our system sought to be justified only by extrinsic reasons which will be addressed in Part V of this opinion. But first let us look at the costs of this anomaly—costs in terms of serious intrusions on other societal values. It is these other values that have been subordinated—not to further justice on behalf of arguably innocent persons but all too often to serve mechanistic rules quite unrelated to justice in a particular case. Nor are these neglected values unimportant to justice in the broadest sense or to our system of Government. They include (i) the most effective utilization of limited judicial resources, (ii) the necessity of finality in criminal trials, (iii) the minimization of friction between our federal and state systems of justice, and (iv) the maintenance of the constitutional balance upon which the doctrine of federalism is founded.

When raised on federal habeas, a claim generally has been considered by two or more tiers of state courts. It is the solemn duty of these courts, no less than federal ones, to safeguard personal liberties and consider federal claims in accord with federal law. The task which federal courts are asked to perform on habeas is thus most often one that has or should have been done before. The presumption that "if a job can be well done once, it should not be done twice" is sound and one calculated to utilize best "the intellectual, moral, and political resources involved in the legal system." [13]

Those resources are limited but demand on them constantly increases. There is an insistent call on federal courts both in civil actions, many novel and complex, which affect intimately the lives of great numbers of people and in original criminal trials and appeals which deserve our most careful attention.[14] To the extent the federal courts are required to reexamine claims on collateral attack, they deprive primary litigants of their prompt availability and mature reflection. After all, the resources of our system are finite: their overextension jeopardizes the care and quality essential to fair adjudication.

The present scope of federal habeas corpus also has worked to defeat the interest of society in a rational point of termination for criminal litigation. Professor Amsterdam has identified some of the finality interests at stake in collateral proceedings:

> "They involved (a) duplication of judicial effort; (b) delay in setting the criminal proceeding at rest; (c) inconvenience and possibly danger in transporting a prisoner to the sentencing court for hearing; (d) postponed litigation of fact, hence litigation which will often be less reliable in reproducing the facts (i) respecting the postconviction claim itself and (ii) reflecting the issue of guilt if the collateral attack succeeds in a form which allows a retrial. . . ."

He concludes that:

> ". . . in combination, these finality considerations amount to a more or less persuasive argument against the cognizability of any particular collateral claim, the strength of the argument depending upon the nature of the claim, the manner of its treatment (if any) in the conviction proceedings, and the circumstances under which collateral litigation must be had." [16]

No effective judicial system can afford to concede the continuing theoretical possibility that there is error in every trial and that every incarceration is unfounded. At some point the law must convey to those in custody that a wrong has been committed, that consequent punishment has been imposed, that one should no longer look back with the view to resurrecting every imaginable basis for further litigation but rather forward to rehabilitation and to becoming a constructive citizen.

Nowhere should the merit of this view be more self-evident than in collateral attack on an allegedly unlawful search and seizure, where the petitioner often asks society to *redetermine* a claim with no relationship at all to the justness of his confinement. Professor Amsterdam has noted that "for reasons common to all search and seizure claims," he "would hold even a slight finality interest sufficient to deny the collateral remedy." But, in fact, a strong finality interest militates against allowing collateral review of search and seizure claims. Apart from the duplication of resources inherent in most habeas corpus proceedings, the validity of a search and seizure claim frequently hinges on a complex matrix of events which may be difficult indeed for the habeas court to disinter especially where, as often happens, the trial occurred years before the collateral attack and the state record is thinly sketched.

Finally, the present scope of habeas corpus tends to undermine the values inherent in our federal system of government. To the extent that every state criminal judgment is to be subject indefinitely to broad and repetitive federal oversight, we render the actions of state courts a serious disrespect in derogation of the constitutional balance between the two systems. The present expansive scope of federal habeas review has prompted no small friction between state and federal judiciaries. Justice Paul C. Reardon of the Massachusetts Supreme Judicial Court and then President of the National Center for State Courts, in identifying problems between the two systems noted bluntly that "the first, without question, is the effect of federal habeas corpus proceedings on State courts." He spoke of the "humiliation of review from the full bench of the highest State appellate court to a single United States Dis-

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13. Bator, *supra*, n. 3, at 451.
The conventional justifications for extending federal habeas corpus to afford collateral review of state court judgments were summarized in *Kaufman*, 394 U.S., at 225–226, 89 S.Ct., at 1073–1074, as follows:
". . . the necessity that federal courts have the 'last say' with respect to questions of federal law, the inadequacy of state procedures to raise and preserve federal claims, the concern that state judges may be unsympathetic to federally created rights, the institutional constraints on the exercise of this Court's certiorari jurisdiction to review state convictions. . . ."
Each of these justifications has merit in certain situations, although the asserted inadequacy of state procedures and unsympathetic attitude of state judges are far less realistic grounds of concern than in years past. The issue, fundamentally, is one of perspective and a rational balancing. The appropriateness of federal collateral review is evident in many instances. But it hardly follows that, in order to promote the ends of individual justice which are the foremost concerns of the writ, it is necessary to extend the scope of habeas review indiscriminately. This is especially true with respect to federal review of Fourth Amendment claims with the consequent denigration of other important societal values and interests.

14. Briefly, civil filings in United States district courts increased from 58,293 in 1961 to 96,173 in 1972. Total appeals commenced in the United States courts of appeals advanced from 4,204 in 1961 to 14,535 in 1972. Petitions for federal habeas corpus filed by state prisoners jumped from 1,020 in 1961 to 7,949 in 1972. Though habeas petitions filed by state prisoners did decline from 9,063 in 1970 to 7,949 in 1972, the overall increase from 1,000 at the start of the last decade is formidable. Furthermore, civil rights prisoner petitions under 42 U.S.C. § 1983 increased from 1,072 to 3,348 in the past five years. Some of these challenged the fact and duration of confinement and sought release from prison and must now be brought as actions for habeas corpus. *Preiser v. Rodriguez*, 411 U.S. 475, 93 S.Ct. 1827, 36 L.Ed. 439 (1973).

16. Amsterdam, *Search, Seizure, and Section 2255*, 112 U.Pa.L.Rev. 318, 383–384 (1964). The article addresses the problem of collateral relief for federal prisoners, but its rationale applies forcefully to federal habeas for state prisoners as well.

trict judge." Such broad federal habeas powers encourage in his view the "growing denigration of the State courts and their functions in the public mind." In so speaking Justice Reardon echoed the words of Professor Bator:

> "I could imagine nothing more subversive of a judge's sense of responsibility, of the inner subjective conscientiousness which is so essential a part of the difficult and subtle art of judging well, than an indiscriminate acceptance of the notion that all the shots will always be called by someone else."

* * *

This case involves only a relatively narrow aspect of the appropriate reach of habeas corpus. The specific issue before us, and the only one that need be decided at this time, is the extent to which a state prisoner may obtain federal habeas corpus review of a Fourth Amendment claim. Whatever may be formulated as a more comprehensive answer to the important broader issues (whether by clarifying legislation or in subsequent decisions), Mr. Justice Black has suggested what seems to me to be the appropriate threshold requirement in a case of this kind:

> ". . . I would always require that the convicted defendant raise the kind of constitutional claim that casts some shadow of a doubt on his guilt." *Kaufman v. United States,* (dissenting opinion).

In a perceptive analysis, Judge Henry J. Friendly expressed a similar view. He would draw the line against habeas corpus review in the absence of a "colorable claim of innocence":

> ". . . with a few important exceptions, convictions should be subject to collateral attack only when the prisoner supplements his constitution plea with a colorable claim of innocence." [23]

[23] Friendly, *Is Innocence Relevant? Collateral Attack on Criminal Judgments,* 38 U.Chi.L.Rev. 142 (1970). Judge Friendly's thesis, as he develops it, would encompass collateral attack broadly both within the federal system and with respect to federal habeas for state prisoners. Subject to the exceptions carefully delineated in his article, Judge Friendly would apply the criterion of a "colorable showing of innocence" to any collateral attack of a conviction, including claims under the Fifth and Sixth as well as the Fourth Amendments. Id., 151–157. In this case we need not consider anything other than the Fourth Amendment claims.

Where there is no constitutional claim bearing on innocence, the inquiry of the federal court on habeas review of a state prisoner's Fourth Amendment claim should be confined solely to the question whether the defendant was provided a fair opportunity in the state courts to raise and have adjudicated the Fourth Amendment claim. Limiting the scope of habeas review in this manner would reduce the role of the federal courts in determining the merits of constitutional claims with no relation to a petitioner's innocence and contribute to the restoration of recently neglected values to their proper place in our criminal justice system.

V

* * * The exclusionary rule has occasioned much criticism, largely on grounds that its application permits guilty defendants to go free and lawbreaking officers to go unpunished. The oft-asserted reason for the rule is to deter illegal searches and seizures by the police. The efficacy of this deterrent function, however, has been brought into serious question by recent empirical research. [The opinion here discussed the Oaks' study at 37 U.Chi.L.Rev.665]. Whatever the rule's merits on an initial trial and appeal—a question not in issue here—the case for collateral application of the rule is an anemic one. On collateral attack, the exclusionary rule retains its major liabilities while the asserted benefit of the rule dissolves. For whatever deterrent function the rule may serve when applied on trial and appeal becomes greatly attenuated when, months or years afterward, the claim surfaces for collateral review. The impermissible conduct has long since occurred, and the belated wrist slap of state police by federal courts harms no one but society on whom the convicted criminal is newly released.

Searches and seizures are an opaque area of the law: flagrant Fourth Amendment abuses will rarely escape detection but there is a vast twilight zone with respect to which one Justice has stated that our own "decisions . . . are hardly notable for their predictability," and another has observed that this Court was "bifurcating elements too infinitesimal to be split." Serious Fourth Amendment infractions can be dealt with by state judges or by this Court on direct review. But the non-frivolous Fourth Amendment claims that survive for collateral attack are most likely to be in this grey, twilight area, where the law is difficult for courts to apply, let alone for the policeman on the beat to understand. This is precisely the type of case where the deterrent function of the exclusionary rule is least efficacious, and where there is the least justification for freeing a duly convicted defendant. * * *

VI

The final inquiry is whether the above position conforms to 28 U.S.C. § 2254 (a). * * * No evidence exists that Congress intended every allegation of a constitutional violation to afford an appropriate basis for collateral review: indeed, the latest revisions of the Federal Habeas Corpus Statute in 1966[33] and the enactment of § 2254(a) came at the time a majority of the courts of appeals held that claims of unlawful search and seizure " 'are not proper matters to be presented by a motion to vacate sentence under § 2255 but can only be properly presented by appeal from the conviction.' " *Kaufman v. United States,* supra,

* * *

Though Congress did not address the precise question at hand, nothing in 2254(a), the state of the law at the time of its adoption, or the historical uses of the language "custody in violation of the Constitution" from which 2254(a) is derived, compels a holding that rulings of state courts on claims of unlawful search and seizure must be reviewed and redetermined in collateral proceedings.

* * *

[33] The 1966 revision to the Federal Habeas Corpus Statute enacted, among other things, the present 28 U.S.C. § 2254(a), (d), (e), and (f).

DIVERSE VIEWS ON THE "COSTS" NOTED IN JUSTICE POWELL'S OPINION IN SCHNECKLOTH *

1. Considerable disagreement exists as to the extent of the burden that habeas corpus petitions have imposed on the criminal justice system. Various federal judges, emphasizing the statistics quoted in fn. 14 of Justice Powell's opinion, argue that such petitions imposed a heavy burden on federal courts and are a significant factor contributing to the current backlog of cases. See e. g., Weick, *Apportionment of the Judicial Resources in Criminal Cases; Should Habeas Corpus be Eliminated?,* 21 DePaul L.Rev. 740 (1972); Friendly, fn. 23 supra (also noting that appeals on prisoners petitions constituted over 20% of the total federal appellate docket). But compare Developments, supra, at 1041: "[I]t is all too easy to overstate the strain that an expanded habeas jurisdiction * * * puts on the judicial system. Most of the petitions were quickly dismissed; less than 500 [of 6,300 petitions filed by state prisoners in 1968] reached the hearing stage, and most of those hearings lasted less than a day. Nor was the burden on the states staggering, many petitions do not even require a response, less than ten percent of the state convictions attacked had to be defended in a hearing, and so few prisoners were released [based on the only available figures—125 released out of 3,220 petitions in 1964] that the burden of retrial must be small." See also Chism, *In Defense of Modern Federal Habeas Corpus for State Prisoners,* 21 DePaul L.Rev. 682 (1973), noting that habeas petitions, while accounting for a substantial portion of the federal civil docket cannot be compared to the average civil case in terms of the burden placed on the court. But compare Attorney General Kleindienst, Statement in H.R. 1441, 118 Cong.Rec. 11507 (1972): "A petition may require a large expenditure of time by district and circuit judges even if no evidentiary hearings are held. * * * Indeed, if such a volume of filings did not impose a severe burden on the Federal courts, it would be indication that these petitions have acquired status as 'second class' litigation which is not taken seriously—a fact which by itself would be strong evidence of the need for reform"; Friendly, supra, at 144 (noting that "the ability of the Federal courts to dispense with evidentiary hearings * * * is due in considerable measure to *state* post-conviction hearings," and the burden of such hearings must be considered in evaluating the impact of Federal habeas corpus upon the total criminal justice system).

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* Reprinted from Kamisar, LaFave & Israel, Modern Criminal Procedure (1974). Unless otherwise indicated, page cross-references are to Modern Criminal Procedure, not to this set of materials.

The best available statistical analysis of the burden imposed upon federal courts is found in Shapiro, *Federal Habeas Corpus: A Study in Massachusetts,* 87 Harv.L.Rev. 321 (1973). That study suggests that: (1) the percentage of cases involving some sort of evidentiary hearing (38% in the district studied) is fairly substantial, notwithstanding some seemingly contrary statistics (see p. infra); most hearings, however, do not last more than a day; (3) while a substantial number of petitions are dismissed summarily, these cases often involve a significant investment of time; (4) a considerable portion of the screening of petitions is being delegated, perhaps beyond the limits of 18 U.S.C. § 636(6)(3), to federal magistrates; (5) there is considerable variation in the time given by different judges to reviewing petitions; (6) the percentage of repeater petitions is not high and is primarily a product of strict application of the exhaustion of remedies rule; (7) counsel are frequently utilized and probably do save the court time in considering petitions, but they are not an effective agency in preventing the filing of frivolous petitions; (8) the Administrative Office is "realistic" in assigning to habeas corpus petitions a time study weight "less than the median for all types of cases, [but] far from the bottom of the list."

2. Not unexpectedly, there also has been considerable dispute as to the impact of a "lack of finality" upon the prisoner's efforts toward rehabilitation. While some commentators have suggested that the potential for "endless litigation" may have an adverse effect upon the prisoner's outlook, as suggested by Justice Powell, others have suggested that "the availability of collateral relief is [itself] a very wholesome kind of therapy." Freund, *Symposium on Habeas Corpus,* 9 Utah L.Rev. 27, 30 (1964). Consider also Schwartz, p. — supra, ("We currently know too little about and do too little for prisoner education and deterrence to warrant firm judgments that liberal habeas corpus impairs these objectives.")

3. Can decisions like *Brown, Noia,* and *Kaufman* justly be criticized as undermining public confidence in the criminal justice system? Some commentators have suggested that such decisions have unduly undermined a sense of "repose [that] is a psychological necessity in a secure and active society"—i. e., that the decisions have deprived the judicial system of a well established point at which it may be assumed "we have tried hard enough and thus [we] may take it that justice has been done." Bator, supra, at 452–53. Instead, they argue, such decisions may have catered to a "perpetual and unreasoned anxiety that there is a possibility that an error may have been committed in any case." Id. Compare, however, Lay, *Modern Administrative Proposals for Federal Habeas,* 21 DePaul L.Rev. 701 (1972): "Sober reflection upon why we have devised a system which allows a continual questioning of its processes discloses that our purpose is not so much to remove the discomforting doubt or to achieve the ultimate assurance, as it is to give safeguard to rights not readily visible or easily acknowledged. We would not send two astronauts to the moon without providing them with at least three or four back-up systems. Should we send literally thousands of men to prison with even less reserves? * * * [W]ith knowledge of our fallibility and a realization of past errors, we can hardly insure our confidence by creating an irrevocable

end to the guilt-determining process." Consider also Schwartz, supra, at 744 (noting, inter alia, the increasing public sensitivity to due process considerations and the possibility that "continued and frequent considerations of constitutional claims will strengthen our moral and intellectual resources.")

4. The impact of expanded collateral attack upon the relationship between federal and state courts has also been questioned. Compare with the statements of Justice Rearden and Professor Bator quoted in Justice Powell's opinion, Chism, supra, at 692:

"[I]t is questionable whether this represents a pervasive sentiment among the judiciaries of the various states. * * * Although the number of petitions filed is large, the chances that a trial-level state judge will see an individual convicted in his court obtain federal habeas corpus relief in a given year are minuscule. Widespread resentment against federal intrusion into state criminal proceedings surely exists, but the resentment is against the substantive and procedural rights that the United States Supreme Court has developed for criminal defendants—not the habeas corpus remedy.[l] * * * Professor Bator stresses that the problem is not so much of 'resentment' by state judges, but rather it is the alleged erosion of the state judge's 'inner sense of responsibility' and his 'pride and conscientiousness.' But it is dangerous to predict so confidently what will be the effect on a decision-maker of opening up additional avenues of recourse from the decision. Some judges steam ahead seemingly oblivious to the prospects of later review. Others adopt a casual 'if-I'm-wrong-I'll-be-reversed' attitude. Still others dread reversal as a personal insult and ponder decision on questions of law almost to the point of paralysis. In short, the alleged 'resentment' of state judges adds little or nothing to the case against modern federal habeas corpus."

To what extent are state judges correct in viewing the expansion of federal habeas corpus as reflecting the view that state judges are less able to adequately consider or less "sympathetic" to constitutional rights than federal judges? Does *Kaufman* suggest that the basic concern is directed to the ability of the trial and appellate process generally—whether federal or state—to provide adequate protection of these rights. See Developments, supra, at 1057: "[E]xpanded use of the writ is responsive to the institutional need for a separate proceeding—one insulated from inquiry into the guilt or innocence of the defendant and designed specifically to protect constitutional rights. The momentum of the trial process and the trial judge's focus upon the central issue of the accused's guilt or innocence may tend to divert attention from ancillary questions relating to constitutional guarantees. Thus, a dispassionate second look focused exclusively on the adjudication of constitutional issues at trial may be necessary to ensure that a defendant's federal constitutional rights are adequately protected."[m]

[l] Chism, supra, also notes that insofar as "resentment" by state judges is based upon the review of the decisions of the highest state courts by a "single United States District judge" (p. 2— supra), this objection may be met without imposing any limitation upon scope of the issues cognizable on a habeas corpus application. Thus, Judge Jerome Frank "thought the problem could be solved by providing Supreme Court review whenever a lower federal court set aside a judgment of conviction that had been affirmed by the highest state court." See also, Carter, *The Use of Federal Habeas Corpus by State Prisoners*, 4 Am.Crim.L.Q. 20 (1965), discussing a similar proposal involving use of a three-judge federal court.

[m] This justification for collateral proceeding is sharply questioned in Friendly, supra, at 155, 162, noting particularly the lack of supportive empirical evidence. But see Schwartz, supra, at 744, arguing that the "possibility of some second guessing" produces increased sensitivity on the part of state courts. Most commentators advocating expansive federal habeas jurisdiction, while supporting *Kaufman*, have nevertheless maintained that a stronger case may be made for consideration of constitutional claims presented by state prisoners because of "broad differences" in the "institutional settings" within which federal and state judges operate. Developments, supra, at 1060. But see Bator, supra, arguing that, once the state system for litigating federal claims is found to be fair by a federal district court, there is no significant justification for departing from the "central feature of our federalism * * * that deciding federal questions is an intrinsic part of the business of state judges" and issues so decided require no special reconsideration by federal courts. See also Note 5 infra.

Kaufman, supra, involved a §2255 petition from a state prisoner who claimed that his conviction was based upon illegally seized evidence. The government argued that a search and seizure issue was not a proper ground for collateral attack in a §2255 proceeding. The government acknowledged that the Court had held otherwise with respect to federal habeas petitions by state prisoners, [see the case cited in the introduction to the Schneckloth opinion]. It contended, however, that special considerations relating to federal review of federal claims were applicable to state prisoners (see fn. 15 of Justice Powell's opinion). The majority opinion, per Brennan, J. rejected the contention that these distinctions were controlling.

> Thus, we are told that the federal prisoner, having already had his day in federal court, stands in a different position with regard to federal collateral remedies than does the state prisoner. Conceding this distinction, we are unable to understand why it should lead us to restrict completely or severely access by federal prisoners with illegal search and seizure claims to federal collateral remedies, while placing no similar restriction on access by state prisoners.
>
> The opportunity to assert federal rights in a federal forum is clearly not the sole justification for federal post-conviction relief, otherwise there would be no need to make such relief available to federal prisoners at all. The provision of federal collateral remedies rests more fundamentally upon a recognition that adequate protection of constitutional rights relating to the criminal trial process requires the continuing availability of a mechanism for relief. This is no less true for federal prisoners than it is for state prisoners. * * *
>
> The approach adopted by the court of Appeals in *Thornton* and pressed upon us here exalts the value of finality in criminal judgments at the expense of the interest of each prisoner in the vindication of his constitutional rights. Such regard for the benefits of finality runs contrary to the most basic precepts of our system of post-conviction relief. [See] *Fay v. Noia*

* * *. The same view was expressed in *Sanders*, a case involving a federal prisoner * * *. Plainly the interest in finality is the same with regard to both federal and state prisoners. With regard to both, Congress has determined that the full protection of their constitutional rights requires the availability of a mechanism for collateral attack. The right then is not merely to a federal forum but to full and fair consideration of constitutional claims. Federal prisoners are no less entitled to such consideration than are state prisoners. There is no reason to treat federal trial errors as less destructive of constitutional guarantees than state trial errors, nor to give greater preclusive effect to procedural defaults by federal defendants than to similar defaults by state defendants. To hold otherwise would reflect an anomalous and erroneous view of federal-state relations.

(3) Consequences of a Procedural Forfeiture

FAY v. NOIA

In Fay v. Noia, 372 U.S. 391, the respondent Noia had been convicted of felony murder along with two accomplices. The sole evidence against each defendant was his signed confession. The accomplices both appealed. Although the appeals were unsuccessful, subsequent legal proceedings resulted in their release on a finding that their confessions had been coerced. Noia had not appealed, but subsequently initiated a habeas corpus proceeding in the federal district court. It was stipulated that his confession was coerced, but the district court held against him on the ground that his failure to appeal constituted a failure to exhaust state remedies under a provision that is now 28 U.S.C. §2254(b). The Court of Appeals reversed. A divided Supreme Court affirmed. The majority opinion, per Brennan J., described its holding as follows: "(1) Federal courts have power under the federal habeas statute to grant relief despite the applicant's failure to have pursued a state remedy not available to him at the time he applies; the doctrine under which state procedural defaults are held to constitute an adequate and independent state law ground barring direct Supreme Court review is not to be extended to limit the power granted the federal courts under the federal habeas statute. (2) Noia's failure to appeal was not a failure to exhaust 'the remedies available in the courts of the State' as required by §2254; that requirement refers only to a failure to exhaust state remedies still open to the applicant at the time he files his application for habeas corpus in the federal court. (3) Noia's failure to appeal cannot under the circumstances be deemed an intelligent and understanding waiver of his right to appeal such as to justify the withholding of federal habeas corpus relief".

The majority opinion, per Brennan J., first reviewed the development of habeas corpus as set forth in the excerpts from Noia reprinted supra in this material. The Court then considered specifically the consequences of Noia's failure to appeal:

Our survey discloses nothing to suggest that the Federal District Court lacked the *power* to order Noia discharged because of a procedural forfeiture he may have incurred under state law. * * * At the time the privilege of the writ was written into the Federal Constitution it was settled that the writ lay to test any restraint contrary to fundamental law, which in England stemmed ultimately from Magna Charta but in this country was embodied in the written Constitution. Congress in 1867 sought to provide a federal forum for state prisoners having constitutional defenses by extending the habeas corpus powers of the federal courts to their constitutional maximum. Obedient to this purpose, we have consistently held that federal court jurisdiction is conferred by the allegation of an unconstitutional restraint and is not defeated by anything that may occur in the state court proceedings. State procedural rules plainly must yield to this overriding federal policy.

A number of arguments are advanced against this conclusion. One, which concedes the breadth of federal habeas power, is that a state prisoner who forfeits his opportunity to vindicate federal defenses in the state court has been given all the process that is constitutionally due him, and hence is not restrained contrary to the Constitution. But this wholly misconceives the scope of due process of law, which comprehends not only the right to be heard but also a number of explicit procedural rights—for example, the right not to be convicted upon evidence which includes one's coerced confession—drawn from the Bill of Rights. * * *

A variant of this argument is that if the state court declines to entertain a federal defense because of a procedural default, then the prisoner's custody is actually due to the default rather than to the underlying constitutional infringement, so that he is not in custody in violation of federal law. But this ignores the important difference between rights and particular remedies. * * * A defendant by committing a procedural default may be debarred from challenging his conviction in the state courts even on federal constitutional grounds. But a forfeiture of remedies does not legitimize the unconstitutional conduct by which his conviction was procured. Would Noia's failure to appeal have precluded him from bringing an action under the Civil Rights Acts against his inquisitors? The Act of February 5, 1867, like the Civil Rights Acts, was intended to furnish an independent, collateral remedy for certain privations of liberty. The conceptual difficulty of regarding a default as extinguishing the substantive right is increased where, as in Noia's case, the default forecloses extraordinary remedies. In what sense is Noia's custody not in violation of federal law simply because New York will not allow him to challenge it on coram nobis or on delayed appeal? But conceptual problems aside, it should be obvious that to turn the instant case on the meaning of "custody in violation of the Constitution" is to reason in circles. The very question we face is how completely federal remedies fall with the state remedies; when he have answered this, we shall know in what sense custody may be rendered lawful by a supervening procedural default.

It is a familiar principle that this Court will decline to review state court judgments which rest on independent and adequate state grounds, notwithstanding the co-presence of federal grounds. * * * *Murdock v. Memphis,* 87 U.S. (20 Wall.) 590, 22 L.Ed. 429 [1874]. * * * Thus, a default such as Noia's, if deemed adequate and independent (a question on which we intimate no view), would cut off review by this Court of the state coram nobis proceeding in which the New York Court of Appeals refused him relief. It is contended that it follows from this that the remedy of federal habeas corpus is likewise cut off.

The fatal weakness of this contention is its failure to recognize that the adequate state-ground rule is a function of the limitations of *appellate* review. * * * Most of * * * the *Murdock* case is devoted to demonstrating the Court's lack of jurisdiction on direct review to decide questions of state law in cases also raising federal questions. It followed from this holding that if the state question was dispositive of the case, the Court could not decide the federal question. The federal question was moot; nothing turned on its resolution.

But while our appellate function is concerned only with the judgments or decrees of state courts, the habeas corpus jurisdiction of the lower federal courts is not so confined. The jurisdictional prerequisite is not the judgment of a state court but detention *simpliciter*. The entire course of decisions in this Court elaborating the rule of exhaustion of state remedies is wholly incompatible with the proposition that a state court *judgment* is required to confer federal habeas jurisdiction. And the broad power of the federal courts under 28 U.S.C. § 2243 summarily to hear the application and to "determine the facts, and dispose of the matter as law and justice require," is hardly characteristic of an appellate jurisdiction. Habeas lies to enforce the right of personal liberty; when that right is denied and a person confined, the federal court has the power to release him. Indeed, it has no other power; it cannot revise the state court judgment; it can act only on the body of the petitioner.

To be sure, this may not be the entire answer to the contention that the adequate state-ground principle should apply to the federal courts on habeas corpus as well as to the Supreme Court on direct review of state judgments. * * * For the federal courts to refuse to give effect in habeas proceedings to state procedural defaults might conceivably have some effect upon the States' regulation of their criminal procedures. But the problem is crucially different from that posed in *Murdock* of the federal courts' deciding questions of substantive state law. In Noia's case the only relevant substantive law is federal—the Fourteenth Amendment. State law appears only in the procedural framework for adjudicating the substantive federal question. The paramount interest is federal. * * * That is not to say that the States have not a substantial interest in exacting compliance with their procedural rules from criminal defendants asserting federal defenses. Of course orderly criminal procedure is a desideratum, and of course there must be sanctions for the flouting of such procedure. But that state interest "competes * * * against an ideal * * * [the] ideal of fair procedure." Schaefer, *Federalism and State Criminal Procedure,* 70 Harv. L.Rev. 1, 5 (1956). And the only concrete impact the assumption of federal habeas jurisdiction in the face of a procedural default has on the state interest we have described, is that it prevents the State from closing off the convicted defendant's last opportunity to vindicate his constitutional rights, thereby punishing him for his default and deterring others who might commit similar defaults in the future.

Surely this state interest in an airtight system of forfeitures is of a different order from that, vindicated in *Murdock,* in the autonomy of state law within the proper sphere of its substantive regulation. * * *

Certainly this Court has differentiated the two situations in its application of the adequate state-ground rule. While it has deferred to state substantive grounds so long as they are not patently evasive of or

discriminatory against federal rights, it has sometimes refused to defer to state procedural grounds only because they made burdensome the vindication of federal rights. That the Court nevertheless ordinarily gives effect to state procedural grounds may be attributed to considerations which are peculiar to the Court's role and function and have no relevance to habeas corpus proceedings in the Federal District Courts: the unfamiliarity of members of this Court with the minutiae of 50 States' procedures; the inappropriateness of crowding our docket with questions turning wholly on particular state procedures; the web of rules and statutes that circumscribes our appellate jurisdiction; and the inherent and historical limitations of such a jurisdiction.

A practical appraisal of the state interest here involved plainly does not justify the federal courts' enforcing on habeas corpus a doctrine of forfeitures under the guise of applying the adequate state-ground rule. We fully grant, that the exigencies of federalism warrant a limitation whereby the federal judge has the discretion to deny relief to one who has deliberately sought to subvert or evade the orderly adjudication of his federal defenses in the state courts. Surely no stricter rule is a realistic necessity. A man under conviction for crime has an obvious inducement to do his very best to keep his state remedies open, and not stake his all on the outcome of a federal habeas proceeding which, in many respects, may be less advantageous to him than a state court proceeding. And if because of inadvertence or neglect he runs afoul of a state procedural requirement, and thereby forfeits his state remedies, appellate and collateral, as well as direct review thereof in this Court, those consequences should be sufficient to vindicate the State's valid interest in orderly procedure. Whatever residuum of state interest there may be under such circumstances is manifestly insufficient in the face of the federal policy, drawn from the ancient principles of the writ of habeas corpus, embodied both in the Federal Constitution and in the habeas corpus provisions of the Judicial Code, and consistently upheld by this Court, of affording an effective remedy for restraints contrary to the Constitution. For these several reasons we reject as unsound in principle, as well as not supported in authority, the suggestion that the federal courts are without power to grant habeas relief to an applicant whose federal claims would not be heard on direct review in this Court because of a procedural default furnishing an adequate and independent ground of state decision.

What we have said substantially disposes of the further contention that § 2254 of the Judicial Code embodies a doctrine of forfeitures and cuts off relief when there has been a failure to exhaust state remedies no longer available at the time habeas is sought. This contention is refuted by the language of the statute and by its history. It was enacted to codify the judicially evolved rule of exhaustion, particularly as formulated in *Ex parte Hawk,* 321 U.S. 114, 64 S.Ct. 448, 88 L.Ed. 572 [1943]. * * * Nothing in the *Hawk* opinion points to past exhaustion. Very little support can be found in the long course of previous decisions by this Court elaborating the rule of exhaustion for the proposition that it was regarded at the time of the Revision of the Judicial Code as jurisdictional rather than merely as a rule ordering the state and federal proceedings so as to eliminate unnecessary federal-state friction. There is thus no warrant for attributing to Congress, in the teeth of the language of § 2254, intent to work a radical innovation in the law of habeas corpus. We hold that § 2254 is limited in its application to failure to exhaust state remedies still open to the habeas applicant at the time he files his application in federal court. * * *

IV.

Although we hold that the jurisdiction of the federal courts on habeas corpus is not affected by procedural defaults incurred by the applicant during the state court proceedings, we recognize a limited discretion in the federal judge to deny relief to an applicant under certain circumstances. Discretion is implicit in the statutory command that the judge, after granting the writ and holding a hearing of appropriate scope, "dispose of the matter as law and justice require," 28 U.S.C. § 2243; and discretion was the flexible concept employed by the federal courts in developing the exhaustion rule. Furthermore, habeas corpus has traditionally been regarded as governed by equitable principles. * * * Among them is the principle that a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks. Narrowly circumscribed, in conformity to the historical role of the writ of habeas corpus as an effective and imperative remedy for detentions contrary to fundamental law, the principle is unexceptionable. We therefore hold that the federal habeas judge may in his discretion deny relief to an applicant who has deliberately bypassed the orderly procedure of the state courts and in so doing has forfeited his state court remedies.

But we wish to make very clear that this grant of discretion is not to be interpreted as a permission to introduce legal fictions into federal habeas corpus. The classic definition of waiver enunciated in *Johnson v. Zerbst,* 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 [1938]—"An intentional relinquishment or abandonment of a known right or privilege"—furnishes the controlling standard. If a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate bypassing of state procedures, then it is open to the federal court on habeas to deny him all relief if the state courts refused to entertain his federal claims on the merits—though of course only after the federal court has satisfied itself, by holding a hearing or by some other means, of the facts bearing upon the applicant's default. * * * At all events we wish it clearly understood that the standard here put forth depends on the considered choice of the petitioner. * * * A choice made by counsel not participated in by the petitioner does not automatically bar relief. Nor does a state court's finding of waiver bar independent determination of the question by the federal courts on habeas, for waiver affecting federal rights is a federal question. * * *

The application of the standard we have adumbrated to the facts of the instant case is not difficult. Under no reasonable view can the State's version of Noia's reason for not appealing support an inference of deliberate bypassing of the state court system. For Noia to have appealed in 1942 would have been to run a substantial risk of electrocution. His was the grisly choice whether to sit content with life imprisonment or to travel the uncertain avenue of appeal which, if successful, might well have led to a retrial and death sentence. * * * He declined to play Russian roulette in this fashion. This was a choice by Noia not to appeal, but under the circumstances it cannot realistically be deemed a merely tactical or strategic litigation step, or in any way a deliberate circumvention of state procedures. This is not to say that in every case where a heavier penalty, even the death penalty, is a risk incurred by taking an appeal or otherwise foregoing a procedural right, waiver as we have defined it cannot be found. Each case must stand on its facts. In the instant case, the language of the judge in sentencing Noia made the risk that Noia, if

reconvicted, would be sentenced to death, palpable and indeed unusually acute.

VI.

It should be unnecessary to repeat what so often has been said and what so plainly is the case: that the availability of the Great Writ of habeas corpus in the federal courts for persons in the custody of the States offends no legitimate state interest in the enforcement of criminal justice or procedure. Our decision today swings open no prison gates. Today as always few indeed is the number of state prisoners who eventually win their freedom by means of federal habeas corpus. Those few who are ultimately successful are persons whom society has greviously wronged and for whom belated liberation is little enough compensation. Surely no fair-minded person will contend that those who have been deprived of their libery without due process of law ought nevertheless to languish in prison. Noia, no less than his codefendants Caminito and Bonino, is conceded to have been the victim of unconstitutional state action. Noia's case stands on its own; but surely no just and humane legal system can tolerate a result whereby a Caminito and a Bonino are at liberty because their confessions were found to have been coerced yet a Noia, whose confession was also coerced, remains in jail for life. For such anomalies, such affronts to the conscience of a civilized society habeas corpus is predestined by its historical role in the struggle for personal liberty to be the ultimate remedy. If the States withhold effective remedy, the federal courts have the power and the duty to provide it. Habeas corpus is one of the precious heritages of Anglo-American civilization. We do no more today than confirm its continuing efficacy.

[Footnote 3, by the Court, here transposed] * * * The District Court held a hearing limited to an inquiry into the facts surrounding Noia's failure to appeal but made no findings as to Noia's reasons. Noia and the lawyer who defended him at his trial testified. Noia said that while aware of his right to appeal, he did not appeal because he did not wish to saddle his family with an additional financial burden and had no funds of his own. The gist of the lawyer's testimony was that Noia was also motivated not to appeal by fear that if successful he might get the death sentence if convicted on a retrial. The trial judge, not bound to accept the jury's recommendation of a life sentence, had said when sentencing him, "I have thought seriously about rejecting the recommendation of the jury in your case, Noia, because I feel that if the jury knew who you were and what you were and your background as a robber, they would not have made a recommendation. But you have got a good lawyer, that is my wife. The last thing she told me this morning is to give you a chance." Noia's confession included an admission that he was the one who had actually shot the victim.

Henry v. Mississippi, 379 U.S. 443 (1965), was not a habeas corpus case. The case reached the Supreme Court on direct appeal from a state court conviction. The Mississippi Supreme Court had rejected petitioner's claim that the conviction was based on evidence illegally obtained because defense counsel had failed to make a timely objection to the evidence. Under the Mississippi "contemporaneous objection rule", the objection should have been made at the time the evidence was introduced. No objection was made, however, until petitioner filed a motion for directed verdict at the close of the state's case, assigning as one ground the use of illegally obtained evidence. Before the United States Supreme Court, the prosecution argued that the conviction was based on an adequate state ground and therefore the search issue could not be considered by the Supreme Court. The majority opinion, per Brennan J., considered the adequacy of the state ground, but did not rule on that issue. The majority concluded that the case should be remanded to the state court's to determine whether there had been a deliberate bypass on the search and seizure objection. The majority opinion noted:

*** Even assuming that the making of the objection on the motion for a directed verdict satisfied the state interest served by the contemporaneous-objection rule, the record suggests a possibility that petitioner's counsel deliberately bypassed the opportunity to make timely objection in the state court, and thus that the petitioner should be deemed to have forfeited his state court remedies. Although the Mississippi Supreme Court characterized the failure to object as an "honest mistake," the State, in the brief in support of its Suggestion of Error in the Supreme Court of Mississippi asserted its willingness to agree that its Suggestion of Error "should not be sustained if either of the three counsel [for petitioner] participating in this trial would respond hereto with an affidavit that he did not know that at some point in a trial in criminal court in Mississippi that an objection to such testimony must have been made." The second opinion of the Mississippi Supreme Court does not refer to the State's proposal and thus it appears that the Court did not believe that the issue was properly presented for decision. Another indication of possible waiver appears in an affidavit attached to the State's brief in this Court; there, the respondent asserted that one of petitioner's lawyers stood up as if to object to the officer's tainted testimony, and was pulled down by co-counsel. Again, this furnishes an insufficient basis for decision of the waiver questions at this time. But, together with the proposal in the Suggestion of Error, it is enough to justify an evidentiary hearing to determine whether petitioner "after consultation with competent counsel or otherwise, understandingly and knowingly forewent the privilege of seeking to vindicate his federal

claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate by-passing of state procedures * * *." *Fay v. Noia*

The evidence suggests reasons for a strategic move. Both the complaining witness and the police officer testified that the cigarette lighter in the car did not work. After denial of its motion for a directed verdict the defense called a mechanic who had repaired the cigarette lighter. The defense might have planned to allow the complaining witness and the officer to testify that the cigarette lighter did not work, and then, if the motion for directed verdict were not granted, to discredit both witnesses by showing that it did work, thereby persuading the jury to acquit. Or, by delaying objection to the evidence, the defense might have hoped to invite error and lay the foundation for a subsequent reversal. If either reason motivated the action of petitioner's counsel, and their plans backfired, counsel's deliberate choice of the strategy would amount to a waiver binding on petitioner and would preclude him from a decision on the merits of his federal claim either in the state courts or here. Although trial strategy adopted by counsel without prior consultation with an accused will not, where the circumstances are exceptional, preclude the accused from asserting constitutional claims, *Whitus v. Balkcom*, 333 F.2d 496 (5th Cir. 1964),[a] we think that the deliberate bypassing by counsel of the contemporaneous objection rule as a part of trial strategy would have that effect in this case.

Only evidence extrinsic to the record before us can establish the fact of waiver, and the State should have an opportunity to establish that fact. In comparable cases arising in federal courts we have vacated the judgments of conviction and remanded for a hearing, suspending the determination of the validity of the conviction pending the outcome of the hearing. We recently adopted a similar procedure to determine an issue essential to the fairness of a state conviction. See *Jackson v. Denno*, 378 U.S. 368 (1964). We think a similar course is particularly desirable here, since a dismissal on the basis of an adequate state ground would not end this case; petitioner might still pursue vindication of his federal claim in a federal habeas corpus proceeding in which the procedural default will not alone preclude consideration of his claim at least unless it is shown that petitioner deliberately bypassed the orderly procedure of the state courts. *Fay v. Noia*, supra.

Of course, in so remanding we neither hold nor even remotely imply that the State must forego insistence on its procedural requirements if it finds no waiver. Such a finding would only mean that petitioner could have a federal court apply settled principles to test the effectiveness of the procedural default to foreclose consideration of his constitutional claim. If it finds the procedural default ineffective, the federal court will itself decide the merits of his federal claim, at least so long as the state court does not wish to do so. By permitting the Mississippi courts to make an initial determination of waiver, we serve the causes of efficient administration of criminal justice, and of harmonious federal-state judicial relations. Such a disposition may make unnecessary the processing of the case through federal courts already laboring under congested dockets, or it may make unnecessary the relitigation in a federal forum of certain issues. See *Townsend v. Sain* [discussed infra]. The Court is not blind to the fact that the federal habeas corpus jurisdiction has been a source of irritation between the federal and state judiciaries. It has been suggested that this friction might be ameliorated if the States would look upon our decisions in *Fay v. Noia*, supra, and *Townsend v. Sain*, as affording them an opportunity to provide state procedures, direct or collateral, for a full airing of federal claims. That prospect is better served by a remand than by relegating petitioner to his federal habeas remedy. Therefore, the judgment is vacated and the case is remanded to the Mississippi Supreme Court for further proceedings not inconsistent with this opinion.

[a] Petitioner in *Whitus*, a semi-literate Negro, had been convicted in the Georgia courts of the murder of a Caucasian. Defense counsel, without consulting petitioner, had decided not to attack the racial composition of the jury because of the "hostility an attack on the all white jury system would stir." The Court of Appeals noted that, considering defendant's ignorance of "the law, it was unrealistic * * * to attach significance to the presence or absence of consultation * * * [with] the attorneys or * * * express consent to the so-called waiver." Counsel's decision, however, did not constitute a voluntary relinquishment of defendant's right, since the state unconstitutionally forced upon defendant a "choice of evils" similar to that noted in *Fay v. Noia*.

THE SCOPE OF THE DELIBERATE BYPASS DOCTRINE.*

1. The practical significance of the doctrine. Shapiro, Federal Habeas Corpus: A Study in Massachusetts, 87 Harv. L. Rev. 321, 346 (1973) casts some doubt on the practical significance of the deliberate bypass issue. The author notes:

> "Looking only at the reported decisions, many of which are at the appellate level, one gets the impression that the direct impact of Noia has been substantial, necessitating numerous hearings on the question of deliberate

* Printed material is taken from Kamisar, LaFave, & Israel, Modern Criminal Procedure (1974).

bypass and opening the doors of the federal courts to a host of claims that would not otherwise be entertained. But study of the 257 petitions filed in the Massachusetts district in 3 years leads one to doubt this conclusion. I found only 12 cases in which a Noia issue can fairly be said to have been presented--admittedly a subjective judgment but one I believe other observers would be close to in their own count. In these 12 cases, only 2 evidentiary hearings were addressed in whole or in part to the question of whether a deliberate bypass had occured. * * *

"While the evidence indicates that the direct impact of Noia is slight, the indirect impact is much harder to assess. First, a selected reading of state court opinions over the last decade leaves one with the direct impression that both in direct and collateral review the state courts are more willing today than they once were to overlook procedural defaults and consider the merits -- at least as an alternative ground. I cannot help but think that this development is beneficial and that it is at least in part a product of the knowledge that, after Noia, the federal courts may well overlook these same defaults. * * * Second, the impact of Noia in indirectly encouraging allegations of incompetence of counsel is not indicated by the study. In order to escape the potentially binding effect of his counsel's procedural default, a petitioner may allege that the ineffectiveness of representation amounted to a violation of his constitutional rights." * * *[a]

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a Ineffective assistance of counsel was the ground most frequently presented in a study of 147 petitions. Thirty eight petitions presented that claim. Other frequently raised grounds were: (1) illegal search (24 petitions); (2) invalid identification procedure (21 petitions); (3) prejudicial statements by prosecutor, judge, or witness (30 petitions). Of course, many petitions raised several claims.

It has also been suggested that establishing a deliberate bypass is so difficult that the state often will not raise the issue, preferring that the court simply reach the merits of the issue.

2. Deliberate bypass and waiver. The relationship between the concept of deliberate bypass and the traditional concept of waiver (i.e., the "intentional relinquishment of a known right") has been the subject of some confusion. While some commentators have suggested that both concepts refer to the "same thing", others suggest that there are certain distinctions. The A.B.A. Standards, Post Conviction Remedies, p. 88-89, distinguishes between a "valid waiver" and an "abuse of process" (defined as "deliberately and unexcusably" failing to utilize available procedures to raise a claim). As applied to trial rights, this distinction apparently rests on the view that a waiver requires an intent to permanently relinquish a claim, while a deliberate bypass requires an intent only to relinquish a particular opportunity to raise a claim--i.e., the defendant may have every intent of raising the claim at a later point. Under this view, all waivers would include a deliberation bypass, but not all deliberate bypasses would encompass a waiver.

In Warden v. Hayden, 387 U.S. 294, 297, fn. 3 (1967), the Court held that the deliberate bypass rule of Noia did not apply where the state court had been willing to entertain petitioner's claim despite his deliberate bypass. D. Currie, Federal Courts, Cases and Materials 177 (1968), suggests that the Warden ruling may make "good sense * * * as a corollary of deference to state procedural interests", but questions its relevancy to any view of a deliberate bypass as a form of "waiver of a federal right". Note, however, the limited scope of Warden suggested in Curry v. Wilson, 405 F.2d 110 (9th Cir. 1968). The majority there, per Duniway, J., held that, although state court consideration of petitioner's claim on the merits barred reliance on the deliberat bypass rule, the federal district court might still dismiss a habeas petition where counsel's bypass also constituted an "affirmative waiver" of the constitutional objection. (The majority found such a waiver in Curry, where counsel failed to object to introduction of defendant's prior admissions and specifically noted his desire to have the jury hear one of the admissions.) Browning, J., dissenting, argued that Warden

applied to "the waiver of the underlying constitutional right as well as the deliberate bypass" since "the interest protected by refusing to consider the merits * * * on either ground would appear to be the same--that is the state's interest in the integrity of its judicial system".

3. Deliberate bypass and section 2255 proceedings. Section 2255 was adopted in 1948 as statutory post-conviction remedy that would replace habeas corpus for federal prisoners and give them a remedy exactly commensurate with that which would otherwise be available by habeas corpus. United States v. Hayman, 342 U.S. 205 (1952). In Kaufman v. United States [discussed previously], the Supreme Court held that the view of habeas corpus expressed in Fay v. Noia were also applicable to section 2255 proceedings. Thus, the petitioner's failure to raise an appeal on search and seizure issue did not bar presentation of that issue in a section 2255 proceeding where there had been no deliberate bypass. In Davis v. United States, 411 U.S. 233 (1973), however, a divided Court held that a constitutional claim was barred from consideration without a deliberate bypass where a specific Federal Rules waiver provision had been violated. The petitioner in Davis sought to present in a section 2255 proceeding a constitutional challenge to the selection of the grand jury that had not been raised previously. Under Federal Rule 12(b)(2), objections based on defects in the indictment "may be raised only by motion before trial", and failure to present the objection at that point constitutes a "waiver" (from which the court may grant relief "for cause shown"). Petitioner's failure to object to the grand jury selection process clearly fell within the waiver provision of Rule 12(b)(2), and the issue before the Court was whether that provision was application to a section 2255 proceeding. The majority relied on the following reasoning in holding that it was:

> "* * * Both the reasons for Rule 12(b)(2) and the normal rules of statutory construction clearly indicate that no more lenient standard of waiver should apply to a claim raised three years after conviction simply because the claim is asserted under the federal habeas statute rather than in the criminal proceeding itself. The waiver provisions of Rule 12(b)(2) are operative only with respect to claims of defects in the institution of criminal proceedings. If its time limits are followed, inquiry into an alleged defect may be concluded and, if necessary, cured before the court, the witnesses and the parties have gone to the burden and expense of a trial. If defendants were allowed to flout its time limitations, on the other hand, there would be little incentive to comply with its terms when a successful attack might simply result in a new indictment prior to trial. Strong tactical considerations would militate in favor of delaying the raising of the claim in hopes of an acquittal, with the thought that if those hopes did not materialize, the claim could be used to upset an otherwise valid conviction at a time when reprosecution might well be difficult.
>
> "Rule 12(b)(2) promulgated by this Court and, pursuant to 18 U.S.C. § 3771, 'adopted' by Congress, governs by its terms the manner in which the claims of defects in the institution of criminal proceedings may be waived. Were we confronted with an express conflict between the Rule and a prior statute, the force of § 3771, providing that 'all laws in conflict with such rules shall be of no further force or effect,' is such that the prior inconsistent statute would be deemed to have been repealed. The Federal Rules of Criminal Procedure do not *ex proprio vigore* govern habeas proceedings, and had Congress in enacting the statute governing federal habeas corpus specifically there dealt with the issue of waiver, we would be faced with a difficult question of repeal by implication of such a provision by the later enacted rules of criminal procedure. But Congress did not deal with the question of waiver in the federal habeas statute, and in *Kaufman* this Court held that the federal statute not having spoken on the subject of waiver with respect to claims of unlawful search and seizure, a particular doctrine of waiver would be applied by this Court in interpreting the statute.
>
> "We think it inconceivable that Congress, having in the criminal proceeding foreclosed the raising of a claim such as this after the commencement of trial in the absence of a showing of 'cause' for relief from waiver, nonetheless intended to perversely negate the Rule's purpose by permitting an entirely different but much more liberal requirement of waiver in federal habeas proceedings. We believe that the necessary effect of the congressional adoption of Rule 12(b)(2) is to provide that a claim once waived pursuant to that rule may not later be resurrected, either in the criminal proceedings or in federal habeas, in the absence of the showing of 'cause' which that rule requires. We therefore hold that the waiver standard expressed in Rule 12(b)(2) governs an untimely claim of grand jury discrimination, not only during the criminal proceeding, but also later in collateral review."

4. *Knowing relinquishment.* Several courts have refused to find a deliberate bypass when counsel, accepting the current state of the law, failed to object to a practice subsequently held unconstitutional by Supreme Court decisions either overruling earlier cases or going substantially beyond prior precedent. See, e. g., *Ledbetter v. Warden*, 368 F.2d 490 (4th Cir. 1966) (failure to anticipate, *Davis v. North Carolina*, p. 568 supra); *United States ex rel. Amaio v. Reincke*, 300 F.Supp. 367, 370 (D.Conn.1969) (failure to anticipate *Griffin v. California*, p. ~~—~~ supra); *Doby v. Bets*, 371 F.2d 111 (5th Cir. 1967) (failure to anticipate *Aguilar v. Texas*, p. 229 supra). These courts have argued that the defense counsel cannot be expected to have objected to a practice that was proper "under the applicable law of the time."[b] They also have noted that one cannot "knowingly relinquish a constitutional right when the right was unknown at the time."

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[b] Compare *Williams v. United States*, 463 F.2d 1188 (2d Cir. 1972): "Williams now urges that the reason for the failure to raise the question of the warrentless arrest in the first appeal was that the point was 'foreclosed' by prior decisions of this court, but that subsequent cases in the Supreme Court now make the question appropriate. We are not impressed by the argument. Lack of probable success in raising an issue has seldom if ever precluded a defendant from raising a question and such a preferred 'justification' * * * will certainly not preclude a finding of 'deliberate bypass.'" [The court in *Williams*, after examining the subsequent Supreme Court cases, also concluded that there was "no greater encouragement today" for petitioner's objection than existed at the time of his trial.]

5. Assume defense counsel has an arguable constitutional objection under the current state of the law, but does not present that objection either because (1) he is totally unaware of any basis for the objection, or (2) he is aware of the basis for the objection, but mistakenly underestimates its persuasiveness. Does his failure to raise that claim constitute a deliberate bypass? Compare *Kuhl v. United States*, 370 F.2d 20 (9th Cir. 1966) with *Pineda v. Craven*, 424 F.2d 369 (9th Cir. 1970). *Kuhl* held that a search and seizure objection abandoned by defense counsel was deliberately bypassed even though the abandonment may have been a product of counsel's "mistake of law" in concluding that defendant lacked standing to raise the objection.[e] *Pineda* held that a search and seizure objection was not deliberately bypassed where counsel failed to make an objection because he was unaware of the *Aguilar* decision. The court noted that "there is nothing strategic or tactical about ignorance, and neither a deliberate bypass or a waiver could be based on such evidence."

[e] The majority noted: "It is seldom that counsel can really 'know' that a constitutional objection on Fourth Amendment grounds, is good, either as a matter of fact or as a matter of law. He may believe that it is; he may hope that it is; he may think that it is not. As to any of these views, he may be mistaken. It is for him to decide, whichever of these views he holds, and even if he 'knows' that the claim is good, whether he will assert the claim. If he does so, he may be more or less surprised to find that the court does or does not agree with him. If he decides not to do so, his decision is still 'an intentional relinquishment or abandonment of a known right or privilege' (*Fay v. Noia*). The 'known right or privilege,' in such a case as this, is the right or privilege of presenting the contention to the court and getting a ruling on it. * * * The law does not, in our opinion, make the fact of waiver stand or fall upon such tenuous matters as the extent or accuracy of the lawyer's knowledge of the facts or the law or the sufficiency of the reasons for his action. Those are, as this case demonstrates, subjective factors which are highly susceptible to after-the-fact tinkering, either intentional or unintentional."

Kuhl was distinguished as a case in which trial counsel had been aware that his side of the "dispute was arguable, yet had deliberately refrained from presenting it." See also *United States ex rel. Henderson v. Brierly*, 300 F.Supp. 638 (E.D.Pa.1969) (no deliberate bypass where counsel was "apparently unaware of palpable deficiencies of the search warrant" and failure to object "could have served no reasoned purpose").

6. Assume that defense counsel is aware of an arguable constitutional claim, but because of a mistaken view of state procedural law, fails to raise that claim at an appropriate time? Does this failure constitute a deliberate bypass? As noted at p. —— supra, a federal district court subsequently found that Henry's counsel had operated under a misconception that a directed verdict was an appropriate remedy for the use of illegally seized evidence under the facts of the *Henry* case. The district court concluded that, in light of the *Henry* and *Noia* opinions, counsel's failure to present a contemporaneous objection therefore had not constituted a deliberate bypass. What if counsel in *Henry* had been aware that a contemporaneous objection arguably was the only means of challenging illegally seized evidence, but mistakenly concluded that more persuasive authority favored use of the directed verdict motion? Consider in this connection, MURCH v. MOTTRAM, 409 U.S. 41, 93 S.Ct. 71, 34 L.Ed.2d 194 (1972). Petitioner there, following the revocation of his parole, brought an action under the Maine post-conviction relief statute challenging his underlying larceny conviction. However, he subsequently withdrew his original petition and filed a "supplemental petition" challenging only the parole revocation proceedings. The state judge advised petitioner's counsel that, under the state post-conviction statute, all claims not brought in that action would be "waived." Counsel disagreed, contending that the supplemental petition was one for common law habeas corpus and that therefore the statutory requirement that all grounds be presented did not apply. The court rejected this position and reiterated its warning that grounds not currently presented would be lost. Counsel, after conferring with his client, then responded: "[I]t is our position here that we do not attack the * * * conviction of 1960. We are now attacking [petitioner's] personal freedom as a parole violator so that whatever rights we may reserve on appeal as to whether or not this is a post-conviction hearing, we would now like to avail ourselves of that reservation."

The state appellate courts agreed with the trial court, and held that petitioner had "waived" his constitutional challenge to his underlying conviction. Petitioner then sought to challenge that conviction via federal habeas corpus, but the state responded that counsel's failure to comply with state procedure constituted a deliberate bypass. The District Court agreed, after finding that petitioner was "fully aware" of the consequences of position taken by his counsel. The Court of Appeals then reversed, but a divided Supreme Court (6–3) held that the Court of Appeals erred in upsetting the District Court's determination. The per curiam opinion for the majority noted:

"The Court of Appeals conceded that 'there are a great many instances where a party must be bound by a mistake of his counsel.' But it concluded that because the statutory question presented to the state trial judge, whether the Maine post-conviction statute required respondent to assert * * * all of his attacks * * * was not open and shut, counsel's failure to assert the constitutional claim in the state proceeding could not be regarded as a 'deliberate bypass' under *Fay v. Noia*. The Court also relied on the fact that there was no 'extrinsic evidence' that Mottram 'was seeking to circumvent state procedures. . . . Concededly, Mottram testified at the hearing in the District Court that he did not intend to waive his constitutional attacks on the underlying 1960 conviction. But if a subjective determination not to waive or to abandon a claim were sufficient to preclude a finding of a deliberate bypass of orderly state procedures, constitutionally valid procedural requirements, such as those contained in the Maine statute requiring the joining of all bases for attack in one proceeding, would be utterly meaningless. Nothing in our previous holdings in this area supports the conclusion that Mottram, having fair warning of the effect of the Maine statute, could cavalierly disregard that intended effect by simply announcing that he did not choose to be bound by it. * * * The Court of Appeals apparently felt that so long as the highest state court has not construed the relevant procedural statute, a prisoner is free to adhere to his own interpretation and to establish thereby that he did not deliberately ignore state procedure. But here, respondent had reasonable warning from the trial judge of the risk that he ran in declining to assert his claim in the first proceeding, and nonetheless chose to run that risk." (The dissenters in *Murch*, Justices Brennan, Marshall and Douglas, merely noted their agreement with the Court of Appeals "on the facts presented").

7. What bearing, if any, should the constitutional standard relating to claims of ineffective assistance have upon the treatment of counsel's legal mistakes in determining whether there has been a deliberate bypass? Many courts have suggested that a single instance of negligence by counsel in failing to object to an unconstitutional trial practice is insufficient in itself to establish a valid constitutional claim of ineffective assistance. See Note 1 at p. 60 supra. See also *People v. Washington*, 41 Ill.2d 16, 241 N.E.2d 425 (1968). But the same negligence

may be viewed as negating a finding of deliberate bypass and thereby permit consideration of the validity of that practice on application for habeas corpus. Accordingly decisions like *Henry* and *Pineda* (Note 5 supra) have been viewed as possible avenues for bypassing the traditional "reluctance of courts to find a denial of effective assistance of counsel"—although habeas corpus is limited in this regard since it permits relief only for counsel's mishandling of possible constitutional claims. Compare *United States ex rel. Henderson v. Brierly*, supra, where the court finding no deliberate bypass, also noted that counsel was "ineffective and inadequate" by Sixth Amendment standards. Cf. White, supra, suggesting that the defense attorney's general level of competency at trial is a relevant factor in determining whether there was a valid waiver because "as the level of competence * * * rises, the probability that the nonasserted claim was frivolous or that it was exchanged for a benefit increases."

8. *Voluntary relinquishment.* *Noia* is generally viewed as a case involving a "knowing" but "involuntary" failure to utilize state court remedies. See Note 39 N.Y.U. 78, 87 (1964). *** If *Noia* is not limited to the facts of that case, how should lower courts treat other factors that lead defendant to forego an appeal because it might result in a longer term of imprisonment? Consider, for example, the defendant who decides not to appeal in the belief that it would be better "to attempt to gain leniency and consideration from the parole board." *Lamar v. Wainwright*, 423 F.2d 1104 (5th Cir. 1970) (finding a deliberate bypass, but noting that no showing had been made that the Parole Board gave "favorable consideration" to these inmates who did not appeal). Cf. *Commonwealth v. Buttingham*, 275 A.2d 83 (Pa.1971) (finding a valid "waiver" where petitioner failed to appeal from an adverse determination in a state post-conviction relief proceeding in order to obtain an immediate hearing before a parole board that automatically delayed consideration of a case while an appeal was pending).

In *Whitus v. Balcom*, [cited in Henry, supra], the court found that defendant's failure to object to racial discrimination in jury selection did not constitute a deliberate bypass where defense counsel had reasonably feared that presenting that objection "would have filled the air with such hostility that an acquittal would almost have been impossible." Relying upon *Noia*, the court concluded that there was no voluntary relinquishment of rights where defendant was confronted by such a "grisly choice." (Cf. *Noia* at p. supra). Can *Whitus* be extended to other instances in which counsel allegedly failed to raise constitutional claims for fear of antagonizing the jury? Consider *Miller v. Carter*, 434 F.2d 824 (9th Cir. 1970), where the trial court, at a preliminary conference, informed defense counsel that any objection to prosecution use of the testimony of an undercover agent (who had been "planted" as petitioner's cellmate) should come after the prosecution laid a foundation at trial for the use of that witness. Relying on *Whitus* a divided court held that petitioner's objection had not been "waived" when counsel subsequently failed to object at trial for fear that "a successful objection might lead the jury to speculate that the excluded testimony was more incriminating than it actually was." See also *Miller v. California*, 392 U.S. 616, 88 S.Ct. 2258, 20 L.Ed.2d 1332 (1968) (Marshall, J., dissenting from dismissal of certiorari and reaching the same conclusion as to the absence of waiver). Can counsel's concern in *Miller* be distinguished from the common concern of counsel operating under a contemporaneous objection rule—particularly with respect to illegally seized evidence that may already be before the jury—that a successful objection "may give the jury the impression that [defendant] was trying to hide something?" *Evans v. Cupp*, 415 F.2d 844 (9th Cir. 1969) (finding a deliberate bypass). If not, is *Miller* appropriately distinguishable because the state court there may have misread state law in requiring the objection to be made in the presence of the jury?

9. *Relevant factors.* Although rulings on alleged deliberate bypasses vary with the facts of each case, there are certain general fact patterns that have been treated similarly by the lower courts. Thus, where an objection was raised at trial, but the constitutional ground was not clearly stated as required by state law, federal courts have ordinarily found that there was no deliberate bypass. See, Note, 31 La.L.Rev. 601, 606 (1971); *United States ex rel. Bulgos v. Follette*, 448 F.2d 130 (2d Cir. 1971). Similarly where the objection was made, but defense counsel failed to fulfill state procedural requirements in other respects (e. g., failure to repeat objection with respect to each witness), the federal courts have found there was no deliberate bypass. See, e. g., *Cooper v. Picard*, 428 F.2d 1357 (1st Cir. 1970). On the other hand, where defense counsel made no objection to the admission of illegally obtained evidence or other practice subject to constitutional attack, but instead made affirmative use of such evidence or practice in presenting a defense, courts have generally found a deliberate bypass. See, e. g., *Hudson v. Rhay*, 446 F.2d 861 (9th Cir. 1971) (where counsel used inflammatory tirade of prosecution to defense advantage in closing argument before the jury); Note, 31 La.L.Rev. 601, 607 (1971). Should a similar conclusion be reached where defense made no affirmative use of evidence subject to constitutional objection, but the evidence apparently did not cause any significant harm —e. g., where it was cumulative or supported a point that was not contrary to the main thrust of the defense strategy? See, e. g., *Evans v. Cupp*, supra (finding deliberate bypass in failure to object to introduction of shotgun where defense did not dispute the initial use of force, but based its defense to alleged rape on subsequent consent of the complainant). Compare *United States ex rel. Diblin v. Follette*, 294 F.Supp. 841 (E.D.N.Y. 1968) (requiring some "affirmative indication" of deliberate choice beyond failure to object); 31 La.L.Rev. 601, 608 (1967).

10. *Hearings.* Where the record reveals that the absence of objection is supported by a possible defense strategy (e. g., where defense made affirmative use of the evidence or the evidence was cumulative), does *Noia* or *Henry* suggest that an evidentiary hearing is required on the bypass issue? Federal courts have generally agreed that the petitioner must be allowed to offer reasons justifying his failure to properly raise a constitutional claim, see *Johnson v. Copinger*, supra, but they have also recognized that an evidentiary hearing is not required when an examination of the state trial or post-conviction hearing record "clearly shows" a deliberate bypass. See *United States ex rel. Cruz v. LaVallee*, supra. Application of this standard, however, has produced considerable disagreement, reflecting in part disparate views as to the assistance provided by evidentiary hearings. Consider, e.g., Kuhl v. United States, Note 5 supra, where the majority found no reason to have an evidentiary hearing at which counsel would testify "as to why he did what he did, or failed to do what he did not do." Such a procedure, the court noted, "places counsel in the unenviable position where, if he can recall his reasons and they are good, he is hurting his former client, and if he can't recall his reasons or they are bad, or even not very good, he is impugning his professional competence." The majority further noted that "we cannot insist upon the importance of counsel, as we properly do, and at the same time indulge in the presumption that counsel does not know what he is doing." The dissent argued that even though the record supported the majority's view as to why counsel failed to raise a constitutional objection, "neither the petitioner nor the government should be confined to the trial record." It noted that the court in *Henry*, despite possible evidence of a strategic bypass, had nevertheless remanded the case for an evidentiary hearing. See also *United States ex rel. LaMolinare v. Duggan*, 415 F.2d 730 (3d Cir. 1970); *United States ex rel. Snyder v. Mazurkiewicz*, 413 F.2d 500 (3d Cir. 1969) (noting the need for evidentiary hearing when claim is one requiring petitioner's participation in the bypass decision).

11. Defendant's personal participation in the bypass decision.

To what extent, if any, does *Henry* limit the broad language in *Noia* emphasizing the need for defendant's personal participation in the bypass decision? Lower courts generally have agreed that *Henry* eliminates the requirement of personal participation only as to decisions involving "trial strategy." See Note, 54 Cal.L.Rev. 1262 (1966) (collecting cases). There has been somewhat less agreement, however, as to the application of that standard. The entering of a plea of guilty, the waiver of the right to a jury trial, and the decision not to appeal are all viewed as decisions clearly requiring the participation of the accused. See Id. at 1268. On the other hand, an attorney's strategic decision not to object to the admission of unconstitutionally obtained evidence is generally viewed as binding upon the defendant despite his lack of participation. See, e. g., *Nelson v. California*, Note 3 infra; *Terry v. Payton* 433 F.2d 1016 (4th Cir. 1970). Courts have also held that the defendant's participation is not needed for a valid waiver of objections based on the following grounds: (1) pretrial publicity, *United States ex rel. Agron v. Herold*, 426 F.2d 125 (2d Cir. 1970); (2) denial of a public trial, *United States ex rel. Bruno v. Herold*, 408 F.2d 125 (2d Cir. 1969); and (3) double jeopardy, *Commonwealth v. Doe*, 217 Pa.Super. 148, 269 A.2d 138 (1970). These rulings, however, have frequently been accompanied by dissents. Moreover, other decisions, while not dealing directly with those claims, have relied upon standards that would require defendant's personal participation in their waiver. See, e. g., *Lanier v. State*, 486 P.2d 981 (Alaska 1971). Note also the dissent in *Tollett v. Henderson*, fn. a at p. 1131 supra. Undoubtedly such disagreement stems in large part from different viewpoints as to the underlying function of the "trial strategy" dividing line suggested in *Henry*.

Some commentators and at least one court have taken the view that considerations of judicial economy and efficiency are the primary factors justifying allocation of the waiver decision exclusively to counsel. Accordingly, they would permit waiver without participation of defendant only where the exigencies of litigation preclude a meaningful opportunity for consultation between the attorney and his client. See Wright and Sofaer, p. 1533 supra; *Lanier v. State*, supra. As a matter of administrative convenience, all waivers that "occur during trial and result from decisions made during trial" may be treated as involving situations in which the exigencies of litigation eliminate the need for personal participation. See *Lanier v. State*, supra. (The "trial stage" is viewed broadly in this respect as encompassing all "trial-type" proceedings, including the suppression hearing and preliminary hearing. Id. at fn. 17.) Waivers made at other stages in the judicial process, or at the trial stages when based upon pretrial strategic decisions, require the defendant's personal participation.

must be the manager of the lawsuit, that if such decisions are to be made by the defendant, he is likely to do himself more harm than good, and that a contrary rule would seriously impair the constitutional guaranty of the right to counsel. * * * One of the surest ways for counsel to lose a lawsuit is to permit his client to run the trial. We think that few competent counsel would accept retainers, or appointment under the Criminal Justice Act * * *, to defend criminal cases, if they were to have to consult the defendant, and follow his views, on every issue of trial strategy that might, often as a matter of hindsight, involve some claim of constitutional right. * * *"

Most courts have tended to emphasize the technical nature of the matter involved as well as the timing of the waiver itself. Consider, e. g., NELSON v. CALIFORNIA, 346 F.2d 73 (9th Cir. 1965). Defendant's counsel, a deputy public defender, purposely failed to attack, either by a pretrial motion to suppress or objection at trial, the search that led to discovery of narcotics in defendant's apartment. In his habeas application, defendant alleged that the search and seizure issue had been raised at preliminary hearing, that he had suggested to counsel that it be raised again at trial, but that counsel had disagreed "and stated that he would pursue the remedy best for [defendant]." The Court of Appeals, per DUNIWAY, J., found that defendant was bound by his counsel's deliberate bypass of state procedures:

> "Does the fact that here there was prior consultation with the accused, and that he disagreed with counsel's strategy, make a legal difference? * * * Our view is that the result should be the same. Our reasons are that only counsel is competent to make such a decision, that counsel

Several courts have suggested that the need for personal participation in the bypass decision must vary according to the "fundamental nature" of the right involved. See Note, 54 Cal.L.Rev. supra. Thus, in *United States ex rel. Goldsby v. Harpole*, 263 F.2d 71 (5th Cir. 1959), the court required personal participation in the decision to forego attacking the composition of the petit jury, but not in a similar decision with respect to the grand jury. Irregularities in the composition of that body, the court noted, had far less serious consequences. Compare *Henderson v. Tollett*, fn. a at p. 1131 supra (dissenting opinion).

Consider also in *United States ex rel. Bruno v. Herold*, 408 F.2d 125 (2d Cir. 1969), where Judge Waterman, dissenting, suggested that "four variables * * * should be considered in adjudicating whether counsel's failure is the equivalent of his client's intentional relinquishment of a known constitutional right: * * * (1) the nature of the right involved; (2) the degree of actual strategy that entered into counsel's decision; (3) the opportunity for and possibility of meaningful consultation between counsel and the accused * * * and (4) the degree of exceptional pressures or circumstances on either counsel or the accused which could dictate a waiver."

(4) Exhaustion of State Remedies

Consider Shapiro, Federal Habeas Corpus: A Study in Massachusetts, 87 Harv. L. Rev. 321, 355 (1973):

> The insistence that state prisoners exhaust state remedies before resorting to federal habeas corpus is almost as old as the remedy itself. The rule was developed in the context of applications for pretrial federal relief [175] — at a time when relief from a judgment of conviction was extremely rare — and has continued to be a judicially developed requirement in that context.[176] With respect to attacks on convictions, the rule has been codified since 1948 in subsections 2254(b) and (c).
>
> Despite the erosion of the exhaustion requirement in the related area of civil rights actions [177] and the difficulties sometimes presented in classifying a prisoner's complaint as one or the other,[178] the Supreme Court and the lower courts have continued to take the requirement most seriously in habeas corpus proceedings. The particular claim must have been presented to the state courts; it is not enough that a related claim, even one falling under the same general constitutional rubric, was presented.[179] The claim must have been presented to the highest state court from which a decision can be had;[180] and if the availability of relief in the courts has been expanded since the petitioner was last there, he may have to return.[181] There is, in addition, authority in the First Circuit for the view that if significant new facts are developed in a federal evidentiary hearing, the petitioner may have to return to the state courts for consideration of those facts.[182]
>
> Application of the doctrine by the appellate courts, however, has not been wooden or unreasonably strict. The only remedies that must be exhausted are those presently available;[183] exhaustion will not be required if essentially the same claim has been rejected in another case involving a different petitioner,[184] or if the availability of a state remedy is highly problematic.[185] Exhaustion need not be required, in the view of some courts, if the petitioner's claim is plainly lacking in merit.[186] And finally, the court may (and indeed should) separate out and consider on their merits those claims as to which there has been exhaustion if they are unrelated to those as to which state procedures are available and still untried.[187]
>
> Since the rule of exhaustion as thus elaborated seems eminently fair and reasonable, it is surprising that it led to the dismissal of so many of the habeas petitions. In the study of the 257 cases, 135, or over 50%, were dismissed for failure to exhaust, and in approximately 100 of these, failure to exhaust was the *sole* ground of dismissal.[188]

> Why have so many petitioners, both counseled and uncounseled, tripped over this requirement? Doubtless, the complexities of state procedure have taken their toll. But in many cases there appears to be no explanation for the failure to exhaust other than negligence or a naive hope that the failure will be overlooked. In other cases, it is highly debatable that further exhaustion should have been required in view of the state court's disposition of a very similar case,[192] or of the manifest weakness of the petition on its merits.[193] In still other instances, the petitioner seems to have been caught in a revolving door from which there was almost no escape. In one case, for example, the petitioner first filed in 1969, claiming that he had tried to exhaust his state remedies but had been unable to get the necessary papers served on the respondent. The court dismissed for failure to exhaust, offering some procedural advice,[194] and the petitioner returned to the state courts with a motion for new trial. The following year he filed a new federal petition, claiming that his appointed state counsel had defaulted in his duty to prosecute the state proceedings, and once again the petition was dismissed for failure to exhaust.[195] This time, the First Circuit, in denying probable cause, noted that the progress of petitioner's motions had been "something less than expeditious." [196] Finally, two years later, petitioner returned to the federal courts armed with a state court rejection of his claims, and was able to have those claims considered, and rejected, in the federal district court.[197]
>
> The wasted effort which results from the exhaustion doctrine, and its burdens on the courts as well as on the litigants, lead one to consider whether it should be abandoned. For me, the question is far from simple, but I conclude that, on balance, the requirement should be retained. The effect of federal habeas corpus on federal-state relations and the delicacy with which the habeas jurisdiction should be exercised need no elaboration. The exhaustion requirement is valuable as a symbol of federal respect for the state court system. In addition, there seems little doubt that one result of the exhaustion doctrine has been a greater willingness of state courts to consider postconviction claims on their merits, and as a result there is a greater likelihood that federal claims will be resolved at the state level or, if they are not, that the federal courts will be able to defer to the state's findings of fact and to concur in its conclusions of law.[198] Thus, whatever annoyance a state court suffers from the occasional barbs of the federal court of appeals on the subject of exhaustion, it is far less damaging than the harm to federal-state relations which would otherwise occur if the exhaustion requirement were eliminated.
>
> But the system is plainly not working as well as it should, and a few means for improvement can be suggested. First, it seems unnecessary and even inappropriate to dismiss for lack of exhaustion when a petition is plainly lacking in merit.[199] Unlike the doctrine of exhaustion of administrative remedies,[200] the ex-

haustion requirement in habeas corpus is not designed to obtain the benefit of the expertise of a specialized tribunal. Rather, it seeks to further federal-state comity by allowing the states ample opportunity to consider and, if necessary, to correct their alleged constitutional errors.[201] It is clear that if there has been no such error, no deferral of the federal decision should be required.[202] Second, the district court should be more willing than it sometimes is to recognize the futility of exhaustion in the light of prior state precedents. Third, an explicit opportunity to amend should be given in all cases where the petitioner has failed to allege with sufficient clarity the steps taken to exhaust. Fourth, if there is any real doubt about the availability of a state remedy suggested by the respondent, a commitment should be sought from the state's attorney that his office will not oppose the state court petition or other pleading on procedural grounds.[203] Fifth, if the case appears to be bogged down in the state courts, much may be gained by informal communication with the state courts,[204] by the respondent's efforts to bring the state proceeding back to life,[205] or by retaining jurisdiction in the event that consideration of the claim is not forthcoming in a reasonable time.[206] As the footnotes indicate, such measures have been utilized on occasion, and serve as illustrations of the value of cooperative federalism.

In addition, I believe that significant improvement would result from a revision of state postconviction procedures. There have been a range of proposals on this point, but they do not purport to deal directly with the exhaustion issue. At one extreme, some suggest that the states should open their doors to postconviction actions to substantially the same extent that the federal courts are open, so as to maximize the likelihood that the state adjudication will be the final one.[207] Indeed, this is the theme of the ABA proposed minimum standards for postconviction relief.[208] At the other extreme, some argue that since the federal courts are ready to consider virtually any constitutional claim at any time, the state courts ought to narrow the availability of relief as much as they constitutionally can — to a minimum not yet clearly defined.[209]

To ameliorate the present disadvantages of the exhaustion requirement, however, an additional element should be recognized — the value of time limits on the availability of state court relief. Thus, whatever grounds the state chooses to allow for postconviction (or any postcommitment) relief, there should be a time limit of, say, six months or one year after the judgment has become final for the filing of any collateral attack. The time limit should be binding unless in the particular circumstances the failure to allow a later petition would be so clear a denial of state corrective process as to violate the due process clause of

the fourteenth amendment.[210] The prisoner should be advised of the time limit and its consequences at the earliest possible date. If at the time of his state court commitment a petitioner was fully advised of the applicable time limits and failed to resort to state court remedies, not only would he lose his right to state postconviction relief, but he would also be hard put to satisfy a federal court that he had not been guilty of a deliberate bypass, so that his federal postconviction remedy would be denied as well.[211]

Of course, this proposal is not designed to resolve the serious problem of retrials long after the event if a prisoner delays in bringing his federal habeas corpus action. The imposition of federal time limits may be required to deal with the problem.[212] Nor can this proposal insure that all collateral attacks, even if received soon after confinement, will be promptly disposed of. It is designed solely to deal with the difficulties inherent in the exhaustion requirement, which is one of the major causes of delay in the adjudication of habeas corpus applications. Imposition of a time limit for state postconviction applications encourages the expeditious filing of such claims, tends to reduce the number of successive federal applications,[213] and decreases the likelihood that a federal court would compel a prisoner to attempt to obtain relief from a state court. Thus, if the proposal is adopted, a prisoner will run far less risk than he does today of becoming the shuttlecock in a frustrating game of judicial badminton that increases the total burden on the courts and does no one any real service.

(5) The Significance of A Prior State Adjudication on the Merits

A state adjudication on the merits of a claim raised in a federal habeas corpus proceeding may not be treated as binding by the federal district court judge. Townsend v. Sain, 372 U.S. 293 (1963), established the relevant guidelines: "[T]he district judge may, where the state court has reliably found the relevant facts, defer to the state court's finding of fact, [but] he may not defer to its finding of law. It is district judge's duty to apply the applicable federal law to the state court fact finding independently. The state conclusions of law may not be given binding weight in habeas".

As Townsend noted, the federal district court may not always rely upon the state findings of fact. Townsend listed six circumstances in which the district judge must hold his own evidentiary hearing and make his own factual findings:

> "If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing".

Townsend held that, in the absence of these circumstances, the court still had discretion to hold its own hearing and make its own factual finding if it so desired. Section 2254(d), adopted after Townsend, presumes the state determination "to be correct" unless one of the 6 factors (restating the Townsend circumstances) are present. Section 2254 also provides that in an evidentiary hearing, once proof of the state court's factual determination is made, the burden rests upon the applicant to establish that the state court's factual determination is erroneous, unless one of the 6 circumstances are present. The impact of

§2254(d) upon Townsend, particularly with respect to the district judge's discretion to hold an evidentiary hearing, has not yet been explored by the Supreme Court. See LaValle v. Delle Rose, 410 U.S. 690 (1973).

The number of evidentiary hearings held each year reportedly ranged from 450-500 from 1965-71, notwithstanding a substantial increase in the number of applications filed. See Hearings in Reform of Federal Criminal Laws, pt. IV, p. 3706. Professor Shapiro, however, in the study noted supra, found that hearings involving introduction of testimonial or documentary evidence were far more common than reported statistics indicate. His study suggests that the reported statistics probably are limited to more extensive "trial type" hearings. Reported cases indicate that where the merits of a factual dispute were resolved in a state hearing, the ground most frequently advanced for ordering an evidentiary hearing is the inadequate factual development at the state hearing.

(6) The Custody Limitation

The federal habeas corpus statute provides that the writ "shall not extend to a prisoner unless he is in custody * * *". 18 U.S.C. §2241. The "custody-requirement" is derived from the procedural function of the writ as an order directing the jailer to bring his prisoner before the court, but it no longer is interpreted as requiring such immediate physical control over the applicant as the form of the writ might suggest. In Jones v. Cunningham, 371 U.S. 236 (1963), for example, the Court held that an applicant on parole was subject to sufficient "restraints" to "invoke the help of the Great Writ". These restraints included restrictions upon movement, employment, and association imposed by typical parole conditions, and the "constant fear that a single deviation, however slight, might be enough to result in his being returned to prison * * * with few, if any, of the procedural safeguards that normally must be and are provided to those charged with crime". The Jones rationale has been applied to prisoners on probation, where similar restraints are imposed. Benson v. Cal., 328 F.2d 159 (9th Cir. 1964).

Similarly, in Hensley v. Municipal Court, 411 U.S. 345 (1973), the Jones rationale was applied to a habeas petitioner who was at large on his own recognizance pending execution of sentence on his misdemeanor conviction. The trial court had originally stayed execution of his sentence and that stay was subsequently extended pending final disposition of his habeas corpus application. The Supreme Court majority, per Brennan, J., noted that a person released on his own recognizance was subject to various conditions, and emphasized that the writ should not be viewed as a "static, narrow, formalistic remedy", but one which must retain the ability to cut through barriers of form and procedural maizes.

In Peyton v. Rowe, 391 U.S. 54 (1968), the Court rejected earlier precedent in holding that a defendant serving the first of two consecutive sentences could attack the validity of the second sentence even though he was not serving the first as well.

The Court noted that the defendant was clearly "in custody" for the aggregate term of both sentences though he had not yet begun to serve the second sentence. In Braden v. 30th Judicial District, 410 U.S. 484 (1973), the Court held that a prisoner in State A, subject to a detainer from State B based on its pending indictment, could utilize federal habeas corpus to challenge the failure of State B to provide a speedy trial. The Braden rationale would also permit a prisoner in State A to challenge immediately a second conviction in another jurisdiction, at least where that second jurisdiction has filed a detainer. Indeed, some cases tend support to the view that a prisoner who has completely served a sentence in an earlier conviction, may utilize habeas corpus to challenge that conviction if it substantially affects his current custody on a second conviction. See Rosa v. United States, 397 F.2d 401 (5th Cir. 1968); Tucker v. Peyton, 357 F.2d 115 (4th Cir. 1967).

B. PROPOSED SOLUTIONS -- NOT DIRECTLY RELATED TO THE APPELLATE PROCESS

(1) Narrowing the Scope of Federal Habeas Corpus

Since Brown v. Allen, various proposals have been introduced in Congress to limit the scope of federal habeas corpus. Following Justice Black's dissent in Kaufman and Judge Friendly's article (noted in Schneckloth), the Justice Department, in conjunction with the National Association of Attorneys General, drafted a substantial revision of the current statutes that was introduced in Congress in 1972 (H.R. 13,722; S. 3833) and 1973 (S. 567). The Justice Department proposal, as introduced by Senator Hruskee would amend §2254 to limit constitutional claims that could be raised on collateral attack by state prisoners to those which met the following conditions: (1) the claim had not theretofore been raised and determined in a state court; (2) the claim was one as to which "no fair and adequate opportunity" had existed for determination by the state court; (3) the claim alleged violation "of a right which has as its primary purpose the protection of the reliability of either the factfinding process at the trial or the appellate process on appeal from the judgment of conviction"; and (4) the petitioner can show "that a different result would probably have obtained if such constitutional violation had not occurred".

Attorney General Kleindienst, in explaining the third condition, noted that use of the "concept of reliability of the trial and appellate process" was derived from principles developed in decisions dealing with the retroactive application of new constitutional interpretations. Illustrations given of claims that would not meet the reliability standard included Fourth Amendment violations. Miranda violations, lineup identification claims based upon the lack of counsel and application of Boykin standards to guilty pleas. In addition, the bill specifically excluded any allegation of incompetent counsel based upon counsel's failure to present a constitutional claim that did not meet the reliability standard. The fourth condition noted above was described as a "modification" of the harmless error standard in Chapman v. California. This approach was favored over a suggested standard that defendant show "substantial doubt as to his guilt" on the ground that "the basic fairness of the procedures used to convict the defendant, without reference to his guilt or innocence, should remain the primary focus of Federal habeas corpus". 118 Cong.Rec. 11509 (1972). Similar changes in §2255 were also recommended.

For a more complete discussion of this proposal see Note, 61 Geo. L.J. 1221 (1973) and the authorities cited therein; Friendly, Averting the Flood by Lessening the Flow, 59 Cornell L. Rev. 634, 637 (1974) (noting the Judicial Conference's intent to prepare an alternative bill). The Justice Department proposal has been challenged by

various commentators as an unnecessary and unduly costly restriction upon a crucial process in the protection of the constitutional rights of defendants. See Note, 61 Geo. L.J. 1221 (1973); R. Shapiro, Where Have All The Lawyers Gone, Trial Mag. 41 (May-June, 1973). See also Lay, Modern Administrative Proposals For Federal Habeas Corpus: The Rights Of Prisoners Preserved, 21 DePaul L. Rev. 70 (1972).

(2) Eliminating Stale and Successive Petitions

Various proposals have been advanced that are designed to eliminate (1) "stale" applications (i.e., applications relating to convictions entered several years previously); and (2) successive applications by the same prisoner, each raising a different issue and each presenting a progressively more "stale" claim. Some of the proposals would require statutory changes, while others would not. In the latter category, it is argued that federal district judges should be more "imaginative" in handling habeas corpus applications as suggested in Sanders v. United States, 373 U.S. 1, 22 (1963). Thus the district judge should take various steps (including appointment of counsel) to insure that all possible constitutional objections either are raised or waived in the initial application. See Lay, Post-Conviction Remedies and The Overburdened Judiciary, 3 Creighton L. Rev. 5, 14-16 (1969).

One federal judge has suggested that such procedures be made mandatory and time limitations be applied so that each convicted defendant be allowed a single application promptly made following the exhaustion of state remedies. See

Weick, Apportionment of the Judicial Resources in Criminal Cases: Should Habeas Corpus Be Eliminated?, 21 DePaul L. Rev. 740 (1972). a

Another related proposal would permit the district court to ignore the petitioner's failure to exhaust state remedies when it concludes, in balance, that the state resolution of factual issues would not be particularly helpful in disposing of the petitioner's claims. Less substantial changes in the application of the exhaustion requirement have also been proposed. See, e.g., the suggestions of Professor Shapiro, quoted previously in these materials.

The significance of such proposals has been challenged on the ground that (1) the number of "repeater petitions" is not high. See Shapiro, supra at p. 353 (of 257 cases studied, only 34 petitioners had filed previous petitions according to available records; (2) most "stale" petitions probably are the product of the retroactive application of recent decisions expanding the scope of defendant's

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a/ Judge Weick suggested that 28 U.S.C. 2254 be amended so as to provide: "(1) Counsel shall be appointed for any indigent applicant to advise him of his rights and to represent him at the hearing and in any appeal. (2) An applicant shall set forth in his application or in any amendment thereto, prior to or at the hearing, all claims which he may have for violation of his rights under the Constitution, laws or treaties of the United States. Any claims not so set forth shall be deemed to have been waived and the court shall not have jurisdiction to consider the same in any subsequent proceeding, unless the claim not previously set forth is based on newly discovered evidence which, in the exercise of reasonable diligence could not have been presented at the time of the hearing, and is presented to the state court within the time of the hearing, and is presented to the state court within the time limited by state law, but in the absence of such law not later than two years after his conviction. (3) The application for the writ shall be filed within sixty days after all available state remedies have been exhausted, or within sixty days after his conviction in the state court has become final under the laws of that state, whichever is later. (4) The judgment of the District Court shall, subject to the right of appeal, be final as to all issues raised or which might have been raised in the proceeding, with the exception of a claim based on newly discovered evidence, as provided in 2 above. (5) In all cases in which the application has been denied, the applicant may, within ten days thereafter, file in the Court of Appeals a motion for leave to appeal, which leave shall be granted if the court finds that a substantial question is presented."

rights; (3) the prisoner receives satisfication that has a good rehabilitative impact when he has received full and fair consideration of his federal claim, and the vast majority of prisoners will not file further claims.

(3) Improved Habeas Procedures

Various commentators have suggested that before any drastic changes are made in the current scope of habeas corpus, procedures should be improved so as to insure more efficient disposition of claims and reduction of frivolous claims. Their proposals include: (1) assignment of counsel to assist prisoners in preparing applications or, in the alternative, appointment of counsel to assist petitioners after an application has been filed; (2) expansion of discovery techniques, including in-prison depositions of petitioners, that may more frequently present summary disposition without the need for evidentiary hearings; (3) use of standardized application forms that will assist prisoners in providing complete information; (4) maintenance of joint state-federal records that will permit prompt production of a complete prior history of filings in connection with a particular conviction; and (5) adoption of special Federal Rules covering habeas proceedings as proposed in the January 1973 draft of the Committee on Rules of Practice and Procedure of the Judicial Conference.

The practical significance and relevancy of these proposals has also been questioned. Appointment of counsel is viewed as likely to save the court some time but unlikely to prevent the filing of frivolous petitions. Other procedural changes are viewed as beneficial, but unlikely to significantly reduce the burden on federal courts.

(4) Changes in State Procedure

Various proposals relating to reform of state procedure have been advanced as a possible solution to the burden imposed upon federal courts by the current scope of federal habeas corpus. Some commentators have suggested that state trial judges take a more active part in the trial process to insure that possible constitutional objections are either raised and fully explored or knowingly and voluntarily waived. In this connection, adoption

of an omnibus pretrial hearing procedure is urged. See A.B.A. Standards, Discovery and Procedure Before Trial 24 (Approved Draft, 1970). Another proposal frequently advanced is that state appellate courts more frequently consider issues that were not properly raised below or remand cases for further hearings on these issues. This proposal is considered in part III of these materials.

The most frequently advanced proposal is that states adopt broader and more flexible post-conviction remedies that will permit full consideration of all constitutional issues. The basic elements of such post-conviction procedures would be: (1) provision for a single statutory remedy, avoiding the confusion presented in many states by the existence of multiple remedies, each limited to particular types of claims; (2) the state remedy would be co-extensive with the state remedy, incorporating, particularly the Noia approach to procedural forfeitures at trial or on appeal; (3) the procedure would emphasize hearings on the merits rather than disposition on the pleadings; (4) any disposition would be supported by finding of fact and conclusions of law. Procedures of this type are proposed in the Uniform Post-Conviction Act, 9B U.L.A. 550, and A.B.A. Standards, Post-Conviction Remedies (Approved Draft, 1968). See also Comment, 12 Wm. & Mary L.Rev. 147 (1970).

The significance of these proposed changes have been challenged on several grounds. First, some commentators question whether improved state procedures will result in a reduction of federal habeas corpus applications. Available statistics do not show a substantial decline in petitions from states that have adopted broader post-conviction procedures. See Comment, 12 Wm. & Mary L. Rev. 147, 170-171 (1970). Second, some doubt has been expressed as to whether improved state fact finding procedures will reduce substantially the time devoted to federal petitions by district courts. Third, it has been suggested that the proposals do not respond to the concerns summarized in Justice Powell's opinion in Schneckloth, but merely shift portions of an unnecessary burden from the federal courts to the state courts.

C. SOLUTIONS RELATING TO THE APPELLATE PROCESS

(1) Consideration of Issues Not Properly Raised Below

Kamisar, LaFave and Israel, Modern Criminal Procedure (1974): The remand in Henry has generally been viewed as reflecting the Supreme Court's "hope" that state courts in the future would consider constitutional claims that were not timely presented due to factors other than a deliberate bypass, rather than refuse such consideration, albeit properly based on an adequate state ground, and thereby force the defendant to seek review on the merits in the Federal courts via habeas corpus.[a] Under this approach, a state appellate court would consider an issue not raised below if the record were adequate, or would remand for further hearings at the trial level if the record were inadequate or there was a likelihood that the state procedures had been deliberately bypassed.[b] Several state appellate

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a/ Assuming a state court accepted this approach, should it be equally willing to consider prosecution responses to defendant's constitutional claims when those responses were not timely presented due to factors other than a deliberate bypass? Consider the Supreme Court's decision in Whiteley v. Warden, 401 U.S. 560. The defendant there, in challenging evidence seized incident to an arrest, had argued that the arrest warrant was insufficient and there was not separate probable cause justifying the arrest without the warrant. The prosecution responded with an argument and an evidentiary record keyed to the latter issue alone. When the Supreme Court rejected that argument on appeal, the prosecution requested that the case be remanded so that further information might be produced concerning the validity of the warrant (the prosecution suggested that the magistrate may have had more information than that presented in an obviously insufficient complaint). The Court refused, however, finding "untenable" the state's contention that it justifiably failed to explore the issue because of the "precedent and logic" supporting its initial argument.

b/ The same approach has been urged for federal courts. Consider, e.g., Alexander v. United States, 390 F.2d 102, 103 (5th Cir. 1968): "The first issue has never been advanced by the defendant; however, we find it to be a basic constitutional question which is reviewable as 'plain error'. Fed. R. Crim. P. 52(b). * * * We recognize our discretion to refuse consideration, * * * but because all three issues are vital to the admissibility question, the first issue merits analysis on our own motion. Moreover, in light of Fay v. Noia, we question the wisdom of refusing to review on appeal what may return to haunt us in the form of a habeas corpus proceeding."

courts have expressed general agreement with this approach. Consider, for example, the approach taken by the Rhode Island and Wisconsin courts. State v. Leavitt, 237 A.2d 309 (R.I. 1968), noted that, under Henry and Fay v. Noia, an earlier state decision designating the pretrial motion as the "exclusive" means of challenging illegally obtained evidence could not be applied to "deny" defendant his "constitutional remedy" by treating his failure to make a pretrial motion as a bar to consideration of an objection made initially at trial. In State v. Carufel, 263 A.2d 686 (R.I. 1970), the Rhode Island court held that, in light of Henry and Fay, it would review on appeal a Fourth Amendment objection that was not considered at trial because defense counsel failed to fully advise the trial court of the scope of his objection. The Wisconsin court has held in several decisions that objections based upon the unconstitutional acquisition of evidence will be considered on appeal, despite the absence of any objection below, if that failure to object was not the product of a deliberate bypass. See State v. Knoblock, 44 Wis.2d 130, 153, 170 N.W.2d 781, 783 (1969).c

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c/ Other courts, though upholding a state requirement of a pretrial objection, have been influenced by Henry in determining the scope of the exceptions to that requirement. See, e.g., People v. Johnson, 38 I11.2d 399, 231 N.E.2d 447 (1967) (upholding a statutory requirement that the motion to suppress be made before trial "unless opportunity therefore did not exist or the defendant was not aware of the grounds", but refusing to permit a strict application where defendant was represented by different assistant public defenders and trial counsel was prevented from raising the constitutional objection by the prosecution's erroneous statement that the issue had been heard and decided adversely before trial).

A somewhat different attitude was expressed in State v. Macon, 57 N.J. 325, 273 A.2d 1 (1971), particularly with respect to remanding a case to consider whether the failure to present an issue below constituted a deliberate bypass: "[W]e do not deem it palliative to explore testimonially the thoughts of trial counsel or his pertinent conversations with his now unhappy client. Our limited experience in that area suggests such inquiries demean the attorney-client relationship with no compensating gain. In any event, except in extraordinary circumstances, a claim of error will not be entertained unless it is perfectly clear that there actually was error. In other words, if upon a timely objection a different or further record might have been made at the trial level, and the claim of error might thereby have been dissipated, we will neither reverse on an assumption that there was error nor remand the matter to explore that possibility. * * * These principles rest upon the belief that our practice offers every opportunity for a fair trial, and that unless there is some order in the trial of cases, the state judiciary cannot hope to meet the swollen demands upon it. The Federal Supreme Court has always recognized that a state has a substantial interest in requiring litigants to object timely so long as a fair opportunity is afforded to that end. Hence, even though the federal courts will permit a State defendant to raise constitutional issues for the first time in a federal proceeding, provided that he did not deliberately bypass State procedures, Fay v. Noia, yet Henry made it plain that the Federal Supreme Court did not wish even remotely [to] imply that the State must forego insistence on its procedural requirements".

Consider also Sykes v. United States, 373 F.2d 607 (5th Cir. 1967), warning against appellate court consideration of issues not raised below where the record does not present the issue in full detail. Thus, courts tended to be more reluctant to rely upon the plain error rule, however, when no objection was raised below, since the prosecution, in such a situation, has not been given an opportunity to develop fully the evidence justifying the search. Even when the testimony indicating illegality came from one of the prosecution's own witnesses, it is always possible that, if other witnesses were questioned on the same point, they might have given contradictory testimony that would establish the legality of the police activities.

Judge Donald P. Lay, Post-Conviction Remedies and the Overburdened Judiciary: Solutions Ahead, 3 Creighton L. Rev. 5, 17 (1969):

C. Appellate Remand

When a petition for a post conviction hearing is filed after the filing of an appeal, some state statutes are interpreted so as to postpone hearing the post conviction motion until the appeal is decided. Such rules seem shortsighted and in some instances may result in a waste of judicial manpower. As a corollary, appellate courts generally bypass constitutional issues which have not been litigated or raised in the trial court. Since an appellate court is not equipped to conduct an evidentiary hearing, it has traditionally been considered in the interest of procedural efficiency that issues which were not raised in the trial court be deemed waived on appeal. However, in a post conviction proceeding, unless there be a determination of a voluntary and knowing waiver of a constitutional right, neither a federal nor state prisoner may be held to have procedurally forfeited his claim. As a result, despite an appellate court's prior decree of procedural forfeiture, the issue will eventually have to be determined in a separate post conviction collateral action. An immediate evidentiary hearing might determine a knowing waiver or alternatively, if not a waiver, the absence of factual merit to the constitutional claim. On the other hand, if there be merit to the belated constitutional claim, it behooves all courts to hear the claim as soon as possible. If in a post conviction motion the defendant is later granted a new trial because of the constitutional claim, the earlier appellate review on the merits becomes a wasted and senseless procedure. Thus, in both federal and state courts, when a belated constitutional claim requiring an evidentiary hearing is initially raised after notice of appeal has been filed or on appeal in the appellant brief itself, a procedure to facilitate its disposition is needed.

This suggestion does not in any way lose sight of the fact that a petition for a writ of habeas corpus and a post conviction motion are collateral proceedings. Neither remedy is a substitute to challenge the verity of the trial itself and both are generally considered to be separate civil proceedings, as distinguished from the original criminal case. However, as Mr. Justice Clark said in *Smith v. Bennett*:

> We shall not quibble as to whether in this context it be called a civil or criminal action for, as Selden has said, it is "the highest remedy in law, for any man that is imprisoned" . . . . The availability of a procedure to regain liberty lost through criminal process cannot be made contingent upon a choice of labels . . . .[81]

The consolidation on appeal of a ruling on a post conviction motion with a determination of issues concerning the merits of the criminal proceeding itself should not present any obstacle. Of course, a limited remand for an evidentiary hearing on a constitutional claim first raised in the appellate brief of the criminal action itself would still be considered as a remand in the same criminal case and not a separate civil proceeding. In either event, whether the constitutional claim is first raised as a separate civil proceeding after notice

of appeal has been filed, or as a part of the appeal itself, the issue should not be ruled untimely or procedurally forfeited. The sooner the issue can be determined, even though it requires a separate evidentiary hearing, the more efficient the administrative process becomes.

A procedure exists under Federal Rule of Civil Procedure 60(b) whereby in civil cases, upon a known mistake or error or new evidence, the trial court may review a previous judgment even though an appeal has been filed. The district court is directed to conduct a hearing on the issue raised; and in the event the district court is disposed to rule favorably to the moving party, the appellate court requests that the district court certify the same to the court. Then the appellate court remands the entire case and a useless appeal is circumvented. In the event the lower court denies the motion, the denial is then handled as a separate judgment and a new appeal is filed. The parties generally stipulate that the new appeal will be consolidated with the prior appeal for an appellate determination of both issues. As a result, only one appellate hearing is necessary. Similar procedures could be adopted for handling post conviction petitions in both federal and state proceedings.

The more immediate the attack made upon a constitutional denial, the better the safeguard for both the individual and the state and the more efficient and expedient the corrective process. Thus, if properly implemented, a limited appellate remand rule has many practical merits: (1) the various and sometimes numerous belated post conviction evidentiary hearings would be thwarted; (2) a motion prior to a final appellate review on the merits would be encouraged; (3) the remand would come at a time when the evidence is fresh and witnesses are still available for an evidentiary hearing or a new trial should it be required; (4) the strategy of the attorney would still be fairly well known by all parties, as well as by the court itself, so the "bypass" issue would usually be much simpler to settle accurately; (5) the petitioner would at all times be represented by either his trial or appellate attorney at the remand hearing; (6) the cumulative effect of the claimed constitutional error could be better reviewed in its true "setting" for determination of whether there was harmless constitutional error beyond a reasonable doubt; (7) in the event a new trial was ordered by the trial court, useless appellate review could be avoided; and (8) the remand procedure would result in consolidation of issues on appeal and avoidance of delay in exhausting remedies.

(2) A Unitary System of Review

National Advisory Commission on Criminal Justice Standards and Goals, Report on Courts (1973, Daniel J. Meador, Task Force Chairman)

Chapter 6: Review of the Trial Court Proceedings*

Because a conviction of crime imposes a serious stigma upon a person in the eyes of society and often results in the loss of liberty, there is a widely shared view that determining guilt and fixing punishment should not be left to a single trial court. The interests of both society and the defendant are served by providing another tribunal to review the trial court proceedings to insure that no prejudicial error was committed and that justice was done. Review also provides a means for the ongoing development of legal doctrine in the common law fashion, as well as a means of insuring evenhanded administration of justice throughout the jurisdiction. Functionally, review is the last stage in the judicial process of determining guilt and fixing sentence. Like the trial proceeding, it should be fair and expeditious.

The review stage, like other aspects of the criminal process, is in trouble. Several decades ago appeals were taken only in a minority of cases, and collateral attacks on convictions were relatively rare. The current picture is strikingly different: in some jurisdictions more than 90 percent of all convictions are appealed, and collateral attack is almost routine in State and Federal courts. Courts are handling appeals under procedures that have changed little in the past hundred years. The process is cumbersome and fragmented; it is beset with delay. Both State and Federal courts are threatened with inundation. Even now, the vast increase in workload is making it increasingly difficult for appellate courts to give to substantial questions the careful, reflective consideration necessary to the development of a reasoned and harmonious body of decisional law.

The crisis in review of criminal proceedings has stimulated a number of works suggesting improvements in particular aspects of the present structure. Those who want to improve the review procedure can refer to such sources as the reports made by the American Bar Association Project on Standards for Criminal Justice dealing with postconviction remedies, appellate review of sentences, sentencing alternatives and procedures, and criminal appeals. The Commission thinks the suggestions made in these reports for improving the existing structure of direct appeals and collateral attack are excellent.

This chapter contains a much more far-reaching proposal, which the Commission recommends be tried on an experimental basis. The suggestions made are novel and controversial. However, they may bring finality to criminal convictions through procedures that are both expeditious and fair.

*Task Force member Stanley C. Van Ness dissents from this chapter of the Report. His views on the subject of this chapter appear at the end of the Report.

An appeal still is seen as a new, separate proceeding that must move in a prescribed manner. Collateral attacks, which begin in trial courts and move up the appellate ladder, are viewed as still another separate proceeding, one that labors under concepts derived from common law writs never contemplated as devices for review of criminal convictions. The review process is complicated still further by our system of federalism with its dual set of courts and the Federal constitutional overlay of State criminal procedure.

Review Process

The review process, as it has developed in American State and Federal courts, is afflicted with two interrelated defects. On the one hand, traditional or direct appellate review is circumscribed by rules that limit the court's consideration to matters in the trial record and thereby prevent a total review of the case. Matters outside the record cannot be considered even though they may undercut the legality of the conviction. On the other hand, and partially as a result of those restrictions, the defendant not only has an opportunity to obtain collateral review, but he can seek, and sometimes obtain, multiple reviews.

A State defendant can pursue collateral litigation through both State and Federal courts. On Federal habeas corpus the courts have been skeptical about relying on prior adjudications and have been reluctant to insist on adherence to procedural rules governing the assertion of issues in the regular course of trial and appeal. The result of this review system has been a substantially increased burden on lawyers and judges, a protracted period of litigation following the trial court judgment—often extending over several years—and the erosion of finality in convictions.

For a State criminal case this complicated review scheme may have as many as 11 steps, some of which can be repeated. Although not every case goes through each of these steps, they are all potentially available, and it is not uncommon for a defendant to pursue at least four or five. They are:

1. New trial motion filed in court where conviction imposed;
2. Appeal to State intermediate appellate court (in States where there is no intermediate appellate court this step would not be available);
3. Appeal to State supreme court;
4. Petition to U.S. Supreme Court to review State court decision on appeal;
5. Postconviction proceeding in State trial court;
6. Appeal of postconviction proceeding to State intermediate appellate court;
7. Appeal to State supreme court;
8. Petition to U.S. Supreme Court to review State court decision on appeal from postconviction proceeding;
9. Habeas corpus petition in Federal district court;
10. Appeal to U.S. Court of Appeals; and
11. Petition to U.S. Supreme Court to review court of appeals decision on habeas corpus petition.

The actual operations and interplay of review proceedings are more complex than this listing suggests. Some convictions are not appealed at all, others are subject to a number of these steps several times over, and with respect to some convictions, review may proceed simultaneously in more than one court system.

Curiously, despite all the variations of review available, the sentence itself—often the most important feature of the case—cannot be reviewed at all in most American jurisdictions.

The result of these limitations and fragmentations is a drawnout, sometimes never-ending review cycle. This in turn brings the criminal process into public disrepute and leaves convicted defendants with feelings of injustice mixed with illusory hopes that another round of review will overturn the conviction.

What is needed, in the view of the Commission, is not merely an effort to accelerate the existing review machinery. Rather, it is necessary to consider a restructuring of the entire process of review.

The basic premise of this chapter is that there should be a single, unified review proceeding in which all arguable defects in the trial proceeding can be examined and settled finally, subject only to narrowly defined exceptional circumstances where there are compelling reasons to provide for a further review. Standards 6.1 through 6.4 establish the concept of a single, unified review: an amalgamation into one proceeding of all issues that are now litigated on new trial motions, direct appeals, and postconviction proceedings. The new trial motion is abolished, and the traditional distinction between direct appeal and collateral attack is abandoned.

The greatly expanded, unified review procedure would be held as expeditiously as possible after trial. The reviewing court would have the authority to review not only the legality of all proceedings leading to the conviction and all matters that may now be asserted on new trial motions, but also errors and defects not apparent on the trial record and even potential errors that were not asserted as such at trial. Essential to this expanded review are the

standards providing the reviewing court with a full-time professional staff charged with the responsibility for ferreting out all arguable issues in the case, whether or not asserted by the defendant and his attorney. The staff would monitor each case to insure timely compliance with the reviewing court's rules, and the reviewing court would be permitted to vary the process of its review according to the nature of the case and the substantiality of the issues involved.

Reviewing Courts

This unified review proceeding—the first, and for most cases the last, stage of review—takes place in what is here called the reviewing court. This term is used instead of appeal and appellate court to make clear that many of the traditional notions about appeals are being discarded. The new unified proceeding has unique characteristics, and should not be encumbered with concepts drawn from a different setting. To make such a single review final as well as fair requires a wholly new way of looking at the proceeding. The Commission believes it is possible that traditional American appellate procedures cannot accomplish these objectives since they confine the appellate court to the record made at trial and do not permit the wide-ranging scrutiny of the case that is essential if the single review is to be fair as well as final.

If the expanded, unified review proceeding proves successful in providing a comprehensive review of criminal convictions, jurisdictions then should seek to implement the substantial limitations on additional postconviction review contained in Standards 6.5 through 6.8. Designed to complement the unified review proceeding, these standards provide that a second stage of review should be available only in exceptional and narrowly defined circumstances. Referred to here as further review, this stage would consist in State criminal cases of more than one step. Because of the Federal system, one further review could occur in the State courts, and an additional further review might be available in Federal court, but only if the circumstances set out in Standard 6.5 are present and if certain Federal issues are involved.

This chapter deals only with the judicial recourse available to a convicted defendant. It does not address itself to such matters as the availability of executive clemency or conditional release or discharge by parole authorities. These matters are beyond the scope of this report.

The term frivolous appeal is not employed. It has invidious connotations, and some lawyers and judges are of the view that there are few, if any, genuinely frivolous appellate cases. On the other hand, there are vast numbers of appeals and postconviction petitions that contain no issues of real substance. These issues may be nonfrivolous by one view, but they involve so little substance or difficulty that a decision on them can quite readily be made by any judge. The term used here for such issues is insubstantial. The contrasting term is substantial, that is, issues that are genuinely arguable and that require significant judicial attention.

IMPLEMENTATION

The review structure embodied in the standards is an integrated scheme. The limited availability of further review is fair and feasible only because of the wide-ranging scope of the initial review. If the initial review proceeding does not encompass new trial motion grounds and postconviction grounds, then the further review could not be restricted as it is here. The broad scope of the initial review is, in turn, workable only if the reviewing court is provided with a professional staff and if it employs the flexible procedures provided for in these standards.

The key element is the unified review proceeding in the reviewing court, and the establishment of such a court should be the first step in the implementation of these standards. This restructure of the first review in a criminal case can be accomplished by legislative enactment, and in many States (as well as in the Federal courts) a statute probably would be required. In some States, however, where the courts have extensive rulemaking power and are prepared to exercise those powers vigorously, unified review might be effectuated by court-promulgated rules In any event, a new court need not be created. An existing appellate court can be utilized; the standards can be implemented by enlarging its powers, altering its procedures, and providing it with staff.

If and when it has been established that the unified review procedure works successfully, the limitations on the scope of further review should be adopted. This, too, will necessitate the enactment of a statute in many jurisdictions. The scope of Federal habeas corpus could best be brought in line with these standards by an act of Congress amending the existing habeas corpus statutes in Title 28 of the United States Code. It is possible, though it would be slower and less certain, that through a series of cases the Supreme Court might be persuaded to reshape the present habeas corpus practice as defined in the case law.

The major obstacle to implementing this chapter is likely to be its novelty. Reform of the judicial

process is difficult and slow. Lawyers and judges are reluctant to abandon the familiar for the new and untried. Thus, the Commission does not advance this chapter as a proposal it would like to see implemented as soon as it would be mechanically feasible in all American jurisdictions. Rather, the Commission urges some demonstrations and experiments putting the plan into active operation. The Appellate Justice Project of the National Center for State Courts, currently underway, may shed light on some features of these proposals. Other projects should be designed and funded to provide for the bench and bar a working example of the standards in operation.

The standards restricting further review are likely to be opposed on the ground that they will unfairly shut off redress for violations of constitutional rights. The best answer to this concern is the prior implementation of an effective, vigorous reviewing court with the powers and procedures contemplated here. Projects demonstrating and experimenting with these procedures would be useful for evaluating the validity of this concern.

The creation of a professional staff in the reviewing court will require funding. Funds will be necessary to provide compensation for the staff lawyers and their secretarial help and for necessary equipment, housing, and administrative support. Under the Appellate Justice Project of the National Center for State Courts funds are being provided, through an LEAA grant, to provide a professional staff for a 2-year period to appellate courts in Nebraska, Illinois, New Jersey, and Virginia. The project is designed to demonstrate the utility of a central staff and to experiment with certain innovations in appellate court operations. This project should do much toward gaining acceptance of the staff concept among judges, lawyers, and legislators throughout the country.

The standard on controlling opinion writing and limiting publication of opinions can best be implemented by court rule. This has been done in California and New Jersey.

A significant educational effort is essential to the implementation of these standards. The full ramifications of the concept of unified review are not easily grasped and the potential salutary consequences of it are not immediately apparent. Explanations and discussions, coupled with one or more visible working models, will be needed. The American Bar Association has sponsored and encouraged programs on a State, regional, and national basis to bring about adoption of its Standards on Criminal Justice. An effort similar to that will be necessary in connection with these standards. Perhaps collaborative ventures with the American Bar Association could be arranged. Or, separately sponsored programs could be planned. The most effective educational leverage might be funding provided to a court or a State directly to implement these standards. One or more pilot projects could prove the workability of the scheme and diminish its novelty, and thereby overcome the main obstacle to implementation.

Standard 6.1: Unified Review Proceeding

Every convicted defendant should be afforded the opportunity to obtain one full and fair judicial review of his conviction and sentence by a tribunal other than that by which he was tried or sentenced. Review in that proceeding should extend to the entire case, including:

1. The legality of all proceedings leading to the conviction;

2. The legality and appropriateness of the sentence;

3. Matters that have heretofore been asserted in motions for new trial; and

4. Errors not apparent in the trial record that heretofore might have been asserted in collateral attacks on a conviction or sentence.

Commentary

This standard reasserts a defendant's right in every case to obtain a full and fair review. It preserves that right—indeed, gives added meaning to it—while also striking directly at the undesirable features of the existing systems. At the same time, the standard asserts that the defendant has a right only to a single review. This review should be in a tribunal other than that in which the case was tried, in order to provide a fresh, detached scrutiny of the trial proceedings, thereby enhancing the justice of the criminal process as well as the appearance of justice.

The review proposed by this standard would extend to all proceedings leading to the conviction and sentence. It would be available to defendants whose convictions rest upon pleas of guilty as well as to those convicted by juries or by courts sitting without juries. It embraces all matters that have customarily been reviewable on appeal. But the scope of review is much broader because of subparagraphs 3 and 4, explained below, whereby review is not restricted to matters of record.

Review also would extend to the legality and appropriateness of the sentence. Less than a third of the States currently provide any means for reviewing the propriety, or appropriateness, or excessiveness of the sentence. Yet the concept of such sentence review now is endorsed widely.

* * *

Review also would extend, under subparagraph 3, to matters currently reviewable only if initially asserted in a new trial motion filed in the trial court. The review proceeding under this standard absorbs the new trial motion in order to give effect to the concept of a single, unified review. Once the sentence is imposed, and the basic trial court proceeding thereby concluded, control of any further litigation of any issue should pass to the reviewing court in the single review proceeding. This compresses two steps into one.

In many jurisdictions new trial motions are made in nearly every criminal case as a matter of routine. Few are ever granted. But under many procedural systems, the appeal cannot go forward while a new trial motion is pending. Weeks often pass before such motions are ruled on in the trial court. Thus the major practical effect of the new trial motion is to delay the flow of the appeal, with virtually no countervailing benefit. It is a time-consuming step that should be eliminated.

The functionally useful roles served by the new trial motion can be dealt with through the reviewing court. A procedure is needed for putting before the trial judge issues he should decide because they call for a discretionary assessment based on his firsthand observation in the trial; those issues may be inappropriate for initial resolution by a reviewing court. A new procedure for accomplishing this, in place of the existing new trial motion, is set out in Standard 6.3. Another function currently served by the new trial motion is to provide a means of getting before the judge—and into the trial record—evidence not introduced during the trial that might justify setting aside the conviction. Examples are newly discovered evidence bearing on the issue of guilt, evidence of juror misconduct, and evidence of knowing use of perjured testimony by the prosecutor. Handling of issues of this sort under the expansive concept of the single review is provided for in Standard 6.3(1) and (2) explained below.

Scope of Review

The review proposed in subparagraph 4 would extend to errors and defects not apparent in the trial record, which, under existing arrangements, may be litigated only through postconviction or collateral proceedings. If effectively administered, this concept would go far toward reducing later efforts by prisoners to attack their convictions. In the course of the first review the reviewing court would affirmatively discover and dispose of all conceivably arguable defects in the trial proceeding, even though they may not have been asserted by the defendant and do not appear in the record. Giving this novel scope to the initial review is consistent with, and indeed essential to, the concept of the single, unified review proceeding and to the concept of review of the case rather than of the record. This scope is necessary also in order that a high degree of finality can be attached to the reviewing court's disposition of the case without unfairness to the defendant.

Subjecting every case to the expansive review prescribed in subparagraphs 3 and 4 will not be easy. Such review is novel in American practice, although it resembles the scope of review in English criminal appeals, where there is no new trial motion and no postconviction procedure. This concept of reviewing goes beyond the American Bar Association *Standards Relating to Criminal Appeals*. While the A.B.A. standards are consistent in many respects with features of these standards, they are premised on the traditional conception of the direct appeal as being a review of the trial court record. Standard 6.3 prescribes the procedural characteristics which a reviewing court should have in order to make the exercise of this authority feasible. But even though effective implementation of the idea will be difficult, strong efforts should be made in that direction by the reviewing court. The idea is central to the effort to reduce fragmentation and to reintroduce finality in the review process.

The unified review proceeding would serve as a substitute for present postconviction procedures. If a defendant who did not seek review immediately following conviction and sentence later desired to attack his conviction or sentence, his remedy would be the review procedure provided in this standard. His failure to take earlier action might bar him from raising some or all issues he wanted to assert. Should the reviewing court refuse to reach the merits of issues asserted, the defendant's remedy would be to seek the further review provided for in Standard 6.5. Whether the failure to assert the matter earlier would bar relief in these further review proceedings is dealt with in Standard 6.8.

If a defendant had unsuccessfully invoked the review procedure provided for in this standard and later desired to seek relief again, his remedy also would be the further review procedure set out in Standard 6.8. If the chapter were to be fully implemented, all attacks upon conviction and sentence would be either review proceedings or further review proceedings. Special postconviction remedies would not be necessary.

Standard 6.2: Professional Staff

The reviewing court should have a full-time professional staff of lawyers, responsible directly to the judges, to perform the following functions in review of criminal cases:

1. Monitoring. The staff should affirmatively monitor each case to insure that the court's rules are complied with and that there is no unnecessary delay in the review process.

2. Shaping the Record. The full trial transcript should be expeditiously provided the reviewing court, and the staff should take action to insure that those portions of transcripts, trial court papers, and other matters that are essential to a full and fair adjudication of the issues are put before the judges.

3. Identification of Issues. The staff should take affirmative steps to discover all arguable issues in the case, even though not asserted by defendant and not apparent on the record, so that all matters that might be asserted later as a basis for further review can be considered and decided in the initial review proceeding.

4. Screening. The staff should review all cases before they are considered by the judges and recommend appropriate procedural steps and disposition; the staff should identify tentatively those cases that contain only insubstantial issues and should prepare recommended dispositional orders so as to permit the court to dispose of them with a minimum involvement of judicial time, thereby leaving for fuller judicial consideration those cases of arguable merit.

The function of this staff should be to supplement rather than replace the work of attorneys representing the prosecution and the defendant in each case.

Commentary

As appellate caseloads have grown, so has the realization that the judges need more assistance than can be provided by their personal law clerks and the court clerk's office. Judges' time should be devoted primarily to deliberation on the legal problems and the writing of opinions on substantial, important issues. Many administrative and procedural details do not require the direct attention of judges. Such matters can be handled by a central professional staff. Moreover, in criminal cases, leaving all matters to the pull and haul of the adversary process has produced delays and made judges' jobs more time-consuming. Staff attorneys are useful to any appellate court, but they are essential to the concept of a single review of the case, embodied in these standards, if such review is to be expeditious and is to embrace all issues heretofore asserted in new trial motions and postconviction proceedings.

* * *

While the English system of tailoring the transcript to the issues presented on appeal has some merit, American judges and lawyers want the entire transcript of the trial proceedings in most criminal appeals. This is desirable—indeed necessary—if the unified review proceeding is to be fully effective. Delay in transcript preparation could delay the review proceeding. But it is possible that transcript preparation can be accelerated substantially. (See the section of this chapter on Recommendations.)

Identification of Issues

The staff should take affirmative steps to identify all potential issues in the case, even though they were not asserted by the defendant and are not apparent on the face of the record. Performing this function effectively is essential if further review is to be limited. As to alleged constitutional defects in proceedings leading up to conviction and sentence, there is a widely accepted notion that the defendant at some point should be provided an opportunity for a hearing. Failure to provide that opportunity in the regular course of trial and appeal has been one of the causes of growth in postconviction litigation. This standard contemplates that once review is sought, the reviewing court, through its staff, will probe the entire case to spot any arguable issues that may be beneath the surface. Such issues then will be resolved in the review proceeding, thereby making it feasible and fair to preclude a later assertion of the same points.

Various procedures might be devised for carrying out this function. The judges and the court staff, for example, might design a checklist type of questionnaire to be submitted to each defendant and his lawyer. The questionnaire would attempt to list all the typical contentions made by defendants in criminal cases—especially those which abound in postconviction proceedings. On every point the defendant and his lawyer could be asked to indicate whether they claim any irregularity or illegality; a space could be provided for them to state the factual basis of any such claim. The form could carry the advice that this was the sole review to which the defendant had a right and that only in exceptional circumstances would points not asserted be reviewable thereafter.

Where points disclosed by this means, or other sorts of probing, are not presented by the trial record, the staff would take necessary steps to get before the court the information necessary to decide the issues. The staff, for example, could direct or invite the lawyers to submit relevant matter by documentary evidence, affidavits, or the testimony of witnesses. * * *

Standard 6.3: Flexible Review Procedures

The reviewing court should utilize procedures that are flexible and that can be tailored in each case by the staff and the judges to insure maximum fairness, expedition, and finality through a single review of the trial court proceeding. The review procedures should provide for:

1. Receiving and considering new evidence bearing on the issue of guilt, or on the sentence, or on the legality of the trial court proceedings, which could not reasonably have been offered at trial;

2. Referral by the reviewing court to the trial judge of those issues that the reviewing court deems appropriate for the trial judge to decide;

3. Means of identifying and deciding all arguable points in the case, whether or not apparent on the record, that heretofore have been grounds for a collateral attack on the conviction or sentence;

4. Internal flexibility permitting the reviewing court to control written briefs and oral argument, including leeway to dispose of the case without oral argument or on oral argument without written briefs on some or all of the issues;

5. Authority in the reviewing court, at its discretion, to require or permit the presence of the defendant at a review hearing;

6. Authority in the reviewing court, for stated reasons, to substitute for the sentence imposed any other disposition that was open to the sentencing court, if the defendant has asserted the excessiveness of his sentence as error; and

7. Authority in the reviewing court, for stated reasons, to set aside the conviction or remand the case for a new trial, even though the conviction is supported by evidence and there is no legal error, if, under all the circumstances, the reviewing court determines that the conviction should not stand. The reviewing court should be given the authority to affirm a conviction despite the existence of error if to do so would not amount to a miscarriage of justice. This power should be exercised more frequently to speed finality.

Commentary * * *

Flexible and distinctive procedures for criminal review are especially important in implementing the concept of unified review, under which provision must be made for receiving evidence outside the record and spotting issues not asserted by the defendant. There is an interrelationship between the flexible procedures provided for in this standard and the staff functions contemplated in Standard 6.2. Each is dependent on the other.

Subparagraph 1

The procedures should provide for receiving and considering new evidence, under the direction of the staff or the judges. While receiving new evidence after conviction and sentence is novel to American appellate courts, it is not novel to the review process as a whole. Trial judges have always been authorized to hear fresh evidence on new trial motions, and new evidence is often offered in postconviction proceedings. These standards simply combine all such review into a single proceeding. The reviewing court will be doing no more in this regard than has previously been done in the fragmented review pattern. The same substantive grounds of attack on convictions and sentences will be applied, as well as the same rules of relevance and admissibility of evidence. However, the reviewing court is not to try the case de novo; thus the receipt of evidence is restricted by the proposition that the evidence could not reasonably have been offered at trial.

Subparagraph 2

Even though the defendant will present to the reviewing court all grounds of attack on the trial proceeding, sound functional and institutional reasons may dictate that the trial judge's ruling be obtained initially on certain issues. These issues are likely to be those calling for an assessment of the impact of an alleged irregularity in the trial result that could best be made by a judge at the scene, or those calling for the exercise of discretion of the kind traditionally accorded a trial judge. This standard provides that if the reviewing court deems an issue to be of this type it can refer the issue to the trial judge.

The concept of the single, unified review is preserved because the entire case comes first to the reviewing court; that court has control over all issues. The court retains jurisdiction in the review proceeding pending the trial judge's decision on the issues dispatched to him. If the trial judge should grant relief to the defendant, the reviewing court may need to decide nothing else. If the trial judge rules against the defendant, the reviewing court can review that ruling and also take up any other issues remaining in the case.

There will be some wasted effort when issues ultimately addressed to the trial judge are first submitted to the reviewing court and then dispatched to the trial judge for initial action. The occasional use of such a procedure is necessary, however, if the motion for a new trial is abolished. The few remands that will occur under the proposed review procedure are a small trade-off for the elimination of the substantial delay caused under the existing system by the almost inevitable routine motion for a new trial. It is basic to the concept of unified review that there be one court to which all possible grounds for attacking a criminal conviction must be expeditiously presented.

Subparagraph 3

Since many issues raised under existing habeas corpus and other collateral procedures have not been asserted at the time of original trial and appeal, and may not have been thought of at that time by the defendant, there must be a mechanism for discovering all such latent issues if the single review proceeding is to achieve its objectives of cutting off later review. Staff can play an important role here, as described in the commentary to subparagraph 3 of Standard 6.2. Such staff action and flexibility of procedure are necessary to implement subparagraphs 3 and 4 of Standard 6.1. The public interest in a simplified, shortened review process justifies this departure, as well as other departures in these standards, from the strict adversary system.

* * *

Subparagraph 5

The presence of the defendant himself may sometimes be desirable or necessary at a hearing by the reviewing court. In dealing with issues traditionally dealt with on new trial motions and postconviction proceedings, the reviewing court may have to consider matters outside the record. Since that will involve the submission of new evidence, fairness requires that the defendant be present. Moreover, the defendant himself may need to testify or desire to do so as to certain issues. In English criminal appeals the defendant customarily is present at the hearings. This matter is best left to the reviewing court's discretion in each case, but the court's authority to have the defendant present and the appropriateness of such practice should be recognized.

* * *

Subparagraph 7

An American appellate court normally is given the authority to overturn a conviction only if there is legal error in the record or if the evidence is insufficient to support a finding of guilty. Under this practice the court has no power to set aside the conviction or remand the case for a new trial simply to prevent a miscarriage of justice. The consequence is that in a case where the court is convinced that the conviction works an injustice it is driven artificially to find some legal error on which a reversal can respectably be based, even if this necessitates a distortion of legal doctrine. The more straightforward approach embodied in this standard gives to the court the power to deal with the conviction directly in terms of injustice.

The English Court of Appeal, Criminal Division, has had statutory authority of this sort since 1966. That court is empowered to quash a guilty verdict if the court considers "that under all circumstances of the case it is unsafe or unsatisfactory." The power has been exercised sparingly. But its availability is a salutary protection for the innocent and a valuable device for use in the occasional case where there is evidence enough to support the verdict and no legal error, yet the circumstances convince the appellate judges that conviction is inconsistent with justice. Under this standard, the reviewing court could either quash the conviction and enter final judgment for defendant or set aside the conviction and remand for a new trial.

* * *

Standard 6.5: Exceptional Circumstances Justifying Further Review

After a reviewing court has affirmed a trial court conviction and sentence, or after expiration of a fair opportunity for a defendant to obtain review with the aid of counsel, the conviction and the sentence generally should be final and not subject to further judicial review in any court, State or Federal. Further review should be available only in the following limited circumstances:

1. An appellate court determines that further review would serve the public interest in the development of legal doctrine or in the maintenance of uniformity in the application of decisional and statutory law;

2. The defendant asserts a claim of newly discovered evidence, which was not known to him and which could not have been discovered through the exercise of due diligence prior to conclusion of the unified review proceeding or the expiration of the time for seeking review, and which in light of all the evidence raises substantial doubt as to defendant's guilt; or

3. The defendant asserts a claim of constitutional violation which, if well-founded, undermines the basis for or the integrity of the entire trial or review proceeding, or impairs the reliability of the fact-finding process at the trial.

Challenges to State court convictions made in the Federal courts should be heard by the U.S. courts of appeals.

Commentary

These standards seek to remedy the ills flowing from fragmented review, lack of finality, and delay. They do so by prescribing a single review proceeding embracing all the issues traditionally dealt with on new trial motions, direct appeals, and postconviction proceedings. The effective implementation of that concept will shorten review time and heighten finality by reducing later attacks on convictions. But even with a reviewing court of this sort functioning at the most efficient and effective level possible, there will still be exceptional circumstances in which a further review of certain issues will be justifiable. It is important, however, that any litigation beyond that in the reviewing court be narrowly limited to those situations in which there are compelling reasons for such further litigation.

Further review of this sort might be justified in the interest of society, of the law, or of fundamental fairness and justice to the defendant. This standard delineates the issues or situations in which further review should be available. Unless a case comes within one of the three categories spelled out here, the decision of the reviewing court should be final. Executive clemency and parole would not be affected by these standards.

This standard is applicable to the review of both State and Federal convictions. While the dual Federal-State court structure complicates the review of State convictions, these standards seek to simplify the process and to reduce the occasions for and the scope of review presently available on habeas corpus in the Federal district courts. The traditional concept and terminology of direct appeal and collateral attack are discarded in favor of unified review proceeding and further review.

If the conviction is rendered in a Federal court the review proceeding and any further review would take place entirely within the Federal judiciary. A conviction rendered in a State court, however, is subject not only to the State review proceeding and possible further review in the State court system, but it is also subject to further review in a Federal court if Federal issues are being raised and if one or more of the circumstances specified in this standard are also present. Any review of a State conviction or sentence by a Federal court will by its nature be further review. Such Federal review is discussed in greater detail later in this chapter.

This standard does not prescribe the precise structure and procedural mechanics through which such further review is carried out, but only identifies those exceptional circumstances in which a limited review beyond the initial reviewing court proceeding should be allowed in any court, State or Federal.

Subparagraph 1

The first of the exceptional circumstances derives from the public interest in the ongoing development of the law, from institutional concerns in administering the court system, and from a desire for even-handed administration of criminal justice throughout the jurisdiction. These concerns have long been

accepted as proper bases for additional review. In States with a three-tiered judiciary the highest court typically is concerned primarily with review of this sort; review for error or safeguarding the interests of the particular litigants is carried out by intermediate appellate courts. Examples of such arrangements may be seen in the judicial systems of California, New Jersey, New York, and Alabama. The Federal judicial system is also constructed on this basis, with the U.S. Supreme Court being confined essentially to the kind of review defined in Standard 6.5(1).

It is important to note here that the standard provides for further review of this type only on the decision of the appellate court. A party has no right to review in this circumstance. The initial review proceeding is designed to satisfy his legitimate interest in a fair and legally correct trial proceeding.

For State convictions further review on this basis may occur in a State appellate court after the reviewing court's decision. Thereafter, still further review may occur on this basis in the U.S. Supreme Court, or in any other Federal court designated by Congress for that purpose, if the described interests are of Federal concern. This essentially preserves the availability of Federal review over State convictions of the type currently exercised by the Supreme Court.

Subparagraph 2

A second basis for further review is a traditional ground for posttrail attack on convictions—newly discovered evidence. Here the interest of justice in protecting those not guilty is sufficiently strong to justify an exception to finality. The standard carries forward the longstanding conditions that the evidence was not known to the defendant in time to have been offered earlier (up through the review proceeding) and that it was not discoverable by the exercise of reasonable diligence. These limitations are desirable in the interest of orderly procedure and finality; a defendant should bring forward all evidence that he can reasonably obtain in the regular course of trial and review.

Since the primary purpose of this exception to the finality of the review proceeding is to protect the innocent, it is sound to make the availability of review on this ground depend upon the court's finding from all the evidence, the new included, that there is some basis for believing the defendant is not guilty. The formula of substantial doubt as to guilt seems appropriate to express the degree to which the court should be persuaded on this point; it does not require the court to conclude that the defendant is not guilty.

In a State criminal case further review on a claim of newly discovered evidence bearing on guilt would normally be available only in a State court, since the claim would not usually involve any Federal issue. These standards do not speak to the question of which State court should perform the function of further review on this ground or on the grounds specified in subparagraph 3 below.

There are numerous ways in which States could provide for further review. The job could be assigned to the trial court where the conviction was imposed. Or it could be performed in the reviewing court where the review proceeding was conducted (or could have been conducted). The latter is more consistent with the unified review concept, and seems preferable. The reviewing court is designed as the forum for consideration of all issues in the case once the trial is concluded. Thus, it is likely to be in the best position to assess a claim for further review. This arrangement also would be consistent with the effort of these standards to abandon the notion of a postconviction proceeding as a separate, new round of litigation.

Further review as contemplated by this standard would not be simply existing postconviction proceedings with a new name, although it would embrace some of the matters currently litigated in postconviction proceedings. Rather, further review is an advanced stage of a unitary review process, permitted only in exceptional situations.

The time within which further review must be sought under subparagraphs 2 and 3 of Standard 6.5 is likewise not dealt with in these standards. Nor do these standards deal with possible bars to further review such as abuse of process or inequitable delay in assertion of claims. Opinion is divided on these and related issues. These are all subsidiary matters. The most important point is the basis for reviewing beyond the first comprehensive review.

Subparagraph 3

Subparagraph 3 of this standard deals with claims of constitutional violations made by convicted defendants. These are the sorts of claims that have caused the enormous rise in postconviction litigation in the last 10 to 15 years. Two parallel developments underlie the existing situation. One is the expanded coverage accorded by judicial interpretation of the Bill of Rights and the 14th amendment in their application to criminal proceedings. Almost any procedural point arising in a criminal case now can be cast arguably into constitutional terms.

The other simultaneous development has been the broadening of the writ of habeas corpus in the Federal courts as a means of litigating such issues arising in State criminal prosecutions. The practical result is that Federal habeas corpus has become a routine layer of review in the State criminal process. Prior litigation of an issue is no necessary bar to its relitigation. Nor is the failure to raise a point at the proper time in the State court a necessary bar to Federal review, even though there was adequate opportunity to do so.

The consequences of all this have been to attenuate the finality of criminal judgments and to burden lawyers and judges with the task of litigating convictions that otherwise would have been settled. Even if most postconviction litigation is disposed of on the papers and relief is rarely granted, the ill effects persist. Any effort to rationalize, simplify, and shorten the criminal review process must direct attention to this situation.

It is important that a defendant be accorded a full and fair opportunity to have his trial proceedings reviewed for all possible errors or irregularities. But, generally speaking, justice does not require that he be accorded more than one opportunity for such review, even of constitutional issues, except in those special circumstances where overriding considerations are present. Sound principles of procedure, the interests in the finality of criminal proceedings, and effective use of limited court and professional resources point toward a restructuring in the direction proposed here.

Subparagraph 3 of this standard defines the circumstances in which a defendant's constitutional claims may be reviewed beyond the initial review proceeding. The standard takes as a premise that not every assertion by a convicted defendant of a constitutional irregularity in the law enforcement or prosecutorial process leading to conviction justifies further review. This is somewhat contrary to existing Federal habeas corpus law. However, since the present scope of Federal habeas corpus rests on the court's construction of the habeas corpus statutes in *Fay* v. *Noia,* 372 U.S. 391 (1963), the proposed alterations in the writ's scope could be achieved either by congressional enactment or by judicial decisions reinterpreting the existing habeas corpus statute.

The only Federal constitutional provision concerning habeas corpus is the prohibition against suspension of the writ except in cases of rebellion or invasion. At the time of the enactment of that constitutional provision the writ was unavailable to review a final judgment of conviction. Under this standard the writ has a broader scope than that. Thus that aspect of the writ protected by the Constitution would remain unimpaired.

A claim of constitutional violation that, if well founded, is so fundamental that it undermines the basis of the prosecution or undermines the integrity of the trial proceeding should not be foreclosed by the review proceeding. An example of the former is a claim that the statute under which the prosecution was brought is unconstitutional. An example of the latter is a claim that the defendant was not represented at trial by counsel or a claim of mob domination of the trial.

A constitutional violation may not be of that type, yet it may still endanger the reliability of the factfinding process. Thus the conviction may either work an actual injustice or leave the appearance of such injustice. The concept of this type of constitutional violation has been articulated by the Supreme Court. The Court has made the relationship to factfinding reliability a factor in determining whether to give retroactive effect to some of its decisions. (*Stoval* v. *Denno,* 388 U.S. 293, 297–98 (1967).) While the issue there is different, this factor seems a useful basis on which to determine whether further review should be made available. Review on this basis would protect the fundamental fairness of the process.

Examples of constitutional claims that would be accorded further review on this reliability-impairing basis are those involving involuntary confessions, unconstitutionally composed juries, and knowing use of perjured testimony by the prosecutor. Examples of claims that would not be open to further review are those raising the use of voluntary confessions allegedly made without constitutionally required warnings, illegally seized evidence, and lineup identifications made in the absence of counsel.

Where none of the circumstances described in subparagraph 3 is present, a claimed constitutional violation would be foreclosed by the initial review proceedings, along with all other issues.

Further Review

The Commission considered recommending further review for any alleged violation of a constitutional right if the defendant could make a colorable claim of innocence. Suggestion has been made that Federal habeas corpus be structured in part in this way. (Friendly, "Is Innocence Irrelevant? Collateral Attack on Criminal Judgments," 30 *U. Chi. L. Rev.* 142 (1970).) But the Commission reached the conclusion that the purpose of further review on constitutional issues should be to protect the basic integrity and fairness of the trial and the initial review process; this was incorporated into the standard as the premise of subparagraph 3.

Society's interest in finality and the conservation of judicial resources outweighs defendants' interests in further review of constitutional issues not of this sort. Moreover, to involve the court in assessing all the evidence of guilt as a threshold step in further review would probably increase, rather than decrease, the time required for the courts to handle such matters.

In undertaking further review of the constitutional claims described in subparagraph 3, the court is circumscribed by Standards 6.6, 6.7, and 6.8.

The standard also recommends that insofar as defendants convicted in State criminal proceedings have access to Federal courts for further review beyond direct review by the U.S. Supreme Court of the State courts' affirmance of the decision, they should be permitted to challenge their convictions only in the U.S. courts of appeals. This would eliminate further review in the U.S. district courts as is presently available. This is based upon the Commission's view that overturning a conviction that has already been upheld by the State's appellate court system is a step of such seriousness that it should not be performed by a single judge of a court with general trial jurisdiction. The courts of appeals could use any of the methods provided for in Standard 6.3 for resolving any issue of fact that might be presented in such cases, subject, however, to the restraints imposed by Standard 6.7.

Standard 6.6: Further Review Within the Same Court System: Prior Adjudication

If, after initial review, a defendant seeks further review in the court system in which he was convicted, claiming a constitutional violation in the exceptional circumstances described in subparagraph 3 of Standard 6.5, the court should not adjudicate the claim if it has been adjudicated previously on the merits by any court of competent jurisdiction within that judicial system.

Commentary

The repetitious and protracted nature of current postconviction litigation stems in large part from failure to apply the doctrine of res judicata. Under this doctrine, the parties to litigation are given only one opportunity to have a matter decided. Once a given matter has been resolved in litigation between two parties, it may not be reopened in subsequent litigation between the same two parties. This practice probably derived historically from English habeas corpus, where one seeking the writ could go from judge to judge, and no judge was foreclosed by another's denial. That practice originated at a time when habeas corpus was a remedy for illegal detention not pursuant to a conviction for crime by a competent court. Bizarre results have been created by carrying forward that practice into the current context, where the writ and similar postconviction procedures are used as a means of reviewing completed trials and appeals.

While federalism and the need to give paramount effect to Federal law may justify some modification of the doctrine of res judicata insofar as Federal review of State criminal cases is concerned, there is little justification within a single court system for allowing the relitigation of any issue, constitutional or otherwise. If a State court already has adjudicated the matter, a court of that same State need not afford a second adjudication. If in a Federal prosecution an issue has been litigated and decided, justice does not require a second litigation over the same issue in the Federal courts. Thus, while subparagraph 3 of Standard 6.5 provides, in the specified circumstances, for further review of constitutional claims, the availability of such review is here qualified; further review is precluded if the claim has been once adjudicated on its merits in the same court system. This is consistent with economy of judicial resources and with the interests in early finality to criminal convictions, and it preserves the defendant's opportunity for one full review of all his claims.

Standard 6.7. Further Review in State or Federal Court: Prior Factual Determinations

When a defendant seeks further review in either a State or a Federal court, claiming a constitutional violation in the exceptional circumstances described in subparagraph 3 of Standard 6.5, determinations of basic or historical facts previously made by either a trial or reviewing court, evidenced by written findings, should be conclusive, unless the defendant shows that there was a constitutional violation that undermined the integrity of the factfinding process.

Commentary

The possibility in current postconviction practice of relitigating factual matters underlying alleged constitutional violations is another aspect of the failure of courts to apply general concepts of res judicata in criminal litigation. The interests of justice require that a defendant have an opportunity to litigate, through trial and review, every material factual issue. But once a defendant has had a constitutionally adequate determination and review of a factual issue, the interests in finality and economy of judicial resources outweigh any interest he may claim in further litigation of the issue. This is true even if the fact be one that is determinative of a constitutional right.

Here, unlike Standard 6.6, a State court determination would be conclusive on further review in a Federal court as well as in a State court. But the conclusiveness is limited to determinations of basic or historical facts such as the date on which the defendant was taken into custody, whether he was given any warnings, how many hours he was held in custody, and similar matters. (See *Brown* v. *Allen*, 344 U.S. 443, 506-08 (1953) (concurring opinion).)

A State court determination would not be conclusive of matters that might loosely be called constitutional facts, such as whether, given the basic or historical facts as found by the State court, a confession was voluntary. Nor, would a prior State determination of a question of Federal constitutional interpretation foreclose a Federal court from deciding such an issue if the circumstances set out in Standard 6.5 governing the availability of further review were present. It would not be desirable, and probably not constitutional, to foreclose a State decision on a Federal constitutional claim from all Federal judicial review, and these standards do not purport to do so.

However, it is desirable to treat underlying factual issues—the historical or basic facts—as settled for all purposes, once they have been tried and reviewed in a constitutionally valid proceeding in any court.

The standard places one qualification on the conclusiveness of factual determinations: they will not be conclusive if the defendant can show that there was a constitutional violation that undermined the integrity of the factfinding process. An example of such a violation would be the denial of counsel in the proceedings where the facts were tried or reviewed. The underlying principle is that a defendant can be held bound by a factual determination only if the determination was constitutionally adequate at both the trial and review levels. If the proceeding measures up to that standard, all courts, Federal and State, should treat its results as final.

This standard is substantially in accord with existing Federal habeas corpus law as it appears in 28 U.S.C. § 2254(d), which in turn is more or less a codification of *Townsend* v. *Sain*, 372 U.S. 293 (1963). But it is not clear that all of the detailed conditions imposed by that statute on State factfinding are required by the Constitution. Under this standard a court on further review is required to accept State court findings of basic or historical facts unless the defendant shows a constitutional violation of such a nature that it undermines the State process. The standard thus strengthens the conclusiveness of factual determinations beyond that which exists under current law.

Standard 6.8. Further Review in State or Federal Court: Claim Not Asserted Previously

When a defendant seeks further review in either a State or a Federal court, claiming a constitutional violation in the exceptional circumstances described in subparagraph 3 of Standard 6.5, the court should not adjudicate the merits of the claim if in the trial court or the review proceeding it was not adjudicated because it was expressly disclaimed by the defendant or his lawyer, or it was not asserted at any point, or it was not asserted in accordance with valid governing rules of procedure, unless the defendant establishes a justifiable basis for not regarding his prior actions related to the claim as foreclosing further review.

Commentary

Under current practices a collateral attack on a conviction is sometimes possible whether the defendant raised a constitutional objection in his trial and appeal or whether he failed to raise it there. Thus, all convictions are left in limbo; it cannot be predicted with certainty, on the basis of what occurred at trial and on appeal, whether any given conviction is final. Undisclosed constitutional defects may sometimes later be presented by the defendant to abort the conviction. Standard 6.8 seeks to remedy this situation where the defendant has been afforded an opportunity to litigate his claims in the course of trial or review, but did not do so. The thrust of the standard is that a defendant is barred in that circumstance from further review unless he shows a justifiable reason why he did not assert the claim.

There are three categories of situations in which claims will not have been asserted before further review is sought. First, the defendant or his lawyer may have expressly disclaimed the point. This may occur more often if the unified review proceeding embodied in these standards is adopted, because the reviewing court would probe affirmatively for possible constitutional defects in the trial proceeding by directing inquiries to the defense lawyer and the defendant. In most cases that procedure would elicit express disclaimers as to some issues. Second, the defendant may simply not have raised the point at all during the trial or on review, even though he did not expressly disclaim it. Third, the defendant may have attempted to raise the point but, under the applicable procedural rules, his attempt was at the wrong time or in the wrong manner.

State Procedure

Under present Federal habeas corpus law, regardless of what happened earlier, a constitutional claim remains open for review unless the State can establish that the defendant deliberately bypassed State procedure. This is a burden that is difficult for the prosecution to meet as a practical matter. Where failure to raise a point does not amount to deliberately bypassing State procedure, the case law is vague as to whether the defendant himself must make an express decision not to assert the point, or whether his lawyer's decision not to raise the matter constitutes a deliberate bypass. Experience suggests that the existing situation downgrades orderly procedure at too great an expense to finality. This standard seeks to strike a sounder balance with no diminution in fairness to the defendant.

The standard does not absolutely foreclose further review of a constitutional claim (in the circumstances specified in subparagraph 3 of Standard 6.5) if it has not been litigated during trial or review. The defendant can obtain further review if he can show a justifiable reason for his previous failure to litigate the issue. The burden is on the defendant. The standard does not attempt to define justifiable reason. The possibilities are so varied that this is best left to the courts to resolve as the issue arises. Examples of what might be justifiable reasons for not asserting points at the proper time are lack of counsel or a reasonable misunderstanding as to the applicable procedure. Where there has been an express disclaimer the burden on the defendant will be heavier; this is appropriate since a party generally should not be allowed to renounce a contention at one point and revive it later.

There is a further qualification on foreclosure in the situation where the defendant has made an effort to obtain an adjudication of his claim but the court declined to pass on it because it was not properly asserted under the procedural rules. The standard requires that further review be foreclosed only if those procedural rules are valid. This means that if a procedural rule a court relied on in declining to adjudicate a claim is itself in violation of due process or any other constitutional provision, the claim remains open for review. Under existing law a State rule of procedure applied to shut off a Federal constitutional claim may be invalid, for

example, if it is an arbitrary rule, if it was invented for the case at hand, or if it unreasonably impedes assertion of the Federal claim. This existing body of law would be applicable under this standard to determine the validity of State procedural rules.

Restrictions

The Commission believes that the restrictions this standard would impose upon the presently available equivalent of further review are justified. The scope of existing postconviction practice, especially Federal habeas corpus, implies a distrust of defense lawyers and of State trial judges. In previous years, there may have been some justifiable basis for leaving open for review indefinitely, in the widest possible scope, all potential constitutional defects in a State criminal proceeding. Many jurisdictions did not provide counsel for indigent defendants. Little attention was given, in the bar and in law schools, to criminal practice. Educational programs for judges were in their infancy.

All this has changed substantially in recent years. Counsel must now be provided for all defendants in felony cases and many or most misdemeanor prosecutions. Law schools have begun to devote substantial teaching and research resources to the criminal field. Continuing legal education programs for lawyers have become widespread on State, regional, and national bases, and they regularly include training in criminal law and procedure. Well-staffed public defender offices now exist in many places. The National Defender Project did much to increase competence and interest among the bar in criminal defense work. Bar committees now give substantial attention to the subject.

Similar developments have improved the judiciary. The National College of the State Judiciary was established in 1964. More than 1,700 State trial judges have taken its monthlong residence course, and the college has reached many others through short courses. The American Academy for Judicial Education likewise is conducting substantial educational programs for trial and appellate judges. The Section of Judicial Administration of the American Bar Association has many activities aimed at raising the quality of the trial and appellate bench. These judicial education enterprises address themselves to criminal law and practice as well as other subjects.

In short, the conditions that earlier might have justified a lack of confidence in the State bench and bar have changed substantially. There is no longer justification for basing the whole system of review of criminal convictions upon the assumption that lawyers and judges are not doing their jobs, especially when such a review system erodes finality so extensively and introduces as much fragmentation, delay, and uncertainty into criminal proceedings as the present system does.

These standards, therefore, rest on the opposite premise that in general lawyers and judges are competent and will assure that defendants' rights are fairly litigated and protected. Only where the facts show that this premise is incorrect—where the prior litigation does not comply with constitutional requirements or where a claim was not raised for a justifiable reason—would the burdensome procedure of further review become available.

Dissenting Views

STATEMENT OF MR. STANLEY C. VAN NESS

I dissent from the Report on Courts on the subject of "Review" and from that portion of the report treating "The Litigated Case" that recommends six-member juries in criminal cases. It is only fitting that I state my reasons for doing so.

Review

The basic objective of the majority proposal on "Review" is that there should be a single unified review proceeding where all arguable trial defects can be raised at one time and that thereafter a defendant's opportunity to test the validity of his conviction through subsequent direct appeal and/or collateral attack should be sharply curtailed. The reason given to support this radical departure from traditional appellate practice is that the adoption of the proposed standards would reduce the backlog that plagues almost every appellate court in the country. I have tried in vain to understand how the proposals accomplish in any significant way their stated purpose.

As the administrative head of a State agency charged with the responsibility of representing indigents accused of crime (some 32,000 persons in fiscal 1972), I am ever mindful of the backlog in our trial and appellate courts and I am interested in any reasonable response to the problem that would insure fairness to the accused. Putting aside for the moment the question of fairness, the fact remains that should the Courts Task Force standards be implemented in New Jersey, they would have minimal impact. Of the 11,792 appeals filed in New Jersey from September 1, 1967, through June 30, 1972, only 4 percent involved collateral attacks on criminal convictions. Of the 42,680 active cases pending in the trial courts at the end of June 1972, only 0.15 percent were collateral attacks on criminal convictions.

The activity in the Federal courts basically mirrors the experience in New Jersey. Keeping in mind that the Federal courts receive petitions from all 50 States, it is significant that only 8.5 percent of the total appeals docketed in the courts of appeals between July 1, 1971, and December 31, 1971, involved collateral litigation. During the same period only 5.4 percent of the 70,067 cases commenced in the United States district courts were habeas corpus petitions from State petitioners, the vast majority of which were disposed of on the papers with a minimal expenditure of judicial time.

Thus, it appears to me that the unified review proposals cannot be justified on the basis that they offer any meaningful reduction in judicial backlogs. Since one of the proposals calls for an automatic review of sentences—a result that I feel is justified regardless of calendar problems—it may well be argued that the number of appeals filed will increase, not decrease.

Before I could consider approving standards that limit the availability of the writ of habeas corpus and that in large measure remove the Federal courts from the business of determining Federal Constitution questions arising out of criminal cases, as these standards do, I would wish to see a clearer presentation of the benefits to be derived than I believe has yet been made.

It should be noted that the foreclosure of collateral attack on convictions can lead to the stagnation of development in the criminal law. Clearly, many of the landmark decisions in the criminal law field started via the collateral route. It may be that the majority finds that restricting this possibility is a benefit to be found in the proposed statutes. Certainly much of the discussion about finality suggested that such was the case. I, however, do not favor procedures that would hamper the ordinary growth of constitutional law.

Finally, I consider the proposed standards to be potentially unfair to the criminally accused—largely the poor and members of minority groups. The plain intent of the standards is to make it more difficult for a person to challenge the validity of a conviction by narrowing the possibility of constitutional attack upon that conviction. I am not satisfied that a single unified review, placing as it does heavy reliance upon an appellate staff to perform the almost impossible job of locating error that does not appear of record and that lays heavy emphasis on the doctrine of waiver, is an adequate substitute for present direct and collateral avenues of review.

Although the section on "Review" contains certain valuable suggestions to expedite the handling of appeals, such as an appellate staff to screen and monitor appeals and the use of computer techniques for the preparation of transcripts, they are offered only in the context of the single unified proceeding. It is that concept that I find unacceptable and therefore I am constrained to dissent from the adoption of the entire section.

Judge Clement F. Haynsworth, Jr., Improving The Handling of Criminal Cases In The Federal Appellate System, 59 Cornell L. Rev. 597, 607-609 (1974):

The report of the National Advisory Commission contemplates a greatly expedited and expanded direct review procedure for the initial reviewing court in the federal and state systems. * * * After the first appellate court's comprehensive review of all issues apparent on the record or made apparent by subsequent motion or inquiry, subsequent review would be sharply curtailed under the Commission's recommendations. Subsequent review would be allowed in those instances where: (1) an appellate court finds that the public interest in the development of the law or in the maintenance of uniformity would be served by a further hearing, (2) the defendant claims newly discovered evidence raises substantial doubt about his guilt, or (3) the defendant claims a constitutional violation which, if true, would undermine the integrity of the trial or review proceeding, or impair the reliability of the fact-finding process.

In addition to these proposals relating to proceedings within a single judicial system, the Commission also addressed itself to federal review of federal claims arising in state court prosecutions. In its Standard 6.5, the Commission suggests that any federal review of state court convictions should be in the federal courts of appeals. Seemingly, this procedure is intended to apply only to collateral attacks because in its Commentary following the Standard, the Commission states that (subject to the limitations outlined above) subsequent review of state convictions may occur "in the U.S. Supreme Court, or in any other Federal court designated by Congress for that purpose".

The recommendations of the Commission insofar as they are directed to swift and comprehensive review--patterned substantially after the English model--are thoroughly commendable and also fully compatible with my proposal of a national court of appeals. I agree generally with the Commission's effort to cut off collateral proceedings following the comprehensive initial review it contemplates but I am disturbed about the limitations it would place upon federal review of federal claims arising in a state court prosecution. * * *

I infer from the reference to "any other Federal court designated by Congress" that the Commission contemplated the possibility that Congress might create a national court of appeals to serve that purpose. If a national court is created and given a discretionary jurisdiction, however, it ought not be required to make preliminary determinations and findings before it can exercise its discretionary jurisdiction. A grant of certiorari may imply that the court, or a substantial minority thereof thinks that the case presents issues substantially meeting the standards of the Commission's proposal. But neither the national court nor the Supreme Court ought to be required to explain its grant of certiorari or to justify it with preliminary determinations of matters which may be debatable.

As long as we are primarily dependent upon collateral proceedings for federal review of federal questions in state court proceedings (as we now are) I would deplore the recommendation which would limit such review to the federal courts of appeals. The courts of appeals have more than enough to do now, even when, as in many cases, they are tremendously assisted by full opinions prepared by district judges. If collateral review is subject to the expressed limitations--and apparently it is--then federal review of claims such as unlawful search and seizure seem unduly restrictive. I am firmly convinced, of course, of the necessity for federal review, at some point, of federal claims. It will be much better if federal review can be accomplished directly through a national court of appeals; but until this is provided, I would not favor restrictions upon such review in the lower federal courts.

Paul H. Robinson, Proposal and Analysis of a Unitary System for Review of Criminal Judgments, 54 B.U.L. Rev. 485 (1974) offers a model for a unitary system of review that differs in several respects from the National Advisory Commission's proposal. One major difference lies in the allocation of responsibility for development and initial resolution of issues. The key to the proposed unitary system is the "post-judgment" hearing before the sentencing court which occurs shortly after trial. At this hearing, the defendant may present "any claim whatsoever, [including] those claims currently reviewable on direct and collateral attack, as well as claims often presented

upon a motion for new trial or a motion for review of sentence". The post judgment hearing is not compulsory. Defendant may choose to appeal his conviction. If he does request a hearing, he may subsequently appeal both these claims denied at the hearing and claims for which the hearing was not needed. The hearing plus the combined appeal therefor would replace all post conviction review procedures. Issues not raised at the hearing are lost unless the defendant "presents facts not previously available or law most previously in operation and retroactive in operation".

The author stresses reliance upon the trial level hearing rather than initial appellate level consideration: "The trial court, instead of an appellate court, is selected as the site for the hearing for a number of reasons. This allows attorneys and witnesses at trial to more easily appear at the post-judgment hearing. Similarly, evidence and witnesses pertaining to the crime, whether presented at trial or not, should be more available. Additionally, the convicted defendant can be held in jail for the 25 days or so until the hearing--instead of being transported back from prison less than a month after his incarceration. Note that the elimination of this transportation process may also eliminate an undesirable source of motivation for filing claims".

The author also notes one other distinction in allocation of responsibilities: "[U]nder the Commission's approach, the presiding judge of the review hearing is under an affirmative duty to probe for any defects in the conviction. While such a duty may have some advantages, it is not embodied in the proposal here. Such a duty might well give rise to endless post-conviction litigation over the adequacy of performance in each particular case, a result which would undermine the finality which unitary review might otherwise establish. But more importantly, there appears to be nothing inherent in the review of collateral claims which would logically require such a dramatic shift from the dependence upon the adversary process present at trial and on subsequent appeal".

(3) A National Court of Appeals

Judge Clement F. Haynsworth, Jr., A New Court to Improve the Administration of Justice, 59 A.B.A.J. 841 (1973).

SINCE *Fay* v. *Noia*, 372 U.S. 391 (1963), use of the writ of habeas corpus has been the primary vehicle for federal review of federal questions arising in connection with state court convictions. Now, after the considerable experience of ten years, the time has come to admit our failures and the high costs of our small successes. I propose that we abandon primary reliance on collateral proceedings, set up an efficient system of direct review, and limit collateral review to questions that cannot be reached on direct review. * * *

Historically, habeas corpus was unavailable to question a conviction in a court having jurisdiction to try the defendant. Direct review of constitutional issues in those cases could be had in the Supreme Court, but in *Fay* v. *Noia* the Court frankly acknowledged that applications to review state convictions were overtaxing its resources. To provide continuing federal review of such questions, following a few earlier straws in the wind, in that and later cases the Court undertook a transformation of habeas corpus into a mechanism for collateral review of constitutional issues. It thus created a new method of review, and it directed primary reliance on it.

The federal writ of habeas corpus has been adapted for meaningful review of federal questions, and most of the technical impediments have been eliminated. The states have been spurred to greater attention to federal claims, and the quality of their disposition of them has been enhanced. Federal interpretation of federal constitutional rights has achieved some consistency without stifling evolution. All of this seems to be a good harvest from the seed of *Fay* v. *Noia*, but there are still imperfections and there have been heavy costs. It remains an imperfect instrument for the substantive consideration of constitutional claims.

First, when direct proceedings in the state court are completed and the defendant has been committed to prison, he usually loses contact with his lawyer. In most instances the lawyer was appointed in the direct proceedings and, with some exceptions, he recognizes no continuing obligation to represent his client in post-conviction proceedings. The prisoner is left to his own resources, which are meager. The district court is authorized to appoint counsel for an applicant for habeas corpus relief, but it does not do so until the applicant gets his foot in the courthouse door by filing a petition that facially merits consideration. In the overwhelming majority of cases, the prisoner has no real professional help until, without it, he has managed to state a claim which, on its face, entitles him to relief.

Second, there is no requirement that claims be developed and pressed promptly. When the Supreme Court turned to collateral proceedings as the preferred method of review, it necessarily foreclosed any application of the principle of res judicata or anything in the nature of a statute of limitations or the equitable doctrine of laches. A habeas corpus claim is never stale or foreclosed by earlier petitions so long as the applicant is still serving the sentence he seeks to attack or is suffering recognized burdens from it, provided the same claim has not been asserted and considered on its merits on a previous petition.

Stale Claims and Repetitiousness Abound

Stale claims may pose substantial difficulties. Prisoners serving life terms or long sentences attack convictions twenty years old and more. If factual issues are created, transcripts may be unavailable and the judge, lawyers, or reporter, or several of them may be dead. At best, to the extent that records are unavailable for the resolution of the factual issues, the recollections of participants in the proceedings will be dim.

The most wasteful consequence of the inapplicability of the principles of res judicata, however, is the growing repetitiousness of petitions from individual prisoners. I

recently participated in the review of an order of a district court in which the judge painstakingly analyzed eighteen previous petitions in order to determine whether there was anything new, requiring his attention on the merits, in the nineteenth from the same prisoner. A hasty sampling of pending cases in the Court of Appeals for the Fourth Circuit discloses a number of appeals by prisoners who have filed fifteen petitions and still more by prisoners who have filed as many as ten.***

The great volume of cases in the district courts and courts of appeals constitutes a very substantial burden on the entire federal system. Those cases on the average require much less judicial time than antitrust and certain other classes of cases, but the weight of the burden they collectively place on the system is undeniable.

Waste Is a Part of Our Present System

In most instances we seek to avoid waste, but waste is a requisite of our present method of reviewing state court convictions. The exhaustion of remedies requirement compels the prisoner to litigate his claim through the state courts to its highest court. He then starts anew in a federal district court, from which he may then appeal to the court of appeals and later seek certiorari in the Supreme Court. If he is to obtain federal consideration of his federal claim, he must litigate the claim at least twice. Some years ago we would have thought this intolerable, and I submit we would think so now if we recognized any effective alternative to the present arrangement for federal review of federal claims in state court convictions.

The state court systems have been burdened also. After 1963 they were strongly encouraged to expand their postconviction procedures, and they responded. State courts now devote a considerable proportion of their time to the processing of postconviction claims, even though it frequently is only a prelude to the prosecution of the same claims in the lower federal courts.

In the beginning I thought that whatever burdens were cast on the courts by the new system of federal review and whatever frictions it created between the separate judicial systems, it would be advantageous to the prison population. I was greatly concerned about the frustrations of a prisoner who felt that his constitutional rights had been denied but who was without a remedy to assert his claim. I feel no less strongly now that he should have an effective remedy, but I have become convinced that our present system has created many more frustrations than it has alleviated. Too many prisoners, clinging to hopes of judicial release, are forgoing opportunities for rehabilitation, and the disappointment of forlorn hopes engendered by jailhouse lawyers leaves too many prisoners with senses of outrage, frustration, and alienation. We have not served the best interests of the prison population.***

Benefits from the system are all too few to begin to warrant the high price we pay, unless, of course, there is simply no other reasonable alternative by which meaningful federal review of federal questions in criminal convictions may be provided. There is an alternative.

National Court Would Have Limited Jurisdiction

I propose the creation by the Congress of a national court of appeals having jurisdiction to review on writs of certiorari federal question issues in convictions in the state and federal systems and in all postconviction proceedings in those systems in which a conviction or a sentence is called into question.

While the court would be one of limited jurisdiction, it would be working in a fascinating field. It would have a golden opportunity to implement a system of federal review that would be orderly, rational, progressive, and economical in replacement of one that borders on the chaotic. It would serve a highly desirable unifying function in an area in which there is much room for constructive innovation. There would be added attractiveness to positions on the court if the members were given the title of justice and compensated at a level well above that of federal circuit judges.

Court Should Have Nine Members

I suggest that the court be composed of nine members. With that number and an adequate supporting staff, I am confident it could properly process and screen all petitions for certiorari coming to it and hear, consider, and deliberately decide all cases deserving to be heard. The court should be authorized to sit in panels of three with a provision for *en banc* hearing or rehearing on the vote of a majority of the members. This, while a high court, would still be an inferior one. Any error of any panel of three would be correctible by the *en banc* court or by the Supreme Court.

While heretofore attention has been directed principally to the problems of processing state prisoner petitions, the new court should have certiorari jurisdiction over all federal convictions and federal prisoner postconviction claims, for the court would serve a unifying purpose, assuring that the same constitutional standards are applied and enforced in each of the federal circuits and in each of the state court systems.

The court should have the power to remand a case for supplementation of the record, including the receipt of additional testimony, and for new or additional findings of fact. Usually the remand would be to the court from which the case came, but there might be discretionary authority to remand a case to a federal district judge acting as special master. Otherwise, its authority to direct further proceedings in the lower courts should be as plenary as the Supreme Court's.

Reserve Supreme Court's Overlordship

There should be adequate provision to preserve the Supreme Court's power of supervision and its overlordship. That would be accomplished if provision were made for petitions to the Supreme Court for certiorari when (1) the new court decided the case on its merits, and (2) certiorari was denied by the new court but one or more of its members expressed the opinion that certiorari should be granted. I would cut off the right to apply to the Supreme Court for certiorari to any petitioner who did not get a single affirmative vote in the new court. Rejected cases of that category are the chaff with which the Supreme Court should not be burdened by formal petitions. I cannot believe that any petitioner who fails to get at least one affirmative vote in the new court could reasonably expect to get four affirmative votes in the Supreme Court. This should not foreclose the use of screening panels provided the panels are instructed to pass on to the full court a petition if its merit or lack of merit is reasonably debatable.

On the remote possibility that there might be a case with merit despite its failure to get a single affirmative vote in the new court, I would give the Supreme Court power on its own motion to issue its writ to the new court or to the lower court from which the case came. With the assistance of a small central staff in the Supreme Court, the certiorari docket in the new court could be monitored as closely as any justice of the Supreme Court wished. If some of the justices of the Supreme Court felt a need to reconsider one of their decisions, for instance, and the new court unanimously denied certiorari in a case apparently appropriate for that purpose, the action of the new court would not cut off either the Supreme Court's power or its opportunity to take the case for decision in the Supreme Court.

To the extent that it would deny a litigant the right to petition the Supreme Court for certiorari after a unanimous denial of certiorari by the new court, the new court would serve a screening function for the Supreme Court, but a provision that permits the Supreme Court to keep itself informed and to act on its own motion should assure that, in all cases, there is but one Supreme Court and that its supervision and control in the development and application of the law would be preserved.

With the establishment of this avenue of direct review of federal questions, I suggest that the federal writ of habeas corpus and motions under 28 U.S.C. § 2255 be limited to claims that were not and could not have been presented to and considered by the new court on direct review. Typical cases of this character would be those in which a guilty plea was induced by an unfulfilled promise or in which a prisoner's representation by counsel in direct proceedings was inadequate in a constitutional sense.

Keep Collateral Review in Another Class of Cases

Collateral review should also be available in another class of cases—those in which direct review in the new court is circumvented or substantially impeded by the presence of "an independent and adequate state ground," such as the lawyer's one-day default which defeated the Daniels claim in *Brown* v. *Allen*, 344 U.S. 443 (1953). In *Fay* v. *Noia* it was decided that the assertion of constitutional claims could not be foreclosed by technical defaults or omissions of counsel for a defendant or one accused of crime. I would fully preserve that rule, although with *Fay* v. *Noia's* stated exception of a deliberate and unreasonable bypass. The exception would include the case of failure to object to the admission of evidence, such as a largely exculpatory statement, if it appeared that the failure to object was the product of a calculated tactical

decision and not of ignorance or ineptitude.

Although the federal writ of habeas corpus would be available to a state prisoner under these circumstances, the requirement that he avail himself of state remedies should be retained. If state remedies are open and available, the defendant could reach the new court through that route. He would then have no right to file a petition in a district court. Since the states would be expected to preserve their postconviction remedies, adoption of this proposal would remove substantially all state prisoner cases from the lower federal courts.

Moreover, I would limit each prisoner to one postconviction petition in the federal courts. If that were done, fairness would require that he be promptly supplied with counsel whether or not a *pro se* petition facially stated a claim for relief when filed. The purpose of the limitation is to assure that every claim of possible merit is brought forth, but the prisoner cannot be expected to do that without the assistance of competent counsel. Deficiencies in a *pro se* petition cannot warrant a confident conclusion that the prisoner has no claim of merit.* * *

Federal Review Would Be More Prompt

The new court should be in a position to provide thorough federal review more readily and more promptly than is provided by the present system. A defendant could go directly from the highest court of a state to a federal court with the authority and resources to hear and determine his claim, without the delays of postconviction proceedings through the lower federal system. It might be done efficiently by a court whose authority would be entitled to general respect and acceptance. If he was free on bail pending the direct proceedings, a defendant should remain at large pending the decision of the new court. Under the present system a state prisoner usually is put to service of his sentence before he has an opportunity to seek federal review of his claim.

The proposal will reduce applications for certiorari to the Supreme Court. In lieu of all the many petitions it now gets for direct review of convictions and for review of collateral proceedings, it would get only petitions to review a comparative handful of cases from the new court. If they ran to two hundred or more a year, this would represent a substantial reduction, and the Supreme Court would have the benefit of the new court's consideration of each case.

The proposal also would remove substantially all of the state prisoner cases from the lower federal courts and reduce the number of Section 2255 proceedings. It would reduce the number of postconviction cases in the state judicial systems, as there would be primary dependence on direct review and repetitious and successive petitions could be foreclosed. Altogether, therefore, the new court would provide substantial relief to the lower federal and state courts and considerable relief to the Supreme Court as well.

It would remove a source of friction between parallel judicial systems and largely eliminate the inordinate waste of time and resources so characteristic of our present method of federal review.

Now a state prisoner's access to the Supreme Court is greatly restricted. If he has any reasonable hope of getting there, the likely way will be the route of federal habeas corpus. If my proposal is adopted, he will have immediate and unrestricted access to a national, unifying court empowered and with the resources to determine his federal claim. If his claim arguably deserves consideration in the new court, he will have access to the Supreme Court without the duplicating litigation in the lower federal courts that now must precede a petition to the Supreme Court.

In short, under this proposal a state prisoner may obtain authoritative and final federal adjudication of his federal claim more promptly than under our present procedures, with fewer procedural limitations and restrictions in reaching the Supreme Court and with a much lightened burden of litigation.

Prison Inmates Might Be Heard

I have concentrated attention on postconviction cases in which the petitioner seeks relief from a sentence, for it is those that have created the problem. There is a demonstrated need for prompt, effective, and considered federal review of federal questions arising in those cases. The new court, however, well might be given jurisdiction to review the growing number of other cases brought by prison inmates. These involve a wide miscellany of claims growing out of disciplinary proceedings, solitary confinement, medical treatment, diets, and limitations of correspondence. If direct review of these cases were vested in this new national court, it might be possible to amend the statutes to require state prisoners to resort to state remedies and involve the state courts in the judicial supervision of state institutions and the kind of prison reform that emerges from adjudication of cases in this area.

Justice Ralph M. Holman, Multiple Post-Trial Litigation in Criminal Cases, 19 DePaul L. Rev. 490. 493 (1970):

> When almost every convicted defendant is going to avail himself of his complete post-trial rights regardless of the merit of his case, does it make sense to run the litigation through two different court systems? What happens in the state system after conviction in the trial court is, in most instances, relatively unimportant, because almost every facet of the case involves a federal constitutional question and therefore is going to have complete federal review. If complete federal review is the rule regardless of whether state review has been had, we cannot justify the maintenance of state post-trial litigation, appellate or otherwise. It is true that state review sometimes results in the invalidation of convictions, thus terminating post-trial litigation without resort to the federal courts. However, we must presume that these convictions would also have been invalidated had their review gone directly to the federal system from the state trial court. At the present time, the real Supreme Court of Oregon for criminal litigation is the Federal District Court or the Circuit Court of Appeals for the Ninth Circuit.
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> I suggest that if the defendant asserts a deprivation of a federal constitutional right in his appeal, or by any other post-trial means, the appeal or other litigation should go in the first instance directly into the federal system. The question immediately presents itself: how will questions of non-constitutional consequence be decided which are present in the same case? The answer is that federal courts will decide them in accordance with state law as they do in many civil cases.

Judge Henry J. Friendly, on Is Innocence Irrelevant? Collateral Attack on Criminal Judgment, 38 U.Chicago L. Rev. 142, 166 (1970) suggested the possibility of routing "appeals from state criminal decisions, whether on direct or collateral attack, to a federal appellate tribunal--either the appropriate court of appeals or a newly created court and precluding "federal habeas corpus as to issues for which that remedy is available". With respect to the appropriate composition of the

federal appellate court, Judge Friendly noted: "One argument against utilizing the existing courts of appeals is that they are already overburdened. But many of the cases that would come to them under this proposal reach them now in federal habeas, either on applications for certificates of probable cause or for full-dress argument when such certificates have been granted. Considerations in favor of utilizing the existing courts are their geographical convenience, their greater knowledge of relevant state procedures and the quality of particular state judges, the difficulty in manning a specialized court, and the historic prejudice against tribunals of specialized jurisdiction. On the other side are the possibly greater acceptability of review by a 'super court' to the highest courts of the states, and the uniformity that would result from review by such a court". 38 U. Chi. L. Rev. 166, fn. 127.

On the matter of greater acceptability, Judge Friendly, noted: "[S]ome judges with whom I have discussed this believe that the highest state courts would find it even more offensive to have their constitutional decisions reviewed by the existing federal courts of appeals, if so, this might argue that a new 'super court' would be preferable if this procedure is to be used at all". 38 U. Chi. L. Rev. 167, fn. 130.

Judge Friendly's article indicated a preference for Congressional amendment of 28 U.S.C. 2241, etc., a position more fully stated below.

Judge Henry J. Friendly, Averting the Flood by Lessening the Flow, 59 Cornell L. Rev. 634, 636-640 (1974):

> Chief Judge Haynsworth has put forward a thoughtful proposal for a National Court of Criminal Appeals having certiorari jurisdiction over all federal criminal appeals and all state criminal appeals raising a federal question. The principal way in which this would relieve the courts of appeals would be by decreasing the volume of applications to the district courts for postconviction relief by federal prisoners under 28 U.S.C. § 2255 and by state prisoners under 28 U.S.C. § 2254, and consequently of appeals from decisions rendered thereon, through foreclosing all claims that were or could have been presented to the National Court on direct review. Judge Haynsworth has now added the review of all decisions on claims of state and federal prisoners attacking prison conditions. The details of this added proposal are not altogether clear to me. In any event it is plain that Judge Haynsworth's chief concern is to develop a better solution for the problem of collateral attack. Agreeing that the present situation is unacceptable, I think there are more direct and less complicated means for dealing with this problem.

A minor step, aimed solely at the appeals problem, would be to provide that appeals in such cases can be taken only when a certificate of probable cause has been issued by the court of appeals. However, a more fundamental change is demanded and has been proposed. A bill, introduced by Senators Hruska and Scott in the second session of the last Congress and reintroduced in this one, would limit collateral attack to cases where the claimed constitutional violation was not and could not have been previously raised and where the violation "is of a right which has as its primary purpose the protection of the reliability of either the factfinding process at the trial or the appellate process on appeal from the judgment of conviction," and "the petitioner shows that a different result would probably have obtained if such constitutional violation had not occurred."a/

In view of the interest which had been taken in this proposal by Senator Ervin, Chairman of the Subcommittee of the Judiciary on Constitutional Rights, I have no doubt that it would have already been the subject of hearings in the present Congress but for the fact that Senator Ervin has had other preoccupations. The delay may well result in Congress having an even better bill to consider. At its September 1973 meeting, the Judicial Conference of the United States received a report of its Special Committee on Habeas Corpus which criticized the Hruska-Scott bill on various grounds and set out a number of alternatives. Some of the criticism seems to me to be valid; I now think the Hruska-Scott bill may have gone a bit too far in foreclosure, particularly when account is taken of the unhappily low level of the assistance of counsel in many cases. The Conference directed the Committee, which has the valuable assistance of Professor Frank Remington, to prepare a bill for consideration at the Conference's spring meeting, and I am confident it will be a good one. There is thus every reason to think that, at long last, collateral attack on criminal convictions is on the way to solution by well-considered legislation addressed directly to the problem, and there will be no need to create a new court for that purpose.

Once the problem of collateral attack is thus solved, the main benefit in Judge Haynsworth's proposal—apart from the recent addition of complaints concerning prison treatment, most of which do not seem to merit review by such an august tribunal—would be in relieving the case load of the Supreme Court, whose criminal jurisdiction would be limited to cases where the new court had granted certiorari and rendered a decision on the merits or where one or more of its judges had voted for certiorari. If, in fact, the Supreme Court is not now overburdened, as several Justices

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a) See the discussion at p. 6-48.

maintain, no sufficient justification exists. Indeed, even if the Court's burden is excessive or should become so, I would object to creation of the new court on two principal grounds.

The first is that it would interpose a new layer in the hierarchy, with consequent delay in the final disposition of those cases which the court took on for decision, or where at least one judge voted to do so.

My second objection is that while I am not at all opposed to specialized courts in principle, criminal law seems to me the last place for them.[15] The main arguments for specialized courts are the need for expertise and for prompt and authoritative determination of the law so that people can formulate their conduct accordingly. As will later appear, I find these arguments persuasive in two fields of federal law—patents and federal taxation. Neither argument applies to criminal law. Its concepts are readily within reach of any competent lawyer, even though, as has been the case with many federal judges, he has had little or no criminal practice. Furthermore, criminals do not plan their activity with an eye fixed on the Bill of Rights, the Federal Penal Code, or the rules of evidence applicable in criminal trials. While conflicts on such matters should ultimately be resolved, as they now are, the earliest possible resolution is not a matter of urgency. Moreover, I see actual detriments in a specialized court of criminal appeals. It is too likely to become dominated by hard-liners or soft-liners, more likely the former.[16] Bad as this would be in any event, it would be worse if the predominant mood of the new court differed from that of the Supreme Court. We would then see the frequent reversals that proved the undoing of the Commerce Court, in a field of law which is of far greater interest to citizens and carries a heavy emotional charge. Such confrontations could have an unhappy effect on the Supreme Court as well. When the Supreme Court reversed the National Court of Criminal Appeals, doubtless by a sharply divided vote and with vigorous dissents, there would be no general agreement that the Supreme Court was right and the National Court was wrong. It is one thing for the Supreme Court to reverse the highest court of Arizona, although that produced storm enough, and quite another for it to be frequently reversing a National Court of Criminal Appeals. When we reflect on the waves of protest that nearly engulfed the Court after some of its constitutional decisions in the criminal field in the late 1960's, we should impose a heavy burden of proof on a proposal that would entail the likelihood of confrontations with a prestigious National Court of Criminal Appeals. With the problem of collateral attack curable by direct means, Judge Haynsworth's proposal does not meet that test.

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[15] Perhaps anticipating this criticism, Judge Haynsworth proposed in his lecture that the new court should have the added job of hearing and determining, although without finality, civil cases referred by the Supreme Court. Reserving my general observations on this procedure for later discussion, I do not think the proposal meets the objection to a specialized criminal court. For one thing, with all the work Judge Haynsworth would give it, now including complaints on prison conditions, I do not see how the new court could accept additional burdens. On the other side, a court that might spend 90% of its time on criminal matters is scarcely the ideal tribunal to settle conflicts between circuits on, for example, the interpretation of the Federal Power Act or the scope of the class action.

[16] While the English Court of Criminal Appeals is a separate court, it does not have separate judges.

CHAPTER 7 EQUALIZING PUNISHMENT

A. PURPOSES OF SENTENCING REVIEW: THE GOAL OF EQUAL JUSTICE

STANDARDS RELATING TO CRIMINAL JUSTICE: APPELLATE REVIEW OF SENTENCING --PRINCIPLES*

Standards with Commentary

PART I. GENERAL PRINCIPLES

1.1 Principle of review.

(a) In principle, judicial review should be available for all sentences imposed in cases where provision is made for review of the conviction. This is specifically meant to include:

(i) review of a sentence imposed after a guilty plea or the equivalent, if the case is one in which review of the conviction would be available had the case gone to trial;

(ii) review of a sentence imposed by a trial judge, a trial jury, or the two in combination; and

(iii) review of a re-sentence in the same class of cases.

(b) Although review of every such sentence ought to be available, it is recognized that it may be desirable, at least for an initial experimental period, to place a reasonable limit on the length and kind of sentence that should be subject to review.

Commentary

a. Background: availability of review

While the number of jurisdictions in this country in which review of sentence is available is steadily growing, it appears that review of the merits of a sentence has actually been undertaken by an appellate court in only twenty-one states. The number in which review is realistically available in every serious case is much lower, something on the order of fifteen. In addition to the cases and statutes cited herein, see Mueller, *Penology on Appeal: Appellate Review of Legal but Excessive Sentences,* 15 VAND. L. REV. 671, 688-97 (1962).

*Prepared by Advisory Committee on Sentencing and Review, Simon E. Sobeloff, Chairman, and Peter W. Low, Reporter. Approved by House of Delegates in 1968.

There are, of course, many reasons why this situation exists. In the federal courts, for example, authority once existed by statute for sentence review as a part of the regular appellate process. But revision of the authorizing statute without mention of the subject led courts subsequently to hold that the power had been implicitly withdrawn. Thus, in spite of persuasive arguments that have been made to the contrary, the prevailing federal practice is for appellate courts to hold that they lack the power to review the merits of a sentence. See, *e.g.*, United States v. Martell, 335 F.2d 764, 767-68 (4th Cir. 1964); United States v. Rosenberg, 195 F.2d 583, 604-07 (2d Cir. 1952). See also Smith v. United States, 273 F.2d 462, 468-69 (10th Cir. 1959) (dissenting opinion); *Appellate Review of Sentences, A Symposium at the Judicial Conference of the United States Court of Appeals for the Second Circuit,* 32 F.R.D. 249, 310-11 (1962) (Letter from Congressman Celler); Comment, 109 U. PA. L. REV. 422 (1961).

Exactly why sentence review is unavailable in the large number of states that so hold is more difficult to ascertain. It is no surprise, of course, to see appellate courts insisting upon statutory authority before exercising such power. What is not so clear, however, and what must await an examination of the history of sentence review in more detail than can be undertaken here, is why the courts have been so reluctant to construe general authority to review criminal judgments as including authority over the sentence. The fact remains, in any event, that the common pattern has been for appellate courts to deny themselves such power in the absence of clear statutory authority. See Hall, *Reduction of Criminal Sentences on Appeal: I,* 37 COLUM. L. REV. 521, 522 (1937). For more recent examples, see State v. Wright, 261 N.C. 356, 134 S.E.2d 624 (1964); Mason v. State, 375 S.W.2d 916 (Tex. Crim. App. 1964); Michell v. State, 154 So. 2d 701 (Fla. App. 1963).

Statutory authority to review sentences has been specifically granted, in one form or another, in thirteen states and in the military courts. See Appendix A, *infra*. In addition, the courts of several states have rejected the more common attitude towards general review statutes and have for many years construed the power to "reverse, affirm or modify" a criminal judgment as including the power to review the merits of a sentence. See, *e.g.*, Bailey v. State, 381 S.W.2d 467, 474 (Ark. 1964); State v. Ledbetter, 83 Idaho 451, 364 P.2d 171 (1961); Hudson v. State, 399 P.2d 296 (Okla. Crim. App. 1965); Commonwealth v. Green, 396 Pa. 137, 151 A.2d 241 (1959), 108 U. PA. L. REV. 434 (1960) (capital cases only); Note, *Statutory Structures for Sentencing Felons to Prison,* 60 COLUM. L. REV. 1134, 1163 n.200 (1960). By a similar construction of general authority, New Jersey and Wisconsin have more recently been added to the list of states in which the sentencing judge no longer has exclusive control over the disposition following conviction. See State v. Johnson, 67 N.J. Super. 414, 170 A.2d 830 (App. Div. 1961); State v. Tuttle, 21 Wis. 2d 147, 124 N.W.2d 9 (1963).

b. Background: kind of case

Adoption of the principle of review of sentences involves at the same time a judgment about the kind of sentence that ought to be subject to review. There is wide variation among existing provisions. In general, they fall into three categories:

1. Limitations keyed to the length or type of sentence. In Massachusetts, any sentence to incarceration in the state prison is subject to review, together with any sentence of more than five years to the state reformatory for women. Connecticut allows review of sentences of one year or more in the state prison or the state prison for women, or any commitment to the state reformatory. All sentences involving a commitment to the state prison are reviewable in Maine. The new Maryland statute provides for review of any commitment for more than two years. See Appendix A, *infra*. Some eight bills have been introduced in Congress to provide for review of federal sentences. Two have proposed limiting review to sentences of incarceration for five years or more; the most recent proposal, introduced by Senator Hruska in October of 1965, provides for review of sentences to imprisonment for terms aggregating more than a year. See Appendix B, *infra*.

2. Limitations keyed to the type of proceeding for determining guilt or sentence. In Oregon, the statutes authorize review if the defendant has pleaded guilty, or if the sentence is imposed as the result of a multiple-offender proceeding. See Appendix A, *infra*. Review is not available, however, if the defendant has pleaded not guilty and gone to trial. See State v. Gust, 218 Ore. 498, 345 P.2d 808 (1959). In Tennessee, review has been held to be available if the judge assessed the sentence, but not if sentence was imposed by the jury. *Compare* Brooks v. State, 187 Tenn. 361, 215 S.W.2d 785 (1948), *with* Carroll v. State, 212 Tenn. 464, 370 S.W.2d 523 (1963). See also Commonwealth v. Williams, 402 Pa. 48, 166 A.2d 44 (1960). And in Iowa, it would violate the state constitution if the Supreme Court reviewed a death penalty assessed by the jury, while the power to review any type of non-jury sentence has long been established. See Appendix A, *infra;* State v. Brown, 253 Iowa 658, 113 N.W.2d 286 (1962); State v. O'Donnell, 176 Iowa 337, 157 N.W. 870 (1916). By way of contrast, the Oklahoma Court of Criminal Appeals quite commonly reviews sentences imposed by the jury. See, *e.g.*, Hudson v. State, 399 P.2d 296 (Okla. Crim. App. 1965); Henderson v. State, 385 P.2d 930 (Okla. Crim. App. 1963).

3. Limitations keyed to the general authority of the reviewing court. The statutes in Arizona, Hawaii, Illinois, Iowa, Nebraska, and New York are of this type. See Appendix A, *infra*. They vest in the regular appellate courts the power to reduce the sentence in any case over which the court otherwise has jurisdiction. In the courts of states like New Jersey and Oklahoma, which rely on general review statutes for their authority to reduce a sentence, the limitation on the kind of case in which such review is available is the same as the limitation on review of criminal cases in general. By far the largest number of states which now permit appellate review of sentences falls within this category.

c. Limitation based on type of proceeding at trial

Subsection (a) endorses the principle that review of the sentence should be available in every case in which provision is made for review of the conviction. It is also made clear in subsection (a) (i) that this is meant to include review of sentences imposed after a guilty plea. A limitation turning on whether guilt was determined by plea or by trial is thus rejected as unsound in principle. Rather, it is thought that the only proper source of a limit on the availability of review should be related

to the seriousness of the offense and the length and kind of sentence imposed. The basic premise underlying this position is that there is a general equivalence between the factors which lead to a decision to provide for an appeal of the conviction and the factors which support providing for review of the sentence. If a case would be serious enough to warrant review of a trial leading to conviction, in other words, it would in most cases be serious enough to warrant review of the sanction imposed.

For similar reasons, subsection (a)(ii) is designed to make it clear that the availability of sentence review should not turn on whether the judge or the jury determined the sentence to be imposed. While arguably the rationale that appellate courts sit to review trial judges and not trial juries should apply to this issue as well as guilt, such an approach ought not to be unthinkingly carried over to review of a jury decision on sentencing—indeed, such an extension in this context can lead to particularly serious consequences. Sentencing in each case by a different jury is a significant contributor to unfounded disparity between sentences. Insulation of a sentence imposed by a jury from review can only prevent any redress from this built-in disparity. There is thus all the more reason for judicial review in those cases where the jury participates in sentencing.* At least where the judge does the sentencing, some measure of uniformity in approach is assured by the fact that the sentencer does not change with *every* case.

d. Re-sentences

It is not always clear whether present reviewing courts are authorized to review a re-sentence imposed on a remand after the initial sentence has been set aside. See, *e.g.*, People v. Gerstenfeld, 14 App. Div. 2d 517, 217 N.Y.S.2d 152 (1961). The purpose of subsection (a)(iii) is to make it clear that the Advisory Committee would include review of re-sentences as well as review of the original sentence. This rests on the principle enunciated above that it should be the nature of the sentence rather than when or how it was imposed that governs the availability of review. There is also the practical point that an appellate court should have the power to assure compliance with its remand orders.

It also follows that re-sentences imposed on other occasions should be subject to review. This would include a re-sentence imposed after a successful collateral attack. See, *e.g.*, People v. Krzywosz, 23 App. Div. 2d 957, 259 N.Y.S.2d 970 (1965). Similarly, proceedings resulting in the modification of a prior suspension of sentence or release on probation should be subject to review. The Illinois statutes include a specific provision authorizing such review. See Appendix A, *infra*. See also, *e.g.*, People v. Hobbs, 56 Ill. App. 2d 93, 205 N.E.2d 503 (1965); People v. Freeman, 49 Ill. App. 2d 464, 200 N.E.2d 146 (1964).

e. Lesser sentences

One result of implementation of the Advisory Committee's recommendations will be that some relatively minor sentences will be subject to correction on appeal. This is a product of the view that the judgment supporting the availability of review of the sentence is closely related, if indeed not identical, to the judgment which supports the availability of review of the conviction itself. It is supported further by the fact that the sentence which is minor when compared to more serious sanctions is neither less likely to be excessive for that reason, nor necessarily of less importance to the particular defendant involved.

Most of the states in which review is now available agree with this conclusion. In each of the states in the third category mentioned in comment *b*, *supra*, the regular appellate courts have the authority to review the sentence in any case over which they otherwise have jurisdiction. And there have been not infrequent occasions for the use of such power in the relatively minor case. In New York, for example, a sentence was recently reduced from five days to time served (two days). People v. Corapi, 42 Misc. 2d 247, 247 N.Y.S.2d 609 (1964). The first case in which the Wisconsin Supreme Court held itself to have the power to re-examine a sentence involved a $150 fine for a speeding offense. See State v. Tuttle, 21 Wis. 2d 147, 124 N.W.2d 9 (1963). Compare State v. Alexander, 255 Iowa 656, 123 N.W.2d 407 (1963) (illegal sentence); State v. Williams, 255 Iowa 657, 123 N.W.2d 406 (1963) (illegal sentence). Because of the lack of judicial control over the length of felony sentences in Hawaii, review in that state is limited as a practical matter to the probation-incarceration decision and to the sentences imposed in misdemeanor cases. See, *e.g.*, State v. Kui Ching, 46 Hawaii 135, 376 P.2d 379 (1962); State v. Sacoco & Cuaresma, 45 Hawaii 288, 367 P.2d 11 (1961).

Review of the minor sentence is also available in England—in one sense, at least, on more favorable terms than review of more serious sentences. Leave of court is necessary before an appeal against sentence can be taken to the criminal division of the Court of Appeal, no matter how serious. On the other hand, there is an appeal as of right from the Magistrates' Courts to Quarter Sessions, no matter how trivial the sentence. See MEADOR REPORT, Appendix C, p. 113, *infra*. There is more striking irony in some jurisdictions in this country. In Florida, for example, it is quite clear that there is no review of sentences for misdemeanors and felonies. See, *e.g.*, Florida Real Estate Comm'n v. Rogers, 176 So. 2d 65, 67 (Fla. 1965); Michell v. State, 154 So. 2d 701 (Fla. App. 1963); Brown v. State, 152 Fla. 853, 13 So. 2d 458 (1943). Yet on appeal from a municipal court conviction for an ordinance violation, "the circuit court shall have power to lower the sentence imposed by the municipal court if in his discretion the same should be lowered." FLA. STATS. ANN. § 932.52(13) (Supp. 1966), Appendix A, *infra*. A somewhat comparable situation exists in Virginia. Sentence review is not available in felony cases. See Messer v. Commonwealth, 145 Va. 872, 134 S.E. 565 (1926), 13 VA. L. REV. 337 (1927). In misdemeanor cases, on the other hand, a trial de novo is available in a court of record following conviction in a municipal court. See VA. CODE ANN. § 16.1-132 (1950); BERRY, CRIMINAL PRACTICE IN MUNICIPAL AND COUNTY COURTS §§ 176-78, pp. 271-74 (1964). In effect, and perhaps most commonly, such provision for a trial de novo can be used to seek revision of a sentence thought unduly severe. See, *e.g.*, Hinckle v. State, 189 A.2d. 432, 434 (Del. 1963); State v. Mull, 30 N.J. 231, 152 A.2d 572 (1959); State v. Haynes, 78 N.J. Super. 60, 187 A.2d 383 (Essex County Ct. 1962).

While it may be that the apparent anomaly of such provisions can be defended in states where municipal courts are manned by part-time judges who lack the experience and training of their counterparts on courts of general jurisdiction, such solicitude for the minor sentence when the most severe sentences cannot be reviewed at the very least calls for a re-examination of the values served by review. In any event, it is the purpose here both to urge consistency in approach and to express the conclusion that as a matter of principle review of sentences should be available whenever review of the conviction is available.

f. Limitations on review

The Advisory Committee nevertheless recognizes that there may be practical reasons supporting the conclusion that some limit to review is necessary short of that to which principle seems to lead. Although the Committee's judgment is that such fears are unwarranted, one basis for this conclusion might be a fear that the appellate courts will otherwise be flooded with frivolous appeals. The Committee is firmly convinced that the principle of appellate review of sentences is more important than the precise limits that are placed upon it. For this reason, the Committee would support a desire to experiment with review of only the more serious sentences. If it then appears that such fears are unfounded, it will then be time enough to broaden the applicability of the review provision.

How such a limitation should be expressed involves two distinct judgments. The first relates to the kind of limitation which should be employed. For reasons expressed in comment *c*, *supra*, the Advisory Committee would recommend that any limitation should take the form of a limit on the length and kind of sentence to be subject to review, rather than a limit keyed to the type of proceeding by which guilt or the sentence was determined. The second issue relates to the quantum of the limitation. That there is room for disagreement on this point is reflected by the fact that the Committee itself could not agree on a specific figure. A majority felt that the limit should not exceed one year in jail. All agreed, however, that a limit in excess of five years in jail would defeat the realization of many legitimate objectives of sentence review.

*It should be noted that the Advisory Committee intends to take a position against jury participation in sentencing, with the possible exception of capital cases. To the extent that jury sentencing is nevertheless retained, the Committee is of the view that its sentence should be subject to revision on appeal.

1.2 Purposes of 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 protection of the public interest;

(ii) to facilitate the rehabilitation of the offender by affording him an opportunity to assert grievances he may have regarding his sentence;

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

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

Commentary

a. Background

The critics of those courts which now engage in appellate review of sentences are quick to point out that the power is often unwisely used. Particularly common are comments that the power is exercised in a manner which is of no significant guidance in determining the next sentence, and that the power is exercised in a manner which reflects no more than the substitution of one guess about the proper disposition for another. See generally Note, *Appellate Review of Primary Sentencing Decisions: A Connecticut Case Study,* 69 YALE L.J. 1453 (1960); Hall, *Reduction of Criminal Sentences on Appeal,* 37 COLUM. L. REV. 521, 762 (1937); MEADOR REPORT, Appendix C, pp. 126-27, *infra.* It is therefore desirable both that consideration be given to the objectives which are sought by a provision for sentence review and that steps be taken to impress upon reviewing courts the importance of exercising the granted power with these objectives in mind.

b. Excessive sentences

A sentence of a length which is neither necessary to protect the interests of the public nor useful in terms of the rehabilitation of the defendant can manifest itself in many ways. The most obvious example is the sentence which is clearly excessive on its face.

Instances of such excessive sentences can be multiplied. In United States v. Smaldone, 216 F.2d 891 (10th Cir. 1954), *rev'd per curiam,* 348 U.S. 961 (1955), one of the defendants received consecutive sentences totaling 170 years, 110 of which were suspended. In Smith v. United States, 273 F.2d 462 (10th Cir. 1959), the court noted its conclusion that a 52-year sentence was excessive for a first offender whose offense was not aggravated, but at the same time noted that it lacked power to do anything about it. In another case, this one from a state court, a young boy was given seven consecutive life terms for a series of offenses committed at the same time. State v. Oberst, 127 Kan. 412, 273 Pac. 490 (1929). Compare *Appellate Review of Sentences, A Symposium at the Judicial Conference of the United States Court of Appeals for the Second Circuit,* 32 F.R.D. 249, 269 (1962) (remarks of Judge Sobeloff).

Occasionally, such sentences come to the attention of the executive in the form of requests for clemency. In one such case, a twenty-year old man was blinded in an industrial accident, after which his wife divorced him and took custody of their two children. After he regained his sight, and in order to obtain money with which to try to get his family back, he robbed a bank of $5,000 at gunpoint. Shortly thereafter, he became remorseful and turned himself in. At his trial, he pleaded guilty, and even though he had never before been in trouble, he was sentenced to forty years at a time when the average sentence for bank robbers was something less than thirteen. See Kennedy, *Justice Is Found in the Hearts and Minds of Free Men,* FED. PROB., Dec. 1961, pp. 3, 4, 30 F.R.D. 401, 424-425 (1961). In another case, a respected lawyer and Purple-Heart veteran who had never before been in trouble was convicted of a conspiracy to smuggle parrots into this country from Mexico. The sentencing judge thought he was arrogant and rude, and sentenced him to eleven years. *Id.* at 4, 30 F.R.D. at 424. For a competing view of this case, see Brewster, *Appellate Review of Sentences,* 40 F.R.D. 79, 82-83 (1965).

To respond that the executive should have the obligation to filter out and correct such errors when they occur, or that granting the power to a court to reduce an excessive sentence interferes with the executive

pardoning power, misses the point. Executive clemency is, and should remain, for the highly exceptional case where the question is not one of excessiveness based on the ordinary factors affecting sentence, but where intervention of the executive is prompted by unusual public interests. That more mistakes occur in sentencing than can be corrected by this process is unfortunately clear. It is equally clear that as in every other phase of the law the judiciary should have both the power and the obligation to correct its own errors. In addition, as Judge Weigel of the Northern District of California has pointed out:

> The standards governing the wise use of Executive clemency are by no means the same standards which would be invoked to correct unjustified disparity in sentencing. Finally, there is no right to Executive clemency. The victim of a serious injustice ought to have a right to get it corrected.

Appellate Review of Sentences, Hearings on S. 2722 Before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 89th Cong., 2d Sess. 73 (1966). Compare Kennedy, *Justice Is Found in the Hearts and Minds of Free Men,* FED. PROB., Dec. 1961, pp. 3, 4, 30 F.R.D. 401, 424-425 (1961).

In addition to the examples cited above, excessiveness can manifest itself more indirectly. The sentence which lacks any affirmative basis and the sentence dictated by emotion are potential examples. It is only by coincidence that such a sentence proves not to be excessive. It is thus clear that review against an excessiveness standard is called for when a sentence has been imposed in such circumstances.

That such sentences are not unknown is supported by the testimony of the former Director of Federal Prisons:

> That some judges are arbitrary and even sadistic in their sentencing practices is notoriously a matter of record. By reason of senility or a virtually pathological emotional complex some judges summarily impose the maximum on defendants convicted of certain types of crimes or all types of crimes. One judge's disposition along this line was a major factor in bringing about a sitdown strike at Connecticut's Wethersfield Prison in 1956. There is one judge who, as a matter of routine, always gives the maximum sentence and who of course is avoided by every defense lawyer. If they have the misfortune of having their case arise before him they lay the ground for appeals since experience has indicated the appeals court is sympathetic and will, if possible, overturn the sentencing court. I know of one judge who continued to sit on the bench and sentence defendants to prison while he was undergoing shock treatments for a mental illness.
>
> The unfortunate fact is that the sentenced offender has no redress against emotionally dictated and unfair judicial sentencing actions. According to Assistant U.S. Attorney General George Doub, the United States is "the only country in the free world where a sentencing court need give no reasons for the imposition of a sentence . . . the only country in the free world in which there is no appellate review of the punishment imposed by the trial court."

Bennett, *The Sentence—Its Relation to Crime and Rehabilitation,* in OF PRISONS AND JUSTICE, S. Doc. No. 70, 88th Cong., 2d Sess. 307, 311 (1964). Compare NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 61 (1966).

It is offensive too if the sentence is based on factors which are unresponsive to proper objectives. An example occurred in a case where the defendant was sentenced to three years in jail, the trial judge adding that:

> Had there been a plea of guilty in this case probably probation might have been *considered* under certain terms, but you are all well aware of the standing policy here that once a defendant stands trial that element of grace is removed from the consideration of the Court in the imposition of sentence.

United States v. Wiley, 267 F.2d 453, 455 (7th Cir. 1960). (Emphasis added.) While this particular sentence was set aside, it is clear that in many states, and possibly other federal circuits as well, a sentence to jail based upon such factors would not be re-examined even though the appellate court thought it clear that no proper objectives were accomplished by such an arbitrary "standing policy."

Finally, a word should be added about the illegal sentence. Such a sentence, typically one which is beyond the limits fixed by the legislature, is commonly subject to review and correction by the normal appellate process, even in those jurisdictions which do not generally afford review of sentences. See, *e.g.,* Watkins, *Appellate Review of the Sentencing Process in Michigan,* 36 U. DET. L.J. 356 (1959). The purpose of mentioning it at this point is to emphasize a basic theme of these materials, namely that all aspects of review, whether of the legality of the sentence, the procedure by which it was assessed, or its propriety on the merits, should be consolidated in a single court. See § 2.1, *infra.*

The problem presented by the illegal sentence is in many respects similar to the problem of the excessive sentence. Surely a legislature would not intend that a sentence exceeding the statutory limits be imposed. Just as surely, when a legislature authorizes a range of one to twenty years for an offense, it does not mean that it makes no difference what sentence within that range is selected in the particular case. Yet to provide that the sentencing judge need not state why he picked a particular sentence and that no one save the executive can undo it once it is imposed comes very close to just that position. The essence of appellate review of the sentence is to emphasize that it does in fact make a difference. Review will require examination in each case, both by the sentencing court and the appellate court, of the interests of the public and the interests of the defendant. The sentence which serves neither interest surely should not stand.

c. Facilitate rehabilitation

As has been pointed out elsewhere, the sophistication of the method by which a sentence is fixed may well be lost on most who are subjected to the criminal process. See Note, *Appellate Review of Primary Sentencing Decisions: A Connecticut Case Study,* 69 YALE L.J. 1453, 1465-66 (1960). No matter how the sentencing decision is reached, and no matter how many times it is reviewed, the average defendant is likely to base his judgment of its fairness on a shallow comparison of his sentence with the sentence that others have received for similar offenses. The concept of punishment tailored to the offender as well as the offense is unlikely to be appreciated.

It does not follow from this, however, that the attitude of the defendant toward the sentencing process is unimportant. Nor does it follow that no positive steps should be taken to create a greater sense of fairness about the manner in which a sentence is determined. At the least, effective sentence review should negate the image of a single judge with unbridled power over the future of the individual before him. This in turn should remove one source of a hostile attitude that can do nothing but impede the rehabilitative progress of the offender. While it is believed that this alone is a goal worth seeking, there is the further possibility that in some cases respect for the process, induced by the opportunity to have grievances aired, will be an affirmative first step toward self-improvement. The availability of review, plus its exercise in such a fashion as to promote this respect, thus has the potential of contributing positively to the attitude of the offender.

d. Respect for law

A third objective of sentence review is the promotion of respect for law. This can be accomplished in at least two ways: by correcting abuses as they occur and by doing justice in a manner that contributes to the appearance of justice. It is shocking, to say the least, that the United States is the only country in the free world where not only can a single man sentence without explaining why, but where there is no regular channel for review of his work. See, *e.g.*, Bennett, *The Sentence—Its Relation to Crime and Rehabilitation,* in OF PRISONS AND JUSTICE, S. Doc. No. 70, 88th Cong., 2d Sess. 307, 311 (1964); George, *An Unsolved Problem: Comparative Sentencing Techniques,* 45 A.B.A.J. 250, 251 (1959); *Appellate Review of Sentences, Hearings on S. 2722 Before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary,* 89th Cong., 2d Sess. 86-100 (1966) (Statement of Professor Mueller). When it is added that the sentencing judge often has an extremely wide range within which to select a sentence, the image is by no means a happy one.

Violation of the federal bank robbery statute, for example, gives to the trial judge the choice between a fine of from $1 to $5,000, probation, or any period of incarceration from one day up to twenty years. In addition, the trial judge may fix the defendant's parole eligibility date at any point from immediately upon incarceration up to one-third of the total sentence. See 18 U.S.C. § § 2113, 3651, 4208(a) (1964). There are good reasons for providing each of these alternatives. But to give to one man the power to select any one for reasons of his own does not immediately command respect for the fairness of the system. *Cf.* Kadish, *Legal Norm and Discretion in the Police and Sentencing Process,* 75 HARV. L. REV. 904, 915-31 (1962). Particularly is this the case in comparison to the highly sophisticated rules surrounding other aspects of the trial, and the

careful and thorough review that assures a minimum of error. To say, as we do, that we care more for the integrity of the hearsay rule than for the difference between one and twenty years is hardly revealing of a sound system of values. Providing for a check on the exercise of the sentencing power should thus increase respect for the system. The exercise of the power to correct the occasional abuse should demonstrate that it works.

e. Development of criteria

It is unfortunate that our system has yet to develop a rational and consistent approach to the sentencing problem. One of the most serious manifestations of this is the clearly demonstrable fact that similarly situated defendants often receive grossly disparate sentences. Of the many examples in both state and federal courts that could be cited, the following are representative:

> Take, for instance, the cases of two men we received last spring. The first man had been convicted of cashing a check for $58.40. He was out of work at the time of his offense, and when his wife became ill and he needed money for rent, food and doctor bills, he became the victim of temptation. He had no prior criminal record. The other man cashed a check for $35.20. He was also out of work and his wife had left him for another man. His prior record consisted of a drunk charge and a nonsupport charge. Our examination of these two cases indicated no significant differences for sentencing purposes. But they appeared before different judges and the first man received 15 years in prison and the second man 30 days.
>
> These are not cases picked out of thin air. In January the President of the United States commuted to time served the sentence of a first offender, a former Army lieutenant, and a veteran of over 500 days in combat, who had been given 18 years for forging six small checks.
>
> In one of our institutions a middle-aged credit union treasurer is serving 117 days for embezzling $24,000 in order to cover his gambling debts. On the other hand, another middle-aged embezzler with a fine past record and a fine family is serving 20 years, with 5 years probation to follow. At the same institution is a war veteran, a 39-year-old attorney who has never been in trouble before, serving 11 years for illegally importing parrots into this country. Another who is destined for the same institution is a middle-aged tax accountant who on tax fraud charges received 31 years and 31 days in consecutive sentences. In stark contrast, at the same institution last year an unstable young man served out his 98-day sentence for armed bank robbery.

Bennett, *Countdown for Judicial Sentencing,* in OF PRISONS AND JUSTICE, S. Doc. No. 70, 88th Cong., 2d Sess. 328, 331 (1964). See generally Rubin, *Disparity and Equality of Sentences—A Constitutional Challenge,* 40 F.R.D. 55 (1966); *Hearings Before Subcommittee No. 3 of the House Committee on the Judiciary,* 85th Cong., 2d Sess., ser. 14, at 41-67 (1958) (testimony of Mr. Bennett); INSTITUTE OF JUDICIAL ADMINISTRATION, DISPARITY IN SENTENCING OF CONVICTED DEFENDANTS (1954); GLUECK, CRIME AND JUSTICE 115-129 (1936).

There are many ways in which the disparity problem can be attacked. The sentencing council, for example, is currently gaining well-deserved support within the federal system as an aid in reducing variations between different judges on the same court. See Levin, *Toward a More Enlightened Sentencing Procedure,* 45 NEB. L. REV. 499 (1966); Smith, *The Sentencing Council and the Problem of Disproportionate Sentences,* FED. PROB., June 1963, p. 5, 11 PRAC. LAW., Feb. 1965, p. 12; Doyle, *A Sentencing Council in Operation,* FED. PROB., September 1961, p. 27. In addition, sentencing institutes are helping in the federal system to perform the same function on a circuit-wide basis. See, *e.g.*, Youngdahl, *Development and Accomplishments of Sentencing Institutes in the Federal Judicial System,* 45 NEB. L. REV. 513 (1966); Youngdahl, *Remarks Opening the Sentencing Institute Program, Lampoc, California,* 37 F.R.D. 115-16 (1964). Another boost would be provided by legislative revision of sentencing structures. See, *e.g.*, Rubin, *Disparity and Equality of Sentences—A Constitutional Challenge,* 40 F.R.D. 55, 56 (1966); Wechsler, *Sentencing, Correction, and the Model Penal Code,* 109 U. PA. L. REV. 465, 472-75 (1961).

But while these devices are useful and important, it is not contended by their advocates that they are a cure-all for the problem of disparity. Similarly, it is not contended here that sentence review will eliminate the problem. Indeed, because the overly lenient sentence is typically not subject to increase on an appeal by the state, only half of the problem can ever be reached by a reviewing court. But sentence review, if properly implemented, can join with other devices to make a substantial contribution.

It can do this in two ways. First, it can level off the peaks by reducing the excessive sentence. It can thus contribute to a solution of half of the problem by reducing the incidence of injustice to the individual. Sec-

ondly, and most importantly with respect to the problem of disparity, sentence review can contribute to the development of sound sentencing principles and thus lead closer to the goal of approaching each defendant on the same basis. This in turn can be brought about in two ways: the requirement that the sentencing judge articulate the basis for his sentence will assist him in developing for himself a set of consistent principles on which to base his sentences; and the articulation in written opinions of the basis for a modification by an appellate court should lead to similar development on a more widely applicable scale. The following was written thirty years ago, and it is in most jurisdictions no less true today:

> The law gives the judge wide discretion in sentencing, but furnishes him no assistance in exercising that discretion. In performing their ordinary judicial functions, judges base their actions either on statutes or on prior judicial decisions and practices. Controversies involving innumerable difficult legal questions have in the course of centuries been appealed to the . . . appellate courts. . . . These courts have written opinions recorded in vast legal libraries. But in the difficult and important task of sentencing offenders, there are almost no precedents or standards to follow. Since determining what sentence to impose has nearly always been a matter of judicial discretion, few opinions have been written to explain sentences. The knowledge and wisdom of individual judges have thus died with them.

WARNER & CABOT, JUDGES AND LAW REFORM 159-60 (1936). Compare GLUECK, CRIME AND JUSTICE, pp. 128-29 (1936). Sentence review at least holds out the hope that the knowledge and wisdom of our experts will not die with them. It also holds out the hope that our system will be fairer and more equitable for that reason.

Finally, it should be added that this emphatically does not mean that sentence review should lead to uniform sentences. As Mr. Bennett has reminded us, "Nothing could be more unequal than treating unequal things equally." Kennedy, *Justice is Found in the Hearts and Minds of Free Men,* 25 FED. PROB. 3 (Dec. 1961), 30 F.R.D. 422, 425 (1961). No advocate of sentence reform argues for uniformity where there are reasonable grounds for differentiation. What is sought, on the other hand, is reasonable, as opposed to arbitrary, differentiation: an approach to the sentence that not only recognizes the justice of individualized sentences, but also demands their rational use. Not only can this contribute to resolution of the disparity problem, but on a much broader scale it can also contribute significantly to the development of sound sentencing policy. Reviewing courts, if they will, can play a leading role in the achievement of these objectives.

h. Collateral benefits

One of the most frequently mentioned points in the debate about the retention of the death penalty centers upon the effect of the penalty on the system. See, *e.g.*, MODEL PENAL CODE § 201.6, comment at 64 (Tent. Draft No. 9, 1959). Judges are cautious when a man's life is at stake; and often a strained decision can be traced to no other feature of the case than that the defendant was under a sentence of death. The effect can be unfortunate: hard cases, in other words, often make bad law.

Many observers have noticed a similar effect caused by the absence of power to review a sentence. If the appellate court is convinced that a given penalty is grossly excessive, it may similarly strain the law: "there is probably more appellate review than appears on the surface, where courts reverse on what would otherwise be dismissed as harmless error because the record shows extreme severity or prejudice in sentencing." Note, *Due Process and Legislative Standards in Sentencing,* 101 U. PA. L. REV. 257, 264 (1952). For the views of several appellate judges on this point, see, *e.g.*, *Appellate Review of Sentences, A Symposium at the Judicial Conference of the United States Court of Appeals for the Second Circuit,* 32 F.R.D. 249, 271 (1962) (remarks of Judge Sobeloff); United States v. Hoffman, 137 F.2d 416, 422 (2d Cir. 1943) (Judge Clark); United States v. Trypuc, 136 F.2d 900, 902 (2d Cir. 1943) (per curiam: Judges Swan, Clark and Frank); United States v. Amendola, 17 F.2d 529, 530 (2d Cir. 1927) (Judge L. Hand).

On the other side of the coin, it is likewise the case that many defendants take appeals only because of dissatisfaction over the sentence:

> The calendars of the courts of appeal are crowded with cases which have little merit other than an entreaty to the court to find some basis on which a Draconian sentence can be upset. Reliable figures indicate that 40 to 50 percent of the time of the appeals court is required to review cases which would not be there had a reasonable sentence been pronounced.

Bennett, *The Sentence—Its Relation to Crime and Rehabilitation,* in OF PRISONS AND JUSTICE, S. Doc. No. 70, 88th Cong., 2d Sess. 307, 311 (1964).

The combination of these two observations – that many appellate courts tend to review sentences anyway by finding reversible errors, and that the basic reason behind many appeals is dissatisfaction over the sentence – has an unfortunate effect on the principled growth of the law. It is the history of the common law that inventive judges have often been forced to prevent injustice by the use of indirect or highly fictional methods. That they have had the ingenuity and the motivation to do so is a great tribute. But the fact that they have been forced to use such techniques can hardly be looked to with pride. What is suggested here is that permitting review of the sentence will have the effect of focusing the contest on what in many cases is the only real issue at stake. It is believed that this will remove one source of the desire, the need, and the practice of reaching this issue by artificial means.

INDIVIDUALIZED JUDGES

Marvin E. Frankel*

It may be supposed by many that the broad discretion of the sentencing judge is actually limited by the discipline of the profession, including a body of criteria for placing a given case within the statutory range of up to "not more than" life in prison. The supposition would, unfortunately, be without substantial basis. There are, to be sure, some vague species of curbstone notions—gravity of the particular offense, defendant's prior record, age, background, etc.—that are thought to serve as guides in the particular case. But there is no agreement at all among the sentencers as to what the relevant criteria are or what their relative importance may be. Again, the point is made in all its stark horror by the compelling evidence that widely unequal sentences are imposed every day in great numbers for crimes and criminals not essentially distinguishable from each other.

The sentencing powers of the judges are, in short, so far unconfined that, except for frequently monstrous maximum limits, they are effectively subject to no law at all. Everyone with the least training in law would be prompt to denounce a statute that merely said the penalty for crimes "shall be any term the judge sees fit to impose." A regime of such arbitrary fiat would be intolerable in a supposedly free society, to say nothing of being invalid under our due-process clause. But the fact is that we have accepted unthinkingly a criminal code creating in effect precisely that degree of unbridled power.

Beyond their failure to impose meaningful limits upon the judges, our criminal codes have displayed bizarre qualities of illogic and incongruity. Studies in the recent past revealed such things as these: a Colorado statute providing a ten-year maximum for stealing a dog, while another Colorado statute prescribed six months and a $300 fine for killing a dog; in Iowa, burning an empty building could lead to as much as a twenty-year sentence, but burning a church or school carried a maximum of ten; breaking into a car to steal from its glove compartment could result in up to fifteen years in California, while stealing the entire car carried a maximum of ten. Examples like these could be multiplied. The specific ones I cite may have been repaired in recent revisions. Their essentially illustrative character remains a fair reflection of the haphazard, disorderly qualities of our criminal penalty provisions. And while this motley look is disturbing, it is, of course, less fundamentally atrocious than the characteristic allowance of unfettered discretion to the sentencing judge selecting a term anywhere up to the high maximum.

Both qualities—the crazy-quilt statutory patterns and the blank-check powers of judges—reflect a number of important, if not uniformly pleasant, things about our society. In one of his many quotable insights—though it was not by any means exclusively his—Winston Churchill said:

> The mood and temper of the public with regard to the treatment of crime and criminals is one of the most unfailing tests of the civilization of any country.

The "mood and temper" reflected in our laws assigning punishments include a kind of simpleminded puritanism in which it is premised that conduct we dislike will end or sharply decrease if we pass a criminal law, with harsh sanctions, against it. Many of our criminal laws are enacted in an access of righteous indignation, with legislators fervidly outshouting each other, with little thought or attention given to the large numbers of years inserted as maximum penalties. Written at the random, accidental times when particular evils come to be perceived, the statutes are not harmonized or coordinated with each other. The resulting jumbles of harsh anomalies are practically inevitable.

The more profound problem of excessive judicial power reflects a congeries of causes, advertent and accidental. To look only at the most important and positive of these, the

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Hill and Wang (1973).

prevalent thesis of the last hundred years or so has been that the treatment of criminals must be "individualized." The Mikado's boast, we have proudly thought, was silly; the punishment in a civilized society must fit the unique criminal, not the crime. The "crime," after all, may describe as a single, mechanical label kinds of misconduct and, more importantly, kinds of individual offenders displaying no similarities of any substantial sort. To assign rigidly a prescribed penalty for each crime (the so-called "tariff" system) is Procrustean. Sentiments like these carried the day long ago; it is scarcely imaginable that they could be questioned today.

Yet it is high time to question and confine them. Like all good ideas allowed to bloom without pruning or other attention, the notion of individualized sentencing has gotten quite out of hand. Reverting to elementary principles for a bit, we ought to recall that individualized justice is prima facie at war with such concepts, at least as fundamental, as equality, objectivity, and consistency in the law. It is not self-evident that the flesh-and-blood judge coming (say) from among the white middle classes will inevitably achieve admirable results when he individualizes the narcotics sentences of the suburban college youth and the street-wise young ghetto hustler. More importantly and more generally, is it perfectly clear that we want our judges to have such power? In most matters of the civil law, while our success is variable, the quest is steadily for certainty, predictability, objectivity. The businessman wants to know what the tax will be on the deal, what the possible "exposure" may be from one risk or another. His lawyer may predict more or less successfully. But what no businessman wants (if he is honest) is a system of "individualized" taxes and exposures, depending upon who the judge or other official may turn out to be and how that decision-maker may assess the case and the individual before him.

This does not mean, of course, that everybody pays the same tax or is held to the same standards of liability. It does mean that the variations are made to turn upon objective, and objectively ascertainable, criteria—impersonal in the sense of the maxim that the law "is no respecter of persons"—and, above all, not left for determination in the wide-open, uncharted, standardless discretion of the judge administering "individualized" justice. The law's detachment is thought to be one of our triumphs. There is dignity and security in the assurance that each of us—plain or beautiful, rich or poor, black, white, tall, curly, whatever—is promised treatment as a bland, fungible "equal" before the law.

Is "individualized" sentencing consistent with that promise? Certainly not under the broad grants of subjective discretion we give to our judges under most American criminal codes today. The ideal of individualized justice is by no means an unmitigated evil, but it must be an ideal of justice *according to law*. This means we must reject individual distinctions—discriminations, that is—unless they can be justified by relevant tests capable of formulation and application with sufficient objectivity to ensure that the results will be more than the idiosyncratic ukases of particular officials, judges or others. I think an approach to such a standard is possible. I shall attempt to sketch it later on. In the meantime, however, if we had to choose between our status quo and a system of narrow "tariffs" for each category of crime, only my prejudiced belief that many judges are humane would make me pause in preferring the latter.

Having said that, let me flee from the appearance of undue complacency about the judges. The judges simply are not good enough—nobody could be—to redress the fundamental absurdities of the system. Some thoughts about the character and limits of the sentencers are the business of the next chapter.

THE ABSURDITIES of our sentencing laws would remain aesthetically repulsive, but might be otherwise tolerable, if our judges were uniformly brilliant, sensitive, and humane. Though I yield only to numerous judges in my admiration for those on the bench, I must acknowledge that we do not, in fact, approach any such state of affairs. Judges, I think, tend to be like people, perhaps even some cuts above the mine run but, unfortunately, less than gods or angels. And how, after all, could we dream it might be otherwise? Consider whence we acquire our judges, how we select them, how they are trained before and after they don robes.

To start near the beginning, most of our judges have been trained as lawyers. (There is a disappearing breed of petty magistrates for whom this is not necessarily true, and the picture is more bleak with respect to them.) Substantially nothing in the law curriculum is relevant to problems of sentencing. Indeed, until the last decade or so, the entire field of criminal law, being neither lucrative nor prestigious, occupied only a small and disfavored corner of our law schools' attention. While that state of neglect has undergone extensive repairs, these have scarcely grazed the area of interest here. Law students learn something about the rules of the criminal law, about the trial of cases, and, increasingly, about the rights of defendants before and during trial. They receive almost no instruction pertinent to sentencing. They may hear some fleeting references to the purposes of criminal penalties—some generalities about retribution, deterrence, etc. But so far as any intentional consequences of their legal education are concerned, they are taught by people and exposed to curricula barren of even food for thought about sentencing.*

* Everything in law, as in life, has exceptions. So I should acknowledge that there are here and there in the law schools some meaningful offerings on the subject. Professor Leonard Orland of the University of Connecticut Law School has lately been giving a well-stocked course on post-conviction matters, including significant and provocative ideas about sentencing. My thoughtful and energetic colleague on the Federal District Court for the Southern District of New York, Judge Harold R. Tyler, Jr., has been finding time in recent years to offer enlightenment on similar subjects at the New York University School of Law. I am certain there are other things of the sort in progress elsewhere. The general point I have made remains basically accurate even today and was sound without noticeable qualification when people now judging went to law school.

From among the total supply of law graduates who have not studied sentencing, there emerges in twenty or thirty years the narrower group from which we select the bulk of our judges. The most notable thing about this group for present purposes is that its members have mostly remained unencumbered by any exposure to, or learning about, the problems of sentencing. Characterized by their dominant attributes, our judges are men (mostly) of no longer tender years who have not associated much with criminal defendants, who have not seemed shrilly unorthodox, who have not lived recently in poverty, who have been modestly or more successful in their profession. They are likely to have had more than an average lawyer's amount of experience in the courtroom, though it is a little remarkable how large a percentage of those who go on the bench lack this credential.* They are unlikely to have defended more than a couple of criminal cases, if that many. They are more likely to have done a stint as prosecutors, usually as a brief chapter in the years shortly after law school. However much or little they have been exposed to the criminal trial process, most people ascending (as we say) the bench have paid only the most fleeting and superficial attention to matters affecting the sentences of convicted defendants. In this respect, the pattern set in the law school is carried forward and reenforced. The professional show ends with the verdict or the plea. The histrionics later on at the sentencing proceeding may be moving or embarrassing, even effective on occasion, but are no part of the skills the average lawyer prizes and polishes as special tools of his trade.

Whatever few things may be said for them, our procedures for selecting judges do not improve the prospects of sensitive, knowledgeable sentencing. It may happen sometimes, but I do not recall ever hearing anything relevant to that

* I am not myself in a position for exuberant stone-throwing. Before I became a trial judge in 1965, I had spent many years working mainly as an appellate lawyer. I had tried some cases and done a fair amount of trial lawyer's work, but had managed somehow never to face a jury. I had argued criminal appeals, but had never been on either side of a criminal trial. In defense of myself and the bar-association committees that found me acceptable, if not the answer to their prayers, I think it fair to add that the mechanics and economics of big-city law practice lead the members of large, respectable law firms to settle most of their clients' disputes short of actual trial.

subject in discussions of the qualifications of prospective judges. I put to one side for this purpose the disgraceful process, widely used, of political nominations, where the candidates are too often selected without concern for any of the qualities supposedly wanted in suitable judges. Even where relevant questions are asked, the professional criteria, reflecting the training and the profession at work, simply do not include meaningful inquiries as to whether the prospective judge is fit to wield the awesome sentencing power. Apart from elementary, and usually superficial, glances at vague qualities of "temperament," we would not know really where to look or what to ask on a subject destined to loom so large among the prospective judge's impacts upon his fellow citizens.

The judges fetched up in the process are a mixed bag, without many surprises. Some grow to be concerned and spend substantial time brooding about their sentencing responsibilities. Most, I think, are not so preoccupied. Judges are commonly heard to say that sentencing is the grimmest and most solemnly absorbing of their tasks. This is not exactly hypocrisy. It is, however, among the less meaningful things judges report about their work. Measured by the time devoted to it, by the amount of deliberation and study before each decision, and by the attention to the subject as a field of intellectual concern in general, the judges' effective expenditures of themselves in worries over sentencing do not reflect a profound sense of mission. Judges don't talk much, to each other or to anyone, about the issues and difficulties in sentencing. They don't read or write about such things. Because strictly "legal" problems are rare in this area, and appeals are normally not allowed to attack the sentence (see Chapter 7), the reading pile rarely contains anything pertinent. The judge is likely to read thick briefs, hear oral argument, and then take days or weeks to decide who breached a contract for delivery of onions. The same judge will read a presentence report, perhaps talk to a probation officer, hear a few minutes of pleas for mercy—invest, in sum, less than an hour in all—before imposing a sentence of ten years in prison.

Some judges, confronting the enormities of what they do and how they do it, are visited with occasional onsets of horror or, at least, self-doubt. Learned Hand—to some, the greatest of our judges; to all, among a small handful of the greatest—reflected such sentiments. Never accounted soft toward criminals among any who knew his work, he said of his role in sentencing: "Here I am an old man in a long nightgown making muffled noises at people who may be no worse than I am." A distinguished committee of federal judges, with Hand among its members, acknowledged "the incompetency of certain types of judges to impose sentence." It spoke of judges "not temperamentally equipped" to learn this task acceptably, of judges who compensate for their own inadequacies by "the practice of imposing severe sentences," of judges "who crusade against certain crimes which they feel disposed to stamp out by drastic sentences." * Other judges have expressed similar misgivings—about their own and (perhaps more strongly) about their colleagues' handling of powers so huge and so undefined over the lives of their fellow men.

Self-criticism, uncertainty, and a resultant disposition toward restraint are useful qualities in judges—for sentencing and for other aspects of the job. They are not, however, in oversupply. The kinds of people who make their way onto the bench are not by and large given to humility. If there are seeds of meekness to begin with, the trial bench is not the most fertile place for their cultivation. The trial judge may be reversed with regularity; he may be the butt of lawyers' jokes and an object lesson in the law schools; but the incidents of his daily life—the rituals of deference, the high bench, the visible evidences of power asserted directly and face-to-face—are not designed to shrink his self-image. It should be said in all fairness that the Hamlets of this world are not suited to the business of presiding over trial courts. Scores of things must be decided every day. It is often more important, as Brandeis taught, that the decisions be made than that they be correct. Both the volume and the nature

* Judicial Conference of Senior Circuit Judges, *Report of the Committee on Punishment for Crime*, pp. 26, 27 (1942).

of the enterprise—the regulation of the flow of evidence, the predictable eruption of emergencies, the endless stream of cloudy questions demanding swift answers—generate pressures for decisive action. And so the trial judge, who starts his career well along the course of a life in which self-effacement has not been the key thing, is encouraged to follow his assertive ways.

Conditioned in the direction of authoritarianism by his daily life in court, long habituated as a lawyer to the stance of the aggressive contestant, and exercising sentencing powers frequently without practical limits, the trial judge is not discouraged from venting any tendencies toward righteous arrogance. The books and the reliable folklore are filled with the resulting horror stories—of fierce sentences and orgies of denunciatory attacks upon defendants. One need not be a revolutionist or an enemy of the judiciary to predict that untrained, untested, unsupervised men armed with great power will perpetrate abuses. The horrible cases may result from moral or intellectual or physical deficiencies—or from all together. But we can be sure there will be some substantial number of such cases.

Everyone connected with this grim business has his own favorite atrocity stories. James V. Bennett, the enlightened former Director of the Federal Bureau of Prisons, wrote this often-quoted passage, which appears in a 1964 Senate Document:

> That some judges are arbitrary and even sadistic in their sentencing practices is notoriously a matter of record. By reason of senility or a virtually pathological emotional complex some judges summarily impose the maximum on defendants convicted of certain types of crimes or all types of crimes. One judge's disposition along this line was a major factor in bringing about a sitdown strike at Connecticut's Wethersfield Prison in 1956. There is one judge who, as a matter of routine, always gives the maximum sentence and who of course is avoided by every defense lawyer. If they have the misfortune of having their case arise before him they lay the ground for appeals since experience has indicated the appeals court is sympathetic and will, if possible, overturn the sentencing court. I know of one judge who continued to sit on the bench and sentence defendants to prison while he was undergoing shock treatments for a mental illness.*

Forgoing the temptation to parade more lurid instances, I think a couple of mild, substantially colorless cases within my own ken give some sense of the unchained sentencing power in operation. One story concerns a casual anecdote over cocktails in a rare conversation among judges touching the subject of sentencing. Judge X, to designate him in a lawyerlike way, told of a defendant for whom the judge, after reading the presentence report, had decided tentatively upon a sentence of four years' imprisonment. At the sentencing hearing in the courtroom, after hearing counsel, Judge X invited the defendant to exercise his right to address the court in his own behalf. The defendant took a sheaf of papers from his pocket and proceeded to read from them, excoriating the judge, the "kangaroo court" in which he'd been tried, and the legal establishment in general. Completing the story, Judge X said, "I listened without interrupting. Finally, when he said he was through, I simply gave the son of a bitch five years instead of the four." None of the three judges listening to that (including me) tendered a whisper of dissent, let alone a scream of outrage. But think about it. Not the relatively harmless, if revealing, reference to the defendant as a son of a bitch. But a year in prison for speaking disrespectfully to a judge.** Was that, perhaps, based upon a rapid, subtle judgment that a defendant behaving this way in the courtroom

* "The Sentence—Its Relation to Crime and Rehabilitation," in *Of Prisons and Justice*. S. Doc. No. 70, 88th Cong., 2d sess., p. 311 (1964).

** Only the prissiness of a lawyer's training would require a footnote here to acknowledge that I have neglected the calculation of probable time off for good behavior.

showed insufficient evidence of remorse and prospects of reform? I confidently think not. Should defendants be warned that exercise of their "right" to address the court may be this costly? They are not.* Would we tolerate an act of Congress penalizing such an outburst by a year in prison? The question, however rhetorical, misses one truly exquisite note of agony: that the wretch sentenced by Judge X never knew, because he was never told, how the fifth year of his term came to be added.

That short story epitomizes much that prompts me to be writing this: the large and unregulated character of the sentencing power, the resulting arbitrariness permitted in its exercise, the frightening chanciness of judicial tempers and reactions. Whatever our platonic vision of the judge may be, this subject, like others, must be considered in the setting of a real world of real, mixed, fallible judicial types.

Let me turn here to my second, somewhat more appalling, anecdote. I happened a few years ago to preside at a widely publicized trial of a government official charged with corrupt behavior and perjury, convicted finally on a perjury count. While the conviction was for perjury only, the aura of corruption tended to overhang the case. In the weeks between the verdict and the sentence, as sometimes happens, I received some unsolicited mail, often vindictive in tone, not infrequently anonymous. One letter was from a more august source. A state trial judge, from Florida, wrote as follows:

Dear Judge Frankel:

I have read with interest the proceedings in the case involving above Defendant and his influence peddling, perjury, etc. . . .

One of the more serious problems confronting Judges in the State Courts, such as the one in which I preside, is the leniency extended by the Federal Judiciary and the pampering of prisoners and parolees by the Federal Penal and Parole Systems. It is difficult for me to justify giving an individual 10, 15, 20 years or life for armed robberies involving a few dollars when persons in the Federal Judicial System are usually given much smaller sentences and are paroled after having served a few months or years of their sentences, and then are proceeded to be loosely supervised by an overly compassionate and headturning parole system.

Accordingly, as an individual, as a Judge in the State Court, as a father of a young man serving upon the High Seas of the country as an enlisted man, and as the step-father of a drafted Army Private on Asiatic soil, and as an individual who has served honorably for five years in the service of the United States Navy in wartime, let me strongly urge upon you that you impose the maximum sentence as provided by law upon the above Defendant, and upon any other individuals who would tend to destroy and demoralize our nation's government from within.

The author of that letter was deeply in earnest. What he wrote was not intended as a caricature. I am sure he did not mean to document the enormities we invite when we empower untested and unqualified officials to spew wholesale sentences of "10, 15, 20 years or life for armed robberies involving a few dollars. . . ." He was not applying for the analyst's couch when he tendered up his generations of patriotism, his cruelty, and his confident ownership of ultimate truths. He was not—I assume, regretfully, he still is not—slowed for a second by any shibboleth about "individualized treatment" when he offered advice on sentencing to a fellow judge based upon newspaper intelligence, without even seeing the defendant or reading a presentence report.

* Dr. Willard Gaylin, in his work *In the Service of their Country—War Resisters in Prison* (New York, Viking Press, 1970), p. 283, reports an episode identical with mine about Judge X. There is other evidence—including, I fear, some results of my own introspection—that the defendant's rare outburst may carry a monstrous price.

What that Florida colleague did was merely to dramatize the macabre point that sweeping penalty statutes allow sentences to be "individualized" not so much in terms of defendants but mainly in terms of the wide spectrums of character, bias, neurosis, and daily vagary encountered among occupants of the trial bench. It is no wonder that wherever supposed professionals in the field—criminologists, penologists, probation officers, and, yes, lawyers and judges—discuss sentencing, the talk inevitably dwells upon the problem of "disparity." Some writers have quibbled about the definitiveness of the evidence showing disparity. It is among the least substantial of quibbles. The evidence is conclusive that judges of widely varying attitudes on sentencing, administering statutes that confer huge measures of discretion, mete out widely divergent sentences where the divergences are explainable only by the variations among the judges, not by material differences in the defendants or their crimes. Even in our age of science and skepticism, the conclusion would seem to be among those still acceptable as self-evident. What would require proof of a weighty kind, and something astonishing in the way of theoretical explanation, would be the suggestion that assorted judges, subject to little more than their own unfettered wills, could be expected to impose consistent sentences. In any event, if proof were needed that sentences vary simply because judges vary, there is plenty of it. The evidence grows every time judges gather to discuss specific cases and compare notes on the sentences they would impose upon given defendants. The disparities, if they are no longer astonishing, remain horrible.

The broad experience of former Prison Director Bennett merits another quotation here from the 1964 Senate Document mentioned earlier:

> Take, for instance, the cases of two men we received last spring. The first man had been convicted of cashing a check for $58.40. He was out of work at the time of his offense, and when his wife became ill and he needed money for rent, food, and doctor bills, he became the victim of temptation. He had no prior criminal record. The other man cashed a check for $35.20. He was also out of work and his wife had left him for another man. His prior record consisted of a drunk charge and a nonsupport charge. Our examination of these two cases indicated no significant differences for sentencing purposes. But they appeared before different judges and the first man received 15 years in prison and the second man 30 days.
>
> These are not cases picked out of thin air. In January the President of the United States commuted to time served the sentence of a first offender, a former Army lieutenant, and a veteran of over 500 days in combat, who had been given 18 years for forging six small checks.
>
> In one of our institutions a middle-aged credit union treasurer is serving 117 days for embezzling $24,000 in order to cover his gambling debts. On the other hand, another middle-aged embezzler with a fine past record and a fine family is serving 20 years, with 5 years probation to follow. At the same institution is a war veteran, a 39-year-old attorney who has never been in trouble before, serving 11 years for illegally importing parrots into this country. Another who is destined for the same institution is a middle-aged tax accountant who on tax fraud charges received 31 years and 31 days in consecutive sentences. In stark contrast, at the same institution last year an unstable young man served out his 98-day sentence for armed bank robbery.*

Protesting more than enough, let me say again that the tragic state of disorder in our sentencing practices is not attributable to any unique endowments of sadism or bestiality among judges as a species. Without claiming absolute detachment, I am prepared to hypothesize that judges in general, if only because of occupational conditioning, may be somewhat calmer, more dispassionate, and more humane than th:

* "Countdown for Judicial Sentencing" in *Of Prisons and Justice*. S. Doc. No. 70, 88th Cong., 2d sess., p. 331 (1964).

average of people across the board. But nobody has the experience of being sentenced by "judges in general." The particular defendant on some existential day confronts a specific judge. The occupant of the bench on that day may be punitive, patriotic, self-righteous, guilt-ridden, and more than customarily dyspeptic. The vice in our system is that all such qualities have free rein as well as potentially fatal impact upon the defendant's finite life.

Such individual, personal powers are not evil only, or mainly, because evil people may come to hold positions of authority. The more pervasive wrong is that a regime of substantially limitless discretion is by definition arbitrary, capricious, and antithetical to the rule of law. Some judges I know believe (and act on the belief) that all draft resisters should receive the maximum sentence, five years; this iron view rests variously upon calculations concerning time off for good behavior, how long those in uniform serve, how contemptible it is to refuse military service, etc. Other judges I know have thought, at least lately, that persons opposing service on grounds of moral or other principle, even if technically guilty of a felony, should be subjected to token terms in prison, or none at all. It is not directly pertinent here whether either category of judge is right, or whether both have failed to exercise, case by case, the discretion with which the law entrusts them. The simple point at the moment is the contrast between such individual, personal, conflicting criteria and the ideal of the rule of law.

Beyond the random spreads of judicial attitudes, there is broad latitude in our sentencing laws for kinds of class bias that are commonly known, never explicitly acknowledged, and at war with the superficial neutrality of the statute as literally written. Judges are on the whole more likely to have known personally tax evaders, or people just like tax evaders, than car thieves or dope pushers. Dichotomies of a similar kind are obvious beyond the need to multiply examples. Can such items of personal experience fail to have effects upon sentencing? I do not stop at simpleminded observations about the substantial numbers of judges who simply do not impose prison sentences for tax evasion though the federal law, for example, provides a maximum of five years per count (and tax-evasion prosecutions frequently involve several tax years, with each a separate count). There are more things at stake than judicial "bias" when tax evaders average relatively rare and brief prison terms, while more frequent and much longer average terms (under a statute carrying the same five-year maximum) are imposed for interstate transport of stolen motor vehicles.* Whatever other factors may be operating, however, it is not possible to avoid the impression that the judges' private senses of good and evil are playing significant parts no matter what the law on the books may define as the relative gravity of the several crimes. And, although it anticipates a later subject, this is certainly the focus of the familiar jailhouse complaint that "the more you steal, the less of a sentence you get." I believe the complaint has a basis in the fundamental realities and in the way justice is seen to be dispensed. The latter aspect is important in itself; among our sounder aphorisms is the one teaching that justice must not only be done, but must appear to be done. Both objectives are missed by a system leaving to individual preferences and value judgments the kind of discretion our judges have over sentencing.

I have touched upon individual traits of temperament and variations of an ideological, political, or social character. The

* It may serve only to confirm a priori hunches, but consider these illustrative figures for federal sentences in the fiscal year 1969. Of 502 defendants convicted for income tax fraud, 95, or 19 percent, received prison terms, the average term being three months. Of 3,791 defendants sentenced for auto theft, 2,373, or 63 percent, went to prison, the average term being 7.6 months. From the Administrative Office of the U.S. Courts' publication, *Federal Offenders in the United States District Courts*, 1969, pp. 146–7 (1971).

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of sentencing authority.

THE SECOND CIRCUIT SENTENCING STUDY

Anthony Partridge & William D. Eldridge*

CHAPTER I - INTRODUCTION

This is a report of a sentencing experiment conducted by the district judges of the Second Circuit to determine the extent of disparity in the sentencing of criminal defendants within the circuit. The experiment, in which each district judge rendered sentences on approximately thirty presentence reports, was developed and organized by the Second Circuit Committee on Sentencing Practices, chaired by former Chief Judge J. Edward Lumbard of the United States Court of Appeals for the Second Circuit. In the course of it, the district judges of the Second Circuit -- all forty-three of the active judges and seven of the senior judges -- rendered roughly as many sentences as they normally do in half a year. The experiment thus represented a major effort at self-evaluation, initiated and carried out principally by the judges themselves.

The unique quality of this experiment, which sets it apart from all previous studies of disparity, is the opportunity it provides to observe a large number of judges rendering sentences in identical cases. Earlier studies have all been based on the observation of sentences rendered by different judges in different cases. The obvious problem for such studies is how to determine whether observed differences in sentences result from differences in judges or differences in cases. The solution is inevitably a statistical one: the analysis is based on groups of cases and relies upon group measures such as the percentage of cases in which different judges give prison sentences. The current study, by contrast, deals directly with differences in judges' sentencing behavior, without the complications introduced by differences in the underlying cases. For the first time, we are able to observe the extent of agreement among many judges on a case-by-case basis. As will be seen later, a study of this type has some methodological problems of its own. But it does permit modes of analysis not previously possible in disparity studies, and it therefore offers the hope of gaining substantial new knowledge about the sentencing process.

* An abridgment of a report to the Judges of the Second Circuit; published by Federal Judicial Center in 1974.

To the extent that this hope is fulfilled, the credit belongs almost entirely to the judges. Their interest in evaluating their own sentencing performance, and their willingness to undertake a substantial extracurricular burden in the service of that interest, are the foundations on which the study has been built.

The thirty presentence reports were sent to the judges at a rate of five reports a week over a six-week period beginning March 16, 1974. The first twenty of them were actual presentence reports, drawn from the files of probation offices within the Second Circuit, but edited to alter identifying facts such as names, places, identification numbers, and dates. These twenty cases were selected to be broadly representative of the sentencing business of the circuit.

Each of the last ten presentence reports was prepared in two versions which differed from one another with respect to some characteristic that might be relevant to the sentencing process. In Case 26, for example, the defendant pleaded guilty in one version and was found guilty after trial in the other, but the versions were otherwise identical. The judges were randomly divided into two groups, so that half the judges got one version and half got the other. Through this technique, it was hoped that we might learn whether certain case characteristics were more likely than others to be productive of disagreement about the appropriate sentence. These last ten presentence reports were not selected to represent the sentencing business of the circuit; rather, they were selected so that certain characteristics might be tested. Nine of them were actual presentence reports drawn from the files of probation offices within the Second Circuit, although one version of each was of course modified to produce the desired variation, and occasional other modifications were made to sharpen the issues being studied. The tenth presentence report in this group was an invention of the Judicial Center staff.

The analysis of the sentences returned is predicated on the assumption that all the judges sentencing in a particular case were acting on the basis of the same information -- that is, the information contained in the presentence report. To avoid introducing information gained from other sources,

a judge who had actually sentenced a defendant (or who had participated in a sentencing council considering the case) was not asked to sentence that defendant for the purposes of the experiment. About half of the judges therefore received somewhat fewer than the full series of thirty cases. The total number of presentence reports mailed was 1,465, not counting those mailed to one senior judge who was unable to participate because of illness. 1,442 responses were received, with all but two of the nonresponses being in the last ten cases.

For the purposes of the study, disparity is defined as dissimilar treatment by different judges of defendants who are similarly situated. Stated differently, disparity is departure from the principle that the defendant's sentence shouldn't depend on which judge he gets. It should be noted that this definition excludes two other phenomena that are sometimes referred to as disparity. First, it excludes dissimilar treatment of similarly situated defendants by the same judge -- that is, departure from the principle that the sentence shouldn't depend on such legally irrelevant factors as the judge's mood or racial prejudices. Second, the definition used here excludes disproportionately dissimilar treatment of unlike situations: we do not deal with the question whether sentences for stealing government checks are unduly harsh when compared with sentences for income-tax evasion. In view of the somewhat flexible content of the word "disparity," it is important to keep these limitations in mind.

CHAPTER II - THE EXTENT OF DISPARITY

A. Disparity in Sentences Rendered in the Experiment

For each case in the group of twenty that was selected as representing the sentencing business of the circuit, the sentences rendered have been ranked from most severe to least severe. Table 1 shows, for each of these twenty cases, selected points on the rank list: the two extreme sentences, the median sentence, the sixth most severe and sixth least severe sentences, and the twelfth most severe and twelfth least severe sentences. Thus, for Case 1, the median sentence was 10 years' imprisonment and a $50,000 fine, and the sentences ranged from 3 years' imprisonment to 20 years' imprisonment and a $65,000 fine. Twelve judges sentenced to 15 years' imprisonment or more; twelve judges sentenced to 8 years' imprisonment and a $20,000 fine or less; and so on. In Cases 3 and 5, special parole terms under 21 U.S.C. § 841 are included in the term "probation."*

The construction of a rank list of sentences of course assumes a set of rules for determining when one sentence is more severe than another. In many cases, there would be no likelihood of disagreement on that question, but there are points at which different observers may disagree on whether one sentence or another is the more severe. Readers who disagree with the rules used here, as well

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* The case numbers in the table are not the same numbers that were assigned to these twenty cases when they were mailed to the judges. For those judges who may wish to refer to the presentence reports that they received, a conversion table is provided at the beginning of Appendix A.

Table 1 - Sentences in Twenty Cases

	Case #1	Case #2	Case #3	Case #4	Case #5	Case #6	Case #7	Case #8	Case #9	Case #10
Most severe sentence	20 yrs pris; $65,000.	18 yrs pris; $5,000.	10 yrs pris; 5 yrs prob.	7 1/2 yrs pris.	5 yrs pris; 3 yrs prob.	3 yrs pris; $5,000.	2 yrs pris.	YCA indet.	3 yrs pris.	1 yr pris.
6th most severe sentence	15 yrs pris; $50,000.	15 yrs pris.	6 yrs pris; 5 yrs prob.	5 yrs pris.	3 yrs pris; 3 yrs prob.	3 yrs pris; $5,000.	2 yrs pris.	YCA indet.	6 mos pris; 2 yrs unsup prob.	6 mos pris; 1 yr prob.
12th most severe sentence	15 yrs pris.	15 yrs pris. [(a)(2)]	5 yrs pris; 5 yrs prob. [(a)(2)]	4 yrs pris.	3 yrs pris; 3 yrs prob.	2 yrs pris; $5,000.	1 1/2 yrs pris.	6 mos pris; 5 yrs prob. [§4209]	6 mos pris.	3 mos pris; 27 mos prob.
Median sentence	10 yrs pris; $50,000.	10 yrs pris.	5 yrs pris; 3 yrs prob.	3 yrs pris.	2 yrs pris; 3 yrs prob.	1 yr pris; $5,000.	1 yr pris.	5 mos pris; 5 yrs prob. [§4209]	3 mos pris; 21 mos unsup prob.	2 mos pris; 1 yr prob.
12th least severe sentence	8 yrs pris; $20,000.	7 1/2 yrs pris. [(a)(2)]	3 yrs pris; 3 yrs prob.	3 yrs pris.	1 1/2 yrs pris; 3 yrs prob.	6 mos pris; 2 1/2 yrs prob; $3,000.	6 mos pris; 18 mos prob.	2 mos pris; 2 yrs prob. [§4209]	1 mo pris; 2 yrs unsup prob.	3 yrs prob.
6th least severe sentence	5 yrs pris; 3 yrs prob; $10,000.	5 yrs pris.	3 yrs pris; 3 yrs prob.	2 yrs pris.	5 yrs prob; $500.	6 mos pris; $5,000.	3 mos pris.	3 yrs prob.	2 yrs unsup prob.	2 yrs prob.
Least severe sentence	3 yrs pris.	5 yrs pris.	1 yr pris; 5 yrs prob.	4 yrs prob.	2 yrs prob.	3 mos pris; $5,000.	1 yr prob.	1 yr prob.	Susp. if leave U.S.	1 yr prob.
No. of sentences ranked	45	48	46	45	42	48	39	41	49	48

Table 1 (Continued)

	Case #11	Case #12	Case #13	Case #14	Case #15	Case #16	Case #17	Case #18	Case #19	Case #20
Most severe sentence	6 mos pris; 6 mos prob; $5,000.	1 yr pris.	1 1/2 yrs pris.	YCA indet.	1 yr pris; $3,000.	YCA indet.	3 yrs pris.	6 mos pris; 18 mos prob.	2 yrs pris; $2,500.	1 yr pris; $1,000.
6th most severe sentence	6 mos pris; $2,500.	6 mos pris; 3 yrs prob.	6 mos pris; 2 yrs prob.	YCA indet.	6 mos pris; 3 yrs prob; $10,000.	5 yrs prob.	6 mos pris; 4 1/2 yrs prob.	5 yrs prob.	6 mos pris; 2 yrs prob.	3 mos pris; $1,000.
12th most severe sentence	2 mos pris; 22 mos prob; $5,000.	3 mos pris; 21 mos prob.	6 mos pris; 18 mos prob.	1 yr pris.	3 mos pris; 2 yrs prob; $5,000.	3 yrs prob.	6 mos pris.	3 yrs prob; $100.	3 mos pris; 33 mos prob; $7,500.	3 yrs prob; $1,000.
Median sentence	1 mo pris; 11 mos prob; $5,000.	1 mo pris; 11 mos prob.	5 yrs prob.	4 yrs prob.	3 yrs prob; $10,000.	3 yrs prob.	3 yrs prob.	3 yrs prob.	2 yrs prob; $15,000.	2 yrs prob; $500.
12th least severe sentence	2 yrs prob; $7,500.	2 yrs prob.	2 yrs prob.	2 yrs prob.	2 yrs prob; $5,000.	2 yrs prob.	3 yrs prob.	2 yrs prob.	2 yrs prob; $400.	1 yr prob; $1,500.
6th least severe sentence	$7,500; 2 yrs unsup prob.	1 yr prob.	2 yrs prob.	2 yrs prob.	2 yrs prob; $1,000.	2 yrs prob.	2 yrs prob.	2 yrs prob.	1 yr prob; $7,500.	1 yr prob; $500.
Least severe sentence	$2,500.	6 mos prob.	2 yrs prob.	1 yr prob.	1 yr prob; $1,000.	2 yrs unsup prob.	1 yr prob.	1 yr prob.	$2,500.	$1,000.
No. of sentences ranked	43	44	48	39	45	42	46	48	47	48

as others who wish to see more detailed data, are referred to the tables in Appendix A. These tables contain all the sentences rendered in each case, and permit fairly easy assessment of the importance of differences that would result from alternative ranking rules. Appendix A also contains brief descriptions of the cases.

The rules that have been used for ranking in this study are based on the assumption that imprisonment of any length is more severe than probation or a fine, that supervised probation is more severe than a fine or unsupervised probation, and that a fine is more severe than unsupervised probation. They also give some weight to the authority under which a prison sentence or probation is imposed. The details of the rules are perhaps best understood by treating them as a series of procedural steps. Each step is applicable only to sentences that are of equal rank under the previous step: that is, Step 2 is used only as necessary to break ties at Step 1, Step 3 is used only as necessary to break ties at Step 2, and so on. For ranking from most severe to least severe, the basis for ranking at the successive steps is as follows:

1. Length of term of imprisonment imposed (with indeterminate sentences under the Youth Corrections Act counted as four-year terms).
2. Length of term of supervised probation (including, in Cases 3 and 5, any special parole term imposed under 21 U.S.C. § 841).
3. Amount of fine.
4. Length of term of unsupervised probation.
5. Authority under which a prison sentence was imposed, as follows (from most severe to least severe):
   a. Regular authority or 18 U.S.C. § 3651;
   b. 18 U.S.C. § 4208(a)(1);
   c. 18 U.S.C. § 4208(a)(2);
   d. Youth Corrections Act (including 18 U.S.C. § 4209).

6. For Young Adult Offenders only, the authority under which a probation sentence or split sentence was imposed: a sentence under the regular authority is treated as more severe than a sentence of equal length under 18 U.S.C. § 4209.

The ranking is not affected by the length of any prison sentence whose execution was suspended, or by any requirement such as restitution, participation in a drug program, etc.

For a variety of reasons, the number of sentences available for ranking varies somewhat from case to case. In part, this reflects the policy of not sending the presentence report to the actual sentencing judge, but principally it reflects the exclusion from the rankings of two classes of response: failures to sentence by judges who indicated that they needed more information (including decisions to commit for observation), and sentences that were ambiguous or unlawful. The number of sentences ranked thus varies from 39 to 49. But speaking roughly, the six most severe sentences in each case can be viewed as the top eighth, the twelve most severe as the top quarter, and a similar translation may be made of the numbers at the less severe end of the scale. The median sentence is the sentence halfway down the rank list except that in Cases 10 and 13, where the true median fell between two sentences that were not identical, the more severe sentence was used. This convention is used in this report whenever median sentences are displayed, to avoid averaging the two sentences around the midpoint: every sentence shown in Table 1 and other tables is thus a sentence actually reported by one or more participating judges.

Table 1 clearly shows a wide range of disagreement among Second Circuit judges about the appropriate sentences in the twenty cases. Substantial disagreement persists, moreover, even if the extremes of the distribution are ignored. In both Cases 1 and 2, for example, at least six judges imposed prison terms of 15 years or longer, while at least six others imposed prison terms of 5 years or shorter. Indeed, in many of the cases the disagreement remains substantial even if we compare the twelfth most severe and twelfth least severe sentences. For the most part, the pattern displayed is not one of substantial consensus with a few sentences falling outside the area of agreement. Rather, it would appear that absence of consensus is the norm.

The effect of differences in the length of prison terms imposed may of course be somewhat moderated by the fact that actual time served is typically less than the stated sentence. If parole eligibility dates were arrayed instead of stated sentences, the range in Case 1 would be stated as one year to 6 2/3 years, which appears less dramatic than the three to twenty years of the stated sentence. Moreover, within the limits that the sentence imposes on its discretion, the Board of Parole tends to act in ways that limit the effect of disparate prison terms imposed by the judges. It is impossible to evaluate the impact of parole discretion on the time that would actually be served under the prison sentences displayed in Table 1, since the exercise of that discretion is affected by the defendant's behavior in prison. But there can be no question, given the ranges of sentences shown in the table, that the disparity in stated sentences would be reflected in substantial disparity in time served.

In addition, there is nothing in the system to moderate the effect of disagreements among judges about the threshold question of whether the offender should be incarcerated at all. The offender who is sentenced to prison may be released before the expiration of his stated term, but he does go to prison; the offender sentenced to probation or a fine does not. It is therefore worthy of note that there was disagreement on the threshold question in 16 of the 20 cases. In the remaining 4 cases, all the sentencing judges agreed on the appropriateness of prison; in no case did all of them agree on the inappropriateness of prison. If we again cut off the extremes of the distribution and look only at the sixth most severe and sixth least severe sentences, we still find 12 cases in which there was disagreement about the appropriateness of incarceration.

Differences in the lengths of probation terms and amounts of fines are generally of less importance, but the lack of consensus is also evident here.

In short, the consistent tenor of the data presented in the table is one of substantial disparity. In later chapters, we will seek the answers to questions such as whether similar sentencing patterns are found within individual districts, whether some judges' sentences are consistently toward one end of the rank list or the other, and whether

particular features of cases tend to generate disparate sentences. First, however, we turn to the question of the validity of conclusions drawn from an experiment of this kind.

B. What the Experimental Sentences Can Tell Us About Actual Sentences

The sentences reported in Table 1 are sentences rendered in a game. The object of the game was to simulate actual sentencing decisions. It is in the nature of games of this type that they are imperfect. But if we cannot eliminate the imperfections, we can try to evaluate their likely impact on the experimental data. In the foregoing discussion, we have considered several such imperfections and reached the following conclusions:

1. The cases selected for the experiment are sufficiently representative that a finding of considerable disparity in this group of cases would support the conclusion that considerable disparity exists in a substantial proportion of Second Circuit cases.

2. The inability to simulate face-to-face contact with defendants in the experiment probably did not tend to produce an overstatement of the extent of disparity.

3. The fact that the sentences in the experiment would not in fact be carried out may have tended toward overstatement of the extent of disparity, but any such tendency does not appear to have been strong.

4. To extent that probation office sentencing recommendations may tend to bring different judges together in their actual sentencing decisions, the use of identical presentence reports signed by a fictitious probation officer may have tended toward overstatement of the extent of disparity, but the net effect of using identical presentence reports probably tended toward understatement rather than overstatement.

Subject to the caveat that the sentences from the Eastern District must be considered to represent sentences that would have been rendered in the absence of a sentencing-council procedure, we therefore conclude that the disparity exhibited in Table 1 is a reasonably good approximation of what really happens in the courtrooms of the circuit.

CHAPTER III - PATTERNS OF SENTENCES

A. Introduction and Summary

In Chapter II, the focus was on the question whether substantial disparity exists among the district judges of the Second Circuit. In this chapter, an effort is made to analyze the disparity that has been observed by looking for patterns in the data that may increase our understanding of it. The analysis here is based on the same sentences that formed the basis for Chapter II.

The first question treated is whether the disparity observed in the previous chapter is primarily a result of disagreement among judges within individual districts or primarily a result of differences in sentencing practices among districts. It is concluded that substantial disparity exists within districts, and that differences among districts are of secondary importance. In addition, the disparity found among judges of the Eastern District of New York casts doubt on the theory that sentencing councils tend to generate common approaches to sentencing among the judges who participate.

The second question considered is whether experience on the Federal bench tends to bring judges closer together in their sentences. No evidence is found of any such tendency.

The third question addressed in the chapter is whether the disparity observed is a function of some judges habitually rendering relatively severe sentences while others habitually render light ones. It is concluded that the disparity is not so easily explained. The overwhelming majority of the Second Circuit judges are sometimes severe relative to their colleagues and sometimes lenient. If there are indeed "hanging judges" and lenient ones -- and it would appear that there are a few -- their contribution to the disparity problem is minor compared to the contribution made by judges who cannot be so characterized.

B. Methods of Analysis

In comparing sentences with one another, we are limited by the fact that there is no single unit of measurement. If one judge sentences to six months in prison and another imposes only a $5,000 fine, we can probably agree that the first judge was more severe but we have no meaningful way of saying how much more severe he was. Our inability to do so serves to limit the number of statistical tools available for analyzing the data in a study of this type.

The principal tool used in this chapter and Chapter IV is known as the Kolmogorov-Smirnov test. This test does not require that we be able to measure the differences between sentences, but it does assume that we are able to rank sentences in order of severity. If that assumption is made, the test can be used to compare the sentences of two groups of judges in a particular case and ask whether the relative severity of their sentences is so different that the difference is unlikely to have occurred simply by chance. For example, if 60 percent of the experienced judges in the circuit rendered sentences of three years' prison or more in a case and only 50 percent of the inexperienced judges were that severe, the difference of 10 percent might well be due to one or more factors, unrelated to experience, that just happened to be distributed unequally between the two groups of judges. We could not conclude on this evidence that there is a relationship between the severity of a judge's sentences and the length of his experience on the bench. But if 60 percent of the experienced judges and only 10 percent of the inexperienced judges rendered sentences this severe, the 50-percent difference would not be likely to have resulted solely from the chance distribution of some irrelevant characteristic among experienced and inexperienced judges. We would conclude that there was a difference among the sentences that was related to experience. The Kolmogorov-Smirnov test is essentially a system for evaluating the likelihood that observed differences of this type might have occurred by chance.

The test is used here at the 95-percent confidence level. Thus, an observed difference between the sentences of two groups of judges will be treated as significant only if there are fewer than 5 chances in 100 that the difference could have occurred through the operation of chance.

* * *

While it seems probable that there is some tendency for the Eastern District judges to be more severe than the circuit generally and for the judges from the four smaller districts to be less severe, it also seems clear that the venue is a good deal less important than the identity of the individual judge.

Table 8 - Sentences in Twenty Cases, by District, Compared With Circuit-Wide Median Sentences in Those Cases

	E.D. N.Y.	S.D. N.Y.	Four smaller districts
Number of sentences more severe than median sentence in same case	96	233	61
Number of sentences equal to median sentence	15	84	29
Number of sentences less severe than median sentence	57	236	90
Total sentences in 20 cases	168	553	180

The tables showing sentences by district also cast some light on the sentencing-council procedure used in the Eastern District of New York. The sentencing council is thought by many to reduce disparity in two ways. First, the sentencing judge has the benefit of his colleagues' wisdom in arriving at a sentence in a particular case, and is thought likely to be discouraged from rendering a sentence greatly out of line with his colleagues' views. Second, the practice of discussing sentencing problems on a regular basis is thought likely to bring the participating judges closer together in their approach to sentencing problems. It is extremely difficult to evaluate these claimed effects with data about actual sentencing councils, since they involve constantly changing trios of judges. The current study, of course, provides no opportunity to evaluate the immediate effect of a collegial process on sentences in cases that are considered in sentencing councils. But Table 6 suggests that the alleged effect on judges' ways of approaching sentencing, if it exists at all, is not very effective in creating a common approach among

the judges of a district. This is not to say that participating in sentencing councils is not educational. It is to suggest, however, that the generation of a common approach should not be regarded as one of the major benefits of that particular kind of education. Each of the Eastern District judges entered on duty in 1971 or earlier, so the sentences in Table 6 are sentences of judges who all had at least two years of sentencing council experience.

D. The Effect of Experience on the Federal Bench

It might be thought that experience on the bench would tend to be a moderating factor in sentencing disparity -- that experienced judges, as a consequence not only of their experience in actual sentencing but also of their greater opportunities to consider sentencing problems in sentencing institutes and other forums, would have developed greater consensus among themselves than the judges with less experience. If this were true, it would suggest that disparity in sentencing might be somewhat moderated through efforts to find training substitutes for the experience that the more recently appointed judges lack. An analysis was therefore undertaken to determine whether a greater consensus was in fact exhibited in the twenty cases by the more experienced judges.

For the purposes of this analysis, the judges were divided into two groups: those who entered on duty in July 1971 or later, and those who entered on duty in August 1968 or earlier. Since none of the participating judges entered on duty in the three years between those two dates, this division followed a natural break in the data. For the circuit as a whole, 32 of the participating judges were in the more experienced group and 18 in the less experienced group. For the Southern District of New York, which was also analyzed separately, 17 judges were in the more experienced group and 13 in the less experienced.

The Kolmogorov-Smirnov test indicates that there are not statistically significant differences in the rank lists of sentences when the experienced and inexperienced judges are compared, either at the circuit level or within the Southern District. Within each group of twenty comparisons, a significant difference at the 95-percent confidence level was found for one case; in twenty tests at a 95-percent confidence level, that can easily happen by chance.

Another way of examining the effect of experience is to ask whether the sentences of experienced judges are often found among both the most severe and the least severe sentences on the rank list. To answer that question, a group of extreme sentences was identified at each end of the rank list for each case. The number of sentences in the group was variable because, if two or more judges gave identical sentences, there was no basis for choosing among them; blocks of identical sentences had to be completely included or completely excluded. At the circuit-wide level, groups of six sentences were sought; if the sixth and seventh sentence were identical, a group of five was sought; if the fifth through seventh sentences were identical, a group of four was sought; and if the fourth through seventh were identical, the group of seven or more was accepted rather than accepting a group as small as three. Within the Southern District the first choice was a group of four, then a group of three, and then a group of five or more. This technique produced groups ranging from four to twelve sentences for the circuit as a whole, and from three to nine for the Southern District.

At the circuit level, half or more of the most severe sentences were rendered by experienced judges in every one of the 20 cases. Half or more of the least severe sentences were rendered by experienced judges in 14 of the 20 cases. Within the Southern District, half or more of the most severe sentences were rendered by experienced judges in 19 of the 20; half or more of the least severe in 11 of the 20. Within the circuit, some 64 percent of the participating judges were classified as experienced; within the Southern District, 57 percent.

Neither the Kolmogorov-Smirnov test nor the examination of the extremes of the rank lists completely precludes the possibility that experience on the Federal bench does have some tendency to reduce disparity. But it is entirely clear that much disparity exists among experienced judges, and that this remains true even if venue is controlled for by examining the sentences of judges within a single district.

E. Consistency Among Judges

The final question addressed in this chapter is whether the disparity that exists reflects a consistent tendency of some judges to impose severe sentences and of others to impose light ones.

The analytical technique used to deal with this question required ranking the sentences in each case in order of severity and then, for each judge, comparing the ranks assigned to his sentences in different cases. The most severe sentence in a case was given a rank of 1, the next most severe was given a rank of 2, and so on. Since different numbers of judges sentenced in the various cases, however, a continuation of this process would have made the numbers at the other end of the scale noncomparable: a rank of 39 might be the least severe sentence in one case but the tenth least severe in another. To adjust for this, a judge who did not sentence in a particular case was arbitrarily put into the rank list for that case at a point suggested by his average rank in the cases in which he did sentence, with the result that every judge had a rank in each case.

Each time a judge is given an arbitrary rank by this procedure, it of course tends to increase the apparent consistency of his sentencing. The effect on the data for the other judges is less clear, however. Since ranks are relative, their places in the rank list would be affected by the arbitrary ranking of another judge, but the direction of that effect might be expected to vary from judge to judge and case to case. To reduce the impact of this factor, only the sentences in the thirteen cases having 45 sentences or more were included in the analysis. Of the 650 ranks analyzed for these thirteen cases, only 39, or 6 per cent, were arbitrary; not more than 5, or 10 per cent, were arbitrary in any single case.

Table 9 shows, for each of the 50 judges, his average rank in the thirteen cases, and also his lowest and highest ranks. The table is arranged in declining order of judge severity as indicated by the average rank. Thus, Judge #1 was the most severe judge, with an average rank of 5.4. His lowest rank was 1, indicating that he gave the most severe sentence in at least one case. His highest rank was 11.

In accordance with a common statistical convention, an averaging process was used when two or more judges gave identical sentences. If the most severe sentence in a case was ten years in prison, the next most severe nine years, and the next two judges sentenced to eight years, these last two judges would be given a rank of 3.5 rather than being treated as tied with a rank of 3; the next rank would be 5. If three judges gave the eight-year sentence, they would all be given a rank of 4 and the next rank would be 6. It is, therefore, not quite accurate to say that Judge #1 was among the 12 most severe in each of the thirteen cases. That statement is a reasonably good approximation, however.

For any given case, the average rank is 25.5, as is the median. If a judge were exactly in the middle of the rank list for each case, therefore, the average rank for that judge would be 25.5. If his average rank was less than 25.5 he may be said, on the whole, to have been somewhat more severe than his fellow judges in these thirteen cases; if more than 25.5, somewhat less severe.

Table 9 shows that most of the judges had average ranks quite close to the center. Some 29 of the 50 judges had average ranks within three points of 25.5 But the table also shows that these closely grouped average ranks are averages of widely differing ranks in individual cases. Judge #33, for example, with an average rank of 27.0, rendered the least severe sentence in at least one case and the second most severe in another. Of the 29 judges with averages between 22.5 and 28.5, 26 judges had a sentence that ranked among the ten most severe in at least one case and a sentence that ranked among the ten least severe in at least one other. Thus, relative to one another, individual judges appear sometimes lenient and sometimes severe. The pattern persists even with the judges whose average ranks are outside the middle group. Of the judges at the more severe end of the scale, only the first two can be said to have been consistently severe; of those at the more lenient end, only one appears to be consistent. Consistency of relative position is thus very much the exception.

Table 9 - Ranks of Sentences of Individual Judges in Thirteen Cases

(A rank of 1 represents the most severe sentence given in a case; a rank of 50 the least severe. More complete data is provided in Appendix C.)

Judge*	Average Rank	Lowest Rank	Highest Rank
1	5.4	1	11
2	10.6	3.5	23
3	12.1	1	47
4	15.3	1	44
5	19.2	1.5	48.5
6	19.2	2	46
7	19.6	6	39
8	19.6	2	45.5
9	20.8	1	49.5
10	22.7	2	45
11	22.8	3	44
12	23.0	3	44.5
13	23.4	4	37.5
14	24.3	3	47
15	24.5	4	46
16	24.5	2	46
17	24.6	10	44.5
18	24.6	7	44.5
19	24.6	2	43
20	24.7	3	44.5
21	25.0	1.5	47
22	25.2	2	47
23	25.5	6.5	48
24	25.7	3.5	48
25	25.8	1	44.5

* The judge numbers in this table are not the numbers that were used for identification in the course of the experiment.

Table 9 (Continued)

Judge	Average Rank	Lowest Rank	Highest Rank
26	25.9	8	47
27	26.0	3.5	44
28	26.0	5.5	48.5
29	26.1	12	43
30	26.7	5.5	48.5
31	26.7	14.5	38
32	26.8	7	44.5
33	27.0	2	50
34	27.6	7.5	41
35	27.8	5	45.5
36	27.8	10	50
37	27.9	5.5	50
38	28.3	5	50
39	29.3	4.5	49
40	30.0	12.5	49
41	30.1	7.5	45.5
42	31.5	3.5	47.5
43	31.8	11.5	47
44	32.1	1	50
45	32.7	5.5	50
46	33.0	17	50
47	33.4	5.5	50
48	34.7	10.5	50
49	36.1	3.5	49.5
50	36.9	26.5	48.5

This should not be interpreted as implying that judges are not individually consistent in their sentencing. To say that judges' sentencing cannot be explained by simply characterizing the judges as "hanging" or "soft" is not to say that the judges are behaving irrationally. On the contrary, it suggests only that their individual approaches to sentencing are more complex than is widely believed. The data is wholly consistent with the proposition that each judge could give a rational and consistent explanation of his sentences in these thirteen cases. There would, however, have to be a number of different rational and consistent explanations to choose from.

At this writing, it has not been possible to identify any groups of judges whose ranks seem to move in the same directions -- that is, who share in common a group of cases in which they are relatively severe and a group in which they are relatively lenient. There is some possibility that further analysis will reveal some patterns that may help explain why position in the rank lists is so fluid. For the present, all that can be said is that it is fluid and that sentencing disparity cannot, on the whole, be explained by labeling the judges. Put another way, the disparity reflected in this study would not be substantially reduced by excluding from consideration the sentences of judges who are consistently severe or consistently lenient.

CHAPTER IV - EFFECT OF PARTICULAR CASE CHARACTERISTICS

A. Introduction and Summary

While the first twenty cases were chosen for their representative qualities, the last ten cases sent to the judges participating in the experiment were designed to test specific hypotheses about case characteristics that might tend to be productive either of sentencing disparity or of consensus. In the first twenty cases, the effect of a single characteristic could not be tested because each case differed from the others with respect to many characteristics. In the last ten cases, limited and controlled variations in the presentence reports were used to permit some testing of such effects.

Presentence reports in each of the last ten cases were produced in two versions -- an "A" version and a "B" version -- which differed from one another with respect to a single characteristic. The judges were divided into two groups, which remained fixed for the series of ten cases. The "A" judges received the "A" versions of these cases; the "B" judges received the "B" versions. Judges were randomly assigned to the two groups, so it was expected that the two groups would be similar to one another in their sentencing predilections. Differences in the sentences imposed by the two groups of judges in a particular case could thus be attributed to the difference between the two versions of the case.

In addition, in three of the last ten cases the judges were explicitly asked, after sentencing on the facts as presented to them, what their sentences would have been if a particular fact had changed. These questions created an additional opportunity to assess the impact of particular case characteristics on sentencing disparity.

Using these techniques, efforts were made to determine whether the degree of disparity was affected by the following matters:

1. Whether or not the probation office offered a recommended sentence.
2. Whether or not the defendant was addicted to heroin.
3. Whether or not the defendant was eligible for sentencing as a young adult offender.
4. Whether the defendant stood trial or pleaded guilty.
5. Whether the defendant's prior arrests had resulted in convictions.
6. Whether the offense was "blue collar" or "white collar."

The conclusions reached display a consistency that was not wholly expected. In some instances, the data indicate that judges do indeed disagree about how to respond to particular issues raised by the cases. But with a possible exception for the third item, which is discussed in Section E below, the data also indicate that resolution of these disagreements would not significantly narrow the range of disparate sentences. Thus, the lesson of these ten cases seems to be that an effort to resolve these matters, whatever its intrinsic merit, would not carry much promise of reducing the extent of disparity within the circuit.

STANDARDS RELATING TO CRIMINAL JUSTICE: APPELLATE REVIEW OF SENTENCING --REVIEWING COURT

American Bar Association*

2.1 Reviewing court.

In general, each court which is empowered to review the conviction should also be empowered to review the disposition following conviction. It may be advisable to depart from this principle in some contexts, as, for example, where intermediate appellate courts are available to review sentences and it is deemed unwise to involve the highest court in such matters. In any event, specialized courts should not be created to review the sentence only.

Commentary

a. Background

There have been essentially two approaches to the question of what kind of court should exercise the review function:

1. The first is found in four states: Connecticut, Maine, Maryland, and Massachusetts. In these states, a specially created court, staffed by more experienced trial judges, sits only for the purpose of reviewing the propriety of the sentence. See Appendix A, *infra*. Other questions about the sentence, including the sufficiency and accuracy of the information on which it was based, whether it was within the limits set by the legislature, and the like, are reviewed by the regular appellate courts. See, *e.g.*, State v. Meleganich, 25 Conn. Supp. 3, 195 A.2d 439 (1963); Commonwealth v. Conroy, 333 Mass. 751, 133 N.E.2d 246 (1956).

2. The second approach vests the review power in the regular appellate courts, generally in each court in the system on the same basis as other issues in the case. The new Illinois statutes, for example, provide for an appeal from sentence in capital cases directly to the Supreme Court, just as in the case of other issues in capital cases. ILL. ANN. STAT. c. 38, §121-3(a) (Smith-Hurd 1964). Appeals of sentence in other cases (except on constitutional grounds) go first to an intermediate appellate court, with discretionary power in the Supreme Court to hear a further appeal. The same procedure exists for issues going to the merits of the conviction. ILL. ANN. STAT. c. 38, §§121-3(b), 121-8(b) (Smith-Hurd 1964).

The provision in New York varies from this pattern. Again the regular appellate courts are used as the vehicle for providing sentence review, but except where a sentence of death has been imposed the authority extends only to the first appellate court in the judicial hierarchy. The Court of Appeals does not have the general power to review the propriety of sentences, and there is thus no single court with state-wide jurisdiction which has such power. See Appendix A, *infra;* People v. Minjac Corp., 4 N.Y.2d 320, 151 N.E.2d 180 (1958); People v. Speiser, 277 N.Y. 342, 14 N.E.2d 380 (1938).

b. The same courts

This section states as a general principle the position that each court which is empowered to review the conviction should also be empowered to review the sentence, subject, of course, to any limitation under section 1.1 on the kind of sentence that is reviewable. At the same time it is recognized that there may be reasons for exempting some courts, as has occurred with the Court of Appeals in New York. There may also be unique institutional reasons, for example, for excluding the United States Supreme Court from reviewing federal sentences.

Where no special reasons invite an exception, it is highly desirable that all appellate courts in the system be given the power to review sentences. One of the objectives of sentence review is the reduction of disparity by the development of a uniform approach to sentencing within particular jurisdictions. To deny review power at any point in the system before a court with jurisdiction-wide authority is reached can only impede the achievement of this objective. It is thus recommended as a general proposition that all appellate courts, including the highest court in the jurisdiction, be empowered to review the sentence. It is to be expected, of course, that such power would rarely be exercised by the highest court of a state which has intermediate appellate courts. Indeed, it is to be hoped that the intermediate appellate courts themselves will have rare occasion to exercise the power. But unless there be strong

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multiplication of courts with different powers over the same judgment, but in the improvement of existing courts in a manner that will meet the objections.

There are other reasons for opposing the Massachusetts system. In many contexts such a solution is simply not practical. In many states, and certainly in the federal system too, a single sentence-review panel would not work, if only for the reason that litigants would have to travel too far. To avoid this, it has been suggested that local panels of trial judges could perform this function. But unless a judge is to sit in review of his own sentence, such a system would be practical only if there were numerous local judges who could be called on. Yet there are many districts, in the federal system for example, in which there are only one or two judges. To provide for a panel of trial judges to review sentences in such districts would require the presence of judges from other courts many miles away, a practice that would surely disrupt already burdened dockets. It would also be difficult for such a system to achieve objectivity when one day a judge passes on the sentence of his colleague, the next day the colleague is reviewing his sentence, and the third day they are on a panel together reviewing the sentences of others. See *Appellate Review of Sentences, Hearings on S. 2722 Before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary*, 89th Cong., 2d Sess. 13 (1966) (Statement of Judge William F. Smith). In short, a review system populated by trial judges is in many respects neither efficient nor economical, particularly when there is a readily available appellate court with procedures that could easily be adapted to dispose of such cases.

Finally, there is the point that providing for review of sentences can help to remove the recurrence of questionable decisions caused by inability to get at what is the real problem. Even if a special tribunal has reviewed a sentence, to the extent that those who review the merits of the conviction still conclude that the sentence is too harsh, the temptation to review by other means will still be there. The use of regular appellate courts to review sentences will thus have the virtue of arming such courts, which must in any event bear the main burden of review in criminal cases, with the power to resolve the whole case before them.

reasons to the contrary, it would better advance the objectives of sentence review if each such court were granted the necessary power.

This section also states opposition to the creation of special courts, as in Connecticut, Maine, Maryland, and Massachusetts. This position is taken for several reasons. Initially, there is the prospect of difficulty caused by the exercise by two independent bodies of different powers over the same judgment. As noted, in each of the states in question review of the merits of the sentence exists in one court, while review of the legality of the sentence and the procedure by which it was assessed exists in another. Such a division of labor between two courts is quite likely to give rise to subtle questions about the division of jurisdiction between them, based on such troublesome distinctions as "procedure" and "substance," or "legality" and "propriety." To avoid this problem, attempts could be made to draw the lines at other points, such as by empowering one court to review all questions concerning sentence and another all questions concerning the conviction. Such an approach would assume, however, that the line between the process of sentencing and the process of conviction is an easier one to draw, an assumption that could well be challenged, for example, in a case where the basic issue was the competency of an attorney who represented the defendant at both stages. Wherever lines are drawn, the fact that two distinct courts are looking at the same judgment for different purposes can produce unseemly and disruptive litigation over the proper court in which to seek correction of a given error. Such difficulties can be completely avoided by empowering the same court to review all of the issues.

More basically, however, the position taken here is premised on the belief that the long-run solution to protecting the integrity of the trial proceeding is not to be found by splitting off isolated problems and creating specialized courts to handle them. It is quite true that many appellate courts are overburdened, that the delay between trial and the final resolution of appeals is often staggering, and that many appellate judges lack the trial experience desirable as a background for exercising review over sentences. But this kind of reasoning could well be used, for example, as the basis for establishing special courts for review of constitutional questions, others for review of questions concerning the admissibility of evidence, others for review of sentences, and so on. Rather, it is believed that the answer to such problems lies not in the

Proposed Rule 35. Correction or Reduction of Sentence.

(a) Illegal Sentence. The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within 120 days after the imposition of the sentence ~~the time provided herein for the reduction of sentence~~.

(b) Motion to Reduce Sentence. ~~The court may~~ A motion to reduce a sentence may be made within 120 days after the sentence is imposed either originally or upon revocation of probation. ~~or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction. The court may also reduce a sentence upon revocation of probation as provided by law.~~ An appeal shall not extend the time within which a motion to reduce sentence may be made. The provisions of rule 38 (a)(2) shall not apply to a motion to reduce sentence.

(c) Review of Sentence.

(1) Motion for Review. Within 30 days after the denial of an application made under subdivision (b) of this rule for the reduction of a sentence which may result in imprisonment for 2 years or more, the defendant may file a motion with the clerk of the district court for a review of the sentence. The motion may be made while an appeal is pending.

(2) Sentence Review Panel. There shall be in each district court a sentence review panel. The panel shall be composed of three district judges of the circuit who shall be designated and, if not already members of the court, assigned to the district court for that service by the chief judge of the circuit pursuant to 28 U.S.C. §292(b) or §294(c). The members of the panel shall serve for such periods of time as the chief judge of the circuit may designate. The same district judge may be designated and assigned to the sentence review panels of two or more district courts of the circuit at the same time. A district judge of the circuit may be designated and, if necessary, assigned by the chief judge of the circuit as an alternate member of the panel to sit in place of a regularly designated member whenever the latter was the sentencing judge in a case under review or is otherwise unable to sit. The district judge who is first in precedence shall preside over the panel.

(3) Procedure of Panel. When a motion is filed for the review of a sentence, the clerk shall forthwith notify the presiding judge of the sentence review panel. The presiding judge shall promptly cause the panel either individually or in joint session to review the sentence. The panel shall consider the papers on file in the case in the district court, including the presentence report, a report of a diagnostic facility, and any other documents which were before the sentencing judge. The panel may direct the preparation of a transcript of all

or part of the testimony and other proceedings in the case if required for its consideration. The panel may, in its discretion, permit the attorney for the government and the defendant or his counsel or both to appear before it and present oral argument or file written briefs or do both.

(4) Powers of Panel; Finality of Decision. If the panel deems that a sentence under review is excessive, it shall modify or reduce it; otherwise it shall confirm the sentence. The order of the panel modifying or reducing the sentence and amending the judgment of the court accordingly or confirming the sentence, as the case may be, shall be filed in the office of the clerk of the district court and entered in his docket. The order of the panel shall be final and not subject to further review or appeal.

Rule 35. Correction or Reduction of Sentence.

Advisory Committee Note

Rule 35 is amended to provide a procedure for the review of sentence thought by a defendant to be excessive. The review is to be before a panel of three district judges designated by the chief judge of the circuit. The panel is empowered to modify or reduce a sentence found to be excessive or to confirm a sentence found not to be excessive. The review panel is not empowered to increase a sentence.

Subdivisions (a) and (b) of the proposed rule remain basically the same with two exceptions: A change is made to provide that a motion to reduce a sentence must be made within 120 days, a period not extended (as under the current rule) by the taking of an appeal. A change is also made to make clear that a sentence of imprisonment need not be stayed, under rule 38 (a)(2), pending the decision on the motion to reduce a sentence. The objective is to achieve the prompt resolution of any issue relating to the propriety of a sentence. Thus the 120 days runs from imposition of sentence rather than 120 days from the decision on an appeal from the conviction. Both an appeal and a motion to reduce sentence can be taken at the same time. This is made explicit in subdivision (c)(1). Because the proposed rule will make possible the prompt resolution of the sentence issue, rule 38 (a)(2) which mandates a stay of a sentence of imprisonment is not made applicable to a motion to reduce a sentence.

Subdivision (c) is entirely new. It provides a procedure for reviewing a trial judge's refusal to grant a reduction of sentence.

Providing for a review of a sentence is recommended by the American Bar Association Standards Relating to Appellate Review of Sentences (Approved Draft, 1968). Section 1.2 of the ABA Standards Relating to Appellate Review of Sentences articulates the purposes of a sentence review procedure (pp. 7-8):

> 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 protection of the public interest;
>
> (ii) to facilitate the rehabilitation of the offender by affording him an opportunity to assert grievances he may have regarding his sentence;
>
> (iii) to promote respect for law by correcting abuses of the sentencing power and by increasing the fairness of the sentencing process; and
>
> (iv) to promote the development and application of criteria for sentencing which are both rational and just.

For a discussion of these objectives, see the commentary to §1.2 at pages 21-31.

Further discussion of the advantages of sentence review is found in Dix, Judicial Review of Sentences; Implication for Individual Disposition, 1969 Law and the Social Order 369, 369-371; Hruska, Appellate Review of Sentences, 8 Am. Crim. L.Q. 10 (1969); The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 25 (1967); Note, Appellate Review of Primary Sentencing De-

cisions; A Connecticut Case Study, 69 Yale L.J. 1453, 1461-1462 (1960); Appellate Review of Sentences, A Symposium at the Judicial Conference of the United States Court of Appeals for the Second Circuit [1962], 32 F.R.D. 249 (1963), Remarks of Judge Kaufman, pp. 260-261.

For discussions of objections to appellate review of sentencing, see Dix, Judicial Review of Sentences: Implications for Individual Disposition, 1969 Law and the Social Order 369, 371-372; The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 26 (1967); Appellate Review of Sentences, A Symposium at the Judicial Conference of the United States Court of Appeals of the Second Circuit [1962], 32 F.R.D. 249 (1963), Remarks of Judge Walsh, p. 276; Brewster, Appellate Review of Sentences [1965], 40 F.R.D. 79 (1967).

Many states now provide for some form of judicial review of sentences. See, e.g., Ariz. Rev. Stat. Ann. §13-1717 (1956); Conn. Gen. Stat. Ann. §§ 51-194 - 51-196 (Supp. 1965); Fla. Stat. §932.52 (1969); Hawaii Rev. Laws §212-14 (Supp. 1965); Ill. Ann. Stat. ch. 38, §117-3 (c) (Smith-Hurd 1964); Iowa Code Ann. §793.18 (1950); Me. Rev. Stat. Ann., tit. 15, §§ 2141-2144 (Supp. 1966); Md. Ann. Code art. 26, §§ 132-138 (1966); Mass. Gen. Laws Ann. ch. 278, §§ 28A-28D (1959); Neb. Rev. Stat. §29-2308 (1964); N.Y. Crim. Proc. Law § 450.30 (1971); Ore. Rev. Stat. §§ 138.050, 168.090 (1970); Tenn. Code Ann. § 40-2711 (1955). The United States military courts also have provisions

for the review of sentence, 10 U.S.C. §§ 860, 862(b), 863-864, 865(a), 866 (a)-(c), 869 (1964). For further discussion of the availability of review, see American Bar Association Standards Relating to Appellate Review of Sentences 13-15 (Approved Draft, 1968).

Subdivision (c)(1) conditions the right to a review of sentence on three things:

First, the sentencing judge must have denied a motion to reduce the sentence under subdivision (b). The sentencing judge is thus given the opportunity to first review the sentence in light of the issue raised by the defendant.

Second, the right of review is limited to those defendants whose sentence may result in imprisonment for two years or more. This would include a sentence of two years which is imposed and suspended and the defendant placed on probation. In this situation the two-year suspended sentence can be reviewed but not the period of probation. It also includes a split sentence if the total period of the sentence is two years or more. It does not include a case in which sentence is not imposed and a defendant placed on probation. Should probation be revoked and a sentence of two years or more be imposed, review of that sentence would then be available to defendant.

The two-year minimum conforms to that of at least one state which provides for review of sentences. See Md. Ann. Code, art. 26, §132 (1966). Of the states providing by statute for the review of sentence, only one has a minimum sentence of

greater than two years. See Mass. Gen. Law Ann. ch. 278, §28A (1959), providing for a sentence of more than five years to the state reformatory for women. However, Massachusetts also provides for the right of review for all sentences to the state prison. Similarly, see Me. Rev. Stat. Ann., tit. 15, §2141 (Supp. 1966). Several other states have a one-year minimum. See, e.g., Conn. Gen. Stat. Ann. §51-195 (Supp. 1965); 10 U.S.C. §866 (b) (1964) (United States Military Courts). For a criticism of having two classes of convicted persons, see Note, Appellate Review of Primary Sentencing Decisions: A Connecticut Case Study, 69 Yale L.J. 1453, 1464 (1960).

Third, the defendant must make his motion to review within thirty days after a denial of a motion to reduce the sentence made under the provisions of subdivision (b).

Subdivision (c)(2) prescribes the manner for selecting the review panel. The panel consists of three district judges with an additional district judge as an alternate. The alternate will make it possible to exclude from the panel the judge who imposed the sentence being reviewed.

Using a panel of district judges permits those judges most experienced with sentencing to participate in the review process. It thus avoids, as a major objection to review of sentences, the argument that appellate judges are not qualified for the task. See, e.g., Appellate Review of Sentences, A Symposium at the Judicial Conference of the United States Court of Appeals for the Second Circuit [1962], 32 F.R.D. 249 (1963), Remarks of Judge Walsh, pp. 285-286. 28 U.S.C. §292 (b)

and §294 (c) are incorporated, by reference, into the rule to emphasize the fact that they are the established procedure for appointing a judge from one district to serve in another district or for appointing a senior judge to serve in a district. These provisions are needed because many districts lack the necessary three district judges to constitute the review panel.

Subdivision (c)(3) prescribes the procedures to be followed by the panel. There is no requirement that the panel hold a formal meeting. It is only required that each member of the panel review the sentence. The need for meetings will vary.

The panel is required to consider the papers on file in the district court which were available to the sentencing judge including the presentence report, a report of a diagnostic facility (such as that following a commitment under 18 U.S.C. §4208 (b) or §5010 (e)), and any other written data relevant to sentencing. The panel, at its discretion, may also order the preparation of the transcript of the trial or other proceedings held in the case. The objective is to present to the review panel all of the sentencing information available to the sentencing judge. See discussion, ABA Standards Relating to Appellate Review of Sentences 42-45 (Approved Draft, 1968). The existing rule has been interpreted to impose a limitation of the inquiry to the factual record. See Semet v. United States, 422 F.2d 1269 (10th Cir. 1970). The proposed rule con-

templates that review will be limited to the factual information in the written record (transcripts, presentence reports, etc.).

The panel is given discretion to hear oral argument and to accept a written brief. The proposed rule is not explicit on the right of a defendant to be represented by counsel during a sentence review procedure. The issue of the constitutional right to counsel is left to future court determination. Compare Consiglio v. Warden, State Prison, 153 Conn. 673, 220 A.2d 269 (1966), ruling that review of sentence, as provided under the Connecticut statute, is a critical stage; and United States v. Birnbaum, 421 F.2d 993 (2d Cir.), cert. denied 397 U.S. 1044, reh. denied 398 U.S. 944 (1970), holding that constitutional rights are not abridged by absence of defendant's counsel on review of a refusal to grant probation. The Connecticut situation is distinguishable from proposed rule 35 in that Connecticut allows the sentence review panel to increase the sentence originally imposed. Proposed rule 35 allows only a reduction and is therefore not as critical a stage as is the Connecticut sentence review. See United States ex rel. Smith v. Hendrick, 260 F. Supp. 235 (E.D. Pa. 1966); aff'd 378 F.2d 373 (1967). Should the review panel request briefs or oral argument, it would seem obviously wise to ensure that the defendant has the advice of counsel. Proposed rule 35 is intended to leave this in the discretion of the sentence review panel in cases where defendant's trial counsel does not carry

through with the motion to review sentence. Because a defendant has the right to counsel at the original sentencing, he is thus provided assistance in marshaling factual information and argument relevant to sentencing which will be a matter of record and available to the review panel. Trial counsel also has an opportunity to inform defendant of his right to review of the sentence imposed by the trial judge.

The rule does not attempt to specify what evidence is admissible on the issue of the propriety of the sentence under review. Consider Proposed Rules of Evidence for United States Courts and Magistrates, rule 1101 (d)(3) (Revised Draft 1971), which recommends that the rules of evidence should not apply to sentencing. For interpretation of existing law, see Proposed Rules of Evidence for United States Courts and Magistrates, p. 153 (Revised Draft 1971).

The rule does not require either the sentencing judge or the review panel to give written reasons for the sentence imposed. There is a question as to the usefulness of written reasons for imposing a sentence. The requirement has been criticized as providing unhelpful opinions. See Note, Appellate Review of Primary Sentencing Decisions: A Connecticut Case Study, 69 Yale L.J. 1453, 1466-1475 (1960); Halperin, Appellate Review of Sentence in Illinois--Reality or Illusion?, 55 Ill. B.J. 300, 301 (1966); and Appellate Review of Sentences, A Symposium at the Judicial Conference of the United States Court of Appeals of the Second Circuit [1962], 32 F.R.D. 249 (1963),

Remarks of Judge Walsh, pp. 282-283. In the view of the Advisory Committee, the contribution made by requiring written reasons is not sufficient to justify the cost in time and money which would be imposed upon the sentencing and sentence review processes. The decision as to when to write an opinion is left to the discretion of the sentencing judge and the review panel. See ABA Standards Relating to Appellate Review of Sentences 50 (Approved Draft, 1968).

Subdivision (c)(4) gives the reviewing panel the power to modify or reduce the sentence under review only if the panel deems the sentence to be excessive. The right to "modify" the sentence includes the right to adopt other sentencing alternatives. The panel is without authority to increase the sentence being reviewed. The reasons for not allowing the sentence to be increased include: (1) There seems to be no inherent relationship between those defendants who deserve an increase and those who are likely to take an appeal. Compare Van Alstyne, In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant, 74 Yale L.J. 606, 621-622 (1965). (2) A stigma of unfairness may attach to the review system, outweighing the value gained in the few cases in which an increased sentence is justified. See Report of the Interdepartmental Committee on the Court of Criminal Appeal, Meador Report, Appendix C, p. 142, ABA Standards Relating to Appellate Review of Sentences (Approved Draft, 1968). (3) The power to increase sentence upon appeal by defendant might frustrate the

objective of rehabilitation. (4) The sixty years of experience in England with the power to increase sentences led to the conclusion that it does not serve a needed function. See Meador Report, Appendix C, pp. 144 and 157 of ABA Standards Relating to Appellate Review of Sentences (Approved Draft, 1968). (5) There is some question as to whether such a provision would be constitutional. See Kohlfuss v. Warden, 149 Conn. 692, 183 A.2d 626, cert. denied, 371 U.S. 928 (1962); and Hicks v. Commonwealth, 345 Mass. 89, 184 N.E.2d 739 (1962), cert. denied, 374 U.S. 839 (1963), where the constitutionality of two state review statutes was questioned and yet the statutes withstood the attack. But compare United States ex rel. Hetenyi v. Wilkins, 348 F.2d 844, 859-860 (2d Cir. 1965), cert. denied, 383 U.S. 913 (1966); People v. Henderson, 60 Cal. 2d 482, 35 Cal. Rptr. 77, 386 P.2d 677 (1963). Also see Appellate Review of Sentences, Hearings on S. 2722 Before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 89th Cong., 2d Sess. 106 (1966) (statement of Professor George). These arguments are discussed in ABA Standards Relating to Appellate Review of Sentences 57-63 (Approved Draft, 1968). To insure against a flood of frivolous claims, the proposed rule limits the right of review to sentences of two years or more rather than to try to deter frivolous appeals by the threat of an increased sentence. See ABA Standards Relating to Appellate Review of Sentences 61-62 (Approved Draft, 1968).

The rule does not provide for the remand of the case to the sentencing court. To remand a case would slow down the procedure of review. If a sentence is found to be excessive, the panel should correct the defect and issue the final order.

The rule does not impose a duty on the sentencing judge to notify the defendant of his right to move for reduction or review of sentence.

MEMORANDUM CONCERNING THE PAROLE POLICIES OF THE UNITED STATES BOARD OF PAROLE

Federal Judicial Center*

Introduction

On September 24, 1973, the United States Board of Parole published rules reflecting the revised organization, operation, and procedures of the Board. (38 Fed. Reg. 26652-57.) On November 19, 1973, the Board published a rule setting forth a statement of paroling policy. (38 Fed. Reg. 31942-45.) On June 5, 1974, a minor revision of the rules was published. (39 Fed. Reg. 20028-39.) It is the purpose of this memorandum to provide some background that may be of assistance in understanding the Parole Board rules, and to point out some implications for the sentencing process.

The rules make three major changes from the past practice of the Parole Board. First, they provide for delegation to hearing examiners of the decision-making authority formerly exercised by Board members, with the consequence that the future role of Board members -- some of whom will serve as the Board's Regional Directors -- will be principally one of deciding internal appeals and making policy decisions. Second, they provide guidelines for making parole decisions. Third, they provide for informing inmates of the reasons for any denial of parole.

It is hoped by the Board that these changes will result in (1) a reduction of the time lag between the parole hearing and the communication of the decision to the inmate; (2) a reduction of the caseload borne by Board members and a corresponding increase in the attention they can give to those matters that do come before them; (3) an increase in inmates' understanding of the workings of the parole system and of the decisions in their cases; and (4) a greater consistency among parole decisions.

Although the delegation process has not yet been completed, the policy guidelines for parole decisions are now effective nationwide. For the Board's Northeast Region, authority has been delegated to hearing examiners in accordance with section 2.23 of the rules (39 Fed. Reg. 20034). For other regions, decisions are currently being made by a Board member and an examiner jointly, but a delegation to hearing examiners is anticipated in the relatively near future. The Board will open regional offices in Philadelphia, Atlanta, Kansas City, Dallas, and San Francisco.

* Published in August, 1974.

For the sentencing judge, the most important portions of the rules are those that set forth the policies that now guide parole decisions. The Parole Board is publicly committed to periodic review of these policies and expects to change them from time to time as experience suggests. There can therefore be no assurance that the current guidelines will be in effect at such time as a prisoner sentenced today becomes eligible for parole. But they do provide the best available basis for estimating how an offender will be treated by the Board.

General Description of Parole Policies

The Parole Board has established three sets of guidelines for decision making -- one for adult offenders, one for youth offenders, and one for defendants sentenced under the Narcotic Addict Rehabilitation Act. The guidelines (39 Fed. Reg. 20031-33) provide a range of "customary" incarceration times based on a combination of (1) the severity of the offense for which the offender is serving time, and (2) a prognosis of the offender's success on parole (salient factor score). For example, referring to the table on page 20031 of the Federal Register, the customary time for a defendant convicted of a low-severity crime would be 6 to 10 months if his salient factor score were 9 to 11; it would be 8 to 12 months if his salient factor score were 6 to 8; etc. The classification of offenses into severity categories is identical in the three tables. The salient factor score is computed on the basis indicated in the worksheet reproduced at page 20034; possible scores range from 0 to 11.

Use of the guidelines in a particular case is predicated on "good institutional adjustment and program progress" by the inmate. In addition, section 2.19 of the regulations (39 Fed. Reg. 20030) lists a number of factors other than the guidelines that the Board generally considers in exercising its discretion. These include such factors as the type and length of sentence, the recommendations of the judge and other responsible officials, and the community resources available to the inmate if he is paroled. These nonguideline factors enter into consideration in a number of ways. First, since the guidelines provide ranges of customary incarceration periods rather than fixed lengths of time, other factors can be brought to bear in selecting an incarceration period within the range. Second, there is in some cases room for judgment in determining the severity category of a crime, either because the crime is not one of those categorized in the guidelines or because the severity category can be changed on the basis of aggravating or mitigating circumstances. Third, the rules provide that the salient factor score may be overridden by clinical evaluation of the parole risk. And fourth, authority is provided to depart from the guideline figures.

It is worthy of emphasis that the guidelines do not contemplate a purely mechanical exercise. But they are of course expected to have a major role in determining parole outcomes. A recent Parole Board study indicates that prisoners are paroled within the guideline ranges in about 88% of the cases in which the sentence permits that result.

Implications for the Sentencing Process

It will be noted that the customary incarceration times in the guidelines are determined almost entirely on the basis of information that is available to the judge at the time of sentencing. Not only is the severity of the crime ascertainable at the time of sentencing, but most of the factors that go into the prognosis of parole success are also ascertainable at that time: of the eleven possible points in the salient-factor score, only two (those based on education and release plan) are likely to turn on post-sentencing events. Thus the Board's exercise of its discretion will be guided largely by two sets of facts: (1) the offender's adjustment and progress in prison, which determine whether the guidelines are applicable, and (2) the guidelines themselves, which are based primarily on facts that were known to the sentencing judge. The sentence itself is treated primarily as establishing the limits of parole discretion rather than as guiding its exercise, except that in some cases the decision whether to use a Youth Corrections Act sentence or a Narcotic Addict Rehabilitation Act sentence will determine which guidelines the Board uses.

Among the implications for the sentencing process are the following:

1. Before deciding upon a sentence, a judge may wish to determine how the guidelines would apply to the particular defendant. This will enable him to assess the impact that various possible sentences would have on the defendant's chances for parole. For example, the guideline for bank burglary indicates that an adult offender with good prison adjustment and a "good" parole prognosis would customarily be paroled after 20 to 26 months. Taking account of parole eligibility and statutory good time, and assuming a regular adult sentence, a 3-year sentence would give the Board discretion to release at any time between 12 months and about 28 months, and would thus leave them free to do so at any time within the guideline range. A 5-year sentence would give discretion

to release at any time between 20 months and about 44 months, and would also leave them free to do so at any time within the guideline range. The actual release date under either sentence would quite probably be the same. A sentence of less than 3 or more than 5 years, on the other hand, would put at least part of the guideline range outside the reach of the Board's discretion, and a sentence of 2 years or 7 years would put the entire range out of reach.

2. For defendants who are under 26 at the time of conviction, the type of sentence given will determine whether the adult guidelines or the youth guidelines are used. Except for crimes of "low" or "low moderate" severity, a sentence under the Youth Corrections Act will result in a shorter customary period of incarceration. This is true for young adult offenders (18 U.S.C. § 4209) as well as for youth offenders.

3. A sentence under the Narcotic Addict Rehabilitation Act often will result in a shorter customary period than either a Youth Corrections Act sentence or a regular adult sentence. In this case, however, the Parole Board requires more than its own determination that there has been good institutional adjustment and program progress; the Board is without authority to grant parole unless it has received the Attorney General's report and Surgeon General's certificate described in 18 U.S.C. § 4254.

4. The fact that a sentence is rendered under 18 U.S.C. § 4208(a)(1) or (a)(2) will not affect which guidelines are used. It will, of course, expand the range of discretion available to the Parole Board. Theoretically, it can also influence the choice of a period within the range established by the guidelines. However, (a)(1) and (a)(2) sentences are used for different purposes by different judges, and perhaps even by the same judge in different cases. Some Parole Board members have indicated that the mere fact that (a)(1) or (a)(2) has been used is therefore unlikely to play a significant role in the exercise of Parole Board discretion.

5. Representatives of the Parole Board have indicated that they welcome recommendations from sentencing judges, including the reasons for sentences imposed, whether at the time of sentencing or later. The Board will not treat such recommendations as limiting their discretion, but it will give them consideration in exercising that discretion. The most effective way for a judge to communicate his views at the time of sentencing is to provide a written statement of those views and direct that it be attached to the copies of the presentence report that go forward to the Bureau of Prisons. That procedure will insure that the expression of views is part of the file considered by the Parole Board.

THE SEARCH FOR A RATIONAL SENTENCE

Robert J. Kutak & J. Michael Gottschalk*

Unquestionably the most widely voiced reservation about a system of appellate review is that such a system would impose too great a burden on the existing courts of appeals. Critics of appellate review have focused upon this argument virtually to the point of excluding all other considerations. In his analysis of federal juris-

*Members of the Nebraska Bar; this is an excerpt from an article by the same title to appeal in a forthcoming issue of the Nebraska Law Review.

diction, Judge Friendly has referred to appellate review as the "worst spectre of all."[188] His concerns about excessive work load are stated as follows:

> But I hope there will be enough good judgment in Congress to realize that adoption of [appellate review] would administer the coup de grace to the Courts of Appeals as we know them. The problem of volume is not so much with the cases where a sentence is imposed after a trial, since most of these will be appealed anyway and the sentence would be just one more point to be considered, although sometimes an important and difficult one, but with the great mass of convictions, nearly 90% of the total, obtained on pleas of guilty or nolo contendere. If the sentence in only half of these were appealed . . . [and] most proponents of appellate review of sentences reject out of hand . . . a possible increase of sentence . . . [as a] limiting effect, the case load of the Courts of Appeals would be doubled by this means alone. While there would not be an equivalent increase in burden, . . . if even a small percentage of those convicted on pleas of guilty should appeal their sentence, "the courts would be swamped."[189]

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

> Experience in these states has not confirmed the fears of those who urged that appellate courts would be overwhelmed with new appeals . . . . . The same has been true of the experience in England where appellate courts have long had and exercised powers like those which would be provided to the U. S. Court of Appeals by S.2722.[190]

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

> . . . far less than decisive weight . . . . We do not know . . . how large the burden would actually be, my own hunch is that the usual attack upon a sentence would be short work (which means . . . most would be affirmed, but does not lessen the need for allowing appeals).[191]

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

> [I]t would greatly relieve whatever system [of appellate review] is adopted if it could be explicitly provided that in cases where the sentence is imposed after [a plea bargain] . . . the defendant . . . need not have the right to appeal from sentence.[192]

During his Senate testimony, Professor Daniel J. Meador was not prepared to agree that such a system should be formalized, but he concurred that "where the negotiated plea includes an agreement about sentence and . . . the agreement is included in the record . . . the appellate court is not going to touch the sentence."[193] The alternative found in S.176 of allowing review only of those sentences imposed more than six months after its passage would, of course, be another method of limiting the change in appellate work load which it is predicted would follow adoption of a system of sentence review.

Another relevant consideration in any evaluation of the potential effect of a sentencing review system upon appellate work load is the manner in which appeals having no significant merit may be identified and disposed of. Appellate court judges soon develop the skills to take an accurate measure of the pleadings coming to them. Those lacking substantial merit are quickly identified. As Judge Lumbard testified: "I think the fact is that most of the petitions for review . . . can be decided very speedily by looking at the papers . . . ."[194] He estimates that 80% of sentence review cases could be disposed of by this initial review and that further consideration or hearings would be required for only the remaining 20%. Judge Hoffman believes the number of sentence appeals which could be rapidly disposed of would be even higher: "We visualize that probably 95 out of every 100 of these cases will be of little or no merit."[195]

The possibility must be acknowledged that a sentence review system could actually reduce appellate work loads. Judge Sobeloff has observed that "when judges sense that injustice has been done, they strain to magnify minor defects in a search for reversible error."[196] The painstaking manner with which appellate courts occasionally search the non-sentence aspects of criminal cases to find

a justifiable basis for overturning what is considered to be an unreasonable sentence has been observed by Judge Frankel:

> [T]he appellate judges will search out some strained species of "error" in the trial, not because they genuinely deem it a proper ground for a reversal, but as a pretext for setting aside the intolerable sentence.[197]

Judge Hoffman readily concurs:

> [W]hen the matter hits the appellate court there is frequently a compromise of differences by one judge saying, "Well, I won't reverse if you will cut the sentence down from ten years to two years, I will go along and vote affirmance . . . ." I don't approve of that. That has been done . . . I am confident it is probably done on the appellate level in many, many instances.[198]

As Judges Sobeloff, Frankel and Hoffman have all observed, and the line of cases based upon Williams confirm, very significant amounts of appellate time may be devoted to seeking vehicles by which to camouflage substantive sentence review. A system which openly permitted such review would obviously eliminate the necessity for these creative enterprises. It is likely in many instances, therefore, that any of the currently proposed appellate review systems would reduce, not increase, existing appellate work load.

Finally, the most obvious response to any suggestion that the appellate review system would overload the court structure is that such a suggestion is simply irrelevant.

"[I]f the work requires an additional law clerk, that is little enough for the government to provide."[199] Or, as Professor Hall stated:

> Anything that gives any judge extra work is a burden on the courts, but our courts exist to do justice, and I am convinced [appellate review] is a very important thing. If it puts an extra burden on the courts, it must be borne.[200]

Judge Frankel agrees:

> Considering all the things on which appellate judges ponder, the effort to make sentences more rational and just would hardly seem unworthy of their labors.[201]

Nearly fourteen years ago, the then chairman of the House Judiciary Committee acknowledged that the most frequent objection to a sentence review system is that it would "overburden the appellate courts with a flood of appeals." His response to that objection, however, remains unanswerable:

> This objection completely evades the issue of whether an appeal procedure is needed to insure the quality of justice that should characterize our courts.[202]

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

> We must be careful that we do not overload our courts. At the same time, we must keep our perspective. We must not refuse to do justice for a lack of courts. Court congestion is reason to move with care. It is not a reason to fail to act.[203]

C. PROCEDURE IN SENTENCING APPEALS

STANDARDS RELATING TO CRIMINAL JUSTICE: APPELLATE REVIEW OF SENTENCING - PROCEDURE

American Bar Association*

2.2 Procedure and conditions.

(a) In all cases where sentence is imposed after a trial on the question of guilt, review of the sentence should be available on the same basis as review of the conviction.

(b) In all cases where a sentence is imposed after a guilty plea or the equivalent, review of the sentence, as well as review of other matters which can be raised, could appropriately be governed by a procedure patterned after the following:

(i) Notice of appeal should be required of the defendant within [15] days of the imposition of sentence. The court should advise the defendant at the time of sentencing of his right to appeal and of the time limit, and should at the same time afford him the opportunity to comply orally with the notice requirement. It should be the responsibility of the attorney who represented the defendant at the sentencing stage to advise him with respect to the filing of the notice of appeal, and to assure that his rights in this respect are protected. Both the sentencing court and the reviewing court should be authorized to enlarge the time for filing the notice of appeal for good cause;

(ii) The sentence appeal should be of right, except to courts where appeal from a conviction after trial would be by leave of court. In cases where leave is required, it may be preferable to follow normal procedures instead of a special procedure patterned after this subsection;

(iii) Unless the defendant is able to retain his own legal assistance or elects not to be represented, an attorney should be appointed as soon as the notice of appeal is filed. Unless it appears inappropriate in a particular instance, it is desirable that the same attorney who represented the defendant at the trial level be appointed to prosecute the sentence appeal;

(iv) The clerk or other responsible official should be required to secure a transcript of the record within [10] days of the filing of the notice of appeal. He should also be required to provide a copy as soon as it is available to the defendant's attorney, to the defendant if he has no attorney, to the state, and to the reviewing court;

* Prepared by Advisory Committee on Sentencing and Review, Simon E. Sobeloff, Chairman and Peter W. Low, Reporter. Approved by House of Delegates in 1968.

(v) All papers in support of the merits of the appeal should be required to be filed within [15] days from the time the attorney, or the defendant if he has no attorney, receives the record, unless the time is enlarged upon application to the reviewing court;

(vi) Any response which the state desires to make should be required to be filed within [10] days of the filing of the defendant's papers, unless the time is enlarged upon application to the reviewing court. The state should promptly notify the court if it has decided not to file a response;

(vii) All written submissions may be typed rather than printed;

(viii) In courts of more than three judges, panels of three may be designated to hear the sentence appeal, without a hearing en banc unless the court sua sponte so orders. The appeal should be decided as expeditiously as is consistent with a fair hearing of the defendant's claims. If possible, time should be allocated each week for the hearing of all appeals which are then ready for disposition, and a decision should be rendered as promptly as the case permits. It may be appropriate in some cases, as where the appeal is patently without merit, to decide the case summarily without a hearing;

(ix) The defendant should commence service of a prison term upon imposition of the sentence, unless bail or the equivalent is granted by the sentencing court or the reviewing court upon special application, or unless either the sentencing court or the reviewing court specifies upon application that the defendant should be detained in a local facility until the sentence appeal has been concluded.

If such a procedure is developed for guilty plea cases, it may also be appropriate to use it in all cases where matters relating to the sentence are the only questions which can be appealed.

Commentary

a. General

Given the decision to provide for review of the sentence, there are a host of collateral issues which must be resolved with respect to the procedures which should be employed. These range from highly technical questions of timing and form of presentation to the critical issue of whether the courts should have at their disposal devices to temper the burden which sentence review may pose.

The starting point for the Advisory Committee is that there seems little to distinguish the problems caused by sentence review from those caused by the review of other issues. Nor, on the other side of the coin, are there particular characteristics of sentence review which call for procedures which are more or less cumbersome than procedures required in other instances. For example, whether there should be an appeal as of right or by leave of court would seem to pose the same type of problem whether the issue is review of the sentence or review of the

conviction. With respect to either issue, use of the leave device to control the volume of cases may be a defensible way to meet the fears of those who are concerned about overburdening the courts with frivolous appeals. On the other hand, to the extent that it is thought desirable that there be at least one appeal as of right in a criminal case, it may be thought equally desirable to apply the idea to the sentence as well as the conviction. Both procedures, in any event, can substantially serve the function which a system of review is designed to serve.

But while the principle of sentence review does not seem to dictate an answer to such questions, there are practical considerations which in the view of the Advisory Committee do suggest an approach. Many cases will arise in contexts which call for review of the sentence in the same proceeding which will review other issues. It would be needlessly complex if the reviewing court had to follow one procedure for the sentence and another for the other issues in the same case. Time and trouble could well be increased rather than reduced. The decision that regular reviewing courts should also review sentences thus leads naturally to the conclusion that the procedures for sentence review should be integrated with the procedures already in use in those courts.

It should be noted that the problems to which this view may lead most likely will be problems which are not unique to sentence review. In general, the Advisory Committee is of the view that appellate procedures should be as informal and flexible as is compatible with the issues to be resolved, but at the same time that the proper approach to simplifying appellate procedures is to attack the problem with reference to all appeals, rather than only with an eye to review of a particular issue. For this reason, the Advisory Committee would recommend that the starting point in the development of a procedure for appellate review of sentences should be the system already in effect for reviewing other issues in criminal cases.*

This section is accordingly based on the principle that the same procedure should govern all of the issues which arise in the same case. A corollary is that the governing procedure should not turn on which issues are in fact raised, but instead should depend upon the issues which can potentially be raised. There is no better way to encourage the raising of frivolous points, for example, than to require leave of court if only the sentence is attacked, but to permit review as of right if the conviction is also appealed.

*It should be noted that the Advisory Committee intends to address in a separate report the broader question of appellate procedure in criminal appeals generally.

The conclusion, therefore, is that the development of unique procedures for sentence review is likely to create more problems than it will solve, and that sentence review should be integrated into the system presently in use. Subsection (a) implements this conclusion with respect to sentences which have been imposed after a trial. Subsection (b) raises the possibility that a special procedure may be desirable, with respect to sentences as well as other issues which can be raised, in cases where conviction is the result of a plea.

b. Guilty plea cases

There are several reasons which may justify the creation of a unique procedure in guilty plea cases. In almost all instances, the issues which could be raised on an appeal after a plea would turn on an evaluation of the factual record established below, and thus rarely would involve matters on which extended research would be required. Briefs could in general be prepared more quickly, perhaps justifying a reduction in the time normally permitted to both sides. The record too is likely to be short, and thus both less time consuming to prepare and less difficult for the parties and the court to digest. Quite aside from any advantage offered because of the availability of review of sentences, a case could thus be made for the provision of a more streamlined procedure for use in guilty plea cases, with of course adequate protection against the possibility that there will be exceptional cases which will justify a departure.

The major reason for the suggestion embodied in subsection (b), however, is that the enactment of a sentence review provision offers an opportunity to simplify appellate procedures and at the same time to meet a major criticism which has hindered the acceptance of the principle of sentence review. Many have expressed concern that providing for sentence review will flood the appellate courts with essentially frivolous appeals, and thus impair their ability to discharge other functions. The major source of this view, as developed in more detail at pages 60-62, *infra*, involves the defendant who has pleaded guilty. Guilty pleas now constitute the great bulk of criminal convictions, and in most instances no direct appeal is taken in such a case. While it can be anticipated that there will be no significant increase in the number of appeals by defendants who have been convicted after a trial, providing for sentence review will for the first time offer an avenue of appeal to the guilty plea defendant, and will thus necessarily increase the pool of potential appeals.

Provision of a more streamlined procedure in guilty plea cases should go far to meet the difficulties suggested by such an increase, and at the same time be more responsive to the problem than some of the other devices which have been suggested. Particularly would this be the case if the court had the power, as contemplated by subsection (b)(viii), to summarily decide those cases which are clearly of no merit. In the view of the Advisory Committee, proper authority to meet frivolous cases on their merits and dispose of them with dispatch should effectively meet the added burdens of sentence review.

The dangers of creating a special procedure can come from two sources. The major one is that the availability of a summary procedure in only certain classes of cases will materially affect the quality and evenness of review afforded to those who must take that route. Care must be taken to assure that the system does not proceed in a manner so abrupt as to create the impression that the claims will not be seriously considered. The second danger stems from the manner in which the line between procedures which are applicable to different kinds of cases is drawn. There is always the possibility that different routes to the same court will invite troublesome distinctions which could consume more time in their resolution than a direct decision on the merits of the case.

The provision of a more simplified procedure in guilty plea cases would not, however, seem to involve such a difficulty. Whether it would lead to so perfunctory a system as not to advance the goals of sentence review seems largely within the control of the reviewing court, so long as the court is not hamstrung with procedures so rigid as not to afford it the flexibility to treat the serious cases with the care they deserve.

Finally, several observations should be made about the specifics of the procedure outlined by subsection (b). First, it is important to make the general point that the Advisory Committee is not recommending the outright adoption of this particular procedure in any jurisdiction. Nor is it suggesting that the quality of review will necessarily be affected by a procedure which is more complex, or more streamlined. The suggested procedure is merely an example of a structure which in the judgment of the Advisory Committee will adequately protect the interests of the parties, as well as operate to the advantage of the system. Its implementation should result in the completion of review within sixty days, a figure which compares favorably with the three months typically consumed by the English procedure. See MEADOR REPORT, Appendix C, pp. 122-23.

Although most of the specific provisions are self-explanatory, three deserve special comment. The detail of subsection (b)(i) is designed to avoid the problems encountered in the federal courts in the administration of Rule 37(a)(2). See Fallen v. United States, 378 U.S. 139 (1964); PROPOSED AMENDMENTS TO RULES OF CRIMINAL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS, 39 F.R.D. 168, 192-93, 197-200 (1966). The underlying reason for subsection (b)(ix) also deserves some elaboration. In most cases, where the defendant is seeking only a reduction in the term to which he has been sentenced, it is fairly clear that bail should not be granted, and that little would be served by detaining the defendant in a local institution to await the conclusion of the sentence appeal. In some cases, however, where there is a realistic chance that the appellate court will decide that probation instead of incarceration was the appropriate sentence, power in the sentencing court and appellate court to release the defendant pending disposition

of the appeal could properly be exercised. It also may be desirable in some instances to permit either court to detain the defendant in a local facility until the review has been completed. The purpose of subsection (b)(ix) is thus to state the conclusion of the Advisory Committee that the normal result should be the commencement of the sentence, with power in the courts to adjust that result as dictated by the circumstances of particular cases. Lastly, the final sentence of subsection (b) is designed to govern cases such as an appeal from a remand for re-sentencing, where the only issue open on review will be whether the sentencing court complied with the remand order. If an expeditious procedure has been developed for guilty plea cases, it would seem appropriate to use it on such occasions.

2.3 Record on appeal; statement explaining sentence.

(a) The following items should be available for inclusion in the record on appeal:

(i) a verbatim record of the entire sentencing proceeding, including a record of any statements in aggravation or mitigation made by the defendant, the defense attorney and the prosecuting attorney, together with any testimony received of witnesses on matters relevant to the sentence, any instructions or comments by the court to the jury in cases where the jury participated in the sentencing decision, and any statements by the court explaining the sentence;

(ii) a verbatim record of such parts of the trial on the issue of guilt, or the proceedings leading to the acceptance of a plea, as are relevant to the sentencing decision;

(iii) copies of the presentence report, the report of a diagnostic facility, or any other reports or documents available to the sentencing court as an aid in passing sentence. The part of the record containing such reports or documents should be subject to examination by the parties only to the extent that such examination was permitted prior to the imposition of sentence.

(b) The record normally should be prepared in each case in the same manner as would any other record to be presented to the court involved.

(c) The sentencing judge should be required in every case to state his reasons for selecting the particular sentence imposed. Normally, this should be done for the record in the presence of the defendant at the time of sentence. In cases in which the sentencing judge deems it in the interest of the defendant not to state fully the reasons for the sentence in the presence of the defendant, he should prepare such a statement for transmission to the reviewing court as a part of the record.

Commentary

a. Background

The experience in Oregon is an illustration of the need for a sentence review statute to anticipate the problem of what the record on

appeal should contain and how it should be prepared. The review statute in that state made no provision for a record, and as a consequence defendants in Oregon were at first without a means of utilizing the statute. The Supreme Court ultimately remedied the situation by an exercise of its rule-making power. See State v. Ridder, 185 Ore. 134, 202 P.2d 482 (1949).

The provision here is of course not intended to disapprove of delegating the power to deal with this issue to the courts. Permitting judicial control over such matters may indeed be the most efficient means of dealing with the problem. The point, on the other hand, is that a legislature contemplating a review statute should confront the problem and assure that either the courts or the statute itself will resolve the questions of what the record should contain and how it will be put together.

b. Contents of record

The objective of the provisions dealing with what the record should contain is to place before the reviewing court all of the information that was before the sentencing court. Of course, in one respect the information will be of a different character, for the trial judge will have had the opportunity to observe the defendant and to hear personally any witnesses. This is an advantage that the reviewing courts can fully take into account, as they do regularly when confronted with other issues involving credibility and a judgment based in part on the demeanor of a witness.

It might be observed at this point that one of the arguments frequently advanced against appellate review of sentences is that it ignores the unique opportunity of the trial judge to observe the defendant and thus to base his disposition on personal familiarity with the defendant's character. See, *e.g.*, Brewster, *Appellate Review of Sentences*, 40 F.R.D. 79, 85-86 (1965). As noted, however, there is no reason to suspect that in a proper case the appellate court will not give due consideration to this factor. In addition, it is not always clear that the trial judge has the advantage. One trial judge has put it this way:

> It is urged that the trial judge has a better acquaintance with the true nature of the defendant because of personal contact or observation. Does this contention really stand up? I think not. Where a judge has presided over a trial, particularly if it be a long trial, it is true that the trial judge has had an opportunity to observe the defendant. In many cases, it is limited literally to visual observation because, in many cases, defendants do not testify. But whether the observation be literally and exclusively visual or is supplemented by a trial judge's assessment of a defendant's testimony and demeanor on the witness stand, is it really reliable as the controlling criterion, for example, as to whether defendant should be imprisoned for 2 years or for 20? Who among us would really want to have that vital determination turn upon one man's assessment of our personality under such unusual and difficult circumstances?

> My admiration for my brothers on the federal trial bench throughout the country and for their exceptional insights into human beings is second to none. But it has not convinced me that they or I possess some wholly unique capacity to make the punishment fit the crime because of their or my personal observation of a defendant during the course of his trial.
>
> There is one more vital fact to be adduced against this whole concept that the trial judge's opportunity to observe the defendant is a sine qua non of justice in sentencing. The great majority of defendants charged with federal crime plead guilty. In these cases, "the eyeball to eyeball" confrontation between judge and defendant, including the colloquy involved in the defendant's right of allocution, is usually a matter of 10 or 15 minutes, Now I do not urge, let me repeat for emphasis, I do not urge, that this person-to-person relationship is without value. I think it has great and meaningful worth to all concerned. But great as that value is, it is just not a sound predicate for the notion that, lacking it, an appellate court cannot soundly review a sentence imposed by a trial judge. So far as justice in sentencing turns upon appraisal of the personal traits of a defendant, I doubt if there be a worse time to make that evaluation than when the always anxious, often frightened, human being stands before us to learn the particular fate we are about to make his.
>
> No, we Federal trial judges know this. The principal reliance for nearly every last one of us is upon the written presentence report of completely trusted and independent probation officers.

Appellate Review of Sentences, Hearings on S.2722 Before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 89th Cong., 2d Sess. 75-76 (1966) (Statement of Judge Weigel).

It is the Advisory Committee's position that a proper sentence, whether based on demeanor evidence or not, will be able to withstand appellate inquiry into its rationality. Certainly it does not follow that because judges get to see the defendant, massively excessive sentences should go uncorrected.

The objective of the provisions in subsection (a), then, is to place before the appellate courts as much as possible of the same information that was presented to the sentencing judge. The verbatim record is selected as the most efficient and accurate manner of achieving this objective.

c. Disclosure of presentence reports

While the Advisory Committee intends to take a position on the disclosure of presentence reports in its recommendations with respect to the sentencing stage itself, no position is taken here because it is thought best not to endanger acceptance of the principle of review by cluttering it with collateral issues. The statement in subsection (a)(iii) is thus to the effect that the presentence report, and similar reports or documents, should be available to the same extent that they were available at the sentencing level. The basis for this position is that whatever the view as to disclosure of such reports, it would be difficult to support secrecy at the trial level and availability at the appellate level, or for that matter the reverse. Whether such reports should be disclosed is an issue to be resolved separately. And whatever the resolution it should apply throughout the system.

d. Manner of preparation

Subsection (b) is in accord with the general philosophy of the view that sentence review should be integrated into the regular appellate structure to the extent possible. There would seem no basis for adding to the complexity of the proceeding by requiring preparation of the the record for a sentence review in a manner different from preparation of the record for review of other issues in the same court. Of course, other steps may have to be taken where a special procedure is adopted for guilty plea cases as envisaged by section 2.2(b).

e. Statement of reasons

In addition to the aid that a statement of reasons by the sentencing judge will give to reviewing courts, there are many independent reasons for requiring such a statement. In the first place, "a good sentence is one which can be reasonably explained." Youngdahl, *Remarks Opening the Sentence Institute Program, Denver, Colorado,* 35 F.R.D. 387, 388 (1964). Compare Wyzanski, *A Trial Judge's Freedom and Responsibility,* 65 HARV. L. REV. 1281, 1292-93 (1952). An attempt by the sentencing judge to articulate his reasons for a sentence in each case should in itself contribute greatly to the rationality of sentences. A related point is that such a requirement should serve to focus the sentencing judge on the discreet issues involved in framing different parts of the same sentence. See, *e.g.*, PROPOSED N.Y. PENAL LAW, Study Bill, Senate Int. 3918, Assembly Int. 5376, pp. 281, 286 (1964).

A second reason for requiring such a statement of reasons is that it can have great value to corrections authorities if the sentence results in a commitment. This principle has been recognized in New Jersey by the following provision: "As part of such presentence report and before the submission thereof to the institution to which the offender is committed, the sentencing judge shall include therein a brief statement of the basic reasons for the sentence so imposed by him." N.J. SUPER. AND COUNTY CTS. (CRIM.) R. 3:7-10(b). See also the MODEL SENTENCING ACT §10:

> The sentencing judge shall, in addition to making the findings required by this act, make a brief statement of the basic reasons for the sentence he imposed. If the sentence is a commitment, a copy of the statement shall be forwarded to the department or institution to which the defendant is committed.

Compare CAL. PENAL CODE § 1203.01. Occasionally, the comments of the prosecuting attorney are included in such a transmission, both where the sentencing judge fixes the minimum sentence, see NEV. CODE ANN. § 176.180(3) (1961), and where an Adult Authority performs that function. See CAL. PENAL CODE § 1203.01; WASH. CODE ANN. §§ 9.95.031-32 (1961); Hayner, *Sentencing by an Administrative Board,* 23 LAW & CONTEMP. PROB. 477, 478-82, 488-89 (1958).

Thirdly, a statement by the sentencing judge explaining to the defendant the reasons for his commitment can in many cases have therapeutic value. See Robinson, *The Defendant Needs to Know,* FED. PROB., Dec. 1962, p. 3. Subsection (c) thus provides that the statement of reasons should in most cases be given for the record at the time sentence is imposed. Of course, care must be taken in the manner in which this is done:

> [I]t is equally important not to go to the other extreme and create bitterness by lecturing and reprimanding defendants at length on their long records or terrible crimes, because a bitter defendant is less likely to emerge from prison a rehabilitated member of society.

Youngdahl, *Remarks Opening the Sentencing Institute Program, Denver, Colorado,* 35 F.R.D. 387, 388 (1964). Subsection (c) also recognizes the possibility that in a given case an explanation to the defendant personally will do more harm than good. For this reason, the provision would leave to the discretion of the sentencing judge the option of not explaining the sentence to the defendant. In such a case, the judge still should explain the basis for his sentence, both for transmission to the reviewing court in the event that the defendant appeals and for transmission to corrections authorities in the event that the sentence involves a commitment. The manner in which this statement should be made is intentionally left open in the belief that it should be for each judge to develop the most efficient method to suit his own working habits.

Finally, of course, a statement of reasons will be invaluable as an aid to the reviewing court. In fact, it is difficult to see how meaningful review can occur, except perhaps in extreme cases, where the appellate court is left completely in the dark as to why the sentence under review was imposed. *Cf.* Kent v. United States, 383 U.S. 541, 561 (1966). It is the practice in England, though not required by statute, for such reasons to be before the appellate court. See MEADOR REPORT, Appendix C, pp. 110, 116-17, 128, *infra.* It is likewise the practice in most European countries. See *Appellate Review of Sentences, Hearings on S. 2722 Before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary,* 89th Cong., 2d Sess. 86-100 (1966) (Statement of Professor Mueller). Suggestions in this country have varied from a statutory requirement that reasons be stated in every case, see S. 2722, Appendix B, *infra,* to a statutory provision authorizing the appellate court to call for reasons when it so desires, see Massachusetts statute, Appendix A, *infra,* to statutory silence on the point. See Arizona statute, Appendix A, *infra.* See generally Note, *Statutory Structures for Sentencing Felons to Prison,* 60 COLUM. L. REV. 1134, 1165 n.210 (1960). The provision proposed here would require a statement of reasons to support every sentence, including, of course, any modification of the original disposition or other re-sentence. See, *e.g.*, People v. Krzywosz, 23 App. Div. 2d 957, 259 N.Y.S.2d 970, 971 (1965).

3.1 Duties of reviewing court.

(a) It should be the obligation of the reviewing court to make its own examination of the record designed to effect the objectives of sentence review as stated in section 1.2.

(b) In those cases in which it would substantially contribute to the achievement of the objectives of sentence review as stated in section 1.2, the reviewing court should set forth the basis for its disposition in a written opinion. Normally, this should be done in every case in which the sentence is modified or set aside by the reviewing court.

Commentary

a. Examination by reviewing court

As noted in comment *b* to section 2.3, an argument often advanced against appellate review is that the appellate court is in no position to review sentences because it has no opportunity to observe the attitude of the defendant and make a personal assessment of his character. See, *e.g.*, STAFF OF HOUSE COMMITTEE ON THE JUDICIARY, 85TH CONG., 2D SESS., REPORT ON FEDERAL SENTENCING PROCEDURES 118-19 (Comm. Print 1958). Even where review power has been granted, it is often advanced as a substitute for genuine review that great deference is due the decision by the trial judge because he has had this opportunity.

The point is of course valid in many cases. Where there has been a long trial at which the defendant testified, clearly the trial judge has had an opportunity which is entitled to weight in reviewing the correctness of the sentence. But unfortunately there is often little attempt by those who use this argument to discriminate between those occasions where such demeanor evidence is properly a factor in the sentence and those in which it is not. See generally Note, *Appellate Review of Primary Sentencing Decisions: A Connecticut Case Study*, 69 YALE L.J. 1453, 1465 nn. 65 & 66 (1960). In effect, the extent to which this argument is used is often a manifestation of the wide variety of general attitudes towards sentence review which is found in the literature and the cases.

Many cases clearly evidence a reluctance by the appellate court to make its own examination of the justice of the particular sentence. The feeling which they generate is that it takes a shocking example before the reviewing court will intervene. See, *e.g.*, State v. Graninger, 96 Ariz. 172, 393 P.2d 266 (1964); State v. Gramenz, 256 Iowa 134, 126 N.W.2d 285 (1964); State v. Bruntlett, 240 Iowa 338, 36 N.W.2d 450 (1949). By way of contrast, the Nebraska court has stated that its review statute "should be liberally construed in favor of justice." State v. Hall, 176 Neb. 295, 309, 125 N.W.2d 918, 926 (1964). And the reviewing courts in New York do not hesitate to intervene when they are of the opinion that an unjust sentence has been imposed. See, *e.g.*, People v. Corapi, 42 Misc. 2d 247, 247 N.Y.S.2d 609 (1964). A quite

distinct view of the role of sentence review is reflected by the frequent practice of the Oklahoma Court of Criminal Appeals of using the review power in effect to compensate the defendant for errors that were committed at trial but that do not rise to the level of grounds for reversal. See, *e.g.*, Hudson v. State, 399 P.2d 296 (Okla. Crim. App. 1965); Henderson v. State, 385 P.2d 930 (Okla. Crim. App. 1963).

It is difficult to articulate precisely the proper role of reviewing courts. The English have probably come the closest to the position endorsed here. In practice, the English court

> purports not simply to substitute its notion of the appropriate sentence for that of the trial judge. The Court says it will not "tinker" with sentences. For example, twelve months imprisonment will not be reduced to nine months even though the latter is thought proper and is what would have been imposed if the appeals judges had been presiding at the trial. The Court has stated its policy thus: "It is only when a sentence appears to err in principle that the Court will alter it. If a sentence is excessive or inadequate to such an extent as to satisfy this Court that when it was passed there was a failure to apply the right principles, then this Court will intervene."

MEADOR REPORT, Appendix C, pp. 125, *infra*.

It is recognized by this view that the primary sentencing responsibility must remain with the trial judge. The system will work only if the sentence as initially fixed is based on the conscientious effort of the trial judge to arrive at the sentence which best suits the case at hand. But respect for the discretion of the trial judge should not prevent the reviewing court from making its own inquiry into the justice of the sentence before it. Having made that inquiry, the reviewing court, to be sure, should not "tinker" with the sentence. Still, the point remains that an independent examination of the justice of the particular sentence is necessary in order for the review process to properly function. Finally, it is quite clear that sentence revision should occur only when some proper objective of sentencing is thereby served. The practice in Oklahoma is thus specifically disapproved.

b. Written opinions

It would be neither realistic nor desirable to expect the reviewing court to write exhaustive opinions in every case. On the other hand, the review power can and should be used in a purposive manner, and there are occasions on which the objectives of sentence review can best be achieved by means of a written opinion. The development of criteria to govern future sentencing, for example, can best be communicated through the opinion. Instances in which careful opinions have been written for this purpose are rare though not unknown. See Note, *Appellate Review of Primary Sentencing Decisions: A Connecticut Case Study*, 69 YALE L.J. 1453, 1454-59, 1466-75 (1960). For example, the extent to which going to trial rather than pleading guilty is a proper factor for consideration in sentencing has been meaningfully explored in several cases. See, *e.g.*, United States v. Wiley, 278 F.2d 500 (7th Cir. 1960); United States v. Wiley, 267 F.2d 453 (7th Cir. 1959); People v. Guiden, 5 App. Div. 2d 975, 172 N.Y.S.2d 640 (1958).

In the last analysis, an answer to the question of when to write an opinion, like the question of the proper approach to the review process, must rest in the good conscience of the reviewing court. The utility of the review device to accomplish objectives other than avoidance of the grossly excessive sentence will depend entirely on the attitude of the reviewing court towards the exercise of the power and the use of the written opinion. To enjoin the wise and careful use of the power to achieve specific objectives is the purpose of this section.

REVIEW OF CRIMINAL SENTENCES IN ENGLAND: BASES FOR DECISION

Daniel Meador*

Bases for decision—sentencing policy

Almost no principles of sentencing review are legislatively prescribed. The Criminal Appeal Act simply states that "On an appeal against sentence the Court of Criminal Appeal shall, if they think that a different sentence should have been passed, quash the sentence passed at the trial and pass such other sentence warranted in law by the verdict (whether more or less severe) in substitution therefor as they think ought to have been passed. . . ." Thus the leeway in substituting for the trial court's decision any sentence that the appellate judges "think ought to have been passed" is limited statutorily only by the requirement that the sentence be legally warranted by the verdict. But in practice the Court purports not simply to substitute its notion of the appropriate sentence for that of the trial judge. The Court says it will not "tinker" with sentences. For example, twelve months' imprisonment will not be reduced to nine months even though the latter is thought proper and is what would have been imposed if the appeals judges had been presiding at the trial.[13] The Court has stated its policy thus: "It is only when a sentence appears to err in principle that the Court will alter it. If a sentence is excessive or inadequate to such an extent as to satisfy this Court that when it was passed there was a failure to apply the right principles, then this Court will intervene."[14]

This statement suggests that there are some ascertainable principles of sentencing which the Court can articulate and by which it judges the sentences brought before it for review. A full-scale analysis of such sentencing principles and policies as the Court may have invoked or formulated has been regarded as beyond the scope of this report. This reporter's investigations, directed chiefly to the mechanics of sentencing and sentencing review, have been pursued empirically by observing proceedings, studying papers in actual cases, and talking with persons who actively participate in the process. No comprehensive study of the opinions of the Court of Criminal Appeal bearing on sentencing theory has been undertaken. This would be a substantial project in itself. Even among scholars in the field of criminal law in England, sentencing is a subject which has only recently begun to receive serious attention.

For this study of appellate review of sentencing, theories of sentencing have been inquired into only in a very limited way for the purpose of determining to what extent, if at all, the machinery for review may contribute to the formulation of sentencing policy, which in turn governs the exercise of the review power and guides the trial courts. One might suppose that if appellate review produces coherent sentencing theory which gives guidance to the trial courts, that may be a good reason why such review is desirable. On the other hand, if appellate review does not produce this, and is exercised without regard to rational policy, then it must be justified on other grounds.

13. Donovan Report 42.
14. R. v. Ball, 35 Cr. App. R. 164.

* Published as an appendix to ABA Standards for the Administration of Criminal Justice, Appellate Review of Sentencing (1968).

In an article published last year by a serious student of the CCA and sentencing generally, the Court's opinions were examined in light of five possible theories of sentencing: (1) retributive or denunciatory, (2) general deterrence, (3) specific deterrence, (4) preventive, (5) rehabilitative. The author concluded that "The position of the court is balanced between the competing claims of the traditional ideas of punishment on a culpability or deterrent basis and more modern ideas of rehabilitative treatment."[15] Another scholar has discovered at least twenty-five different categories of consideration which the court has applied from time to time in the reassessment of sentences.[16]

One way of testing pragmatically whether the Court has shaped sentencing policy through reviewing sentences is to ask judges of the lower courts whether they feel that they get any guidance from the Court of Criminal Appeal. This question tended to draw a mixed and inconclusive response. Several recorders and chairmen of Quarter Sessions did say that in arriving at a sentence they were aware of little or no helpful direction, other than some notion as to the length of imprisonment which the Court would consider excessive. There was some opinion that the policing of excessive sentences—"knocking off the peaks"—is really all that an appellate court can do. One said that whether a particular sentence was upheld depended on which three judges happened to constitute the Court and that inconsistent decisions were sometimes rendered by different panels. That view is corroborated by one writer on the subject who says that unless a sentence is contrary to statute or some clear pronouncement in an earlier case, "it is difficult to discover what are the principles of punishment. For the most part our courts seem to impose sentence by a process dependent upon experience of what this sort of criminal, in circumstances of this kind, on this sort of charge usually gets—that and intuition. It necessarily follows that the question whether a particular sentence is excessive can be gauged by no better yardstick."[17]

Another student of the Court, however, disagrees with those views and attributes them to a failure of communication. He believes that there are discernible patterns and policies in the Court of Criminal Appeal's sentencing decisions but that these are not gotten across very well to the Quarter Sessions, largely because many of the Court's opinions on sentences are not reported and not studied. There is also a view that the sentencing policies formulated by the Court do find their way subtly into the judicial atmosphere and that the policy guidance provided by the Court is significant but is something of which Quarter Sessions are not consciously aware. The Queen's Bench judges who preside at criminal trials in the Assizes register more awareness of sentencing principles (real or imagined) stemming from the Court of Criminal Appeal, as indeed they should, because they sit on the Court themselves from time to time and associate in the High Court with the other CCA judges. A similar situation exists on those Quarter Sessions courts which happen to have a Queen's Bench judge as chairman.

15. Thomas, Theories of Punishment in the Court of Criminal Appeal, 27 Modern Law Review 546, 566 (1964).

16. Davies, The Court of Criminal Appeal: The First Forty Years, 1 J.Soc.P.T.L. (N.S.) 425, 435 (1951).

17. Napley, The Court of Criminal Appeal: The Functions of an Instructing Solicitor, 61 *The Law Society's Gazette* 307, 310 (1964).

The published evidence of the attention which university law teachers are beginning to give to sentencing,[18] as well as a quick sampling of CCA opinions, shows that the CCA has in fact enunciated and followed numerous sentencing principles over the years. A few illustrations may be cited out of the hundreds of cases. The Court has held, for example, that it is wrong in principle to impose a heavier sentence on a defendant because of his misconduct at the trial.[19] The Court seems to have established the principle that a "professional" in certain criminal activity is to get a heavier sentence than a person committing a similar offence on an isolated occasion as the result of peculiar pressures.[20] And in a case observed, the court substituted a conditional discharge for a fine where the fine had been imposed on defendant with the intention of the Court that it be paid by his employer; it was wrong in principle, CCA said, to sentence on this basis.[21] As suggested above, the inadequate communicating of such decisions as these to the trial level throughout the country may be responsible for some of the feeling of lack of policy guidance.

Incidentally, the last example also illustrates the importance to appellate review of the trial judge's stating reasons for his sentence. For had the trial judge not explained that the fine was being imposed with the intention of getting at the employer instead of the defendant, there would have been no ground for interfering with the sentence. If meaningful review is to be undertaken, it seems essential that explanations for sentences be given for the record in the trial court.[22]

The trial court is deprived of potentially valuable assistance on the sentencing question because of the limited role of prosecution counsel. It is thought improper for the prosecution even to cite cases to the court, unless perhaps they are distinctly favorable to the accused. So even if there be an articulated sentencing principle in the CCA opinions, counsel for the prosecution cannot in any manner inform the court of it, though of course defense counsel could if he were aware of the cases.

The conclusion derived from this cursory inquiry is that the case law generated by sentencing review does produce a number of principles of sentencing, some of which feed into the climate surrounding the sentencing process and all of which could be ascertained more concretely if one studied all of the Court's opinions, reported and unreported. One writer has said of the Court: "It is submitted that by its decisions week by week, month by month, and year by year, it is slowly and steadily building up a criminal jurisprudence of sentencing of which we in this country can be moderately proud."[23]

18. See the articles cited in the bibliography in Meador Report Appendix 5.

19. R. v. Aston [1948] W.N. 252.

20. See Thomas, Sentencing Co-defendants -- When is Uniform Treatment Necessary?, 1964 Crim.L.R. 22, 27.

21. Alan George Niel, No. 1561, CCA, Oct. 25, 1965.

22. In support of this idea, see Cross, Paradoxes in Prison Sentences, 81 L.Q.R. 205 (1965); Thomas, Sentencing—The Case for Reasoned Decisions, 1963 Crim.L.R. 243.

23. J.E. Hall Williams, The Sentencing Policy in the Court of Criminal Appeal, 10 The Howard Journal 201, 211 (1960).

STANDARDS RELATING TO CRIMINAL JUSTICE: APPELLATE REVIEW OF SENTENCING --SCOPE OF REVIEW

A.B.A. Special Committee on Sentencing and Review*

3.2 Powers of reviewing court: scope of review.

The authority of the reviewing court with respect to the sentence should specifically extend to review of:

(i) the excessiveness of the sentence, having regard to the nature of the offense, the character of the offender, and the protection of the public interest; and

(ii) the manner in which the sentence was imposed, including the sufficiency and accuracy of the information on which it was based.

Commentary

a. Background

Several present review statutes provide that a sentence should be subject to review, but do not attempt further to spell out the issues that should be open on such a review or the criteria by which these issues should be resolved. In Illinois, for example, the statute says simply that "on appeal the reviewing court may . . . reduce the punishment imposed by the trial court." See Appendix A, *infra*. In Iowa, the Supreme Court may "reduce the punishment, but cannot increase it." *Ibid.*

Other statutes are more specific. In Arizona, the defendant can appeal from his sentence "on the ground that it is excessive" and the court is empowered to reduce the sentence "if, in its opinion, the conviction is proper, but the punishment imposed is greater than under the circumstances of the case ought to be inflicted." *Ibid.* Similarly, the Nebraska Supreme Court may "reduce the sentence . . . when in its opinion the sentence is excessive." *Ibid.*

*Simon E. Sobeloff, Chairman and Peter W. Low, Chairman; published in 1962 and amended by the House of Delegates in 1968.

b. Excessiveness

The purpose of this section is to indicate a preference for the type of statutory provision found in Arizona and Nebraska. This is done in subsection (i) by directly incorporating the language of section 1.2(i). As elaborated in comment *b* to that section, the provision is designed to reach not only the sentence that is clearly excessive on its face, but also the sentence that has no rational basis, the sentence that is dictated by emotion, the sentence that is wrong in principle, and sentences suffering from similar defects. It is intended that among other things the reviewing court should measure the imposed sentence against other dispositions that were open to the sentencing court. A consideration of whether a sentence is excessive thus involves not only consideration of a change in the length of the sentence, but also changes in its form. A commitment to jail when probation should have been imposed can of course be just as excessive as the imposition of ten years where five was called for. Hawaii has recognized this principle by retaining sentence review even though the sentencing judge has no discretion as to the length of a felony sentence. See, *e.g.*, State v. Kui Ching, 46 Hawaii 135, 376 P.2d 379 (1962); State v. Sacoco & Cuaresma, 45 Hawaii 288, 367 P.2d 11 (1961).

c. Manner

Certainly to the extent that an appellate court is responsible for making a judgment about whether a particular sentence is excessive, it also is responsible for determining whether the sentence has a sufficient informational base to make that judgment possible. Subsection (ii) thus makes explicit what should follow anyway, namely that a reviewing court should have the power to pass on the manner in which the sentence was imposed.

In many jurisdictions, this power is presently exercised by appellate courts, even in the absence of provision for review of the propriety of the sentence itself. See generally Note, *Appellate Review of Sentencing Procedure*, 74 YALE L.J. 379 (1964); Note, *Due Process and Legislative Standards in Sentencing*, 101 U. PA. L. REV. 257, 263-71 (1952). In addition to making explicit that the power should be available, this section also reinforces the point made earlier that review of all of the issues relating to the sentence should be consolidated in a single court for disposition at the same time.

Examples of the review of such questions could be multiplied. See, *e.g.*, State v. Laird, 85 N.J. Super. 170, 204 A.2d 220 (App. Div. 1964) (denial of allocution); Kuhl v. District Court, 139 Mont. 536, 366 P.2d 347 (1961) (failure to afford defendant the opportunity to challenge contents of the presentence report); Commonwealth v. Garramone, 307 Pa. 507, 161 Atl. 733 (1932) (insufficient information). The provision authorizing review of the accuracy of the information on which the sentence was based is meant to include review of the accuracy of the sentencing judge's conclusions both of law and of fact. A sentence clearly should be adjusted or set aside if based on an inaccurate view of the law. See, *e.g.*, State v. Brown, 136 Mont. 382, 351 P.2d 219 (1959); State v. Squier, 56 Nev. 386, 54 P.2d 227 (1936). A reviewing court should likewise be able to take corrective action if it believes that inaccuracies in a presentence report may have misled the sentencing judge, or that the sentencing judge may have misunderstood the contents of such a report. See, *e.g.*, State v. Killian, 91 Ariz. 140, 370 P.2d 287 (1962); *cf.* State v. Pohlabel, 61 N.J. Super. 242, 160 A.2d 647 (App. Div. 1960) (successful collateral attack on this basis).

3.3 Powers of reviewing court: available dispositions.

Every reviewing court should be specifically empowered to:

(i) affirm the sentence under review;

(ii) with the exception stated in section 3.4, substitute for the sentence under review any other disposition that was open to the sentencing court; or

(iii) remand the case for any further proceedings that could have been conducted prior to the imposition of the sentence under review and, with the exception stated in section 3.4, for re-sentencing on the basis of such further proceedings.

Commentary

a. Substitution

Several present review statutes simply provide that the reviewing court shall have the power to "reduce" the sentence, thus making it arguable whether such power extends to the substitution of one form of disposition for another. See, *e.g.*, the statutes in Illinois and Iowa. Other statutes, for example in Arizona and Nebraska, specifically authorize the substitution by the reviewing court of any other legal sentence. See Appendix A, *infra*. While no problems seem to have been caused by this difference in language, one purpose of this section is to indicate the Advisory Committee's preference for the latter type of statement as more accurately reflecting the objective of the statute. Subsection (ii) is meant to authorize specifically, for example, such varied dispositions as the substitution of probation for incarceration (see, *e.g.*, State v. Hall, 87 N.J. Super. 480, 210 A.2d 74 [App. Div. 1965]), the alteration of the date from which probation starts to run (see, *e.g.*, State v. Ortiz, 98 Ariz. 65, 402 P.2d 14 [1965]), the deletion of a suspended jail sentence from the punishment imposed (see, *e.g.*, Satterfield v. State, 172 Neb. 275, 109 N.W.2d 415 [1961]), and the substitution of concurrent sentences for consecutive sentences (see, *e.g.*, State v. Johnson, 67 N.J. Super. 414, 170 A.2d 830 [App. Div. 1961]).

b. Remand

There have been numerous instances in which courts with the power to review have considered it proper to reduce the sentence without a remand for further proceedings. See, *e.g.*, State v. Ledbetter, 83 Idaho 451, 364 P.2d 171 (1961); People v. Wilson, 51 Ill. App. 2d 132, 201 N.E.2d 166 (1964); Fisher v. State, 154 Neb. 166, 47 N.W.2d 349 (1951). On occasions when such action is appropriate, power in the appellate court to reduce without further proceedings can avoid needless further steps and thus expedite already slow procedures.

There are as well, however, occasions which call for a remand for further proceedings at the trial level. See, *e.g.*, People v. Gerstenfeld, 14 App. Div. 2d 517, 217 N.Y.S. 2d 152 (1961) (remand to secure a presentence report); State v. Squier, 56 Nev. 386, 54 P.2d 227 (1936) (mistake by trial judge as to the scope of his discretion). It is not at all clear that such a remand is authorized by several present review statutes. The Arizona statute, for example, states that the Supreme Court may reduce a sentence if the punishment imposed is greater than ought to have been inflicted, and that in such a case the court "shall impose" any legal sentence as a substitute. Compare the Nebraska statute: "it shall be the duty *of the Supreme Court* to render such sentence against the accused as in its opinion may be warranted by the evidence." See Appendix A, *infra*. (Emphasis added.) In order to avoid the difficulty suggested by such language, subsection (iii) is included here.

3.4 Limitation on available dispositions.

(a) No reviewing court should be empowered to impose, or direct the imposition of, a sentence which results in an increase over the sentence imposed at the trial level.

(b) On a remand for the purpose of re-sentencing an offender, no sentencing court should be empowered to impose a sentence which results in an increase over the sentence originally imposed.

Commentary

a. Background

Perhaps the most controversial question involved in the decision to provide for sentence review is whether the reviewing court should be authorized to increase the penalty imposed by the sentencing court. The question can arise in two forms: whether the state should be allowed to take an appeal seeking an increase; and if not, whether the appellate court should be authorized to increase the sentence when the defendant appeals.

Existing sentence review statutes in this country are unanimous to the effect that the state cannot take an appeal against sentence and thereby secure an increase. See Appendix A, *infra*. The English agree. See MEADOR REPORT, Appendix C, pp. 141-42, *infra*. A few European countries, however, do permit the state to appeal a sentence it considers too lenient. See *Appellate Review of Sentences, Hearings on S. 2722 Before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary*, 89th Cong., 2d Sess. 90 (1966) (Statement by Professor Mueller).

Opinion is more evenly divided on the question of whether an increase should be permitted when the defendant has taken the appeal. Most of the states in this country which now afford review do not allow such an increase. See, *e.g.*, the statutes in Arizona, Illinois,* Iowa, and Nebraska, Appendix A, *infra*. The sentence review which follows a general court martial likewise is limited to approval or reduction of the imposed sentence. See Appendix A, *infra;* United States v. Christensen, 12 U.S.C.M.A. 393, 30 C.M.R. 393 (1961). Four states, on the other hand, do permit an increase if the defendant appeals. See statutes in Connecticut, Maine, Maryland and Massachusetts, Appendix A, *infra*.

*As initially proposed, the Illinois statute contained an increase provision, but it was deleted by the legislature. See Appendix A, *infra*.

An increase once was permitted by the statute in England, although for reasons to be developed, the power to increase no longer exists. See MEADOR REPORT, Appendix C, pp. 144, 147-48, 157, *infra*. Finally, it should be noted that several recent proposals include provision for an increase in this context. See proposed federal statute (S.2722) and proposal by the Council on State Governments, Appendix B, *infra*.

b. Appeal by the state

There are two major arguments in support of allowing an appeal by the state to increase the too-lenient sentence. The first concedes that the interests of the defendant deserve protection by a review provision, but at the same time argues that the interests of the state need the same protection. Justice demands correction of the too-lenient sentence as well as the sentence that is too severe. The second argument is closely related. The product of the fact that many sentences are either too low or too high is the much discussed disparity problem. Providing an appeal by both the state and the defendant will open both sides of this problem to review and should contribute significantly to its resolution.

In spite of some sympathy for the position supported by these arguments, 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.

There are two basic reasons which lead the Committee to this view. In the first place, there 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 in 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.

The second reason why the Committee opposes an appeal by the state in this context is that it is not sufficiently clear that such a provision would make a significant contribution to the objectives sought by those who favor it. At the same time, it could well amount to the creation of an even more serious problem. In the first place, it is doubtful whether provision for an appeal by the state would in fact serve to assure that those defendants who most deserve it would have their sentences increased. The principal reason for such doubt is that the guilty-plea bargainers—who are undoubtedly the chief beneficiaries of the too-lenient sentence—would surely exact as part of the bargain that no appeal of their sentence would be taken. In addition, the same practical difficulty that would confront the state if suddenly all those who now plead guilty went to trial would act as a brake on the number of appeals that the state would initiate. In the second place, a much more serious problem could be created by giving the state the power to seek an increase on appeal. The existence of such power could well have the effect of preventing the defendant from appealing even on the merits of his conviction. The ability to seek an increase could be a powerful club, the very existence of which—even assuming its good faith use—might induce a defendant to leave well enough alone.

c. Appeal by the defendant

Although four members of the Advisory Committee disagree, a majority is of the view that the least desirable solution is to permit an increase only when the defendant appeals. The majority believes that the issue which is properly put by the question of whether increases should be allowed is the one discussed above, namely whether the state should be permitted to take an appeal seeking an increase. Rejection of such an appeal by the state should also, in the view of the majority, lead to rejection of the half-way house of permitting an increase only if the defendant appeals.

Many reasons support this position. In the first place, there would seem to be no inherent relation between those defendants who deserve an increase and those who are likely to take an appeal. Compare Van Alstyne, *In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant*, 74 YALE L.J. 606, 621-22 (1965). If there are affirmative reasons for authorizing an increase on appeal—such as, for example, the view noted above that in justice a sentence which is too low ought to be raised—then some method should be devised for placing before the appellate court those most likely to deserve such treatment. In fact, as also noted above, it is likely that those who most deserve an increase will be just the ones who will *not* take an appeal, namely those who have obtained leniency in exchange for a plea of guilty. It is thus the conclusion of a majority of the Committee that authorizing an increase only if the defendant appeals is not likely to expose to an increase those who most deserve it. Permitting an appeal initiated by the state would come closer to this end; but as noted, even that provision is not likely to achieve this objective.

The second reason that leads a majority of the Advisory Committee to believe that this is the least desirable alternative was best expressed by the Donovan Commission in England. After noting that it rejected the device of an appeal by the state in which an increase could be sought, the Commission continued as follows:

> The question then is whether the existence of the power [to increase only if the defendant appeals] is warranted on the ground that the doing of justice in only a few cases is to be preferred to leaving those cases, however few, uncorrected. In theory one would suppose the answer must be "Yes." In practice, however, one must consider whether any stigma of unfairness attaches to the method of exercising the power which outweighs the fact that justice is done in, at any rate, a few cases per year. We have already stated that in 1963 there were six cases [out of some 2000 applications for leave to appeal] in which the power was exercised.
>
> The Court would have had no power to increase the sentence even in those few cases had not the appellant himself invoked the Court's consideration of it. In response the Court granted his application for leave to appeal, and assigned to him the benefit of counsel, thus indicating to him in all probability that his plea for a reduction was regarded as having substance. The Court was privately of the opinion, however, that the sentence ought to be increased, but was careful to let no hint of his view reach the appellant. In the end the increase of his punishment must have come to the prisoner as a very rude shock, and the granting of leave to appeal as nothing but the setting of a trap.
>
> No criticism of the Court is intended, or would be justified, by this description of what in fact happens. If it is to do what Parliament has said it should, namely, increase a sentence where it thinks a longer sentence should have been passed, no other course seems practicable. For if the Court frankly stated its opinion that the sentence was inadequate, and said that leave to appeal against it was given so that it could be increased if the Court remained of that opinion, the appeal would

3.4 Limitation on available dispositions.

promptly be abandoned. But the procedure to which the Court is unavoidably driven is not an edifying spectacle.

REPORT OF THE INTERDEPARTMENTAL COMMITTEE ON THE COURT OF CRIMINAL APPEAL, MEADOR REPORT, Appendix C, p. 142, *infra*. The fact that an appeal may be of right will of course not change this result. The appellate courts certainly should not increase a sentence without hearing oral argument on the point, and perhaps not without hearing the defendant himself (see S.2722, Appendix B, *infra*). Granting such an argument will undoubtedly be viewed in much the same manner by the defendant.

The fact that the power to increase is exercised so infrequently by courts so authorized means that the device is not very effective in catching the defendant who really deserves an increase and in reducing the effect of the too-lenient sentence on the disparity problem. Moreover, as is implicit in the observations of the Donovan Commission, in the rare case in which it is invoked, exercise of the power may do more harm with respect to rehabilitation of the defendant than the good it does to the ends of justice. It is thus concluded that as a matter of principle the appellate courts should not be allowed to increase a sentence only on occasions where the defendant has initiated the appeal. Interestingly, several European countries have recognized this principle even though the prosecutor is entitled to appeal the sentence he deems too lenient. Under such codes, a sentence cannot be increased by the appellate courts if only the defendant has appealed. See *Appellate Review of Sentences, Hearings on S.2722 Before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary*, 89th Cong., 2d Sess. 90 (1966) (Statement by Professor Mueller).

The argument most frequently advanced in justification of such an increase provision is not, however, based on a matter of principle. It is a purely pragmatic one, based on the fear that if the defendant has nothing to lose by taking an appeal the appellate courts will be flooded with appeals, most of them frivolous. If the court can increase the sentence, on the other hand, this will act as a deterrent and thus, to some extent at least, help to stem the tide.

The basis for this fear is very simple. Approximately 90% of all convictions are the result of guilty pleas. At present, except perhaps in very rare instances, these defendants have no appeal. The work of the appellate courts in criminal cases thus comes from about 10% of the total number of convictions. If sentence review is given to both classes of defendants—to those who plead guilty as well as those who go to trial—this raises the potential number of appeals tenfold. And if there is no reason for the defendant not to appeal, the result may be disastrous.

The Advisory Committee does not believe, however, that such fears are warranted. The courts in those states which now permit review do not seem to have been inundated. And the same fears that *all* defendants will appeal would seem in theory to be applicable to the conviction itself. There too the defendant has little to lose, and since he has protested his innocence once he might be expected to do so again on an appeal. Yet, although the number of appeals has been increasing recently, in 1964 in the federal system, of the 2897 defendants who were convicted after trial, only 1043 appealed. See ADMINISTRATIVE OFFICE OF THE U.S. COURTS, FEDERAL OFFENDERS IN THE U.S. DISTRICT COURTS, p. 5, table 5 (1964); 1964 ADMINISTRATIVE OFFICE OF THE U.S. COURTS ANN. REP. 28, table B. Thus, for that period, 64% of those convicted after trial did not appeal, a number significantly lower than might have been predicted.

Providing to this group an appeal against sentence should not significantly increase the percentage of appeals. As noted previously, many present appeals, perhaps a majority, are already taken only because the defendant is dissatisfied with the sentence. The fears, if they are well grounded, must thus come from the group of defendants who plead guilty. It can be anticipated initially that, as in the case with appeals against conviction, *all* defendants will not appeal. In fact, significantly fewer from this group can be expected to appeal. A great many will have pleaded guilty in the expectation of receiving a certain sentence, and will have received it. Many others will have been placed on probation. Still others will simply take what they get. It is thus clear that nothing like the whole of the additional group of 90% will be taking appeals.

It may still be, however, that such a significant number of this group will appeal as to give justification for the fear that existing courts will not be able to handle the additional workload. One response to this, of course, is to give the courts the resources to handle an increase. Another is the adoption of various devices to control the problem. It is the view of the Advisory Committee, however, that it is not sound to attempt to control the number of appeals by means of an increase provision.

Any method designed to control the number of appeals should take some account of the need of various classes of defendants to have their sentences reviewed. What is sought to be discouraged by those who advocate the device of an increase provision to achieve this control is the incidence of the frivolous appeal. If it indeed accomplished that objective, much would be gained. But the Advisory Committee is unable to perceive why adoption of this device will not be just as effective in deterring meritorious appeals. The argument assumes that the defendant can tell beforehand whether his appeal has merit or is frivolous, and that when he concludes that his appeal is frivolous he will not take it because his sentence might be increased. What is much more likely to happen is that the defendant will base his judgment on whether to appeal—will decide whether he should run the risk of an increase—on the basis of how close his sentence is to the maximum provided for the offense. There is some evidence that this is what in fact has happened in at least one jurisdiction in which an increase provision is now in use: those with heavy sentences appeal; those with light ones do not. See Note, *Appellate Review of Primary Sentencing Decisions: A Connecticut Case Study*, 69 YALE L.J. 1453, 1464-65 (1960).

If this is the objective, then it would seem more appropriate to adopt an outright limitation on the length and kind of sentence that should be subject to review. Although the Committee has indicated in section 1.1 its disapproval in principle of such a limitation, it has recognized that it may be desirable to experiment with a limit on the sentences which are subject to review in order to accommodate this type of fear. It should not be at all difficult to collect data in the jurisdiction in question on the total number of defendants in each penalty range who would be eligible to appeal under given limitations, and to adopt a limit that would give the principle of review a fair test and at the same time avoid overburdening the appellate courts.

Devices such as this would seem to confront the problem much more sensibly. Another solution might be the development of a unique procedure to be employed in guilty plea cases, such as that envisaged by section 2.2(b). Such a measure would speak directly to the class of cases which causes the concern, and at the same time reduce the burden of an increase in the number of appeals as well as provide an effective avenue for review of the sentence. In any event, it is the conclusion of the Advisory Committee that if docket control is the objective, allowing an increase only if the defendant appeals both is an inefficient way to approach the problem and carries with it enough disadantages to recommend against its use.

In addition to the reasons stated thus far, several others lead to opposition of an increase only if the defendant appeals. It is questionable in the first place whether this would not affirmatively impede the achievement of one of the most important objectives of sentence review. Certainly experience with the indigent petitioner in other contexts indicates that he cannot easily detect the frivolous from the meritorious. To the extent that providing a forum in which he can air his grievances is an objective of review, there would thus seem as much reason to make provision for the frivolous case as the meritorious one. Whatever therapeutic effect sentence review can have will not occur unless impediments to review are removed. Telling the defendant that he can only have his grievances aired if he is willing to run the risk of an increase hardly contributes to the objective. It would seem better to admit frankly that only certain classes of defendants are entitled to assert grievances, and that the system will take all comers within that class.

The Advisory Committee majority is also influenced by the English experience. The English have lived with an increase provision for close to sixty years, and have finally concluded that it does not work. See MEADOR REPORT, Appendix C, pp. 140-45, 157, *infra*. Dean Meador reported that as a result of the studies of the Donovan Commission the

Court, in anticipation of legislative implementation of the recommendation that the power be abolished, announced that it would no longer impose increases in sentences. See MEADOR REPORT, Appendix C, p. 144, *infra*. Such a statute was enacted on August 9, 1966. CRIMINAL APPEAL ACT, 1966, § 4(2). See MEADOR REPORT, Appendix C, p. 157, *infra*.

Finally, the majority is concerned with constitutional problems in this area too. There is considerable doubt, at least under limitations applicable to the federal government, whether such a provision can withstand constitutional attack. The provisions in both Massachusetts and Connecticut have been questioned on this basis. See Kohlfuss v. Warden, 149 Conn. 692, 183 A.2d 626, *cert. denied*, 371 U.S. 928 (1962); Hicks v. Commonwealth, 345 Mass. 89, 185 N.E.2d 739 (1962), *cert. denied*, 374 U.S. 839 (1963). While in both of these cases the increase provision survived the attack, it is arguable that the rationale of Green v. United States, 355 U.S. 184 (1957), undercuts their reasoning. Compare United States *ex rel.* Hetenyi v. Wilkins, 348 F.2d 844, 859-60 (2d Cir. 1965); People v. Henderson, 60 Cal. 2d 482, 35 Cal. Rptr. 77, 386 P.2d 677 (1963). See *Appellate Review of Sentences, Hearings on S.2722 Before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary*, 89th Cong., 2d Sess. 106 (1966) (Statement of Professor George).

One last point should be added. Even though a majority of the Advisory Committee is opposed to an increase provision for the reasons stated, it would still prefer to see the principle of review implemented with such an increase provision rather than to see no review at all. It would urge, however, that an initial statute not include such a provision, and that experimentation be conducted along other lines. Only if time shows such a provision to be necessary and desirable should it be added.

d. Reduction by intermediate appellate court

The language of subsection (a) is deliberately phrased so as to permit an appeal by the state of a sentence reduced by an intermediate reviewing court. This is consistent with the normal provision that although the state cannot appeal an acquittal at the trial level, it can appeal the reversal of a conviction by an intermediate appellate court.

The position taken is that the original sentence should mark the upper limit to which the defendant should be subject. It is thus contemplated that the higher court should be permitted to increase a sentence reduced by an intermediate appellate court, but not to a level which exceeds the original sentence. This is a rejection, incidentally, of the effect attributed to a reduction of sentence by an intermediate reviewing authority in the military system. It is reasonably clear that the military courts are governed by the principle that no sentence can ever exceed the lowest sentence imposed by any authority in the reviewing process. See MILITARY JUSTICE, PUNISHMENTS AND PENOLOGY 68-69 (Military Criminal Law—Part III 1964) (Student Text, Judge Advocate General's School, Charlottesville, Virginia); United States v. Jones, 10 U.S.C.M.A. 532, 28 C.M.R. 98 (1959); United States v. Dean, 7 U.S.C.M.A. 721, 23 C.M.R. 185 (1957).

e. Sentence of less than the minimum

There is an additional problem which occurs infrequently, but which should be considered along with the problem of whether to allow an appeal by the state to increase the sentence. It occasionally happens that, through what turns out to have been a misinterpretation of the statutory limitations, an imposed sentence is less than the minimum provided by the governing statute. See, *e.g.*, State v. Johnson, 75 Nev. 481, 346 P.2d 291 (1959). Whether this should be correctible on appeal presents similar questions of policy and constitutional limitations as those discussed above. It is arguable, however, that this limited situation is properly distinguishable from the general principles developed there.

The constitutional arguments against allowing the state to appeal are much less persuasive in this limited context. It is not at all clear that a defendant should by constitutional command be entitled to the benefit of a mistake by the sentencing judge resulting in a sentence that is less than the statutory limits. It is a far different thing to hold that the defendant should not be subjected to repeated exercises of sentencing discretion, each time potentially resulting in a longer sentence. And

arguably the policy reasons against a general power in the state to appeal would be less effective here.

The Advisory Committee has not taken a position in favor of a provision authorizing such an appeal, however, out of fear that the exception would consume the principle. In addition, the situation would occur so infrequently that it is undoubtedly not enough of a problem to run that risk. On the other hand, the Committee would not oppose a provision allowing an appeal by the state in this limited context. It would be the Committee's judgment, however, that if such a provision were adopted, it would be best to limit the increase to the lowest sentence within the required range. Such a provision would minimize the problems raised by allowing the increase.

f. Increase on remand

The interests served by withholding the power to increase could easily be frustrated if the reviewing court were permitted to remand for the imposition of a higher sentence. This is therefore precluded by the language of subsection (a).

Arguably, however, the situation should be treated differently if there were a remand for the collection of further information and such information showed that the original sentence probably was too low. A majority of the Committee would take the position, however, that an increase should not be permitted in such a context for the same reasons as led it to reject increases by the reviewing court. Subsection (b) thus states this conclusion. Beyond the scope of materials dealing with review of sentences as such, and thus not covered by this section, is the situation with respect to an increased sentence in cases where there is a complete retrial on the question of guilt or where the sentence alone is set aside by some means other than direct appellate review.*

g. What is an increase

A simple reduction in the length of incarceration or the substitution of a life sentence for the electric chair presents no difficulty in terms of whether an increase or a reduction has occurred. But the question is not so easy if, for example, a longer sentence with greater visitation privileges is substituted for a shorter sentence at hard labor, or if a longer period of probation is substituted for a shorter period in jail. The courts in Germany and the Netherlands, for example, have held—perhaps to the dismay of the defendants involved—that a longer suspended sentence is an increase over a shorter non-suspended sentence. See *Appellate Review of Sentences, Hearings on S.2722 Before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary*, 89th Cong., 2d Sess. 90 (1966) (Statement by Professor Mueller). Dean Meador has put the case of consecutive sentences of four years and two years. The Court of Criminal Appeal altered the sentence to five and two years, to run concurrently. See MEADOR REPORT, Appendix C, p. 144, *infra*. As more sophisticated types of institutional commitment and conditional release are developed, the issue can only be raised in more complex contexts.

The issue has arisen more frequently in this country in the military courts, largely due, no doubt, to the peculiar features of the military relationship. See, *e.g.*, United States v. Christensen, 12 U.S.M.C.A. 393, 30 C.M.R. 393 (1961). No specific provision to deal with the problem is made here because it is thought that the approach of the military courts is the only sound one to take. The problem is best solved by a careful examination of the circumstances of each case, rather than by an attempt to catalogue in advance the many variations that can occur.

*See the report of this Advisory Committee on POST-CONVICTION REMEDIES § 6.3 (Tent. Draft, Jan. 1967).

STANDARDS RELATING TO CRIMINAL JUSTICE: APPELLATE REVIEW OF SENTENCING --SCOPE OF REVIEW*

American Bar Association

3.2 Powers of reviewing court: scope of review.

The authority of the reviewing court with respect to the sentence should specifically extend to review of:

(i) the propriety [excessiveness] of the sentence, having regard to the nature of the offense, the character of the offender, and the protection of the public interest; and

(ii) the manner in which the sentence was imposed, including the sufficiency and accuracy of the information on which it was based.

3.3 Powers of reviewing court: available dispositions.

Every reviewing court should be specifically empowered to:

(i) affirm the sentence under review;

(ii) [with the exception stated in section 3.4,] substitute for the sentence under review any other disposition that was open to the sentencing court; or

(iii) remand the case for any further proceedings that could have been conducted prior to the imposition of the sentence under review and[, with the exception stated in section 3.4,] for re-sentencing on the basis of such further proceedings.

[3.4 Limitation on available dispositions.]

[(a) No reviewing court should be empowered to impose, or direct the imposition of, a sentence which results in an increase over the sentence imposed at the trial level.]

[(b) On a remand for the purpose of re-sentencing an offender, no sentencing court should be empowered to impose a sentence which results in an increase over the sentence originally imposed.]

Commentary

a. Point of disagreement

The only issue on which the Special Committee and the Advisory Committee are in disagreement is whether the appellate court should be empowered to increase the sentence on an appeal by the defendant. It should be clearly understood, however, that except for this one point of disagreement, both Committees are unanimously in favor of the concept of appellate review of sentences and are unanimously in support of the Advisory Committee Report as written.

b. Degree of division

The disagreement which is thus reflected between the two Committees is also reflected by the closeness of the voting within each Committee. The Special Committee divided 8-4 on the issue, with the majority in favor of the modifications reproduced above. The Advisory Committee divided 7-4, with the majority in favor of the original report as written. Thus the matter stands.

The issue is one which has also proved divisive in other quarters. The Council of the Section of Criminal Law of the American Bar Association supported the position of the Advisory Committee, though by a closely divided vote. The proposed federal bills have been in disagreement over whether the power to increase should be included.

*As recommended by the Special Committee on Minimum Standards, J. Edward Lumbard, Chairman. The standards are reproduced as written by the Advisory Committee. Material which the Special Committee would delete is placed in brackets. Material which the Special Committee would add is underlined.

And as noted in the Commentary to the original report,* appellate review statutes, both in this country and elsewhere, are divided on the issue. There has been strong and knowledgeable advocacy, for example, of the system in Massachusetts where an increase has been permitted for nearly 25 years. See APPELLATE REVIEW OF SENTENCES, HEARINGS ON S.2722 BEFORE THE SUBCOMMITTEE ON IMPROVEMENTS IN JUDICIAL MACHINERY OF THE SENATE COMMITTEE ON THE JUDICIARY, 89th Cong., 2d Sess. 132-38 (1966). On the other hand, most of the states in which power to review the sentence presently exists do not accompany such power with authority to increase. And at the same time, the English have recently decided to delete the authority to increase from their law after over 60 years of experience with a statute that permitted an increase. See ABA STANDARDS, APPELLATE REVIEW OF SENTENCES § 3.4, comment pp. 62-63 (Tent. Draft, April 1967).

c. Reasons for Special Committee action

The arguments which persuaded a majority of the Special Committee are stated in the Commentary to the original report, but perhaps deserve elaboration here. Specifically, there were two.

The first was based on the principle that it is just as appropriate for the reviewing court to have the power to correct an excessively low sentence as it is for the court to have the power to correct an excessively high one. It is in general unsound to restrict the discretion of courts in a manner which may prohibit them from reaching the result dictated by justice in the particular case. On the other hand, the conflicting principle of double jeopardy undoubtedly will prevent the state or the appellate court from initiating review of a sentence deemed too low. Leaving the choice of seeking review to the defendant, however, and giving the appellate court the power to substitute in such a case the sentence which it deems appropriate would appear to satisfy both the spirit of the double jeopardy clause and the basic principle that courts should be authorized to do evenhanded justice in each case.

The second argument that persuaded the majority of the Special Committee was based on the fear that the normal functioning of appellate courts would be seriously burdened by an excessive number of frivolous appeals. The inhibiting factors of cost are no longer present when the defendant is afforded a free attorney and a free transcript and it can thus be anticipated that defendants who have nothing to lose will flood the courts with frivolous appeals. The possibility of an increase on an appeal from the sentence, on the other hand, will tend to discourage appeals by all but those who feel seriously aggrieved. And it is for this group that authority to review the sentence is primarily afforded.

The arguments which have persuaded those who are of the view that the reviewing court should not have the power to increase are likewise set forth in the original report. They can be briefly summarized as follows:

To the point that principle argues in favor of the power to increase, the response is that there are practical factors which on balance outweigh the principle: there is the very real possibility that the defendant will be seriously embittered by the experience of asking for a decrease and getting an increase; and there is a certain illogic to the position that insulates from review and from an increase all those defendants who do not initiate the proceedings by seeking a decrease. In addition, there is the point that the principle of double jeopardy may well extend to the case where the defendant initiates the appeal.

There are basically two responses to the argument that an increase should be provided because of the possibility of too many frivolous appeals. The first is the practical one that courts which now review sentences without the authority to increase do not seem to be overburdened, perhaps because of the fact that defendants in contested cases can be expected to appeal anyway and the fact that defendants who have pleaded guilty in large part expected the sentence which they received. There is also the fact that most frivolous appeals are obviously so, and they can be disposed of with dispatch. The second point is that this is not the kind of attack that should be made on the problems of frivolous appeals. This is a problem that exists in appeals from the merits of conviction and it exists in civil as well as criminal cases. It is unsound to attempt a solution of such problems by isolating a particular kind of appellate review and attaching a potential sanction that may discourage as many meritorious appeals as appeals that are frivolous.

*See ABA STANDARDS, APPELLATE REVIEW OF SENTENCES § 3.4, comment, pp. 55-56 (Tent. Draft, April 1967).

Before HAYNSWORTH, Chief Judge, and CRAVEN and BUTZNER, Circuit Judges.

BUTZNER, Circuit Judge:

Cecil H. Robinson challenges the constitutionality of Maryland's sentence review act because it allows the reviewing panel to increase a prisoner's sentence. He contends that the increased sentence imposed on him after review violated the constitutional guarantee against double jeopardy, denied him due process of law, and constituted cruel and unusual punishment. The district court denied his petition for a writ of habeas corpus. We affirm.

Robinson was convicted in the Criminal Court of Baltimore City for robbery with a deadly weapon and assault with intent to commit murder. He was sentenced to two concurrent terms of 10 years. His conviction was affirmed by the Maryland Court of Special Appeals, and certiorari was denied by the Maryland Court of Appeals. While his appeal was pending, Robinson filed an application for a review of his sentence in accordance with § 132 of Article 26 of the Code of Maryland.[1] Following a hearing, the sentence review panel, stating its reasons, increased Robinson's sentence for assault with intent to commit murder from 10 to 15 years. This increase is expressly authorized by § 134 of Article 26.[2] These provisions of the Maryland law were patterned after the Massachusetts act, which was held to be constitutional in Walsh v. Picard, 446 F.2d 1209 (1st Cir. 1971), and Hicks v. Com. of Massachusetts, 345 Mass. 89, 185 N.E.2d 739 (1962), cert. denied, 374 U.S. 839, 83 S.Ct. 1891, 10 L.Ed.2d 1060 (1963).

I

Although the Supreme Court has not yet considered the constitutionality of sentence review, we believe that North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072, 23 L.Ed.2d 656 (1969), forecloses Robinson's double jeopardy claim. There the Court held that the guarantee against double jeopardy does not prohib-

1. "Right to review of sentence.

Unless no different sentence could have been imposed or unless the sentence was imposed by more than one trial judge, every person convicted of a crime after July 1, 1966, by any trial court of this State and sentenced to serve, with or without suspension, a total of more than two (2) years imprisonment in any penal or correctional institution in this State, or sentenced to death, shall be entitled to have the sentence reviewed by a panel of three (3) or more trial judges of the judicial circuit in which the sentencing court is located; provided, however, that no person shall have the right to have any sentence reviewed more than once pursuant to this section. Whether or not he is a trial judge of the judicial circuit in which the sentencing court is located, the judge who sentenced the convicted person shall be one of the members of the panel, whenever he is determined to be available by the chief judge of the judicial circuit in which the sentencing court is located, unless this requirement is eliminated or amended by an appropriate rule of the Court of Appeals."

Md.Code Ann. Art. 26, § 132 (1966).

2. Section 134 provides in part:

"The panel shall have the right to require the Department of Parole and Probation to investigate, report, and make recommendations with regard to any such application for review. The panel shall consider each application for review and shall have the power, with or without holding a hearing, to order a different sentence to be imposed or served, including, by way of illustration and not by way of limitation, an increased or decreased sentence."

it harsher punishment after reconviction of a defendant who has obtained a retrial. The Court rested its conclusion on "the premise that the original conviction has, at the defendant's behest, been wholly nullified and the slate wiped clean." 395 U.S. at 721, 89 S.Ct. at 2078. In reaching this conclusion, it relied on well-established precedent permitting retrials, when sought by defendants, because of society's dual interest in assuring accused persons a fair trial and punishing the guilty. United States v. Tateo, 377 U.S. 463, 466, 84 S.Ct. 1587, 12 L.Ed.2d 448 (1964).

Although a petition under the Maryland act does not serve the same function as an application for retrial, it fully reopens the propriety of the sentence at the behest of the defendant who seeks review. When a prisoner initiates review, the state has an interest in assuring that punishment for similar criminal conduct is uniformly imposed. This interest embraces correcting sentences that are too lenient, as well as those that are too severe. The scope of the double jeopardy clause, as defined in *Pearce*, provides authority for holding that this interest is served by increasing as well as decreasing punishment when a defendant petitions for review. There is no sound reason for interpreting the double jeopardy clause, as does *Pearce*, to allow an increased sentence on retrial when reversible error goes to the heart of the case, but to deny an increased sentence on review when the error affects only the propriety of the punishment. *See* Walsh v. Picard, 446 F.2d 1209, 1211 (1st Cir. 1971).

In support of his double jeopardy claim, Robinson relies primarily on Green v. United States, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957); United States v. Benz, 282 U.S. 304, 51 S.Ct. 113, 75 L.Ed. 354 (1931); and Ex parte Lange, 85 U.S. (18 Wall.) 163, 21 L.Ed. 872 (1874). Certain principles stated in these cases and dicta they contain support Robinson's argument in part, but they do not establish that the increased sentence he received violated the guarantee against double jeopardy.

Green held that a prisoner charged with first degree murder, but convicted of second degree murder, could not be retried for first degree murder after his conviction for second degree murder had been set aside on appeal and the case remanded for a new trial. The Court ruled that Green's jeopardy for first degree murder ended when the jury was discharged. Robinson seizes on the Court's explanation that Green neither waived his defense nor prolonged his original jeopardy when he appealed his conviction of second degree murder.

[1] The result we reach is not dependent on waiver or the concept of continuing jeopardy. It rests instead on the lesson *Pearce* teaches—the double jeopardy clause is not an absolute bar to increased punishment. Unbroken precedent spanning many years, and now constituting a "well-established part of our constitutional jurisprudence," demonstrates that the double jeopardy clause does not preclude reassessment of every aspect of a criminal trial at the defendant's behest. North Carolina v. Pearce, 395 U.S. at 720, 89 S.Ct. at 2078; Van Alstyne, In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant, 74 Yale L.J. 606, 625 (1965). Moreover, Robinson's position differs fundamentally from Green's. Robinson was not acquitted of the crime for which he is now being punished. For the same reason, *Green* was held inapplicable in *Pearce*. 395 U.S. at 720 n. 16, 89 S.Ct. 2072.

Robinson relies on dictum in United States v. Benz, 282 U.S. 304, 307, 51 S. Ct. 113, 75 L.Ed. 354 (1931), to the ef-

7. *Benz* established that a court can reduce a partially executed sentence during the term in which it was imposed. In the course of discussing a court's plenary power over judgments entered during the same term, the Court said:

"The distinction that the court during the same term may amend a sentence so as to mitigate the punishment, but not so as to increase it, is not based upon the ground that the court has lost control of the judgment in the latter case, but upon the ground that to increase the penalty is to subject the defendant to double punishment for the same offense in violation of the Fifth Amendment to the Constitution. . . ."
282 U.S. at 307, 51 S.Ct. at 114.

fect that while a court may reduce a sentence, the double jeopardy clause bars an increase.[7] *Benz*, however, must be read in the light of Ex parte Lange, 85 U.S. (18 Wall.) 163, 21 L.Ed. 872 (1874), which is cited as authority for the dictum. *Ex parte Lange* supports Robinson's assertion that the double jeopardy clause protects against multiple punishment as well as multiple trials, but apart from this principle, the case and the dictum found in *Benz* afford him no relief. Lange was convicted of violating a statute which prescribed a penalty of either imprisonment or a fine, but the court inadvertently imposed both. After Lange paid his fine, he sought to be discharged from prison. The court then vacated the sentence of both a fine and imprisonment and sentenced Lange to prison. Again Lange applied for a writ of habeas corpus. The Supreme Court held that since Lange had been penalized by a fine, one of the alternative penalties prescribed by the statute, the double jeopardy clause protected him from twice being punished by the subsequent imposition of a prison sentence.

[2] The increase in Robinson's punishment is not similar to Lange's. When Robinson's sentence was reviewed, he had not served his initial sentence. While the Maryland statute authorized the review panel to increase his sentence, it did not subject him to multiple punishment by superimposing a new sentence on one already served. Furthermore, the Court was careful to note in *Ex parte Lange* that the double jeopardy clause does not bar retrial on writ of error prosecuted by the accused, a situation which, as we have previously mentioned, is analogous to Robinson's. We find no suggestion that by dictum the *Benz* Court intended to broaden *Ex parte Lange's* interpretation of the double jeopardy clause.

II

Robinson contends he was denied due process of law because the review panel's power to increase a sentence, coupled with its discretion to deny withdrawal of a petition for review,[8] unconstitutionally subjects a prisoner to a "grisly choice" in deciding whether to appeal his sentence. He relies on that part of North Carolina v. Pearce, 395 U.S. 711, 723, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), which holds that due process requires that a defendant's appeal be unfettered by apprehension that a new trial will expose him to retaliation in the form of an increased sentence. To implement this safeguard, the Court ruled that an increased sentence on retrial could be imposed only if the record showed, and the court found, that more severe punishment was justified by the defendant's conduct occurring after he was originally sentenced. Robinson, urging that he is entitled to the same protection, complains that the review panel did not have any derogatory evidence concerning his conduct after he was originally sentenced and that it simply considered information available to the sentencing judge.

[3–6] The *Pearce* rule was designed to enable a defendant who was wrongfully convicted to seek redress without being deterred by fear of reprisal. However, a prisoner seeking sentence review is not faced with the dilemma of either remaining in jail under an invalid conviction or of risking harsher punishment if he is convicted on retrial. Sentence review deals only with the justness of punishment, and a statute such as Maryland's gives adequate notice that the review panel may find sentences unjust because they are too short, as well as because they are too long. The very purpose of sentence review is to reconsider and reevaluate information bearing on the appropriateness of the prisoner's punishment. Ideally, review should quickly follow sentencing, and it is not designed to examine a defendant's conduct in the interim. Therefore, the sanction fashioned in *Pearce* to assure due process is inappropriate for sentence review.

Pearce's ruling on due process is, however, not altogether inapplicable to sentence review. Though a state need not provide sentence review, if it does, it may not discourage applications for relief by vindictively imposing harsher sentences on those who exercise their statutory right. The enlightened policy of a legislature cannot be thwarted in this manner by a reviewing court. But there is in this record no suggestion that the state acted vindictively. Robinson has not shown that the 15-year sentence he received on review is excessive when compared to sentences imposed under similar circumstances. Nor does he point to a pattern of increased sentences from which one might infer an intent on the part of review panels to chill applications for relief.

Pearce stops short of holding the due process clause is violated by every increased sentence on retrial, and we believe that its ruling should not be extended to absolutely prohibit a review panel from imposing an increased sentence. We conclude, therefore, that the statute on its face, and as it was applied in this case, does not violate the due process clause of the fourteenth amendment.

8. Md.Code Ann., Rule 762(b) (5) (Cum. Supp.1971) provides as follows:
"Withdrawal of Application.
A convicted person may withdraw his application for review of a sentence at any time prior to receipt of notice of a hearing thereon, but not thereafter except by permission of the review panel. A withdrawal shall be in writing, signed by the convicted person, and shall be filed with the clerk of the sentencing court. An election to withdraw is final and shall terminate all rights of the convicted person to have the sentence reviewed under the Review of Criminal Sentences Act."

END