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Sentencing in Indiana: Appellate Review of the Trial Court's Discretion

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SENTENCING IN INDIANA: APPELLATE REVIEW OF THE TRIAL COURT'S DISCRETION

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INTRODUCTION

No other aspect of the criminal justice system has received so little attention in the development of its standards to insure procedural fairness as the sentencing of the criminal defendent. Traditionally, the determination of what punishment is appropriate for the convicted is left to the discretion of the trial judge who in the general absence of guidelines and criteria is free to impose any sentence authorized from a broad range of statutory prescriptions. As Professor Kenneth Davis has aptly stated in his commentary on discretionary justice, under the traditional sentencing system,

> the judge has no guide except a statutory mandate, such as not less than one year nor more than fifteen years. He can do as he pleases within the limits. If he chooses, he can focus on the crime alone, without considering the criminal. He can act without a presentence investigation. He can be guided by a theory of retribution, by a theory of deterrence—or by no theory. He can give a wholly emotional response and get approving headlines in the newspapers by expressing indignation against the crime, without making any effort to find a rational basis for any facet of his decision. He can announce his decision without findings, without reasons, without relating what he does with what he has done before, and without relating his

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> decision to the relevant decisions of other judges. His discretionary power is so much at large that review by an appellate court would usually be futile.[1]

Given this unguided and virtually unlimited discretion, the trial judge is free to develop his own sentencing standards based solely on the dictates of his own conscience and the attitudes he brings with him to the bench. "In no other role can a judge so freely impose a pattern of his personal reactions, philosophy, and animosity as when he sentences a man who has no right of appeal though the effect may be his own destruction."[2] While each judge in his own mind seeks to provide equal justice under the law, the result is a disparity in sentences in which the punishment may be as varied as the judges themselves.[3]

The practice in the United States[4] of leaving the awesome responsibility of sentencing the criminal defendant[5] to the trial judge with little or no guidance from the legislature or supervising judiciary, has been characterized as a "wasteland in the law."[6] Our approach to sentencing policy in general has been the subject of increasing critical review and commentary.[7] Unwarranted sentencing

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1. K. DAVIS, DISCRETIONARY JUSTICE 137-38 (1969).

2. *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, 268 (1962) (remarks of Chief Judge Sobeloff) [hereinafter cited as *Symposium*].

3. "In other words, a statutory system that leaves a wide, untrammeled discretion to judges is the doom of equality of treatment." Rubin, *Disparity and Equality of Sentences—A Constitutional Challenge*, 40 F.R.D. 55, 73 (1965). *See also* Comment, *Apellate Review of Sentences: A Survey*, 17 ST. LOUIS U.L.J. 221, 226 (1972) [hereinafter cited as *Survey*].

4. "In no other area of the law are judicial prerogatives so uncontrolled or criteria so obscure—in no other country is such a situation permitted to exist." *Symposium*, *supra* note 2, at 268. *See generally* Note, *European Approaches to Problems in the Sentencing Process*, 3 NEW ENGLAND J. PRISON L. 171-226 (1976) [hereinafter cited as *European Approaches*].

5. It may be noted in this regard that it is estimated that approximately ninety per cent of those convicted of felonies plead guilty, waiving their right to trial. For this ninety per cent, the most important concern is normally not pretrial and trial procedures, but sentencing practices and corrections. Pugh and Carver, *Due Process and Sentencing: From Mapp to Mempa to McGautha*, 49 TEXAS L. REV. 25, 26 (1970) [hereinafter cited as Pugh and Carver]. *See also* A.B.A. PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES 1 (Approved Draft 1967) [hereinafter cited as A.B.A. STANDARDS FOR APPELLATE REVIEW].

6. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1, 54 (1972) [hereinafter cited as Frankel].

7. M. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1973) [hereinafter cited as M. FRANKEL]; Coburn, *Disparity in Sentences and Appellate Review of Sentences*, 25 RUTGERS L. REV. 207 (1971) [hereinafter cited as Coburn]; De Costa,

variations resulting from unguided judicial discretion, it has been argued, produce numerous negative consequences. They are morally offensive both to the defendant and to the citizenry, leading to disrespect for the judicial process and potentially for the law itself and are particularly disfunctional for prison rehabilitation efforts. From the standpoint of judicial administration, they may cause delays in the orderly scheduling of cases as attorneys vie for hearings before judges perceived to be lenient. The appellate courts, moreover, where not authorized to review sentences directly, may tend to distort substantive law to provide relief from sentences deemed to be grossly excessive.[8]

Two significant developments, legislative and judicial, have taken place in Indiana criminal law in recent months which may offer an effective response to the problem of unguided discretionary sentencing. The Indiana Penal Code has been revised to require that the trial court, before sentencing a convicted felon, conduct a separate hearing for the purpose of determining the appropriate sentence and to make a record of the hearing which must include a statement of the court's reasons for selecting the sentence imposed.[9] The General Assembly has also provided specific directives which the trial court must consider in determining a proper sentence to impose for any crime.[10] The legislature also provided a list of criteria which the court may consider in assessing the aggravating or mitigating circumstances which may warrant an increase or reduc-

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Disparity an Inequality of Criminal Sentences; Constitutional and Legislative Approaches of Appellate Review and Relocation of the Sentencing Function, 14 HOWARD L.J. 29 (1968); D'Esposito, *Sentencing Disparity; Causes and Cures*, 60 J. CRIM. L., C. & A.S. 182 (1969); Frankel, *supra* note 6; Frankel, *The Sentencing Morass and a Suggestion for Reform*, 3 CRIM. L. BULL. 365 (1967) [hereinafter cited as S. Frankel]; Hennessey, *Disparity in Sentencing*, 3 NEW ENGLAND J. PRISON L. 5 (1976) [hereinaftr cited as Hennessey]; Smith, *The Sentencing Council and the Problem of Disproportionate Sentences*, 27 FED. PROB. 5 (1963); Zalman, *A Commission Model of Sentencing*, 53 NOTRE DAME LAW. 266 (1977).

8. Hoffman and De Gostin, *An Argument for Self-Imposed Explicit Judicial Sentencing Standards*, 3 J. CRIM. JUST. 195, 196 (1975) (footnotes omitted) [hereinafter cited as Hoffman and De Gostin].

9. IND. CODE 35-4.1-4-3, *as added* by Acts of 1976, Pub. L. 148, Acts of 1976, Pub. L. 148, sec. 28, *as amended* by Acts of 1977. Pub. L. 340, sec. 151, provided that this section takes effect October 1, 1977.

10. IND. CODE 35-4.1-4-7(a): "In determining what sentence to impose for a crime, the court shall consider the risk that the person will commit another crime, the nature and circumstances of the crime committed, and the prior criminal record, character, and condition of the person." *See* notes 94-100 *infra* and accompanying text.

tion of a sentence,[11] or favor a suspended sentence or probation.[12] In addition to these legislative innovations, the Indiana Supreme Court has promulgated rules to govern the appellate review of sentences authorized by the Indiana Constitution.[13] The announcement of these rules apparently signals the court's preparedness to exercise its constitutional prerogative to review criminal sentences, an invitation which it has previously declined to accept.[14]

This article will examine these recent developments in Indiana criminal law against the background of the experiences of other jurisdictions which authorize appellate review of sentences and have

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11. It may be noted that the revised Indiana Penal Code provides for "determinate" sentencing fixing a standard term of imprisonment for the various classifications of felonies. The court, however, retains the discretion to add a number of years for aggravating circumstances. *See* IND. CODE § 35-50-2-1—35-50-2-9. Similarly, the trial court may suspend a sentence for a misdemeanor and place the offender on probation, and may suspend the fine determined for an infraction. IND. CODE § 35-50-3-1-3; IND. CODE §35-50-4-1—35-50-4-4.

The provision for this discretionary authority on the part of the sentencing judge reflects the general agreement that a certain amount of discretion in sentencing is essential:

> While absolute uniformity is neither desirable nor attainable, it is imperative that a greater similarily of treatment of offenders must inevitably lead to differences in sentences, but this does not account for the flagrant disparities which occur in cases where the only differentiating factors are the geographical sites of the offense or the proclivities of the sentencing judge.

Byrne, *Federal Sentencing Procedures: Need for Reform*, 42 L.A.B. BULL. 563 (1967). *See also* Hoffman and De Gostin, *supra* note 8, at 196. For a discussion of determinate sentencing in general along with a survey of authorities in this area, *see* RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES 143-158 (approved Draft 1968).

12. IND. CODE § 35-4.1-4-7, *as added by* Acts of 1976, Pub. L. 148, sec. 15. Acts of 1976, Pub. L. 148, sec. 28, *as amended* by Acts of 1977, Pub. L. 340, sec. 151 provided that this section take effect October 1, 1977.

13. SUPREME COURT OF INDIANA, APPELLATE REVIEW OF SENTENCES, Rules 1 and 2. (effective January 1, 1978) [hereinafter cited as APPELLATE REVIEW OF SENTENCES].

14. In Beard v. State, 262 Ind. 643, 649, 328 N.E.2d 216, 219 (1975), the Indiana Supreme Court stated:

> The grant [in Article 7, § 4 of the Constitution of Indiana] appears to be beyond our inherent power to review and revise those sentences that exceed constitutional limitations, a responsibility that we have previously recognized. . . . Thus far, we have refrained from exercising this recently granted power and believe that it can be properly exercised only under a program of policies and procedures not yet established. We, therefore, decline the defendant's prayer for a review of the sentence.

Since the *Beard* decision, the Supreme Court has consistently declined to review sentences. Miller v. State, ___ Ind. ___, 364 N.E.2d 129 (1977); Parker v. State, ___ Ind. ___, 358 N.E.2d 110 (1976); Delph v. State, ___ Ind. ___, 332 N.E.2d 783 (1975); Stroehr v. State, ___ Ind. ___, 328 N.E.2d 442 (1975). *See* notes 33-37 *infra* and accompanying text.

adopted the requirement for a statement of reasons when sentencing. A proposal is made for the adoption of a standard for appellate review which may serve to curb sentencing abuses. Guidelines are also suggested to aid bench and bar in the effective implementation of these sentencing practices in our judicial system.

THE ARGUMENT FOR APPELLATE REVIEW OF SENTENCES

The general objectives sought to be achieved through appellate review of judicial sentencing have been identified as:

> 1. The correction of the sentence which is excessive in length, having regard to the nature of the offense, the character of the offender, and the protection of the public interest;
> 2. The facilitation of the rehabilitation of the offender by affording him an opportunity to assert grievances he may have regarding his sentence;
> 3. The promotion of respect for law by correcting abuses of the sentencing power and by increasing the fairness of the sentencing process; and
> 4. The promotion of the development and application of criteria for sentencing which are both rational and just.[15]

Of these four objectives, apparently the most beneficial is that of appellate review of sentences which will provide our criminal system with a mechanism by which the grossly excessive sentence can be corrected. A term of punishment imposed for a duration of time which is neither necessary to protect the public interest nor useful in terms of rehabilitating the criminal defendant is the most obvious example of an excessive sentence. Excessiveness may also manifest itself by more direct practices—the sentence which lacks any affirmative basis in relation to the nature of the defendant and the crime, and the sentence dictated by the trial judge's emotional reactions to the defendant being prime examples. Since the underlying rationale of sentence review is that consideration for the interest of the public and the interest of the defendant is critical in determining the sentence to be imposed, the sentence which serves neither interest should not be permitted to stand.[16]

In addition to providing an opportunity to correct excessive sentences, appellate review may operate to negate the defendant's perception of the sentencing judge as one who possesses unbridled

15. A.B.A. STANDARDS FOR APPELLATE REVIEW, *supra* note 5, at § 1.2, 7-8.
16. *Id.* at 21-25.

power over his future. The elimination of this potential source of hostility is worth pursuing, as Chief Justice Hennessey of the Massachusetts Supreme Court reminds us, "[i]t is certainly not in the best interest of public security that the released prisoner come out unnecessarily embittered and more dangerous because he has served an inexplicable and ill-considered sentence."[17] Furthermore, the availability of appellate review enhances the possibility that in some instances respect for the sentencing process may be induced by the opportunity to air grievances and thus provide an initial first step towards rehabilitation. The attitude of the defendant in this regard is not unimportant as a defendant who has an opportunity to air his grievances concerning his punishment is more likely to approach rehabilitation with a positive attitude than one who is convinced that one person wronged him in passing judgment and there is nothing which may be done about it.[18] The availability of review, and its exercise in a fashion as to promote this respect thus offers a potential for an affectation of the offender's attitude.

A third objective of appellate review of sentencing is the promotion of respect for the law by providing the opportunity to correct sentencing abuses and to mete out justice in a manner which contributes to the appearance of fairness.[19] It seems clear that the procedural guidelines which are designed to insure the respect for individual rights before and during the criminal trial as well as the opportunity to correct errors after trial that is available in every other phase of the law, should be no less assured when the time comes to deprive a person of his freedom. Such a check on the exercise of the sentencing power should contribute to an increase in respect for the legal system, and the effective implementation of the power to correct the occasional sentencing abuse should demonstrate that the system works.[20]

A final objective in appellate review of sentencing is the development of the basic principles of sentencing policy. If the sentencing judge is required to articulate his reasoning when determining a sentence,[21] and the appellate courts similarly explain in written opinions the basis for the modifications of a sentence on appeal, the result could be a set of consistent criteria which may be followed in arriving at sentencing decisions. Not only is it possible

17. Hennessey, *supra* note 7, at 14.
18. A.B.A. STANDARDS FOR APPELLATE REVIEW, *supra* note 5, at 2.
19. *Id.* at 25-26.
20. *Id.* at 26-27.
21. *See* notes 70-84 *infra* and accompanying text.

that this may contribute to the resolution of the problem of disparate sentences, but on a broader scale it may lead to the formulation of sound sentencing policy. The availability of sentencing review offers the appellate courts the opportunity to play a leading role in the achievement of this objective.[22]

The objection most frequently raised to appellate review of sentences is that the availability of such review will open floodgates which will drown the appellate courts in a deluge of frivolous appeals. In England, whose sentences have been subject to appellate review for some seventy years, this concern simply has not been evidenced by the experiences of that country's judicial system.[23] In addition, the apprehension that review of legal sentences would severely overburden the appellate courts of this nation has been proved unfounded by the experiences of those states that permit appellate review of sentences.[24] Indeed, perhaps the strongest argument in favor of appellate review of sentences is the estimation that almost half of the appeals taken from criminal convictions are due to the defendant's dissatisfaction with the sentence imposed.[25] This observation, along with the admission of many experienced appellate judges that technical errors in the trial court proceedings are often seized upon as a means to correct a sentence deemed to be too severe,[26] suggest that appellate review of sentences may in actuality effect judicial economy. By focusing the attention of the appellate court on the root of the appellant's complaint, the defective sentence, the additional time and expense involved in a full retrial may be avoided by a remand exclusively for the purpose of resentencing.

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22. *Id.* at 27-31.

23. Frankel, *supra* note 7, at 379-380. For a general discussion of the English sentencing system, see Thomas, *Appellate Review of Sentences and the Development of Sentencing Policy: The English Experience*, 20 ALA. L. REV. 193 (1968); *Survey*, *supra* note 3, at 240-243; A.B.A. STANDARDS FOR APPELLATE REVIEW, *supra* note 5, at 130 (Meador Report, Appendix C).

24. Note, *Statutory Structures for Sentencing Felons to Prison*, 60 COLUM. L. REV. 1134, 1166 (1960).

25. 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% of the time the appeal court is required to review cases which would not be there had a reasonable sentence been pronounced.

Bennett, *The Sentence—Its Relations to Crime and Rehabilitatin, Of Prisons and Justice*, S. Doc. No. 70, 88th Cong., 2d Sess. 307, 311 (1964).

26. A.B.A STANDARDS FOR APPELLATE REVIEW, *supra* note 5, at 30-31.

SENTENCE REVIEW—THE INDIANA EXPERIENCE

Provisions for appellate review of sentences have been enacted in slightly more than half of the states through legislation, case law, or constitutional mandate.[27] However, the number in which review is realistically available in every serious case is much lower—approximately fifteen states.[28] Sentence review remains, as a practical matter, unavailable in many states in which it has been authorized due to the reluctance of the appellate courts to overrule the discretionary actions of the trial court judge. For the most part, sentencing continues to be viewed as an exclusive function of his discretion, and as long as the sentence is within the statutory boundaries and there is no clear evidence of abuse the sentence will not be modified on appeal.[29] The experience in Indiana with appellate review of sentences, which while authorized, but not exercised, is typical of other jurisdictions.

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27. The number of states authorizing sentence review has been increasing over the past two decades. *European Approaches*, *supra* note 4, at 195, lists the following statutes and decisions which are in addition to the Indiana Constitutonal provisions, *infra* notes 31-32:

ALASKA STAT. § 12.55 120 (Supp. 1972); ARIZ. REV. STAT. ANN. § 27-2144 (1962); CAL. PENAL CODE § 1260 (West 1970); COLO. REV. STAT. § 40-1-509 (1963); CONN. GEN. STAT. §§ 51-194 to 96 (1960); HAWAII REV. STAT. § 641-24 (1968); IDAHO CODE ANN. § 19-2821 (1948); ILL. REV. STAT. Ch. 110A § 615 (b) (1968); IOWA CODE § 793.18 (1971); KAN. STAT. § 22-3605 (1971); ME. REV. STAT. tit. 15, § 2141 (supp. 1973); MD. CODE ANN. §§ 132-388 (1973); MASS. ANN. LAWS ch. 278, § 28 (1972); Mo. Sup. Ct. Rs. 27.04, 05, .06 (1953); MONT. REV. CODES ANN. §§ 2501-04 (1969); NEB. REV. STAT. § 29-2308 (1965); N.Y. CONSOL. LAW ch. 11-A, § 470.15 (West 1971); OHIO REV. CODE ANN. § 2953.07 (1954); OKLA. STAT. ANN. tit. 22, § 1066 (1958); OREG. REV. STAT. § 138.050 (1971); PA. STAT. tit. 17 § 211.504 (1962); WIS. STAT. ANN. § 251.17 (1971). State v. Johnson, 67 N.J. Supp. 414, 170 A.2d 830 (App. Div. 1961); Brooks v. State, 187 Tenn. 361, 215 S.W.2d 875 (1948).

Comment, U. PA. L. REV. 434, 436 (1960), lists the states which recognize the power of the appellate courts to revise or reduce a sentence as Arizona, Arkansas, Connecticut, Idaho, Iowa, Nebraska, New York, Oklahoma, and Pennsylvania. Coburn, *supra* note 7, at 213, notes that "in certain instances Oregon and Tennessee allow appellate review." Mueller, *Penology on Appeal: Appellate Review of Legal but Excessive Sentences*, 15 VAND. L. REV. 671, 677 (1962), lists fourteen states in which modification of legal but excessive sentences is authorized by statutes or precedent, adding Hawaii, Massachusetts, and New Jersey to the states enumerated above.

28. NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, CORRECTIONS 172 (1973); A.B.A. STANDARDS FOR APPELLATE REVIEW, *supra* note 5, at 13.

29. Coburn, *supra* note 7, at 212-216. This standard appears to be the majority rule. *See* 24A C.J.S., *Criminal Law*, § 1878 (1962), and the numerous authorities cited there: "The discretion of the trial court in fixing the sentence, punishment, or costs within the limits prescribed by law will not be reviewed or revised, except for abuse."

The judicial articles adopted in the 1970 amendments[30] to the Indiana Constitution provide that: "The Supreme Court shall have, in all appeals of criminal cases, the power to review all questions of law and to review and revise the sentence imposed."[31] This judicial article also provides that the court of appeals, in all cases other than direct review of administrative decisions, shall:

> exercise appellate jurisdiction under such terms and conditions as the Supreme Court shall specify by rules which shall, however, provide in all cases an absolute right to one appeal and to the extent provided by rule, review and revision of sentences for defendants in all criminal cases.[32]

In *Beard v. State*,[33] the Indiana Supreme Court was first presented with an opportunity to exercise this authority. Here, the court could have reduced a life sentence which had been imposed upon the defendant. While the court recognized that it had been granted this additional authority by the constitutional amendment, it nevertheless declined to exercise it, stating:

> The grant appears to be beyond our inherent power to review and revise those sentences that exceed constitutional limitations, a responsbility that we have previously recognized. . . . Thus far, we have refrained from exercising this recently granted power and believe that it can be properly exercised only under a program of policies and procedures not yet established. We, therefore, decline the defendant's prayer for a review of this sentence.[34]

Since the *Beard* decision, the Indiana Supreme Court[35] and court of appeals[36] have consistently declined to invoke the judicial power to review and revise sentences. Viewed against the background of this

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30. The constitutional amendments were added on November 3, 1970, upon voter ratification, and became effective January 1, 1972.

31. IND. CONST. art. 7, § 4.

32. IND. CONST. art. 7, § 6.

33. ___ Ind. ___ , 323 N.E.2d 216 (1975).

34. *Id.* at 219 (citations omitted).

35. Miller v. State, ___ Ind. ___ , 364 N.E.2d 129 (1977); Parker v. State, ___ Ind. ___ , 358 N.E.2d 110 (1976); Chritchlaw v. State, ___ Ind. ___ , 346 N.E.2d 591 (1976); Thomas v. State, ___ Ind. ___ , 348 N.E.2d 4 (1976); Delph v. State, ___ Ind. ___ , 332 N.E.2d 783 (1975); Stroehr v. State, ___ Ind. ___ , 328 N.E.2d 422 (1975).

36. State ex rel. Taylor v. Allen Superior Court Criminal Felony Div., ___ Ind.App. ___ , 366 N.E.2d 206 (1977); Willis v. State, ___ Ind.App. ___ , 318 N.E.2d 385 (1974).

experience, the recent promulgation of court rules to govern the appellate review of sentences may be an indication of the preparedness on the part of the appellate judiciary to afford the criminal defendant his constitutional right to sentencing review.[37]

THE SCOPE OF SENTENCING REVIEW[38]

In adopting its rules for the appellate review of sentences, the Indiana Supreme Court has limited the scope of the appellate court's review to the determination of whether the sentence imposed is "manifestly unreasonable" when viewed in relation to the nature of the offense and the offender:

> 1. The reviewing court will not revise a sentence authorized by statute except where such sentence is manifestly unreasonable in light of the nature of the offense and the character of the offender.
> 2. A sentence is not manifestly unreasonable unless no reasonable person could find such sentence appropriate to the particular offense and offender for which such sentence was imposed.[39]

By stating at the outset the standard which shall govern the scope of the court's review, the supreme court has avoided the initial problem experienced in other jurisdictions of developing a workable review system.[40]

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37. APPELLATE REVIEW OF SENTENCES, *supra* note 13, Rule 1 provides:

> 1) Appellate review of the sentences imposed on any criminal defendant convicted after the effective date of this rule is available as this rule provides.
> 2) The Supreme Court will review sentences imposed upon convictions agreeable to the Court; the Court of Appeals will review sentences imposed upon convictions agreeable to the Court of Appeals.

38. It may be noted that Rule 1 (2) of Appellate Review of Sentences, *supra* note 13, prohibits appeal by the prosecution: "Appellate review of sentences under this rule may not be initiated by the State." Compare with the Alaska statute, *supra* note 41.

While considerations of justice would demand the correction of the too-lienient sentence as well as the sentence that is too severe, it is not clear whether a provision for appeal by the state—especially in the context of permitting the reviewing court to increase the sentence on appeal—would make a significant contribution to the objectives sought by those who favor appellate review. For further elaboration on this point, see A.B.A. STANDARDS FOR APPELLATE REVIEW, *supra* note 5, at 56-57. The discussion presented here will focus on the scope of sentencing review provided under the rules.

39. APPELLATE REVIEW OF SENTENCES, *supra* note 13, Rule 2.

40. *See* Halperin, *Sentence Review in Main: Comparisons and Comment*, 18 MAINE L. REV. 133, 150 (1966).

As an example, in Alaska where sentencing review has been authorized by statute since 1969,[41] the supreme court of Alaska has wrestled with a variety of sentencing review standards, with the result being that there is no clear articulation of the standards for sentencing review for its lower trial courts to follow in fashioning their sentences.[42] One member of Alaska's appellate judiciary has responded to the problem by suggesting that the pattern of development of sentence review standards is irrelevant because the standards themselves are insignificant—what seems to be more important is the outcome of each case.[43] However, only through the formulation and implementation of proper standards for the review of sentences can the objectives of sentencing review be achieved.[44] A case-by-case review of sentencing decisions in the absence of standards cannot contribute to the development of rational sentencing criteria. In this respect, the Indiana Supreme Court's formulation of a standard to govern the scope of appellate review of sentences enhances the possibility that sentencing review will achieve the desired goal of greater fairness and rationality in sentencing decisions. The extent to which this standard contributes to the development of criteria for sentencing which is both "rational and just," will depend in large measure on its interpretation as applied by the trial courts and practicing bar.

Certainly one construction that may be posited is that the "manifestly unreasonable" standard serves merely to embody the principle to which the Indiana appellate courts have generally held—i.e., that the determination of appropriate penalties for

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41. ALASKA STAT. § 12.55.120 provides:

> Appeal sentence: (a) A sentence of imprisonment lawfully imposed by the Superior Court for a term or for aggregate terms exceeding one year may be appealed to the Supreme Court by the defendant on the ground that the sentence is excessive.
>
> (b) A sentence of imprisonment lawfully imposed by the Superior Court may be appealed to the Supreme Court by the state on the ground that the sentence is too lenient; however, when a sentence is appealed by the state and the defendant has not appealed the sentence, the court is not authorized to increase the sentence but may express its approval or disapproval of the sentence and its reasons in a written opinion.

42. "Today both bench and bar remain confused as to what the actual state of Alaska sentence review law is; the criminal and the community fail to see concrete progress toward the general objectives of sentence review." Note, *Sentence Review in Alaska: The Continuing Controversy*, 6 U.C.L.A.-ALASKA L. REV. 129, 144 (1967) [hereinafter cited as *Sentence Review*].

43. Erwin, *Five Years of Sentence Review in Alaska*, 5 U.C.L.A.-ALASKA L. REV. 1, 20-21 (1975).

44. *See* notes 15-22 *supra* and accompanying text.

criminal violations is exclusively a legislative function and that the appellate courts have only a limited authority to review sentences to determine if they violate any of the various constitutional provisions concerning sentencing.[45] This principle has been reiterated in a number of opinions in which the appellate courts have indicated that they will not set aside a sentence because it appears to be too severe, but rather will review it only to determine if it is proportioned to the nature of the offense involved, imposes "atrocious or obsolete punishment," or is "grossly and unquestionably excessive."[46]

In fashioning a rule which emphasizes the review of sentences authorized by statute,[47] it may be argued that the supreme court is simply reflecting past holdings to the effect that where the penalty fixed by the legislature does not exceed constitutional limitations, the courts may not interfere.[48] According to this view, the "manifestly unreasonable" standard set forth in the new rules may represent no more than the test of "proportionality" which has long been available in accordance with the Indiana and United States Constitutions to modify a disproportionally excessive sentence.[49] However, the

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45. Sentences in criminal cases are limited by the provisions of the Indiana Constitution which prohibit excessive fines, cruel and unusual punishment, and require that sentences be proportioned to the nature of the offense involved. IND. CONST. art. 1 § 16.

46. *See* Beard v. State, ___ Ind. ___ , 323 N.E.2d 216, 219 (1975); Rowe v. State, ___ Ind. ___ , 314 N.E.2d 745, 749 (1974); Smith v. State, ___ Ind. ___ , 312 N.E.2d 896, 900 (1974); Clark v. State, ___ Ind. App. ___ , 311 N.E.2d 439 (1974); *See also* Kerr, *Criminal Law and Procedure*, 9 IND. L. REV. 160, 192 (1975).

47. APPELLATE REVIEW OF SENTENCES, *supra* note 13, Rule 2 provides:

> (1) The reviewing court will not revise a sentence authorized *by statute* except when such sentence is manifestly unreasonable. . . . (Emphasis added.)

Such a reading of the rule would not preclude appellate review where the sentence imposed is clearly illegal in that it exceeds the punishment fixed by the legislature.

48. Landlaw v. State, ___ Ind. ___ , 279 N.E.2d 230 (1972); McHaney v. State, ___ Ind. App. ___ , 288 N.E.2d 284 (1972).

49. *See* Hollars v. State, ___ Ind. ___ , 286 N.E.2d 166, 170 (1972):

> These are primarily legislative cosiderations, and we are not at liberty to set aside a conviction and sentence because, on the record, they seem too severe. Blue v. State 224 Ind. 394, 67 N.E.2d 377 (1946); Mellot v. State 219 Ind. 646, 40 N.E.2d 655 (1942).
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> It is only when a criminal penalty is not graduated and proportioned to the nature of the offense, or where it is grossly and unquestionably excessive that this provision of the United States Constitution is intended to apply. Weems v. United States (1910), 217 U.S. 349, 30 S. Ct. 544, 54 L. Ed. 793 . . . .

See also Dickens v. State, 260 Ind. 285, 293, 295 N.E.2d 613, 619 (1973) in which the

Indiana precedent of non-interference with the trial court's discretion in imposing a sentence authorized by statute does not adequately address the problem of sentencing abuse as such a policy fails to focus on the exercise of the court's discretion in selecting from alternative penalties within the limits established by the legislature.[50]

The more favored and perhaps more logical interpretation of the "manifestly unreasonable" standard is that it is designed to focus the attention of the reviewing court not only on the proportionality of the punishment to the crime, but also on the manner in which the trial judge exercises his discretion in sentencing. It may be contended that sentencing review in accordance with the Indiana rules must center both on the trial judge's assessment of the character of the defendant and the nature of the crime committed,[51] and on his reasonings in selecting the punishment he impose.[52] Such an interpretation of the "manifestly unreasonable" standard is based upon the emphasis in the rules on the approrpriateness of the sentence as it relates not only to the nature of the offense, but also to the character of the offender.[53]

This construction of the scope of review afforded the appellate judiciary in reviewing criminal sentences is logically consistent with the appellate courts' previous decisions in declining to exercise the review power provided by the Indiana Constitution. The *Beard* opi-

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court observed: "The authority of the Supreme Court to modify or revise a sentence has been constitutionalized [by Art. 7 § 4 of the Indiana Constitution]," thereby suggesting that the new judicial article in the Constitution had added nothing to the Supreme Court's preexisting inherent power of sentence review.

50. The general rule in this State is that this Court will not invade the province of the legislature or the jury and impose a different sentence from that authorized by law or issued by the jury so long as it is not grossly disproportionate to the nature of the offense or unquestionably excessive.

Delph v. State, 263 Ind. 385, 332 N.E.2d 783 (1975); Beard v. State, 262 Ind. 643, 323 N.E.2d 216 (1975). The penalty imposed in this case is within the statutory limit and is not, in our view, grossly disproportionate or unquestionably excessive." Hall v. State, ____ Ind. ____ , 60 Ind. Dec. 532, 534 (1978).

51. *See* text accompanying notes 102-136 *infra*, in connection with discussion of sentencing criteria in IND. CODE 34-4.1-4-7.

52. *See* text accompanying notes 89-98 *infra*, in connection with discussion of requirement in IND. CODE 35-4.1-4-3 that sentencing court make a record of the reasons for selecting the sentence that it imposes.

53. APPELLATE REVIEW OF SENTENCES, *supra* note 13, Rule 2.

(1) The reviewing court will not revise a sentence . . . except where such sentence is manifestly unreasonable in light of the nature of the offense *and the character of the offender.*

nion[54] and subsequent decisions have stated that the reluctance to review criminal sentences is based upon concern that the power conferred by Article 7, §§ 4 and 6, goes beyond "the inherent power of the courts to review and revise those sentences that exceed constitutional limitations,"[55] and therefore cannot be rationally exercised until the supreme court has developed procedures for the use of that power.[56] Based on this reasoning, it follows that the rules promulgated for the implementation of the sentencing review power would not represent a mere embodiment of past judicial principles. To the contrary, it may be argued that the new rules encompass a broader approach to sentencing policy under which the appellate courts will exercise supervisory jurisdiction over the procedure by which sentences are imposed.[57] Such an argument was advanced in Justice White's well-reasoned concurring opinion in *Gray v. State*.[58] Justice White emphatically pointed out that the new judicial article in the Indiana Constitution was included for the purpose of empowering the appellate courts to expand their traditionally limited role in sentencing review by nullifying through appropriate revision a trial judge's abuse of discretion in sentencing:

> It seems to me to be so obvious to be indisputable, that the inclusion in the new Article 7, section 4 of the clause granting "the power . . . to review and revise the sentencing imposed" was for the purpose of changing that situation [non-review of sentencing discretion] and not *merely* for the purpose of constitutionalizing the existing exceedingly limited review and revisions practice.[59]

The recent decision of the New Jersey Supreme Court in *State v. Leggeadrini*[60] is illustrative of this suggested approach to sentence review authority. By focusing on the reasoning of the court

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(2) A sentence is not manifestly unreasonable unless no reasonable person could find such sentence appropriate to the particular offense *and offender* for which such sentence was imposed. (Emphasis added.)

54. *Supra* note 33.

55. *See* authorities cited *supra* notes 35-36.

56. *See, e.g.*, Miller v. State, *supra* note 35, at 132.

57. It may be noted that the proposal in the 1970 Indiana Constitutional revision that the power of the appellate courts in criminal cases include the power to review sentences is based on the "efficacious use to which this power has been put by the Courts of Criminal Appeals in England." REPORT OF THE INDIANA JUDICIAL STUDY COMMISSION 139-141 (1967). For a general discussion of the English sentencing system see authorities cited *supra* note 23.

58. ___ Ind. App. ___ , 305 N.E.2d 886 (1974).

59. *Id.* at 891 (emphasis in text).

60. 75 N.J. 150, 380 A.2d 1112 (1977).

in determining the sentence, the established criteria may effectively be employed to correct injustices which may result from the abuse of judicial discretion. This ruling is all the more noteworthy in view of the distinct similarity between the standards governing review of sentences before the New Jersey appellate courts and those which have been formulated by the Indiana Supreme Court.[61]

In this instance, Leggeadrini, a sixty-six year old pensioner, was charged with the fatal shooting of a twenty-six year old neighbor in an incident which had been precipitated by a dispute between the victim, defendant and his wife over possible damage to the defendant's property arising from the victim's ballplaying near Leggeadrini's front yard. On the date of the shooting, Leggeadrini, while inside his house, overheard an argument between his wife and the victim in which the victim had directed abusive remarks towards Mrs. Leggeadrini. The defendant proceeded outside to rebuke the victim for the manner in which he had addressed Mrs. Leggeardrini, and when the victim declined to continue the argument any longer, Leggeardrini stated that he would shoot him. He immediately grabbed a .22 caliber rifle from inside the doorway of the house, cocked it and shot the victim, who then ran across the street to his house where he collapsed and died. Leggeadrini then went back into his house and summoned the police. In his version of the incident, Leggeadrini stated that he had intended to do no more than "hurt" the victim, claiming that he would have fired more than one shot had he intended to kill.[62]

Upon indictment for murder, Leggeadrini entered a plea of *non vult* and was sentenced to a prison term of twenty-five to thirty years, which was the equivalent of a maximum sentence permitted for a conviction of second degree murder. At the sentencing hearing, a presentence report and psychiatric evaluation of the defendant were introduced to present a composite picture of an individual who had been a solid member of the community and enjoyed a stable family life. Leggeadrini had no prior criminal record, and prior to

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61. *Compare*

> [T]he scope of appellate review is normally limited to the question of whether [the trial court's] discretion has been abused by the imposition of a sentence which is *manifestly excessive under the particular circumstance of the case*. . . .

75 N.J. at 157, 380 A.2d at 1116 (emphasis added), *with*

> The reviewing court will not revise a sentence authorized by statute except where such sentence is *manifestly unreasonable* in light of the *nature of the offense and the character of the offender.*

APPELLATE REVIEW OF SENTENCES, *supra* note 13, Rule 2 (1) (emphasis added).

62. 75 N.J. at 153, 380 A.2d at 1114.

his retirement had been a productive citizen holding continuous employment at the same job for thirty-one years. He and his wife lived on modest pension and social security benefits which he supplemented with part-time work for the local school board.[63]

On behalf of Leggeadrini, defense counsel alluded to his age, lack of prior criminal involvement, stable background and extreme remorse as personal factors mitigating any need for a substantial period of incarceration. He argued further that the offense was an isolated incident—an over-reaction to momentary stress—unlikely to be repeated. In his brief statement to the court, Leggeadrini displayed perplexity as to how a man of his temperament who had minded his own business for many years could have fallen into such a predicament. He reiterated his version of the unintentional nature of the killing.[64]

In imposing sentence, the court acknowledged that rehabilitation was not the primary sentencing consideration with respect to murder committed in emotional-laden circumstances since the minimal likelihood of repetition substantially lessens the need for deterrence of the offender. In his oral statement of reasons the sentencing judge nevertheless concluded that the defendant's conduct contained all of the elements of second degree murder and warranted substantial punishment because of the seriousness of the harm resulting from a relatively trivial provocation.[65]

On appeal granted solely to consider the excessiveness of the sentence, the Supreme Court of New Jersy emphasized that in the interest of justice it had the power to modify any sentence that was manifestly excessive, even if within statutory limits, although its scope of appellate review was normally limited to the question of whether the trial court has abused its discretion by imposing a sentence which was manifestly excessive under the particular circumstances.[66] After considering the totality of circumstances presented in this case, and weighing the factors relevant to appellate review of sentences, the court concluded that the sentence imposed was manifestly excessive and warranted modification.[67]

With regard to the reasoning of the sentencing court in determining the appropriate punishment to be imposed in this case, the

63. *Id.* at 114-1115.
64. *Id.* at 1115.
65. *Id.*
66. *Id.* at 1116.
67. *Id.* at 1114.

New Jersey Supreme Court noted that a proper aggravating factor for the court's consideration was the insufficiency of the provocation for the defendant's act. On the other hand, the opinion of the court suggests that substantial mitigating factors concerning both the personal circumstances of the defendant and other details of his act warranted the sentencing court's assessment of this crime for sentencing purposes as being more in the nature of manslaughter than second-degree murder.[68] In particular, the court felt the fact that the defendant summoned the police immediately after the shooting, and had entered a plea of *non vult* even in the face of a potential life imprisonment, as suggesting an acknowledgement of grievous wrongdoing conducive to rehabilitation. Additionally, defendant's prior non-involvement in any criminality and the minimal prospect of any repetition of his wrongdoing operated to overcome the concern for deterrence or societal protection through the defendant's isolation.[69] The court went on to point out that in this context the defendant's advanced age, while not a basis for mitigation insofar as his criminal liability was concerned, was especially relevant. The court then suggested that where a person has attained advanced age without acquiring a criminal record, a sentencing judge may properly treat a single instance of criminality as an aberrant episode which would permit a degree of leniency in sentencing.[70] Based on this evaluation of the relevant factors, the court concluded that the sentence imposed in the case, which was tantamount to life imprisonment for the defendant, was clearly unwarranted and amounted to an abuse of discretion on the part of the sentencing judge:

> We differ with him . . . on his ultimate determination that the interests of society require a substantial term of incarceration for this defendant, despite the preponderance of circumstances pointing to a lesser term of incarceration. It appears that the sentence more nearly fits the *offense* than the *offender*.[71]

The court, accordingly modified the sentence to a term of imprisonment for a minimum of seven years and a maximum of ten years.[72]

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68. *Id.* at 1117-1118.

69. *Id.* at 1118.

70. *Id.* This observation should not be understood as precluding the imposition of a severe prison term when such is warranted by an appraisal of the offense or the offender nothwithstanding the defendant's advanced age. *Id.*

71. *Id.* at 1119 (emphasis added).

72. *Id.* The maximum term of imprisonment authorized for manslaughter under New Jersey criminal law is ten years. *See id.* at 1117 n.3.

As the *Leggeadrini* case poignantly demonstrates, appellate review of sentencing may effectively be employed to curb those excesses which can result from the abuse of sentencing discretion. Our appellate courts may similarly better serve the interests of justice by adopting an interpretation of the "manifestly unreasonable" standard which insures that sentencing decisions are based upon rational criteria appropriately applied to the nature of the crime and the character of the defendant.[73]

THE REQUIREMENT FOR A STATEMENT OF REASONS WHEN SENTENCING

As suggested by the foregoing discussion, a most apparent argument in favor of requiring the trial court to present a statement of its reasons when sentencing the criminal defendant is that it serves as an invaluable aid to the reviewing court.[74] It goes without saying that if an appellate court is to make an intelligent review of the sentence imposed, it must be provided with a record detailing the sentencing court's reasoning. The requirement to elaborate upon the reasons for each sentencing decision assists both in identifying the factors considered, and in pinpointing the significance assigned to each factor.[75]

In addition to the aid that a statement of reasons by the sentencing court provides the appellate courts, a number of other

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73. It is noteworthy that the appellate courts of the State of Washington have adopted a standard of review with regard to sentencing discretion which also parallels that of the Indiana rules: "Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion *manifestly unreasonable*, or exercised on untenable grounds, or for untenable reasons." State ex. rel. Carroll v. Junker 79 Wash. 2d 12, 25, 482 P.2d 775, 784 (1971), (emphasis added). *See also* State v. Batten, 16 Wash. App. 313, 314, 556 P.2d 551 (1976); State v. Blight, 569 P.2d 1129, 1131 (Wash. 1977): "discretion is abused only where it can be said *no reasonable man* would take the view adopted by the trial court." Citing State v. Derefield, 5 Wash. App. 798, 799-800, 491 P.2d 694 (1971); State v. Hurst, 5 Wash. App. 146, 148, 486 P.2d 1136 (1971) (emphasis added).

74. A.B.A. STANDARDS FOR APPELLATE REVIEW, *supra* note 5, at 47. The courts of this state have given increasing recognition to the value of a statement of reasons and conclusions drawn from supportive facts as aid to appellate review in the context of administrative hearings. *See* Carlton v. Board of Zoning Appeals, ___ Ind. ___, 245 N.E.2d 337 (1960); V.I.P. Limousine Service, Inc. v. Herider-Sinders, Inc., ___ Ind. App. ___, 355 N.E.2d 441 (1976); Metropolitan Bd. of Zon. App., ect. v. Graves, ___ Ind. App. ___, 360 N.E.2d 848 (1977).

75. Kaufman, *Second Circuit Note, 1973 Term, Foreword: The Sentencing Process and Judicial Inscrutability*, 49 ST. JOHN'S L. REV. 215, 221 (1975) [hereinafter cited as Kaufman].

valid reasons for such a requirement are presented. It has been suggested, for example, that "a good sentence is one which can reasonably be explained."[76] Therefore, requiring the judge to pass sentence only after formulating a statement of the considerations which he takes into account will act as a safeguard against the danger that a judge will allow his emotions or other irrelevant factors to sway him in sentencing.[77] Additionally, the fact that many judges do not like to state all the reasons for the sentence imposed,[78] may be a good reason for requiring them to do so.[79]

Another reason for requiring the trial court to record its statement of reasons is that the record may be of great value to correction authorities if the sentence results in incarceration.[80] The sentencing judge can provide even further assistance in this regard by offering the correctional authorities comments on the defendant as he has observed him.[81] Providing an explanatory statement to the defendant may in many cases also have therapeutic value in aid to his rehabilitation.[82]

A forceful argument has been made to the effect that due process of law requires a written statement of reasons and facts supporting the sentencing decision.[83] Indeed, the United States Supreme Court has acknowledged that a statement of reasons is a prerequisite to determining the factors considered in sentencing. In *North Carolina v. Pearce*,[84] a case in which the defendant had succeeded in overturning his conviction on appeal and was to be retried, the Court decided that to preclude the possibility that the defendant be punished for seeking the reversal of his original convictions, any imposition of a harsher penalty for the subsequent con-

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76. Youngdahl, *Remarks Opening the Sentence Institute Program, Denver, Colorado*, 35 F.R.D. 387, 388 (1964).

77. Wyzanski, *A Trial Judge's Freedom and Responsibility*, 65 HARV. L. REV. 1281, 1292-93 (1952).

78. *Symposium*, *supra* note 2, at 284 (remarks of Judge Walsh).

79. *See* S. Frankel, *supra* note 7, at 370.

80. A.B.A. STANDARDS FOR APPELLATE REVIEW, *supra* note 5, at 46. *See* MODEL SENTENCING ACT § 10 (1972): "A copy of the investigation report, together with the record of the sentencing hearing, shall be sent to the institute or any other agency to the person that will supervise the defendant." [Hereinafter cited as MODEL SENTENCING ACT.]

81. MODEL SENTENCING ACT § 10, *supra* note 80, Commentary at 25.

82. A.B.A. STANDARDS FOR APPELLATE REVIEW, *supra* note 5, at 46-47.

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

84. 395 U.S. 711 (1969).

viction or affirmation must be supported by reasons affirmatively stated on the record.[85] This decision was the first by the Court to *require* a sentencing judge to explain the sentence imposed, and is significant in that it embodies an implicit recognition that sentencing decisions can be rationally justified and the factors upon which it is based specified.[86]

More recently, in *Gardner v. Florida*,[87] a majority of the Supreme Court agreed that the due process clause is violated when one charged with murder is sentenced to death on the basis of confidential information contained in his presentence report which was not made available to him during the sentencing hearing. Of even greater significance is the opinion of a plurality of the Court that the due process clause has application to sentencing proceedings in general:

> [I]t is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause. Even though the defendant has no substantive right to a particular sentence within the range authorized by statute, the sentencing is a critical stage of the criminal proceedings at which he is entitled to the effective assistance of counsel. . . . The defendant has a legitimate interest in the character of the procedure which leads to the imposition of the sentence even if he may have no right to object to a particular result of the sentencing process. . . .[88]

As suggested by these authorities, one aspect of procedural due process is a sentencing decision based upon rational criteria and a statement of the court's reasoning to the defendant.

The emerging awareness of the need to impart procedural safeguards into the sentencing process is reflected in the provision of the Indiana Penal Code which requires:

> Before sentencing a person for a felony the court must conduct a hearing to consider the facts and circumstances relevant to sentencing. The person is entitled to subpoena and call witnesses and otherwise to present information in

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85. *Id.* at 726.

86. *See* Pugh and Carver, *supra* note 5, at 42-43.

87. 430 U.S. 349 (1977). The *Gardner* decision is also of note in that the procedure for imposing the death penalty under which the defendant was sentenced parallels that recently introduced to the Indiana Penal Code. *See* IND. CODE 35-50-2-9, *as added* by Acts of 1977, Pub. Law 340, sec. 122 (effective October 1, 1977).

88. 430 U.S. 349 at 358 (opinion of J.J. Stevens, Stewart and Powell).

> his own behalf. The court shall make a record of the hearing, including:
> (1) a transcript of the hearing
> (2) a copy of the presentence report; and
> (3) a statement of the court's reasons for selecting the sentence that it imposed.[89]

By authorizing a separate hearing for sentencing at which the defendant is entitled to call witnesses and make presentation of evidence, this section embodies principles of fair hearing which are deemed to be fundamental to due process.[90] In addition to the presentence report,[91] the evidence presented in the defendant's behalf, along with the defendant's own statement, may provide the sentencing judge with information and opinion about the defendant for his critical evaluation.[92] In this fashion the sentencing hearing takes on the appearance of a quasi-judicial function[93] in which, after ascertaining the facts, the judge is permitted to exercise a limited amount of discretion based upon considerations of public policy.[94]

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89. IND. CODE 35-4.1-4-3. For legislative history of this section, see note 9 *supra*.

90. "Pronouncement of judgment is a critical stage in the criminal prosecution with the constitutional right 'to appear and defend, in person and with counsel' apply. A defendant convicted of a felony has the right to be present at the pronouncement of judgement; to be represented by counsel; and to receive a hearing at which he may present evidence with respect to mitigation of sentence."

In re Cortez, 6 Cal. 3d 78, 88, 98 Cal. Rptr. 307, 313, 490 P.2d 819, 825 (1971) (citations omitted).

The determination that procedural protections be available in the sentencing process, however, does not necessarily imply that the hearing be conducted in accordance with all the procedural requirements of the trial. As was noted by Justice Stevens in his discussion of the sentence process in *Gardner v. Florida*: "The fact that due process applies does not, of course, implicate the entire panoply of criminal procedural rights." 430 U.S. at 358 n.9.

91. As to the pre-sentence report generally, see IND. CODE 35-4.1-4-11, 35-4.1-4-17.

92. Pugh and Carver, *supra* note 5, at 36-37.

93. Thomas, *Sentencing—The Case for Reasoned Decisions*, 1963 CRIM. L. REV. 243, 244 (1963).

94. At the time of this writing a proposal has been introduced before the Indiana General Assembly to specify that the court's reasons for a sentence be stated only where aggravating or mitigating circumstances are taken into account. 103rd I.G.A. (short sess.), S.B. No. 326. The purpose of this amendment is to clarify this section as it relates to determinate sentencing under the Indiana Penal Code. *See* note 11 *supra*.

In a January 9, 1978 letter to the author, State Senator Leslie Duvall (R. Indianapolis), the chief sponsor of the Penal Code revisions, explains:

> It was always my understanding that the legislated sentence, sometimes referred to as the presumptive sentence, could be imposed by the court

It may be noted that the above provision requires a hearing and statement of reasons only for the sentencing of convicted felons, presumably because the sentencing of dangerous offenders may appropriately demand greater due process than is required in lesser sentences of non-dangerous offenders.[95] However, since the rules for appellate review of sentences now provide that a person convicted of any crime may avail himself of sentencing review,[96] it may be an advisable practice for the trial judge to prepare a statement of reasons when sentencing both felons and misdemeanants.[97] The small effort involved in transcribing such a record may in the long run avoid a needless remand by an appellate court for clarification of the sentencing decision.[98]

DEVELOPING CRITERIA FOR SENTENCING DECISIONS

Given the recognition that requiring the sentencing judge to state the reasons underlying each particular judgment may provide at least an initial step towards rationality in the sentencing process, the remaining task becomes the development of sound criteria to guide the court in formulating the sentencing decision. A consistent and authoritiative set of criteria upon which the sentencing court may rely is of critical importance since problems of irrationality and disparity in the sentencing process may be based on the lack of agreement between judges as to the appropriate criteria to be applied in particular instances.[99] Moreover, the need for such guidance

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> without further explanation. Since apparently there seems to be some doubt concerning this, I am introducing a bill recommended by the Governor's Criminal Code Study Commission which will clearly so state. Where for any reason the judge wishes to mitigate or aggravate the sentence, he must do so after a hearing and must state his reasons therefor.

Letter on file with the University of Notre Dame Law School Legislative Research Service.

95. MODEL SENTENCING ACT, *supra* note 80, commentary at 24.

96. *See* APPELLATE REVIEW OF SENTENCES, *supra* note 13, Rule 1. "(1) Appellate review of the sentence imposed on *any criminal defendant* convicted after the effective date of this rule is available as this rule provides." (Emphasis added).

97. As defined in the Penal Code, the term "crime" encompasses both felonies and misdemeanors. *See* IND. CODE 35-41-1-2.

98. *See, e.g.*, Andrews v. State, 552 P.2d 150 (Alaska 1976) (where appellate court unable to discern the basis for the sentence, case remanded for sentencing procedures in accordance with established criteria); *See* text accompanying note 143 *infra*.

99. "Irrational sentencing along the criteria may occur because a decision-maker may be considering other criteria, such as willingness to plead guilty, prior record, or institutional behavior. Thus, the criticism of irrationality leveled against decision-makers might in fact mask a problem of duplicate or confusing criteria." Zalman, *supra* note 7, at 268-269.

in sentencing is readily apparent when one considers the insignificant amount of training the trial judiciary receives for the execution of the awesome responsibility to impose punishment. Judge Craven, of the Fourth Circuit Court of Appeals, has described this state of affairs in his lament:

> What is now an appropriate sentence? All my life I have wished for precision in the art of sentencing, and it eludes me. It seems to me incongruous that trial judges, without either training or experience in penology, are accorded finality in the determination of punishment. . . .
>
> Even today one can graduate from the nation's best law schools without receiving so much as one hour of instruction in penology. It should not be surprising that this is so—for penology is not law: it is sociology. The only law is the maximum sentence. When I was a trial judge, and charged with the responsibility of sentencing, I used to make myself scan and sometimes read the quarterly entitled "Federal Probation" devoted to the science of penology. That, plus attendance at a sentencing institute and visits to three prisons, comprised nearly all of my training and experience for the sentencing function. I think it not enough. I have about concluded that the trial judges I have known (including me, especially) are not as qualified by education and experience as are those from other disciplines to decide whether a man should go, nor how long he should remain in prison.[100]

This statement serves to underscore the problem in light of the fact that Judge Craven issued this opinion when called upon to hear an appeal regarding a sentence which he himself had imposed as a trial judge—and could not himself recall the factors relied upon in imposing the sentence.[101]

Viewed against this background, one of the more innovative provisions of the revised Indiana Penal Code is the section designed

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100. United States v. Miller, 361 F. Supp. 825, 826-27 (W.D.N.C. 1973). Judge Craven then went on to advocate the use of panels of persons with diverse sociological expertise in sentensing. *Id.* The use of such panels has been adopted by three federal districts (the Eastern District of Michigan, the Eastern District of New York, and the Northern District of Illinois). *See* discussion in M. FRANKEL, *supra* note 7, at 69-74. The use of a sentencing commission has also been proposed in the revisions of the federal criminal code. Zalman, *supra* note 7, at 266. *See also* Korbakes, *Should the "Judge's Sound Discretion" Be Explained?*, 59 JUDICATURE 185, 187 (1975).

101. 361 F. Supp. at 827. He thus assumed that reliance had been placed on the defendant's prior record which, because the case involved a *Tucker* problem, made a considerable difference in the sentence finally imposed. *Id.*

to prescribe definite criteria to guide the court in sentencing.[102] In accordance with these criteria, the court, when sentencing any criminal defendant[103] must consider the risk that the person will commit another crime, the nature and circumstances of the crime committed, and the prior criminal record, character and condition of the person.[104] Additionally, this code section provides that the court may consider the following factors as mitigating circumstances or as favoring a suspended sentence and the imposition of probation:

(1) The crime neither caused nor threatened serious harm to persons or property, or the person did not contemplate that it would do so.
(2) The crime was the result of circumstances unlikely to recur.
(3) The victim of the crime induced or facilitated the offense.
(4) There are substantial grounds tending to excuse or justify the crime, though failing to establish a defense.
(5) The person acted under strong provocation.
(6) The person has no history of delinquency or criminal activity, or he has led a law-abiding life for a substantial period before commission of the crime.
(7) The person is likely to respond affirmatively to probation or short-term imprisonment.
(8) The character and attitudes of the person indicate that he is unlikely to commit another crime.
(9) The person has made or will make restitution to the victim of the crime for the injury, damage, or loss sustained.

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102. IND. CODE 35-41-4-7 (effective October 1, 1977). For legislative history of this section, see note 12 *supra*. *See also* INDIANA CRIMINAL LAW STUDY COMMISSION, INDIANA PENAL CODE, Proposed Final Draft 191-193 (1974).

It has been suggested that the enumeration of relevant factors to be considered in mitigation or aggravation of punishment is a judgment properly reserved to the legislature which, as the embodiment of the representative will of society, is in a better position than the courts to the objectives of criminal sanctions. *See* M. FRANKEL, *supra* note 7, at 40-43; S. RUBIN, H. WEIHOFEN, G. EDWARDS AND S. ROSENQWEIG, THE LAW OF CRIMINAL CORRECTIONS 649-50 (1963).

103. Unlike the provisions for hearing, which applies only to the sentencing of convicted *felons*, the list of sentencing criteria which must be considered by the courts applies to sentences for all crimes—both felonies and misdemeanors. *See* IND. CODE 35-41-1-2 for definition of "crime" referenced.

104. *See* text of IND. CODE 35-41-4-7(a), *supra* note 10.

(10) Imprisonment of the person will result in undue hardship to himself or his dependents.[105]

The sentencing court may also take into account these factors as aggravating circumstances, or as favoring the imposition of consecutive terms of imprisonment:

(1) The person has recently violated the conditions of any probation, parole, or pardon granted him.
(2) The person has a history of criminal activity.
(3) The person is in need of correctional or rehabilitative treatment that can best be provided by his commitment to a penal facility.
(4) Imposition of a reduced sentence or suspension of the sentence and imposition of probation would depreciate the seriousness of the crime.
(5) The victim of the crime was sixty-five [65] years of age or older.
(6) The victim of the crime was mentally or physically infirm.[106]

This listing of criteria is expressly intended not to be exhaustive.[107] The authorization for the sentencing court to take these enumerated factors into account in decreasing or increasing a sentence is moreover discretionary;[108] and in contrast to the legislative mandate that the nature of the crime, the character of the offender and the risk that he will commit another crime be considered in all criminal sentencing decisions.[109]

As the Code thus suggests, the sentencing court is authorized to exercise its discretion in determining the aggravating or mitigating factors pertinent to the imposition of a particular sentence. Discretion in the context of sentencing, however, is not

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105. IND. CODE 35-41-4-7(b).

106. IND. CODE 35-41-4-7(c).

107. IND. CODE 35-41-4-7(d). The criteria listed in subsections (b) and (c) of this section do not limit the matters that the court may consider in determining the sentence.

108. IND. CODE 35-41-4-7

(b) The court *may* consider these factors as mitigating circumstances or as favoring suspending the sentence and imposing probation.

(c) The court *may* consider these factors as aggravating circumstances or as favoring imposing consecutive terms of imprisonment. (Emphasis added).

109. IND. CODE 35-41-4-7: "(a) In determining what sentence to impose for a crime, the court *shall* consider . . . ." (Emphasis added).

synonymous with mere decision-making. The background of the defendant, his motives, attitude and demeanor, and the peculiarities of the crime all must be assessed in formulating the sentencing decision. Indeed, a rational approach to sentencing contemplates the exercise of discretion based upon a process of reasoning which takes into account facts that are in the record, or are reasonably derived from the record, and a conclusion based upon logical rationale.[110] The availability of appellate review of sentences heightens the significance of the sentencing court's evaluation of the facts and circumstances bearing upon the punishment imposed, as the opportunity is present to challenge the reasonableness of the court's assessment of both the offense and offender.[111] While the enumeration of criteria in the Penal Code provides considerable guidance to the court in fashioning an appropriate penalty, it cannot capture the uniqueness of each individual brought before the court for sentencing. Thus, when weighing the factors relevant to his decision the sentencing court may find further guidance in the precedents of those jurisdictions which, by combining appellate review of sentences with the requirements for a statement of reasons when sentencing,[112] have developed a sound body of criteria for their courts to draw upon in sentencing. Although not numerous, these decisions suggest that agreement can be reached as to criteria applicable to the variety of sentencing determinations.

Following the lead of the *American Bar Association Standards for Sentencing Alternatives and Procedures*,[113] a predominant number of states, including Indiana, which have authorized appellate

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110. State v. Hutnik, 39 Wis. 2d 754, 764, 159 N.W.2d 733, 738 (1968): "there should be evidence in the record that discretion was in fact exercised and the basis of that exercise of discretion should be set forth."

111. *See* notes 51-53 *supra* and accompanying text.

112. The following states in addition to Indiana, have expressly provided that a written statement of reasons accompany the sentencing decision: ALASKA STAT. § 12.55.075 (Supp. 1977); CONN. GEN. STAT. ANN. § 51-195 (1977 Cum. Supp.); ME. REV. STAT. § 2142 (1977-78 Cum. Supp.); Super. and County Cts. (Crim.) R. 3:21-4(e); N.D. CENTRY CODE § 12-55-30; UTAH CODE ANN. §§ 77-35-21, 77-62-8(c); McCleary v. State, 49 Wis. 2d 263, 182 N.W.2d 572 (1971).

In some jurisdictions the court is required to set forth its reasons only when imposing a minimum term for a felony conviction. *See, e.g.*, NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, Final Report, § 3201, 284-286; New York Penal Law, § 70.000 (3)(b) (McKinney). Pennsylvania has flatly rejected the requirement. *See, e.g.*, Commissioner v. Olson, 372 A.2d 1207 (Pa. Super. 1977).

113. A.B.A. PROJECT ON STANDARDS OF CRIMINAL JUSTICE, Standards for Sentencing Alternatives and Procedures § 2.2 (Approved Draft 1968). *See also* A.B.A. STANDARDS RELATING TO PROBATION § 1.3 (Approved Draft 1970).

review of the trial court's reasoning in sentencing have set forth the primary factors to be considered in determining an appropriate sentence. These factors include the gravity of the offense, the character of the offender and the need for protection of the public.[114] Additional factors which may be considered have been suggested by *State v. Killory*,[115] wherein the Wisconsin Supreme Court held that criteria relevant to sentencing determinations include:

> the defendant's personality, character, and social traits, the result of a presentence investigation, the vicious or aggravated nature of the crime, the degree of defendant's culpability, the defendant's demeanor at trial, the defendant's age, educational background and employment record, the defendant's remorse, repentance and cooperativeness, the defendant's need for close rehabilitative control, and the rights of the public.[116]

A study conducted by the YALE LAW JOURNAL has identified the following as being one or more of the multiple objectives of criminal sanctions:

> *rehabilitation* of the convicted offender into a noncriminal member of society; *isolation* of the offender from society to prevent criminal conduct during the period of confinement; *deterrence* of other members of the community who might have tendencies toward criminal conduct similar to those of the offender (secondary deterrence) and deterrence of the offender himself after release; *community condemnation* or the purpose of maintaining respect for the norms themselves; and *retribution* or the satisfaction of the community's emotional desire to punish the offender.[117]

In *State v. Chaney*,[118] the Alaska Supreme Court found the above set of specific objectives to be within the scope of its constitutional mandate to administer a penal system based upon the dual

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114. *See* People v. Henley, ___ Colo. App. ___, 539 P.2d 496 (1975); Rosado v. State, 70 Wis. 2d 263, 182 N.W.2d 69 (1975); McCleary v. State, 49 Wis. 2d 263, 182 N.W.2d 512 (1972). *See also* People v. Craig, 47 Ill. App. 3d 242, 361 N.E.2d 736, 745 (1977).

115. 73 Wis. 2d 400, 243 N.W.2d 475 (1976).

116. State v. Killory, 73 Wis. 2d at 408, 243 N.W.2d at 481, *citing* State v. Tew, 54 Wis. 2d 361, 195 N.W.2d 615 (1972).

117. Note, *Appellate Review of Primary Sentencing Decisions: A Connecticut Case Study*, 69 YALE L. J. 1453, 1455 (1960) (footnotes omitted).

118. 477 P.2d 441 (Alaska 1970).

principles of reformation and the need for protection of the public[119] and accordingly has made these sentencing criteria the foundation of sentence review in that state.[120]

The New Jersey Supreme Court, which has had numerous occasions to consider the factors involved in deriving a just sentence in accordance with its rules authorizing appellate review,[121] has suggested that the aims of penology include "retribution, rehabilitation, deterrence and sequestration of dangerous persons."[122] Of these, deterrence and rehabilitation are the most emphasized, with retribution being the least favored.[123] That state's highest court has also noted that in fixing a sentence a judge should:

> consider the gravity of the crime and appropriate punishment therefore, deterrence, protection of the public, rehabilitation and any other factors or circumstances relevant to the particular situation.[124]

Chief Justice Weintraub of New Jersey, in his consideration of this aspect of the admininstration of justice, has further suggested that where "the offense has strong emotional roots or is an isolated event unassociated with a pressing public problem, there is room for greater emphasis upon the circumstances of the individual offender."[125] This conclusion is apparently based on Weintraub's skepticism concerning the efficacy of punishment as a deterrent to crimes "steeped in emotional pressures" or which are "isolated excursions beyond the pale of the law induced by engulfing circumstances."[126] With regard to crimes not involving emotional factors, Weintraub offers that the sentencing judge may properly give paramount concern to the magnitude of the crime and the deterrance of others rather than to the attributes of the offender. A sanction may be fashioned which will neither diminish the gravity of the offense nor encourage would-be criminals to act with any expectation of leniency or impunity.[127]

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119. Alaska Const. Art. I § 12.

120. Note, *Sentence Review*, *supra* note 42, at 130-31.

121. N.J. Super. and County Crts. (Crim.) R. 2:10-3.

122. State v. Ivan, 33 N.J. 197, 200-202, 162 A.2d 851 (1960).

123. State v. Ivan, 33 N.J. at 199-200, 162 A.2d at 852. *See also* State v. Dunbar, 69 N.J. 333, 339, 354 A.2d 281 (1976).

124. State v. Jones, 66 N.J. 563, 568, 334 A.2d 20, 22 (1975).

125. State v. Ivan, 33 N.J. at 202, 162 A.2d at 853.

126. *Id.* at 851.

127. *Id. See also* State v. Sherwin, 127 N.J. Super. 370, 380, 317 A.2d 414 (App. Div.), *cert. denied*, 65 N.J. 569, 325 A.2d 703 (1974).

Aggravating and Mitigating Factors in Sentencing

The New Jersey appellate courts have also pointed to an additional number of generalized factors which may be appropriately considered in mitigation of punishment. For example, the absence of any prior record of arrests may indicate the inadvisability of incarceration as a means to the rehabilitation goal. A voluntary plea of guilty along with cooperation with the police may in appropriate circumstances evidence some promise that the defendant can be rehabilitated by lesser punishment than the circumstances might otherwise require. Where the offender is young and rehabilitation is the primary goal of sentencing, the "human cost" incidental to a particular disposition may militate in favor of compromising the otherwise weighty concern for deterrence of others. Integrated family and community relationships, a stable home environment, steady employment, as well as a defendant's "outstanding personal record" are also significant factors. While advanced age, *per se* does not preclude imposition of a custodial sentence, a defendant's age, state of health and the potential effect of incarceration thereon are valid considerations to be weighed by the sentencing judge in determining the appropriate sentence.[128]

An appropriate aggravating factor for the court to take into account in sentencing is the criminal history of the defendant.[129] The defendant's record of prior arrests[130] may be properly considered along with evidence of crimes for which the defendant has been indicted but not convicted,[131] so long as the sentencing judge does not permit the sentence to vary because of his belief that the defendant is guilty of unrelated, pending criminal charges.[132] Such consideration does not constitute double jeopardy since the defendant is not punished a second time for the same offense, and the repetition of criminal conduct aggravates his guilt and justifies heavier penalties

128. *See* State v. Leggeadrini, 75 N.J. 150, 159, 380 A.2d 1112, 1117 (1977) (citations omitted).

129. *See* IND. CODE 35-4.1-4-7(c), (2) *See also* text accompanying note 106 *supra.*

130. State v. Dainard, 85 Wash. 2d 624, 537 P.2d 760 (1975); *accord* United States v. Weston, 448 F.2d 626 (9th Cir. 1971). *See also* Williams v. New York, 337 U.S. 241 (1949).

Such arrest records have been considered among the relevant data to be evaluated in sentencing according to a study conducted by the National College of the State Judiciary. *See* REVELLE, SENTENCING AND PROBATION 127 (1973).

131. United States v. Bowdach, 561 F.2d 1160 (5th Cir. 1977).

132. Com. v. LeBlanc, ___ Mass. ___, 346 N.E.2d 874 (1976). *See also* Com. v. Settipane, ___ Mass. App. ___, 368 N.E.2d 1213, 1217 (1977).

when he is again convicted.[133] Even facts disclosed during the course of a trial which ended in acquittal or was reversed on appeal may be considered by the court.[134] The defendant's lack of remorse and failure to show a penitent spirit in the aftermath of a serious offense may also be properly considered in imposing a severe sentence, even though otherwise mitigating factors are present on the record,[135] as may the belief of the sentencing judge that the defendant has committed perjury at the trial.[136]

THE SENTENCING COURT'S DISCRETION IN APPLYING THE CRITERIA

The approach to sentencing review as undertaken by the state appellate courts which review the reasoning of the sentencing judge varies among the jurisdiction. In Wisconsin, for example, the trial judge is afforded wide discretion in determining an appropriate sentence in a particular case. The appellate courts of Wisconsin have made it clear that all that is required of a trial judge is to state the facts upon which he predicates the sentence, and give the reasons for his conclusions. If there is evidence that his discretion was properly exercised and the sentence imposed was the product of that discretion, the trial judge was fully complied with the standards.[137] Thus the reviewing courts of Wisconsin have upheld the imposition of a maximum sentence for a first offender on the charge of firebombing, solely on the basis of the gravity of the offense involved.[138] Likewise, the Wisconsin Supreme Court has affirmed the sentence of extended incarceration imposed on a first offender convicted of indecent liberties with a minor because the trial court concluded that it was necessary to protect the public from such further criminal activities by the defendant.[139] The Alaska Supreme Court, although stressing the importance of a thorough explanation of the sentence

133. "To argue that the presumption of innocence is appointed by considering unproved criminal activity is as implausible as taking the double jeopardy clause to bar reference to past convictions." United States v. Doyle, 348 F.2d 715, 721 (2d Cir.), *cert. denied*, 382 U.S. 843 (1965); United States v. Metz, 470 F.2d 1140 (3d Cir. 1972), *cert. denied*, 411 U.S. 919 (1973). *See also* State v. Burton, 52 Ohio St. 2d 21, 368 N.E.2d 297 (1977).

134. United States v. Bowdach, 561 F.2d at 1175.

135. People v. Bigsby, 52 Ill. App. 3d 277, 367 N.E.2d 358 (1977).

136. *See* Fox v. State, 569 P.2d 1335, 1338 (Alaska 1977), and authorities cited therein. This is to be distinguished from the rule that a sentence may not be augmented because a defendant refuses to confess or invokes his privilege against self-incrimination. *Id.* at 1338.

137. Anderson v. State, 76 Wis. 2d 361, 251 N.W.2d 768, 769-770 (1977) (quoting Bastian v. State, 54 Wis. 2d 240, 248, 194 N.W.2d 687, 691 (1972)).

138. Chaney v. State, 44 Wis. 2d 454, 171 N.W.2d 339 (1969).

139. Bastian v. State, 54 Wis. 2d at 247, 194 N.W.2d 687 (1972).

imposed, has ruled that a sentence will not be declared defective under its statute[140] if all the goals announced in *State v. Chaney*[141] are not discussed in the record.[142] Nonetheless, Alaska's highest court has maintained that if the sentencing court's stated reasons are so lacking in completeness as to prevent the appellate court from discerning the basis for the sentence, it will be remanded for further sentencing procedures in accordance with the *Chaney* criteria.[143]

Among those jurisdictions in which the sentencing judge must articulate the criteria upon which he relies in formulating a sentencing decision there is apparent agreement that the determination of an appropriate sentence involves the judicious balancing of many and often competing values; and therefore the weight which he may attribute to each factor is left to his discretion.[144] The Alaska Supreme Court, for example, has upheld imposition of a fifteen year concurrent sentence upon a defendant convicted of four counts of

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140. The Alaskan sentencing statute is substantially the same as that enacted in Indiana: *Compare* ALASKA STAT. § 12.55:

> *Imposition of sentence.* (a) In addition to any other requirement of law relating to the imposition of sentences, at the time of imposing sentence for the conviction of a felony, the court shall prepare a sentencing report as part of the record to include the following:
>
> (1) a verbatim record of any sentencing hearing made, witnesses, the prosecuting attorney, the defense attorney, and the defendant;
>
> (2) the reasons for selecting the particular sentence imposed;
>
> (3) specific findings on all material issues of fact and on all factual questions required as a prerequisite to the selection of the sentence imposed;
>
> (4) a precise statement of the terms of the sentence imposed, and the purpose the sentence is intended to serve;
>
> (b) The sentencing report required under (a) of this section shall be furnished to the Department of Law, the defendant, the Division of Corrections and the Alaska Parole Board, Department of Health and Social Services,

with IND. CODE 35-4.1-4-3, *supra* note 89 and accompanying text.

141. *See* note 111 *supra*.

142. Perrin v. State, 543 P.2d 413 (Alaska 1975).

143. Andrews v. State, 552 P.2d 150 (Alaska 1976). *See* notes 110-113 *supra*.

144. "Judicial discretion is a composition of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously." State v. Blight, ____ Wash. ____, 569 P.2d 1129, 1131, (citations omitted). *See also* Nicholas v. State, 477 P.2d 447, (Alaska 1970); Faulkner v. State, 445 P.2d 875, (Alaska 1968); People v. Henley, 539 P.2d 496, 499 (Colo. 1975), Ocanas v. State, 70 Wis. 2d 179, 185, 223 N.W.2d 457, 461 (1975).

armed robberty, asault with a dangerous weapon, felon in possession of weapon, and probation violation where, in view of the defendant's prior record and rehabilitation failures and the dangerous nature of his acts, the trial court in weighing the objectives of sentencing did not emphasize the goal of rehabilitation.[145] Some explanation of the court's reasoning, however, must appear on the record for the appellate court's scrutiny. Thus a judgment of conviction which contains only the statement: "Extremely serious offense. Punishment necessary," would not fulfill the obligation of the sentencing court to consider the gravity of the crime and appropriate punishment, general and specific deterrence, protection of the public, rehabilitation of the defendant and the other circumstances relevant to the particular sentence.[146] Indeed, the courts of some states have gone so far as to suggest that the failure to state the reasons supporting a sentence, when reasons are required to be stated, is in itself an abuse of discretion on the part of the sentencing court subject to appellate review.[147]

CONCLUSION

The problem of disparate treatment of the criminal offender resulting from unguided judicial sentencing discretion presents a major and pervasive challenge to our criminal justice system with which all attorneys, legislators, judges, and most importantly, the general citizenry should be concerned. So long as the rationale underlying the punishment imposed remains a mysterious aspect of our sentencing procedure, the possibility exists for returning the offender who can be rehabilitated to society as a more dangerously embittered individual than before he began his experience with the judicial system:

> When the sentence is imposed, the darkness deepens for the defendant; there usually is . . . little or nothing to show that a reasoned judgment is being rendered. This is not to imagine that the average defendant, doomed to a term of confinement, is likely to find pleasure or solace in a coherent rationale for the affliction. It is to say that the failure to explain, especially in light of the ample time for later brooding, lends a quality of baleful mystery rather than open justice. At least the absence of an ex-

145. Pike v. State, 570 P.2d 1066 (Alaska 1977).

146. State v. Sanducci, 150 N.J. Super. 400, 375 A.2d 1216 (1977).

147. *See* Gray v. State, 159 Ind. App. 200, 305 N.E.2d 886 (1974); McCleary v. State, 49 Wis. 2d 263, 182 N.W.2d 512, 522 (1971) (concurring opinion).

> planation does nothing to quell the disposition to suspect unfairness, fired later by encounters with prisoners who have much lighter sentences based upon circumstances that seem, or are perceived to be (or simply, are), essentially identical.[148]

As this article suggests, a first step towards decreasing the lack of uniformity and rationality in our sentencing system is the combination of appellate review of sentencing decisions with the requirement for an articulation of the sentencing court's reasons supporting the punishment imposed. Such a combination may offer some reassurance to the accused that his liberty is not being revoked in a wholly arbitrary fashion.[149] The review of sentencing decisions may also assist in identifying the criteria considered by the sentencing court and determining the relative weight to be assigned each factor in a given circumstance. Furthermore, the adoption of an active approach to sentencing review by our appellate judiciary may establish a body of precedent upon which the trial court may rely in the fashioning of well-reasoned sentencing decisions.

The recently-enacted provisions of the Indiana Penal Code governing the sentencing procedure employed in conjucntion with the authorization for appellate review of sentences announced by our Supreme Court thus presents a significant possibility for the improvement of the criminal justice system in Indiana.

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148. M. FRANKEL, *supra* note 7, at 13-14.
149. Kaufman, *supra* note 75, at 221.