COMMENTS

SENTENCING UNDER SECTION 5010(D) OF THE FEDERAL YOUTH CORRECTIONS ACT

Dorszynski v. United States, 418 U.S. 424 (1974)

Petitioner, 19 years old, was eligible for sentencing[1] under the Federal Youth Corrections Act.[2] The district court, however, made no mention of the Act at any time during the sentencing proceedings. Upon consideration of a postsentencing motion by defense counsel,[3] the

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1. Petitioner had pleaded guilty to a charge of knowingly and intentionally possessing a controlled substance in violation of 21 U.S.C. § 844(a) (1970) and 18 U.S.C. § 1(2) (1970), a misdemeanor offense.

2. 18 U.S.C. §§ 5005-26 (1970). Prior to sentencing, both defense counsel and the government prosecutor stated that petitioner might be eligible for a sentence under the Act. Dorszynski v. United States, 418 U.S. 424, 427 (1974). 18 U.S.C. § 5010 (1970) provides for sentencing as follows:

> (a) If the court is of the opinion that the youth offender does not need commitment, it may suspend the imposition or execution of sentence and place the youth offender on probation.
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> (b) If the court shall find that a convicted person is a youth offender, and the offense is punishable by imprisonment under applicable provision of law other than this subsection, the court may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter until discharged by the Division as provided in section 5017(c) of this chapter; or
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> (c) If the court shall find that the youth offender may not be able to derive maximum benefit from treatment by the Division prior to the expiration of six years from the date of conviction it may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter for any further period that may be authorized by law for the offense or offenses of which he stands convicted or until discharged by the Division as provided in section 5017(d) of this chapter.
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> (d) If the court shall find that the youth offender will not derive benefit from treatment under subsection (b) or (c), then the court may sentence the youth offender under any other applicable penalty provision.
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> (e) If the court desires additional information as to whether a youth offender will derive benefit from treatment under subsections (b) or (c) it may order that he be committed to the custody of the Attorney General for observation and study at an appropriate classification center or agency. Within sixty days from the date of the order, or such additional period as the court may grant, the Division shall report to the court its findings.

3. Defense counsel filed a motion seeking relief pursuant to FED. R. CRIM. P. 32 (d) (withdrawal of plea of guilty may be permitted by court "to correct manifest injus-

district court stated that section 5010(d) of the Act did not require, as a precondition to imposition of an adult sentence, an explicit finding that the petitioner would not derive benefit from treatment under the provisions of the Act. The Seventh Circuit Court of Appeals affirmed,[4] holding that a finding of "no benefit" could be implied from the record as a whole.[5] The Supreme Court reversed and remanded, and *held*: A finding of "no benefit" from treatment under the Act must be stated explicitly, although supporting reasons need not be offered.[6]

Traditional sentencing doctrine[7] is premised on the belief that the

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tice"), FED. R. CRIM. P. 35 (correction of sentence imposed in illegal manner), and 28 U.S.C. § 2255 (1970), which provides as follows:

> 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.

4. United States v. Dorszynski, 484 F.2d 849 (7th Cir. 1973).

5. *Id.* at 851:

> The record here supports the implication that after the petitioner's trial counsel had raised the possibility of sentencing the petitioner as a youth offender, the trial court determined that the petitioner would not derive benefit from treatment pursuant to section 5010(b) or (c).

This statement was interpreted by the Supreme Court as a holding by the court of appeals that the imposition of a split sentence upon petitioner after his counsel had raised the possibility of sentencing under the Act satisfied § 5010(d).

6. Dorszynski v. United States, 418 U.S. 424 (1974). Mr. Chief Justice Burger delivered the opinion of the Court and Mr. Justice Marshall filed an opinion concurring in the result. While the concurrence supported the judgment of the Court insofar as it reversed and remanded for failure of the district court to make the requisite "no benefit" finding, Mr. Justice Marshall would have required, in addition, a statement of reasons supporting the finding. The concurrence also objected to "dicta, on the question of appellate review of a § 5010(d) adult sentence, an issue not before this Court." *Id.* at 460.

7. *See generally* K. DAVIS, DISCRETIONARY JUSTICE, A PRELIMINARY INQUIRY (1969); R. DAWSON, SENTENCING: THE DECISION AS TO TYPE, LENGTH AND CONDITIONS OF SENTENCE (1969); Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1 (1972); Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 HARV. L. REV. 904 (1962); *Special Issue: Sentencing*, 53 J. AM. JUD. SOC'Y 45, 50-78 (1969); Symposium, *Sentencing*, 23 LAW & CONTEMP. PROB. 399 (1958). *See also* Wechsler, *Sentencing, Correction, and the Model Penal Code*, 109 U. PA. L. REV. 465 (1961).

MODEL PENAL CODE § 1.02(2) (Tent. Draft No. 2, 1954) lists eight general purposes underlying the *Code*'s sentencing and treatment provisions:

> (a) To prevent the commission of offenses;
> (b) To promote the correction and rehabilitation of offenders;
> (c) To safeguard offenders against excessive, disproportionate or arbitrary punishment;

sentence should reflect the facts and circumstances of each individual human being; the punishment should fit the offender as well as the offense.[8] To achieve any degree of individualization, the sentencing judge must necessarily wield some measure of discretionary power.[9] Wide discretion may be freely exercised, provided that the sentence imposed is within the generally broad limits set by the legislature.[10] Concern for the inevitably disparate results of such a policy[11] is offset by a desire to avoid the equally undesirable alternative of designating an immutable statutory penalty for every offense.[12] Thus, except for "egregious departures from lawful criteria," the discretionary pronouncement of sentence remains immune from appellate review.[13]

(d) To give fair warning of the nature of the sentences that may be imposed on conviction of an offense;

(e) To differentiate among offenders with a view to a just individualization in their treatment;

(f) To define, co-ordinate and harmonize the powers, duties and functions of the courts and of administrative officers and agencies responsible for dealing with offenders;

(g) To advance the use of generally accepted scientific methods and knowledge in the sentencing and treatment of offenders;

(h) To integrate responsibility for the administration of the correctional system in a State Department of Correction [or other single department or agency].

8. Williams v. New York, 337 U.S. 241 (1949).

9. "[I]n no legal system, however minute and detailed its body of rules, is justice administered wholly by rule and without recourse to the will of the judge and his personal sense of what should be done to achieve a just result in the case before him." 2 R. POUND, JURISPRUDENCE 355 (1959).

10. *See* United States v. Tucker, 404 U.S. 443 (1972); Gore v. United States, 357 U.S. 386 (1958); Townsend v. Burke, 334 U.S. 736 (1948); Blockburger v. United States, 284 U.S. 299 (1932); Shepard v. United States, 257 F.2d 293 (6th Cir. 1958); Gurera v. United States, 40 F.2d 338 (8th Cir. 1930). In *Dorszynski* the Court stated: "[O]nce it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end." 418 U.S. at 431.

11. *See* Coburn, *Disparity in Sentences and Appellate Review of Sentencing*, 25 RUTGERS L. REV. 207 (1971); Frankel, *supra* note 7; 20 CATH. U.L. REV. 748 (1971).

12. *See* K. DAVIS, *supra* note 7; Kadish, *supra* note 7.

13. Frankel, *supra* note 7, at 23. Judge Frankel adds that the United States is the only nation in the free world where such a system exists. *Id.*

United States v. Daniels, 446 F.2d 967, 971 (6th Cir. 1971), sets out four circumstances in which appellate review can be appropriate. The presence in a trial judge's determination of sentence of (1) improper consideration of certain factors, (2) improper reliance on false information, (3) a failure to evaluate relevant information, or (4) an inflexible sentencing policy should result in a remand for reconsideration of the sentence to be imposed. The failure to exercise discretion caused remands in United States v. Hartford, 489 F.2d 652, 654 (5th Cir. 1974), and United States v. Williams, 407 F.2d 940, 945 (4th Cir. 1969). In Yates v. United States, 356 U.S. 363, 366-67 (1958), the Supreme Court stated:

Every state has adopted special procedures to individualize treatment of juvenile offenders.[14] In the federal system, the Juvenile Delinquency Act of 1938[15] provides for offenders under the age of 18. Not until the adoption of the Federal Youth Corrections Act of 1950 did Congress direct regulation towards those persons in the vulnerable age bracket between 18 and 22.[16] Described as the most comprehensive

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> [W]hen in a situation like this the District Court appears not to have exercised its discretion in the light of the reversal of the judgment but, in effect, to have sought merely to justify the original sentence, this Court has no alternative except to exercise its supervisory power over the administration of justice in the lower federal courts by setting aside the sentence of the District Court.

See also Proceedings, Pilot Institute on Sentencing, 26 F.R.D. 231 (1959).

The principal theory advanced in support of such a system is that a well-considered sentence imposed by a trial judge who has had the opportunity to observe the defendant throughout the trial and sentencing process should not be subject to adjustment by appellate judges reviewing a cold record. For other arguments pro and con appellate review, see *Symposium, Appellate Review of Sentences*, 32 F.R.D. 249, 257-75 (1962) (remarks of Judge Kaufman and Chief Judge Sobeloff). For a discussion of the impact of the Model Sentencing Act on discretion and review, see *Institute on Sentencing*, 42 F.R.D. 175 (1966).

14. *See, e.g.*, Arnold-Kennick Juvenile Court Law, CAL. WELF. & INST'NS CODE §§ 500-945 (Deering 1969, Supp. 1974); Juvenile Court Act, ILL. ANN. STAT. ch. 37, §§ 701-1 to 707-5 (Smith-Hurd 1972, Supp. 1974); N.Y. FAMILY CT. ACT §§ 111-1119 (McKinney 1963, Supp. 1974). For a commentary on the failures of the system as a whole, see PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 7-9 (1967).

15. 18 U.S.C. §§ 5031-37 (1970).

16. The Act defines a youth offender as "a person under the age of twenty-two years at the time of conviction." 18 U.S.C. § 5006(e) (1970). That age group was selected because it was felt that personalities at that age were malleable. Also, since recidivism rates were high, punishment under the adult correction system was not producing acceptable results. H.R. REP. No. 2979, 81st Cong., 2d Sess. 2-3 (1950).

A committee of the Judicial Conference of the United States studied the general subject of punishment, paying particular attention to the problems of youthful offenders, and published a report in 1942. REPORT OF THE SUBCOMMITTEE ON TREATMENT OF YOUTHFUL OFFENDERS, in REPORT TO THE JUDICIAL CONFERENCE OF THE COMMITTEE ON PUNISHMENT FOR CRIME (1942) [hereinafter cited as REPORT]. *See also* ALI MODEL YOUTH CORRECTION AUTHORITY ACT at vii (Official Draft 1940); T. SELLIN, THE CRIMINALITY OF YOUTH 37-55 (1940). For an analysis of the Youth Offenders Act proposed by the committee and a comparison of it and the *ALI Model Youth Correction Authority Act*, see Note, *The Federal Youth Corrections Act: Past Concern in Need of Legislative Reappraisal*, 11 AM. CRIM. L. REV. 229, 233 (1972). The recommended correctional treatment was based primarily on the English Borstal System. H.R. REP. No. 2979, 81st Cong., 2d Sess. 4 (1950).

The Borstal idea grew out of an 1894 commission report which recommended special treatment for youths aged 16 to 21, and segregation of this group from hardened adult criminals. Providing instruction in a trade rather than retributive punishment, the Borstal System was predicated on the principles of "(1) flexibility, (2) individualization,

federal statute concerned with sentencing,[17] the Act seeks to "substitute for retributive punishment methods of training and treatment designed to correct and prevent anti-social tendencies. It departs from the mere punitive idea of dealing with criminals and looks primarily to the objective idea of rehabilitation."[18] To this end, the Act provides a number of sentencing alternatives for the district court judge.[19] The judge may place the youthful defendant on probation,[20] commit him to the custody of the Attorney General for treatment,[21] or sentence him under any applicable adult penalty provision. The adult penalty may be imposed "[i]f the court shall find that the youth offender will not derive benefit from treatment . . . ."[22] The congressional purpose in imposing the finding requirement is unclear.[23]

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and (3) emphasis on the intangibles." H.R. REP. No. 2979, 81st Cong., 2d Sess. 5 (1950). Begun in a wing of Bedford Prison, the experimental treatment of the youth steadily expanded until, by 1950, there were thirteen institutions ranging from walled prisons to completely open camps in the country. *Id.* at 4-7; *see Hearings on S. 1114 & 2609 Before a Subcomm. of the Senate Comm. on the Judiciary*, 81st Cong., 1st Sess. 60-65 (1949) (remarks of Chief Judge Orie L. Phillips). *See generally* W. HEALY & B. ALPER, CRIMINAL YOUTH AND THE BORSTAL SYSTEM (1941); R. HOOD, BORSTAL RE-ASSESSED (1965); Fry, *The Borstal System*, in PENAL REFORM IN ENGLAND 127 (L. Radzinowicz & J. Turner eds. 1940); Note, *supra.*

The *Report*'s recommendations were incorporated into the Federal Corrections Act of 1943. *See* H.R. 2140, 78th Cong., 1st Sess., tit. II, § 3 (1943); S. 895, 78th Cong., 1st Sess., tit. III, § 2 (1943). Largely because of controversies concerning the adult provisions, the Federal Corrections Act failed to pass, but its provisions regarding youth offenders were adopted virtually intact by Congress in the Federal Youth Corrections Act of 1950. *See* H.R. REP. No. 2979, 81st Cong., 2d Sess. 2, 10-14 (1950).

17. United States v. Coefield, 476 F.2d 1152, 1156 (D.C. Cir. 1973).

18. H.R. REP. No. 2979, 81st Cong., 2d Sess. 3 (1950).

19. *See* note 2 *supra.*

20. 18 U.S.C. § 5010(a) (1970).

21. *Id.* §§ 5010(b), (c).

22. *Id.* § 5010(d).

23. There are no remarks in the legislative history materials directly on point. Stating that "nowhere in the committee reports, at the committee hearings or in the debates on the floor is there any indication that a judge is precluded from imposing a regular adult sentence unless he first finds that an eligible defendant will not receive any benefit from the Youth Act sentence," Senator Beall proposed a bill to amend § 5010 to read as follows:

> "(d) Nothing in this chapter shall be construed to preclude the court, in any case, from sentencing a youth offender under any other applicable penalty provision."

118 CONG. REC. 6776-77 (1972) (remarks of Senator Beall). Senator Beall's avowed motive in affirming the discretion available to the trial court was to place priority on the rights and protection of lawful citizens. The bill was referred to the Senate Committee on the Judiciary where it died.

Difficulties in judicial interpretation of the Act have centered around section 5010(d).[24] While it was generally agreed that the section required a finding that the youth offender would derive no benefit from a sentence under section 5010(b) or (c) before he or she could be sentenced under other applicable penal statutes,[25] three distinct positions regarding the expression of this finding emerged from the circuit courts: some circuits stated that such a finding could be implied from the record;[26] others agreed that the statute permitted an implicit finding of "no benefit" but indicated a preference for an explicit finding;[27] and a third group required that the finding be explicit and be supported by reasons expressed on the record.[28] It was to resolve this conflict in the circuits that the Supreme Court granted the petition for certiorari in *Dorszynski v. United States.*

Operating under the premise that appellate review ends once it is found that the sentence imposed is within the limitations set by stat-

24. There have been no constitutional challenges regarding general congressional power to enact the Act. Past litigation has questioned the constitutionality of imposing an indeterminate sentence of up to six years for an offense which carried a shorter statutory sentence. The well-settled view is that benefits derived under the Act sufficiently balance the prospect of a longer confinement. *See, e.g.*, United States v. Crichlow, 459 F.2d 793 (10th Cir. 1972); Cunningham v. United States, 256 F.2d 467 (5th Cir. 1958); Guidry v. United States, 317 F. Supp. 1110 (E.D. La.), *aff'd*, 433 F.2d 968 (5th Cir. 1970). The consequences of a failure by the judge to advise the defendant of the possibility of sentence under the Act before accepting the defendant's guilty plea were examined in Pilkington v. United States, 315 F.2d 204 (4th Cir. 1963) (sentence under Act rendered constitutionally invalid). *See also* Pelton v. United States, 465 F.2d 952 (5th Cir. 1972), *cert. denied*, 410 U.S. 935 (1973) (explanation given held sufficient); Cunningham v. United States, 461 F.2d 995 (9th Cir. 1972) (court's explanation in conjunction with that of government counsel held sufficient). The Act was upheld against a challenge that it provided for an unconstitutional delegation of legislative power to the courts in United States v. Baker, 429 F.2d 1344 (7th Cir. 1970). *See also* Standley v. United States, 318 F.2d 700 (9th Cir. 1963), *cert. denied*, 376 U.S. 917 (1964); Guidry v. United States, *supra.*

25. *See generally* Note, *Sentencing Under the Federal Youth Corrections Act: The Need for an Explicit Finding and a Statement of Reasons*, 53 B.U.L. REV. 1071 (1973). *But see* 118 CONG. REC. 6776 (1972) (remarks of Senator Beall).

26. United States v. Dorszynski, 484 F.2d 849 (7th Cir. 1973), *rev'd*, 418 U.S. 424 (1974); Williams v. United States, 476 F.2d 970 (3d Cir. 1973).

27. Cox v. United States, 473 F.2d 334 (4th Cir.) (en banc), *cert. denied*, 414 U.S. 869 (1973); Jarratt v. United States, 471 F.2d 226 (9th Cir. 1972), *cert. denied*, 411 U.S. 969 (1973).

28. Brooks v. United States, 497 F.2d 1059 (6th Cir. 1974); United States v. Kaylor, 491 F.2d 1133 (2d Cir. 1974) (en banc); United States v. Coefield, 476 F.2d 1152 (D.C. Cir. 1973) (en banc); *cf.* United States v. Schencker, 486 F.2d 318 (5th Cir. 1973).

ute,[29] the Court in *Dorszynski* began its analysis with an examination of the purpose,[30] philosophy,[31] and treatment[32] authorized by the Act.[33] Nowhere in the legislative history of the Act did the Court find any statement pointing to a congressional intent to restrict the trial judge's traditional role in sentencing.[34] There were no indications, for example, of a desire to limit sentencing options or to provide for appellate review. Far from believing that Congress had departed from established sentencing doctrine, the Court concluded that the Act enlarges, rather than restricts, the trial judge's options, thus actually broadening the scope of judicial sentencing discretion.[35] While a finding of "no benefit" is required, "[l]iteral compliance with the Act can be satisfied by any expression that makes clear the sentencing judge considered the alternative of sentencing under the Act and decided that the youth offender would not derive benefit from treatment under the Act."[36] Supporting reasons need not be stated because appellate review would be unavailable.[37]

The concurring opinion agreed that a "no benefit" finding was a condition precedent to the imposition of an adult sentence on a youth of-

29. 418 U.S. at 431. Had there been a contention that the district court had relied on improper or inaccurate information, review would have been possible.

30. "The Act was thus designed to provide a better method for treating young offenders convicted in federal courts in that vulnerable age bracket [ages 16-22], to rehabilitate them and restore normal behavior patterns." *Id.* at 433.

31. The Court found the fundamental elements of the program to be the following: (1) the sentence was to fit the person, not the crime, 18 U.S.C. §§ 5014, 5015 (1970); (2) a broad range of treatment was to provide maximum flexibility, *id.* §§ 5011, 5015; and (3) offenders were to be segregated from more hardened criminals, *id.* § 5015. 418 U.S. at 434.

32. Treatment included conditional release (probation) and unconditional discharge; under certain circumstances the conviction would be set aside. 418 U.S. at 434. The full range of sentencing alternatives is set out in note 2 *supra*.

33. The Court's sole concern was the validity of the sentence in terms of § 5010(d). Although petitioner raised a due process issue in the brief submitted to the Supreme Court, the Court did not address the question since it had not been raised before the lower courts or in the petition for certiorari.

34. "We will not assume Congress to have intended such a departure from well-established doctrine without a clear expression to disavow it." 418 U.S. at 441.

35. That is, by offering a broader range of dispositional alternatives. *Id.* at 440.

36. *Id.* at 444.

37. The "no benefit" finding is not a "substantive standard" according to the Court. *Id.* at 441. The only purpose for requiring a statement of reasons would be to facilitate appellate review, and thereby limit the discretion vested in the district judge, *i.e.* to depart from well-established sentencing doctrine. Thus, once it is clear that the Act has been considered as an option and has been rejected, no appellate review is warranted.

fender. The Act, according to Justice Marshall, presented a "preferred sentencing alternative"[38] which *must* be used unless a "no benefit" finding is made.[39] Pointing to the clear words of the statute[40] and a reading of the legislative history that emphasized the Act's foundation upon the English Borstal System,[41] Justice Marshall rejected the notion that a mere express statement of "no benefit" would satisfy the Act's mandates. He felt that such an interpretation would render the finding requirement a nullity: the ritual recitation assures only that the judge was aware of the Act and rejected it.[42] A supporting statement of reasons, on the other hand, would not only give effect to congressional concern that the rehabilitation of youth offenders be given priority,[43]

38. According to Justice Marshall, several aspects of the legislative history support the view that Congress intended the Act to be a preferred alternative. First, S. REP. No. 1180, 81st Cong., 1st Sess. 5 (1949) implies that the judge would have to find the youth offender "incorrigible" to sentence him under other applicable provisions of law. Secondly, in 1943 Senator Kilgore observed that, given the requisite finding, no more than ten percent of eligible offenders would have to be sentenced as adults. 418 U.S. at 448 (Marshall, J., concurring), *quoting Hearings on S. 895 Before the Subcomm. of the Senate Comm. on the Judiciary*, 78th Cong., 1st Sess. 13 (1943). Finally, H.R. REP. No. 2979, 81st Cong., 2d Sess. 10 (1950) estimates a seventy percent rehabilitation rate, even given instances where youthful offender treatment may fail.

39. 418 U.S. at 449.

40. "Section 5010(d) does not say the sentencing court must merely consider the treatment option provided by the Act; it says in the most uncompromising terms that the court must find the youth 'will not benefit' from YCA treatment as a prerequisite to imposing an adult sentence. The use of the words 'shall find' emphasizes the mandatory nature of that finding." *Id.* Section 5010(e), which provides for observation of the youth offender and a report on the § 5010(d) benefit question, lends weight to this position.

41. For a brief explanation of the Borstal System and a citation to general sources, see note 16 *supra*.

Whereas, prior to 1948, the Court of Quarter Sessions or Assize could exercise free discretion to accept or reject recommendations of the Prison Commissioners, §§ 17(2) and (3) of the Criminal Justice Act of 1948 "limited the haphazard use of imprisonment by requiring magistrates to give reasons in writing for their decision to sentence a youth to prison and to 'obtain and consider information about the circumstances' in all cases." R. HOOD, *supra* note 16, at 72. If the judge does decide that the Borstal training is the best alternative under the circumstances, his discretion ends with this determination; he cannot specify the length of sentence or even to which Borstal institution the youth offender will be sent. W. HEALY & B. ALPER, *supra* note 16, at 77.

42. 418 U.S. at 452.

43. Justice Marshall cited H.R. REP. No. 2979, 81st Cong., 2d Sess. 3 (1950) to support his position. The Act "departs from the mere punitive idea of dealing with criminals and looks primarily to the objective idea of rehabilitation." 418 U.S. at 448. In the limited sense that the Act requires the judge to consider rehabilitation paramount, the sentencing discretion of the trial judge is necessarily circumscribed.

but would also be beneficial from the perspective of general social policy.[44]

Both opinions recognized the requirement of some sort of "finding,"[45] which, if substantive, would affect established sentencing procedure by imposing limitations on judicial discretion.[46] As the Court pointed out, nowhere in the legislative history does a clear congressional intent to alter the traditional prerogatives of federal judges emerge. Rather, the documents are littered with words and phrases evincing deference to judicial choice.[47] While Justice Marshall was clearly correct in maintaining that Congress viewed sentencing under the Act as a preferred alternative,[48] his conclusion that such a view

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44. A statement of reasons would serve to
(1) rationalize the sentencing process;
(2) decrease disparities in sentencing;
(3) help judges develop a consistent set of sentencing principles;
(4) aid correctional authorities;
(5) help the defendant's attorney insure that a sentence was not based on inaccuracies or misinformation;
(6) facilitate rehabilitation of the offender by avoiding any feeling that his sentence was arbitrary;
(7) legitimize the sentencing process as perceived by the general public; and
(8) insure that the judge
(a) is aware that the Act is applicable;
(b) is aware of his discretion under the Act;
(c) knows the pertinent facts relating to the defendant; and
(d) has related the facts to the law.

418 U.S. at 455.

45. This would be a finding of fact. Professor Davis contrasts reasons with findings: "Reasons differ from findings in that reasons relate to law, policy, and discretion rather than to facts." K. DAVIS, ADMINISTRATIVE LAW TEXT § 16.07, at 326 (3d ed. 1972).

46. If the standard were substantive, the trial judge could still exercise his discretion and impose sentence outside of the Act, but he would be required to justify his decision. Traditionally, a trial judge need not support his sentencing decision by a statement of reasons or in any other way. *See* notes 7-13 *supra* and accompanying text. Further, since the Act mandates that rehabilitation is the paramount aim in sentencing youth offenders, a judge could not justify a sentence by stressing the need for deterrence, incapacitation, or retribution. An attempt so to justify a sentence would be reviewable as an abuse of discretion.

While discretion might be reshaped, a substantive standard would not necessarily transform current conceptions of appellate review. Appellate review could be limited to allegations of abuses of discretion or of clearly erroneous findings.

47. For example, the only remarks on the floor of the Senate were delivered by Senator Kilgore, the bill's sponsor. "The judges say that the bill will give them an additional facility, although use of the system provided by the bill will not be mandatory." 96 CONG. REC. 8267 (1950). "The bill will not be compulsory in any sense of the word . . . ." *Id.* at 1283. *See* 418 U.S. at 438.

48. Proponents presented the Act as a virtual panacea to correct the inadequacies of the existing methods of treating youth offenders. *See* note 38 *supra*.

would necessarily result in a change in the nature of judicial discretion seems of questionable validity.[49] Justice Marshall, however, did counter the Court's assertion that a nonsubstantive standard would render a statement of reasons superfluous[50] with a forceful social policy argument.[51]

Rejecting both the concept of a restrictive substantive standard and that of a flexible system of implicit findings,[52] the Court has opted for an alternative approach with few repercussions. A simple expression of "no benefit" satisfies the literal meaning of section 5010(d) without seriously impinging on traditional judicial discretion. A ritual recital of a single phrase, however, does not in any way insure that the court is aware of pertinent facts relating to the youth offender or that the judge has related these facts to the Act in a principled fashion. The requirement merely provides assurance that the judge knew of the applicability of the Act and, for acceptable or unacceptable reasons, chose not to apply it to the defendant.[53] Criminal justice processes will be expedited by the Court's formulation. Future sentences imposed under the Act by the trial judge in the exercise of his sound discretion will be final if either a sentence under the Act has been utilized or a "no benefit" statement has been made. When the "no benefit" finding has been expressed, no review of the sentence will be possible; failure to make an explicit statement will be held clear error.[54] The necessity for case-by-case, ad hoc determinations will be avoided. Requiring form without content also serves to maintain established practices until a legislative decision regarding both discretion and appellate review of sentencing is made.

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49. *See* note 47 *supra.*

50. *See* note 37 *supra.*

51. *See* note 44 *supra* and accompanying text. *But see* note 53 *infra.*

52. "To hold that a 'no benefit' finding is implicit each time a sentence under the Act is not chosen would render § 5010(d) nugatory; to hold that something more is necessary to support the inference that must be found in the record would create an *ad hoc* rule." 418 U.S. at 444. Important policy considerations militate against placing the burden of case-by-case examinations on already overburdened appellate courts.

53. Alternatively, a required statement of reasons may be of dubious benefit as well, particularly where such reasons are not to be subject to close scrutiny under ordinary circumstances. A judge may put forward such reasons as will prove acceptable to society, whatever his true bases for decision. *Cf.* K. DAVIS, *supra* note 7, at 105.

54. *See* United States v. Allen, Criminal No. 106-72 (D.C. Cir., Oct. 15, 1974) (appellate court, in light of *Dorszynski* decision, refused to review supporting reasons expressed by trial court).

Thus, sentencing discretion remains virtually untouched by the *Dorszynski* decision, as do the traditional limitations placed on appellate review of sentencing. If there is to be reform in this area, it will be legislative rather than judicial.[55]

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55. Suggestions for judicial reform generally concentrate on the structuring of discretion through imposing appellate review and requiring a statement of reasons in support of conclusions. *See* K. DAVIS, *supra* note 7; Kadish, *supra* note 7; Kimball & Newman, *Judicial Intervention in Correctional Decisions: Threat and Response*, 14 CRIME & DELINQ. 1 (1968); Rubin, *Sentences Must Be Rationally Explained*, 42 F.R.D. 203, 212 (1966); *Symposium, Appellate Review of Sentences*, 32 F.R.D. 249 (1962); Wyzanski, *A Trial Judge's Freedom and Responsibility*, 65 HARV. L. REV. 1281 (1952). *See also* ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES (1968).

While the *Model Penal Code* and its advocates assume that an increase in legislative control is needed, controversy continues as to how much control is desirable. *See* R. DAWSON, *supra* note 7. *But see* Frankel, *supra* note 7, at 46, 54: "Every factor reviewed in sentencing calls for a judgment of policy, suited exactly for legislative action and not for random variation from case to case. . . . Sentencing is today a wasteland in the law. It calls, above all, for regulation by law . . . ."

The Act specifically has been criticized for causing a lack of standardization in approach by a failure to delineate guidelines. Note, *The Federal Youth Corrections Act: Past Concern in Need of Legislative Reappraisal*, 11 AM. CRIM. L. REV. 229, 254-57 (1972).