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Appellate Review of Legal but Excessive Sentences: A Comparative Study

Gerhard O. W. Mueller and Fré Le Poole***

The American criminal statutes do not generally establish criteria to be followed by the trial judges in sentencing; therefore, the right of judicial review of sentences as a matter of law is largely unavailable due to the almost total exercise of judicial discretion in the sentencing process. The authors will examine and evaluate the continental system in which the criminal codes generally provide sentencing guidelines, thus enabling sentence review to be obtaincd as a matter of law.

I. EMERGENCE OF SENTENCE REVIEW

Classical penology was conceived in France in the eighteenth century,[1] and then eclipsed all over the world in the nineteenth, when Lombroso conjured up the picture of the born criminal. It was finally laid to rest in the United States in the twentieth century. Its basic tenet had been simple enough: the legislature in its infinite wisdom would seek and find the appropriate punishment for every crime. This can be accomplished if a crime is defined narrowly enough, perhaps by the creation of subcategories of that crime, so as to encompass all potential perpetrators who will each incur the same amount of criminal guilt. All perpetrators in the same subcategory are then entitled to the exact same amount of punishment in expiation of their criminal guilt. This system, so it was thought, ideally adjusts the

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1. *See* Canals, *Classicism, Positivism and Social Defense,* 50 J. CRIM. L.C. & P.S. 541 (1960).

punishment to achieve a balance between the crime and its harm and the criminal and his guilt, without going into undue subtleties of minute variations in the guilt of perpetrators in the same subcategory. Consequently the codes of the eighteenth and nineteenth centuries could satisfy themselves with defining and categorizing crimes in terms of the harm created and the specific mens rea in question.

The punishments in such a scheme of things, being almost entirely designed to serve the goals of retribution and deterrence of all nondescript members of a class, could be almost entirely stereotyped. A system which does not admit of variation among members of its various categories of perpetrators needs little variability of its punishments. Therefore, whether in an American state or European nation in the nineteenth century, nearly all first degree murderers were rewarded with death, and nearly all thieves received a stereotyped penitentiary sentence. To the extent that the need for variability was recognized, such variability—like its historical ancestor, the benefit of clergy—was regarded primarily as a matter of mercy to be dispensed by the sovereign. However, in nearly all countries the legislative scheme of crimes and punishments did permit a minimum of variation, usually in terms of alternate punishments, or sometimes regarding the quantum of punishment. "The duration and quantity of [fine and imprisonment] must, says Blackstone, frequently vary from the aggravations, or otherwise of the offence, the quality and condition of the parties, and from innumerable other circumstances. . . ."[2]

In a system of relatively stereotyped punishments for static guilt and harm, practically no question of reviewability of sentence can arise as long as each sentence is within the narrow legislative frame. However, such an arrangement could not survive a recognition that the infinite variety of subjective and objective factors, which exist in the personality of every offender, and in the harm and guilt, must be reflected in the criminal sanction. Likewise, the criminal sanction must be adjusted to serve the needs of a variety of aims of penal policy. While the new variants in the personality of the perpetrator and in the aims of penal policy were first scientifically recognized and stated in Europe, especially by the Italian positivists, it was in this country that the first significant breaks with the established stereotyped and static penal scheme occurred. Among the devices of the new penology we find the following: (1) the mini-max statute, which allows the court to choose an appropriate sentence within a framework of a minimum and maximum sentence provided by the

2. Frese v. State, 23 Fla. 267, 270, 2 So. 1, 2 (1887), upholding fine provision without maximum as constitutional.

legislature; (2) the alternate sentence, providing for either one form of punishment or another, or both; (3) additional sentences, *e.g.*, forfeiture of office, added to imprisonment; (4) the open-ended sentence, which allows the court to individually fix either the minimum or the maximum and to make the other limit to the sentence depend on subsequent factors; (5) good conduct and good time provisions, resulting in deductions from initial punishment; (6) parole rights and duties; (7) probation; and (8) an infinite variety of commitments to special institutions.

With such a potpourri of penal dispositions available, the modern judge needs a degree of guidance unimagined in the nineteenth century. Now, a significant choice has to be made in every case, a choice which was generally not possible a few decades ago. Therefore, it seems that a legal machinery is needed to guard against the wrong choice. How does the law usually protect the defendant against a wrong choice on the part of a judge? It grants appellate review. But our system has not yet adapted itself to the novelty. Appellate review is largely unavailable to question the exercise of sentencing discretion. While a system without appellate review of criminal sentences was workable and lawful in the nineteenth century, it can be neither proper nor lawful at the present time. It can be attributable only to chance or ignorance that the American system, which permits no review of judicial choice in sentencing, has not been declared unconstitutional.

Elsewhere we have demonstrated that a movement is underfoot to provide American convicts with a machinery for the review of criminal sentences alleged to be excessive, though lawful. From the modest beginning of a single American jurisdiction which granted such review in 1858, we now have reached the point at which such remedies are available in fifteen jurisdictions, albeit on a very limited scale.[3] It does not take much courage to predict that in the foreseeable future, all American jurisdictions will adopt sentence review procedures.

II. The Lacking Criteria of Sentence Review at Home

While the need for reviewing the exercise of judicial choice in sentencing may be quite apparent, what makes one pause is the lack of criteria by which we can measure the propriety of a given choice. It must be noted that we are here interested primarily in the judicial choice. There is also a legislative choice, which is subject to review. Thus, the constitutionality of a statute permitting

3. Mueller, *Penology on Appeal: Appellate Review of Legal but Excessive Sentences*, 15 Vand. L. Rev. 671 (1962).

any prison sentence from one day to life and/or a fine of any magnitude for the crime of shoplifting may well be subject to some doubt. Indeed, the supreme courts of the nineteenth century at first were considerably hesitant to uphold as constitutional, against charges of uncertainty and vagueness, statutes allowing penological variety which seemed to permit the exercise of judicial choice, unguided by fixed legislative criteria. For all practical purposes, the legislatures have not provided the judiciary with criteria to guide them in exercising sentencing discretion. If there are no criteria to begin with, how can it be charged that the wrong criteria have been used? Our system has muddled along with vague expressions like "the sound exercise of judicial discretion," "recognition of the crime and the criminal," "the gravity of the deed," "the guilt of the perpetrator," and "the protection of society." None of these slogans is law. Appellate review, however, has been customarily available for judicial violations of law—not slogans, and it is arguable that slogans are not entitled to appellate review.

Elsewhere we have endeavored to state the real criteria which have prompted courts to play with the legislative choices in sentencing and which we found to be conditioned by the infinite variety of life, manifested in the perpetrator and his crime, but always limited by the scope of the penal purposes. This limitation, designed to protect society from initial or repeated harm through crime, extends to vindication of the law, retribution for the wrong committed, penitence of the perpetrator, neutralization of the still dangerous actor, deterrence of potential wrongdoers, and above all, resocialization of the offender.[4] While these observations may properly describe reality, they are not positive law. There is a need for appellate review of criminal sentences. But upon what criteria should such review proceed and to what end?

To solve these perplexing problems we have turned to the experiences of other members of the family of civilized nations. While their experiences are not likely to be dispositive of our problems, they are likely to be helpful, for all nations are endeavoring only to find the most appropriate method of insuring the establishment and continuance of the most effective sentencing policies. Although these problems appear predominantly theoretical at first glance, they have the potential of becoming explosively practical in the not-too-distant future. The Supreme Court of the United States recently held unconstitutional for vagueness a statute which permitted the jury to impose costs upon an acquitted criminal defendant, *without guidance*

4. Mueller, *Punishment, Corrections and the Law*, 45 NEB. L. REV. 58-98 (1966).

as to when costs were or were not to be imposed.[5] By dictum the majority added that the distribution of varying punishments based solely upon the reprehensibility of a convicted offender would certainly violate the due process clause. Mr. Justice Stewart, concurring, contended that much of the reasoning in the opinion cast grave constitutional doubt upon the settled practice of many states to allow the jury in its unguided discretion to determine the nature and degree of punishment to be imposed.[6] Also, consideration must be given to the problem of the judge's use of his unguided discretion in the sentencing process. It appears that in the near future sentencing criteria and the aims of penal policy may become matters of positive law and, therefore, subject to appellate review as questions of law. By looking at the advanced continental experience, we may be able to delineate the course that we should follow.

III. General Scheme in Civil Law Countries

As in our system, continental code provisions contain sentencing alternatives and sentence ranges. Many foreign codes set some guidelines for the exercise of sentencing discretions, both in the penal provisions and in special sentencing sections of the more general parts of the codes. These sentencing frames and criteria have become matters of positive law, and, like all other matters of law, are subject to appellate review. However, there are many code and statutory provisions which contain no criteria for guiding sentencing choice; frequently these are found in cases where a crime category (*e.g.*, homicide) has been subdivided into minute sub-categories which are descriptive of different offender types. Thus, the old, but still subsisting German Penal Code provides in section 211 that "murder shall be punished by confinement in a penitentiary for life." This stereotype sentence for all murderers is understandable only if it is considered that this provision also describes a murderer in terms of specific personality characteristics and that the murder provision is followed by eight subsequent provisions on homicide which are descriptive of other stereotypes, including: manslaughter (section 212); manslaughter under extenuating circumstances (section 213); mercy killing (section 216); infanticide (section 217); genocide (section 220a); negligent homicide (section 222); and assault and battery with fatal consequences (section 226). Each of these variations from the basic form of criminal homicide carries its own penal sanction which differs from that of the basic form. Some of these penal sanctions also allow a certain amount of variation (*e.g.*, for

5. Giaccio v. Pennsylvania, 382 U.S. 399 (1966).
6. *Id.* at 405.

"mitigating circumstances," as in section 216.2, or for "serious cases," as in section 212.2).[7]

By far the most frequent sentencing variables which the continental codes place at the disposition of judges are in terms of minimum-maximum sentences and alternative sentences. For example, under the Italian Penal Code the punishment for mercy killing is "confinement in a penitentiary from six to fifteen years."[8] As regards imprisonment, the legislature has sometimes set only maximum[9] or only minimum terms[10] for each offense. Under statutes with open-ended provisions, the judge has to find the limit for the open-end in the penal provisions of the General Part of his code. For example, the Dutch Code provides: "Temporary imprisonment may be imposed for a term of at least one day and not exceeding fifteen years . . . ."[11] Under some codes the minimum and maximum standards may be extended in case of mitigating or aggravating circumstances, which may be of either a general or a more limited nature.[12] Some codes/statutes set further standards for judges by establishing what might be termed "judicial arithmetics."[13] For example the Spanish Penal Code presents a veritable "price list" of criminal wrongs by giving consideration to a multitude of aggravating and mitigating circumstances, which is, in effect, a catalogue of human emotions (*see* Appendix A.).

We do not regard it as possible or desirable to emulate the Spanish example. Apart from the hopelessness of any effort to achieve completeness in the list of factors to be considered in sentencing, the attribution of weight measures to these human emotions amounts to an objectification of applied psychology, which is totally at odds with an individualized system of criminal justice, administered by relatively sophisticated judges and correctional officers, rather than automatons.

IV. GUIDELINES FOR AND EVIDENCE OF JUDICIAL DISCRETION

Within the legal framework described and with variations to be noted, sentencing in civil law countries has remained a matter of

7. All citations of the German Penal Code are to G. MUELLER & BUERGENTHAL (transl.), THE GERMAN PENAL CODE (Vol. 4, American Series of Foreign Penal Codes, 1961).

8. ITALIAN CRIMINAL CODE (hereinafter IT. C. PEN.) art. 579 (1930).

9. *E.g.*, in the Netherlands.

10. *E.g.*, IT. C. PEN. art. 575.

11. DUTCH PENAL CODE art. 10 (1881).

12. *Compare, e.g.*, DUTCH PENAL CODE art. 44 *with* art. 288; *see also* note 8 *supra* and accompanying text.

13. See SCHMIDT, DIE STRAFZUMESSUNG IN RECHTSVERGLEICHENDER DARSTELLUNG 124 (1961).

some judicial discretion. The legislature, however, may provide guidelines. Many criminal codes (*e.g.*, the Brazilian, Bulgarian, Danish, Greek, Swedish, Swiss and Yugoslav Codes and the German Draft Penal Code) tell the judge what factors should be taken into account when imposing sentence. Different legislatures have shown a fair amount of agreement on this subject. Factors frequently mentioned are: the dangerousness of the offense and its harmful consequences; the motives of the offender; the intensity of his criminal intent or criminal negligence; his previous criminal record; his personal and economic conditions; and his behavior during and after the act (*see* Appendix B).

From the nature of the different factors to be taken into account in sentencing, it is apparent that punishment is not meant to serve one goal exclusively. Rather, multiple goals—such as retribution, deterrence (both general and specific prevention), and rehabilitation—seem to have their place. Some legislatures seem to express a preference for one of these goals, while others allow the judge to determine which goal should be primarily considered in a specific case. The latter is the position of those codes which contain specific provisions on the goals of punishment (*e.g.*, the Soviet Union and Czechoslovak Codes) (*see* Appendix C). These lists of goals are not dissimilar to those compiled by American criminologists and are comparable to the American Model Penal Code provision in point.[14] All such lists are subject to the criticism that they remain codified social science and philosophy and are scarcely subject to empirical validation as to their effectiveness. Nevertheless, the codification of correctional policy may be a necessary first step toward effective judicial administration of the ultimate preventive goal of all penal law.[15]

All correctional policy exhortations in penal codes are bound to remain ineffectual until there is evidence of the extent to which such exhortations have influenced judicial choice in sentencing. Consequently, in most European countries trial judges are obligated to write detailed opinions justifying their sentences in terms of the codified correctional policy.[16] A judge who fails to give evidence that he abided by the codified standards is likely to have his sentences set aside on motion of either party.[17] The Italian Supreme Court has

14. MODEL PENAL CODE § 1.02 (Official Draft 1966).

15. *See* Mueller, *Punishment, Corrections and the Law, supra* note 4, at 86.

16. *See, e.g.*, DUTCH CODE OF CRIMINAL PROCEDURE (hereinafter WvSv) art. 359; FRENCH CODE OF CRIMINAL PROCEDURE (hereinafter FR. C. PRO. PEN.) arts. 485, 543; GERMAN CODE OF CRIMINAL PROCEDURE (hereinafter STGB) art. 267.

17. *See, e.g.*, WvSv art. 359; ITALIAN CODE OF CRIMINAL PROCEDURE (hereinafter It. D. C. PRO. PEN.) art. 574.

ruled expressly that it will not accept standardized or cliché formulas adhering only formally to the codified standard.[18]

V. APPELLATE REVIEW OF SENTENCES

Most continental countries do not distinguish between appellate review of convictions and sentences. They do, however, distinguish between appellate review on matters of fact and law and on matters of law only. The former is primarily meant to serve the purpose of correction of errors of the trial court; while the latter primarily assures the uniform interpretation of the law. Generally, appeal solely on matters of law is available only if all other appellate rights have been exhausted. An appeal concerning matters of fact and law may result in a review of the sentence. This is due to the fact that European codes, unlike American statutes, prescribe sentencing rules which must be respected by the trial judge. Also, in some countries, the appellate courts interpret "law" broadly and, consequently, have an extensive power of review.

In some countries, the system of appeal differs from that just described. Norwegian law provides that a so-called "appeal proper" may be directed against a sentence for the reason, among others, that the punishment is not appropriate because it is too severe or too lenient.[19] This indicates that such appeals may be brought by either prosecution or defense;[20] however, it is not likely that a defendant will appeal a sentence he considers too lenient. The prosecutor, who is legally obligated to see that the law is properly applied, may appeal a sentence which is too severe, as well as one he considers too lenient. So as not to discourage sentence appeal by convicts, many codes provide that "the judgment may not be amended to the prejudice of the defendant, insofar as kind and amount of punishment are concerned, if the appeal was initiated by the defendant alone."[21] This doctrine, which is referred to as the prohibition of *reformatio in pejus*, has no applicability when the sentence is appealed by the prosecution for being too lenient. In that case, the appellate tribunal could either increase or decrease the punishment. This is also true where both defendant and prosecutor have appealed the sentence, as long as the sentence increase is not the result of the defendant's appeal. In the Netherlands the punishment may be increased even if only the defendant has appealed, provided that all judges of the

18. Court of Cassation, Jan. 30, 1935 (La giustizia penale 1935, 310).

19. NORWEGIAN MINISTRY OF JUSTICE, ADMINISTRATION OF JUSTICE IN NORWAY 80 (1957).

20. *Compare* FR. C. PRO. PEN. art. 497, *with* WvSv art. 404, *and* STGB ¶ 296.

21. STGB ¶ 331; STGB art. 358; FR. C. PRO. PEN. art. 515; WvSv art. 424.

appellate court concur.[22] Finally there is some doubt in Europe, as there is in this country,[23] as to what in fact constitutes an increase of punishment (*i.e.*, an amendment of the sentence prejudicial to the defendant). Thus, while both the German and Dutch courts hold a longer suspended sentence to be heavier than a shorter non-suspended sentence,[24] it can be doubted that the defendants agree.

VI. Permissibility and Scope of Appeal on Fact and Law

Most European nations permit, as of right, an appeal on fact and law. In France and the Netherlands, an appeal lies from practically all criminal judgments, except those involving very small penalties.[25] However, in France no such appeal is possible from the judgment of a jury court,[26] since there, as formerly in England,[27] the judgment of the jury is regarded as unimpeachable. Also, in France no fact-and-law appeal is possible from the judgments of a number of special courts.[28] In the Netherlands and some other countries, a defendant may not appeal a judgment of acquittal rendered "for lack of evidence," despite the fact that such a judgment leaves him under a shadow of suspicion, which he may wish to have removed by the more favorable judgment of acquittal because of "innocence."[29] In Germany, the only difference between the two types of acquittal lies in the availability of compensation for detention suffered pending trial for those acquitted because of "innocence."[30] The German Code

22. WvSv art. 424.

23. *See* State v. Fisher, 126 W. Va. 117, 27 S.E.2d 581 (1943).

24. Oberlandesgericht (hereinafter OLG) Oldenburg (Monatschrift für Deutscbes Recht 55, 436); Hoge Raad (hereinafter H.R.) December 18, 1933 (Nederlandse Jurisprudentie 1934, 298).

25. Fr. C. Pro. Pen. art. 546; Dutch Law on Court Organization (hereinafter Wet R.O.) 44.

26. Fr. C. Pro. Pen. art. 370. But cases brought before the Jury Court have been evaluated in the pre-trial stage by two judicial authorities, the investigating magistrate and the Chamber of Indictments.

27. In England, before the introduction of the Criminal Appeal Act in 1907, there was no appeal as of right from the verdict of a jury in a criminal trial. Only in very few cases did the trial judge decide to reserve a point of law for consideration by the Court for Crown Cases Reserved which could quash the conviction. Under the 1907 Act (§ 3), a person couvicted on indictment may appeal against conviction as of right if a question of law alone is involved. If his appeal is based on a question of fact or mixed law and fact, he may appeal only after having obtained the leave of the Court of Appeal or of the judge who tried the case. Appeal against sentences is permissible only on leave of the Court of Appeal. Compare: Interdepartmental Comm. on the Court of Crim. App., Report, Cmd., No. 2755, at 3, 6 (1965).

28. Court of State Security, Military Courts, etc. *See* Stéfani-Levasseur, Procédure Pénale 18 (1964).

29. WvSv art. 404; StGB § 267.V distinguishes between the two kinds of acquittals, but the distinction has no bearing on the permissibility of appeal. (*See* StGB § 313).

30. *See* German Law Concerning Compensation for Innocently Suffered Preliminary Detention of July 4, 1904.

of Criminal Procedure, which is generally regarded as providing the most limited appeal on fact and law (*Berufung*), only allows such appeal against judgments of some of the least significant criminal courts. This results in allowing a defendant tried in a minor court for a minor offense to have a fact-and-law appeal and a pure-law appeal; while a defendant tried in a major court for a major offense is limited to an appeal of law only.[31] This is regarded as one of the most serious shortcomings of the German Code of Criminal Procedure.[32]

Where partial appeals (*i.e.*, those restricted to a single issue) are permissible, the judgment unlike that of the general appeal, is subject to review only insofar as it has been attacked.[33] Ordinarily it is not advisable for a defendant to lodge a partial appeal, since this may be held to bar the appellate court from amending the judgment in the defendant's favor with respect to matters not called to its attention. Thus, the German Supreme Court has held that where a convict appeals solely on the ground that his sentence is excessive, the court has no jurisdiction to reverse and enter a judgment of acquittal for lack of criminal responsibility.[34] Where the defendant chooses to appeal the sentence only, it has been held that an appeal may not be limited to the type of punishment, and therefore, type and duration of punishment are also regarded as being reviewable.[35] Thus, when not limited by a partial application, the reviewing court will proceed to a re-examination of the entire case. It may receive new evidence,[36] or it may use only the evidence before the trial court which has become a matter of record.[37] If the court considers the appeal well-founded, it will either render a new judgment or remand the case for a new trial. Rarely will it remand the case to the trial court whose judgment was attacked.[38] The German courts have held themselves competent to review such questions as whether a commitment to an institution for cure and care was justified[39] and whether the lower court had been right in cancelling the defendant's driver's license or in imposing other supplementary penalties.[40]

31. STGB ¶ 312-13.

32. *See* HIRSCHBERG, DAS AMERIKANISCHE UND DEUTSCHE STRAFVERFAHREN 33 (1963).

33. FR. C. PRO. PEN. art. 509; STGB ¶ 327.

34. Reichsgericht (hereinafter RG) (Deutsche Rechtszeitung 22 (1930)).

35. RG (Juristische Rundschau 1927 nr. 667).

36. FR. C. PRO. PEN. art. 513; WvSv art. 414; STGB ¶ 323.

37. FR. C. PRO. PEN. art. 513; WvSv art. 422; STGB ¶ 325.

38. FR. C. PRO. PEN. art 514-20; WvSv art. 423; STGB ¶ 328.

39. Compare ¶ 42b GERMAN PENAL CODE.

40. Court Freiburg (Deutsche Rechtszeitung 140 (1941)).

VII. Permissibility and Scope of Appeal on Law Only

In practically all continental countries final criminal judgments are subject to appeal on matters of law. However, there are a few exceptions, such as acquittals rendered by French jury courts[41] and judgments rendered which acquit for lack of evidence or are appealable by another remedy of which the defendant has not availed himself.[42] If the appellate court finds that the law appeal is well-founded, it may reverse the judgment attacked, or it may decide the matter itself, if it can do so without a further inquiry into the facts.[43] Generally, however, it will remand the matter to a trial court other than the one which rendered the judgment attacked.[44] In Germany and the Netherlands, the court to which the case is remanded is bound to respect the higher court's decision.[45] In an appeal solely on law, the scope of inquiry is much narrower than in an appeal on fact and law.[46] The court is bound to the facts as stated in the judgment below and the review is limited to points listed in the petition for review.[47] As stated previously, appeal on law only includes sentences which under American law would not be reviewable.

In Switzerland and Austria the appellate courts hold themselves incompetent to review the determination of punishment, as long as the judge has exercised his discretion within the legal framework, but in case of clear arbitrariness, a sentence might be reversed.[48] Thus, these two alpine countries follow the same procedure as the Supreme Court of Pennsylvania.[49] According to German theory, the discretion of the trial judge is not subject to review in an appeal on matters of law.[50] But a judgment and sentence are subject to such a review if the standards of law have not been properly applied by the judge. The following are examples of successful reviews of legally

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41. Fr. C. Pro Pen. art. 572.

42. Wet R.O. 96; WvSv art. 430. The rule is otherwise in Germany, where a defendant may waive his initial right to appeal on fact-and-law and proceed immediately to his appeal on law only (so-called "leap revision"). *See* StGB § 335.

43. StGB ¶ 353-54; Fr. C. Pro. Pen. art. 617; WvSv art. 441. Compare Minkenhof, Nederlandse Strafvordering 296 (1948).

44. Fr. C. Pro. Pen. art. 609 et seq.; WvSv art. 441; StGB ¶ 354.

45. In France this is not the case. If, however, after reversal of a first decree or final judgment, the second decree or second final judgment, rendered in the same case between the same parties, is attacked on the same grounds as the first, it will be decided by the united divisions of the Supreme Court. If a reversal results, the court to which the matter is remanded is bound to respeet the decision of the united divisions, unless the decree rendered by these is different from that passed by the Criminal Division in the first place. Fr. C. Pro. Pen. art. 619.

46. Fr. C. Pro. Pen. art. 567; Wet R.O. 99; StGB ¶ 337.

47. StGB ¶ 353.

48. Compare Schmidt *supra* note 13 at 29 & 43 (1961).

49. Commonwealth v. Green, 396 Pa. 137, 151 A.2d 241 (1959).

50. Kern, Strafverfahrensrecht 208 (1959).

"improper" sentences which nevertheless had been within the statutory framework: the trial judge had only taken into account deterrence without considering the retributive guilt of the offender;[51] the punishment imposed though within the legal framework was not proportionate to the guilt of the offender and, in that sense was excessive;[52] the trial court had not considered all aspects of the offense and the offender by taking into account all essential goals of punishment;[53] and the maximum penalty had been imposed, although it was "obvious" that the punishment should have been closer to the minimum.[54]

In Norway, the Supreme Court has full authority to reverse sentences when the punishment is too lenient or too severe, that is, excessive in either direction. Nevertheless, the Norwegian judge is given a wide discretion in sentencing.[55] Extracts from the Norwegian Supreme Court decisions show that the Court does not limit itself to reviewing sentences which are truly outrageous, but in fact does sometimes substitute its own discretion for that of the trial judge (*see* Appendix D). The Supreme Court considers the particulars of each offender and offense and decides what should be the principal objective of punishment in that particular case. If there is a reasonable possibility of rehabilitation, the Court tends to let this consideration prevail over reasons of general prevention. The Norwegian judges, as those of all other nations which have not catalogued the objectives of punishment, are ultimately driven to finding the right criteria in their own internalized notions of the proper objectives of criminal justice.

VIII. Conclusions

This study of continental schemes of appellate review of legal but excessive sentenccs has the reassuring effect of informing us that we do not stand alone with our problems. The benefit of comparative study extends beyond theoretical reassurance; it reveals that continental law, more readily than ours, regards a proper criminal sentence within the legislative framework to be a matter of law, and therefore

51. RG 76, 325; OLG Freiburg (Höchstrichterliche Entscheidungen in Strafsachen 2, 112).

52. OHGSt 1, 174. Compare State v. O'Dell, 240 Iowa 1157, 39 N.W.2d 100 (1949). But within this range of factors the trial judge's discretion is decisive. *See* OHGSt 2, 145. Compare State v. Sullivan, 241 Wis. 276, 5 N.W.2d 798 (1942).

53. OGHSt 2, 94.

54. Bundesgerichtshof 2 StR 45, 50. Compare Dalcke, Strafrecht und Strafverfahren 1365 (1955); Löwe-Rosenberg, Strafprozessordnung 1301 et seq. (1962).

55. Compare Norwegian Penal Code 52-65.

reviewable. The difference between review of an ordinary error of law and an error in legal sentence is one of standards for determining the error. While our legislatures have rarely seen fit to provide the judiciary with legal criteria for the imposition of legally proper sentences, many European legislatures have provided their judges with such criteria. These criteria are of two kinds: (1) the recognized aims of penal-correctional policy; and (2) the proper criteria by which the perpetrator and his deed should be evaluated.

We are not convinced that any foreign code has provided a truly acceptable list of penal-correctional aims. Nevertheless, even a hodgepodge of stated aims, as that contained in the Model Penal Code of the American Law Institute, can usefully serve as a convenient guide, the total disregard of which would be considered illegal. In any event, in accordance with continental experience, a statement of penal-correctional aims appear to us to be a necessary step toward developing a sound sentencing and sentence review system. We are totally unimpressed by the efforts of some nations in cataloguing the enormous range of human emotions and character. This approach, designed to provide a legal (and thus reviewable) framework in which the trial court may evaluate the crime and the perpetrator in imposing sentence, views man, including both the judge and the judged, as a mechanical monster.

If the European experience teaches us anything, it is that an imaginative, free-thinking judge, properly guided by the codified basic penal-correctional objectives, must be trusted to find the right sentence. Since the sentence is then a matter of law, it is subject to review and revision by an appellate court which has its own criteria and approach for interpreting the legal goals of punishment and correction. These appellate court interpretations make precedent and build tradition. Several European judges have assured us in personal conversation that no one factor is as strong a sentence review criterion as the custom of the court.

Criteria and custom have been developed through appellate decisions in several European countries (Norway and Germany have been cited as leading examples). While we have cited Norway as a leading example of an enlightened practice, Norway also acquaints us with an all-too-liberal law of sentence review. We wonder whether an appellate court's view of a sentence is truly more expert than that of a trial judge. It strikes us that the proper limitation for sentence review may have been stated by the English Court of Criminal Appeal:

> In the first place, this Court does not alter a sentence which is the subject of an appeal merely because the members of the Court might have passed

> a different sentence. The trial judge has seen the prisoner and heard his history and any witness to character he may have chosen to call. It is only when a sentence appears to err in principle that the Court will alter it. If a sentence is excessive or inadequate to such an extent as to satisfy this Court that when it was passed there was a failure to apply the right principles, then this Court will intervene.[56]

It is doubtful whether the appellate court should be empowered to increase the sentence. In Europe, an increased sentence usually prevails only on an appeal by the prosecutor, a procedure which is not available in the United States. In England, the Court of Criminal Appeal has such power, but it has recently been proposed that this power, which was rarely used, be abolished. In 1963, out of 1976 applications for leave to appeal received by the English Court, the sentence was reduced in one hundred forty-five, quashed in thirteen and increased in only six cases. In England, as elsewhere, it is felt that an increase in sentence on appeal is basically unfair. Nor is there any evidence that the existence of the power to increase a sentence on appeal serves as a substantial barrier to frivolous appeals.[57] If, per chance, there are policy reasons—which we cannot detect—favoring the existence of the power to increase sentences on appeal, we would urge that the Dutch practice, requiring unanimity of all judges of the appellate court, be followed.

56. Regina v. Ball, 35 Crim. App. 164, as quoted by INTERDEPARTMENTAL COMMITTEE ON THE COURT OF CRIMINAL APPEAL, REPORT, CMD. No. 2755, at 43 (1965).
57. *Id.* at 42-47.

Appendices

APPENDIX A

PROVISIONS ON SENTENCING TAKEN FROM THE SPANISH PENAL CODE
(1870, modified in 1944)

CHAPTER III: MITIGATING CIRCUMSTANCES

Article 9

The following are mitigating circumstances:

1. All those mentioned in the preceding chapter, wheu the requiremeuts needed for complete exemption from liability in each situation did not concur.
2. Intoxication which is neither habitual nor self-induced for purposes of committing an offense.
3. Minority below the age of eighteen years.
4. The fact that the criminal harm caused is more severe than the perpetrator intended.
5. Sufficient antecedent provocation or threats on the part of the victim.

6. When the act was committed in proximate vindication of a grievous offense against the actor, his spouse, his ascendants or descendants, his legitimate, natural or adoptive brothers, or his relatives by affinity in the same degrees.
7. The fact that the deed was motivated by moral, altruistic or patriotic reasons of considerable importance.
8. The fact that the deed was committed under such powerful excitement, as to cause rage or loss of self-control.
9. The fact that the perpetrator, prior to having knowledge of the institution of judicial proceedings against him, and moved by his own voluntary repentance, proceeded to make amends in whole or in part for the harm caused, to offer satisfaction to the victim, or to confess his infraction to the authorities.
10. And lastly, any other circumstance of like significance to the above.

CHAPTER IV: AGGRAVATING CIRCUMSTANCES

Article 10

The following are aggravating circumstances. The fact that:

1. The act was committed with perfidy. Perfidy is present whenever the perpetrator commits an offense against persons through such means, forms or kinds of execution which directly and particularly insure the success of the criminal act without those risks to his own person which would result from the defensive action the victim might otherwise take;

2. The offense is committed for a price, reward or promise;

3. The offeuse is committed by means of flood, fire, poison, explosion, destruction of an aircraft, grounding of a ship or other willful damage, derailment of locomotives, or by any other highly destructive means;

4. The offense is committed by means of printed matter, radio broadcasting or other means facilitating publicity;

5. The ordinary harm of the offense is willfully aggravated by causing additional harm unnecessary for the commission of the offense;

6. The act is perpetrated with known premeditation;

7. Trickery, fraud, or disguise are employed;

8. Advantage is taken of superior strength or through the use of meaus which weaken the victim's defense;

9. The victim's confidence is misused;

10. The perpetrator makes use of his official position;

11. The crime is committed during a fire, shipwreck or other calamity or misfortune;

12. The offense is committed with the aid of armed companions or persons who provide or secure impunity;

13. The act is committed at night, in secluded locations, or by a gang; a gang is present whenever three or more armed persons jointly engage in the commission of an offense;

14. The perpetrator is a general recidivist. A general recidivist is one, who at the time of the commission of the deed, has previously been sentenced for another offense which carries an equal or greater punishment, or for two or more offenses which carry a lighter punishment.

15. The perpetrator is a specific recidivist. A specific recidivist is one who, at the time of the commission of the deed, has already been (executorily) sentenced for one or more offenses within the same Title of this Code.

16. The deed was committed against public authority or with disrespect toward the dignity, age or sex of the victim, or in the victim's home, provided the victim did not provoke the act.

17. The deed was committed in a sacred place.

CHAPTER V: CIRCUMSTANCES WHICH MAY EITHER MITIGATE OR AGGRAVATE CRIMINAL LIABILITY, DEPENDING ON THE FACTS

Article 11

The fact that the victim is the perpetrator's spouse, ascendant, descendant, legitimate, natural or adoptive brother, or a relative by affinity within the same degrees of relationship, may attenuate or aggravate bis criminal liability depending on the nature, motives or effects of the offense.

Article 61*

Whenever the punishment prescribed by law is composed of three degrees, the Courts shall impose it according to the following rules depending upon the concurrence of aggravating or mitigating circumstances:

1. If only one mitigating circumstance is present in the deed, the punishment prescribed by law shall be applied in its minimum degree.
2. If one aggravating circumstance is present, the punishment shall be applied in its maximum degree.

However, in cases where the maximum degree is the death sentence, and only one aggravating circumstance is present, the Courts, after considering the nature and circumstances of the felony and of the perpetrator, may refrain from imposing the death sentence.

A death sentence shall never be imposed due to the aggravation of a punishment prescribed for a felony unless prescribed in this Code for such felony.

3. When both aggravating and mitigating circumstances concur, the punishment shall be determined after reasonably weighing them in view of their relative importance.
4. In the absence of either aggravating or mitigating circumstances, the Courts shall apply the punishment prescribed by law in the degree they consider adequate, in view of the harm caused by the deed and the personality of the offender.
5. When two or more, or when one highly mitigating circumstance alone, concur in the absence of aggravating ones, the Courts may impose a punishment one or two grades lower than the one prescribed by law, in whatever degree they consider reasonable in view of the number and importance of such mitigating circumstances.
6. Regardless of the number and importance of aggravating circumstances, Courts shall not impose a punishment higher than the one prescribed by law in its maximum degree, unless the aggravating circumstance described in number 15, Article 10 is present, in which case a punishment one or two grades higher shall be imposed, starting with the second conviction for the same offense, to the extent they consider reasonable.
7. Within the limits of each degree, the Courts in determining punishment shall consider the number and importanee of aggravating or mitigating circumstances and the greater or less harm produced by the offense.

Article 62

If the punishment prescribed by law does not consist of three degrees, the Courts shall apply the rules set forth in the preceding article, and shall divide the term of each punishment in three equal parts, each constituting a degree.

Article 63

Courts may impose fines as widely as allowed by law, determining the amount not only on the basis of the mitigating or aggravating circumstances present in the deed, but especially on the basis of the financial status or capabilities of the perpetrator.

*The provision refers to the complicated schemes and charts ruling the grades and degrees of punishment which are contained in art. 68-79 of the Penal Code.

APPENDIX B

EXAMPLES OF GENERAL GUIDELINES FOR SENTENCING

1. Provisions which express a preference for several theories of punishment: Section 81, DANISH CRIMINAL CODE:[1A]

In determining the penalty, account shall be taken, not only of the gravity and dangerousness of the offense, but also of the previous record of the offender, of his age and of his general conduct hefore and after the deed, of the persistence of his criminal tendencies and of the motives uuderlying the aet.

Article 79, GREEK PENAL CODE:[2A]
Judicial Calculation of the Punishment.

1. In the calculation of the punishment within the defined limits of the statute, the court shall consider on the one hand, the quality of the act committed, and, on the other hand, the personality of the offender.
2. In order to determine the gravity of the offense the court shall consider: (a) the damage resulting from the offense, or the threatened danger; (b) the nature, the kind and the purpose of the offense, as well as all factors accompauying its preparation or commission, circumstances of time, place, means and manner; (c) the intensity of the intention, or the grade of the negligence of the perpetrator.
3. In the evalnation of the personality of the offender the court weighs particularly the degree of the criminal propensity of the perpetrator, as evidenced by the act, and for a more precise determination thereof: (a) the reasons which prompted him to commit the offense, the origin and the purpose which he sought; (b) his character, and the grade of his development; (c) the individual and social circumstances and his prior life; (d) his conduct duriug and after the act; especially his remorse and his willingness to compensate for the harm he has inflicted.
4. The judgment shall state the reasons explaining the decision of the court for the imposition of the sentence."

Articles 132, 133 ITALIAN PENAL CODES[3A]
Discretionary Powers of the Judge in Imposing the Punishment: Limits.

Within the limits established by law, the judge shall apply the punishment in his discretion; he must statc the grounds which justify the use of such discretionary power. In increasing or reducing the punishment, the limits estahlished for each kind of punishment may not be exceeded, except in the cases expressly established by the law.

Gravity of the Crime: Valuation for the Purposes of Punishment.

In the exercise of the diseretionary powers specified in the preceding Article, the judge must take into account the gravity of the crime as inferred from:
(1) The nature, character, means, object, time, place and any other circumstances of the act.
(2) The gravity of the harm or the danger causcd to the person injured by the crime.
(3) The intensity of criminal intent or the degree of culpable negligence.

The judge must also take into account the perpetrator's propensity for delinquency, as inferred from:

(1) The motives to commit delinquency and the character of the offender.

1A. GIERSING (transl.), THE DANISH CRIMINAL CODE 49 (1958).

2A. LOLIS (transl.), THE GREEK PENAL CODE (mimeo. ed. 1962).

3A. Translated by the Comparative Criminal Law Project, per J. M. Canals.

(2) The criminal and judicial precedents and, in general, the conduct and life of the offender prior to the crime.
(3) The conduct contemporary with or subsequent to the crime.
(4) The individual, domestic and social conditions of life of the offender."

Article 54, POLISH PENAL CODE:[4A]

The court shall impose penalty according to its discretion having regard primarily for the motives and the manner of acting of the offender, and his relation to the person injured, to the degree of mental development and the character of the offender, to his past life, and to his behavior after committing the offense.

Article 37, USSR CRIMINAL CODE:[5A]

General Principles for Assignment of Punishment.

The court shall assign punishment within the limits established by the articles of the Special Part of the present Code which provide for responsibility for a committed crime, in strict accordance with the provisions of the Fundamental Principles of Criminal Legislation of the USSR and Union Republics and of the General Part of the present Code. At the time of assigning punishment the court, guided by socialist legal consciousness, shall take into consideration the character and degree of social danger of the committed crime, the personality of the guilty person, and circumstances of the case which mitigate or aggravate responsibility.

Article 38, YUGOSLAV CRIMINAL CODE:[6A]

For a particular criminal offence the Court shall fix the degree of punishment within the limits provided by law for that offence, with due consideration for all the circumstances influencing the punishment to be severer or milder (aggravating and extenuating circumstances), and especially, the degree of criminal liability, the motives from which the offence was committed, the intensity of the danger or wrong to the protected object, the circumstances under which the offence was committed, the earlier life, the personal circumstances and the behaviour of the offender after the commission of the criminal offence.

2. Provisions which consider *retribution* as the primary goal of punishment: Section 60, GERMAN DRAFT PENAL CODE:[7]

(1) The basis for fixing a punishment shall be the guilt of the perpetrator.
(2) In fixing a punishment the court shall weigh against each other such circumstances, other than definitional elements, as speak for and against the perpetrator.

Especially there shall be considered:

the motives and aims of the perpetrator,
the state of mind which the act bespeaks and the exercise of volition involved,
the extent of breach of duty,
the manner of perpetration and the wrongful effects of the act,
the prior life of the perpetrator, his personal and economic circumstances, as well as his conduct after the act, especially his endeavor to make restitution.

4A. LEMKIN & MCDERMOTT (transl.), THE POLISH PENAL CODE of 1932 (1939).

5A. BERMAN & SPINDLER (transl.), SOVIET CRIMINAL LAW & PROCEDURE (1966).

6A. 10 THE NEW YUGOSLAV LAW (3-4) 17 (1959).

7A. Ross (transl.), THE GERMAN DRAFT PENAL CODE (1965).

Article 63 SWISS CRIMINAL CODE:[8A]

Sec. 1. General Rules. ART. 63. The court shall mete out penalties in accordance with the guilt of the offender, considering the motives, previous conduct and the personal situation of the convicted person.

3. Provisions which consider *correction* (*rehabilitation*) as the primary goal of punishment:

Section 7, SWEDISH PENAL CODE:[9A]

In the choice of sanctions, the court, with an eye to what is required to maintain general law obedience, shall keep particularly in mind that the sanction shall serve to foster the sentenced offender's adaptation to society.

APPENDIX C

EXAMPLES OF PROVISIONS SOLELY STATING THE VARIOUS GOALS OF PUNISHMENT

Section 17, CZECHOSLOVAKIAN CRIMINAL CODE:[10A]

1. The goal of punishment is:
(a) to make the enemy of the working people harmless;
(b) to prevent the offender from committing other offenses and to educate him towards respecting the rules of socialist society;
(c) to contribute to the education of other members of society.
2. The execution of the punishment shall not lower human dignity.

Article 20, USSR CRIMINAL CODE:[11A]

Purposes of punishment. Punishment not only constitutes a chastisement for a committed crime, but also has the purpose of correcting and re-educating convicted persons in the spirit of an honorable attitude toward labor, of strict compliance with the laws, and of respect toward socialist communal life; it also has the purpose of preventing the commission of new crimes both by convicted persons and others.

Punishment does not have the purpose of causing physical suffering or the lowering of human dignity.

APPENDIX D

EXTRACTS FROM DECISIONS OF THE SUPREME COURT OF NORWAY CONCERNING SENTENCE REVIEW*

December 18, 1951 (Norsk Retstidende 1166 et seq.)

The defendant had been convicted of attempted homicide and sentenced to a term

8A. FRIEDLANDER & GOLDBERG (transl.), THE SWISS FEDERAL CRIMINAL CODE, in supplement to, 30 J. CRIM. L.C. & P.S. (1939).

9A. SELLIN (transl.), THE PENAL CODE OF SWEDEN (1965).

10A. Translated from SCHMIDT, *supra* note 13, at 216.

11A. BERMAN & SPINDLER, *supra* note 5A, at 151.

*(The decisions were kindly made available to the authors by Prof. Johs. Andenaes, a former Justice of the Supreme Court of Norway, and a member of the International Advisory Board of the Comparative Criminal Law Project of New York University.)

of imprisonment of one year and six months, less 154 days already spent in custody, as well as deprivation of the right to hold office. He appealed on the ground that the sentence was too severe.

From the opinion of the leading judge:

I believe the appeal should be granted.

The crime considered here is a very serious one, but in view of the fact that the Jury found that the act was committed under especially mitigating circumstances and during a strong reduction of the level of consciousness, c.f., the Penal Code, Section 56, No. 1b, I consider a punishment of 1 year's imprisonment suitable. I also attach importance to the fact that Johansen immediately after the act repented it, helped his victim to bed, "stanched" the bleeding, lay down beside her and was lying crying when people arrived. He attempted afterwards to commit suicide. The Court has been informed that after hospitalization for about 14 days, the woman he stabbed was discharged with a clean bill of health and has suffered no permanent injury. She has not put in any request for prosecution.

The expert witnesses have found Johansen to be a person with inadequately developed mental faculties, but the Jury has given a negative answer to the question whether there is any danger that he may again commit an act as specified in Section 39 point 2 of the Penal Code. The Court has been informed that after being released from custody he has again moved into the said woman's home and that it is his and the woman's intention to marry as soon as the latter has obtained her divorce.

Under these circumstances and in view of the fact that Johansen is an able workman, who works for the said woman and her children, whose home he has taken part in rebuilding, I find compelling reasons for not sentencing him to serve a long term of imprisonment. I find special grounds in the case for presuming that the execution of the sentence is not necessary in order to keep Johansen from committing new offenses. . . .

Execution of the sentence was suspended.

September 8, 1959 (Norsk Retstidende 799 et seq.)

The defendant has been convicted of attempted rape and had been sentenced to a term of imprisonment of 3 years subject to deduction of one day for custody sustained. He had appealed from the judgment on the ground that the sentence should have been suspended.

From the opinion of the leading majority judge:

I have found the case extremely doubtful, but have come to the conclusion that it is justifiable to apply a suspended sentence . . . Among the special reasons to which I attach importance, I mention that Appellant, who is married and has two children under age, has according to our information lived a normal married life, that he has no previous convictions whatsoever, and that in general nothing discreditable is known about him. These circumstances support the assumption, which also seems to be upheld by the medical certificate produced in the Court: that the offense was committed on the spur of the moment, that it was an act of emotional excitement caused by excessive alcohol consumption and committed during a consequent reduction of his powers of judgment and ability to reason.

The execution of the sentence was suspended for a trial period of 2 years.

From the dissenting opinion:

In my opinion, considerations of general deterrence must weigh heavily in determining the punishment for a crime of this nature. In addition, it is only permissible, in this case where the Code's minimum penalty is imprisonment for 3 years, to hand down a suspended sentence when special reasons so indicate, cf. the Penal Code Section 52,

No. 2., second paragraph. Although Appellant has no previous convictions, I cannot find any such special reasons in the present case. Appellant is a married man of mature age. As pointed out by the Court of Appeal, he showed considerable brutality during the attempt at rape, and he did not abandon his attempt until his victim obtained assistance. True, the execution of the sentence will have very serious consequences for his family—wife and 2 boys, but I cannot find that these detrimental effects are greater than must normally be expected from the serving of a prison sentence of such long duration. Nor do I find it decisive that the punishment imposed is far higher than that which I would have voted for under the general principles governing the determination of sentences, if I had not been bound by the minimum penalty provided by the Code. In my opinion, this should not lead to the conclusion that the entire sentence be suspended.

From the conference I know that a majority of the Court are for allowing the appeal, whereby the sentence will be suspended. If the appeal had been dismissed, I would have recommended—as is the case quoted in Rt. 1959, pp. 43 et seq.—that the punishment imposed be considerably reduced or in part suspended, by reprieve.

March 2, 1963 (Norsk Retstidende 231 et seq.)

Defendants had been convicted of bank robbery and sentenced to a term of imprisonment of one year and three months, subject to deduction of 71 days of sustained custody for each of them, as well as to pay compensation to the victim.

On the appeal of the Public Prosecutor, the sentence was converted to imprisonment for two years and three months less 155 days of sustained custody.

From the majority opinion:

I come to the conclusion that the appeal ought to be allowed. It is true that the prisoners are very young. However, this is a case of a carefully premeditated crime, which has been planned and discussed by the prisoners for some time, and had been carried out cynically and in cold blood according to the plan. The amount robbed was considerable, as the offenders assumed it would be. The planning and execution of the offence were particularly likely to attract attention notably among adventurous young people; for that reason as well as the crime must be regarded as particularly dangerous to the community. In these circumstances considerations of general deterrence weigh heavily. The prisoners, both of whose intellectual qualifications and social environment should have given them every reason to behave properly, have flagrantly failed to live up to expectations.

April 6, 1963 (Norsk Retstidende 365 et seq.)

Defendant had been convicted of driving when under influence of alcohol and sentenced to imprisonment for 21 days to be suspended subject to a trial period of two years without probation, as well as a fine of Kr. 300.—or, if the fine was not paid, to imprisoument for nine days. The local Chief of Police appealed against the sentence on the ground that it should not have been suspended. The appeal was dismissed.

From the majority opinion:

Further, I attach importance to A's young age—as mentioned in the statement of appeal he was 19 years and 4 months old at the time when the driving took place—although this age is not so low that this fact alone would have been sufficient to justify a suspension of the sentence. I also attach importance to the fact that A is at present doing his military service which he commenced on January 10, 1963. If the prison sentence is made non-suspended the effect will be either that he must leave his military services in order to serve his sentence—with the result that his military service would be extended accordingly—or that he would have to serve his sentence after the military service has been completed in July, 1964.

May 15, 1957 (Norsk Retstidende 541 et seq.)

Defendant had been convicted of grand larcenies and sentenced to a term of imprisonment of 120 days, subject to deduction of 31 days for sustained custody. Defendant appealed, on the ground that the sentence should have been suspended. The Supreme Court decided to suspend the remaining punishment with a probation period of two years.

From the majority opinion:

In considering the appeal, I have felt serious doubts, especially in view of the fact that Appellant has on several previous occasions been guilty of similar offences, that he has a previous conviction for robbery (Penal Code Section 267) and that the conditions are now satisfied for applying a heavier punishment for repeated crimes pursuant to the Penal Code Section 263, first paragraph. Nonetheless, I have come to the conclusion that in view of the special circumstances in the case, it is justifiable to let the execution of the prison sentenee be suspended in accordance with the Penal Code Sections 52 et seq. I have attached importance to the fact that the thefts concerned very modest values, that most of the stolen objects have been returned to their owner and that the offences are partly of a casual nature. Appellant's previous convictions are not to my mind of decisive importance in view of the comparatively long period of time—almost 6 years—that has passed since his last offence. Appellant has been unemployed for some time when the offences were committed; he has not obtained more permanent employment and one may suppose that the execution of the sentence, by depriving him of his employment, would have a particularly serious effect on himself, his wife and unsupported children. According to the information in the case, there is reason to believe that Appellant has received a strong warning and that he will now make a serious effort to mend his ways and not again come into conflict with the criminal law. I find it reasonable that, under these circumstances, he be given a last chance and I add that the Mayor of his home town has recommended this in a letter dated to the Supreme Court dated March 12, 1957.