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Mr. Mueller traces the development of the technique of sentence appeals in relation to the evolution of penological theory and examines the practices of representative American jurisdictions in this area. In evaluating the status of the law, the author's reasoned judgment is that too few appellate courts have the power to review excessive sentences, and that even these courts do not exercise their power in terms of functional penology.

I. INTRODUCTION

The year 1960 marked the centenary of the first grant of power to an American appellate court to review legally valid sentences attacked as excessive in the particular case. It was the Iowa legislature which in 1860 authorized its supreme court to concern itself with penological problems through the power to reduce the punishment—but not to increase it.[1] The century which has passed since this revolutionary innovation has witnessed more progress in penology than perhaps the entire preceding history of humanity. It is fitting, therefore, that at the beginning of the second century of appellate review of legal but "excessive" sentences we pause to reflect on the past and to speculate on the future.

It cannot be our objective to give an account of the minutiae of the rules which have developed over these one hundred years, for this has been done —and quite successfully—by Professor Livingston Hall in 1937, at least for a limited number of jurisdictions.[2] Rather, it shall be our endeavor to

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1. Iowa Code § 4925 (1860). For the present version of this law, see IOWA CODE ANN. § 793.18 (1946).

2. Hall, *Reduction of Criminal Sentences on Appeal* (pts. 1-2), 37 COLUM. L. REV. 521, 762 (1937); see also Sobeloff, *A Recommendation for Appellate Review of*

trace the development of the technique of sentence appeals in broad strokes, to relate this development to the evolution of penological theory, and to give an accurate account of the present state of the law in American jurisdictions. Indeed, to relate the history of sentence appeals *is* to relate the history of penology, for nowhere is penological thought and practice as accurately mirrored as in sentencing policies and laws and, especially, in appellate reflections thereon, *i.e.*, reflections coming from the most sophisticated segment of the judiciary. Yet, these reflections are rarely expressed in words. We must look to the actions of appellate tribunals and we must read the thoughts between the lines of appellate opinions in order to gain an accurate and complete view of the judges' penal philosophies. But it should be granted that occasionally appellate judges will spell out the thoughts—or at least some of them—which they entertained when deciding to act on the charge of an excessive sentence.

II. DEVELOPMENT OF APPEALS

A popular justice, unswervingly convinced of the reason and reasonability of twelve—or any number of—peers, needs no appellate review to an authority higher than the people. The *vox populorum* is final. Such was true of the early Roman law,[3] as well as early common law.[4] Indeed, the English common law was exceedingly slow in recognizing any judicial review in criminal cases.[5] When appellate review was finally recognized, it was not a matter of right, but was permitted only upon consent of the Crown.[6] Not until 1705 did review upon request become permissible in cases involving misdemeanors, and felons did not have the right of appeal until 1907.[7] Of

Criminal Sentences, 21 BROOKLYN L. REV. 2 (1954); Watkins, *Appellate Review of Sentencing Process in Michigan*, 36 U. DET. L.J. 356 (1959); Comment, 69 YALE L.J. 1453 (1960); 46 IOWA L. REV. 159 (1960).

3. During the Roman monarchy the last step of a criminal procceding was the *provocatio, i.e.*, appeal to the people following a trial before the King or judicial authority instituted by him (*e.g.*, the royal *consilium*, the *duumviri perduellionis* or the *quaestores parricidii*). LIVIUS I, 26. During the republic the trial jurisdiction passed to the people, where it was exercised either by the people as a whole or by a permanent group of popular representatives (*quaestiones perpetuae*) consisting—in our terminology—of judge and jury; consequently, the right to an appeal ceased, although the people might pardon a convicted criminal. 2 SHERMAN, ROMAN LAW IN THE MODERN WORLD 433-38 (3d ed. 1937).

4. The "appeal" of felony or larceny and similar proceedings (which was not an "appeal" in the modern sense), in vogue during the Saxon and early Norman periods of England, was soon replaced by jury trial, and from that there was no appeal to higher authority, other means of disciplining jurors for conceivable neglect of duty then being in use. ORFIELD, CRIMINAL APPEALS IN AMERICA 14-25 (1939).

5. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 213 (5th ed. 1956); 1 HOLDSWORTH, A HISTORY OF ENGLISH LAW 214-16 (7th ed. 1956); 2 POLLOCK & MAITLAND, THE HISTORY OF ENGLISH LAW 664 (2d ed. 1898); Sobeloff, *supra* note 2.

6. PLUCKNETT, *op. cit. supra* note 5, at 213.

7. 46 IOWA L. REV., *supra* note 2, at 160; Regina v. Paty, 2 Salk. 503, 91 Eng.

course, once appellate remedies for the correction of errors of law below were recognized, an "unlawful" sentence was obviously subject to appeal, though, at the beginning, the courts were not at all certain as to what the disposition should be. For example, in *King v. Ellis* the defendant had been sentenced to fourteen years of transportation beyond the seas, when the statute provided for a maximum of only seven years. On behalf of the Crown it was suggested that the court should let the sentence stand as to seven years, or remand for resentencing. But the court rejected both ideas: "If the prisonor [sic] is sent out of the country for fourteen years, who is to say that he is to be discharged at the end of seven?" Furthermore, the court said "that [a] judgment being erroneous, we think there is no ground to send it back to be amended. The consequence is, that the judgment pronounced by the Court below must be reversed," and the defendant was discharged.[8] A similar situation arose in *King v. Bourne,* and the court relied upon *King v. Ellis* as authority. The court added that it did not have the power to modify the sentence itself, and that precedent for any other mode of proceeding was wanting.[9]

It thus became the established practice in England to review illegal sentences in the same manner as any other error of law below, and to discharge the defendant completely if the sentence was indeed illegal.[10]

The early American practice was entirely in accord with the early English practice.[11] But such a "windfall" procedure did not recommend itself to the popular dictates of justice,[12] and now it is generally accepted that appellate courts have the power to provide for the correction of sentences which exceed statutory limitations.[13] The courts employ two methods: the

Rep. 431 (K.B. 1705) (misdemeanors); Criminal Appeals Act, 1907, 7 Edw. 7, c. 23, § 3 (felonies). This latter statute gave a "right of appeal to the Court of Criminal Appeal against conviction and sentence . . . to any person convicted on indictment except in the case of a . . . sentence fixed by law." 10 HALSBURY, LAWS OF ENGLAND 521 (3d ed. 1955).

8. King v. Ellis, 5 B. & C. 395, 399-400, 108 Eng. Rep. 147, 149 (K.B. 1826).

9. King v. Bourne, 7 Ad. & E. 58, 112 Eng. Rep. 393 (K. B. 1837).

10. 46 IOWA L. REV., *supra* note 2, at 159.

11. Shepherd v. Commonwealth, 43 Mass. 419 (1841); Elliott v. People, 13 Mich. 365 (1865); ORFIELD, *op. cit. supra* note 4, at 101.

12. For a discussion of the process involved by which the appellate courts assumed power to correct illegal sentences, see ORFIELD, *op. cit. supra* note 4, at 101-02; Watkins, *supra* note 2, at 359-64 (with particular emphasis on Michigan's attempt to allow appellate courts to affirm the legal part of the sentence, and reverse as to the excess without releasing the defendant); State v. Johnson, 67 N.J. Super. 414, 424-32, 170 A.2d 830, 836-40 (Super. Ct. 1961) (the court, in determining that it has the right to review legal but excessive sentences, reviews the history of the appellate review of sentences in New Jersey).

13. 46 IOWA L. REV., *supra* note 2, at 160; ORFIELD, *op. cit. supra* note 4, at 101; Annot., 89 A.L.R. 295, 296 (1934); ABBOTT, CRIMINAL TRIAL PRACTICE § 789, at 1447 (4th ed. 1939); Johnson v. United States, 32 F.2d 127 (8th Cir. 1929); Goode v. United States, 12 F.2d 742 (8th Cir. 1926); Salazar v. United States, 236 Fed. 541 (8th Cir. 1916).

case may be remanded for resentencing,[14] or the appellate court may modify the sentence itself and affirm the judgment as so modified.[15] The latter method has the stamp of approval of the American Law Institute's Code of Criminal Procedure.[16]

A society which predetermines "justice" prospectively by legislation—thereby equating justice and positive legality and balancing justice with value and punishment with harm—needs no appellate power beyond that of reviewing the legality of the sentence and proceedings below, for a legal sentence is bound to be a just sentence. This is classical penology, a philosophy which has few, if any, ambitions (perhaps for want of knowledge and sophistication) to use the power to punish as a socio-political manipulant, or at least which thinks of manipulation only on the legislative level (viz., when deciding upon the "appropriate" punishment which a given crime type may call for). Such was the Anglo-American penal law of the early nineteenth century.

III. Evolution of Review of Legal but Excessive Sentences

Classicism in penology, which seeks to assess for each crime its "just" punishment, began to wither away with the growth of the conviction that no statutory definition of a crime is narrow enough to encompass only one class of evil acts or evildoers. The premeditated killing by a highwayman is not like the premeditated killing by a deserted, desperate and destitute mother of her illegitimate and deformed child, and the *animus furandi* of the thief of a shipload of Canadian fur is unlike the *animus furandi* of the desperate wench who takes a rabbit skin to keep her child from freezing. And thus, while classic penology kept insisting that the punishment must be apportioned in accordance with the harm created and the animus which accompanies wrong-doing, it had to admit that these objectives cannot be achieved with a penal code which posits one and the same punishment for a vast act-group broadly defined. It thus became necessary to permit discretion in sentencing and, consequently, the nineteenth century witnessed the growth of the system of alternate punishments and "minimax" statutes.[17]

But as soon as a legal system recognizes the need for determining the

14. Millich v. United States, 282 Fed. 604 (9th Cir. 1922); Dorsey v. State, 179 Ind. 531, 100 N.E. 369 (1913); Kennedy v. State, 62 Ind. 136 (1878); State v. Tyree, 70 Kan. 203, 78 Pac. 525 (1904); State v. Carton, 102 N.J.L. 318, 133 Atl. 403 (Ct. Err. & App. 1926).

15. Salazar v. United States, *supra* note 13; Burch v. State, 55 Ala. 136 (1876); Indian Fred v. State, 36 Ariz. 48, 282 Pac. 930 (1929); Russell v. State, 112 Ark. 282, 166 S.W. 540 (1914) (illegal amount reduced to legally permissible amount).

16. ALI Code of Criminal Procedure § 459(1) (1930).

17. *I.e.*, those setting minimum and maximum punishments among which the court must choose.

"justice of the case," there will arise the need for some form of control over the trial judge's discretion in imposing sentence, for the "justice of the case" may strike different judges differently. What to one may be a ground of mitigation may to another be a ground of aggravation. The result is bound to be a vast disparity in sentencing within that frame of discretion within which the judges are authorized to speak. The Iowa Code commissioners in discussing a proposal for the mandatory reporting of testimony in all criminal cases, put their objective in these terms:

> We propose to apply it to another equally important purpose, to allow it to be used on an appeal to the Supreme Court, in order to remedy a mischief universally admitted, we believe, to exist, viz.: the inequality of punishment in cases of conviction in the different judicial Districts . . . in one District, the Court will, perhaps, sentence the defendant to imprisonment in the penitentiary for *one* year, whilst in another District, another defendant for a similar offense, committed under precisely similar circumstances and accompanied with similar circumstances of aggravation or alleviation, will be sentenced by the Court for *two, three, four* or *five,* or more years,—and for this the law as it now stands affords no remedy, but the pardoning power, vested in the Governor. . . . Is this as it ought to be? We think it is not. [Under the proposed change] equality of punishments will be secured, at least, in a great measure. Inequality in this respect is injustice. One tribunal can, at least, approximate to equality.[18]

The objective of the Iowa Supreme Court—and the courts of those states which, with or without statutes, followed the Iowa example—was quite clear: it was "uniformity." And uniformity was understood to encompass the differential treatment of cases which the legislature, by grouping them as one and the same issue had regarded as substantially alike, and which, on judicial examination, appear capable of sub-grouping. The judicial task of creating uniformity, thus, was meant to be the ascertainment of sub-group likeness, so as to permit the imposition of sub-group uniform punishments within the legislatively established frame. Such uniformity, or equalization, could be achieved only by a supreme tribunal with supervisory power over all trial courts.

Naturally, the task thus created for supreme courts was not an easy one. Trial courts were (and still are) not in the habit of assigning specific reasons for the particular sentence they impose. What standards should govern a supreme court in its onerous task? In the late nineteenth century, the appellate courts would simply consider all the facts apparent from the trial

18. SMYTH, BARKER & DARWIN, REPORT OF THE CODE COMMISSIONERS OF THE 8TH GENERAL ASSEMBLY OF THE STATE OF IOWA 117-18 (1859), as quoted in Hall, *supra* note 2, at 762-63. (Italics in original.) For an excellent bibliography dealing with sentence disparities see *Disparity in Sentencing of Convicted Defendants,* in INSTITUTE OF JUDICIAL ADMINISTRATION (1954). For federal recognition of the problem of the disparity of criminal sentences see Doub, *Recent Trends in the Criminal Law,* 46 A.B.A.J. 139, 141 (1960).

record. From these might be gleaned "the justice of the case," a relatively objective (since typified) "justice." Inevitably, subjective elements would enter into the determination; but during this entire early period of appellate review of "excessive" sentences, "uniformity" was regarded as a jurisprudential goal itself, and this uniformity was determined on the basis principally of the "like act," rather than the "like actor."

The Iowa statute led to the passage of similar laws in a few other jurisdictions,[19] but we cannot speak of a marked trend at that time. In nineteenth century America one was reluctant to disturb the discretion of the trial judge; after all, he had the defendant before him, an opportunity denied the appellate court. Of course, courts which were given the power of sentence review exercised it sparingly, not to say formalistically, only in cases of clear abuse of discretion on the part of the trial judge. Such abuses were not easily proven. Strong showings of passion or prejudice were usually required.[20]

Those who had hoped that the introduction of the appellate sentence review power would develop systems of jurisdiction-wide sentencing policies or even penological theories and practices were utterly disappointed. Nor, indeed, can judges suffering from caseload burdens be expected to develop such policies. Guide-lines must be established by others who are not similarly handicapped, such as the scholarly branch of the profession. Nevertheless, as we follow the sentence review decisions through the decades, we can note a shift from the *mere* "justice of the case" practice to more specific considerations of a policy nature. Professor Hall has documented this shift in detail; he speculated for the first third of the twentieth century that appellate courts cater to the retribution (he called it vengeance) theory in cases evoking emotional reactions from the community, especially in homicide cases; that they cater to the neutralization theory (the "recidivist" principle) in cases likely to lead to recidivism; and that they cater to the deterrence theory if the crime[21] is one which the population is prone otherwise to commit. All three of these tendencies, he felt, are subject to limitations imposed by the popular sense of justice.[22] It remains to be seen whether such concern with only one of many penological theories in a given case will satisfy the ends of penal policy.

While concern for the "generally preventive" aspects of punishment[23] has remained with us, the concern for the particular offender has grown over the years. When Hall wrote his now classic article, judges and

19. Hall, *supra* note 2, at 522-23.

20. *Id.* at 526-28.

21. For an analysis of appellate review of legal but excessive sentences from the point of view of the type of crime committed, rather than the particular jurisdiction, see Annots., 29 A.L.R. 313, 321 (1924), 89 A.L.R. 295, 300 (1934).

22. Hall, *supra* note 2, at 782-83.

23. Those aimed at the community, rather than the specific offender.

criminologists were earnestly emphasizing the search for the "ascertainable reason for individualization."[24] During the second third of the twentieth century, the practice of actor-related penology, as distinguished from act-related penology, has been prominent. This was best expressed by the Supreme Court of Pennsylvania in *Commonwealth v. Green,* a recent decision setting aside a sentence of capital punishment: "The court below in determining the appropriate penalty considered the criminal act, but not the criminal himself and in so doing committed an abuse of discretion."[25]

IV. American Law on Sentence Review Today and Tomorrow

Despite all penological advances, only fifteen American jurisdictions (and England) have either specific statutes authorizing modification of a legal, but excessive sentence, or precedents establishing such a procedure.[26] The remaining jurisdictions either have not had an opportunity to rule on this question or have specifically negated the power of the appellate court so to act. Since the law of each jurisdiction will be examined in detail in Appendix B, we may here restrict the discussion to the practices of a few representative jurisdictions.

A. States With Express Statutory Authorization

The State of Arizona exemplifies a jurisdiction which has specific statutory authorization of appellate modification of legal but excessive sentences. The statute provides:

> Upon an appeal from the judgment or from the sentence on the ground that it is excessive, the court shall have the power to reduce the extent or duration of the punishment imposed, if, in its opinion, the conviction is proper, but the punishment imposed is greater than under the circumstances of the case ought to be inflicted. In such a case, the supreme court shall impose *any legal* sentence, not more severe than that originally imposed, which in its opinion is proper. Such sentence shall be enforced by the court from which the appeal was taken.[27]

Such a statute permits the widest possible latitude. Perhaps the appellate power to substitute its own sentence is undesirably broad, absent mandatory provisions under which the trial judge must submit an opinion in which he assigns the reasons for the sentence he has imposed. For, if the appellate tribunal must operate by gness or from chance remarks and circumstances, it might be better to remand the case for resentencing upon full considera-

24. Hall, *supra* note 2, at 763.

25. 396 Pa. 137, 150, 151 A.2d 241, 247 (1959).

26. See Appendices for details: Arizona, Arkansas, Connecticut, Hawaii, Idaho, Iowa, Massachusetts, Nebraska, New Jersey, New York, Oklahoma, Oregon, Pennsylvania, Tennessee, United States federal jurisdiction.

27. Ariz. Rev. Stat. Ann. § 13-1717(B) (1956). (Emphasis added.)

tion of all factors, rather than to reduce the sentence at the highest level.

As for the particular Arizona statute, we have no indication that it has led to incongruous dispositions. As a matter of fact, the Arizona Supreme Court has been extremely conservative in its application.[28]

Hawaii, similarly, has a statute which authorizes the state supreme court "in a criminal case, if in its opinion the sentence is illegal or excessive, . . . [to] correct the sentence to correspond with the verdict of finding or reduce the same . . . ."[29] This statute has been correctly interpreted as authorizing modification of legal but excessive sentences by the Hawaii Supreme Court.[30]

The appellate courts of Connecticut and Massachusetts (like the English courts[31]) have the specific statutory power to review, to decrease and even to increase sentences imposed below.[32] In both states the grant of these powers is implemented by a unique procedure for sentence review.

Following the example set by Massachusetts in 1943,[33] the Connecticut legislature established a review division composed of three judges of the superior court in a state-wide court of original jurisdiction.[34] With the exception of minor differences,[35] the procedures followed in the two states are similar. The judges meet on an informal basis with the defendant or his counsel and a representative of the prosecuting authority. The trial judge may be consulted. The existence of this review body in no way affects any other procedural remedies.

This new approach to the problem of sentence review has not gone unnoticed, for at least two additional states have established committees to study the feasibility of adopting a similar procedure.[36]

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28. State v. Castano, 89 Ariz. 231, 360 P.2d 479 (1961). The sentence was not excessive merely because it did not give the defendant, a first offender, the minimum sentence; nor could the punishment be regarded as "cruel and unusual," since it was within statutory limits; nor does the fact that others, apparently less worthy than defendant, have received lesser sentences, mean that the defendant is denied due process or equal protection of the laws.

29. HAWAII REV. LAWS § 212-14 (1955).

30. Territory v. Masami Idemota, 39 Hawaii 152 (Cir. Ct. 1951); Territory v. Kunimoto, 37 Hawaii 591 (Cir. Ct. 1947).

31. Criminal Appeals Act, 1907, 7 Edw. 7, c. 23, § 4(3); 10 HALSBURY, LAWS OF ENGLAND 541-42 (3d ed. 1955). A summary of the English practice is found in *The Principles of Passing Sentence, as Shown by Cases in the Court of Criminal Appeals*, 86 JUST. P. 61, 75, 87 (1922).

32. CONN. GEN. STAT. ANN. § 51-196 (1958); MASS. GEN. LAWS ANN. c. 278, § 28B (1956); see also Act No. 136 of the Philippine Commission § 39 (1901), which allowed an appellate court to increase a legal but excessive sentence.

33. MASS. ANN. LAWS c. 278, §§ 28 A-D (1956).

34. CONN. GEN. STAT. ANN. §§ 51-194 to -197 (1958). For a discussion of the Connecticut procedure see Comment, 69 YALE L.J. 1453 (1960).

35. PRELIMINARY REPORT OF THE MARYLAND STATE BAR ASSOCIATION SPECIAL COMMITTEE TO STUDY THE REVIEW OF SENTENCES IN CRIMINAL CASES (1962) (mimeo) [hereinafter cited as MARYLAND REPORT].

36. REPORT OF NEW JERSEY SUPREME COURT'S COMMITTEE ON CRIMINAL PROCEDURE

It should be pointed out, however, that while years ago no serious constitutional questions would have arisen,[37] at least as far as these statutes are concerned, contemporary constitutional doctrine may well result in the unconstitutionality of the appellate power to increase the sentence.[38]

B. States With Implied Statutory Authorization

The New York statute bestows upon its appellate tribunals the power of appellate sentence review in a covert manner:

> Upon hearing the appeal the appellate court may, in cases where an erroneous judgment has been entered upon a lawful verdict, or finding of fact, correct the judgment to conform to the verdict or finding; *in all other cases* they must either reverse or affirm the judgment or order appealed from or reduce the sentence imposed to a sentence not lighter than the minimum penalty provided by law for the offense of which the defendant or defendants have been convicted and in cases of reversal, may, if necessary or proper, order a new trial.[39]

The term "erroneous" used in the first part of the statute appears to authorize review of illegal sentences, while "all other cases" has been interpreted to include legal but excessive sentences, so that the New York appellate courts do have the power of appellate review of excessive sentences.[40] Note should be taken of a New York peculiarity. The reviewing power of the New York Court of Appeals (the highest state court) is limited by a constitutional provision.[41] On the basis of this limitation it has been held that, save for capital cases, the court of appeals has no power to

(1961) (mimeo). With reference to the State of Maryland, see MARYLAND REPORT, *op. cit. supra* note 35.

37. For a discussion of the constitutional questions see Ocampo v. United States, 234 U.S. 91 (1914) (holding the Philippine Act constitutional, as applied to a defendant whose punishment had been increased after sentence appeal); Kepner v. United States, 195 U.S. 100 (1904) (holding Philippine Act unconstitutional under the double jeopardy clause of the fifth amendment, but only insofar as the act allows sentence increase upon appeal by the government).

38. See Green v. United States, 355 U.S. 184 (1957), so far extending only to situations involving different degrees of the crime, not *yet* solving the question where the penalty increase is within the same degree of the crime. Conceivably, however, the double jeopardy prohibition may extend that far.

39. N.Y. CODE CRIM. PROC. § 543(1). (Emphasis added.)

40. People v. Potskowski, 298 N.Y. 299, 83 N.E.2d 125 (1948) (court of appeals affirming the right of the appellate division to extend mercy by reducing a legal but excessive sentence); People v. Gold, 7 App. Div. 2d 739, 180 N.Y.S.2d 723 (1958) (appellate division reducing a legal but excessive sentence); People v. Pannone, 8 App. Div. 2d 608, 184 N.Y.S.2d 677 (1959) (on the basis of the court reports and probation record, appellate division modifying a judgment so as to allow separate sentences to run concurrently, rather than consecutively); People v. Downs, 5 App. Div. 2d 935, 172 N.Y.S.2d 377 (1958).

41. See N.Y. CONST. art. VI, § 7, providing that, with the exception of a judgment of death, the jurisdiction of the court of appeals is limited to the review of questions of law.

review the appropriateness of discretionary sentences.[42] Therefore, the review of legal but excessive sentences in New York is limited to the appellate division of the supreme court, except for capital punishment.

Arkansas also has a generally worded statute, judicially interpreted to authorize appellate review of legal but excessive sentences. The statute reads:

> The Supreme Court may reverse, affirm or modify the judgment or order appealed from, in whole or in part and as to any or all parties, and when the judgment or order has been reversed, or affirmed, the Supreme Court may remand or dismiss the cause and enter such judgment upon the record as it may in its discretion deem just . . . .[43]

The Arkansas courts have unhesitatingly accepted this statute as authorization of appellate review of legal but excessive sentences.[44]

Idaho has a similar statute, which reads as follows: "The court may reverse, affirm, or modify any or all of the proceedings subsequent to, or dependent upon, such judgment or order, and may, if proper, order a new trial."[45] In Idaho, however, the court assumes its right to modify a legal, but excessive sentence without the slightest mention of statutory authority.[46]

The last state to be discussed in this group is Pennsylvania. The statute provides: "The supreme court . . . shall have power . . . , as well in criminal as in civil pleas or proceedings, . . . to reverse, modify, or affirm . . . judgments . . . as the law doth or shall direct . . . ."[47] On the basis of this statute, the court for the first time exercised its discretion in reversing a legal but excessive sentence in *Commonwealth v. Garramone*.[48] The defendant, upon arriving home, found that his son had been beaten by a neighbor. The defendant was so provoked by seeing his family in a near state of shock that he took the law into his own hands and shot the agitator. Upon review of the death sentence imposed by the trial court, the supreme court held that an abuse of discretion had occurred. The court said that the trial judge abused his authority by not considering the provoking circumstances of the crime, as well as the favorable background of the defendant. It thereupon reversed and remanded with instructions that the defendant be sentenced to life imprisonment.

This view was followed in the much discussed[49] case of *Commonwealth*

42. People v. Minjac Corp., 4 N.Y.2d 320, 151 N.E.2d 180 (1958); People v. Speiser, 277 N.Y. 342, 14 N.E.2d 380 (1938).
43. ARK. STAT. § 27-2144 (1947).
44. Hadley v. State, 196 Ark. 307, 117 S.W.2d 352 (1938); Simpson v. State, 56 Ark. 8, 19 S.W. 99, 102 (1892); Gugson v. State, 257 S.W.2d 1021 (1952).
45. IDAHO CODE ANN. § 19-2821 (1947).
46. State v. Neil, 13 Idaho 539, 90 Pac. 860, *rehearing denied*, 91 Pac. 318 (1907).
47. PA. STAT. tit. 17, § 41 (1936).
48. 307 Pa. 507, 161 Atl. 733 (1932); see also Annot., 89 A.L.R. 295 (1934).
49. Mueller, *Criminal Law and Procedure*, 35 N.Y.U.L. REV. 111, 139 (1959).

v. Green,[50] decided in 1959. There the appellate court found that the trial court had abused its discretion by determining the sentence on the basis of the criminal act alone, not having considered the criminal himself.

> The defendant Green was a boy with an I.Q. of 80, convicted of murder and sentenced to end his life at the age of fifteen. The majority of the Pennsylvania Supreme Court found age and I.Q. to have been the only subjective factors which the trial court considered in the exercise of its statutorily imposed discretion to impose the death penalty. One trial judge, however, had considered that Green was part of a crime wave caused by juvenile delinquents. The court's dissenter believed that other subjective factors were considered by the trial court, *i.e.*, the defendant's troubled history, *e.g.*, the psychological report indicating that "social mores were not taught by his family." Obviously, the dissent wanted to make the point that the trial court exercised proper judicial discretion with many subjective factors before it. The majority found an abuse of discretion in *not* considering enough subjective factors. The third possibility, overlooked by both majority and dissent, would have been to find that the trial court abused its discretion because, on the subjective factors before it, the defendant's punishment should not have been death, since, *e.g.*, he certainly cannot be blamed for not having received any moral education from his parents.[51]

The effect of this decision is to create a presumption in favor of the defendant, so that the death penalty is imposable "*only* when it is the sole penalty justified both by the criminal act and the criminal himself . . . ."[52]

In 1959, the State of Pennsylvania amended its murder statute so as to deprive the trial judge of his discretion in determining whether death or life imprisonment shall be imposed. In cases where a jury trial is had, and a verdict of murder in the first degree is entered, "the court shall proceed to receive such additional evidence not previously received in the trial as may be relevant and admissible upon the question of the *penalty* to be imposed upon the defendant, and shall permit such argument by counsel, and deliver such charge thereon as may be just and proper in the circumstances."[53] In the event that the jury can not reach a decision on the punishment imposed, "the court shall sentence the defendant to life imprisonment upon the verdict theretofore rendered by the jury, and recorded as foresaid."[54] The judge has the sole responsibility for selection of the appropriate punishment only in cases decided without a jury.

The statute marks considerable progress in penological practice. At the same time it must be admitted that it imposes serious burdens on the

50. 396 Pa. 137, 151 A.2d 241 (1959).
51. Mueller, *supra* note 49.
52. Commonwealth v. Green, *supra* note 50, at 247. (Emphasis added.)
53. PA. STAT. tit. 18, § 4701 (Supp. 1959). (Emphasis added.) This statute follows California practice. See CAL. PEN. CODE § 190.7 (Supp. 1959).
54. PA. STAT. tit. 18, § 4701 (Supp. 1959).

supreme court. For example, since the death penalty lacks any penological basis, what factors, sociological or whatever else, should be considered in selecting this man to die and that man to live?

Nevertheless, the statute is a logical first step in the implementation of the modern penal policy of imposing a socially useful punishment in each case. It is clear that this cannot be done merely upon the evidence admissible on the question of the defendant's liability for the particular crime charged. A separate hearing, after the issue of guilt has been established, is therefore the most appropriate means for receiving evidence bearing solely on the type and amount of punishment called for in the given case. While we believe that the universal introduction of the split sentence statute applicable to all criminal cases would minimize the need for appellate review of legal but excessive sentences, sound penological theory nevertheless requires a supervision of the sentencing discretion. Indeed, unsupervised discretion ceases to be discretion and becomes absolute power.

C. Appellate Review of Excessive Sentences by Case Law

As late as 1942 it had been relatively certain in New Jersey that an appellate court may not review a legal sentence merely charged to be excessive, since the quantum of the sentence, within the statutory framework, was subject to judicial discretion.[55] But over the years the courts' language sounded less and less emphatic. By 1957 it was said that, quite apart from statutes, New Jersey appellate tribunals have the power to correct not ouly illegal but also "improper" sentences;[56] and in 1961 this power was actually exercised, in line with what appears to be a national trend, albeit a slow one, statute or no statute. For example, the appellate courts will now correct the sentence if it was "very much greater than the proper protection of society demands."[57]

D. No Appellate Review of Legal but Excessive Sentences

In the vast majority of American states, penology has not yet entered the supreme court temples. Montana is a demonstrative jurisdiction. The Montana appeals statute, of long standing, grants the supreme court the power to "reverse, affirm, or modify the judgment or order appealed from . . . or modify any or all of the proceedings subsequent to, or dependent upon, such judgment or order . . . ."[58] Yet, despite such statute, the Montana Supreme Court thought itself without authority to modify or remand a judgment, even though the sentence appeared greater than deserved.

55. State v. Newman, 128 N.J.L. 82, 88, 24 A.2d 206 (Sup. Ct. 1942).
56. State v. Culver, 23 N.J. 495, 505-06, 129 A.2d 715, 721 (1957).
57. State v. Johnson, 67 N.J. Super. 414, 170 A.2d 830, 840 (Super. Ct. 1961) (quoting Montalto v. State, 51 Ohio App. 6, 199 N.E. 198, 200 (Ct. App. 1935)).
58. MONT. REV. CODES ANN. § 94-8210 (1947).

The court felt disinclined to tamper with what it regarded to be executive prerogative.[59]

E. Federal Law

The Judicature Act of 1879[60] allowed the old circuit courts to review and modify legal but excessive sentences as well as illegal sentences imposed by lower federal courts.[61] In 1881, when the appellate jurisdiction of the circuit courts was transferred to the circuit courts of appeals, no similar power was given to these new courts. The review power was deemed abrogated,[62] and such was the unquestioned law until 1960, when the landmark case of *United States v. Wiley* reached the Seventh Circuit for the second time.[63] The defendant had pleaded not guilty to a charge of knowing possession of an interstate shipment of stolen goods. He was tried before a judge and sentenced to three years of imprisonment, and his request for probation was denied. The case went on appeal to the Court of Appeals for the Seventh Circuit. The appeals judges indicated that they would have granted probation had they been in the district court's place, but found that failure to grant probation did not amount to an abuse of discretion. Nevertheless, they regarded the legal sentence as excessive, basing their view on the facts, revealed by the trial record, that the defendant was a minor without prior conviction, whereas the "ringleader," who had four previous felony convictions, had been sentenced to only two years in the penitentiary. The court added that the defendant's not guilty plea should not prejudice his standing.[64] The three-year sentence was set aside and the case was remanded "for a proper sentence not inconsistent with the views herein expressed."[65]

On remand the district court questioned the legality of the court of appeals' disposition.[66] It reaffirmed its belief in the propriety of the three-year sentence and reimposed it. But, "out of my deep respect for the Court of Appeals, and in obedience to its mandate, I also hereby suspend the execution of the said sentence,"[67] the trial judge related.

This, then, is the first rumbling presaging a conceivable penological eruption in the federal appellate courts. Despite recent avowals to the

59. State v. Shaffer, 59 Mont. 403, 197 Pac. 986 (1921).
60. Ch. 176, § 1, 20 Stat. 354.
61. United States v. Wynn, 11 Fed. 57 (C.C.E.D. Mo. 1882); Bates v. United States, 10 Fed. 92 (C.C.N.D. Ill. 1881).
62. Jackson v. United States, 102 Fed. 473 (9th Cir. 1900).
63. 278 F.2d 500 (7th Cir. 1960). See Comment, 10 DE PAUL L. REV. 104, 105 (1960); Note, 109 U. PA. L. REV. 422 (1961).
64. On this point see also the first appeals decision, United States v. Wiley, 267 F.2d 453 (7th Cir. 1959).
65. United States v. Wiley, *supra* note 63.
66. United States v. Wiley, 184 F. Supp. 679 (N.D. Ill. 1960).
67. *Id.* at 688.

contrary,[68] the Supreme Court of the United States may then have to enter the realm of penology after all.

V. EVALUATION

To the superficial observer the trend toward appellate review of legal sentences may seem a penologically sound development. Is it sound as currently practiced and as currently possible?

Let us first glance briefly at the common objections voiced against the practice, so as to test their substantiality.

(1) It has been said that this power disturbs the executive prerogative to dispense mercy in the form of pardons and reprieves.[69] With due respect, the executive pardon, not being subject to any legal restraint, has absolutely nothing to do with the problem at hand. Sentencing is a judicial problem, and as long as the judiciary is vested with a discretionary range of sentences, there must be some guard against a possible abuse of such discretion, just as there is appellate supervision over every other exercise of judicial discretion.

(2) It has been argued that the review power is inconsistent with the trial judge's discretion. But there is no such thing as an unsupervised discretion; it would be anarchy. This argument could only be made, it would seem, by those who are unaware of the dimensions of "discretion."[70]

(3) One argument which conceivably could be made is a formalistic one. It might be argued that statutes authorizing appellate courts to affirm, modify or reverse "judgments" are not designed to cover like power with respect to sentences. Such an argument would overlook the fact that the sentence is an integral part of the judgment, at least according to the better authorities.[71]

(4) Some statutes employing the term "modify" have been construed as not authorizing appellate courts to *modify* excessive sentences.[72] It might be asked, however, what "modify" means if it does not mean "to

68. Gore v. United States, 357 U.S. 386, 393 (1958).

69. Watkins, *Appellate Review of Sentencing Process in Michigan*, 36 U. DET. L.J. 356, 375 (1960); 46 IOWA L. REV. 159, 165-66 (1960); Cummins v. People, 42 Mich. 142, 3 N.W. 305 (1879); People v. Freleigh, 344 Mich. 306, 54 N.W.2d 599 (1952).

70. Watkins, *supra* note 69, at 369, 377; Cummins v. People, 42 Mich. 142, 144, 3 N.W. 305 (1879) ("the statute gives a wide discretionary power to the trial court upon the supposition that it will be judicially exercised in view of all the facts and circumstances appearing at the trial"). See ORFIELD, CRIMINAL APPEALS IN AMERICA 104-05 (1939); 46 IOWA L. REV., *supra* note 69, at 165.

71. Citations, pro and con, are collected in ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 535-37 (1947).

72. Watkins, *supra* note 69, at 374; ORFIELD, *op. cit. supra* note 70, at 104-05; 46 IOWA L. REV., *supra* note 69, at 165.

modify." It would seem that lack of statutory authorization cannot be seriously argued where such terminology is used.

(5) It is said that an appellate tribnnal is handicapped in not having had the benefit of personal observation of the defendant in court and that it has insufficient information from below on which to render an intelligent decision on the sentence entered.[73] This argument seems to be directed primarily against the substitution of a new sentence by the appellate court itself, as distinguished from a remand for possible resentencing. Even so, while it is true that the appellate court can act only on what is sent before it, there is no reason why trial judges cannot be ordered to detail their observations and data on which they based the sentence, *e.g.*, pre-sentence investigation reports. This report and the judge's opinion then should become part of the record on appeal (as it already is in many jurisdictions).[74]

(6) If no further arguments were available against appellate review of excessive sentences, one might well embrace the new policy without hesitation. But there remains the argument forcefully made in a recent leading article, an argument striking at the heart of the matter:[75]

> Appellate courts seem ill-adapted to the function of reviewing and revising the sentences of trial judges, besides being too preoccupied with other functions. The creation of a new authority, with the single responsibility of equalizing sentences initially imposed, to the end of assuring that they reflect uniform concepts of degrees of blameworthiness, is a tempting possibility. Short of this expedient, the only institutional machinery presently available in most American legal systems is the parole board.[76]

While agreeing on the need for a central review agency, I beg to differ in a number of material respects. Appellate courts are not too preoccupied with "other functions." If law has drawn penology within its orbit, and

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73. Sobeloff, *A Recommendation of Appellate Review of Criminal Sentences*, 21 BROOKLYN L. REV. 2, 10 (1954).

74. *E.g.*, PA. SUP. CT. R. 30; Commonwealth v. Paul, 289 Pa. 453, 137 Atl. 606 (1927); CONN. GEN. STAT. § 51-210 (1958); N.Y. CODE CRIM. PROC. § 485; People v. Hogan, 245 App. Div. 790, 281 N.Y. Supp. 70 (1935).

75. Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401 (1958). Recounting the detriments resulting from grievously disparate sentences as ruinous to the convict's morale and conducive to prison riots, the author points to two conceivable answers: "[E]ither by the laying down of quite precise rules of decision . . . , or by subjecting heterogeneous discretionary decisions to review and revision by a single tribunal, or in both ways." *Id.* at 440. "Guides for sentencing," it appears to us, are perhaps more helpful to the trial judiciary than statutory lists of mitigating and aggravating circumstances, for no human ingenuity can list the multifariousness of factors and circumstances which, in view of a multitude of correctional purposes, ought to be considered.

For discussion of the relevant German Draft Code provisions see Mueller, *The German Draft Criminal Code 1960—An Evaluation in Terms of American Criminal Law*, 1961 U. ILL. L.F. 25, 32-33.

76. Hart, *supra* note 75, at 440.

in providing for penal and correctional sentences it has done so, it is obviously the duty of the appellate court to see to it that the law is properly served. This is an appellate function. Indeed, it is the only one, and appellate courts are not preoccupied with anything but that. True, appellate judges are as unfamiliar with the precise aspects of penological science or correctional theory as are trial judges. The answer is simple: if they are untrained, they must be trained. If they are uninformed they must gain this information. And, both trial and appellate judges must act with the advice of professional penologists. Only such a system is in keeping with the common law, a law which has been wisely hesitant to yield any of its functions to "alienists" unfamiliar with legal technique and policy. Law must remain the concern of the courts and penology has become law. We need no new authority. We already have one.

But we now come to the crucial issue. Neither "uniformity," nor "degrees of blameworthiness" can be our aim, at least not our sole aim. To be quite sure, blameworthiness is a prerequisite for the imposition of any judgment of conviction in the first place, and we shall wholeheartedly endorse the need for a better consideration of differentiations, or degrees, of the intensity and extent of blameworthiness (*e.g.*, through providing for degrees of crimes, through acceptance of the concepts of partial and diminished responsibility). But all this, as of right and justice, ought to find *primary* consideration at the stage of the verdict.

But what then ought to be the guide for imposing the "appropriate" judgment in the first place, and what similar guides must be used in reviewing the sentence?

When Professor Hall wrote his article, he said, in virtual desperation, that "the factors to be considered are for the most part so numerous, and their interaction is so complicated, that . . . legal rules may be impossible to define."[77] And we still have not progressed beyond this bewilderment. We can be certain only that the classical phase of penology, with its overemphasis on harm and act,[78] is a matter of the past and that the actor-bound penology of the early twentieth century died with the positivism which had given birth to it. Of course, our courts still consider the one or the other. But today's criminology no longer can afford to be one-sided, nor can it be two-faced. It must be all-embracing to accomplish its sole purpose: to minimize, if not prevent entirely, the occurrence of crime in this society. In other words, in imposing a sentence the trial judge, acting on the best evidence available (probation reports, etc.), gathered after verdict of guilty, must consider act and actor in the light of all the par-

77. Hall, *Reduction of Criminal Sentences on Appeal*, 37 COLUM. L. REV. 762, 767 (1937).

78. The classical penology found frequent expression in statutory and constitutional provisions like that of W. VA. CONST. art. III, § 5, providing that "penalties shall be proportioned to the character and degree of the offense."

ticular demands of penal policy, which in combination aim at the prevention of crime. Nothing short of this will suffice in the effort to arrive at that sentence within the legislatively created framework which the totality of circumstances demands. While a listing of sentence-influencing elements of act and actor is impossible—for they are as multifarious as life itself—[79] a list of the demands of penal policy is easily compiled. It includes the demands of retribution—that inextricable feeling of justice which is very much alive in our society, and which, as a moral agent, in the nature of ethicized vengeance, supports the law (to psychiatrists it appears in the individual and collective "super-ego"). It includes the demands of general prevention (or general deterrence) which uses the individual defendant, as a member of society with obligations toward it, as an object lesson for his compatriots. And it includes the demands of special prevention, among which we find the objectives of special deterrence, resocialization, neutralization and penitence. As has been demonstrated elsewhere in great detail,[80] the modern penological machinery or penal technique cannot be operated by the employment of any one lever. But even at the risk of calling forth immediate adverse reactions on the part of "social-defense" penologists, I must leave the remainder of the explanation unsaid in this connection and cross-refer to previous publications.[81]

What conclusions can we draw from this recognition insofar as appellate review of "excessive" sentences is concerned? Rather than merely looking to considerations of act or actor, the modern appellate court with review power in each case coming before it for sentence review, must ask itself this question: Does this sentence, as far as this convict in this society is concerned, serve the functional purpose of general and special prevention and accord with the popular retributive feeling of the community? If the answer clearly is no on all the evidence on which the trial court acted and which is now before the appellate court, an abuse of discretion has occurred, and the appellate court must set aside the sentence and modify or remand, as the statute may provide.

As yet, only a few appellate courts have assumed or have been granted the power of appellate review of "excessive" sentences. That their number is bound to grow in the near future, no one doubts. And as yet none of the courts with such power exercises it in terms of functional penology as here outlined. But nothing short of it can possibly suffice!

79. And there is by no means unanimity on the effect (*i.e.*, whether positive or negative) any such factor has; for example, note the factor of "lack of moral education" in Commonwealth v. Green, *supra* note 50 and accompanying text.

80. Mueller, *The Many Dimensions of Punishment as a Social Tool*, in PROCEEDINGS OF THE ATTORNEY GENERAL'S CONFERENCE ON CRIME 1-16 (Lansing, Mich. 1961), reproduced in Mueller, *The Public Law of Wrongs—Its Concepts in the World of Reality*, 10 J. PUB. L. 202, 205-14 (1962).

81. *Ibid.* See also Hart, *supra* note 75, at 440.

APPENDICES

Donald A. Statland and Irving Goldstein

A.

The following chart classifies the current law of the fifty American states and the District of Columbia. Entries have been made for each jurisdiction on whether appellate review of legal but excessive sentences is available at all (column I), and, if so, on the type of disposition which appellate courts are likely to make (column II).

In column I, the "yes" entries include those states in which the courts have specifically held that a legal but excessive sentence is reviewable by the appellate court, as well as states with statutes specifically authorizing such action. The "no" entries list those jurisdictions which have specifically denied themselves the power of appellate review of legal but excessive sentences. The "undecided" jurisdictions are those on which clear authority either way is not yet available.

	I. Availability of Appellate Review			II. Type of Disposition	
	Yes	No	Undecided	Reduced by appellate court or remanded with specific instructions	Remanded for re-sentence without specific instructions
Alabama		X			
Alaska			X		
Arizona	X			X	
Arkansas	X			X	X
California			X		
Colorado		X			
Connecticut	X			X	
Delaware			X		
Florida		X			
Georgia		X			
Hawaii	X			X	
Idaho	X			X	
Illinois			X		
Indiana		X			
Iowa	X			X	
Kansas			X		
Kentucky		X			
Louisiana		X			
Maine			X		
Maryland		X			
Massachusetts	X			X	
Michigan		X			
Minnesota			X		
Mississippi		X			

Missouri			X		
Montana		X			
Nebraska	X			X	
Nevada			X		
New Hampshire			X		
New Jersey	X			X	
New Mexico			X		
New York	X			X	
North Carolina			X		
North Dakota		X			
Ohio			X		
Oklahoma	X			X	
Oregon	X				X
Pennsylvania	X			X	
Rhode Island			X		
South Carolina			X		
South Dakota		X			
Tennessee	X			X	
Texas		X			
Utah			X		
Vermont			X		
Virginia			X		
Washington			X		
West Virginia			X		
Wisconsin		X			
Wyoming			X		
District of Columbia			X		
Total	14	15	22	13	2

B.

No attempt has been made in this appendix to list all pertinent cases; only representative decisions have been included.

ALABAMA

ALA. CODE tit. 15, § 389 (1958) gives the appellate courts of Alabama the right to "render such judgment as the law demands." This statute has not been interpreted. According to the decisional law, there is no appellate review of legal but excessive sentences. Ganey v. State, 36 Ala. App. 570, 60 So. 2d 861 (1952); Gilley v. State, 22 Ala. App. 184, 113 So. 650 (1927).

ALASKA

ALASKA COMP. LAWS ANN. § 69-6-11 (1949) allows the appellate courts, in cases of criminal appeals, to correct errors in law appearing upon the face of the judgment, or the proceedings connected therewith.

A case in point is City of Seldovia v. Lund, 138 F. Supp. 382 (D. Alaska 1956). The defendant appealed the sentence on grounds of excessiveness. However, since he had served his ten-day sentence, the court considered the question moot and dismissed the case.

ARIZONA

ARIZ. REV. STAT. ANN. § 13-1717(B) (1956) gives the appellate courts power to modify allegedly excessive sentences by imposing any legal sentence not more severe than that originally imposed. The opinions have indicated that this power will be exercised only when it appears that the sentence is excessive as a result of an abuse of discretion. State v. Castano, 89 Ariz. 231, 360 P.2d 479 (1961). *Cf.* State v. Telavera, 76 Ariz. 183, 261 P.2d 997 (1953), where the court reduced the sentence from ten-twenty years to seven-ten years for rape, involving a 17-year-old defendant.

ARKANSAS

ARK. STAT. § 27-2144 (1947) allows the reversal, affirmation, or modification of judgments by the appellate courts. Although this is a civil statute, it has been held to apply to criminal actions. Hadley v. State, 196 Ark. 307, 117 S.W.2d 352 (1938).

Upon finding a sentence to be excessive, the case may be remanded for resentencing, Simpson v. State, 56 Ark. 8, 19 S.W. 99 (1892), or the appellate court itself may modify the sentence, Blake v. State, 186 Ark. 77, 52 S.W.2d 644 (1932).

CALIFORNIA

CAL. PEN. CODE § 1260. Despite this statute authorizing appellate court review of legal but excessive sentences, some California decisions intimate that the statute authorizes only appeals from a "judgment," and that a sentence is not part of a "judgment." See People v. Dunlap, 12 Cal. App. 2d 333, 55 P.2d 522 (Dist. Ct. App. 1936); People v. Ray, 13 Cal. App. 2d 701, 57 P.2d 975 (Dist. Ct. App. 1936); People v. Kennedy, 120 Cal. App. 2d 793, 262 P.2d 24 (Dist. Ct. App. 1953); People v. Millum, 42 Cal. 2d 524, 267 P.2d 1039 (1954); People v. Pettyjohn, 172 Cal. App. 2d 188, 342 P.2d 416 (Dist. Ct. App. 1959).

Notwithstanding the supreme court decision of People v. Millum, *supra*, subsequent intermediate appellate decisions have specifically said that the sentence in a criminal action is the judgment, and an appeal lies from the judgment. People v. Tokich, 128 Cal. App. 2d 515, 275 P.2d 816 (Dist. Ct. App. 1954); People v. Clarke, 146 Cal. App. 2d 904, 304 P.2d 271 (Super. Ct. 1956).

The California courts appear to allow review of a legal but excessive sentence, if it is assumed that the sentence is a part of the judgment. People v. Harrison, 41 Cal. 2d 216, 258 P.2d 1016 (1953); People v. Rossi, 37 Cal. App. 778, 174 Pac. 916 (1918).

COLORADO

COLO. REV. STAT. ANN. § 39-7-27 (1953) provides for appellate review of all legal errors in criminal proceedings.

In Maynes v. People, 119 Colo. 149, 200 P.2d 915 (1948), the court said that relief from excessive sentences was a matter for the executive, and not the judiciary. See also Gallegos v. People, 358 P.2d 1028 (Colo. 1960).

CONNECTICUT

CONN. GEN. STAT. § 51-196 (1958) provides for the *increase* or decrease of legal but excessive sentences by the specially created review division of the superior court. State v. Tirella, 22 Conn. Supp. 25, 158 A.2d 602 (Super. Ct. 1959) and State v. Gonski, 21 Conn. Supp. 468, 159 A.2d 182 (Super. Ct. 1958) exemplify appellate court reduction of legal sentences. See text for further discussion of Connecticut procedure.

DELAWARE

No statute or case could be found authorizing review of a legal but excessive sentence. However, DEL. SUPER. CT. (CIV.) R. 35(a), although apparently authorizing correction of illegal sentences, does suggest that a legal sentence may be reviewed by authorizing review of sentences which violate constitutional rights or are subject to any other collateral attack.

FLORIDA

Where a sentence is within the statutory limit, the extent of it cannot be reviewed on appeal regardless of existence or nonexistence of mitigating circumstances. Davis v. State, 123 So. 2d 703 (Fla. 1960); LePrell v. State, 124 So. 2d 18 (Fla. Dist. Ct. App. 1960).

GEORGIA

A sentence within statutory limits will not be set aside as excessive or as cruel and unusual punishment. See Curtis v. State, 102 Ga. App. 790, 116 S.E.2d 264 (1960); Brown v. State, 149 Ga. 816, 102 S.E. 449 (1920). See GA. CONST. art. 1, § 1, ¶¶ 9, 21.

HAWAII

HAWAII REV. LAWS § 212-14 (1955). Territory v. Kunimoto, 37 Hawaii 591 (1947) discusses Hawaii Rev. Laws § 9564 (1945), which is restated in section 212-14 of the 1955 revision. See Territory v. Masami Idemota, 39 Hawaii 152 (1951).

IDAHO

IDAHO CODE ANN. § 19-2821 (1947). "The court may reverse, affirm, or modify the judgment or order appealed from, and may set aside, affirm or modify any or all of the proceedings subsequent to, or dependent upon, such judgment or order, and may, if proper, order a new trial." In State v. Neil, 13 Idaho 539, 90 Pac. 860, *rehearing denied*, 91 Pac. 318 (1907), the court remanded with directions to the trial court to resentence the defendant to imprisonment in the state penitentiary for the term of two years; see also State v. Ramirez, 34 Idaho 623, 203 Pac. 279 (1921) where the court reduced the sentence itself; State v. Owen, 73 Idaho 399, 253 P.2d 203 (1953) where the court modified the judgment, and affirmed it as so modified; State v. Linebarger, 71 Idaho 255, 232 P.2d 669 (1951), where the appellate court reduced the sentence in a rape conviction, claiming that the trial judge had abused his discretion.

ILLINOIS

No case could be found in which a legal but excessive sentence was challenged by the appellate court. However, the Illinois judiciary has suggested that they would do so where the penalty "is manifestly in excess of the proscription of [the constitutional requirement] . . . that all penalties shall be proportioned to the nature of the offense." People v. Smith, 14 Ill. 2d 95, 150 N.E.2d 815, 817 (1958). See People v. Stevenson, 27 Ill. App. 2d 144, 169 N.E.2d 281 (1960); People v. Brendeland, 10 Ill. 2d 469, 140 N.E.2d 708 (1957).

INDIANA

Despite a statute which says, "On appeal, the court may reverse, modify or affirm the judgment appealed from, and may, if necessary or proper, order a new trial," IND. ANN. STAT. § 9-2321 (1956), the Indiana Supreme Court has held that it can not interfere with a legal punishment because of its severity, and that the defendant's only remedy is executive clemency. Gingerich v. State, 226 Ind. 678, 83 N.E.2d 47 (1948).

IOWA

IOWA CODE § 793.18 (1946) provides that upon appeal by the defendant, the court "may affirm, reverse, or modify the judgment, or render such judgment as the district court should have done, or order a new trial, or reduce the punishment, but cannot increase it." In State v. O'Dell, 240 Iowa 1157, 39 N.W.2d 100 (1949), the court said that a sentence will be reduced if it is disproportionate to the degree of guilt. State v. Marcus, 240 Iowa 116, 34 N.W.2d 179 (1948), held a sentence excessive in view of the fact that the defendant had children, was of good moral character, and his reputation in the community was good. Therefore, the court modified the sentenco and affirmed the judgment as so modified. See also State v. Myers, 241 Iowa 670, 42 N.W.2d 79 (1950).

KANSAS

KAN. GEN. STAT. ANN. § 62-1716 (1949) provides: "The appellate court may reverse, affirm or medify the judgment appealed from, and may if necessary or proper order a new trial." In Miller v. Hudspeth, 164 Kan. 688, 192 P.2d 147 (1948), the supreme court said they will not disturb a legal sentence as long as it is not the result of partiality, prejudice, oppressien, or corrupt motive.

KENTUCKY

KY. REV. STAT. § 21.055 (1955) gives the Kentucky courts the usual powers of reversal or modification of judgments. The Kentucky court has held it has no authority to modify or reverse a sentence that is within the statutory, or legal limits. Galloway v. Commonwealth, 209 Ky. 501, 273 S.W. 63 (1925). The case left the matter to the chief executive's clemency powers.

LOUISIANA

In State v. Vittoria, 224 La. 258, 69 So. 2d 36 (1953), the court said that the length of a sentenee is a matter entirely within the discretion of the trial judge, and the appellate courts are without power to interfere except in cases of illegality (*i.e.*, where the sentence is beyond statutory bounds).

MAINE

ME. REV. STAT. ANN. c. 148, § 32 (1954): "When a final judgment in any criminal case is reversed upon a writ of error on account of error in the sentence, the court may render such judgment therein as should have been rendered or may remand the case for that purpose to the court before whom the conviction was had." No case could be found which discussed the application of this statute to legal but excessive sentences.

MARYLAND

Maryland statutes dealing with appellate court power to review sentences are unclear as to whether they authorize review of legal but excessive sentences as well as illegal sentences. MD. ANN. CODE art. 5, § 17, art. 27, § 73 (1957). However, the cases have held that the appellate eourt *can not* review legal but excessive sentences. Merchant v. State, 217 Md. 61, 141 A.2d 487 (1958); Holt v. Warden of the Maryland Penitentiary, 223 Md. 654, 162 A.2d 743 (1960).

MASSACHUSETTS

MASS. ANN. LAWS c. 278, § 28(B) (1956), provides for an appeal to the appellate division of the superior courts for the sole purpose of sentence review. This statute gives the court the power to modify *any* sentence if it so desires. In Guerin v. Commonwealth, 339 Mass. 731, 162 N.E.2d 38 (1959), the appellate division modified a sentence by allowing numerous sentences imposed upon the defendant to run con-

currently, rather than consecutively, as originally decided by the trial court. See text for further discussion of Massachusetts procedure.

MICHIGAN

This state does not permit appellate review of legal but excessive sentences. People v. Connor, 348 Mich. 456, 83 N.W.2d 315 (1957); People v. Losinger, 331 Mich. 490, 50 N.W.2d 137 (1951), *cert. denied,* 343 U.S. 911 (1952).

MINNESOTA

MINN. STAT. ANN. § 632.06 (1947) provides: "If the court affirms the judgment, it shall direct the sentence pronounced to be executed . . . . If it reverses such judgmeut, it shall either disect a new trial, or that the defendant be absolutely discharged, as the case may require." No cases could be found which interpreted the applicability of this statute to legal but excessive sentences.

MISSISSIPPI

"One of the most ınportant functions of the circuit judge in criminal cases is to determine the punishment of the accused. His actions in this regard are not reviewable on appeal." Barnes v. State, 220 Miss. 248, 70 So. 2d 920, 921 (1954).

MISSOURI

MO. SUP. CT. Rs. 27.04, .05, .06 authorize the court to reduce the extent or duration of the punishment assessed if, under the circumstances, it is greater than ought to be inflictcd. State v. Burton, 355 Mo. 792, 198 S.W.2d 19 (1946) suggests that reversal of a legal sentence is permissible upon a showing of abuse of discretion by the trial judge, to be shown by evidence indicating motives of partiality, prejudice or oppression.

MONTANA

MONT. REV. CODES ANN. § 94-8210 (1947): "The court may reverse, affirm, or ınodify the judgment or order appealed froın, and ınay set aside, affirm, or modify any or all of the proceedings subsequent to, or dependent upon, such judgment or order, and may, if proper, order a new trial. In either case the cause must be remanded to the district court with proper instruction." It has been held that this statute does not give a Montana appellate court the power to vary legal but excessive sentences. State v. Schaffcr, 59 Mont. 403, 197 Pac. 986 (1921).

NEBRASKA

NEB. REV. STAT. § 29-2308 (1956) allows the supreme court to reduce the sentence when in its opinion the sentence is excessive; it further provides that it shall be the duty of the supreme court to cnter such sentence against the accused as in its opinion may be warranted by the evidence. Miller v. State, 169 Neb. 737, 100 N.W.2d 876 (1960), affirmed the supreme court's power to intervene in case of legal but excessive sentences where there appears to have been an abuse of discretion by the trial court. See also Muzik v. State, 99 Neb. 496, 156 N.W. 1056 (1916); Cryderman v. State, 101 Neb. 85, 161 N.W. 1045 (1917); Lillard v. State, 123 Neb. 838, 244 N.W. 640 (1932); Haswell v. State, 167 Neb. 169, 92 N.W.2d 161 (1958); Ysac v. State, 167 Neb. 24, 91 N.W.2d 49 (1958).

NEVADA

NEV. REV. STAT. § 177.240 (1960) authorizes the appellate court to reverse, affirm or modify a judgment appealed from; it may, if necessary or proper, order a new trial. No case could be found discussing the application of the statute to legal but excessive sentences.

NEW HAMPSHIRE

"The supreme court shall have general superintendence of all courts of inferior jurisdiction to prevent and correct errors and abuses, shall have exclusive authority to issue writs of error, and may issue writs of certiorari, prohibition, habeas corpus, and all other writs and processes to other courts, to corporations and to individuals, and shall do and perform all the duties reasonably requisite and necessary to be done by a court of final jurisdiction of questions of law and general superintendence of inferior courts." N. H. REV. STAT. ANN. § 490.4 (1955). No cases in point could be found. However, it is suggested that the general supervisory power vested in the supreme court might be a sufficient basis for the review of legal but excessive sentences.

NEW JERSEY

A recent case reviews the New Jersey history on the subject and concludes that the superior court has the right to revise a sentence where it is manifestly excessive, even though within authorized statutory limits. State v. Johnson, 67 N.J. Super. 414, 424-32, 170 A.2d 830, 836-40 (Super. Ct. 1961).

NEW MEXICO

N.M. STAT. ANN. § 41-15-5 (1953) allows the supreme court either to affirm the sentence and have it executed, or reverse the judgment and direct a new trial, or discharge the defeudant, according to the circumstances of the case. No cases were found which interpret this statute in terms of appellate modification of legal but excessive sentences.

NEW YORK

N.Y. CODE CRIM. PROC. § 543 gives the Appellate Division of the New York Supreme Court the right to reduce any sentence to one which is within legal limits, or, if necessary and proper, to order a new trial.

The courts have held that this statute gives the appellate division the power to modify a legal bnt excessive sentence. People v. Potskowski, 298 N.Y. 299, 83 N.E.2d 125 (1948); People v. Gold, 7 App. Div. 2d 739, 180 N.Y.S.2d 723 (1958); People v. Pannone, 8 App. Div. 2d 608, 184 N.Y.S.2d 677 (1959); People v. Downs, 5 App. Div. 2d 935, 172 N.Y.S.2d 377 (1958).

Due to a constitutional limitation on the reviewing power of the New York Court of Appeals, N.Y. CONST. art. VI, § 7, it has been held that, save for capital cases, the court of appeals has no power to review the appropriatencss of discretionary sentences. People v. Minjac Corp., 4 N.Y.2d 320, 151 N.E.2d 180 (1958); People v. Speiser, 277 N.Y. 342, 14 N.E.2d 380 (1938). Therefore, the right to review legal but excessive sentences has been left to the appellate division.

NORTH CAROLINA

N.C. GEN. STAT. § 7-11 (1953) allows the supreme court to render such sentence or judgment as in their opinion the law requires.

It has been said that appellate modification is justified when there has been manifest gross abuse by the trial court. State v. Stansbury, 230 N.C. 589, 55 S.E.2d 185 (1949); State v. Downey, 253 N.C. 348, 117 S.E.2d 39 (1960).

NORTH DAKOTA

N.D. CENT. CODE § 29-28-28 (1960) gives the appellate courts the right to reverse, affirm, or modify the judgment or order on appeal. State v. Holte, 87 N.W.2d 47 (N.D. 1957), held that as long as the sentence is within the statutory limits, it is not reviewable, even though the jury's recommendation of leniency was disregarded by the trial court.

OHIO

No cases could be found interpreting the statute, OHIO REV. CODE ANN. § 2953.07 (1954), which gives the appellate courts the right to affirm or reverse the judgment or any part of it.

OKLAHOMA

OKLA. STAT. ANN. tit. 22, § 1066 (1951) gives the appellate courts the power to reverse, affirm or modify the judgment appealed from. The courts have construed the statute to allow modification of excessive but legal sentences when the administration of justice so requires. Dickson v. State, 336 P.2d 1113 (Okla. Crim. App. 1959); Ratcliff v. State, 289 P.2d 152 (Okla. Crim. App. 1955); Shewmaker v. State, 329 P.2d 858 (1958); Watson v. State, 329 P.2d 865 (Okla. Crim. App. 1958).

OREGON

ORE. REV. STAT. § 138.050 (1955) allows an appeal on the grounds of excessiveness where the defendant has pleaded guilty and has been convicted. The statute also provides for a remanding to the court of first instance for proper resentencing when the appellate court does reverse for excessiveness. State v. Peddicord, 209 Ore. 360, 306 P.2d 416 (1957).

However, after a trial upon a plea of not guilty, it has been held that the determination of a legal punishment is entirely within the "informed discretion of the trial judge." State v. Gust, 218 Ore. 498, 345 P.2d 808 (1959).

PENNSYLVANIA

PA. STAT. tit. 17, § 41 (1936) gives the appellate courts the power to reverse, modify, or affirm a lower court judgment. The supreme court has held that this statute gives appellate courts the power to modify legal but excessive sentences. Commonwealth v. Williams, 402 Pa. 48, 166 A.2d 44 (1960); Commonwealth v. Cater, 396 Pa. 172, 152 A.2d 259 (1959); Commonwealth v. Green, 396 Pa. 137, 151 A.2d 241 (1959); Commonwealth v. Hawk, 328 Pa. 417, 196 Atl. 5 (1938); Commonwealth v. Garramone, 307 Pa. 507, 161 Atl. 733 (1932); see PA. STAT. tit. 18, § 4701 (Supp. 1959) (capital sentencing); text discussion of Pennsylvania.

RHODE ISLAND

No cases could be found interpreting the general statute, R.I. GEN. LAWS ANN. § 8-1-2 (1956), allowing appellate courts to correct and prevent errors and abuses.

SOUTH CAROLINA

In interpreting S.C. CODE § 7-427 (1952), which grants appellate power to reverse, affirm or modify the judgment, the courts have held that there was no grant of jurisdiction to correct a legal but allegedly excessive sentence, unless it is the result of partiality, prejudice, oppression, or corrupt motive. State v. Bell, 215 S.C. 311, 54 S.E.2d 900 (1949); State v. Fleming, 228 S.C. 129, 89 S.E.2d 104 (1955).

SOUTH DAKOTA

State v. McFall, 75 S.D. 630, 71 N.W.2d 299 (1955), held that where the sentence imposed is within permitted statutory limits, the discretion of the trial court in fixing the term is not reviewable.

TENNESSEE

Where the judge imposes the sentence, the appellate court has the right to review legal but excessive sentences. Brooks v. State, 187 Tenn. 361, 215 S.W.2d 785 (1948). In a misdemeanor conviction, however, where the defendant avails himself of the right to have the jury impose the punishment, TENN. CODE ANN. § 40-2704 (1956),

there is no appellate review of such sentences, if legal. Ryall v. State, 204 Tenn. 422, 321 S.W.2d 809 (1959); Thompson v. State, 197 Tenn. 112, 270 S.W.2d 379 (1954).

TEXAS

Despite TEX. PEN. CODE ANN. art. 847 (1950), which gives appellate courts the power to affirm or reverse, as the law and nature of the case may require, the appellate courts have held excessive sentences to be outside the scope of review. Lewallen v. State, 166 Tex. Crim. 297, 313 S.W.2d 293 (1958); Manning v. State, 162 Tex. Crim. 329, 284 S.W.2d 903 (1955).

UTAH

UTAH CODE ANN. § 77-42-3 (1953) gives the appellate courts power to reverse, affirm or modify the judgment. No cases interpreting this statute could be found.

VERMONT

A Vermont statute provides that upon appeal to the supreme court the judgment and sentence of the lower court may be enforced. However, if error is found, the judgment and sentence of the lower court shall be reversed and judgment of acquittal rendered by the supreme court or the cause may be remanded to the lower court for a new trial. VT. STAT. ANN. tit. 13, § 7402 (1958). No case on point could be found.

VIRGINIA

VA. CODE ANN. § 19.1-288 (1950) gives the appellate court the power to affirm the judgment, if there is no error therein, or to reverse it in whole or in part. No cases on point could be found. Nevertheless, in Slayton v. Commonwealth, 185 Va. 357, 38 S.E.2d 479 (1946) the court held that a revocation of a suspended sentence is reviewable, though only upon clear showing of abuse of discretion.

WASHINGTON

On appeal from denial of a motion to the trial court to vacate the sentence and judgment, the supreme court held the trial court's refusal not reviewable in the absence of an abuse of discretion. State v. Roff, 44 Wash. 2d 309, 266 P.2d 1059 (1954). See also WASH. SUP. CT. APP. R. 16, which authorizes the supreme court to affirm, modify or reverse any judgment.

WEST VIRGINIA

W. VA. CODE ANN. § 5811 (1961) allows the supreme court to reverse, affirm or modify any judgment. No case on point conld be found.

WISCONSIN

WIS. STAT. ANN. § 251.17 (1957) gives the appellate court the power either to pronounce the proper judgment or to remit to the court below. Nevertheless, the Wisconsin court has refused to permit appellate review of legal but excessive sentences. State v. Sullivan, 241 Wis. 276, 5 N.W.2d 798 (1942), states that the trial court's imposition of a sentence more severe than the appellate court would have imposed creates no right to disturb such a discretionary sentence.

WYOMING

The supreme court is bound by the jury-imposed punishment, even though the court may disagree with it. State v. Riggle, 76 Wyo. 63, 300 P.2d 567 (1956); Hahn v. State, 78 Wyo. 258, 322 P.2d 896 (1958). A dictum in State v. Sorrentino, 36 Wyo. 111, 253 Pac. 14 (1927), states that if the trial court abuses its discretion, the appellate court may modify a legal sentenee. See also WYO. R. CIV. P. 72; WYO. STAT. ANN. § 7-292 (1957) (which applies the civil rule to criminal cases).

DISTRICT OF COLUMBIA

The first appeal above trial level in the District of Columbia goes to the municipal court of appeals. D.C. CODE ANN. § 11-722 (1951) allows the appellate court to affirm, reverse, or modify the order or judgment in accordance with law. No cases on point were found.

Further appeals go to the federal courts, where the law of the federal jurisdiction applies. See text discussion for the applicable law in the federal jurisdiction.