REPEAT OFFENDER LAWS IN THE UNITED STATES: THEIR FORM, USE AND PERCEIVED VALUE

Final Report

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the analysis of the laws and of the survey findings and the writing of the final report was done by William McDonald.

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ABSTRACT

This study examines the history, content and operation of general recidivist laws. In addition to a synthesis of existing research, it consists of an analysis of the crucial dimensions of all the general recidivist sentencing laws in effect on December 31, 1982, plus information about the operation of these laws as well as evaluations of them based on structured telephone interviews of 179 prosecutors, 91 defense attorneys, and 89 judges in 96 jurisdictions. The study finds that over more than a century of experience "habitual offender" laws never directly achieved their apparent legislative purpose of ensuring special sentences for repeat offenders. Only a small fraction of eligible habitual offenders have been and are currently being sentenced as such. But, these laws are extensively used by prosecutors to obtain convictions through plea negotiations. Prosecutors and judges are generally satisfied with the current operation of these laws. Defense attorneys are not. All parties recommend that the laws be changed; but their recommendations are primarily intended to enhance their institutional roles rather than assure that larger proportions of eligible habituals are sentenced as such. Prosecutors and defense attorneys want greater leverage in plea negotiation. Judges do not want their discretion restricted.

The failure of the habitual offender laws as sentencing instruments is due to a combination of factors including failure to adequately define the target population, the perception among practitioners that prior criminality is already being taken proper account of under the normal sentencing structure; and that the administrative and logistical problems required to meet the legal requirements of proving prior convictions are either insurmountable or not worth the effort.

Failure to adequately conceptualize the problem of habitual criminality has plagued policy initiatives. Four dimensions need to be distinguished: the seriousness of the crimes committed, the total number of them; their rate (number within a unit of time, e.g. per year); and the predicted future dangerousness of the offender. Two additional sources of confusion have been over whether these laws' purposes are as retributive or utilitarian and the inherent ambiguity of language.

Future policy choices regarding the sentencing of habitual offenders should be informed by the frank recognition of the competing values involved. Alternative policies will maximize different values. If a legislature wants to simultaneously increase the uniformity of punishments, to minimize sentencing discretion at the local level and to ensure that a record of prior criminality be given special weight, then some degree of determinant sentencing system appears to be a more appropriate choice than tacking mandatory habitual offender laws onto existing indeterminant systems. If local discretion is allowed to remain then legislatures should recognize that habitual offender laws will serve primarily to alter the balance of power

between prosecutors, defense attorneys and judges. Their primary influence will be on plea negotiations rather than directly influencing sentences. Legislatures may choose to increase the power of prosecutors over judges and defense attorneys. Habitual offender laws with mandatory minimums allow prosecutors to counteract judges whose sentencing tendencies they regard as too lenient. Habitual offender laws with broad definitions are not likely to be applied as sentences but they are likely to increase the efficient conviction of eligible offenders by strengthening the prosecutor's hand in plea negotiations. However, broad laws also increase the risk of uneven workings of the law. Narrowing the law's scope will reduce this risk but will also reduce the prosecutor's negotiating power and is not likely to substantially increase the proportion of eligibles sentenced as habituals.

INTRODUCTION

Two Policy Concerns

This study addresses two policy questions which are as complex as they are troublesome. What should society do with the offender who persists in crime even after having been previously convicted and punished? This issue is nested within a more general problem. What should be the relative contribution of the legislature and the local criminal justice officials in addressing this problem? Should public policy be formulated at the legislative level in anything more than broad outlines? Should legislatures yield to local officials substantial amounts of discretion in dealing with persistent offenders and allow them to set their own priorities based on local needs, concerns and resources? Or, should legislatures formulate precise policies and require that all jurisdictions enforce them?

These two broad policy issues cannot be settled by the present (or any other) empirical study, as the normative is incommensurable with the scientific. Nevertheless, if penal policies are to be anything more than public symbols, the choice of policy needs to be informed by an assessment of the factual conditions impinging upon the policy choices. The parameters and focus of the present study were shaped by the above two policy considerations. Our concern is with the problem of persistent criminality primarily from the perspective of what, if anything, the legislative can do to help ameliorate this problem. Any policy will have to be within budgetary and constitutional

constraints. Thus, this study has been guided by the question of how can legislatures best respond to the problem of persistent criminality within constitutional and fiscal constraints.

At the outset, it is crucial to doubly emphasize the normative nature of public policy choices and the incommensurability of the normative and the factual. Decisionmakers seeking to maximize different values may find support for alternative and even contradictory policies based on the empirical findings of this study.

On Intractabilty and Symbolic Law

The problem of the intractable offender has been as intractable as the offenders, themselves. For over 200 years American legislatures have tried persistently to develop solutions to the problem of the persistent offender. The British Parliament has been equally persistent. Yet both efforts appear to have been about as effective as the punishments applied to persistent criminals. However, despite these unedifying records of achievement, both countries continue to seek the "right" policy. This tenacity in the face of bicentennial failure is a social phenomenon worthy of explanation in its own right (although it is not within our compass to do so). It certainly justifies the suspicion that legislative concern for the persistent offender may not be motivated by pure rationality. The policies that legislatures have tried may not have been designed primarily for their instrumental (as opposed to their symbolic, political) value. In other words, we may be in danger

of taking legislatures too seriously when they claim they are trying to build better mousetraps.

Notwithstanding this caveat, we approached the problem as if it were one of rationality alone. Certainly there are sufficient complexities to the problem of defining, apprehending, convicting and treating the persistent offender to support the equally plausible, alternative conclusion. Past policies may have failed because of potentially manageable problems which were not anticipated by earlier policies but which could be by future ones.

Scope: The Heart of the Artichoke

The final scope of this project was arrived at like the heart of an artichoke by a continuous process of stripping away related but tangential issues. Its original scope was loosely defined by the National Institute of Justice (NIJ) in its solicitation of 1982. That document read:

> The National Institute of Justice is seeking research on the use of effects of certain laws and procedures which allow or require longer prison sentences for serious repeat offenders. Such laws include those specifying additional time for habitual or repeat offenders and those allowing for multiple or consecutive sentences for persons concurrently convicted of separately punishable crimes. The primary purpose of this research will be to inform the legislative process by providing information on the effectiveness of existing laws in accomplishing the goal of increasing sentences for more serious offenders.
>
> The research will have three primary objectives: 1) development of a typology of sentence enhancement laws and procedures which are currently available for use in the different states; 2) examination of the frequency with which they are invoked and the nature of the cases in which they are used; and, 3) analysis of their effects on time served by individual offenders and, to a lesser extent, their effects on the courts and correctional system. It is anticipated that the

> research will draw heavily on existing sources of statutory and empirical information but will also involve original data collection in at least two jurisdictions.

The scope of our original proposal was generally congruent with the solicitation's.[1] But the narrowing began immediately. After we were selected to submit a final proposal but before the award was made, NIJ decided to reduce the funding by half. Aware of the common belief that habitual offender laws are rarely used and given that it had recently funded a related sentencing study (Cooper et al., 1982), NIJ thought it prudent to first survey the laws and practices regarding the sentencing of repeat offenders and then do any in-depth site studies in a subsequent study should the need for them be indicated.

Even with this revision our scope remained broad. All laws relating in any way to the effect of prior conviction upon sentencing within it. This quickly proved overwhelming. All the recidivist-related sentencing provisions in a given legal system are not conveniently located in one place or under a specific reference code. Tracking them down became a monumental task which eventually exceeded the time and effort we had allowed for it and threatened to consume all our resources if lines were not drawn.

Our initial solution was to naively adopt the distinction between "general" and "specific" recidivist laws made by George Brown (1945) in his landmark analysis. As he put it, specific

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1 Except that it excluded multiple offender laws.

recidivist laws are those which provide enhanced penalties for subsequent convictions of the exact same offense. All other recidivist laws are "general." We have since found that this dichotomy is misleading (see Chapter 3). But, it was adequate for setting boundaries.

Our analysis is restricted to what Brown would call "general" recidivist laws. It consists of six major parts:

- a review of the American and British experiences with their laws which identifies hypotheses and highlights definitional and substantive issues;
- an analysis of the conceptual and definitional problems involved in scientific and policy discussions of habitual criminality;
- an analysis of all these laws in the 49 American jurisdictions which have them wherein all laws are classified along 13 dimensions and a typology of the specificity of these laws is developed and used analytically;
- three telephone surveys of national samples of 179 prosecutors, 91 defense attorneys and 89 judges in 96 jurisdictions regarding the use of, satisfaction with and recommended changes in these laws;
- a special analysis of the relationship between the new determinate sentencing laws and the traditional habitual offender laws;
- a statistical analysis of a sample of 139 cases of offenders sentenced as habituals.

Definitions

The terminology used in the literature and laws relating to offenders who persist in crime even after being punished represents a veritable Tower of Babel. No convention exists as to the name of these laws or this type of offender. He[2] is indiscriminately referred to as the persistent, incorrigible,

habitual, repeat, recidivist, serious, dangerous or career offender. The terms "repeat" or "recidivist" offender are the most neutral. They do not carry the connotations of a distinct mental or personality trait associated with the term, habitual. And they do not connote a time frame as does the term persistent. Nevertheless, in deference to common usage, we shall use the terms habitual and persistent as well as repeat and recidivist interchangeably. Moreover, we will be referring to repeat offenders whose criminal histories are of moderate to major seriousness. We do not deal with the petty scofflaw.

Prior Research

The history of research on habitual criminality can be traced back in an unbroken line to the work of the father of scientific criminology, Caesare Lombroso. The quality of that research dramatically improved in the 1970s with the work of Marvin Wolfgang and associates (1972) and the Rand studies (Chaiken and Chaiken, 1982; Petersilia et al., 1978; Peterson et al., 1981). In contrast, research on criminal justice policies and practices relating to the habitual criminal is thin and spotty. In England several studies were done of the operation of the English habitual offender laws (Morris, 1951; Taylor, 1960; Hammond and Cheyen, 1965); and the history of the English experience has been well documented (Radzinowicz and Hood, 1981).

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2 The problem of the repeat offender is primarily a male problem. Thus we shall use the male pronoun throughout the report.

However, the American experience has not been systematically researched. What is known of that experience is based on a patchwork of insights obtained from a few scattered studies mostly either dated or of limited scope.

The best source of information about the American experience prior to 1945 is a survey of the available literature by George Brown (1945). The studies he collected indicated that American legislatures had responded to the problem of habitual criminality with harsh, mandatory, poorly focused sentencing laws; that these laws were not being enforced locally for a variety of reasons including their harshness, redundancy, and administrative difficulty; that they seemed to be used for plea bargaining; and that when they were enforced it was against less serious criminals rather than the truly dangerous offenders.

In 1949 Paul Tappan published the only national survey of practitioners regarding the effectiveness of the habitual offender laws. His findings largely confirmed Brown's. Since then a few case studies have provided some limited additional empirical detail about the operation of the habitual offender laws in certain jurisdictions (Brown, 1956; Furgeson, 1967; Cook, 1974). These studies have generally confirmed the findings of the earlier studies regarding the infrequent use of those laws for sentencing and their apparent use for plea negotiation. In addition, the possibility of their arbitrary and capricious enforcement was raised but not settled. In addition, some compilations of the laws relating to habitual offenders have been made (Sleffel, 1977; Cooper et al., 1982; Shane-Dubow et al.,

1985). Also, there have been several evaluations of a related matter, namely, the career criminal programs that were inaugurated in prosecutor's offices and police departments since the 1970s (Chelimsky and Dahmann, 1979; California Office of Criminal Justice Planning, 1982; Springer et al., 1985b).

None of these recent studies has conducted a national survey of prosecutors, defense attorneys, and judges for their views and experience regarding their repeat offender laws; none has analyzed a national sample of offenders sentenced as repeaters; none has established the national pattern of use of these laws; none has developed a systematic classification of the critical dimensions of these laws; none has explored the relationship between the characteristics of the laws and their pattern of use; and, none has shown the origin and change in the content of these laws. Each of these matters, however, is addressed by the present study.

Methodology

The telephone surveys were conducted in 49 jurisdictions including the District of Columbia and the U.S. District for the Southern District of New York. All states[3] which had repeat offender laws on December 31, 1982 were included in the survey. Two local jurisdictions within each state jurisdiction (except the federal system) were selected randomly, one each from two strata, jurisdictions with 1980 populations of between 50,000 and

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3 For convenience our reference to all "states" includes the federal district and the District of Columbia.

250,000 and jurisdictions with larger populations for a total of 96 jurisdictions[4], see Table I.1.

Within each jurisdiction the selection of respondents was in part purposeful and in part adventitious. For all respondents an attempt was made to ensure that they were familiar with their repeat offender laws. They were asked how familiar they were with the law and practice of their repeat offender laws. If they said they were unfamiliar we moved to interview someone more familiar. In each jurisdiction we attempted to interview one judge, one defense attorney and two prosecutors. When calling for judges, the chief judge or chief criminal judge was requested. When calling for defense attorneys, the local public defender services were contacted. Where they did not exist, we asked prosecutors, judges or clerks for the name of the attorney in the most recent criminal matter. Among prosecutors we sought at least one with direct trial experience with the repeat offender law and the chief prosecutor.

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4 In states without any jurisdictions over 150,000, two jurisdictions between 50,000 and 250,000 were selected.

Table I.1 Jurisdictions Surveyed*

State/County		1980 Population***
Alabama		
	Tuscaloosa	137,541
	Jefferson	671,324
Alaska**		
	Anchorage	174,431
	Fairbanks	53,983
Arizona		
	Yavapai	68,145
	Pima	531,443
Arkansas		
	White	50,835
	Pulaski	340,613
California		
	Placer	117,247
	Orange	1,932,709
Colorado		
	Adams	245,944
	Arapahoe	293,621
Connecticut		
	Middlesex	129,017
	New Haven	761,337
Delaware		
	Kent	98,219
	New Castle	398,115
District of Columbia		638,333
Florida		
	Pasco	193,643
	Palm Beach	576,863
Georgia		
	Clayton	150,357
	Cobb	297,718
Hawaii		
	Maui	70,847
	Honolulu	762,565

State/County		1980 Population***
Idaho**		
	Bannock	65,421
	Canyon	83,756
Illinois		
	Henry	57,968
	Lake	440,372
Indiana		
	Hendricks	69,804
	Lake	522,965
Iowa		
	Linn	169,775
	Polk	303,170
Kansas		
	Leavenworth	54,809
	Johnson	270,269
Kentucky		
	Fayette	204,165
	Jefferson	685,004
Louisiana		
	Calcasieu	167,223
	Caddo	252,358
Maine**		
	Androscoggin	99,657
	Cumberland	215,789
Maryland		
	Cecil	60,430
	Baltimore City	786,775
Massachusetts		
	Barnstable	147,925
	Suffolk	650,142
Michigan		
	Ionia	51,815
	Kent	444,506
Minnesota		
	St. Louis	222,229
	Ramsey	459,784
Mississippi		
	Jackson	118,015
	Hinds	250,998

State/County	1980 Population***
Missouri	
Clay	136,488
Jackson	629,266
Montana**	
Missoula	76,016
Flathead	51,966
Nebraska	
Sarpy	86,015
Douglas	397,038
Nevada	
Washoe	193,623
Clark	463,087
New Hampshire	
Strafford	85,408
Hillsborough	276,608
New Jersey	
Cumberland	132,866
Burlington	362,542
New Mexico	
Bernalillo	419,700
Valencia	61,115
New York	
Broome	213,648
Albany	285,909
North Carolina	
Forsyth	243,684
Mecklenburg	404,270
North Dakota**	
Burleigh	54,811
Grand Forks	66,100
Ohio	
Delaware	53,840
Montgomery	571,697
Oklahoma	
Comanche	112,456
Tulsa	470,593
Oregon	
Douglas	93,748
Lane	275,226

State/County	1980 Population***
Pennsylvania	
Venango	64,444
York	312,963
Rhode Island	
Washington	93,317
Providence	571,349
South Carolina	
Laurens	52,214
Charleston	276,974
South Dakota**	
Pennington	70,361
Minnehaha	109,435
Tennessee	
Madison	74,546
Knox	319,694
Texas	
Randall	75,062
Tarrant	860,880
Utah	
Cache	57,176
Salt Lake	619,066
Vermont**	
Rutland	58,347
Windsor	51,030
Virginia	
Richmond City	219,214
Virginia Beach City	262,199
Washington	
Skaget	64,138
Snokomish	337,720
West Virginia**	
Cabell	106,835
Harreson	77,710
Wisconsin	
Portage	57,420
Waukesha	280,326

State/County	1980 Population***
Wyoming*	
Laramie	68,649
Natrona	71,856

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* Two jurisdictions chosen from each state are from jurisdictions with populations from 50,000 to 250,000; the other from over 250,000.

** Has no jurisdictions of over 250,000.

*** Source. U.S. Census Bureau, (1984).

CHAPTER 1

AN HISTORICAL OVERVIEW

Historical Vignettes

1984 "[T]here is a relationship. . . between being persistent as an offender and being a serious offender. All observations of conduct indicate that the more frequently a person breaks the law, the more likely he or she is to commit more grave offenses. This finding of a small majority of repetitive, serious violators justifies the picture of incorrigible toughs, hard-core delinquents."

-- Gwynn Nettler (1984:82)

1983 "The only prudent thing to do is lock you up for the rest of your natural life."

--South Dakota Judge sentencing Jerry Helm as a habitual offender upon a plea of guilty to a charge of writing a $100 check on a nonexistent account plus having six previous, non-violent felony convictions involving the cumulative theft of $230. (Greenhouse, 1983:A1)

"Using a variety of different indicators, offense seriousness and offender's prior record emerge consistently as the key determinants of sentences."

--National Research Council Panel on Sentencing Research (1983: 11).

1982 "[T]he justice system is now searching for new ways to control crime. This study examines one possible approach . . . . Selective incapacitation is a strategy that attempts to use objective actuarial evidence to improve the ability of the current system to identify and confine offenders who represent the most serious risk to the community."

"[W]e have shown that selective incapacitation strategies may lead to significant reductions in crime without increasing the total number offenders incarcerated."

--Peter Greenwood and Allan Abrahamse

(1982:vii)

1981 "From the statistics a portrait emerges. The portrait is that of a stark, staring face, a face that belongs to a frightening reality of our time--the face of a human predator, the face of the habitual criminal."

--President Ronald Reagan, (1981:104)

1980 "The . . . history of habitual offender legislation in England and Wales has been often told. It is a story of continuing failure to resolve the problems of definition and its legislative formulation, of continuing failure to convince the courts to make use of their powers, and of continuing failure to devise a form of detention significantly different from ordinary punishment.

"[Today h]abitual offender legislation in England is all but dead.

"And yet the urge to distill from the mass of criminals a distinct group of dangerous persons, and to devise for them distinctive penal measures, still endures . . . ."

--Leon Radzinowicz and Roger Hood (1980:1377)

1978 "Proponents of the new hard-line approach assert that its deterring and incapacitating effects on habitual offenders will significantly reduce crime.

". . . [T]he application of the hard-line policy presents problems. As a practical matter, unlimited prison capacity cannot be provided. And since habitual offenders differ in their dangerousness, the system needs to distinguish among them and identify those most deserving of containment.

"With present knowledge it is difficult to accurately classify an offender in terms of the future threat he poses to the community."

--Joan Petersilia, Peter Greenwood and Marvin Lavin (1978:1)

1975 "The state of prediction is evidently rather

poor. Implementaticn of a policy of selective confinement based on predictions of dangerousness would clearly founder on the gross inaccuracies of prediction."

--David Greenberg (1975:548).

1974 "Experience with special laws for recidivists may have been disappointing, but one should not discount entirely the possibility of developing helpful programmes for the persistent offender."

--The Sub-Committee of the European Committee on Crime Problems on Sentencing (1974: 21).

1973 ". . . [T]here are some offenders whose aggressive, repetitive, violent, or predatory behavior poses a serious threat to the community [and who] are not responsive to correctional programs. Public safety may require that they be incapacitated for a period of time in excess of 5 years.

"Current attempts to classify the 'dangerous' offender in terms of sexual crimes or by 'habitual offender' laws are undeniably ineffective and have become so distorted in their application as to be meaningless.

"[Recidivist laws are] so grossly overbroad, poorly defined, often resulting in mismanagement and distortion of the criminal process and perpetuation of the arcane concept that the recidivist is automatically a danger to society, while the first offender is not."

--National Advisory Commission on Criminal Justice Standards and Goals (1973:155 ff)

1973 "[A]n ideal indeterminant-sentence law, say, of one year to life, applicable to all offenders and administered by an expert classification committee within the prison system, would enable institutional authorities to hold dangerous, aggressive, and unimprovable offenders for longer periods of time than is now possible with fixed sentences or a fixed maximum. Theoretically, an ideal indeterminate-sentencing law, properly implemented, can give society all the protection that habitual-offender laws give and more besides, since it includes cases of serious involvements that may

not be covered by two or three previous convictions for a felony."

--Walter Reckless (1973:395)

1972 "Of the 10,214 cohort offenses, 8,601 (84.2%) were committed by the 1,862 recidivists (53.6% of all the delinquents). Those who committed five or more offenses (627 or 18%) whom we have call chronic offenders, were responsible for 5,305 of these delinquent acts (51.9%)."

--Marvin Wolfgang, Robert Figlio and Thorsten Sellin (1972:88)

1966 "[I]t is a common belief that the most serious crimes are committed by the 'persistent offender.' It is more than strange that this assumption does not seem ever to have been put to the test. A search of the literature has failed to reveal any rigorous study of offenders which could justify this belief . . . ."

--Leslie Wilkins (1966:313)

1960 "The nuclear problem of crime lies in dangerous repetitive criminality . . . . More rigorous measures must be employed in dealing with the core of hardened criminals . . . . Endeavors to prevent recidivism among them have been far from successful, largely because of the inefficacy of the measures at hand. These may be improved and, as we gain further understanding of their requirements, it is to be hoped that an increasing proportion of the seemingly intractable will respond to treatment. Our recidivist legislation has been quite unsatisfactory in dealing with them."

--Paul Tappen (1960:471ff)

1955 "[F]undamental attention should be paid by legislatures, judges, correctional officials . . . to the problem of recidivism . . . .

[T]he prognosis of recidivism can be improved, among other methods, with the aid of prediction tables . . . .

[T]he use of systematic methods of prognosis . . . should be encouraged . . . ."

--Resolutions of the Section on the Prognosis and Predictions of Recidivism, Third International Congress on Criminology (Glueck and Glueck 1964:230).

1955 "As to legal aspects (of recidivism), such devices as the indeterminate sentence or measures of security are essential on a sufficient basis of law to insure adequate treatment of the recidivist. Mechanical increase of length or severity of sentence upon recidivists is not recommended; the judge's choice in sentencing should not be too limited."

--Conclusions of the Section on the Treatment of Recidivism, Third International Congress on Criminology (Glueck and Glueck, 1964:236).

1955 "[I]t is both impossible to achieve and unwise to seek a single definition of recidivism . . . .

"The essential unifying concept behind recidivism is the repetition of crime after conviction. The . . . definitions [of recidivism] . . . will vary according to the particular proposition or inquiry concerning recidivism being made and will vary considerably from one legal system to another . . . .

--Noval Morris (Glueck and Glueck, 1964:215)

1949 "The replies received in response to [a nationwide survey of state attorney generals' offices] concerning the effectiveness of the recividist statutes reveal no uniformity of opinion, but the main trend of reaction to them is unfavorable."

--Paul Tappan (1949:28)

1945 "The only conclusion one may draw from [a review of the available literature] is that although these [habitual offender] laws are still on the statute books they are seldom used.

"The legislative policy as expressed in the Habitual Offender Laws bears no particular resemblance to the enforcement policy of prosecutors and judges. Nor do these policies

. . . [consider] problems of administration faced by institution officials in handling inmates."

--George Brown (1945:898)

1930 [L]egislative prescription of penalties, and judicial sentencing, are founded upon considerations almost wholly irrelevant to whether or not a criminal will thereunder ultimately be a success . . . or a total failure.

"[W]e have presented . . . prognostic tables . . . indicating that it is possible to introduce scientific method into the work of criminal courts and parole boards. Under the existing system, judges either are compelled to follow blindly the dictates of a legislature which has set down in advance the precise punishments to be imposed for each offense, or are governed by considerations which are almost entirely irrelevant to the factors which are most strongly associated with the future conduct of criminals. [Our instrument] constitutes a step towards a scientific management of the problem of crime by courts and administrative agencies."

--Sheldon Glueck and Eleanor Glueck (1930:295)

1929 "It is the task of criminal law to discover and mark out the lines of a wise adjustment or practical compromise between the general security and the individual life. In the humanitarian thinking of the eighteenth century, stress was put upon the individual life and until recently that interest in effect had preponderant recognition. The whole apparatus of criminal justice was shaped by the quest for means of ensuring an abstractly uniform, outwardly mechanical administration.

"Inevitably there was a reaction . . . . A movement for . . . individualized penal treatment [arose]. But this movement . . . has itself brought about a reaction . . . . Men have come to fear that in our zeal to secure the individual life we . . . release habitual offenders prematurely to resume their warfare upon society.

[The new hope for the possibility of balancing public security and fairness to individual offenders is scientific devices such as prediction tables by which habitual offenders can be distinguished from less serious criminals.] Let it

once be made clear that probation laws may be administered with a reasonable assurance of distinguishing between the sheep and the goats, let it be shown that the illusory certainty of the old regime of reasonably predictable results . . . and the paths of a modern penal treatment will be made straight."

--Roscoe Pound (Glueck and Glueck, 1930:278)

1926 "Habitual criminals have in general an inferior biological, physical and mental constitution. This inferiority renders them little fitted to live a regular life, to control their impulses and emotions, to resist temptations and suggestions of their milieu; they are predisposed or given to crime and infractions by their hereditary and acquired blemishes."

--Louis Vervaeck (Belgian criminologist) (Reckless, 1973:680)

1894 "In proportion to the spread of education, the increase of wealth, and the extension of social advantages, the retention of a compact mass of habitual criminals in our midst is a growing stain on our civilization."

--Gladstone Committee (England) (Radzinowicz and Hood, 1980:1313)

1894 "The only effective way of dealing with the incorrigible vagrant, drunk and a thief, is by some system of permanent seclusion in a penal colony."

--W.D. Morrison (England) (Radzinowicz and Hood, 1980:1315)

1817 [W]here a person is again convicted of a crime punishable by hard labor, in addition to the penalty for the crime, he shall have thirty days solitary confinement and seven years added to the penalty; for the third offense, he shall have the same term of solitary confinement and shall be imprisoned for life . . . ."

--Massachusetts Laws of 1317, Ch. 176, Sec. 6

Pre-1976 [I]f any person having been once convicted of

hogg stealing, shall a second tyme be convict thereof then for such his default he shall stand in the pillory two howres and have both his eares nailed thereto, and at the expiration of said two howres, have his ears cut loose from the nails . . . . And whoever shall be taken a third time stealing hoggs, that then he be tried by the laws of England as in felony."

--Colonial Virginia Statute (Hening, 1890:440)

1571 All rogues, vagabonds, and sturdy beggars shall be committed to the common goal . . . shall be greviously whipped, and burnt thro the gristle of the right ear with a hot iron . . . . And for the second offense, he shall be adjudged a felon unless some person will take him for two years in to his service. And for the third offense, he shall be adjudged guilty of felony without benefit of clergy."

--England, Statute of 14 Edward 1.c.5

Criminals who repeatedly commit crime even after they have been punished by society represent a problem for criminal justice policy which is as old as it is troublesome. On its face the problem and its solution seem simple enough. Criminals who do not learn their lesson the first time will have to be dealt with differently (usually more harshly) on subsequent passes through the justice system. But the long, conflicted and unsatisfactory history of American and other attempts to devise a viable policy regarding habitual criminals belies the apparent simplicity of the problem.

The Origins of Recidivist Offender Legislation

There are several different explanations of the origins of the repeat offender laws. They all seem plausible but theoreti-

cally inadequate. They fit a narrow slice of the phenomenon they choose to explain. But their conceptualizations are at a low level of abstraction (e.g., the origin of the habitual offender legislation in England in the 1860's or the public enemy laws in the United States in the 1920's); and, their definitions of the scope of the phenomenon are vague.[1] Consequently, while they discuss the origins of certain kinds of repeat offender laws they ignore the existence of other repeat offender laws which antecede the ones being explained.

This definitional problem is endemic to the topic of repeat offenders. It plagues both the scientific and the legal literature. The reader must be forewarned never to assume that any two discussions of the phenomenon of repeated criminality are referring to the same thing. The same phenomenon is referred to under different names, and different phenomena are referred to by same name. The recidivist offender is also sometimes known as the repeat, habitual, persistent, incorrigible, public enemy, multiple, professional, career, serious, dangerous, and violent offender.

Legislation directed at the problem of ricidivism also presents conceptual and definitional problems. Repeat offender laws can be divided into two types which are better thought of as poles along a continuum from very specific to very general recidivist laws. Specific recidivist laws are ones which are

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1 For a discussion of the importance of the level of abstraction in the analysis of laws see Inverarity et al. (1983).

targeted at a highly specific crime, e.g., hog stealing, dead animals in wells, offensive slaughter houses, intoxicating liquors sold by persons unseen, offensive soap factories, vagrancy, or petty theft (Elliott, 1931:189). General recidivist laws provide increased sentences for repeated crime of a general type, e.g. second conviction for any crime or any felony. In reality this distinction breaks down because some "specific" laws are fairly general, e.g., specific recidivist laws which target one general class of crime such as theft whether it be petty, grand, or by false pretenses. Analyses are further complicated by the fact some states have enacted all kinds of recidivist laws from the very specific to the very general.[2]

Some theories of the origins of repeat offender laws focus on specific recidivist laws, others on the general laws. Some address the matter of recidivism only tangentially to some other primary concern. Chambliss (1984) accounts for the origin of the vagrancy law in fourteenth century England as a response by the landed aristocracy to the breakup of feudalism. In the sixteenth century the focus of the vagrancy laws shifted from itinerant workers to rogues and vagabonds and severe penalties were added for repeat offenders. Chambliss interprets this as the power elite's means of controlling the wandering populations of unemployed highwaymen who increasingly threatened the growing commercial economy.

Katkin (1971) offers an explanation of the origin of

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2 See Chapter 3 for further discussion.

"habitual offender laws." By this he means general recidivist laws (in particular, the Prevention of Crime Act of 1908[3] in England which was the result of the work of the famouse Gladstone Committee, and the general recidivist laws which were enacted in the United States during the 1920's, particularly the Baume's Law).[4] He argues that recidivism as a general social problem was a new phenomenon in mid-nineteenth century England. It resulted from English penal reform (1750-1833) that eliminated the use of the death penalty or its equivalent for trifling offenses. (1971:99) He asserts that "while there were unquestionably habitual criminals [before penal reform], there were few whose careers were not ended by a first conviction."[5]

Katkin further argues that in England the Prevention of Crime Act of 1908 was a reaction to the shorter sentences and the new penological goal of rehabilitation. The Gladstone Committee was skeptical about the capacity for reformation of the recidivist offender. For the recidivist it recommended extended terms:

> When an offender has been convicted a fourth time or more he or she is pretty sure to have taken to crime as a profession and sooner or later to return to prison. We are, therefore, of opinion that further corrective measures are desirable for these persons (Katkin, 1971:99).

The weaknesses of Katkin's account are that it omits

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3 8 Edw. 7, c. 57 § 10.

4 N.Y. Sess. Laws (1926), ch. 457.

5 Katkin's historical analysis follows Morris' (1951).

important historical detail about the history of parliamentary concern about recidivism and it does not seem generalizable to America. The first general recidivist law in America was enacted by New York in 1797 long before the Gladstone Committee existed. It provided for life imprisonment for a second felony (Brown, 1945:642). In 1817 Massachusetts enacted a general recidivist law which provided that:

> "where a person is again convicted of a crime punishable by hard labor, in addition to the penalty for the crime, he shall have thirty days solitary confinement and seven years added to the penalty; for the third offense, he shall have the same term of solitary confinement and shall be imprisoned for life." (Brown, 1945:641)

Similar laws were passed in Virginia in 1849, West Virginia 1860, Illinois, 1883, New Jersey, 1890, and Washington, 1909 (Brown, 1945; and Tappan, 1960:472). In addition, in 1885 Ohio passed a law entitled the Habitual Offender Act. It created a new kind of double sentence which in England would become known as "preventive detention" a decade later. It provided that after a person had been twice convicted, sentenced and imprisoned in some penal institution, he would be deemed to be an habitual criminal. At the completion of his normal sentence he would not be released but detained during his natural life. He was eligible for an indefinite parole but if it were granted it could be revoked at any time (see Brown, 1945:645).[6]

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6 Connecticut and Rhode Island passed similar laws a half century later. The Incorrigible Act of Connecticut (1918) provided that upon the third conviction of a felony the offender could be held an additional twenty-five years after the expiration of his sentence. (Conn. Gen. Stats., Rev. sec. 6502 (1930)). A Rhode Island statute provided that upon
(Footnote continued)

In the 1920's in America general recidivists laws peaked in popularity. In 1927 six states (Oregon, Florida, North Dakota, Minnesota and Vermont) adopted, with certain variations, the famous "Baumes Law" of 1926 which was commonly but erroneously regarded as the habitual criminal act of New York (Brown, 1945:643).[7] They established mandatory life sentences for third or fourth time offenders. Katkin does not attempt to account for the sudden burst in popularity of general recidivist laws in America. But other authors do. Mabel Elliott interprets it as a conservative public backlash against the ineffectiveness and leniency of rehabilitation. In a statement uncannily similar to those which would be made by sentencing reformers of the 1970's, she (1931:186) concluded that:

> ". . . the obviously ineffective administration of intelligent principles, as for example, of parole, probation, and indeterminate sentence, has undoubtedly given rise to the public distrust for what it considers soft or lenient penal treatment. The recidivist, who makes up the bulk of our prison population, represents the failure of penal practice."

In her view the problem of the repeat offender had caused American sentencing philosophy to split into two conflicting

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6(continued)
a third conviction for an offense punishable by imprisonment a person would be deemed an "habitual criminal" and in addition to his sentence for the third offense he would be imprisoned for up to twenty-five years. Rhode Island, Gen. Laws, ch. 625, sec. 64 (1938).

7 Baumes law does not refer to habitual criminals at all. It was solely a "fourth offender act" that provided mandatory life sentences for fourth offenders. New York had a separate statute entitled, "The Habitual Criminal Act" (Brown, 1945:643).

penological principles: twentieth century rehabilitation with "scientific," individualized treatment for minor and first-time offenders and nineteenth century, non-individualized harsh penalties for repeaters.

Brown (1945) agrees with Elliot that the spurt of general recidivist laws in the 1920's was fed by public distrust of "soft" penal legislation and the perception of ineffectiveness of the criminal justice system.[8] He reports that the momentum for the laws came almost immediately after World War I due to an apparent increase in crime which led to intense criticism of penal law and treatment. In his view the Volstead Act (prohibition) (and the crime and gangsterism generated by it) was the most important factor in the total situation. Again, in yet another preview of sentencing reform in the 1970's, Brown reports that, the crime commissions of the 1920's set out to strip the courts and parole boards of some of their power. Sentencing for the habitual criminal would be mandatory so that it would be controlled by the legislature.

Tappan (1960:472) agrees with Brown's analysis but places heavier emphasis on the view that the habitual offender laws developed in the 1920's were primarily a response to the criminal activities of the mobs.

The English Experience

While American legislatures were propagating general

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8 Between 1920 and 1930, 33 states adopted general recidivist laws (Brown, 1945:642).

recidivist as well as mental defective and psychopathic offender laws, the English Parliament was taking a different course. It quickly confronted but inadequately resolved the crucial problem of distinguishing between recidivism and dangerousness. By 1893, the Habitual Criminal's Law of 1869 (which had been substantially amended in 1871 and 1879) was considered a dead letter. In 1894 the Gladstone Committee (the Department Committee on Prisons under Chairman, Herbert Gladstone) was established to address the problem of recidivism which was described as "the most important of all prison questions, . . . the most complicated and difficult" (quoted in Radzinowicz and Hood, 1980:1363).

The Committee attempted to distinguish between petty misdemeanants and those who repeated serious crimes. Remarkably, the Committee seemed bent on focusing upon the <u>less serious</u> repeat offender. Evidently the Committee wanted to exclude offenders who committed serious crimes because it believed very heavy sentences "frequently make [serious criminals] desperate and determined when again at large not to be taken alive" [Radzinowicz and Hood, 1980:1353]. The Committee mainly had in mind:

> "a large class of habitual criminals not of the desperate order, who live by robbery and thieving and petty larceny, who run the risk of comparatively shorter sentences with comparative indifference. They make money rapidly by crime, they enjoy life after their fashion, and then on detection and conviction they serve their time quietly with the full determination to revert to crime when they come out . . . . [T]he bulk of habitual criminals are of this class." (Radzinowicz and Hood, 1980:1354).

Thus the aim of the Committee was to combat repetition not

dangerousness. It assumed that any offender with four prior convictions was an inveterate criminal. Persistence rather than the crimes themselves was regarded as the crucial problem. This view is revealed in the Committee's statement that "the real offense is the wilful persistence in the deliberately acquired habit of crime" (Radzinowicz and Hood, 1980:1355). On the other hand, Gladstone had stressed that his proposal was not meant to focus on the truly petty, or mere nuisance offenders, or offenders who were mentally deficient.

After years of deliberation during which the definition of who the habitual criminal is was never clearly resolved the Prevention of Crime Bill of 1908 was enacted. It established what are referred to as the "dual sentence" and "preventive detention." Upon a finding by a jury that an offender is a habitual offender (i.e., having three previous convictions since age sixteen and "leading persistently a dishonest or criminal life") a sentence of preventive detention could be imposed. It would run consecutive to the sentence for the offense for which the offender had been brought to court. The preventive detention sentence could be from five to ten years but was also indeterminate in that the offender could be released at any time should it be considered that it was possible for the offender to engage in honest employment.

Again, within 25 years this new legislation had fallen into disuse (less than forty offenders being sentenced to preventive detention in 1932); and, again, the English began exploring new legislative strategies (Hammond and Chayen, 1963:9). The result

was the Criminal Justice Act of 1948 which replaced the 1908 legislation. The dual sentence was changed to a single sentence system. The "preventive detention" sentence was now part of the sentence due to the current crime. "Habitual" offenders were now called "persistent" offenders; and the criteria for eligibility were as follows:

> An offender becomes liable to preventive detention if he is not less than 30 years of age and (a) he is convicted on indictment of an offense punishable with imprisonment for a term of two years or more; and (b) he has been convicted on indictment on at least three previous occasions since he attained the age of 17 of offenses punishable on indictment with such a sentence, and was on at least two of those occasions sentenced to borstal training, imprisonment or corrective training."[9]

Fifteen years later a Home Office study found that the new preventive detention law was being used in only 13% of the eligible cases (Hammond and Chayen, 1963). Most of the offenders who qualified for preventive detention were in connection with instant offenses involving property (43% breaking and entering, 33% larceny; 14% receiving, fraud and false pretenses). Very few were for instant offenses involving persons (5.6% violence against persons, 3.7% sexual offenses). This pattern of involvement with property offenses was roughly the same when the types of prior proven offenses were examined. Ninety percent of them involved property offenses. Moreover, only 19% of all persons who qualified for preventive detention were in respect of crimes involving amounts of one-hundred pounds or more. To cap

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9 England, Criminal Justice Act, 1948, Sec. 21.

it all, the offenders who were preventively detained and eventually released had a reconviction rate of 73% within three years.

These facts prompted Leslie Wilkins to resurrect the time-worn but still unresolved question of purposes. He (1966:316) wrote:

> "It seems from the recent research findings [of Hammond and Chayen] that the protection of the public from the dangerous criminal and the problem of the persistent offender are not by any means one and the same problem. Persistent offenders (in England, certainly, and possibly elsewhere) are not normally what are usually understood 'as dangerous criminals.'"

By 1965 the English courts were using preventive detention so sparingly that only 42 men were sentenced as such. One might have thought that after a century of failure even the English would give up. But the Home Secretary's Advisory Council on the Treatment of Offenders decided to give it another go. It believed that existing law had failed because the penalty for preventive detainees was too severe relative to what other persistent offenders received (who were not sentenced as preventive detainees). Accordingly it introduced a new statute by which the gap between the sentences of the persistent offenders who were preventively detained and those who were not could be closed. It increased the severity of the penalties for the <u>latter</u>! Under the Criminal Justice Act of 1967 the sentences of persistent offenders (who were not preventively detained) could be "extended." But once again the legislative draftsmen failed to give clear guidance as to who the persistent offender

is or how detainees should be distinguished from non-detainees.

By 1980 the new statute was so infrequently used that the numbers were not even mentioned in official criminal statistics. After reviewing the century of English experience with recidivist Radzinowicz and Hood (1980:1385) report that "[h]abitual offender legislation in England is all but dead." But, they add an ominous note which portends that dealing with recidivism may be a perennial problem which criminal justice policymakers like Sisyphus are cursed to perpetually push up the hill. They (1980:1386) write that despite the century of failure:

> The urge to distill from the mass of criminals a distinct group of dangerous persons, and to devise for them distinctive penal measures, still endures . . . ."

Habitual offender legislation in England seems to be rising in a new form, one which stresses the dangerousness rather than the repetitivenss side of the problem, the side which English legislation since 1908 neglected. Three important committees have recommended new sentencing schemes for "dangerous" offenders. Not unexpectedly the definition of dangerousness is imprecise. Reflecting the continued faith in scientific solutions, two committees propose to use psychiatric evidence regarding the probability that the offender will inflict grave harm on another person.

American Habitual Offender Policy 1930-1960

The popularity of habitual offender legislation continued in America beyond the 1920's. By 1949 five states required that recidivists must receive a life term when convicted for a third

time. Ten required it for the fourth conviction. Ten others made the life sentence discretionary with the courts after a third or fourth conviction. Nineteen made no provision for penalties of life imprisonment for recidivists but did graduate penalties for subsequent convictions (Tappan, 1949:28). In all, 43 of the 48 states and the District of Columbia had habitual offender laws.[10]

By the mid-1940's the question was raised as to the primary purpose of recidivist sentencing laws. Noted legal commentator, John Waite (1943) devoted an entire book to the prevention of repeated crime. In it he took a desultory first step toward a much needed and continually overlooked distinction between dangerousness and repetitiousness. He (1943:55) criticized the "repetitious" offender statutes for focusing solely on the fact of repetition rather than on the dangerousness of the criminal. Unfortunately his conception of dangerousness added to the confusion of purposes that has plagued the history of recidivist legislation. Instead of distinguishing the dangerous from the merely repetitious offender on the grounds of the seriousness of the crimes committed, Waite distinguishes them on the basis of whether the repetitious offender can be reformed (and hence, is not dangerous) or whether he is irredeemably habituated to his criminal ways (and hence, dangerous). Thus the repetitious and irreclaimable petty thief or public drunkened is, in Waite's

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10 Only Arkansas, Maryland, Mississippi, North Carolina, South Carolina and the federal government lacked a general recidivist law.

terminology, as much a "dangerous" offender as the professional burglar.

Sharing the illusion among criminologists of the time that science could reliably distinguish between the reformable as distinct from the truly habitual offender, Waite favored statutes that permitted incarcerating truly habitual ("dangerous") offenders indefinitely until they were "cured." The idea of having habitual offenders first serve the sentence for the crime for which they were convicted and then be retained in prison until they were cured was the basis of the English and other European approaches to the problem of habitual criminology.[11] It

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11 The Swiss Federal Criminal Code of 1937 explicitly allowed detention of habituals for the purpose of protection of society (as against imprisonment for punishment.) Article 42 provides that "Whoever has already served many sentences for felonies or misdemeanors and is inclined to felonies, misdemeanors, disorderly conduct or idleness, and again commits a felony or misdemeanor punishable by confinement, may be placed under detention by the court for an unlimited period. In this instance the detention shall take the place of the sentence imposed (Waite, 1943:12).

The Spanish law of 1933 provides that persons guilty of certain activities may be declared in a special finding by the courts to be dangerous and subject to the measures of social security, and that after they have served the punitive sentence for the offense committed they may be subject to further preventive detention. Most of the crimes enumerated by the law as making a person eligible for preventive detention are minor and by themselves would not subject an offender to more than short periods of imprisonment, if any at all. They were: e,.g., vagrancy, pandering, receiving stolen goods, begging, gambling, habitual public drunkenness, concealment of identity and frequenting criminal resorts (Waite: 1943:127).

The Cuban Criminal Code established "measures of security" by which persons showing predisposition toward crime and adjudged dangerous by the court could be confined for a period of from one year to life. As with the Spanish

(Footnote continued)

was a system referred to as "preventive detention." In theory, the period of detention was not supposed to be punitive but only therapeutic and segregative, to prevent the offender for harming the community until he or she was cured. In support of such laws for the United States Waite pointed out approvingly and by way of analogy that some states already permitted the continued preventive detention prisoners who had infectious or contagious diseases like venereal disease (Waite: 1943:59). Waite need not have relied on analogies or foreign examples because as noted earlier some American legislatures had already tried--and abandoned--the preventive detention approach.

In addition to the preventive-detention-type laws American legislatures also enacted more specialized laws which supposedly applied to a narrower range of "dangerous" types of persons. These laws referred to "sexual psychopathic persons,"[12] "psychopathic personalities,"[13] "habitual delinquents,"[14] "mental defectives,"[15] and "feebleminded" criminals.[16]

11(continued)
law the finding of dangerousness could be predicated upon minor crimes (Waite, 1943:128).

12 Ill. Rev. Stats. ch. 38, sec. 820ff (1935) (Jones, Ann. Stats. 37,665(1)(ff).

13 Calif. Welfare and Institutions Code, sec. 5-500ff (1939).

14 Mass. 4 Ann. Laws, ch. 123, sec. 113ff (1933).

15 N.Y. 10 B McKinney's Consol. Laws Ann. sec. 428ff (1938); Ohio Throckmorton's Code Ann., sec. 13451-19 (1940); Pa. Purdon's Stats. Ann. tit. 61, 541-3 (1930); federal 18 U.S.C.A. sec 871ff.

16 Mich. 2 Comp. Laws sec. 6991-1ff. (Mich. Stats. Ann.
(Footnote continued)

These laws were enacted in two waves. The first began in 1911 with the Briggs Act in Massachusetts. It focused on "mental defectives." The second wave began in the late 1930's and focused on sexual psychopaths (see Sleffel, 1977:43). These laws differed from the traditional recidivist statutes in several ways. They typically required something more than merely prior convictions to establish eligibility for extended incarceration. Usually they required psychiatric evidence to establish the existence of a personality or mental defect. Their rationale was rehabilitation not punishment (at least in theory). They provided for indefinite incarceration until the offender was "cured" (Waite, 1943; Sleffel, 1977). These laws were <u>not</u> regarded as responses to the general problem of recidivism as such, at least not the recidivism of "normal" criminals. That is, although there was some dispute among criminologists as to whether all recidivists were mentally defective, these laws reflected what appears to have been the prevailing view, namely, that only a small proportion of all recidivists were mentally or psychologically defective.[17]

16(continued)
§ 28,967(1)(ff) (1929); Ore. 8 Comp. Laws. Ann. sec. 127-305 (1940).

17 Some criminologists did believe that habitual criminality is the product of mental defects. A typical representative of this school is the Belgian criminologist, Louis Vesvaeck, who in 1929 wrote:

> Habitual criminals have in general an inferior biological, physical, and mental constitution. This inferiority renders them little fitted to live a regular life, to control their impulses
> (Footnote continued)

The American Experience Since 1960

Since 1960 there has been considerable thought and activity relating to sentencing and other criminal justice reforms in America. Much of it has dealt in one way or another with the repeat offender. Several model sentencing statutes or standards have been promulgated.[18] Several crime commissions have addressed sentencing policy.[19] The rehabilitative model of sentencing has been challenged as both ineffective and unfair. Several states and the federal government have shifted to the new "justice" model of sentencing. Indeterminate sentencing is being replaced by various "determinate" systems or sentencing guidelines.[20] Hundreds of millions of dollars have been spent by the federal government for criminal justice research and

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17(continued)

> and emotions . . . they are predisposed . . . to crime (Reckless, 1973:680).
>
> Similarly the Gluecks explained persistence in crime beyond the age of forty almost entirely in terms of mental deviations (Sutherland 1947:589). But other studies had not supported these opinions. An analysis by Thompson (1937) of 1,380 repeaters in the clinic of the Court of General Sessions in 1935 found that mental defectives, psychotics, and psychotic personalities were 8.8% of all repeaters and were approximately the same proportion in all clinic cases; and the defectives practically disappeared from among the repeaters after the age of 30. The rest were rational but persistent violators.

18 The Model Penal Code; the Model Sentencing Act.

19 The President's Commission on Law Enforcement and Administration of Justice (1967); and National Advisory Commission on Criminal Justice Standards and Goals (1973a).

20 See Chapter 7.

demonstration. Larger and methodologically more sophisticated studies have refined our knowledge of repetitive criminals. Special police and prosecution programs to more effectively apprehend and convict habitual and dangerous offenders have been tried and evaluated (Springer et al. 1985a). Inflation, prison overcrowding, the citizen revolt against government spending and a conservative political atmosphere have converged to demand that the criminal justice system get tougher, be more effective and do it at lower costs. American legislatures have continued to enact, repeal and modify laws. Since 1970, 30 of our 49 jurisdictions enacted or modified their repeat offender laws (see Chapter 3; and also Shane-DuBow et al., 1985.) In 1945, seven states had no repeat offender laws (Brown, 1945:648). By 1956 only three were without them (Brown, 1956:32).

Similarly contemporary is the lively interest in the fairness and constitutionality of these laws, (see, e.g., Cook, 1974; Davis, 1982; Dressler, 1981; Marshall, 1980; Newman, 1980; Notre Dame Lawyer, 1979; University of Florida Law Review, 1978). In the recent past the Supreme Court has ruled that it is not unconstitutional for a Kentucky prosecutor to threaten to charge a defendant as a habitual offender if he refused to accept a guilty plea offer.[21] The court has also held that it was not unconstitutional for Texas to sentence William Rummel to a mandatory life term as a habitual felon for being found guilty of three felonies over a nine year period that yielded him a total

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21 Bordenkircher v. Hayes, 434 U.S. 357 (1978).

of $229.11 in criminal earnings.[22] But, three years later the Court declared that a South Dakota sentence of life in prison without the possibility of parole for a thief with six previous non-violent convictions does violate the constitutional prohibition against cruel and unusual punishment.[23]

Americans have not forsaken the hope of achieving greater public safety at lower cost by targeting the repeat offender for special sanctions.

Model Sentencing

The Model Penal Code

Between 1870 and 1960 American penal philosophy and practice developed in a fits and starts, first moving towards rehabilitation, the indeterminate sentence and greater leniency and then reacting with harsh mandatory sentences for serious repeat offenders.[24] The penalty structures within penal codes developed in a haphazard, piecemeal fashion and contained glaring disparities. Vastly different penalties accompanied many not so different crimes. In an effort to remedy these inconsistencies professional groups and commissions began recommending model sentencing principles.

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22 Rummel v. Estelle, 445 U.S. 263 (1980).

23 Solem v. Helms, 463 U.S. 277 (1983).

24 See Chapter 7.

Table 1.1 Model Penal Code Recommendations for Length of Prison Sentence

	Minimum Sentence	Maximum Sentence
First-degree felony	1-10 yrs.	life
Second-degree felony	1-3 yrs.	10 yrs.
Third-degree felony	1-2 yrs.	5 yrs.

Source: American Law Institute (1962).

In 1962 the American Law Institute (ALI) issued its Model Penal Code. Its purposes were to standardize penalties on the basis of meaningful classifications of crime seriousness, to make sentences fairer and "to safeguard offenders against excessive, disproportionate, or arbitrary punishment." ALI recommended that all serious crimes be classified into one of three degrees of felony. Penalty ranges were recommended for each grade of crime as indicated in Table 1.1. Although the Model Penal Code was intended to make sentences more uniform, lenient and rational it left substantial amounts of discretion within its provisions. It did not require mandatory minimums for all felonies. Judges were allowed discretion to place felons on probation and the recommended ranges of minimum and maximum sentences were broad e.g., 1 year to life for first-degree felony. It did little to change the existing habitual offender statutes. Rather it recommended that extended terms be provided under provisions similar to the traditional habitual offender statutes. In the end, its sentences were regarded as excessively severe by some commentators (Rubin, 1973:761). But, many states adopted its

recommendations (Robin, 1984:347). The Code's recommended criteria for a sentence of extended term of imprisonment (felonies) (Sec. 7.03) are set forth as follows:

> (1) The defendant is a persistent offender whose commitment for an extended term is necessary for the protection of the public.
>
> The Court shall not make such a finding unless the defendant is over twenty-one years of age and has previously been convicted of two felonies or of one felony and two misdemeanors, committed at different times when he was over [insert Juvenile Court age] years of age.
>
> (2) The defendant is a professional criminal whose commitment for an extended term is necessary for protection of the public.
>
> The Court shall not make such a finding unless the defendant is over twenty-one years of age and:
>
> > (a) the circumstances of the crime show that the defendant has knowingly devoted himself to criminal activity as a major source of livelihood; or
> >
> > (b) the defendant has substantial income or resources not explained to be derived from a source other than criminal activity.
>
> (3) The defendant is a dangerous, mentally abnormal person whose commitment for an extended term is necessary for protection of the public.
>
> The Court shall not make such a finding unless the defendant has been subjected to a psychiatric examination resulting in the conclusions that his mental condition is gravely abnormal; that his criminal conduct has been characterized by a pattern of repetitive or compulsive behavior or by persistent aggressive behavior with heedless indifference to consequences; and that such condition makes him a serious danger to others.
>
> (4) The defendant is a multiple offender whose criminality was so extensive that a sentence of imprisonment for an extended term is warranted.
>
> The Court shall not make such a finding unless:
>
> > (a) the defendant is being sentenced for two or

more felonies, or is already under sentence of imprisonment for felony, and the sentences of imprisonment involved will run concurrently under Section 7.06; or

(b) the defendant admits in open court the commission of one or more other felonies and asks that they be taken into account when he is sentenced; and

(c) the longest sentences of imprisonment authorized for each of the defendant's crimes, including admitted crimes taken into account, if made to run consecutively would exceed in length the minimum and maximum of the extended term imposed.

Model Sentencing Act

In response to what it regarded as needlessly punitive prison terms in the ALI Model Penal Code, the Council of Judges of the National Council of Crime and Delinquency established its Model Sentencing Act (Rubin, 1973:761). The Act attempts to place sentencing on a strictly rehabilitative basis. It represents the ultimate triumph of scientific criminologists who had advocated that sentencing should fit the criminal not the crime. It tries to achieve a classification of offenders according to the concept of dangerousness that is based on both the crime and the mentality of the offender.

Three categories of dangerous offenders are distinguished: 1) a person who is convicted of a felony in which he inflicted or attempted to inflict serious bodily harm, and is suffering from a severe mental or emotional disorder indicating a propensity toward continuing dangerous criminal activity; 2) a person convicted of a felony in which he seriously endangered the life or safety of another, was previously convicted of an unrelated

felony and is suffering from a severe mental or emotional disorder indicating a propensity toward continuing dangerous criminal activity; 3) a person convicted of a felony which he committed as part of a continuing criminal activity in concert with five or more persons, the defendant having been in a management or supervision position (i.e. high level organized crime) or, as a public servant, having unlawfully done or omitted to do anything to promote the criminal activity. It is the only formulation of sentencing which avoids sentencing by offense.

The Act's policy is that all offenders including dangerous repeaters should be dealt with entirely according to their potential for rehabilitation. Accordingly it distinguishes between "dangerous" and non-dangerous offenders and strongly recommends that the latter (who are believed to constitute the bulk of the prison population) should be dealt with through noninstitutional sentences. The Act recommends that statutes limit the maximum prison term for nondangerous felonies to five years. Dangerous offenders can be sentenced to extended prison terms of up to 30 years, but the Act emphasizes that such cases would be few. Life sentences would be eliminated except for first-degree murder and traditional habitual offender statutes would be eliminated, although a prior conviction of a felony is part of the criteria used in defining one of the three types of dangerous offenders. As of 1976, Oregon was the only state to have adopted the Model Sentencing Act, in slightly modified form (Robin, 1984:348).

The Johnson Crime Commission

In 1967 the President's Commission on Law Enforcement and Administration of Justice (1967) reported that half the states and the Congress were engaged in penal law revisions including reconsideration of their sentencing codes. The Commission recommended that sentencing codes should give greater discretion to trial judges but should also provide clear statutory criteria to guide the exercise of sentencing discretion. It applauded both the Model Penal Code and the Model Sentencing Act for their attempts to distinguish between offenders who require lengthy imprisonment and those who do not. But it issued the following warning:

> Developing proper standards to guide the courts in determining the length of prison sentences is only in the elementary stages. Standards such as the Code's 'dangerous, mentally abnormal person,' or the Act's 'severe personality disorder indicating a propensity toward criminal activity' are subject to many interpretations, and there is a risk that they may be used improperly by the courts. They are the most definite criteria, however, which have been formulated on the basis of limited ability to predict behavior. These standards will be revised should the behavioral sciences develop improved ways of identifying dangerous offenders. The advantage of the approach taken by the Model Penal Code and the Model Sentencing Act is that it provides a vehicle for incorporating basic sentencing structure" (President's Commission on Law Enforcement and Administration of Justice, 1967:17).

Indeed, fifteen years later advocates of selective incarceration offered improved criteria for incorporation into the basic sentencing structure.[25]

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25 See discussion of proposal by Greenwood and Abrahamse, (1982) in Chapter 2.

The Nixon Crime Commission

By 1973 the tide had turned against psychiatric diagnosis as a means of identifying the "dangerous offender" and, by logical extension, to sentencing proposals like the Model Sentencing Act which relied on a psychiatric report indicating that the offender is "mentally abnormal." The National Advisory Commission on Criminal Justice Standards and Goals (1973b) adopted the three types of felony offenders which the Model Penal Code had distinguished for extended terms of imprisonment: the "persistent," the "professional," and the "dangerous criminal but redefined each category. The persistent offender was redefined as a person over 21 years of age who stands convicted of a felony for the third time. At least one of the prior felonies has to have been committed within the five years preceding the commission of the instant offense and at least two of the three felonies should be offenses involving the infliction, or attempted or threatened infliction of serious bodily harm on another.

The professional criminal was redefined as a person over 21 years of age, who stands convicted of a felony that was committed as part of a continuing illegal business in which he acted in concert with other persons and occupied a position of management or was an executor of violence. An offender should not be found to be a professional criminal unless the circumstances of the instant offense show that he has knowingly devoted himself to criminal activity as a major source of his livelihood or unless it appears that he has substantial income or resources that do

not appear to be from a source other than criminal activity.

The dangerous offender was redefined to deliberately eliminate the former reliance on psychiatric judgments. Instead the test of dangerousness was cast in terms of prior behavior short of prior convictions. The new requirements are that a person be over 21 years of age and whose criminal conduct is found by the court to be characterized by: a) a pattern of repetitive behavior which poses a serious threat to the safety of others, b) a patter of persistent aggressive behavior with needless indifference to the consequences, or c) a particularly heinous offense involving the threat or infliction of serious bodily injury.

In explaining its movement away from a reliance on psychiatry the Commission (1973b:156) wrote that "psychiatric 'labeling' is not enlightening or conclusively reliable as to the potential or actual dangerousness of individuals.[26]

Sentencing Reforms

During the 1970's the calls for greater detail in the structuring of sentencing decisions were heard and a variety of efforts to modify sentencing practices were tried. Sentencing reforms included:

- abolition of plea bargaining
- plea-bargaining rules and guidelines
- mandatory minimum sentences
- statutory determinate sentencing

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26 For further discussion see Chapter 2.

- voluntary/discriptive sentencing guidelines
- presumptive/prescriptive sentencing guidelines
- sentencing councils
- requiring judges to provide reasons for sentences
- parole guidelines
- abolition or modification of good time procedures
- appellate review of sentences.[27]

Many states revised their penal codes, moving away from indeterminate sentencing and toward increasing degrees of determinacy.[28] One of the core concepts of the new determinate sentencing systems was that of sentencing guidelines. Two different kinds of guidelines were proposed: descriptive vs. prescriptive guidelines. The former are developed through multivariable statistical analysis of a sample of cases from a jurisdiction. It determines what the past and present sentencing preferences are and then converts them into guidelines for future sentencing. It develops an offender and an offense score and relates these to sentencing outcomes.

Wilkins and his associates (1978:xiii) who developed this approach note that its advantage is that it incorporates "the collective wisdom of experienced and capable sentencing judges by developing representations of underlying court policies. Moreover, the solution is not the mechanical and inflexible one

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27 For fuller discussion see National Research Council Panel on Sentencing Research (1983).

28 See Chapter 7.

offered by proponents of mandatory sentencing legislation, but one that retains sufficient judicial discretion to insure that justice can be individualized and humane as well as evenhanded in application.

But descriptive guidelines can be criticized on several ethical and policy grounds. If sentences are as disparate as has been widely reported, then a sentencing system based on the average of these disparities seems ethically unsound. Additionally, basing a sentencing system on existing judicial practice not only transforms what is into what ought to be but also shifts critical policy choices from the conscious deliberation of the legislature to the aggregate, average choices of separate judges operating in the contexts of individual cases.

These disadvantages can be resolved by prescriptive guidelines. Here the legislature selects which factors shall be considered in the sentencing decision and what weights shall be attached to them. Some judicial discretion can be allowed within presumptive sentence ranges or with allowance for departures from presumptive sentences for selected reasons and with reasons given. The disadvantage of the prescriptive approach is that if it is written so that judicial discretion is narrowly restricted and if the allowable factors and their weights do not reasonably accord with local sentencing practices, then perceived injustices will occur and the risk that local practitioners will seek ways to circumvent the system will increase.[29]

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29 Local justice officials in Minnesota are highly critical of
(Footnote continued)

American Bar Association

Model sentencing standards were first recommended by the American Bar Association's Project on Standards for Criminal Justice (ABA Standards) in 1968. Those standards have been amended and reissued as of 1980. The new standards recommend presumptive sentencing. Standard 18-4.4 addresses the matter of habitual offenders. It reads as follows:

> (a) The failure to integrate habitual offender statutes into a unitary penal code both impedes the interests of law enforcement and results in the uneven application of such statutes. To reduce the disparities thereby caused and to ensure the adequate provision is made for the exceptional offender, it would be preferable if, in place of a special statutory extended term for the habitual offender, the guideline drafting agency were authorized:
>
> (i) to develop more specific criteria by which to identify the persistent offender who poses a serious danger to society, and
>
> (ii) to promulgate special enhanced guideline ranges for such exceptional offenders within a single outer maximum term authorized by the legislature for the offense.
>
> (b) To the extent that existing statutes prescribing special enhanced terms for habitual offenders are retained, they should be revised to conform to the following minimum standards:
>
> (i) Any increased term which can be imposed because of prior criminality should be reasonably related in severity to the sentence otherwise provided for the new offense;
>
> (ii) Guidelines should be adopted fixing presumptive ranges within the outer limits authorized by the legislature. As a limit for extreme cases, twenty-five years ought to be the maximum authorized prison term; and

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29(continued)
their legislative decision to downgrade the weight given to prior record, see Chapter 7.

(iii) The court should be authorized to fix a minimum term in accordance with the principles stated in standard 18-4.3.

(c) In all cases, the decision whether to sentence an offender to the normal term or to an enhanced term on grounds of habitual criminality should be within the discretion of the sentencing authorities, and they should be instructed to develop specific criteria by which to guide such discretion and reduce the potential for disparities. An enhanced term should only be permitted if the sentencing court finds that such a term is necessary in order to protect the public from a substantial possibility for further serious criminal conduct by the defendant and, in support of this finding, also finds that:

(i) the offender has previously been convicted of two felonies committed on different occasions, and the present offense is a third felony committed on an occasion different from the first two. A prior offense committed within another jurisdiction may be counted if it was punishable by confinement in excess of one year. A prior offense should not be counted if the offender was pardoned on the ground of innocence, or if the conviction was set aside in any postconviction proceeding; and

(ii) less than five years have elapsed between the commission of the present offense and either the commission of the last prior felony or the offender's release, on parole or otherwise, from a prison sentence or other commitment imposed as a result of a prior felony conviction; and

(iii) the offender has previously served a term of total confinement in excess of one year.

The court, in addition, should be required to comply with a procedure consistent with the principles and procedures reflected in standard 18-6.5.

The ABA concurs with all the model codes and standards that the persistent offender represents a special problem and should be sentenced to enhanced terms. But it is critical of previous legislative solutions to the problem. It reiterates the century-old warning that by now has become a tiresome cliche. "[C]learer criteria should be employed to distinguish the persistent

offender who is dangerous to society from the one who is merely a nuisance to society" (ABA Standards, 1980:18-282).

This injunction, however, is severely limited, if not contradicted, by another one of the ABA's principles. The ABA refuses to allow the prediction of future criminality to be used as a basis for sentencing.[30] Thus, apparently the ABA would object to using research findings on the prediction of danagerousness to distinguish the persistent dangerous from the mere nuisance offender for selective incarceration as proposed, for example by Greenwood and Abrahamse (1982).[31] From what other source the ABA expects clearer criteria to emerge is unknown. When dangerousness is operationally defined apart from predictions of future behavior, the definitions become arbitrary classifications of someone's idea of bad behavior, as for example John Waite's recommendation to call persistence in any crime no matter how trivial, a criterion of dangerousness.[32]

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30 It says its requirement that the court find an offender poses a substantial possibility of further serious criminal conduct is used as a basis for limiting confinement and that this is different from using prediction as a justification for confinement. This distinction, however, seems to break down in other parts of the ABA's rationale particularly where it supports the use of past criminality as a justification for enhanced sentences because "[t]o the extent that the propensity of human beings to behave in a certain way in the future can ever be validly predicted, the factor of past criminality on which [habitual offenders] statutes focus is by far the best and safest predictor." (ABA Standards, 1980:18-282).

31 For the criteria proposed, see Chapter 2. See also Moore et al. (1983).

32 See supra.

The ABA standards are intended to remedy the undesirable aspects of previous legislative solutions to the problem of the habitual. The ABA believes that presumptive sentencing under its guidelines is the answer to: structuring discretion without eliminating it; achieving proportionality in sentencing; having prior criminality appropriately considered at the local level; reducing disparity; reducing gross severity; reducing unnecessary severity; making the idea of habituality more meaningful by imposing comparatively short time limits on priors; being fairer to the offender and the community by restricting the use of certain priors and expanding the use of others; and avoiding the injustices of mechanical and mandatory sentencing systems by using guidelines which allow for judicial discretion.

Career Criminal Programs

In addition to sentencing reforms, the problem of habitual offender has been addressed by career criminal programs located in police agencies or prosecutors' offices. These programs present legislatures with other options. Instead of or as a supplement to statewide sentencing structures which target the repeat offender, monies can be made available to improve the performance of the local law enforcement agencies in identifying, apprehending and prosecuting the dangerous repeat offender.

Evaluations of these programs have not established conclusive proof of their impact. Local career criminal programs were immensely popular with prosecutors but systematic research that could produce scientifically valid findings of their impacts

was thwarted for various reasons (Springer and Phillips, 1984). Special police programs targetting certain types of repeaters moved to be able to increase the apprehension of that type offender.[33]

Summary: The American and the English Experiences

Legislative actions against offenders who repeat the identical crime can be traced to colonial America and to sixteenth century England. Laws directed at the general recidivist were first enacted in the United States in New York in 1797 and in England in 1869. The popularity of "habitual" offender laws in the United States occurred in the 1920's when six states enacted them. The major English law was enacted in 1908 and revised in 1948. In both nations the laws provided harsh sentences. In both cases the origins of these laws have been explained as repressive reactions to both perceived increases in crime and developments in penal practices which were regarded by the public as "soft" and ineffective.

Despite several major revisions of their law the English failed to achieve a viable sentencing policy for repeaters. Today their habitual offender law is considered a deadletter, although there are now legislative stirrings to enact a special sentencing law directed at dangerous as distinct from merely habitual offenders. Unlike the American laws, the English laws attempted to target the moderately serious habitual offender for

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33 See Moore et al. (1983) for a review of several police programs.

separate, nonpunitive but lengthy detention to be served consecutively to the sentence for the underlying conviction. The failure of the English policy has been attributed to the continuing failure to resolve the problems of defining who the habitual offender is and to the resistance of the courts to impose sentences which appeared disproportionate to the underlying offense.

Since 1945 the American repeat offender laws have been known to be rarely used for sentencing. But American policymakers have not given up hope of devising a workable formula. Almost all of the professional groups and commissions which have recommended sentencing standards since the 1960's have agreed that the repeat offender should be sentenced to lengthy incarceration. But, these groups have also sought to eliminate some of the defects of the earlier habitual offender laws. Several remedies have been recommended. The definition of the habitual offender should be limited to the serious, violent offender who is likely to be dangerous in the future. The maximum additional sentence should bear some proportionality to the present offense. The prior qualifying convictions should be limited in several ways such as time since last sentence, seriousness type of prior offense, and whether the prior sentence involved some incarceration. Structured discretion should be involved in the use of these laws.

In its 1979 revision of its sentencing standards the American Bar Association went so far as to recommend the abolition of the traditional, separate habitual offender laws.

Instead, the ABA recommends that the matter of prior criminality be integrated into an overall presumptive sentencing structure.

CHAPTER 2

WHO IS THE HABITUAL OFFENDER?

"The most vexing problem of habitual offender legislation confronts every draftsman and special commission right at the outset: How is the habitual offender to be defined? Is he only the violent criminal who poses an immediate threat to public safety, or is he also the bumbling petty thief?"

-- Michigan Law Review (Radzinowicz and Hood, 1980:1306)

"Dangerousness probably cannot be defined rigorously, and we shall probably never have a test for determining whether an offender's dangerousness is extinguished. Nevertheless, society will continue to confront the criminal justice system with the demand that persons who have inflicted death or grave physical injury should be kept in custody until there is reason to believe that the danger they once presented has been sorely reduced. This is a quandry from which social science cannot extricate the law; there can be be no certainty in these matters."

-- Conrad (1977:xii)

"Many criminals . . . choose to continue to commit criminal offenses after repeated contacts with criminal justice agencies. Normally, the term "habitual" is applied to such criminals. However, there is a fundamental confusion over the term 'habitual offenders,' and, as Wilkins notes, 'most definitions of what constitutes an habitual criminal are extremely vague.' Upon careful examination of the concept as used in criminological, sociological, legal, and psychiatric literature, we agree wholeheartedly with Wilkins."

-- Petersilia and Samulon (1976).

"[I]t is both impossible to achieve and unwise to seek a single definition of recidivism . . . .

"The essential unifying concept behind recidivism is the repetition of crime after conviction. The . . . definitions [of recidivism] . . . will vary according to the particular proposition or inquiry concerning recidivism being made and will vary considerably from one legal system another . . . .

-- Norval Morris (Glueck and Glueck, 1964:215)

"Although both public officials and criminal justice researches have focused attention on the 'serious criminal offender,' there is little agreement on the definition of seriousness.

Many criminological researchers avoid definitions of the 'serious' offender because they realize that an absolute undimensional definition is impossible to construct."

-- Chaiken and Chaiken (1982)

Two Dimensions of Recidivism

A fundamental problem that has plagued legislative efforts to achieve a viable policy regarding recidivist offenders has been the failure to adequately define who the recidivist offender is. It is reflected in the confusing welter of terms which are used indiscriminately to refer to the topic. The recidivist offender is also referred to as the persistent, incorrigible, serious, dangerous, career, repeat or habitual offender. In addition, for recidivists involved in certain crimes there are still other labels that may apply, such as sexual psychopath. Also, there is the legal category of the "dangerous offender." This category is distinguishable from the "recidivist" in that its definition--while notoriously vague (Frederick:1978)--is usually not defined in terms of prior convictions.

When talking about special laws relating to recidivists, practitioners generally refer to them as habitual offender laws (known in the courthouse vernacular as "the bitch," or, in some places as "the big bitch" and "the little bitch" where the law distinguishes between serious and less serious habitual offenders). When talking about special police or prosecution

programs in which recidivists are targeted, practitioners generally refer to them as "career criminal" programs. We shall use the terms, "repeat" and "habitual," interchangeably with the term, "recidivist."

There are two distinct dimensions to the problem of habitual criminality. The first has to do with the repetitiveness of the criminal; the second with his or her dangerousness or seriousness. These two dimensions are often confused. Recidivism has sometimes been regarded as synonymous with seriousness or dangerousness; and dangerousness has sometimes been defined in terms of repetitive anti-social behavior not resulting in arrests or convictions and hence not usually referred to as "recidivism."

A six-fold table presenting the logical combinations of these two dimensions helps clarify the matter. Of the six cells, four (I, II, III, V) represent matters of continuing public concern. Three of the four are addressed by habitual offender laws, namely, the offender with a substantial record of serious prior criminality, moderate prior criminality, and petty prior criminality, such as persistent parking law violators. The offender who commits a serious crime but lacks a prior record (cell II) is, of course, a matter of public concern but is not addressed by the traditional habitual offender laws. However, if the crime involves a sex offense the matter may be addressed by a sexual psychopath law.

The crucial difference between the sexual psychopath (and dangerous offender laws) and the traditional habitual offender laws lies in the requirement of repetitiveness. Habitual

Table 2.1 The Relationship Between Repetitiveness and Seriousness of the Criminal

		Repetitiveness of the Criminal	
		High	Low or None
Seriousness of the Criminal	high	I	II
	moderate	III	IV
	petty	V	VI

offender laws have the "advantage" (from the point of view of objectivity, reliability, and relative protection against erroneous judgments about seriousness) of relying upon the documentable fact of prior convictions. Whereas sexual psychopath laws rely upon clinical judgments about the presence of mental disorders or "criminal propensities" or "tendencies" which do not have to have manifested themselves in prior convictions (Sleffel, 1977).[1] The crucial difference between the traditional habitual offender laws and the new (post-1970) career criminal programs operated by police and prosecutors lies in the nature of the evidence of repetitiveness. Some of the career criminal programs substitute prior arrests for prior convictions for eligibility criteria (Institute for Law and Social Research,

1 Some "dangerous offender" laws do refer to repetitive anti-social behavior but this need not be demonstrated by prior convictions. For example, Ohio Criminal Code Annotated § 2929.01(A) defines a dangerous offender as "a person who has committed an offense, whose history, character, and condition reveal a substantial risk that he will be a danger to others, and whose conduct has been characterized by a pattern of repetitive, compulsive, or aggressive behavior with heedless indifference to the consequences."

1980). Some even use police beliefs that a person is a career criminal "regardless of the ability of the law enforcement community to arrest or convict such an individual" (Springer et al., 1985b:120).

The definitional problems of habitual offender legislation have arisen in connection with both the concept of repetitiveness and that of seriousness. Of the two, the latter has been more troublesome. Repetitiveness is typically defined in terms of the number of prior convictions. The ambiguity and controversy have arisen in answering a set of related questions. Should there be a time-limit between offenses after which previous convictions should be ignored as no longer constituting a pattern of "persistent" or "habitual" criminality? How long should it be? Should it be counted from the date of the last conviction or from the date of release from the last period of custody or supervision? Should there be a period of time between one conviction and the next during which the offender is at large in order for the first conviction to be counted as a "prior"?

The point has been made that two convictions separated by several years or even months hardly qualifies under the usual connotation of habitual or persistent behavior (Wilkins, 1966). Contemporary thinking is that repetitiveness has two dimensions both of which should be taken into account. One has to do with the rate of criminal activity (e.g. X crimes per year), the other with the persistence of a certain rate over several years (Moore et al. 1983). No habitual offender laws define their targets in this way. Most place no time limits on the prior convictions[2]

while others place limits as low as five or seven years.[3]

The problem of legally defining the dangerousness or seriousness of the criminal is much more difficult. It arises from a complex of several factors: the inherent ambiguity of language; the inevitable overreach of legal definitions of criminal offenses; the distortion of criminal justice records; the local differences in the perceptions to what constitutes serious criminality or, at least, the most serious crime problem for a given community at a given time; the confusion of sentencing purposes; and the lack of an acceptably reliable method of predicting recidivism.

Despite their constitutionally required specificity, legal definitions of criminal offenses admit of widely varying types of behavior which technically fall within the same legal category. A skid-row drunk who forcibly takes a bottle of wine by threatening his fellow inebriate with a rock is as liable to the charge of armed robbery as is the robber who holds up a liquor store with a gun. Both meet the legal definition of an unlawful taking

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2 See, e.g., Ala. Crim. Code, 1982 Replacement, § 13A-5-9; and Del. Code Ann., 1979, Vol. 7, 11-§ 4214.

3 Kentucky requires that the instant felony be committed within five years of the completion of the sentence imposed on the previous felony conviction (Ky. Rev. Stat., 1982 Supp., Vol. 16, § 532.080). Oregon requires seven years (Ore. Rev. Stat., 1983, Vol. 1, § 161.725). Tennessee defines a persistent offender as a defendant who has received two or more prior felony convictions for offenses the convictions for which occurred within five years immediately preceding the commission of the instant offense; or four or more priors within ten years (Tn. Code Ann., 1983 Supp., Vol. 7A § 40-35-106).

of something from the person of another through force or threat of force while armed. But the two cases will be handled very differently by the justice system. The first is likely to be dismissed or reduced to a misdemeanor (if processed at all). The second is likely to be treated more seriously. Should the two cases both result in convictions, the court records may not accurately reflect the actual crimes. Plea negotiations may have reduced the charges to theft. Should both offenders commit a subsequent crime they may be equally eligible for sentencing as habituals (by virtue of their prior convictions); but, the one would represent a more serious threat to society than the other.

The overreach that exists within specific legal categories like armed robbery is multiplied a thousand fold when legislatures define eligibility for habitual offender sentencing on the basis of convictions for "any prior felony." Historically the trend has been away from such general categories and toward more and more specific targeting of types of convictions (see Chapter 3). Increased specificity is helpful, but there are limits to what selection formulas based on legal categories can do to reduce overreach. This point has been recently substantiated by an evaluation of career criminal programs in seven prosecutors' offices. Springer and associates (1985a:12) report that

> "[t]he most persistent criticism of career criminal programs by (prosecutors) was that a portion of their cases were not serious enough to warrant selective prosecution."

This complaint was more likely to be heard in programs where the selection criteria were broadly defined than where they were

narrowly drawn. Thus, specificity is useful but not a total solution.

Legislative policymakers should not draw the conclusion that greater specificity in defining the habitual offenders is not desirable or useful in reducing the overreach of the law. But, especially when contemplating mandatory laws, they should recognize the inherent limitations of formulas based on legal categories. All legal categories cover a core of person-and-situation combinations to which the law is intended to apply. In addition, they inevitably cover a periphery of person-and-situation combinations which technically fit within the law but which were not intended. The latter are usually screened out at the local level on the basis of a set of shared understandings regarding the meaning of the law. These understandings represent a set of criteria used to interpret whether the case falls within the core or the periphery of the meaning of the law (see generally, Sudnow, 1965, and Daudistel et al., 1979).

The experience of the career criminal programs is also useful in highlighting the lack of consensus regarding what constitutes serious criminality. Their experience stands as another warning to legislatures against removing local discretion and trying to impose statewide, uniform definitions of seriousness and case priority. In two major evaluations of career criminal programs it was found that no consensus existed regarding who the serious offender is. Springer and associates (1985b:110) conducted a telephone survey of all career criminal programs and found that

"Tremendous diversity in selection criteria is one of the most evident features of career criminal programming across jurisdictions. The national telephone survey . . . confirms that no shared approach to selecting cases has developed."

An earlier evaluation by Mitre (Dahmann and Lacy, 1977:118) reported the same thing:

"The lack of consensus in defining characteristics of 'career' and 'habitual' offenders, combined with the stance taken by the LEAA in permitting each jurisdiction participating in the Career Criminal program to develop its own target population definition, have resulted in a range of different 'career criminal' target populations . . . ."

The diversity in the defining criteria used by career criminal programs is illustrated in Table 2.2.[4]

Table 2.2 Criteria Defining Target Populations of Career Criminal Programs by Jurisdiction*

Contra Costa County, CA	Selection Criteria: Combination of seriousness of current offense and conviction record Target Offenses: Drugs (sale or possession for sale), robbery, larceny or theft (including motor vehicle), arson, receiving or selling stolen property.
Santa Barbara County, CA	Selection Criteria: Presently charged with a property offense and having a substantial criminal history. Target Offenses: Property crimes, burglary, grand theft, auto theft.
Ventura County, CA	Selection Criteria: Currently charged with a crime of violence and having a record of violence; or, burglary, with prior record of violence; or, any 2 felony convictions. Target Offenses: Homicide, rape, burglary,

4 Source, Institute for Law and Social Research (1980). One hundred and forty-six programs were described. Every fifteenth program (beginning with a random start) is our sample exemplars.

	robbery, assault, kidnapping.
Orlando, FL	Selection Criteria: At least 1 prior felony conviction and currently charged with a target crime. Target Offenses: Homicide, aggravated or felonious assault, rape and other sex offenses (including sexual assault), robbery, burglary.
Lake County, IN	Selection Criteria: AT least 1 prior felony conviction for target offense and currently charged with a target offense. Target Offenses: Robbery, residential burglary, rape and other sex offenses (including sexual assault), felony murder.
Prince George's County, MD	Selection Criteria: Any prior felony conviction. Target Offenses: All felonies
St. Clair County,	Selection Criteria: Combination of seriousness of current offense and conviction record. Target Offenses: Breaking and entering, robbery.
Chemung County (Elmira), NY	Selection Criteria: At least 1 prior felony conviction and currently charged with a target offense. Target Offenses: Homicide, burglary, felony assault, forcible sex offenses, robbery.
Mechlenberg County (Charlotte) NC	Selection Criteria: Based on a point system which considers prior felony and misdemeanor convictions and arrests. A total of 6 points is required for entry into the program. 1 prior felony conviction = 3 points 1 prior misdemeanor conviction = 2 points prior felony arrests = 1-3 points Target Offenses: None
State of South Dakota	Selection Criteria: One felony conviction. Target Offenses: All felonies.
City of Virginia Beach, VA	Selection Criteria: A point system involving: victim-defendant relationship; type of weapon used or threat of force, and prior record. Target Offenses: Homicide, rape and other sex offenses including sexual assault, robbery, aggravated or felonious assault, arson, other.

* Source: Institute for Law and Social Research (1980).

The disagreement among policymakers at the prosecution and legislative levels regarding the criteria for defining the serious/habitual offender reflects the confused state of the art in the criminological sciences. In their review of the professional literature on the habitual offender, Petersilia and Samulon (1976) concluded that the basic confusion over defining who is a dangerous habitual offender exists. They found that while it is generally agreed that the appropriate elements in the definition should have demonstrated value predicting the likelihood of future involvement in criminal activities, there is no agreement as to what those elements are. Among the elements that have been advocated by knowledgeable people are:

> the number of contacts with the criminal justice system; some criterion of 'dangerousness versus non-dangerousness;' background characteristics, such as employability, self perception, peer group associations; or possibly some clinical diagnosis of mental stability." (Petersilia and Samulon, 1976)

Greenwood and Abrahamse (1982) have recently proposed a simple additive scale for sentencing robbery and burglary offenders. It consists of seven binary variables:

1. Incarcerated more than half of the two year period preceding the most recent arrest.
2. A prior conviction for the crime type that is being predicted.
3. Juvenile conviction prior to age 16.
4. Commitment to a state or federal juvenile facility.
5. Heroin and barbituate use as a juvenile.
6. Heroin or barbituate use in the two-years preceding the current arrest.

7. Employed less than half of the two-year period preceding the current arrest.

Using this scale to give shorter sentences to "low-rate" offenders (their offense rates were determined by self reports but, theoretically could be inferred from their recorded arrests over time) and longer sentences for high-rate robbers, Greenwood and Abrahamse claim they could achieve a 15 percent reduction in the robbery rate with only 95 percent of the current incarcerated population level for robbery. To achieve the same reduction in the robbery rate without selective incarceration based on their scale would require a 25 percent increase in the prison population level for robbery.

Such proposals to reduce crime by longer sentence terms for higher rate offenders have been the snake oil of habitual offender legislation. Advocates of such laws have long believed that a small proportion of offenders accounted for a substantial proportion of the crime problem. They have also believed that it was (or soon would be) possible to accurately distinguish from the mass of criminals those who were most dangerous. The first assumption has been supported since the 1970's by several major studies. Wolfgang and associates (1972:88) found that 18 percent of the 3,472 delinquents in their cohort were responsible for 52 percent of the total number of offenses committed by the delinquent group. Rand researchers estimate that the worst 5 percent of criminal offenders account for half of the serious violent crime (Moore et al., 1983:xiv).

The second assumption, namely, that the dangerous offender

could be accurately predicted by criminal justice officials operating within restraints of actual court systems, continues to be problematic--both practically and ethically. Even under the best of circumstances (i.e. with the relevant information in hand) researchers are unable to achieve high degrees of accuracy in predicting dangerousness. (Moore et al., 1983). Thus, assuming that justice officials could get the necessary information,[5] they might incarcerate and release the wrong offenders. The inaccuracy could not only thwart the desired incapacitative effect but might even result in an increase in crime. Ethical problems are raised not only by the prospect of wrongly increasing the sentence of the non-dangerous offender (the "false positive" problem) but, more fundamentally, by questions about the philosophical jusitfication for punishment.

Habitual Offender Laws And Selective Incarceration

Advocates of selective incarceration of dangerous offenders are recommending the use of predictive devices. It is important to recognize that legislatures have already approved the use of prediction and incorporated it into law. In fact, the habitual offender laws can be regarded as one of two ways through which the prediction of dangerousness has been implemented. The other is through the dangerous offender and the sexual deviate offender laws.

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5 See Chapter 4 for a description of the difficulty criminal justice officials have in obtaining basic arrest and conviction information.

There is some ambivalence about the purpose of habitual offender laws. Many policymakers regard them as retributive measures which look backwards at the offender's present and past criminal history as a justification for a severe penalty, an offender's "just deserts." But many of the same policymakers also justify them in terms of their utility in preventing future crime either by deterrence or by incarceration. It is in connection with this last purpose, (namely, crime prevention through incarceration) that habitual offender laws can be regarded as an experiment in the prediction of dangerousness. In effect, prior record is used to a predictor of future criminality.

Selective incarceration advocates are, in a sense, merely suggesting that the accuracy of the habitual offender laws' predictions of future criminality could be improved by the reliance upon other factors in addition to prior record. This raises ethical as well as practical problems. Retributivists approve of the use of prior record in the calculation of just deserts (Von Hirsch, 1976); but they reject utility as a justification for punishment. Utilitarians approve of crime prevention as a penal objective but worry about the fairness of using status variables such as employment history as predictions (because such variables are correlated with social class) and about the accuracy of predictions. Moore and associates (1983) favor the use of prediction methods. They put the matter in terms of a choice between the utility and the justness of the alternative prediction formulas available. Those which rely on

prior criminality as measured by convictions are more just in that they rely on proven prior criminal conduct of the specific offender being punished. Those which rely on arrests or inferred rates of actual criminality and those relying on status factors provide increased accuracy but are less just. The prior criminality is not proven and status categories are irrelevant to just deserts and are not specific to the offender's actual behavior. They are based on probabilities of future crime among a class of offenders.

After reviewing the state of the art of prediction tests and the ethical dilemmas involved Moore and associates (1983:137) conclude that "there are important reasons to be cautious in using such tests. . . ." Nevertheless they further conclude that "the tests are tolerably accurate for sentencing and other purposes in the criminal justice system" (1983:141). "[I]f we use discriminating tests (even at our current levels of accuracy) we can have less crime and less imprisonment" (1983:145). "[F]ocusing the supervising capacity of the criminal justice system on unusually dangerous offenders could produce a significant if not revolutionary impact on current levels of serious crime" (1983:148). In seeking to maximize the justness of the tests they recommend that the test should be based primarily on information about past criminal conduct--both adult and juvenile, and both convictions and arrests. Moreover they recommended that the tests should be designed to identify a small group of very high rate serious offenders (the worst 5 to 10 percent) rather than a larger group of relatively less serious

offenders. Finally, they point out that tests based on these "just" criteria would become even more accurate in predicting future criminality if the criminal justice system improves its capacity for convicting criminals. In the meantime, Moore and associates recommend the use of other types of information which can improve the discriminating power of tests. Their items are listed below in decreasing order of justness and what is probably a decreasing order of discriminating power.

The strongest known predictor of future serious criminality is past serious criminal behavior. So they recommend giving highest priority to convictions for serious crime and to improve the justice system's ability to obtain such convictions. But restricting tests to adult convictions reduces their accuracy and utility. The problems are that the criminal justice system only produces low rates of conviction; and it takes such a long time to accumulate several convictions against an adult offender that he may be beyond the crime prone years by that time. These low rates and delays can be offset by using: (1) juvenile convictions for serious offenses; (2) information on arrests for serious crimes as well as convictions; (3) use of information about convictions for less serious crimes (to indicate rates of undetected serious offending); or (4) use of information about other social characteristics associated with high rates of offending (e.g. drug use, employment history).

A few comments on habitual offender laws and their enforcement in light of these recommendations are warranted. The use of prior adult convictions criteria for extended sentencing has been

of course the heart of habitual offender legislation from the beginning. The recommendation that only convictions for serious crimes be used would restrict habitual offender laws somewhat. It is not currently being done in most jurisdictions (see Chapter 3). Similarly the use of juvenile convictions for serious crimes has also been permitted by some legislature as part of their new determinate sentencing structures.[6] But this has not been extended to the traditional habitual offender statutes. Doing so would be a major shift in the legal definition of the habitual offender but one which is not without precedent. The other criteria recommended by Moore and associates are also not currently used in traditional legal definitions of the habitual offender but are regularly considered in sentencing decisions. Thus, whether one approves of them or not, their incorporation into a newly revamped definition of the habitual dangerous offender would at least not constitute a departure from previous sentencing principles.

Apart from the legal and penological precedents for the policy recommendations of Moore and associates, there is the question of their feasibility. Could prosecutors obtain the necessary information within reasonable time and would these revised criteria reduce the scope of the habitual offender laws to the truly serious offenders? The available evidence suggests negative answers to both these questions.

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6 See e.g., Minn. State. Ann., 1984 Supp., Vol. 16, § 244.; Revised Code of Wash. Ann., 1983-4 Supp., Title 9 § 9.94A.360.

Our own findings indicate that prosecutors have serious problems obtaining prior conviction information (see Chapter 4). A survey of prosecutors' offices by Petersilia (1981). Confirm and extend our findings.[7] A survey of career criminal programs whose eligibility criteria are more restrictive than traditional habitual offender laws found that the most common complaint of prosecutors in the programs was that even with these restricted criteria the programs a portion of the target population did not seem serious enough to warrant selective prosecution (Springer et al., 1985). Our own survey found that prosecutors regarded very few of all the eligible habitual offenders as exceptionally dangerous (see Chapter 5). Among a sample of sentenced habituals there was no clear pattern to the relationship between the gravity of the criminal history and the number of prior convictions (see Chapter 5). In Minnesota where a formula for weighing prior convictions including juvenile offenses is used practitioners complain that its mechanical operation results in inappropriate cases being sentenced too severely (see Chapter 7). In light of these problems, the Moore recommendations should be marked as more of the same old high hopes but doubtful feasibility.

Habitual Offender, Dangerous Offender Laws, and The Prediction of Dangerousness

While habitual offender laws may be regarded as one approach

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7 But see Greenwood, et al. (1984) whose study suggest that prosecutors may be able to get local juvenile records when they want to.

to the problem of predicting dangerousness, the dangerous offender and sexual deviate laws represent another.[8] The relative merits of the two approaches are worth commenting upon from the points of view of their relative justness and accuracy.

The habitual offender laws assume that a record of prior convictions is a reliable indicator of dangerousness. In contrast, dangerous offender laws assume that some offenders who lack records of prior convictions are more dangerous than their present offense may convey and that this dangerousness can be reliably determined by psychologists or psychiatrists using diagnostic tests and/or clinical judgments. The accumulated evidence suggests that while neither approach has been satisfactory, the habitual offender approach has been closer to the mark. That is, prior criminal record is a far better (although not by itself sufficient) indicator of dangerousness than are the diagnostic tests and judgments of psychologists and psychiatrists (Monahan, 1981 and Frederick, 1978; Monahan, 1981a; and Moore et al. 1984). In addition, from a policy perspective, the habitual offender approach (with certain modifications designed to improve the accuracy of the prediction of dangerousness) is the more desirable of the two. In addition to its greater accuracy, its two main advantages are that it allows public discussion and debate of the explicit criteria which are to be used to differentially punish offenders; and it transfers from individual

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8 For a review of these laws see Sleffel (1977). We shall treat as synonymous in this discussion.

psychiatrists to the legislature the responsibility for choosing where to strike the balance between individual liberty and public safety.

Dangerousness is not an absolute but a probabilistic quality of an offender. Predictions of dangerousness are always subject to some degree of error. A non-dangerous person may be wrongly classified as dangerous (false positive) and a dangerous person wrongly classified as nondangerous (false negative). The degree of accuracy of any prediction device (measured either as the rate of true positives or the ratio of false positives to true positives) is a function of how frequently the phenomenon it attempts to predict occurs in the general population, i.e. the statistical base rate of the phenomenon. It is virtually impossible to predict any low base rate event without simultaneously wrongly identifying many false positives. Monahan (1981:33) illustrates this dilemma as follows:

> Assume that one person out of a thousand will kill. Assume also that an exceptionally accurate test is created which differentiates with 95 percent effectiveness those who will kill from those who will not. If 100,000 people were tested, out of the 100 who would kill, 95 would be isolated. Unfortunately, out of the 99,900 who would not kill, 4,995 people would also be isolated as potential killers."

The discriminating accuracy of a test can be artificially increased or decreased by redefining the phenomenon to be predicted so as to increase or decrease its statistical base rate (i.e., by changing the criterion variable). For example, recommitments to prison have a lower statistical base rate (are less common) than rearrests. Thus a test which predicted "recidivism"

could have its discriminating power improved by using rearrest rather than reincarceration as its operational definition of recidivism[9] (i.e. its criterion variable).

The discriminating power of a predictive test is also a function of two other considerations: the predictive method involved ("clinical" or "actuarial" ("statistical")) and the predictor variables used (i.e., the categories that are presumed to be relevant to what is being predicted). "Clinical" predictions by psychiatrists and psychologists have relied on a variety of personality and situational factors such as motivation, internal inhibition, habit strength and sometimes on non-articulated judgmental factors. The method relies upon an intuitive grasp or subjective assessment of the factors involved and may vary the choice of factors with the individual case. In contrast, the actuarial approach specifies precisely what data will be used and reaches a decision in an mechanistic way. Among the major correlates used in actuarial studies the one which overshadows all the rest is prior criminality, sometimes operationalized as prior arrests and sometimes as prior convictions. Wolfgang found that if a person is arrested four times, the probability that it will happen a fifth is 80 percent. If a person is arrested 10 times, the probability of an eleventh arrest is 90 percent and the probability that the offense will be a serious or "index"

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9 For example, a Michigan study using rearrest-for-a-violent-crime as its criterion of violence achieved a 40 percent accuracy in identifying recidivists whereas a California study using convicted-and-returned-to-prison as its criterion achieved only a 0.3 percent accuracy rate (Monahan, 1981:70).

offense (although not necessarily a violent one) is 42 percent (Monahan, 1981:71). Greenwood and Abrahamse (1982) found that prior conviction for the crime type that is being predicted and juvenile conviction prior to age 16 together with five other dichotomous variables can be used as a scale to predict the highest rate offenders with 50 percent accuracy. Other major predictor variables are age, sex, race, employment history, age at first arrest, opiate or alcohol abuse and socioeconomic status (Nettler, 1984; Monahan, 1981; Greenwood and Abrahamse, 1982).

Numerous studies have compared the relative accuracy of clinicians versus actuarial tables in predicting the same events. The actuarial tables have been found to be consistently superior to clinical predictions (Monahan, 1981:65).

Some Definitions of the Dangerous Habitual Offender

While the near impossibility of defining the essence of dangerous habitual criminality is widely acknowledged, scholars have had to develop nominal definitions that provide a practical working agreement as to the general scope of the subject. Three nominal definitions are worth noting. All share a common emphasis on two dimensions: repetitiveness and dangerousness.

Norval Morris (1951:6) defines "habitual criminal" in terms of the presence of three elements:

"(a) criminal qualities inherent or latent in the mental constitution;

(b) settled practice in crime;

(c) public danger."

Linda Sleffel's topic is broader. It includes a review of

all the dangerous and sexual deviate laws as well as the habitual offender laws. Nevertheless her nominal definition is similar to Morris'. "[A] dangerous offender is anyone who repetitively commits violent offenses." A "violent offense" refers to "offenses that cause physical injury or . . . create immediate, direct risk of injury." The term "serious offense" is used to refer to crimes that are not violent but sufficiently troublesome to society to warrant relatively severe penalties. Examples are extortion or large scale fraud (Sleffel, 1977:xvii).

Moore and associates (1983:75) derive their definition from the empirical studies of recidivism especially the Chaiken and Chaiken study (1982). They state that a proper definition of "dangerous offenders" must incorporate three characteristics: the nature of the offense, rates of offender and persistence in offending. They note that the narrowest definition of "dangerous offender" would require an offender to commit violence among strangers, do so persistently, and at high rates.

Summary: Definitions and Philosophies

The problem of defining who the habitual offender is has plagued policy efforts in this field. Three matters continue to be major sources of this problem: the confusion of dangerousness with repetitiveness; the inherent ambiguity of language; and the ethical dilemmas of using prediction instruments to refine one's definition of the habitual offender.

Discussions of the habitual criminal have sometimes equated mere repetitiveness with dangerousness. Thus, repeated minor

crime has been regarded by some as dangerous behavior deserving severe punishment. Recent sentencing commissions have recognized this tendency and have recommended it be offset by limiting the eligibility for habitual offender treatment to serious crimes and even then requiring some proportionality between the sentence and the underlying offense.

Even definitions of habitual criminality in terms of the commission of crimes will catch some cases which will be regarded as inappropriate for enhanced sentencing. This is the inevitable result of the inherent ambiguity of language. No legislative formulas or sentencing guidelines can completely eliminate this ambiguity.

Prediction instruments which employ information about prior criminality not resulting in adult convictions as well as status variables such as age, education, drug use, and employment history can improve the accuracy of defining the dangerous criminal in terms of possible future criminality. Definitions of the dangerous offender which rely on these instruments will be more accurate than those based solely on convictions. And, those based solely on convictions will be more accurate than those which rely on the clinical judgments of psychiatrists and psychologists. However, all prediction instruments raise thorny questions about the philosophical justification of punishment. All prediction instruments assume a forward looking, utilitarian justification for penal sanction. Punishment is justified on the basis of the harm it will avoid in the future. This is unacceptable to retributivist for whom punishment is justified by looking

backward at the harm already done and which makes the punishment "deserved." Even for utilitarians there are additional moral dilemmas in using prediction devices. All devices have will make some errors and wrongly punish some offenders who would not have committed future crime. Devices using status variables reinforce class biases. Devices using prior legal involvements short of conviction offend the presumption of innocence.

Compared to dangerous offender laws which rely on psychiatric predictions of dangerousness and selective incarceration proposals which rely on status variables, traditional habitual offender laws represent a compromise between the incompatible moral and scientific concerns involved. They are more accurate than psychiatric judgments but they do not employ factors other than prior convictions. However, even after limiting their scope to serious crime they will be unable to achieve greater accuracy in distinguishing the truly dangerous habitual offender from the no-longer dangerous offender without the use of ethically problematic factors. For the retributivist this poses no problem because the narrowly defined dangerous habitual offender deserves what he gets regardless of his future propensities for crime. For the utilitarian, the dilemma of achieving an effective, fair and just sentencing policy for the dangerous repeat offender has not been resolved.

CHAPTER 3

REPEAT OFFENDER STATUTES

In his survey of "habitual offender laws" in the United States Tappan (1949:28) reported that these laws were "fairly well standardized." In contrast, more recent analyses have emphasized the non-standardized nature of these laws. Kerper (1979:352) notes their "immense variation." Singer and Hand (1974:326) found "an almost limitless variety and disparity of habitual offender laws, many of them of dubious rationality." We too found enormous variation which almost defies classification and dubious rationality. This chapter describes that variety within the context of a classification system which captures it. In addition analyses of the major characteristics of the repeat offender laws is presented.

Units of Analysis

In attempting to develop a system for classifying[1] the repeat laws of the many states[2] two problems immediately present themselves. Firstly, what should be the unit of analysis the entire legal code of the state or the specific legal provisions relating to repeat offenders? Secondly, which laws should be included in a review, every legal provision relating to every

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1 The method of classification we used follows the constant comparison method as described by Glaser (1965).

2 Our survey includes the federal laws and those of the District of Columbia but for convenience we shall usually refer solely to the laws of the "states."

kind of repeated criminality or only certain kinds of repeated criminality?

The first question is a problem because within some states there are more than one repeat offender law and within a given law several subtypes of repeat offenders may be distinguished. Most importantly, these provisions do not all operate in the same way. Thus, generalizations about the state's habitual offender law become problematic. Our solution to this was to record each separate legal provision for each state which has special provisions for repeat offenders. Thus our classification of repeat offender laws that were in effect on December 31, 1982 consists of 49 states (including the District of Columbia, and the federal code and 222 district subtypes of repeat offender provisions (see Chart 3.1).[3]

Among all the laws which can be regarded as recidivist laws, some are more specific than others. Brown (1945) distinguished these laws into "specific" and "general" recidivist laws. For him, specific recidivist laws are those which provide enhanced sentences for repeated convictions of the exact same offense, e.g. reconvictions for driving while intoxicated, use of weapons, drug possession or sale, or sexual crimes. General recidivist laws then are all the other laws that enhance sentences for

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3 The number of subtypes of repeat offender provisions distinguished was based on a complex set of coding rules (see Statute Code Book in Technical Appendix). Generally, a spearate subtype was distinguished for each distinct combination of legal definition (based on distinct mixes of instant and prior offenses) and sentence.

Chart 3.1 Characteristics of General Recidivist Laws By State And By Subtype of Legal Provision

ALABAMA: SPECIFIC TRIGGER AND GENERAL PRIOR: "HABITUAL FELONY OFFENDERS"

ORIGINAL DATE OF ENACTMENT; SOURCE	NUMBER OF SUB-TYPES OF REPEAT OFFENDERS	SUB-TYPE	KINDS OF TRIGGERING	KINDS OF PRIORS	NUMBER OF PRIORS	TYPE OF PRIORS REQUIRED	JURISDICTION OF PRIORS	WHEN CHARGES MUST BE FILED	ABSOLUTE MAXIMUM?	ABSOLUTE MINIMUM?	DIFFERENCE BETWEEN MAXIMUM AND MINIMUM?	JUDICIAL DISCRETION	SENTENCE	PAROLE ELIGIBILITY
1977	9													
§ 13A-5-9(a)(1)		1	L.C. FELONY (CLASS C)	ALL FELONIES	1	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE SENTENCING	YES	YES	YES	NO	CLASS B SENTENCE	SOMETIMES
§ 13A-5-9(a)(2)		2	L.C. FELONY (CLASS B)	ALL FELONIES	1	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE SENTENCING	YES	YES	YES	NO	CLASS A SENTENCE	SOMETIMES
§ 13A-5-9(a)(3)		3	L.C. FELONY (CLASS A)	ALL FELONIES	1	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE SENTENCING	YES	YES	YES	NO	15-99 YEARS	SOMETIMES
§ 13A-5-9(b)(1)		4	L.C. FELONY (CLASS C)	ALL FELONIES	2	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE SENTENCING	YES	YES	YES	NO	CLASS A SENTENCE	SOMETIMES
§ 13A-5-9(b)(2)		5	L.C. FELONY (CLASS B)	ALL FELONIES	2	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE SENTENCING	YES	YES	YES	NO	15-99 YEARS	SOMETIMES
§ 13A-5-9(b)(3)		6	L.C. FELONY (CLASS A)	ALL FELONIES	2	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE SENTENCING	YES	YES	NO	NO	LIFE OR 99 YEARS	SOMETIMES
§ 13A-5-9(c)(1)		7	L.C. FELONY (CLASS C)	ALL FELONIES	3 OR MORE	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE SENTENCING	YES	YES	YES	NO	LIFE OR 99 YEARS	SOMETIMES
§ 13A-5-9(c)(2)		8	L.C. FELONY (CLASS B)	ALL FELONIES	3 OR MORE	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE SENTENCING	YES	YES	NO	NO	LIFE	SOMETIMES
§ 13A-5-9(c)(3)		9	L.C. FELONY (CLASS A)	ALL FELONIES	3 OR MORE	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE SENTENCING	YES	YES	NO	NO	LIFE	NEVER

ALABAMA: SPECIFIC TRIGGER AND GENERAL PRIOR: "HABITUAL FELONY OFFENDERS"

ORIGINAL DATE OF ENACTMENT; SOURCE	NUMBER OF SUB-TYPES OF REPEAT OFFENDERS	SUB-TYPE	KINDS OF TRIGGERING	KINDS OF PRIORS	NUMBER OF PRIORS	TYPE OF PRIORS REQUIRED	JURISDICTION OF PRIORS	WHEN CHARGES MUST BE FILED	ABSOLUTE MAXIMUM?	ABSOLUTE MINIMUM?	DIFFERENCE BETWEEN MAXIMUM AND MINIMUM?	JUDICIAL DISCRETION	SENTENCE	PAROLE ELIGIBILITY
1977	9													
§ 13A-5-9(a)(1)		1	L.C. FELONY (CLASS C)	ALL FELONIES	1	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE SENTENCING	YES	YES	YES	NO	CLASS B SENTENCE	SOMETIMES
§ 13A-5-9(a)(2)		2	L.C. FELONY (CLASS B)	ALL FELONIES	1	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE SENTENCING	YES	YES	YES	NO	CLASS A SENTENCE	SOMETIMES
§ 13A-5-9(a)(3)		3	L.C. FELONY (CLASS A)	ALL FELONIES	1	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE SENTENCING	YES	YES	YES	NO	15-99 YEARS	SOMETIMES
§ 13A-5-9(b)(1)		4	L.C. FELONY (CLASS C)	ALL FELONIES	2	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE SENTENCING	YES	YES	YES	NO	CLASS A SENTENCE	SOMETIMES
§ 13A-5-9(b)(2)		5	L.C. FELONY (CLASS B)	ALL FELONIES	2	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE SENTENCING	YES	YES	YES	NO	15-99 YEARS	SOMETIMES
§ 13A-5-9(b)(3)		6	L.C. FELONY (CLASS A)	ALL FELONIES	2	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE SENTENCING	YES	YES	NO	NO	LIFE OR 99 YEARS	SOMETIMES
§ 13A-5-9(c)(1)		7	L.C. FELONY (CLASS C)	ALL FELONIES	3 OR MORE	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE SENTENCING	YES	YES	YES	NO	LIFE OR 99 YEARS	SOMETIMES
§ 13A-5-9(c)(2)		8	L.C. FELONY (CLASS B)	ALL FELONIES	3 OR MORE	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE SENTENCING	YES	YES	NO	NO	LIFE	SOMETIMES
§ 13A-5-9(c)(3)		9	L.C. FELONY (CLASS A)	ALL FELONIES	3 OR MORE	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE SENTENCING	YES	YES	NO	NO	LIFE	NEVER

ALASKA: SPECIFIC TRIGGER AND GENERAL PRIOR; "DEFINITE TERMS OF IMPRISONMENT"

ORIGINAL DATE OF ENACTMENT; SOURCE	NUMBER OF SUB-TYPES OF REPEAT OFFENDERS	SUB-TYPE	KINDS OF TRIGGERING	KINDS OF PRIORS	NUMBER OF PRIORS	TYPE OF PRIORS REQUIRED	JURISDICTION OF PRIORS	WHEN CHARGES MUST BE FILED	ABSOLUTE MAXIMUM?	ABSOLUTE MINIMUM?	DIFFERENCE BETWEEN MAXIMUM AND MINIMUM?	JUDICIAL DISCRETION	SENTENCE	PAROLE ELIGIBILITY
1978	6													
TITLE 12.55.125(c)(3)		1	U.C. FELONY (CLASS A)	ALL FELONIES	1	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE SENTENCING FOR TRIGGERING	YES	NO	N/A	NO	10 YEARS	NEVER
12.55.125(c)(4)		2	U.C. FELONY (CLASS A)	ALL FELONIES	2	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE SENTENCING FOR TRIGGERING	YES	NO	N/A	NO	15 YEARS	NEVER
12.55.125(d)(1)		3	U.C. FELONY (CLASS B)	ALL FELONIES	1	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE SENTENCING FOR TRIGGERING	YES	NO	N/A	NO	4 YEARS	NEVER
12.55.125(d)(2)		4	U.C. FELONY (CLASS B)	ALL FELONIES	2	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE SENTENCING FOR TRIGGERING	YES	NO	N/A	NO	6 YEARS	NEVER
12.55.125(e)(1)		5	U.C. FELONY (CLASS C)	ALL FELONIES	1	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE SENTENCING FOR TRIGGERING	YES	NO	N/A	NO	2 YEARS	NEVER
12.55.125(e)(2)		6	U.C. FELONY (CLASS C)	ALL FELONIES	2	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE SENTENCING FOR TRIGGERING	YES	NO	N/A	NO	3 YEARS	NEVER

ARIZONA: SPECIFIC TRIGGER AND SPECIFIC PRIOR:"DANGEROUS AND REPETITIVE OFFENDERS"

ORIGINAL DATE OF ENACTMENT; SOURCE	NUMBER OF SUB-TYPES OF REPEAT OFFENDERS	SUB-TYPE	KINDS OF TRIGGERING	KINDS OF PRIORS	NUMBER OF PRIORS	TYPE OF PRIORS REQUIRED	JURSIDICTION OF PRIORS	WHEN CHARGES MUST BE FILED	ABSOLUTE MAXIMUM?	ABSOLUTE MINIMUM?	DIFFERENCE BETWEEN MAXIMUM AND MINIMUM?	JUDICIAL DISCRETION	SENTENCE*	PAROLE ELIGIBILITY
1977	0													
S 13-604 A.		1	L.C. FELONY (CLASS 4,5 or 6)	ALL FELONIES	1	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE TRIAL FOR TRIGGERING OFFENSE	YES	YES	NO*	NO	MEDIAN 1X-2X	ALWAYS
S 13-604 B.		2	L.C. FELONY (CLASS 2 or 3)	ALL FELONIES	1	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE TRIAL FOR TRIGGERING OFFENSE	YES	YES	NO	NO	3/4 MEDIAN 1X-3X	ALWAYS
S 13-604 C.		3	L.C. FELONY (CLASS 4,5 or 6)	ALL FELONIES	2 OR MORE	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE TRAIL FOR TRIGGERING OFFENSE	YES	YES	NO	NO	MEDIAN 2X-3X	ALWAYS
S 13-604 D.		4	L.C. FELONY (CLASS 2 or 3)	ALL FELONIES	2 OR MORE	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE TRIAL FOR TRIGGERING OFFENSE	YES	YES	NO	NO	3/4 MEDIAN 2X-4X	ALWAYS
S 13-604 E.		5	L.C. FELONY (CLASS 4,5 or 6: involving weapon or serious injury)	L.C. FELONY (ANY CLASS involving weapon or serious injury)	1	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE TRIAL FOR TRIGGERING OFFENSE	YES	YES	NO	NO	MEDIAN 2X-3X	ALWAYS
S 13-604 F.		6	L.C. FELONY (same as above)	L.C. FELONY (same as above)	2 OR MORE	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE TRIAL FOR TRIGGERING OFFENSE	YES	YES	NO	NO	MEDIAN 3X-4X	ALWAYS
S 13-604 G.		7	L.C. FELONY (CLASS 2 or 3: involing weapon or serious injury)	L.C. FELONY (same as above)	1	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE TRIAL FOR TRIGGERING OFFENSE	YES	YES	NO	NO	3/4 MEDIAN 2X-4X	ALWAYS
S 13-604 H.		8	L.C. FELONY (same as above)	L.C. FELONY (same as above)	2 OR MORE	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE TRIAL FOR TRIGGERING OFFENSE	YES	YES	NO	NO	MEDIAN 3X-5X	ALWAYS

* X = Normal presumptive sentence for the offense.

ARKANSAS: GENERAL TRIGGER AND SPECIFIC PRIOR: "EXTENDED TERM FOR HABITUAL OFFENDER"

ORIGINAL DATE OF ENACTMENT; SOURCE	NUMBER OF SUB-TYPES OF REPEAT OFFENDERS	SUB-TYPE	KINDS OF TRIGGERING	KINDS OF PRIORS	NUMBER OF PRIORS	TYPE OF PRIORS REQUIRED	JURISDICTION OF PRIORS	WHEN CHARGES MUST BE FILED	ABSOLUTE MAXIMUM?	ABSOLUTE MINIMUM?	DIFFERENCE BETWEEN MAXIMUM AND MINIMUM?	JUDICIAL DISCRETION	SENTENCE	PAROLE ELIGIBILITY
1975	14													
§ 41-1001(1)(a)		1	L.C. FELONY (CLASS Y)	ALL FELONIES	2 OR 3	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE TRIAL FOR TRIGGERING	YES	YES	YES	YES*	20-60 w/LIFE	SOMETIMES
§ 41-1001(1)(b)		2	L.C. FELONY (CLASS A)	ALL FELONIES	2 OR 3	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE TRIAL FOR TRIGGERING	YES	YES	YES	YES*	12-50	ALWAYS
§ 41-1001(1)(c)		3	L.C. FELONY (CLASS B)	ALL FELONIES	2 OR 3	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE TRIAL FOR TRIGGERING	YES	YES	YES	YES*	10-30	ALWAYS
§ 41-1001(1)(d)		4	L.C. FELONY (CLASS C)	ALL FELONIES	2 OR 3	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE TRIAL FOR TRIGGERING	YES	YES	YES	YES*	6-20	ALWAYS
§ 41-1001(1)(e)		5	L.C. FELONY (CLASS D)	ALL FELONIES	2 OR 3	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE TRIAL FOR TRIGGERING	YES	YES	YES	YES*	6-12	ALWAYS
§ 41-1001(1)(f)		6	L.C. FELONY (unclassified punish < life)	ALL FELONIES	2 OR 3	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE TRIAL FOR TRIGGERING	YES	YES	YES	YES*	MIN +3-MAX +5	UNKNOWN
§ 41-1001(1)(g)		7	L.C. FELONY (unclassified punish = life)	ALL FELONIES	2 OR 3	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE TRIAL FOR TRIGGERING	YES	YES	YES	YES*	10-50 OR LIFE	UNKNOWN
§ 41-1001(1)(a)		8	L.C. FELONY (CLASS Y)	ALL FELONIES	4 OR MORE	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE TRIAL FOR TRIGGERING	YES	YES	YES	YES*	40-LIFE	NEVER
§ 41-1001(2)(b)		9	L.C. FELONY (CLASS A)	ALL FELONIES	4 OR MORE	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE TRIAL FOR TRIGGERING	YES	YES	YES	YES*	30-60	NEVER
§ 41-1001(2)(c)		10	L.C. FELONY (CLASS B)	ALL FELONIES	4 OR MORE	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE TRIAL FOR TRIGGERING	YES	YES	YES	YES*	20-40	NEVER
§ 41-1001(2)(d)		11	L.C. FELONY (CLASS C)	ALL FELONIES	4 OR MORE	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE TRIAL FOR TRIGGERING	YES	YES	YES	YES*	10-30	ALWAYS
§ 41-1001(2)(e)		12	L.C. FELONY (CLASS D)	ALL FELONIES	4 OR MORE	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE TRIAL FOR TRIGGERING	YES	YES	YES	YES*	8-15	ALWAYS
§ 41-1001(2)(f)		13	L.C. FELONY (unclassified punish < life)	ALL FELONIES	4 OR MORE	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE TRIAL FOR TRIGGERING	YES	YES	YES	YES*	MIN +7-2 x MAX	UNKNOWN
§ 41-1001(2)(g)		14	L.C. FELONY (unclassified punish = life)	ALL FELONIES	4 OR MORE	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE TRIAL FOR TRIGGERING	YES	YES	YES	YES*	20-50 w/LIFE	UNKNOWN

* But see 43-2328.

CALIFORNIA: SPECIFIC TRIGGER AND SPECIFIC PRIOR:"HABITUAL CRIMINALS"

ORIGINAL DATE OF ENACTMENT; SOURCE	NUMBER OF SUB-TYPES OF REPEAT OFFENDERS	SUB-TYPE	KINDS OF TRIGGERING	KINDS OF PRIORS	NUMBER OF PRIORS	TYPE OF PRIORS REQUIRED	JURSIDICTION OF PRIORS	WHEN CHARGES MUST BE FILED	ABSOLUTE MAXIMUM?	ABSOLUTE MINIMUM?	DIFFERENCE BETWEEN MAXIMUM AND MINIMUM?	JUDICIAL DISCRETION	SENTENCE	PAROLE ELIGIBILITY
1872, 1976, 1981	4													
	§ 667	1	L.C. FELONY (serious felonies)	L.C. FELONY (serious felonies)	1 OR MORE	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE TRIAL FOR TRIGGERING	YES	YES	NO	NO	MAXIMUM 5 YEARS	NEVER
	§ 667.5(a)	2	L.C. FELONY (violent felony)	L.C. FELONY (violent felony)	1 OR MORE	ONLY CONVICTIONS FOR WHICH JAIL OR PRISON SENTENCES WERE IMPOSED	ALL U.S. and FOREIGN	BEFORE TRIAL FOR TRIGGERING	YES	YES	SOMETIMES	NO	MAXIMUM 3 YEARS	SOMETIMES
	§ 667.5(b)	3	ALL FELONIES	ALL FELONIES	1 OR MORE	ONLY CONVICTIONS FOR WHICH JAIL OR PRISON SENTENCES WERE IMPOSED	ALL U.S. and FOREIGN	BEFORE TRIAL FOR TRIGGERING	YES	YES	NO	NO	MAXIMUM 1 YEAR	NEVER
	§ 667.7	4	L.C. FELONY (violent felonies)	L.C. FELONY (violent felonies)	2 OR MORE	ONLY CONVICTIONS FOR WHICH JAIL OR PRISON SENTENCES WERE IMPOSED	ALL U.S. and FOREIGN	BEFORE TRIAL FOR TRIGGERING	YES	YES	SOMETIMES	NO	LIFE	SOMETIMES

COLORADO: GENERAL TRIGGER AND SPECIFIC PRIOR: "HABITUAL CRIMINALS"

ORIGINAL DATE OF ENACTMENT; SOURCE	NUMBER OF SUB-TYPES OF REPEAT OFFENDERS	SUB-TYPE	KINDS OF TRIGGERING	KINDS OF PRIORS	NUMBER OF PRIORS	TYPE OF PRIORS REQUIRED	JURISDICTION OF PRIORS	WHEN CHARGES MUST BE FILED	ABSOLUTE MAXIMUM?	ABSOLUTE MINIMUM?	DIFFERENCE BETWEEN MAXIMUM AND MINIMUM?	JUDICIAL DISCRETION	SENTENCE	PAROLE ELIGIBILITY
1972	2													
§ 16-13-101(1)		1	L.C. FELONY (max > 5 years)	ALL FELONIES	2	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE SENTENCING FOR TRIGGERING	YES	YES	YES	NO	25-50	ALWAYS
§ 16-13-101(2)		2	ALL FELONIES	ALL FELONIES	3 OR MORE	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE SENTENCING FOR TRIGGERING	YES	YES	NO	NO	LIFE	ALWAYS

CONNECTICUT: SPECIFIC TRIGGER AND SPECIFIC PRIOR: "PERSISTENT OFFENDERS"

ORIGINAL DATE OF ENACTMENT; SOURCE	NUMBER OF SUB-TYPES OF REPEAT OFFENDERS	SUB-TYPE	KINDS OF TRIGGERING	KINDS OF PRIORS	NUMBER OF PRIORS	TYPE OF PRIORS REQUIRED	JURISDICTION OF PRIORS	WHEN CHARGES MUST BE FILED	ABSOLUTE MAXIMUM?	ABSOLUTE MINIMUM?	DIFFERENCE BETWEEN MAXIMUM AND MINIMUM?	JUDICIAL DISCRETION	SENTENCE	PAROLE ELIGIBILITY
1963	6													
§ 53a-40(a)		1	L.C. FELONY ("dangerous")	L.C. FELONY ("dangerous")	1	ONLY CONVICTIONS FOR WHICH JAIL OR PRISON SENTENCES > 1 YR. WERE IMPOSED	ALL U.S. (State & Federal)	BEFORE TRIAL FOR TRIGGERING	YES	YES	YES	YES	CLASS A	NEVER
§ 53a-40(b)		2	L.C. FELONY (CLASS B)	ALL FELONIES	1	ONLY CONVICTIONS FOR WHICH JAIL OR PRISON SENTENCES > 1 YR. WERE IMPOSED	ALL U.S. (State & Federal)	BEFORE TRIAL FOR TRIGGERING	YES	YES	YES	YES	CLASS A	NEVER
§ 53a-40(b)		3	L.C. FELONY (CLASS C)	ALL FELONIES	1	ONLY CONVICTIONS FOR WHICH JAIL OR PRISON SENTENCES > 1 YR. WERE IMPOSED	ALL U.S. (State & Federal)	BEFORE TRIAL FOR TRIGGERING	YES	YES	YES	YES	CLASS B	NEVER
§ 53a-40(b)		4	L.C. FELONY (CLASS D)	ALL FELONIES	1	ONLY CONVICTIONS FOR WHICH JAIL OR PRISON SENTENCES > 1 YR. WERE IMPOSED	ALL U.S. (State & Federal)	BEFORE TRIAL FOR TRIGGERING	YES	YES	YES	YES	CLASS C	NEVER
§ 53a-40(d)		5	L.C. FELONY (CLASS B)	L.C. FELONY (except Class D)	2	ONLY CONVICTIONS FOR WHICH JAIL OR PRISON SENTENCES > 1 YR. WERE IMPOSED	UNKNOWN	BEFORE TRIAL FOR TRIGGERING	YES	YES	YES	YES	3 YEARS MIN - CLASS A	NEVER
§ 53a-40(d)		6	L.C. FELONY (CLASS C)	L.C. FELONY (except Class D)	2	ONLY CONVICTIONS FOR WHICH JAIL OR PRISON SENTENCES > 1 YR. WERE IMPOSED	UNKNOWN	BEFORE TRIAL FOR TRIGGERING	YES	YES	YES	YES	3 YEARS MIN - CLASS B	NEVER

DELAWARE: SPECIFIC TRIGGER AND SPECIFIC PRIOR: "HABITUAL CRIMINAL"

ORIGINAL DATE OF ENACTMENT; SOURCE	NUMBER OF SUB-TYPES OF REPEAT OFFENDERS	SUB-TYPE	KINDS OF TRIGGERING	KINDS OF PRIORS	NUMBER OF PRIORS	TYPE OF PRIORS REQUIRED	JURSIDICTION OF PRIORS	WHEN CHARGES MUST BE FILED	ABSOLUTE MAXIMUM?	ABSOLUTE MINIMUM?	DIFFERENCE BETWEEN MAXIMUM AND MINIMUM?	JUDICIAL DISCRETION	SENTENCE	PAROLE ELIGIBILITY
1953	2													
CH.S 4214(a)		1	ALL FELONIES	ALL FELONIES	3 OR MORE	CONVICTION ONLY	ALL U.S. (State & Federal)	BEFORE TRIAL FOR TRIGGERING	YES	YES	NO	YES	LIFE	ALWAYS
CH.S 4214(b)		2	L.C. FELONY ("predatory")	L.C. FELONY ("predatory")	2	CONVICTION ONLY	ALL U.S. (State & Federal)	BEFORE TRIAL FOR TRIGGERING	YES	YES	NO	NO	LIFE	NEVER

DISTRICT OF COLUMBIA: GENERAL TRIGGER AND GENERAL PRIOR: "SECOND CONVICTION"

ORIGINAL DATE OF ENACTMENT; SOURCE	NUMBER OF SUB-TYPES OF REPEAT OFFENDERS	SUB-TYPE	KINDS OF TRIGGERING	KINDS OF PRIORS	NUMBER OF PRIORS	TYPE OF PRIORS REQUIRED	JURSIDICTION OF PRIORS	WHEN CHARGES MUST BE FILED	ABSOLUTE MAXIMUM?	ABSOLUTE MINIMUM?	DIFFERENCE BETWEEN MAXIMUM AND MINIMUM?	JUDICIAL DISCRETION	SENTENCE	PAROLE ELIGIBILITY
1901	1													
S 22-104a		1	ALL FELONIES	ALL FELONIES	2 OR MORE	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE TRIAL FOR TRIGGERING	NO	YES	N/A	YES	3 x MAX	ALWAYS

FLORIDA: SPECIFIC TRIGGER AND SPECIFIC PRIOR: "HABITUAL FELONY OFFENDERS"

ORIGINAL DATE OF ENACTMENT; SOURCE	NUMBER OF SUB-TYPES OF REPEAT OFFENDERS	SUB-TYPE	KINDS OF TRIGGERING	KINDS OF PRIORS	NUMBER OF PRIORS	TYPE OF PRIORS REQUIRED	JURSIDICTION OF PRIORS	WHEN CHARGES MUST BE FILED	ABSOLUTE MAXIMUM?	ABSOLUTE MINIMUM?	DIFFERENCE BETWEEN MAXIMUM AND MINIMUM?	JUDICIAL DISCRETION	SENTENCE	PAROLE ELIGIBILITY
1971	6													
§ 775.084(1)(a)1.a. and (4)(a)1.		1	L.C. FELONY (1st Degree)	ALL FELONIES	1 OR MORE		FLORIDA ONLY	BEFORE SENTENCING FOR TRIGGERING	YES	YES	NO	YES	LIFE	ALWAYS
§ 775.084(1)(a)1.b. and (4)(a)1.		2	L.C. FELONY (1st Degree)	COMBINATION: L.C. Misdemeanor (1st Degree) and L.C. Felony (Foreign)	2 OR MORE		ALL U.S. (State & Federal)	BEFORE SENTENCING FOR TRIGGERING	YES	YES	NO	YES	LIFE	ALWAYS
§ 775.084(1)(a)1.a. and (4)(a)2.		3	L.C. FELONY (2nd Degree)	ALL FELONIES	1 OR MORE		FLORIDA ONLY	BEFORE SENTENCING FOR TRIGGERING	YES	NO	N/A	YES	30 YEARS	ALWAYS
§ 775.084(1)(a)1.b. and (4)(a)2.		4	L.C. FELONY (2nd Degree)	COMBINATION: (same as in Type 2, above)	2 OR MORE		ALL U.S. (State & Federal)	BEFORE SENTENCING FOR TRIGGERING	YES	NO	N/A	YES	30 YEARS	ALWAYS
§ 775.084(1)(a)1.a. and (4)(a)3.		5	L.C. FELONY (3rd Degree)	ALL FELONIES	1 OR MORE		FLORIDA ONLY	BEFORE SENTENCING FOR TRIGGERING	YES	NO	N/A	YES	10 YEARS	ALWAYS
§ 775.084(1)(a)1.b. and (4)(a)3.		6	L.C. FELONY (3rd Degree)	COMBINATION: (same as in Types 2 & 4 above)	2 OR MORE		ALL U.S. (State & Federal)	BEFORE SENTENCING FOR TRIGGERING	YES	NO	N/A	YES	10 YEARS	ALWAYS

GEORGIA: GENERAL TRIGGER AND GENERAL PRIOR: "REPEAT OFFENDERS"

ORIGINAL DATE OF ENACTMENT; SOURCE	NUMBER OF SUB-TYPES OF REPEAT OFFENDERS	SUB-TYPE	KINDS OF TRIGGERING	KINDS OF PRIORS	NUMBER OF PRIORS	TYPE OF PRIORS REQUIRED	JURSIDICTION OF PRIORS	WHEN CHARGES MUST BE FILED	ABSOLUTE MAXIMUM?	ABSOLUTE MINIMUM?	DIFFERENCE BETWEEN MAXIMUM AND MINIMUM?	JUDICIAL DISCRETION	SENTENCE	PAROLE ELIGIBILITY
1833	2													
§ 17-10-7(a)		1	ALL FELONIES	ALL FELONIES	1 OR 2	ONLY CONVICTIONS FOR WHICH JAIL OR PRISON SENTENCES WERE IMPOSED	GEORGIA ONLY	BEFORE TRIAL FOR TRIGGERING	YES	YES	NO	YES	MAXIMUM	ALWAYS
§ 17-10-7(b)		2	ALL FELONIES	ALL FELONIES	2 OR MORE	CONVICTION ONLY	ALL U.S. (State & Federal)	BEFORE TRIAL FOR TRIGGERING	YES	YES	NO	NO	MAXIMUM	NEVER

HAWAII: SPECIFIC TRIGGER AND SPECIFIC PRIOR: "REPEAT OFFENDERS AND EXTENDED TERMS"

ORIGINAL DATE OF ENACTMENT; SOURCE	NUMBER OF SUB-TYPES OF REPEAT OFFENDERS	SUB-TYPE	KINDS OF TRIGGERING	KINDS OF PRIORS	NUMBER OF PRIORS	TYPE OF PRIORS REQUIRED	JURISDICTION OF PRIORS	WHEN CHARGES MUST BE FILED	ABSOLUTE MAXIMUM?	ABSOLUTE MINIMUM?	DIFFERENCE BETWEEN MAXIMUM AND MINIMUM?	JUDICIAL DISCRETION	SENTENCE	PAROLE ELIGIBILITY
1972	7													
Title 37 § 706-606.5 (1,a)		1	L.C. FELONY (only certain CLASS A or B)	COMBINATION: L.C. Misdemeanor L.C. Felony (only certain CLASS A, B, or C)	1	CONVICTION ONLY*	ALL U.S. and FOREIGN	BEFORE SENTENCING FOR TRIGGERING	YES	NO	N/A	NO	5 YEARS	ALWAYS**
§ 706-606.5 (1,b)		2	L.C. FELONY (same as above)	COMBINATION: (same as above)	2	CONVICTION ONLY*	ALL U.S. and FOREIGN	BEFORE SENTENCING FOR TRIGGERING	YES	NO	N/A	NO	10 YEARS	ALWAYS**
§ 706-606.5 (2,a)		3	COMBINATION: L.C. Misdemeanor L.C. Felony (only certain CLASS B or C)	COMBINATION: (same as above)	1	CONVICTION ONLY*	ALL U.S. and FOREIGN	BEFORE SENTENCING FOR TRIGGERING	YES	NO	N/A	NO	3 YEARS	ALWAYS**
§ 706-606.5 (2,b)*		4	COMBINATION: (same as above)	COMBINATION: (same as above)	2	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE SENTENCING FOR TRIGGERING	YES	NO	N/A	NO	5 YEARS	ALWAYS**
§ 706-661(1)*		5	L.C. FELONY (CLASS A)	ALL FELONIES	2	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE SENTENCING FOR TRIGGERING	YES	NO	N/A	NO	LIFE	ALWAYS**
§ 706-661(2)		6	L.C. FELONY (CLASS B)	ALL FELONIES	2	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE SENTENCING FOR TRIGGERING	YES	NO	N/A	YES	20 YEARS	ALWAYS**
§ 706-661(3)		7	L.C. FELONY (CLASS C)	ALL FELONIES	2	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE SENTENCING FOR TRIGGERING	YES	NO	N/A	YES	10 YEARS	ALWAYS**

* These two laws are not completely mutually exclusive.

** Offenders convicted of certain special kinds of murder are only exception, see: § 706-606.

IDAHO: GENERAL TRIGGER AND GENERAL PRIOR: "PERSISTENT VIOLATOR"

ORIGINAL DATE OF ENACTMENT; SOURCE	NUMBER OF SUB-TYPES OF REPEAT OFFENDERS	SUB-TYPE	KINDS OF TRIGGERING	KINDS OF PRIORS	NUMBER OF PRIORS	TYPE OF PRIORS REQUIRED	JURSIDICTION OF PRIORS	WHEN CHARGES MUST BE FILED	ABSOLUTE MAXIMUM?	ABSOLUTE MINIMUM?	DIFFERENCE BETWEEN MAXIMUM AND MINIMUM?	JUDICIAL DISCRETION	SENTENCE	PAROLE ELIGIBILITY
1923	1													
§ 19-2514		1	ALL FELONIES	ALL FELONIES	2	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE TRIAL FOR TRIGGERING	YES	YES	YES	NO	5-LIFE	ALWAYS

ILLINOIS: SPECIFIC TRIGGER AND SPECIFIC PRIOR: "HABITUAL CRIMINALS AND EXTENDED TERMS"

ORIGINAL DATE OF ENACTMENT; SOURCE	NUMBER OF SUB-TYPES OF REPEAT OFFENDERS	SUB-TYPE	KINDS OF TRIGGERING	KINDS OF PRIORS	NUMBER OF PRIORS	TYPE OF PRIORS REQUIRED	JURSIDICTION OF PRIORS	WHEN CHARGES MUST BE FILED	ABSOLUTE MAXIMUM?	ABSOLUTE MINIMUM?	DIFFERENCE BETWEEN MAXIMUM AND MINIMUM?	JUDICIAL DISCRETION	SENTENCE	PAROLE ELIGIBILITY
1973, 1978, 1982	7													
CH.38, Article 33B-1		1	L.C. FELONY CLASS X (forcible offense) or MURDER	L.C. FELONY CLASS X or greater	2	CONVICTION ONLY	ALL U.S. (State & Federal)	BEFORE SENTENCING FOR TRIGGERING	YES	YES	NO	NO	LIFE	NEVER
CH., Article 1005-5-3(c)(6)		2	L.C. FELONY CLASS 1 or CLASS 2	L.C. FELONY CLASS 2 or greater	2	CONVICTION ONLY	SAME STATE ONLY	UNCLEAR	YES	YES	YES	NO	CLASS X	ALWAYS
CH., Articles 1005-5-3.2(b)(1) and 1005-8-2(a)(2)		3	L.C. FELONY CLASS X	L.C. FELONY CLASS X or greater	1	CONVICTION ONLY	SAME STATE ONLY	UNCLEAR	YES	YES	YES	YES	30-60	ALWAYS
CH.38, Articles 1005-5-3.2(b)(1) and 1005-8-2(a)(3)		4	L.C. FELONY CLASS 1	L.C. FELONY CLASS 1 or greater	1	CONVICTION ONLY	SAME STATE ONLY	UNCLEAR	YES	YES	YES	YES	15-30	ALWAYS
CH.38, Articles 1005-5-3.2(b)(1) and 1005-8-2(a)(4)		5	L.C. FELONY CLASS 2	L.C. FELONY CLASS 2 or greater	1	CONVICTION ONLY	SAME STATE ONLY	UNCLEAR	YES	YES	YES	YES	7-14	ALWAYS
CH.38, Articles 1005-5-3.2(b)(1) and 1005-8-2(a)(5)		6	L.C. FELONY CLASS 3	L.C. FELONY CLASS 3 or greater	1	CONVICTION ONLY	SAME STATE ONLY	UNCLEAR	YES	YES	YES	YES	5-10	ALWAYS
CH.38, Articles 1005-5-3.2(b)(1) and 1005-8-2(a)(6)		7	L.C. FELONY CLASS 4	ALL FELONIES	1	CONVICTION ONLY	SAME STATE ONLY	UNCLEAR	YES	YES	YES	YES	3-6	ALWAYS

INDIANA: GENERAL TRIGGER AND GENERAL PRIOR: "HABITUAL OFFENDERS"

ORIGINAL DATE OF ENACTMENT; SOURCE	NUMBER OF SUB-TYPES OF REPEAT OFFENDERS	SUB-TYPE	KINDS OF TRIGGERING	KINDS OF PRIORS	NUMBER OF PRIORS	TYPE OF PRIORS REQUIRED	JURSIDICTION OF PRIORS	WHEN CHARGES MUST BE FILED	ABSOLUTE MAXIMUM?	ABSOLUTE MINIMUM?	DIFFERENCE BETWEEN MAXIMUM AND MINIMUM?	JUDICIAL DISCRETION	SENTENCE	PAROLE ELIGIBILITY
1976	1													
$ 35-50-2-8		1	ALL FELONIES	ALL FELONIES	2 OR MORE	CONVICTION ONLY	ALL U.S. (State & Federal)	BEFORE TRIAL FOR TRIGGERING	YES	YES	SOMETIMES*	NO	30 YEARS ADD-ON	NEVER

* If less than 10 years have elapsed between triggering and priors, minimum and maximum are the same (30 years). But, if more than 10 years have elapsed, minimum is 10 years; maximum is 30 years.

IOWA: GENERAL TRIGGER AND SPECIFIC PRIOR: "HABITUAL OFFENDERS"

ORIGINAL DATE OF ENACTMENT; SOURCE	NUMBER OF SUB-TYPES OF REPEAT OFFENDERS	SUB-TYPE	KINDS OF TRIGGERING	KINDS OF PRIORS	NUMBER OF PRIORS	TYPE OF PRIORS REQUIRED	JURSIDICTION OF PRIORS	WHEN CHARGES MUST BE FILED	ABSOLUTE MAXIMUM?	ABSOLUTE MINIMUM?	DIFFERENCE BETWEEN MAXIMUM AND MINIMUM?	JUDICIAL DISCRETION	SENTENCE	PAROLE ELIGIBILITY
1976	1													
$ 902.8		1	L.C. FELONY CLASS C or CLASS D	ALL FELONIES	2 OR MORE	CONVICTION ONLY	ALL U.S. (State & Federal)	BEFORE TRIAL FOR TRIGGERING	YES	YES	YES	NO	MANDATORY MIN 3 YEARS	ALWAYS

KANSAS: GENERAL TRIGGER AND SPECIFIC PRIOR: "SECOND AND SUBSEQUENT FELONIES"

ORIGINAL DATE OF ENACTMENT: SOURCE	NUMBER OF SUB-TYPES OF REPEAT OFFENDERS	SUB-TYPE	KINDS OF TRIGGERING	KINDS OF PRIORS	NUMBER OF PRIORS	TYPE OF PRIORS REQUIRED	JURSIDICTION OF PRIORS	WHEN CHARGES MUST BE FILED	ABSOLUTE MAXIMUM?	ABSOLUTE MINIMUM?	DIFFERENCE BETWEEN MAXIMUM AND MINIMUM?	JUDICIAL DISCRETION	SENTENCE	PAROLE ELIGIBILITY
1969	8													
CH.21-4504(a) and 4501(b)		1	L.C. FELONY (CLASS B)	ALL FELONIES	1	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE SENTENCING FOR TRIGGERING	YES	YES	YES	YES	5-30 MIN TO 20-LIFE MAX	ALWAYS
CH.21-4501(a) and 4501(c)		2	L.C. FELONY (CLASS C)	ALL FELONIES	1	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE SENTENCING FOR TRIGGERING	YES	YES	YES	YES	3-10 MIN TO 10-40 MAX	ALWAYS
CH.21-4504(a) and 4501(d)		3	L.C. FELONY (CLASS D)	ALL FELONIES	1	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE SENTENCING FOR TRIGGERING	YES	YES	YES	YES	2-6 MIN TO 5-20 MAX	ALWAYS
CH.21-4504(a) and 4501(e)		4	L.C. FELONY (CLASS E)	ALL FELONIES	1	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE SENTENCING FOR TRIGGERING	YES	YES	YES	YES	1-4 MIN TO 4-10 MAX	ALWAYS
CH.21-4504(b) and 4501(b)		5	L.C. FELONY (CLASS B)	ALL FELONIES	2 OR MORE	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE SENTENCING FOR TRIGGERING	YES	YES	YES	NO	15-45 MIN TO 20-LIFE MAX	ALWAYS
CH.21-4504(b) and 4501(c)		6	L.C. FELONY (CLASS C)	ALL FELONIES	2 OR MORE	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE SENTENCING FOR TRIGGERING	YES	YES	YES	NO	5-15 MIN TO 10-60 MAX	ALWAYS
CH.21-4504(b) and 4501(d)		7	L.C. FELONY (CLASS D)	ALL FELONIES	2 OR MORE	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE SENTENCING FOR TRIGGERING	YES	YES	YES	NO	3-9 MIN TO 5-30 MAX	ALWAYS
CH.21-4504(b) and 4501(e)		8	L.C. FELONY (CLASS E)	ALL FELONIES	2 OR MORE	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE SENTENCING FOR TRIGGERING	YES	YES	YES	NO	2-6 MIN TO 2-15 MAX	ALWAYS

KENTUCKY: GENERAL TRIGGER AND SPECIFIC PRIOR: "PERSISTENT FELONY OFFENDERS"

ORIGINAL DATE OF ENACTMENT; SOURCE	NUMBER OF SUB-TYPES OF REPEAT OFFENDERS	SUB-TYPE	KINDS OF TRIGGERING	KINDS OF PRIORS	NUMBER OF PRIORS	TYPE OF PRIORS REQUIRED	JURISDICTION OF PRIORS	WHEN CHARGES MUST BE FILED	ABSOLUTE MAXIMUM?	AUSOLUTE MINIMUM?	DIFFERENCE BETWEEN MAXIMUM AND MINIMUM?	JUDICIAL DISCRETION	SENTENCE	PAROLE ELIGIBILITY
1974	6													
CH. 532.080(2) and (5)		1	L.C. FELONY (CLASS A)	ALL FELONIES	1	ONLY CONVICTIONS FOR WHICH JAIL OR PRISON SENTENCES ≥ 1 YR. WERE IMPOSED	ALL U.S. and FOREIGN	BEFORE TRIAL FOR TRIGGERING	YES	YES	YES	NO	CLASS A	ALWAYS
CH. 532.080(2) and (5)		2	L.C. FELONY (CLASS B)	ALL FELONIES	1	ONLY CONVICTIONS FOR WHICH JAIL OR PRISON SENTENCES ≥ 1 YR. WERE IMPOSED	ALL U.S. and FOREIGN	BEFORE TRIAL FOR TRIGGERING	YES	YES	YES	NO	CLASS A	ALWAYS
CH. 532.080(2) and (5)		3	L.C. FELONY (CLASS C)	ALL FELONIES	1	ONLY CONVICTIONS FOR WHICH JAIL OR PRISON SENTENCES ≥ 1 YR. WERE IMPOSED	ALL U.S. and FOREIGN	BEFORE TRIAL FOR TRIGGERING	YES	YES	YES	NO	CLASS B	ALWAYS
CH. 532.080(2) and (5)		4	L.C. FELONY (CLASS D)	ALL FELONIES	1	ONLY CONVICTIONS FOR WHICH JAIL OR PRISON SENTENCES ≥ 1 YR. WERE IMPOSED	ALL U.S. and FOREIGN	BEFORE TRIAL FOR TRIGGERING	YES	YES	YES	NO	CLASS C	ALWAYS
CH. 532.080(3) and (6)(a)		5	L.C. FELONY (CLASS A or B)	ALL FELONIES	2 OR MORE	ONLY CONVICTIONS FOR WHICH JAIL OR PRISON SENTENCES ≥ 1 YR. WERE IMPOSED	ALL U.S. and FOREIGN	BEFORE TRIAL FOR TRIGGERING	YES	YES	YES	NO	MAX 20 -LIFE	ALWAYS
CH. 532.080(3) and (6)(b)		6	L.C. FELONY (CLASS C or D)	ALL FELONIES	2 OR MORE	ONLY CONVICTIONS FOR WHICH JAIL OR PRISON SENTENCES ≥ 1 YR. WERE IMPOSED	ALL U.S. and FOREIGN	BEFORE TRIAL FOR TRIGGERING	YES	YES	YES	NO	MAX 10-20	ALWAYS

LOUISIANA: SPECIFIC TRIGGER AND SPECIFIC PRIOR: "HABITUAL OFFENDER LAW"

ORIGINAL DATE OF ENACTMENT; SOURCE	NUMBER OF SUB-TYPES OF REPEAT OFFENDERS	SUB-TYPE	KINDS OF TRIGGERING	KINDS OF PRIORS	NUMBER OF PRIORS	TYPE OF PRIORS REQUIRED	JURISDICTION OF PRIORS	WHEN CHARGES MUST BE FILED	ABSOLUTE MAXIMUM?	ABSOLUTE MINIMUM?	DIFFERENCE BETWEEN MAXIMUM AND MINIMUM?	JUDICIAL DISCRETION	SENTENCE	PAROLE ELIGIBILITY
1956	5													
15 § 529.1(1)		1	ALL FELONIES	ALL FELONIES	1	CONVICTION ONLY	ALL U.S. and FOREIGN	ANY REASONABLE TIME	YES	YES	YES	NO	1/3 MAX-2 x MAX	ALWAYS
15 § 529.1(2)(a)		2	ALL FELONIES	ALL FELONIES	2	CONVICTION ONLY	ALL U.S. and FOREIGN	ANY REASONABLE TIME	YES	YES	YES	NO	1/2 MAX-2 x MAX	NEVER
15 § 529.1(2)(b)		3	L.C. FELONY (serious, i.e. sentence > 12 yrs.)	L.C. FELONY (serious, i.e. sentence > 12 yrs.)	2	CONVICTION ONLY	ALL U.S. and FOREIGN	ANY REASONABLE TIME	YES	YES	NO	NO	LIFE	NEVER
15 § 529.1(3)(a)		4	ALL FELONIES	ALL FELONIES	3 OR MORE	CONVICTION ONLY	ALL U.S. and FOREIGN	ANY REASONABLE TIME	YES	YES	YES	NO	MAX OR 20 YEARS-LIFE	NEVER
15 § 529.1(3)(b)		5	L.C. FELONY (serious)	L.C. FELONIES (At least 2 of priors must be serious felonies)	3 OR MORE	CONVICTION ONLY	ALL U.S. and FOREIGN	ANY REASONABLE TIME	YES	YES	NO	NO	LIFE	NEVER

MARYLAND: SPECIFIC TRIGGER AND SPECIFIC PRIOR: MANDATORY SENTENCES FOR CRIMES OF VIOLENCE"

ORIGINAL DATE OF ENACTMENT; SOURCE	NUMBER OF SUB-TYPES OF REPEAT OFFENDERS	SUB-TYPE	KINDS OF TRIGGERING	KINDS OF PRIORS	NUMBER OF PRIORS	TYPE OF PRIORS REQUIRED	JURSIDICTION OF PRIORS	WHEN CHARGES MUST BE FILED	ABSOLUTE MAXIMUM?	ABSOLUTE MINIMUM?	DIFFERENCE BETWEEN MAXIMUM AND MINIMUM?	JUDICIAL DISCRETION	SENTENCE	PAROLE ELIGIBILITY
1975	2													
ART.27, § 643B(b)		1	L.C. FELONY (violent crime)	L.C. FELONY (violent crime)	3	ONLY CONVICTIONS FOR WHICH JAIL OR PRISON SENTENCES WERE IMPOSED	ALL U.S. and FOREIGN	BEFORE SENTENCING FOR TRIGGERING	YES	YES	NO	NO	LIFE	NEVER
§ 643B(c)		2	L.C. FELONY (violent crime)	L.C. FELONY (violent crime)	2	ONLY CONVICTIONS FOR WHICH JAIL OR PRISON SENTENCES WERE IMPOSED	ALL U.S. and FOREIGN	BEFORE SENTENCING FOR TRIGGERING	NO	YES	N/A	NO	MINIMUM 25 YEARS	SOMETIMES

MASSACHUSETTS: SPECIFIC TRIGGER AND GENERAL PRIOR: "HABITUAL CRIMINALS"

ORIGINAL DATE OF ENACTMENT; SOURCE	NUMBER OF SUB-TYPES OF REPEAT OFFENDERS	SUB-TYPE	KINDS OF TRIGGERING	KINDS OF PRIORS	NUMBER OF PRIORS	TYPE OF PRIORS REQUIRED	JURSIDICTION OF PRIORS	WHEN CHARGES MUST BE FILED	ABSOLUTE MAXIMUM?	ABSOLUTE MINIMUM?	DIFFERENCE BETWEEN MAXIMUM AND MINIMUM?	JUDICIAL DISCRETION	SENTENCE	PAROLE ELIGIBILITY
1904	1													
CH. 279, § 25		1	ALL FELONIES	L.C. FELONY	2 OR MORE	ONLY CONVICTIONS FOR WHICH JAIL OR PRISON SEN-	ALL U.S. (State & Federal)	BEFORE TRIAL FOR TRIGGERING	YES	YES	NO	NO	MAX FOR INSTANT OFFENSE	ALWAYS

MICHIGAN: GENERAL TRIGGER AND SPECIFIC PRIOR: "SUBSEQUENT FELONIES"

ORIGINAL DATE OF ENACTMENT; SOURCE	NUMBER OF SUB-TYPES OF REPEAT OFFENDERS	SUB-TYPE	KINDS OF TRIGGERING	KINDS OF PRIORS	NUMBER OF PRIORS	TYPE OF PRIORS REQUIRED	JURISDICTION OF PRIORS	WHEN CHARGES MUST BE FILED	ABSOLUTE MAXIMUM?	ABSOLUTE MINIMUM?	DIFFERENCE BETWEEN MAXIMUM AND MINIMUM?	JUDICIAL DISCRETION	SENTENCE	PAROLE ELIGIBILITY
1927	6													
S 769.10(a)		1	L.C. FELONY (only felonies punishable by sentence < than life)	ALL FELONIES	1	CONVICTION ONLY	ALL U.S. and FOREIGN	ANY REASONABLE TIME	YES	NO	N/A	YES	0-1 1/2 x MAX	ALWAYS
S 769.10(b)		2	L.C. FELONY (only felonies punishable by life)	ALL FELONIES	1	CONVICTION ONLY	ALL U.S. and FOREIGN	ANY REASONABLE TIME	YES	NO	N/A	YES	0-LIFE	ALWAYS
S 769.11(a)		3	L.C. FELONY (only felonies punishable by sentence < than life)	ALL FELONIES	2	CONVICTION ONLY	ALL U.S. and FOREIGN	ANY REASONABLE TIME	YES	NO	N/A	YES	0-2 x MAX	ALWAYS
S 769.11(b)		4	L.C. FELONY (only felonies punishable by life)	ALL FELONIES	2	CONVICTION ONLY	ALL U.S. and FOREIGN	ANY REASONABLE TIME	YES	NO	N/A	YES	0-LIFE	ALWAYS
S 769.12(a)		5	L.C. FELONY (only felonies punishable by sentence > 5 yrs.)	ALL FELONIES	3 OR MORE	CONVICTION ONLY	ALL U.S. and FOREIGN	ANY REASONABLE TIME	YES	NO	N/A	YES	0-LIFE	ALWAYS
S 769.12(b)		6	L.C. FELONY (only felonies punishable by sentence < 5 yrs.)	ALL FELONIES	3 OR MORE	CONVICTION ONLY	ALL U.S. and FOREIGN	ANY REASONABLE TIME	YES	NO	N/A	YES	0-15	ALWAYS

MINNESOTA: GENERAL TRIGGER AND SPECIFIC PRIOR: "SENTENCING GUIDELINES AND CRIMINAL HISTORY SCORES"

ORIGINAL DATE OF ENACTMENT; SOURCE	NUMBER OF SUB-TYPES OF REPEAT OFFENDERS	SUB-TYPE	KINDS OF TRIGGERING	KINDS OF PRIORS	NUMBER OF PRIORS	TYPE OF PRIORS REQUIRED	JURISDICTION OF PRIORS	WHEN CHARGES MUST BE FILED	ABSOLUTE MAXIMUM?	ABSOLUTE MINIMUM?	DIFFERENCE BETWEEN MAXIMUM AND MINIMUM?	JUDICIAL DISCRETION	SENTENCE	PAROLE ELIGIBILITY
1980	10													
CH. 244 Appendix		1	L.C. FELONY SEVERITY LEVEL 1	COMBINATION: All felonies and misdemeanors (except petty ones)	POINT SYSTEM $0 \leq x \leq 6$	CONVICTION ONLY	*ALL U.S. and FOREIGN	BEFORE SENTENCING FOR TRIGGERING	YES	NO	N/A	YES	DEPENDS ON PRIOR RECORD SCORE	NEVER*
		2	L.C. FELONY LEVEL 2	COMBINATION: same as in TYPE 1	POINT SYSTEM $0 \leq x \leq 6$	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE SENTENCING FOR TRIGGERING	YES	NO	N/A	YES	DEPENDS ON PRIOR RECORD SCORE	NEVER*
		3	L.C. FELONY LEVEL 3	COMBINATION: same	POINT SYSTEM $0 \leq x \leq 6$	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE SENTENCING FOR TRIGGERING	YES	NO	N/A	YES	DEPENDS ON PRIOR RECORD SCORE	NEVER*
		4	L.C. FELONY LEVEL 4	COMBINATION: same	POINT SYSTEM $0 \leq x \leq 6$	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE SENTENCING FOR TRIGGERING	YES	NO	N/A	YES	DEPENDS ON PRIOR RECORD SCORE	NEVER*
		5	L.C. FELONY LEVEL 5	COMBINATION: same	POINT SYSTEM $0 \leq x \leq 6$	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE SENTENCING FOR TRIGGERING	YES	NO	N/A	YES	DEPENDS ON PRIOR RECORD SCORE	NEVER*
		6	L.C. FELONY LEVEL 6	COMBINATION: same	POINT SYSTEM $0 \leq x \leq 6$	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE SENTENCING FOR TRIGGERING	YES	NO	N/A	YES	DEPENDS ON PRIOR RECORD SCORE	NEVER*
		7	L.C. FELONY LEVEL 7	COMBINATION: same	POINT SYSTEM $0 \leq x \leq 6$	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE SENTENCING FOR TRIGGERING	YES	NO	N/A	YES	DEPENDS ON PRIOR RECORD SCORE	NEVER*
		8	L.C. FELONY LEVEL 8	COMBINATION: same	POINT SYSTEM $0 \leq x \leq 6$	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE SENTENCING FOR TRIGGERING	YES	NO	N/A	YES	DEPENDS ON PRIOR RECORD SCORE	NEVER*
		9	L.C. FELONY LEVEL 9	COMBINATION: same	POINT SYSTEM $0 \leq x \leq 6$	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE SENTENCING FOR TRIGGERING	YES	NO	N/A	YES	DEPENDS ON PRIOR RECORD SCORE	NEVER*
		10	L.C. FELONY LEVEL 10	COMBINATION: same	POINT SYSTEM $0 \leq x \leq 6$	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE SENTENCING FOR TRIGGERING	YES	NO	N/A	YES	DEPENDS ON PRIOR RECORD SCORE	NEVER*

* Parole no longer exists in Minnesota; however, inmates released early for "good time" are supervised until the expiration of their entire sentence.

MISSISSIPPI: SPECIFIC TRIGGER AND SPECIFIC PRIOR: "HABITUAL CRIMINALS"

ORIGINAL DATE OF ENACTMENT; SOURCE	NUMBER OF SUB-TYPES OF REPEAT OFFENDERS	SUB-TYPE	KINDS OF TRIGGERING	KINDS OF PRIORS	NUMBER OF PRIORS	TYPE OF PRIORS REQUIRED	JURISDICTION OF PRIORS	WHEN CHARGES MUST BE FILED	ABSOLUTE MAXIMUM?	ABSOLUTE MINIMUM?	DIFFERENCE BETWEEN MAXIMUM AND MINIMUM?	JUDICIAL DISCRETION	SENTENCE	PAROLE ELIGIBILITY
1976	2													
§ 99-19-81		1	ALL FELONIES	ALL FELONIES	2	ONLY CONVICTIONS PROVIDING JAIL OR PRISON SENTENCES ≥ 1 YR.	ALL U.S. (State & Federal)	BEFORE TRIAL FOR TRIGGERING	YES	YES	NO	NO	MAXIMUM	NEVER
§ 99-19-83		2	COMBINATION: All Felonies OR L.C. Felony (violent)	COMBINATION: L.C. Felony (at least 1 of which must be violent) OR All Felonies	2	ONLY CONVICTIONS FOR WHICH JAIL OR PRISON SENTENCES ≥ 1 YR. WERE IMPOSED	ALL U.S. (State & Federal)	BEFORE TRIAL FOR TRIGGERING	YES	YES	NO	NO	LIFE	NEVER

MISSOURI: SPECIFIC TRIGGER AND SPECIFIC PRIOR: "PERSISTENT OR DANGEROUS OFFENDERS"

ORIGINAL DATE OF ENACTMENT; SOURCE	NUMBER OF SUB-TYPES OF REPEAT OFFENDERS	SUB-TYPE	KINDS OF TRIGGERING	KINDS OF PRIORS	NUMBER OF PRIORS	TYPE OF PRIORS REQUIRED	JURISDICTION OF PRIORS	WHEN CHARGES MUST BE FILED	ABSOLUTE MAXIMUM?	ABSOLUTE MINIMUM?	DIFFERENCE BETWEEN MAXIMUM AND MINIMUM?	JUDICIAL DISCRETION	SENTENCE	PAROLE ELIGIBILITY
1973	8													
§ 558.016, 3. + 6(1)		1	L.C. FELONY (CLASS A)	ALL FELONIES	2 OR MORE	CONVICTION ONLY	ALL U.S.* (State & Federal)	BEFORE TRIAL FOR TRIGGERING	YES	YES	YES	YES	NO CHANGE**	ALWAYS
§ 558.016, 3. + 6(2)		2	L.C. FELONY (CLASS B)	ALL FELONIES	2 OR MORE	CONVICTION ONLY	ALL U.S. (State & Federal)	BEFORE TRIAL FOR TRIGGERING	YES	YES	YES	YES	30 YEARS	ALWAYS
§ 558.016, 3. + 6(3)		3	L.C. FELONY (CLASS C)	ALL FELONIES	2 OR MORE	CONVICTION ONLY	ALL U.S. (State & Federal)	BEFORE TRIAL FOR TRIGGERING	YES	NO	N/A	YES	15 YEARS	ALWAYS
§ 558.016, 3. + 6(4)		4	L.C. FELONY (CLASS D)	ALL FELONIES	2 OR MORE	CONVICTION ONLY	ALL U.S. (State & Federal)	BEFORE TRIAL FOR TRIGGERING	YES	NO	N/A	YES	10 YEARS	ALWAYS
§ 558.016, 4. + 6(1)		5	L.C. FELONY (CLASS A) "Dangerous"	L.C. FELONY Class A or B or "Dangerous"	1 OR MORE	CONVICTION ONLY	ALL U.S. (State & Federal)	BEFORE TRIAL FOR TRIGGERING	YES	YES	YES	YES	NO CHANGE**	ALWAYS
§ 558.016, 4. + 6(2)		6	L.C. FELONY (CLASS B) "Dangerous"	L.C. FELONY Class A or B or "Dangerous"	1 OR MORE	CONVICTION ONLY	ALL U.S. (State & Federal)	BEFORE TRIAL FOR TRIGGERING	YES	YES	YES	YES	30 YEARS	ALWAYS
§ 558.016, 4. + 6(3)		7	L.C. FELONY (CLASS C) "Dangerous"	L.C. FELONY Class A or B or "Dangerous"	1 OR MORE	CONVICTION ONLY	ALL U.S. (State & Federal)	BEFORE TRIAL FOR TRIGGERING	YES	NO	N/A	YES	15 YEARS	ALWAYS
§ 558.016, 4. + 6(4)		8	L.C. FELONY (CLASS D) "Dangerous"	L.C. FELONY Class A or B or "Dangerous"	1 OR MORE	CONVICTION ONLY	ALL U.S. (State & Federal)	BEFORE TRIAL FOR TRIGGERING	YES	NO	N/A	YES	10 YEARS	ALWAYS

* Statute does not address this issue, however, case-law discusses use of other state and federal convictions, but not those in other countries.

** Although there is no change in the available sentence range, trial as a persistent offender does take sentencing decision away from the jury and gives it to the judge.

MONTANA: GENERAL TRIGGER AND GENERAL PRIOR: "PERSISTENT FELONY OFFENDER"

ORIGINAL DATE OF ENACTMENT; SOURCE	NUMBER OF SUB-TYPES OF REPEAT OFFENDERS	SUB-TYPE	KINDS OF TRIGGERING	KINDS OF PRIORS	NUMBER OF PRIORS	TYPE OF PRIORS REQUIRED	JURSIDICTION OF PRIORS	WHEN CHARGES MUST BE FILED	ABSOLUTE MAXIMUM?	ABSOLUTE MINIMUM?	DIFFERENCE BETWEEN MAXIMUM AND MINIMUM?	JUDICIAL DISCRETION	SENTENCE	PAROLE ELIGIBILITY
1973	2													
TITLE 46-18-501 and -502		1	ALL FELONIES	ALL FELONIES	1	ONLY CONVICTIONS WHICH PROVIDE JAIL OR PRISON SENTENCES ≥ 1 YR.	ALL U.S. and FOREIGN	BEFORE TRIAL FOR TRIGGERING	YES	YES	YES	NO	5-LIFE	SOMETIMES
46-18-502		2	ALL FELONIES	ALL FELONIES	2 OR MORE	ONLY CONVICTIONS WHICH PROVIDE JAIL OR PRISON SENTENCES ≥ 1 YR.	ALL U.S. and FOREIGN	BEFORE TRIAL FOR TRIGGERING	YES	YES	YES	NO	10-LIFE ADD-ON	SOMETIMES

NEBRASKA: GENERAL TRIGGER AND GENERAL PRIOR: "HABITUAL CRIMINAL"

ORIGINAL DATE OF ENACTMENT; SOURCE	NUMBER OF SUB-TYPES OF REPEAT OFFENDERS	SUB-TYPE	KINDS OF TRIGGERING	KINDS OF PRIORS	NUMBER OF PRIORS	TYPE OF PRIORS REQUIRED	JURSIDICTION OF PRIORS	WHEN CHARGES MUST BE FILED	ABSOLUTE MAXIMUM?	ABSOLUTE MINIMUM?	DIFFERENCE BETWEEN MAXIMUM AND MINIMUM?	JUDICIAL DISCRETION	SENTENCE	PAROLE ELIGIBILITY
1921	1													
§ 29-2221		1	ALL FELONIES	ALL FELONIES	2 OR MORE	ONLY CONVICTIONS FOR WHICH PRISON OR JAIL SENTENCES ≥ 1 YR. WERE IMPOSED	ALL U.S. (State & Federal)	BEFORE TRIAL FOR TRIGGERING	YES	YES	YES	NO	10-60	ALWAYS

NEVADA: SPECIFIC TRIGGER AND GENERAL PRIOR: "HABITUAL CRIMINALS"

ORIGINAL DATE OF ENACTMENT; SOURCE	NUMBER OF SUB-TYPES OF REPEAT OFFENDERS	SUB-TYPE	KINDS OF TRIGGERING	KINDS OF PRIORS	NUMBER OF PRIORS	TYPE OF PRIORS REQUIRED	JURISDICTION OF PRIORS	WHEN CHARGES MUST BE FILED	ABSOLUTE MAXIMUM?	ABSOLUTE MINIMUM?	DIFFERENCE BETWEEN MAXIMUM AND MINIMUM?	JUDICIAL DISCRETION	SENTENCE	PAROLE ELIGIBILITY
1911	4													
NRS 207.010, 1.		1	COMBINATION: All Felonies or L.C. Misdemeanor (fraud or larceny)	ALL FELONIES	2	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE TRIAL FOR TRIGGERING	YES	YES	YES	YES	10-20	ALWAYS
NRS 207.010, 1.		2	COMBINATION: same as above	L.C. MISDEMEANOR (fraud or larceny)	3 OR 4	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE TRIAL FOR TRIGGERING	YES	YES	YES	YES	10-20	ALWAYS
NRS 207.010, 2.		3	COMBINATION: same as above	ALL FELONIES	3 OR MORE	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE TRIAL FOR TRIGGERING	YES	YES	SOMETIMES**	YES	LIFE	SOMETIMES**
NRS 207.010, 2.		4	COMBINATION: same as above	L.C. MISDEMEANOR (same as in Type 2 above)	5 OR MORE	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE TRIAL FOR TRIGGERING	YES	YES	SOMETIMES**	YES	LIFE	SOMETIMES**

** If judge allows parole, then minimum is 10 years; otherwise the maximum and minimum are the same.

NEW HAMPSHIRE: SPECIFIC TRIGGER AND SPECIFIC PRIOR: "EXTENDED TERMS OF IMPRISONMENT"

ORIGINAL DATE OF ENACTMENT; SOURCE	NUMBER OF SUB-TYPES OF REPEAT OFFENDERS	SUB-TYPE	KINDS OF TRIGGERING	KINDS OF PRIORS	NUMBER OF PRIORS	TYPE OF PRIORS REQUIRED	JURISDICTION OF PRIORS	WHEN CHARGES MUST BE FILED	ABSOLUTE MAXIMUM?	ABSOLUTE MINIMUM?	DIFFERENCE BETWEEN MAXIMUM AND MINIMUM?	JUDICIAL DISCRETION	SENTENCE	PAROLE ELIGIBILITY
1971	2													
CH. 651:6, II(a)		1	ALL FELONIES (except murder)	COMBINATION: All Felonies, L.C. Misdemeanor (i.e., sentence > 1 year)	2 OR MORE	ONLY CONVICTIONS FOR WHICH JAIL OR PRISON SENTENCES > 1 YR. WERE IMPOSED	ALL U.S. and FOREIGN	BEFORE TRIAL FOR TRIGGERING	YES	NO	N/A	YES	MIN 0-10 TO 30 MAX	ALWAYS
CH. 651:6, II(b)		2	ALL MISDEMEANORS	COMBINATION: (same as above)	2 OR MORE	ONLY CONVICTIONS	ALL U.S. and FOREIGN	BEFORE TRIAL FOR TRIGGERING	YES	NO	N/A	YES	MIN 0-2 TO 5	ALWAYS

NEW JERSEY: GENERAL TRIGGER AND SPECIFIC PRIOR: "PERSISTENT OFFENDERS"

ORIGINAL DATE OF ENACTMENT; SOURCE	NUMBER OF SUB-TYPES OF REPEAT OFFENDERS	SUB-TYPE	KINDS OF TRIGGERING	KINDS OF PRIORS	NUMBER OF PRIORS	TYPE OF PRIORS REQUIRED	JURISDICTION OF PRIORS	WHEN CHARGES MUST BE FILED	ABSOLUTE MAXIMUM?	ABSOLUTE MINIMUM?	DIFFERENCE BETWEEN MAXIMUM AND MINIMUM?	JUDICIAL DISCRETION	SENTENCE	PAROLE ELIGIBILITY
1978	3													
TITLE 2C:44-3, a. 2C:43-7		1	L.C. FELONY ("1st degree crimes")*	COMBINATION: All Misdemeanor and Felonies	2 OR MORE	CONVICTION ONLY**	ALL U.S. and FOREIGN	BEFORE SENTENCING FOR TRIGGERING	YES	YES	YES	YES	20-LIFE	ALWAYS
TITLE 2C:44-3, a. 2C:43-7		2	L.C. FELONY ("2nd degree crimes")*	COMBINATION: same as in Type 1	2 OR MORE	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE SENTENCING FOR TRIGGERING	YES	YES	YES	YES	10-20	ALWAYS
TITLE 2C:44-3, a. 2C:43-7		3	L.C. MISDEMEANOR* ("3rd degree crimes")	COMBINATION: same as in Types 1 & 2 above	2 OR MORE	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE SENTENCING FOR TRIGGERING	YES	YES	YES	YES	5-10	ALWAYS

* New Jersey does not classify crimes as felonies and misdemeanors.

** Foreign convictions must have a sentence $\geq$ 6 months.

NEW MEXICO: GENERAL TRIGGER AND GENERAL PRIOR: "HABITUAL OFFENDERS"

ORIGINAL DATE OF ENACTMENT; SOURCE	NUMBER OF SUB-TYPES OF REPEAT OFFENDERS	SUB-TYPE	KINDS OF TRIGGERING	KINDS OF PRIORS	NUMBER OF PRIORS	TYPE OF PRIORS REQUIRED	JURISDICTION OF PRIORS	WHEN CHARGES MUST BE FILED	ABSOLUTE MAXIMUM?	ABSOLUTE MINIMUM?	DIFFERENCE BETWEEN MAXIMUM AND MINIMUM?	JUDICIAL DISCRETION	SENTENCE	PAROLE ELIGIBILITY
1977	3													
§ 31-8-17B		1	ALL FELONIES	ALL FELONIES	1	CONVICTIONS ONLY	ALL U.S. and FOREIGN	ANY REASONABLE TIME	YES	YES	NO	NO	MAX UP TO -1 YR	NEVER
§ 31-18-17C		2	ALL FELONIES	ALL FELONIES	2	CONVICTIONS ONLY	ALL U.S. and FOREIGN	ANY REASONABLE TIME	YES	YES	NO	NO	MAX UP TO 4 YRS	NEVER
§ 31-18-17D		3	ALL FELONIES	ALL FELONIES	3 OR MORE	CONVICTIONS ONLY	ALL U.S. and FOREIGN	ANY REASONABLE TIME	YES	YES	NO	NO	MAX UP TO 8 YRS	NEVER

NEW YORK: SPECIFIC TRIGGER AND SPECIFIC PRIOR: "SECOND VIOLENT FELONY OFFENDERS" — 70.04
"SECOND FELONY OFFENDERS" — 70.06
"PERSISTENT VIOLENT FELONY OFFENDERS" — 70.08
"PERSISTENT FELONY OFFENDERS" — 70.10

ORIGINAL DATE OF ENACTMENT; SOURCE	NUMBER OF SUB-TYPES OF REPEAT OFFENDERS	SUB-TYPE	KINDS OF TRIGGERING	KINDS OF PRIORS	NUMBER OF PRIORS	TYPE OF PRIORS REQUIRED	JURISDICTION OF PRIORS	WHEN CHARGES MUST BE FILED	ABSOLUTE MAXIMUM?	ABSOLUTE MINIMUM?	DIFFERENCE BETWEEN MAXIMUM AND MINIMUM?	JUDICIAL DISCRETION	SENTENCE	PAROLE ELIGIBILITY
1975, 1978	13													
§ 70.04, 3.(a)		1	L.C. FELONY CLASS B ("violent")	L.C. FELONY "violent"	1	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE SENTENCING FOR TRIGGERING	YES	YES	YES	NO	MAX 12-25, MIN 1/2 MAX	ALWAYS
§ 70.04, 3.(b)		2	L.C. FELONY CLASS C ("violent")	L.C. FELONY "violent"	1	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE SENTENCING FOR TRIGGERING	YES	YES	YES	NO	MAX 8-15, MIN 1/2 MAX	ALWAYS
§ 70.04, 3.(c)		3	L.C. FELONY CLASS D ("violent")	L.C. FELONY "violent"	1	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE SENTENCING FOR TRIGGERING	YES	YES	YES	NO	MIN 5-7 MAX 1/2	ALWAYS
§ 70.04, 3.(d)		4	L.C. FELONY CLASS E ("violent")	L.C. FELONY "violent"	1	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE SENTENCING FOR TRIGGERING	YES	YES	YES	NO	MAX 4, MIN 1/2 MAX	ALWAYS
§ 70.06, 3.(a)		5	L.C. FELONY CLASS A-II	ALL FELONIES	1 OR MORE	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE SENTENCING FOR TRIGGERING	YES	YES	YES	NO	MIN 6-12 1/2 TO LIFE	ALWAYS
§ 70.06, 3.(b)		6	L.C. FELONY CLASS B	ALL FELONIES	1 OR MORE	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE SENTENCING FOR TRIGGERING	YES	YES	YES	NO	MAX 9-25, MIN 1/2 MAX	ALWAYS
§ 70.06, 3.(c)		7	L.C. FELONY CLASS C	ALL FELONIES	1 OR MORE	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE SENTENCING FOR TRIGGERING	YES	YES	YES	NO	MAX 6-15, MIN 1/2 MAX	ALWAYS
§ 70.06, 3.(d)		8	L.C. FELONY CLASS D	ALL FELONIES	1 OR MORE	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE SENTENCING FOR TRIGGERING	YES	YES	YES	NO	MAX 4-17, MIN 1/2 MAX	ALWAYS
§ 70.06, 3.(e)		9	L.C. FELONY CLASS E	ALL FELONIES	1 OR MORE	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE SENTENCING FOR TRIGGERING	YES	YES	YES	NO	MAX 3-14, MIN 1/2 MAX	ALWAYS
§ 70.08, 3.(a)		10	L.C. FELONY CLASS B ("violent")	L.C. FELONY "violent"	2 OR MORE	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE SENTENCING FOR TRIGGERING	YES	YES	YES	NO	10-25 TO LIFE	ALWAYS
§ 70.08, 3.(b)		11	L.C. FELONY CLASS C ("violent")	L.C. FELONY "violent"	2 OR MORE	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE SENTENCING FOR TRIGGERING	YES	YES	YES	NO	8-25 TO LIFE	ALWAYS
§ 70.08, 3.(c)		12	L.C. FELONY CLASS D ("violent")	L.C. FELONY "violent"	2 OR MORE	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE SENTENCING FOR TRIGGERING	YES	YES	YES	NO	6-25 TO LIFE	ALWAYS
§ 70.10		13	ALL FELONIES	ALL FELONIES	2 OR MORE	ONLY CONVICTIONS FOR WHICH JAIL OR PRISON SENTENCES > 1 YR. WERE IMPOSED	ALL U.S. and FOREIGN	BEFORE SENTENCING FOR TRIGGERING	YES	YES	YES	YES	CLASS A-I	ALWAYS

NORTH CAROLINA: GENERAL TRIGGER AND GENERAL PRIOR: "HABITUAL FELONS"

ORIGINAL DATE OF ENACTMENT; SOURCE	NUMBER OF SUB-TYPES OF REPEAT OFFENDERS	SUB-TYPE	KINDS OF TRIGGERING	KINDS OF PRIORS	NUMBER OF PRIORS	TYPE OF PRIORS REQUIRED	JURISDICTION OF PRIORS	WHEN CHARGES MUST BE FILED	ABSOLUTE MAXIMUM?	ABSOLUTE MINIMUM?	DIFFERENCE BETWEEN MAXIMUM AND MINIMUM?	JUDICIAL DISCRETION	SENTENCE	PAROLE ELIGIBILITY
1967	1													
CRIM. LAW AST. 2A S 14-7.1 to 7.6		1	ALL FELONIES	ALL FELONIES	3 OR MORE	CONVICTION ONLY	ALL U.S. (State & Federal)	BEFORE TRIAL FOR TRIGGERING	YES	YES	NO	NO	CLASS C 14 YEARS WITH 7 MAX	NEVER

NORTH DAKOTA: SPECIFIC TRIGGER AND SPECIFIC PRIOR: "DANGEROUS SPECIAL OFFENDERS"

ORIGINAL DATE OF ENACTMENT; SOURCE	NUMBER OF SUB-TYPES OF REPEAT OFFENDERS	SUB-TYPE	KINDS OF TRIGGERING	KINDS OF PRIORS	NUMBER OF PRIORS	TYPE OF PRIORS REQUIRED	JURISDICTION OF PRIORS	WHEN CHARGES MUST BE FILED	ABSOLUTE MAXIMUM?	ABSOLUTE MINIMUM?	DIFFERENCE BETWEEN MAXIMUM AND MINIMUM?	JUDICIAL DISCRETION	SENTENCE	PAROLE ELIGIBILITY
1973	9													
TITLE 12.1-32-09, 1.C.+2.a.		1	L.C. FELONY (CLASS A)	L.C. FELONY (Class B or above)	2	CONVICTION ONLY	ALL U.S. (State & Federal)	BEFORE TRIAL FOR TRIGGERING	YES	NO	N/A	YES	LIFE MAX	ALWAYS
12.1-32-09, 1.C.+2.b.		2	L.C. FELONY (CLASS B)	L.C. FELONY (Class B or above)	2	CONVICTION ONLY	ALL U.S. (State & Federal)	BEFORE TRIAL FOR TRIGGERING	YES	NO	N/A	YES	20 YEARS MAXIMUM	ALWAYS
12.1-32-09, 1.C.+2.c.		3	L.C. FELONY (CLASS C)	L.C. FELONY (Class B or above)	2	CONVICTION ONLY	ALL U.S. (State & Federal)	BEFORE TRIAL FOR TRIGGERING	YES	NO	N/A	YES	10 YEARS MAXIMUM	ALWAYS
12.1-32-09, 1.C.+2.a.		4	L.C. FELONY (CLASS A)	COMBINATION: L.C. Felony (must include at least, one Class B or above) L.C. Misdemeanor (Class A misdemeanor)	3	CONVICTION ONLY	ALL U.S. (State & Federal)	BEFORE TRIAL FOR TRIGGERING	YES	NO	N/A	YES	LIFE MAX	ALWAYS
12.1-32-09, 1.C.+2.b.		5	L.C. FELONY (CLASS B)	COMBINATION: (Same as above)	3	CONVICTION ONLY	ALL U.S. (State & Federal)	BEFORE TRIAL FOR TRIGGERING	YES	NO	N/A	YES	20 YEARS MAXIMUM	ALWAYS
12.1-32-09, 1.C.+2.c.		6	L.C. FELONY (CLASS C)	COMBINATION: (Same as above)	3	CONVICTION ONLY	ALL U.S. (State & Federal)	BEFORE TRIAL FOR TRIGGERING	YES	NO	N/A	YES	10 YEARS MAXIMUM	ALWAYS
12.1-32-09, 1.d.+2.a.		7	L.C. FELONY (Class A dangerous or violent)	L.C. FELONY ("similar" to triggering)	1	CONVICTION ONLY	ALL U.S. (State & Federal)	BEFORE TRIAL FOR TRIGGERING	YES	NO	N/A	YES	LIFE MAX	ALWAYS
12.1-32-09, 1.d.+2.b.		8	L.C. FELONY (Class B dangerous or violent)	L.C. FELONY (same as above)	1	CONVICTION ONLY	ALL U.S. (State & Federal)	BEFORE TRIAL FOR TRIGGERING	YES	NO	N/A	YES	20 YEARS MAXIMUM	ALWAYS
12.1-32-09, 1.d.+2.c.		9	L.C. FELONY (Class C dangerous or violent)	L.C. FELONY (same as above)	1	CONVICTION ONLY	ALL U.S. (State & Federal)	BEFORE TRIAL FOR TRIGGERING	YES	NO	N/A	YES	10 YEARS MAXIMUM	ALWAYS

OKLAHOMA: SPECIFIC TRIGGER AND SPECIFIC PRIOR: "SECOND AND SUBSEQUENT OFFENSES"

ORIGINAL DATE OF ENACTMENT; SOURCE	NUMBER OF SUB-TYPES OF REPEAT OFFENDERS	SUB-TYPE	KINDS OF TRIGGERING	KINDS OF PRIORS	NUMBER OF PRIORS	TYPE OF PRIORS REQUIRED	JURISDICTION OF PRIORS	WHEN CHARGES MUST BE FILED	ABSOLUTE MAXIMUM?	ABSOLUTE MINIMUM?	DIFFERENCE BETWEEN MAXIMUM AND MINIMUM?	JUDICIAL DISCRETION	SENTENCE	PAROLE ELIGIBILITY
1910	7													
TITLE 21, § 51,A.1.		1	L.C. FELONY (punishable by any term > 5 years)	ALL FELONIES	1	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE TRIAL FOR TRIGGERING	NO	YES	N/A	YES	10 YEARS MINIMUM	ALWAYS
TITLE 21, § 51,A.2.		2	L.C. FELONY (punishable by any term ≤ 5 years)	ALL FELONIES	1	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE TRIAL FOR TRIGGERING	YES	NO	N/A	YES	10 YEARS MAXIMUM	ALWAYS
TITLE 21, § 51,A.3.		3	COMBINATION: L.C. Misdemeanor L.C. Felony (petty larceny or any "attempt")	ALL FELONIES	1	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE TRIAL FOR TRIGGERING	YES	NO	N/A	YES	5 YEARS MAXIMUM	ALWAYS
TITLE 21, § 51,B		4	ALL FELONIES	ALL FELONIES	2 OR MORE	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE TRIAL FOR TRIGGERING	NO	YES	N/A	NO	20 YEARS MINIMUM	ALWAYS
TITLE 21, § 51,1.		5	L.C. FELONY (punishable by life)	COMBINATION: L.C. Misdemeanor L.C. Felony (petty larceny or any "attempt")	1	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE TRIAL FOR TRIGGERING	YES	YES	NO	YES	LIFE	ALWAYS
TITLE 21, § 51,2.		6	L.C. FELONY (punishable by ...y term < life)	COMBINATION: (name as in Type 5, above)	1	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE TRIAL FOR TRIGGERING	YES	YES	NO	YES	MAX ON INSTANT	ALWAYS
TITLE 21, § 51,3.		7	COMBINATION: (name as in Type 3, above)	COMBINATION: (name as above)	1	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE TRIAL FOR TRIGGERING	YES	NO	N/A	YES	5 YEARS MAXIMUM	ALWAYS

OREGON: GENERAL TRIGGER AND SPECIFIC PRIOR: "DANGEROUS OFFENDERS"

ORIGINAL DATE OF ENACTMENT; SOURCE	NUMBER OF SUB-TYPES OF REPEAT OFFENDERS	SUB-TYPE	KINDS OF TRIGGERING	KINDS OF PRIORS	NUMBER OF PRIORS	TYPE OF PRIORS REQUIRED	JURISDICTION OF PRIORS	WHEN CHARGES MUST BE FILED	ABSOLUTE MAXIMUM?	ABSOLUTE MINIMUM?	DIFFERENCE BETWEEN MAXIMUM AND MINIMUM?	JUDICIAL DISCRETION	SENTENCE	PAROLE ELIGIBILITY
1971	1													
S 161.725(2)		1	L.C. FELONY (violent or dangerous)*	ALL FELONIES	1 OR MORE	ONLY CONVICTIONS PROVIDING JAIL OR PRISON SENTENCES ≥ 1 YR.	ALL U.S. (State & Federal)	BEFORE SENTENCING FOR TRIGGERING	YES	NO	N/A	YES	30 YEARS MAXIMUM	SOMETIMES

* Court must also find that defendant is suffering from "a severe personality disorder indicating a propensity toward criminal activity."

PENNSYLVANIA: SPECIFIC TRIGGER AND SPECIFIC PRIOR: "SENTENCING GUIDELINES AND PRIOR RECORD SCORE"

ORIGINAL DATE OF ENACTMENT; SOURCE	NUMBER OF SUB-TYPES OF REPEAT OFFENDERS	SUB-TYPE	KINDS OF TRIGGERING	KINDS OF PRIORS	NUMBER OF PRIORS	TYPE OF PRIORS REQUIRED	JURISDICTION OF PRIORS	WHEN CHARGES MUST BE FILED	ABSOLUTE MAXIMUM?	ABSOLUTE MINIMUM?	DIFFERENCE BETWEEN MAXIMUM AND MINIMUM?	JUDICIAL DISCRETION SENTENCE	PAROLE ELIGIBILITY
1982	10												
TITLE 42 § 9714 § 9721		1	L.C. FELONY ("10" offense gravity)	COMBINATION: All Felonies and L.C. Misdemeanors (excludes violations of local ordinances)	POINTS SYSTEM $0 \leq x \leq 6$	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE SENTENCING FOR TRIGGERING	YES	YES	YES	NO DEPENDS ON PRIOR RECORD SCORE	ALWAYS
		2	L.C. FELONY ("9" offense gravity)	COMBINATION: (same as above)	POINT SYSTEM $0 \leq x \leq 6$	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE SENTENCING FOR TRIGGERING	YES	YES	YES	NO DEPENDS ON PRIOR RECORD SCORE	ALWAYS
		3	L.C. FELONY ("8" offense gravity)	COMBINATION: (same as above)	POINT SYSTEM $0 \leq x \leq 6$	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE SENTENCING FOR TRIGGERING	YES	SOMETIMES	N/A	SOMETIMES DEPENDS ON PRIOR RECORD SCORE	ALWAYS
		4	COMBINATION: L.C. Misdemeanor & L.C. Felonies ("7" offense gravity)	COMBINATION: (same as above)	POINT SYSTEM $0 \leq x \leq 6$	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE SENTENCING FOR TRIGGERING	YES	SOMETIMES	N/A	SOMETIMES DEPENDS ON PRIOR RECORD SCORE	ALWAYS
		5	COMBINATION: L.C. Misdemeanor & L.C. Felonies ("6" offense gravity)	COMBINATION: (same as above)	POINT SYSTEM $0 \leq x \leq 6$	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE SENTENCING FOR TRIGGERING	YES	NO	N/A	YES DEPENDS ON PRIOR RECORD SCORE	ALWAYS
		6	COMBINATION: L.C. Misdemeanor & L.C. Felonies ("5" offense gravity)	COMBINATION: (same as above)	POINT SYSTEM $0 \leq x \leq 6$	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE SENTENCING FOR TRIGGERING	YES	NO	N/A	YES DEPENDS ON PRIOR RECORD SCORE	ALWAYS
		7	COMBINATION: L.C. Misdemeanor & L.C. Felonies ("4" offense gravity)	COMBINATION: (same as above)	POINT SYSTEM $0 \leq x \leq 6$	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE SENTENCING FOR TRIGGERING	YES	NO	N/A	YES DEPENDS ON PRIOR RECORD SCORE	ALWAYS
		8	COMBINATION: L.C. Misdemeanor & L.C. Felonies ("3" offense gravity)	COMBINATION: (same as above)	POINT SYSTEM $0 \leq x \leq 6$	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE SENTENCING FOR TRIGGERING	YES	NO	N/A	YES DEPENDS ON PRIOR RECORD SCORE	ALWAYS
		9	COMBINATION: L.C. Misdemeanor & L.C. Felonies ("1" offense gravity	COMBINATION: (same as above)	POINT SYSTEM $0 \leq x \leq 6$	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE SENTENCING FOR TRIGGERING	YES	NO	N/A	YES DEPENDS ON PRIOR RECORD SCORE	ALWAYS
		10	COMBINATION: L.C. Misdemeanor & L.C. Felonies ("2" offense gravity	COMBINATION: (same as above)	POINT SYSTEM $0 \leq x \leq 6$	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE SENTENCING FOR TRIGGERING	YES	NO	N/A	YES DEPENDS ON PRIOR RECORD SCORE	ALWAYS

RHODE ISLAND: GENERAL TRIGGER AND GENERAL PRIOR: "HABITUAL CRIMINALS"

ORIGINAL DATE OF ENACTMENT; SOURCE	NUMBER OF SUB-TYPES OF REPEAT OFFENDERS	SUB-TYPE	KINDS OF TRIGGERING	KINDS OF PRIORS	NUMBER OF PRIORS	TYPE OF PRIORS REQUIRED	JURSIDICTION OF PRIORS	WHEN CHARGES MUST BE FILED	ABSOLUTE MAXIMUM?	ABSOLUTE MINIMUM?	DIFFERENCE BETWEEN MAXIMUM AND MINIMUM?	JUDICIAL DISCRETION	SENTENCE	PAROLE ELIGIBILITY
1896	1													
§ 12-19-21		1	ALL FELONIES	ALL FELONIES	2 OR MORE	ONLY CONVICTIONS PROVIDING JAIL OR PRISON SENTENCES	ALL U.S. (State & Federal)	BEFORE SENTENCING FOR TRIGGERING	YES	NO	N/A	NO	MAX 25 YRS ADDED-ON	ALWAYS

SOUTH CAROLINA: SPECIFIC TRIGGER AND SPECIFIC PRIOR: "THIRD CONVICTION"

ORIGINAL DATE OF ENACTMENT; SOURCE	NUMBER OF SUB-TYPES OF REPEAT OFFENDERS	SUB-TYPE	KINDS OF TRIGGERING	KINDS OF PRIORS	NUMBER OF PRIORS	TYPE OF PRIORS REQUIRED	JURSIDICTION OF PRIORS	WHEN CHARGES MUST BE FILED	ABSOLUTE MAXIMUM?	ABSOLUTE MINIMUM?	DIFFERENCE BETWEEN MAXIMUM AND MINIMUM?	JUDICIAL DISCRETION	SENTENCE	PAROLE ELIGIBILITY
1982	1													
§ 17-25-45		1	L.C. FELONY (dangerous)	L.C. FELONY (dangerous)	2 OR MORE	CONVICTION ONLY	ALL U.S. (State & Federal)	ANY REASONABLE TIME	YES	YES	NO	NO	LIFE	ALWAYS

SOUTH DAKOTA: SPECIFIC TRIGGER AND SPECIFIC PRIOR: "HABITUAL CRIMINALS"

ORIGINAL DATE OF ENACTMENT; SOURCE	NUMBER OF SUB-TYPES OF REPEAT OFFENDERS	SUB-TYPE	KINDS OF TRIGGERING	KINDS OF PRIORS	NUMBER OF PRIORS	TYPE OF PRIORS REQUIRED	JURISDICTION OF PRIORS	WHEN CHARGES MUST BE FILED	ABSOLUTE MAXIMUM?	ABSOLUTE MINIMUM?	DIFFERENCE BETWEEN MAXIMUM AND MINIMUM?	JUDICIAL DISCRETION	SENTENCE	PAROLE ELIGIBILITY
1877*	13													
TITLE 22-7-7		1	L.C. FELONY (CLASS B)	ALL FELONIES	1 OR 2	CONVICTION ONLY	ALL U.S. (State & Federal)	BEFORE TRIAL FOR TRIGGERING	YES	YES	NO	NO	CLASS A	NEVER
22-7-7		2	L.C. FELONY (CLASS C)	ALL FELONIES	1 OR 2	CONVICTION ONLY	ALL U.S. (State & Federal)	BEFORE TRIAL FOR TRIGGERING	YES	YES	NO	NO	CLASS B	SOMETIMES**
22-7-7		3	L.C. FELONY (CLASS 2)	ALL FELONIES	1 OR 2	CONVICTION ONLY	ALL U.S. (State & Federal)	BEFORE TRIAL FOR TRIGGERING	YES	NO	N/A	NO	CLASS 1	ALWAYS
22-7-7		4	L.C. FELONY (CLASS 3)	ALL FELONIES	1 OR 2	CONVICTION ONLY	ALL U.S. (State & Federal)	BEFORE TRIAL FOR TRIGGERING	YES	NO	N/A	NO	CLASS 2	ALWAYS
22-7-7		5	L.C. FELONY (CLASS 4)	ALL FELONIES	1 OR 2	CONVICTION ONLY	ALL U.S. (State & Federal)	BEFORE TRIAL FOR TRIGGERING	YES	NO	N/A	NO	CLASS 3	ALWAYS
22-7-7		6	L.C. FELONY (CLASS 5)	ALL FELONIES	1 OR 2	CONVICTION ONLY	ALL U.S. (State & Federal)	BEFORE TRIAL FOR TRIGGERING	YES	NO	N/A	NO	CLASS 4	ALWAYS
22-7-7		7	L.C. FELONY (CLASS 6)	ALL FELONIES	1 OR 2	CONVICTION ONLY	ALL U.S. (State & Federal)	BEFORE TRIAL FOR TRIGGERING	YES	NO	N/A	NO	CLASS 5	ALWAYS
22-7-8		8	ALL FELONIES	L.C. FELONIES (one or more priors or must have been "violent")	3 OR MORE	CONVICTION ONLY	ALL U.S. (State & Federal)	BEFORE TRIAL FOR TRIGGERING	YES	NO	N/A	NO	CLASS 1	SOMETIMES**
22-7-8		9	L.C. FELONY (CLASS 2)	L.C. FELONIES (none of the priors may have been "violent"	3 OR MORE	CONVICTION ONLY	ALL U.S. (State & Federal)	BEFORE TRIAL FOR TRIGGERING	YES	NO	N/A	NO	CLASS B	ALWAYS
22-7-8		10	L.C. FELONY (CLASS 3)	L.C. FELONIES (same limit as 9)	3 OR MORE	CONVICTION ONLY	ALL U.S. (State & Federal)	BEFORE TRIAL FOR TRIGGERING	YES	NO	N/A	NO	CLASS 1	ALWAYS
22-7-8		11	L.C. FELONY (CLASS 4)	L.C. FELONIES (same limit as 9)	3 OR MORE	CONVICTION ONLY	ALL U.S. (State & Federal)	BEFORE TRIAL FOR TRIGGERING	YES	NO	N/A	NO	CLASS 2	ALWAYS
22-7-8		12	L.C. FELONY (CLASS 5)	L.C. FELONIES (same limit as 9)	3 OR MORE	CONVICTION ONLY	ALL U.S. (State & Federal)	BEFORE TRIAL FOR TRIGGERING	YES	NO	N/A	NO	CLASS 3	ALWAYS
22-7-8		13	L.C. FELONY (CLASS 6)	L.C. FELONIES (same limit as 9)	3 OR MORE	CONVICTION ONLY	ALL U.S. (State & Federal)	BEFORE TRIAL FOR TRIGGERING	YES	NO	N/A	NO	CLASS 4	ALWAYS

* 1984 amendment was taken into account.

** Only if sentence is less than life.

TENNESSEE: SPECIFIC TRIGGER AND SPECIFIC PRIOR: "PERSISTENT OFFENDERS" -- § 40-35-106
"HABITUAL CRIMINALS" -- § 39-1-801

ORIGINAL DATE OF ENACTMENT; SOURCE	NUMBER OF SUB-TYPES OF REPEAT OFFENDERS	SUB-TYPE	KINDS OF TRIGGERING	KINDS OF PRIORS	NUMBER OF PRIORS	TYPE OF PRIORS REQUIRED	JURISDICTION OF PRIORS	WHEN CHARGES MUST BE FILED	ABSOLUTE MAXIMUM?	ABSOLUTE MINIMUM?	DIFFERENCE BETWEEN MAXIMUM AND MINIMUM?	JUDICIAL DISCRETION	SENTENCE	PAROLE ELIGIBILITY
1939, 1982	3													
§ 40-35-106(1)		1	ALL FELONIES	ALL FELONIES	2 OR 3	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE TRIAL FOR TRIGGERING	YES	YES	YES	NO	RANGE II**	ALWAYS
§ 40-35-106(2)*		2	ALL FELONIES	ALL FELONIES	4 OR MORE	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE TRIAL FOR TRIGGERING	YES	YES	YES	NO	RANGE II**	ALWAYS
§ 39-1-801* 39-1-806		3	L.C. FELONY (2 of the 3 the offenses, including the triggering one, must have been for a serious felony)	L.C. FELONY	3 OR MORE	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE TRIAL FOR TRIGGERING	YES	YES	NO	NO	LIFE	NEVER

* These two laws are not completely mutally exclusive.

** Range II can be found in § 40-35-109. It increases minimums to usual minimum plus one-half the difference between maximum and minimum.

STATE SPECIFIC FELONY AND MISDEMEANOR SENTENCING PROVISIONS

SOURCE: ENACTMENT OR EFFECTIVE DATE OF ORIGINAL PROVISION	NUMBER OF SEPARATE OFFENSES	NUMBER OF SUB-STATE JURISDICTIONS	KINDS OF FELONIES	KINDS OF MISDEMEANORS	NUMBER OF PRIORS	2 OR MORE PRIORS	ONLY CONVICTIONS REQUIRED FOR PRIORS	TYPE OF PRIORS	JURISDICTION OF PRIORS	ALL U.S. (State & Federal)	MINIMUM TIME BEFORE TRIAL FOR PRIORS	MAXIMUM TIME BEFORE TRIAL FOR PRIORS	DIFFERENCE BETWEEN MAXIMUM AND MINIMUM?	JUDICIAL DISCRETION	SENTENCE	MAXIMUM SENTENCE	ALTERNATIVE PENALTY
1971	5																
PENAL § 12.42(a)		1	ALL FELONIES	L.C. FELONY (3rd Degree)	ALL FELONIES	1	ONLY CONVICTIONS FOR WHICH JAIL OR PRISON SENTENCES WERE IMPOSED	ALL FELONIES	ALL U.S. (State & Federal)	ANY REASONABLE TIME			YES	NO	YES	2, 5 YRS. MAXIMUM	ALWAYS
§ 12.42(b)		2	ALL FELONIES	L.C. FELONY (2nd Degree)	ALL FELONIES	1	ONLY CONVICTIONS FOR WHICH JAIL OR PRISON SENTENCES WERE IMPOSED	ALL FELONIES	ALL U.S. (State & Federal)	ANY REASONABLE TIME			YES	NO	YES	2 YRS. MIN. 10 YRS. MAX.	ALWAYS
§ 12.42(c)		3	ALL FELONIES	L.C. FELONY (1st Degree)	ALL FELONIES	1	ONLY CONVICTIONS FOR WHICH JAIL OR PRISON SENTENCES WERE IMPOSED	ALL FELONIES	ALL U.S. (State & Federal)	ANY REASONABLE TIME			YES	NO	YES	5 YRS. MIN. LIFE MAX.	ALWAYS
§ 12.42(d)		4	ALL FELONIES	ALL FELONIES	ALL FELONIES	2	ONLY CONVICTIONS FOR WHICH JAIL OR PRISON SENTENCES WERE IMPOSED	ALL FELONIES	ALL U.S. (State & Federal)	ANY REASONABLE TIME			YES	NO	YES	LIFE	ALWAYS
§ 12.43(a)	5	5	L.C. MISDEMEANOR (CLASS A)	COMBINATION: L.C. Misdemeanor (Class A Misdemeanor) or All Felonies	ALL FELONIES	1	ONLY CONVICTIONS FOR WHICH JAIL OR PRISON SENTENCES WERE IMPOSED	ALL FELONIES	ALL U.S. (State & Federal)	ANY REASONABLE TIME			YES	YES	YES	1 YR. MIN. 10 YRS. MAX.	ALWAYS
§ 12.43(b)		6	L.C. MISDEMEANOR (CLASS B)	COMBINATION: L.C. Misdemeanor (Class A or B Misdemeanor) or All Felonies	ALL FELONIES	1	ONLY CONVICTIONS FOR WHICH JAIL OR PRISON SENTENCES WERE IMPOSED	ALL FELONIES	ALL U.S. (State & Federal)	ANY REASONABLE TIME			YES	YES	YES	30 DAYS MIN. 10 YRS. MAX.	NEVER

* Not stated in statute, but in case law.

** This has been recently changed to 25-life.

UNITED STATES: GENERAL TRIGGER AND GENERAL PENALTY PROVISIONS

"PRIORS" STATUTES

SOURCE: ENACTMENT OR EFFECTIVE DATE OF ORIGINAL PROVISION	NUMBER OF SEPARATE OFFENSES	NUMBER OF SUB-STATE JURISDICTIONS	KINDS OF FELONIES	KINDS OF MISDEMEANORS	NUMBER OF PRIORS	2 OR MORE PRIORS	ONLY CONVICTIONS REQUIRED FOR PRIORS	TYPE OF PRIORS	JURISDICTION OF PRIORS	ALL U.S. (State & Federal)	MINIMUM TIME BEFORE TRIAL FOR PRIORS	MAXIMUM TIME BEFORE TRIAL FOR PRIORS	DIFFERENCE BETWEEN MAXIMUM AND MINIMUM?	JUDICIAL DISCRETION	SENTENCE	MAXIMUM SENTENCE	ALTERNATIVE PENALTY
1970	1																
SEC. 5 ET SEQ.		1	ALL FELONIES		ALL FELONIES	2 OR MORE	ONLY CONVICTIONS REQUIRED FOR PRIORS OR PRISON SENTENCES > 1 YR.*	ALL FELONIES	ALL U.S. (State & Federal)	YES	NO	N/A	N/A	YES	2, 5 YRS. MAXIMUM	ALWAYS	ALWAYS

* One of prices must have resulted in imprisonment.

UTAH: SPECIFIC TRIGGER AND SPECIFIC PRIOR; "HABITUAL CRIMINALS"

ORIGINAL DATE OF ENACTMENT; SOURCE	NUMBER OF SUB-TYPES OF REPEAT OFFENDERS	SUB-TYPE	KINDS OF TRIGGERING	KINDS OF PRIORS	NUMBER OF PRIORS	TYPE OF PRIORS REQUIRED	JURISDICTION OF PRIORS	WHEN CHARGES MUST BE FILED	ABSOLUTE MAXIMUM?	ABSOLUTE MINIMUM?	DIFFERENCE BETWEEN MAXIMUM AND MINIMUM?	JUDICIAL DISCRETION	SENTENCE	PAROLE ELIGIBILITY
1975	1													
TITLE 76-8-1001		1	L.C. FELONY (2nd Degree or higher, except murder in 1st or 2nd degree)	L.C. FELONY (at least 1 of priors must have been 2nd degree or higher)	2 OR MORE	ONLY CONVICTIONS FOR WHICH JAIL OR PRISON SENTENCES WERE IMPOSED	ALL U.S. and FOREIGN	BEFORE TRIAL FOR TRIGGERING	YES	YES	YES	YES	5-LIFE	ALWAYS

VERMONT: GENERAL TRIGGER AND GENERAL PRIOR; "HABITUAL CRIMINALS"

ORIGINAL DATE OF ENACTMENT; SOURCE	NUMBER OF SUB-TYPES OF REPEAT OFFENDERS	SUB-TYPE	KINDS OF TRIGGERING	KINDS OF PRIORS	NUMBER OF PRIORS	TYPE OF PRIORS REQUIRED	JURISDICTION OF PRIORS	WHEN CHARGES MUST BE FILED	ABSOLUTE MAXIMUM?	ABSOLUTE MINIMUM?	DIFFERENCE BETWEEN MAXIMUM AND MINIMUM?	JUDICIAL DISCRETION	SENTENCE	PAROLE ELIGIBILITY
1927	1													
TITLE 13 § 11		1	ALL FELONIES	ALL FELONIES	3 OR MORE	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE TRIAL FOR TRIGGERING	YES	YES	NO	YES	LIFE	ALWAYS

WASHINGTON: SPECIFIC TRIGGER AND GENERAL PRIOR: "HABITUAL CRIMINALS"*

ORIGINAL DATE OF ENACTMENT; SOURCE	NUMBER OF SUB-TYPES OF REPEAT OFFENDERS	SUB-TYPE	KINDS OF TRIGGERING	KINDS OF PRIORS	NUMBER OF PRIORS	TYPE OF PRIORS REQUIRED	JURSIDICTION OF PRIORS	WHEN CHARGES MUST BE FILED	ABSOLUTE MAXIMUM?	ABSOLUTE MINIMUM?	DIFFERENCE BETWEEN MAXIMUM AND MINIMUM?	JUDICIAL DISCRETION	SENTENCE	PAROLE ELIGIBILITY
1909	4													
TITLE 9	§92.090	1	COMBINATION: L.C. Misdemeanors (petty theft or larceny) All Felonies	ALL FELONIES	1	CONVICTION ONLY	ALL U.S. and FOREIGN	ANY REASONABLE TIME	NO	YES	N/A	NO	10 YEARS MINIMUM	ALWAYS
	§ 92.090	2	COMBINATION: (same as above)	L.C. MISDEMEANOR (petty theft or fraud)	2 TO 3	CONVICTION ONLY	ALL U.S. and FOREIGN	ANY REASONABLE TIME	NO	YES	N/A	NO	10 YEARS MINIMUM	ALWAYS
	§ 92.090	3	COMBINATION: (same as above)	ALL FELONIES	2 OR MORE	CONVICTION ONLY	ALL U.S. and FOREIGN	ANY REASONABLE TIME	YES	YES	NO	NO	LIFE	ALWAYS
	§ 92.090	4	COMBINATION: (same as above)	L.C. MISDEMEANOR (petty theft or fraud)	4 OR MORE	CONVICTION ONLY	ALL U.S. and FOREIGN	ANY REASONABLE TIME	YES	YES	NO	NO	LIFE	ALWAYS

This law has been repealed for felonies committed after July 1, 1984.

WEST VIRGINIA: GENERAL TRIGGER AND GENERAL PRIOR: "SECOND OR THIRD OFFENSE OF FELONY"

ORIGINAL DATE OF ENACTMENT; SOURCE	NUMBER OF SUB-TYPES OF REPEAT OFFENDERS	SUB-TYPE	KINDS OF TRIGGERING	KINDS OF PRIORS	NUMBER OF PRIORS	TYPE OF PRIORS REQUIRED	JURSIDICTION OF PRIORS	WHEN CHARGES MUST BE FILED	ABSOLUTE MAXIMUM?	ABSOLUTE MINIMUM?	DIFFERENCE BETWEEN MAXIMUM AND MINIMUM?	JUDICIAL DISCRETION	SENTENCE	PAROLE ELIGIBILITY
1849	2													
§ 61-11-18		1	ALL FELONIES	ALL FELONIES	1	CONVICTION ONLY	ALL U.S. (State & Federal)	BEFORE SENTENCING FOR TRIGGERING	YES	YES	SOMETIMES*	NO	MAX UP TO 5 YRS	ALWAYS
§ 61-11-18		2	ALL FELONIES	ALL FELONIES	2	CONVICTION ONLY	ALL U.S. (State & Federal)	BEFORE SENTENCING FOR TRIGGERING	YES	YES	NO	NO	LIFE	ALWAYS

* May be sentenced to determinate or indeterminate term.

WISCONSIN:* SPECIFIC TRIGGER AND SPECIFIC PRIOR: "HABITUAL CRIMINALITY"

ORIGINAL DATE OF ENACTMENT; SOURCE	NUMBER OF SUB-TYPES OF REPEAT OFFENDERS	SUB-TYPE	KINDS OF TRIGGERING	KINDS OF PRIORS	NUMBER OF PRIORS	TYPE OF PRIORS REQUIRED	JURSIDICTION OF PRIORS	WHEN CHARGES MUST BE FILED	ABSOLUTE MAXIMUM?	ABSOLUTE MINIMUM?	DIFFERENCE BETWEEN MAXIMUM AND MINIMUM?	JUDICIAL DISCRETION	SENTENCE	PAROLE ELIGIBILITY
1949	6													
§ 939.62(1)(a)		1	ALL MISDEMEANORS (crimes with a maximum sentence are _ 1 year)	ALL FELONIES	1	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE TRIAL FOR TRIGGERING	YES	NO	N/A	YES	MAX UP TO 3 YEARS	ALWAYS
§ 939.62(1)(a)		2	ALL MISDEMEANORS (same as in Type 1)	ALL MISDEMEANORS (same as in Type 1 triggering)	3	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE TRIAL FOR TRIGGERING	YES	NO	N/A	YES	MAX UP TO 3 YEARS	SOMETIMES
§ 939.62(1)(b)		3	L.C. FELONY (crimes whose maximum sentence are > 1 yr. but < 10 yrs.)	ALL FELONIES	1	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE TRIAL FOR TRIGGERING	YES	NO	N/A	YES	MAX UP TO 6 YEARS	ALWAYS
§ 939.62(1)(b)		4	L.C. FELONY (same as in Type 3)	ALL MISDEMEANORS	3	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE TRIAL FOR TRIGGERING	YES	NO	N/A	YES	MAX UP TO 2 YEARS	ALWAYS
§ 939.62(1)(c)		5	L.C. FELONY (crimes whose maximum sentence are > 10 years)	ALL FELONIES	1	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE TRIAL FOR TRIGGERING	YES	NO	N/A	YES	MAX UP TO 10 YEARS	ALWAYS
§ 939.62(1)(c)		6	L.C. FELONY (same as in Type 5)	ALL MISDEMEANORS	3	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE TRIAL FOR TRIGGERING	YES	NO	N/A	YES	MAX UP TO 2 YEARS	ALWAYS

* Wisconsin also has a guidline system which is "recommended," but not required to be used by judges.

WYOMING: GENERAL TRIGGER AND SPECIFIC PRIOR: HABITUAL CRIMINALS*

ORIGINAL DATE OF ENACTMENT; SOURCE	NUMBER OF SUB-TYPES OF REPEAT OFFENDERS	SUB-TYPE	KINDS OF TRIGGERING	KINDS OF PRIORS	NUMBER OF PRIORS	TYPE OF PRIORS REQUIRED	JURISDICTION OF PRIORS	WHEN CHARGES MUST BE FILED	ABSOLUTE MAXIMUM?	ABSOLUTE MINIMUM?	DIFFERENCE BETWEEN MAXIMUM AND MINIMUM?	JUDICIAL DISCRETION	SENTENCE	PAROLE ELIGIBILITY
1982	2													
§ 6-10-201(b)(i)		1	F.C. FELONY (violent crime)	ALL FELONIES	2	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE TRIAL FOR TRIGGERING	YES	YES	YES	NO	10-50	ALWAYS
§ 6-10-201(b)(ii)		2	F.C. FELONY (violent crime)	ALL FELONIES	3 OR MORE	CONVICTION ONLY	ALL U.S. and FOREIGN	BEFORE TRIAL FOR TRIGGERING	YES	YES	NO	NO	LIFE	NEVER

repeated convictions but where the second offense does not have to be exactly the same as the first. We have adopted a modified version of this distinction. We found that a simple dichotomy is untenable and misleading. The appropriate conceptualization is a continuum in degrees of specificity. Among laws that Brown would classify as general there are important differences in the degree of specificity. These differences are relevant because greater specificity in the definition of the target population represents an advance over the vagueness and overbreadth of the early repeat offender laws.

However, at the risk of unleashing total semantic confusion, we do draw as fine a line as possible between recidivist laws which are more or less general and those that are very specific. Our very specific laws are all those provisions pertaining exclusively to sex, drug, or dangerous weapon offenses and those which require that both the instant and the prior offenses be the exact same offense. We excluded these very specific laws from our study.[4]

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4 There are several practical reasons for our having excluded specific repeat offender laws from this study. Manageability is perhaps foremost among them. Specific repeat offender laws can cover a wide variety of topics, may be extremely broad (all misdemeanors for example), or extremely narrow (first degree burglary or dangerous drugs, for example). Across all 50 states, these provisions are so numerous and varied that simply to a mass a complete collection of them would have required for more time for than was available.

In addition, to have included specific repeat offender laws would have confused and complicated our attempts at analysis on two fronts. First, within each state we interviewed judges, prosecutors and defense attorneys. Specific repeat offender laws are often so narrowly focused or so

(Footnote continued)

4(continued)
infrequently utilized that it would have been extremely difficult to find a single respondent who was completely familiar with each statute. Further, even if many of these specific laws do sometimes form an important part of a rational sentencing scheme, many do not. Often the sentences to be imposed bear no resemblance to other sentences either in form or substance. The forces within a state which give rise to the enactment of some specific laws may often be politicized or sensationalized. (DWI laws may be an example of this.) The resulting statutes often do not appear to be part of a broader sentencing plan. By way of proof that our decision was proper here, it might be mentioned that with a few exceptions almost all of our 361 respondents quickly began discussing the "general" repeat offender statutes we were studying, with little or no direction from the interviewer.

On the second front, by excluding specific repeat offender laws we have been able to make comparisons among different states. Even with the limitations we set, "general" repeat offender laws vary so widely from state to state that this analysis required a great amount of time and effort to find and label common characteristics. To have studied specific laws as well would have been to produce dozens of crates of apples and oranges of every variety. It is unlikely that any useful comparisons or conclusions could have resulted from such a study.

Some examples of specific repeat offender laws will illustrate our point. It so happens that a search of the statutes of the first few states (in alphabetical order) produces an array of specific statutes that runs the gamut from extremely simple to the more complex or specialized. These examples should help to illustrate our reasons for their exclusion from this study.

Alabama has a statute aimed at drunk drivers. Code of Ala. 1975; Sec. 32-5A-191. This is a "specific" law because it provides for harsher treatment of defendants upon their second or subsequent convictions on the same charge of drunken driving. From our conversations with lawyers and judges around the country it is evident that many states have similar laws, some of them enacted quite recently. The drunk driving problem is unique according to some state legislatures; and it requires unique solutions. These solutions may or may not bear any resemblance to the state's overall sentencing format.

The Colorado Legislature enacted a similarly specific law for "first degree burglary, first degree burglary of controlled substances, (and) second degree burglary of a

(Footnote continued)

4(continued)
dwelling." Col. Rev. Stat. 1973 (78 ed.) § 18-4-202.1. Although the category of crime is a bit broader than DWI, the law is specific because it specifically names the crimes and requires the prior offense(s) to be from this same list. Interestingly, the legislature added the following at the end of the statute:

> (6) The general assembly hereby finds and declares that the frequency of incidence of the crime of burglary, together with particularly high rates of recidivism among burglary offenders, and the extensive economic impact which results from the crime of burglary, requires the special classification and punishment of Habitual Burglary Offenders as provided in this section (Id.)

As in Alabama, the Colorado statute bears no resemblance to the state's general repeat offender law. Col. Rev. Stat. 1973 (78 ed.) § 16-13-101. Moreover Colorado's specific repeater statute overlaps its general repeater statute.

An even broader, yet still specific repeat offender laws can be found within the statute that outlines Arizona's general repeat offender law, Ariz. Rev. Stat. Ann., § 13-604. Part E states:

> A person who . . . stands convicted of any misdemeanor or petty offense, other than for a traffic offense, and has been convicted of one or more of the same misdemeanors or petty offense . . . shall be sentenced for the next higher class of offense . . . . (emphasis added)

Because this provision appears in the same statute as Arizona's general repeat offender law, its sentencing format might be thought to resemble that of the overall scheme. However, the computation here is completely different from the computation done for most repeat offenders. More importantly, the class of criminal at whom this section is aimed is a specialized class: those offenders who keep committing the exact same offense. The law may be seen as being aimed not only at repeat offenders, but also, more directly, at each specific misdemeanor offense standing by itself.

Given the wide variety of repeat offender statutory formulation, it is not surprising that there are statutes

(Footnote continued)

4(continued)
which straddle the border between specific and general but which, adhering to our definition for all the reasons of manageability and analysis mentioned above, we had to exclude from our study. Again, here are some example which fit our definition of "specific" yet are one even broader than the last example cited above.

Arkansas has more than one specific repeat offender law. It was an easy decision to exclude § 82-2644 Ark. Stat. 1947 (77 edition) from our study. This statute provides enhanced penalties for the second, and third or subsequent conviction of charges of conducting a drug paraphernalia business. More troubling is § 43-2328.1 which states that if any person shall be

> convicted of murder, rape, carnal abuse, or kidnapping and it shall be shown that such person has been twice previously convicted of any of the above-mentioned crimes . . . upon a third conviction . . . (that person) shall be sentenced to life . . . .

While this law might have been included if we have been willing to call the enumerated crimes a "class," equivalent perhaps to a class of "dangerous" crimes. The fact remains that the crimes are specifically named, many other dangerous crimes are left out, and identity between the priors and the instant offense is required. Therefore, under our definition, the statute could not be included. Moreover, Arkansas has a general repeat offender law which overlaps this statute. So our analysis does not exclude these crimes completely.

Finally, Alaska's "presumptive sentencing" statute which provides for enhanced penalties for general recidivism also contains a section which addresses a specific crime separately. Alas. Stat. (1983 ed.) § 1255.125 Part "(i)" provides enhanced penalties upon convictions of sexual assault in the first degree or sexual abuse of a minor in the first degree. The presumptive sentence here increases if the offense is a second <u>felony</u> conviction or a third <u>felony</u> conviction. Thus the state legislature has addressed a specific problem but linked it to past general criminality. It is a unique approach. It comes close to being a general offender law but it fits our definition of "specific" repeat offender laws because it requires that a specifically named crime be committed as the instant offense.

All these examples should illustrate the need to focus
(Footnote continued)

The Specificity of General Recidivist Laws

A crucial dimension of habitual offender laws is the degree of specificity in the definitions of their target populations. Broad definitions have been held responsible for the failure of these laws in the past as well as for their arbitrary enforcement and their grossly disproportionate sentences. Legislatures can refine the definitions of target populations of general recidivist laws by manipulating three factors: 1) the degree of specificity in defining the triggering offense, 2) the degree of specificity defining the number or kind of prior offenses, and 3) differentiating sentences for different mixes of triggers and priors. The joint effect of two of these three factors is illustrated in Table 3.1.

The most general kind of general recidivist law is one in which the triggering offense can be any one of a general class of crimes (e.g. any felony) and the prior conviction(s) can also be any one of a general class of crimes (e.g. any felony). Twelve states have this kind of broad-gauged law. The most specific kind of general recidivist law is one in which the triggering offense(s) must be one of a limited class of crimes (e.g. "predatory felonies," or "class A felonies") and the priors must also be of a limited class of crimes.[5] Most states (22)

4(continued)
this study only on general repeat offender laws. Dozens more examples of specific laws could be cited here and it is entirely possible that the variety seen in this small number of examples would only grow wider as more detailed research progressed.

Table 3.1 Repeat Offender Laws Type of Triggering Offense, By Type of Prior Offenses By State

Type of Prior Offenses are:	Type of Triggering Offense Is: General	Specific
General	DC; GA; ID; IN; MT; NB; NM; NC; RI; US: VT; WV (n=12)	AL; AK; AR; CO; IO; KS; KY; MI; MN; NJ; OR; WY (n=12)
Specific	MA; NV; WA (n=3)	AZ; CA; CT; DE; FL; HA; IL; LA; MD; MS; MO; NH; NY; ND; OK; PA; SC; SD; TN; TX; UT; WI (n=22)

currently have these highly differentiated definitions of their habitual offender populations.

The other two cells in Table 3.1 represent intermediate degrees of specificity. Overall, the vast majority of the states (37) have moderate to highly differentiated definitions of their habitual offender populations. The degree of specificity can be

5 Notice that this is not the equivalent of Brown's "specific" recidivist law category because the prior and the trigger are not the identical offense. They are from limited classes of offenses. For example, a law enhancing the sentence for a second offense of leaving a dead horse in a well would constitute a specific recidivist law in Brown's terminology. (All such laws would fit within our category of specific trigger combined with specific prior.) In contrast, under our system a law enhancing the sentence for any class A misdemeanor if there have been two prior convictions for any class A felonies would fit our category of a "highly specific" general recidivist law.

shown to be even greater if one adds the third factor namely, distinctions among subtypes of habitual offenders based on different sentences for different combinations of trigger and number and/or kind of priors.

Again, the most general kind of general recidivist law is one which provides one enhanced sentence for one category of habitual offender defined in terms of a general class of triggering offenses and a general class of priors. This completely undifferentiated kind of general recidivist law exists in the District of Columbia, Idaho, Indiana, Nebraska, North Carolina, Rhode Island, the federal code and Vermont (see Table 3.2). Illustrative of these laws is the District of Columbia's which distinguishes only one type of habitual offender. He is defined as a person convicted of any felony and having two prior convictions for any felony. Such a person is eligible for three times the maximum of the normal sentence for the triggering offense (see Chart 3.1).

In contrast are states with highly differentiated penal structures depending upon the variety of mixes among limited classes of triggering offenses and the number and kind of limited classes of priors. For example Missouri distinguishes eight subtypes of habitual offenders. For a person convicted of a class A felony with any 2 or more prior felony convictions his sentencing is effected (see Chart 3.1). It is removed from the jury and given to the judge. Similarly, seven other distinct sentencing changes are provided, one for each of the seven mixes of certain type of trigger, certain type of prior and certain

number of priors.

Of the 22 states whose general recidivist laws involve specific triggers combined with specific priors, seven distinguish eight or more subtypes of habituals and only two define only one type of habitual offender (Table 3.2). Among those with specific triggers but general priors, five distinguish eight or more subtypes of habituals and only two define one type of habitual. In short, specificity begets more specificity. Legislatures that have narrowed the scope of their triggering and prior offense categories have also tended to differentiate graded punishments for various mixes of number and kind of prior and kind of trigger. Legislative refinements of the targets of habitual offender laws have evidently accompanied the general sentencing reform movement. Since 1970, 30 of the 49 states with recidivist offender laws have enacted or amended their recidivist offender provisions. These states are more likely to have general recidivist laws with specific triggers and specific priors. States with laws enacted earlier are more likely to have the most general kind of general recidivist laws (see Table 3.3). The latter tend to be the old, pre-1920 habitual offender laws. Critics of habitual offender laws will be heartened by this trend toward greater specificity in the definition habitual offenders a toward greater proportionality between types of recidivism and severity of penalties. But they should be reminded that progress in this area has been offset by regress in others. Some states which have narrowing of the definitions of the recidivist have also enacted redundant sentencing structures which reintro-

duce the discretion removed by the narrowing of the definition.[6]

The Punitiveness of General Recidivist Laws

Another crucial dimension of the general recidivist laws is their penalty structure. In the past their severe and often mandatory penalties have been regarded as too harsh. This has been cited as the reason for the non-use of the laws; has led to notorious cases of grossly disproportionate sentences; and has sometimes led to these laws being ruled unconstitutional.[7] In Solem v. Helms the court held that a sentence of mandatory life without parole for an offender who plead guilty to writing a $100 check on a nonexistent account plus having six previous, non-violent felony convictions involving the cumulative theft of $230 violated the Eight Amendment prohibition against cruel and unusual punishment.[8]

In his review of the sentencing provisions of habitual offender laws in the 1960 edition of his text, Tappan (1960: Table 18) found that 18 states provided mandatory life sentences and 5 provided discretionary life sentences see Table 3.3.

We found that as of January 1, 1984, of the 30 states which provide life sentences for recidivists eleven states provide mandatory life sentences without parole; seven states provide mandatory life sentences with parole; two provide for

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6 See the discussions of how this operates in California and Pennsylvania in Chapter 2.

7 See Chapter 4 for fuller discussion.

8 463 U.S. 277, 77 L. Ed. 2d 637 (1983).

TABLE 3.3 Type of Specificity* by Date of Enactment of Law

	Typology of Specificity				
Enactment Date	General trigger & general prior	General trigger & specific prior	Specific trigger & general prior	Specific trigger & specific prior	Total
Pre-1970 (N=19)	42%	16%	16%	26%	100%
1970 & After (N=30)	13%	23%	7%	57%	100%

* If more than one date, most recent date was used.

discretionary life sentences without parole; and ten provide discretionary life sentences with parole see Table 3.4.

Table 3.3 Provisions of Habitual Offender Laws*

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1. Life sentence mandatory upon the court when the offender is convicted for the third time of a felony, without provision for extending the duration of commitment for a second conviction: Indiana.

2. Life sentence mandatory upon the court when the offender is convicted for the fourth time of a felony, without provision for extending the duration of commitment for a second or third conviction: Tennessee and Vermont.

3. Graduated penalties for second and subsequent convictions, but without provision for life sentences as such: Alabama, Arizona, Connecticut, District of Columbia, Georgia, Illinois, Iowa, Kansas, Louisiana, Maine, Massachusetts, Montana, Nebraska, New Hampshire, New York, Oklahoma, Rhode Island, Utah, Virginia, and Wisconsin.

4. Graduated penalties for second convictions, with provisions for life sentence for third felony.

   a. Life sentence mandatory: California, Kentucky, Texas, Washington, West Virginia.

   b. Life sentence discretionary: Idaho.

5. Graduated penalties for second and third convictions, with provision for life sentence for fourth felony:

   a. Life sentence mandatory: Colorado, Florida, Michigan, Minnesota, Missouri, Nevada, New Jersey, New Mexico, Ohio, Wyoming.

   b. Life sentence discretionary: North Dakota, Oregon, Pennsylvania, South Dakota.

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* Source: Tappan (1960: Table 18).

Table 3.4 Repeat Offender Laws: Life Sentence Provisions by Mandatory or not by Qualifying Criteria and by State

I.	State, Type of Triggering Offense, Number and Type of Priors Mandatory Life (or 99 years) without Parole	
AL	Class A Felony	3 Felonies
CA	Violent Felony	2 Violent Felonies
DE	Predatory Felony	2 Predatory Felonies
GA	Any Felony	2 Felonies
IL	Class X (forcible or murder)	2 Class X or Greater Felonies
LA	Serious Felony	2 Serious Felonies
MD	Violent Felony	3 Violent Felonies
MO	Any or Violent Felony	1 Violent and 1 any Felony
SD	Class B Felony (punishable by life or death	1 Felony
TN	Serious Felony	2 Felonies, 1 Serious
WY	Violent Felony	3 Felonies
II.	Mandatory Life (or 99 years) with Parole	
AL	Class A felony	2 Felonies
AL	Class C Felony	3 Felonies
AL	Class B Felony	3 Felonies
CO	Any Felony	3 Felonies
DE	Any Felony	3 Felonies
FL	First Degree Felony	1 Felony combination, limited
FL	First Degree Felony	2 Felony and Misd.
GA	Any Felony	1 Felony

MA class)	Any Felony	2 Felonies (limited
OK	Felony Punishable by life	1 Felony or Misd., eg. petit larceny or attempt
SC	Dangerous Felony	1 Dangerous Felony
VT	Any Felony	3 Felonies
WA	Petty Theft or any Felony	2 Felonies
WA	Petty Theft or any Felony	3 Petty Thefts or misdemeanor frauds
WV	Any Felony	2 Felonies
III.	Optional Life (or 99 years) without Parole	
AR	Class Y Felony	4 Felonies
CT	Dangerous Felony	1 Dangerous Felony
IV.	Optional Life (or 99 years) With Parole	
AL	Class B Felony	1 Felony
AL	Class A Felony	1 Felony
AL	Class C Felony	2 Felonies
AL	Class B Felony	2 Felonies
AL	Class A Felony	2 Felonies
AL	Class C Felony	3 Felonies
AR	Class Y Felony	2 Felonies
HA	Class A Felony	2 Felonies
ID	Any Felony	2 Felonies
KS	Class B Felony	1 Felony
KY	Class A Felony	1 Felony
KY	Class B Felony	1 Felony

MI	Felonies punishable by life	1 Felony
MT	Any Felony	1 Felony
NV	Any Felony or Certain misdemeanors	3 Felonies
NJ	First Degree Felony	2 Felonies or 1 Felony 1 misdemeanor
NY	Class A-II	1 Felony
NY	Class B ("violent") Felony	2 Violent Felonies
NY	Class C ("violent") Felony	2 Violent Felonies
NY	Class D ("violent") Felony	2 Violent Felonies
ND	Class A Felony	2 Class B or Above Felonies
ND	Class A Felony	3, combination class B or Above Felony and Class A misdemeanor
ND	Class A Felony (Dangerous or Violent)	Felony "similar" to Triggering Offense
SD	Class 1 Felony (max. of life imprisonment)	1 Felony
SD	Class 2 Felony (25 years max.)	1 Felony
SD	Any Felony	3 Felonies, none violent
SD	Class 2 Felony	3 Felonies, none violent
SD	Class 3 Felony (15 yrs. max.)	3 Felonies, none violent
TX	First Degree Felony	1 Felony
TX	Any Felony	2 Felonies
VT	Second Degree or Higher Except Murder 1 or 2	2 Felonies, 1 Second Degree or Higher

By coincidence there were eighteen states which provided mandatory life sentences when Tappan conducted his review and there are eighteen that do so today. But only eight of them are the same (CA; MO; TN; WY; CO; FL; VT; WA). This means that twenty legislatures have changed their policies regarding the use of mandatory life sentences for habituals. Ten enacted the policy where they had not in the past; and ten repealed the policy they once supported. Additionally, there were only five states which provided discretionary life sentences for habituals at the time of Tappan's review but there are twelve today and only two of the twelve are among the original five.

On the whole, the number of states with life sentences for habitual criminals since 1960 has increased from 23 to 30. While 13 states have dropped life sentences for habituals, 20 have inaugurated them where they had not previously existed. This pattern of change suggests that habitual offender laws continue to serve as vehicles for expressing society's strongly punitive condemnation of serious criminality. Whether or not these laws are ever used for sentencing, their enactment at least provides legislatures with a means of symbolically affirming basic community values in a way which is more powerful and unqualified than in any other provisions of their penal code except capital punishment.[9]

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9 Occasionally the community itself makes such affirmations directly, as for example in 1982 when the people of California added by initiative a life-without-parole-for-20-years habitual offender law to its laws (see Chapter 2).

The Purpose of the General Recidivist Laws

In her analysis of habitual offender laws enacted between 1900 and 1927, Elliott (1931:187) identifies three penal objectives embodied in the laws: "deterrence, vengeance and social utility." One apparent purpose was to deter the first offender from subsequent offenses. A second was to punish the offender for his wilful persistence in serious crime. The third was to incarcerate unreformable offenders for lengthy periods for the protection of the community. Elliott could not say which objective was uppermost. But she concluded "the welfare of the law abiding is probably not a stronger factor than the desire to punish the man for his successive misdoings. Certainly there is little emphasis upon the welfare of the prisoner."

Today it is equally difficult to say what the primary objective of habitual offender legislature is. Certainly retribution for serious criminality and for less serious but repeated criminality continues to be an important motive. But deterrence, social utility and even reformation are among the objectives stated by legislatures. Some examples of commentaries on legislative purpose will illustrate the point.

> "Recidivist statutes are enacted in effort to deter and punish incorrigible offenders. Recidivist statutes are intended to apply to persistent violators who have not responded to restraining influence of conviction and punishment."[10]

> "Dangerous offenders who habitually violate the law and victimize the public shall be removed from society and correctively treated in custody for long terms as

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10 Iowa Code Ann. 1983 Supp. Vol. 57A § 902.8, p. 358.

needed."[11]

"The primary goals of the recidivist statute are to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time."[12]

"Act 98, Session Laws 1979, amended this section [the section defining sentences for repeat offenders] to provide that persons convicted of any of the crimes enumerated be punished as repeat offenders if they are subsequently convicted of any of the enumerated offenses within the time of the maximum sentence of the prior conviction. Under the prior law, a person had to be convicted of the same enumerated crime on more than one occasion. The legislature felt this amendment was needed to alleviate concerns that the repeat offender problem be dealt with seriously."[13]

Discretion In General Recidivist Laws

Another source of controversy regarding general recidivist laws has been their mandatory nature. Trial and appellate courts and prosecutors have refused to abide by mandatory provisions; mandatory life without parole has been held unconstitutional under certain conditions; and mandatory severe sentences have been held responsible for serious sentencing injustices (see Chapter 4). Discretion can be removed from the operation of recidivist laws in various ways. Prosecutors may be required to file the habitual charges in every eligible case; judges may be required to sentence habituals as such when eligibility has been

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11 Mont. Code Ann. 1983 § 46-18-101.

12 Code of Ala. 1983 Supp., Vol. 12, § 13A-9.

13 Ha. Penal Code, 1976, § 706-606.5. Note: this change is from a Brown-type "specific" to a more general recidivist law.

established; the sentences provided may be mandatory fixed sentences or mandatory ranges; and parole eligibility may be denied. Our review of the laws examine each of these dimensions.

Although West Virginia prosecutors were required by law to file habitual offender charges in all eligible cases (Brown 1956), we virtually never found such requirements in our review. One notable exception is New Mexico where the law states:

> "If at any time, either after sentence or conviction, it appears that a person convicted of a noncapital felony is or may be a habitual offender, it is the duty of the district attorney of the district in which the present conviction was obtained to file an information charging that person as a habitual offender."[14]

New Mexico law even extends a mandatory obligation to assist in the filing of habitual charges to all criminal justice officials:

> "Whenever it becomes known to any warden or prison official or any prison, probation, parole or police officer or other peace officer that any person charged with or convicted of a noncapital felony is or may be a habitual offender, it is his duty to promptly report the facts to the district attorney of the proper district, who shall then file on information."[15]

In his review of the habitual laws in 1945, Brown (1945:680) found that most (76%) American states denied their judges any choice in applying these sentences. An additional 10% denied it in some cases but allowed it in others. We found that of the 222 distinct repeat offender sentences currently provided in the 49 states reviewed, 102 of them must be imposed by the court (see Chart 3.1). Most states (24) require their courts to impose the

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14 N. Mex. Stats. Ann. 1981 Supp., Vol. 6, § 31-18-19.

15 Id. at § 31-18-18.

repeat offender sentences in all of subtypes of repeat offenders distinguished under their laws. Seven more require their courts to impose the repeat offender sentence in some of the subtypes of repeat offenders distinguished but not all. Thus, there has been a substantial decline since the 1940's in the number of states making their repeat offender sentences entirely mandatory upon their courts.

Mandatory minimum sentences are prescribed for 142 of the 222 distinct repeat offender sentences in our study. Of the 49 states, 34 provide mandatory minimum sentences for all the subtypes of repeat offender sentences distinguished by their laws.

When a law provides both an absolute minimum and an absolute maximum and the two are identical, then the result is a mandatory sentence of a given length. In this way legislatures can set the specific lengths of sentences they want imposed thereby completely removing this aspect of the sentence from the trial courts. In other words, it reduces yet another aspect of judicial discretion. Of the 222 distinct repeat offender sentences in our study, it was not appropriate to calculate the difference between the maximum and minimum sentences in 87 cases. Of the remaining 135, 42 have no difference between maximum and minimum, i.e. no judicial discretion in selecting the length of the sentence. In 10 states all of the sentences distinguished by the repeat offender laws have specific sentences lengths set by the legislature.

Parole eligibility is denied to all repeaters sentenced

under 36 of 152[16] distinct repeat offender sentences in our study. An additional 20 other provisions allow for the denial of parole eligibility in some cases. Five states deny parole to all offenders sentenced under all provisions of their repeat offender statutes.[17]

Other Characteristics of General Recidivist Laws

Three other features of the general recidivist laws were enumerated in our classification: the type of priors required, the jurisdiction of the priors and the point in the justice process by which the repeat offender charges must be filed.

Most states (30) require that the prior record consist simply of prior convictions. But the rest attach some special limitation on the prior conviction. Most commonly this is that the prior convictions were followed by some actual incarceration or that the prior conviction carried a sentence of equal of one or more years; or that a sentence of one or more years was actually imposed (see Chart 3.1).

Most states (29) allow the broadest possible range of geographical jurisdiction for the prior convictions. The conviction may have occurred in any American or any foreign jurisdiction. Several states impose the minimal restriction that the prior must be from an American jurisdiction. Three states (FL; GA; IL) restrict the jurisdiction of the priors to the same

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16 Minnesota's seven provisions are eliminated here because parole has been eliminated under the new law.

17 NM; MI; IN; CT; AS.

state for some of the subtypes of the repeat offenders defined. But none do this for all subtypes of repeaters.

Most states (28) require that the repeat offender charges be filed before the case goes to trial. Fourteen allow them to be filed before sentencing and six allow it at any reasonable time. It should be noted that the requirement of filing before trial places time pressure on prosecutors attempting to obtain documented proofs of prior convictions.[18]

Summary

There is enormous variation among the laws relating to the repeat offender. The variation occurs not only among states but within them. Classification of these laws is further complicated by the existence of numerous very specific recidivist laws which provide increased sentences for second and subsequent convictions of the identical crime. These laws were excluded from the present analysis. The rest of the laws can be regarded as "general" recidivist laws. However a crucial difference among them is the degree to which they specify the targets of their penal sanctions. This specification is achieved by manipulating three factors: the degree of specificity in the definition of the triggering offense, the degree of specificity in the definition of the prior offense, and the provision of distinct sentences for different mixes of kind of trigger and number and kind of priors.

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18 See Chapter 4.

In the past habitual offender laws were criticized for being too broad in the definition of their target population. Currently, few states (8) have completely undifferentiated recidivist laws which provide one sentence for a person convicted of any broad class of crimes (e.g. any felony) having been previously convicted of some broad class of crimes (e.g. any felony). Most states have somewhat narrower definitions of their target populations. Many states (22) have narrowed their definitions by limiting both the class(es) of priors and the class(es) of triggers. Since 1970, 30 of the 49 states in our study have enacted or amended their recidivist offender provisions. These states are more likely to have increased the specificity of their definitions of the repeat offender.

As of 1960, 18 states provided mandatory life sentences for repeaters and 5 provided discretionary life sentences. Currently, 11 states provide mandatory life sentences without parole; 7 more provide them with parole; 2 provide discretionary life sentences without parole; and 10 provide them with parole. Several states (13) that had life sentences for repeaters as of 1960 have abolished them but many (20) which previously did not have them have since adopted them.

Repeat offender laws continue to serve as symbolic affirmation of social values and the condemnation of serious criminality.

The penological objectives of recidivist laws continue to be an incoherent mixture of punitive retributivism, deterrence, social protection through incarceration, and even rehabilitation.

As of 1945 most (76%) American states denied their courts any discretion in applying the repeat offender sentences. Currently 31 of the 49 states studied deny judges this discretion in all or some of the repeat offender cases. A larger number (34) deny judges discretion in sentencing by imposing mandatory minimums for repeat offenders. In 10 states all the sentences distinguished by the respective repeat offender laws have specific terms set by the legislature.

Five states deny parole to all offenders sentenced under their respective repeat offender statutes.

Most states (30) require that the prior record used to establish eligibility for repeat offender sentencing consist of convictions only. Other states, for some or all of the subtypes of repeat offenders distinguished by their laws, require that the conviction be either for a crime punishable by a year or more, or that some incarceration have been served or that the sentence was imposed.

Most states (29) allow prior convictions from anywhere in the world to be used in establishing eligibility for repeat offender sentencing. No states restrict the priors to the same state for all subtypes of repeaters defined by their respective laws.

Most states (28) require that repeat offender charges be filed by trial. Others allow them to be filed before sentencing or at any reasonable time.

CHAPTER 4

USE OF THE REPEAT OFFENDER LAWS

> "It would be a valuable but difficult exercise to determine what percentage of repetitive offenders eligible for confinement as habitual criminals . . . actually were subjected to such sanctions."
>
> --John P. Conrad (Sleffel, 1977; xv)

One of the most conspicuous features of the repeat offender laws has been their underutilization. This fact has often been cited as evidence of the uselessness and failure of these laws as well as their arbitrary and capricious nature when on rare occasions they are used. In this chapter the evidence of underutilization is reviewed together with the reported reasons for it. The chapter first focuses on prior studies and then reports the findings of the present study. The question of the arbitrariness of the law's application is addressed in Chapter 5.

Prior Studies

Numerous studies have established the ubiquitous "underutilization" of repeat offender laws. In most of these studies the term, "underutilization," has referred to "sentence-usage," i.e., eligible offenders not being actually sentenced as repeaters. Usually they imply an unintended/unanticipated utilization thesis, i.e., that the repeat offender laws are being used to obtain guilty pleas. The extent of this latter practice, however, was not documented by the early studies.

More recent studies suggest that the use of the repeat offender laws for plea negotiation purposes may have been

overstated and that the laws may be doubly underutilized. According to these studies the repeat offender laws are not even being used to obtain guilty pleas to the extent that they could be. That is, not only are many eligible offenders not being sentenced as repeaters, they are not being charged as such (for leverage in plea negotiation). In contrast, however, our survey findings indicate that most prosecutors' offices "use" the repeat offender laws in one way or another in most eligible cases, as will be shown later. The best source of American studies prior to 1945 is Brown (1945). A summary of his findings follows.

In Indiana between 1907 and 1931 convictions under the Habitual Criminal Law averaged one per year. In California between 1927 and 1931 only three life termers were found in the prison system who were sentenced under the habitual criminal act. In New York between 1926-1931 there were 199 cases sentenced to life under the Baumes Law. Until 1933, the life imprisonment clause of the habitual criminal act in Pennsylvania had not been used at all. Between 1933 and 1945 it was applied in less than a half dozen cases. In Kansas between 1928 and 1935 only 457 of 1933 (23%) eligible offenders were sentenced under the recidivist law. If the law had been applied to all eligible cases, one in seven prisoners would have been sentenced to life imprisonment as habituals; and two in seven would have had their sentences doubled.

Post-1945 studies reveal a similar pattern of underutilization. In West Virginia for the years 1937, 1938, 1947 and 1948 only five persons per year were sentenced to life

imprisonment under the habitual criminal law and 364 persons who were eligible to being sentenced under that law were not (Brown, 1956). In Oregon in 1961 it was reported that while 50% to 60% of Oregon prisoners qualified for sentencing as recidivists, "few" were sentenced as such (see table 4.1) (Oregon Legislative Interim Committee on Criminal Law 1961:36). In Douglas County, Nebraska in 1971 and 1972, 82 persons were eligible for sentencing as habituals but only 3 (4.5%) were actually sentenced as such (Cook, 1975).

In five of six jurisdictions (El Paso, Tx.; New Orleans; Seattle; Tucson; Delaware County, Pa.; and Norfolk) for which data on burglary and robbery cases were collected for 1977 the familiar pattern of underutilization was found (see Tables 4.2 and 4.3) (McDonald, 1985). Even in New Orleans where the Connick administration had a policy of systematically filing habitual offender charges, only 56% of the eligibles ended up sentenced as habituals. Additional measures of the underutilization of habitual offender laws have been assembled by the American Criminal Law Review (1979:227). The Review found that the Colorado law was applied in 30 of 3,220 possible cases from 1954-1974. The Maine law was used only once among 70 eligible cases. The Washington law was used in four of 525 cases. The same general pattern has been documented for Canada (Boiland, 1967; Klein, 1973) and for England (Hammond and Cheyen, 1963; and Radinowicz and Hood, 1981).

In the United States, the one exception to the general pattern of underuse of sentence enhancements comes from those 13

Table 4.1 Prisoners in the Oregon State Penitentiary By Previous Commitments, Year, and Whether Sentenced Under the Habitual Criminal Act, Jan. 1, 1960*

Previous Commitments	1955	1956	1957	1958	1959
0	648	578	499	582	450
1	378	364	335	326	269
2	252	246	216	212	186
3	112	157	132	139	129
4	91	96	95	100	103
5	31	62	61	74	74
6	16	26	13	34	51
7	10	15	18	24	26
8	10	11	9	18	22
9	2	4	6	11	11
10	2	2	4	4	15
over 10	0	1	2	2	5
TOTAL INMATES COMMITTED	1552	1562	1400	1526	1341
TOTAL INMATES SENTENCED AS HABITUALS	18	21	31	29	32

* Oregon Legislative Interim Committee on Criminal Law, 1961: 36.

Table 4.2 Frequency of Prior Felony Convictions Within Five Years of Instant Offense Among Defendants Who Pleaded Guilty Or Were Tried For Robbery or Burglary By Jurisdiction*

Number of Prior Felony Convictions Within Five Years of Instant Offense	El Paso (N=197)	New Orleans (N=321)	Seattle (N=735)	Tucson (N=474)	Delaware County (N=605)	Norfolk (N=515)
None	77.7%	56.6%	66.5%	50.2%	57.8%	54.8%
1-2	18.3%	37.4%	29.8%	31.7%	30.1%	30.5%
3+	4.0%	5.0%	3.7%	18.1%	12.1%	14.7%

*McDonald, 1985.

Table 4.3 Frequency of Habitual Offender Enhancements of Sentences of Defendants Who Pleaded Guilty or Were Tried For Robbery or Burglary and Had One or More Prior Felony Conviction(s) Within Five Years By Jurisdiction*,**

Was Defendant Sentenced As Habitual Offender?	El Paso (N=44)	New Orleans (N=180)	Seattle (N=246)	Tucson (N=236)	Delaware County (N=73)	Norfolk (N=233)
Yes	22.7%	56.1%	3.2%	5.1%	8.2%	0.0%

* For Delaware County only defendants with three or more prior felony convictions are included.

** McDonald, 1985.

California jurisdictions that participated in the statewide Career Criminal Prosecution Program. Using "targeted prosecution" that focused on habitual offenders prosecutors' offices were given additional funding to improve several dimensions of their effectiveness regarding these cases. The program had a dramatic impact on the use of enhancements (California Office of Criminal Justice Planning, 1982: 67). Of 2,091 career criminal cases, 78.8% were convicted with sentence enhancements. This resulted in an average increase in sentence length of 3 years and 8 months over the 21.2% of the cases which did not get enhanced. This California experience suggests that contrary to the mostly fruitless, lengthy and multinational experience with repeat offender laws, these laws can be made to work as they were intended to be used if the proper conditions prevail. Among those conditions are special resources for enforcing these laws and a political climate conducive to doing so.

Hypotheses Regarding Underutilization for Sentencing

The literature contains several explanations for the underutilization of recidivist laws. Each can be regarded as an hypothesis.

Redundancy

A common explanation for the underutilization for sentencing of the repeat offender laws attacks the very logic of their existence. The argument is that they are redundant. It is said that the regular sentencing scheme provides a sufficient range of penalties for repeat offenders. Hence, a separate set of

recidivist laws is unnecessary.

Even before the turn of the last century English reformers believed that separate habitual offenders laws were not necessary to deal with the problem of the most serious offender who also happened to be a recidivist. The Gladstone Committee, itself, did not see its own proposed habitual offender legislation as directed primarily at the most serious offender because the available penalties for such offenders were believed to be adequate. In commenting on the Gladstone proposals the English Prison Commissioners reemphasized this point. They believed that

> "the law, as it stands, gives very ample power for punishing with long sentences, reconvictions for larceny . . . . [T]he most effectual safeguard against habitual recidivism in the graven forms of crime is to be found in the firm and judicious application of the existing law, and secondly, in a keener and more sustained vigilance over the man on his discharge." (Radzinowicz and Hood, 1980: 1356).

More recently in America, Katkin (1971: 106) has argued that

> "habitual offender laws are wholly unnecessary to deter serious offenses. This would seem to be true almost as a matter of definition. Courts sentencing truly dangerous felons, such as murderers, rapists or armed robbers, can impose lengthy terms of imprisonment (in some cases even the death penalty) without regard to the existence of habitual offender laws or the issue of habitual criminality.

The legitimacy of the claim of redundancy is partially substantiated by the consistent finding in sentencing research that prior record and offense seriousness are key determinants of sentences (National Research Council, Panel on Sentencing Research, 1983) and plea bargaining (McDonald, 1985). Defendants with prior records and/or defendants charged with more serious crimes are more likely to receive more severe sentences. This

well-established fact has recently been further documented by Koppel (1984) for Illinois, New York, Connecticut, Minnesota, and Maryland (see Tables 4.5 and 4.6). The implication is that judges and prosecutors are already taking defendants' prior criminality and present dangerousness into account in the normal sentencing process.

Severity

A second explanation can be referred to imprecisely as the severity hypothesis. Implicated in it are three distinct but related matters: disproportionality, mandatory sentences, and the inadequacy of legislative formulas for defining and distinguishing among habitual offenders who truly deserve long sentences from those who meet the letter but not the spirit of these laws. Two forms of the explanation occur. One is that the laws are not used because the penalties they provide are disproportionate to the class of offenders they define. For instance, in England the 1932 Committee on Persistent Offenders concluded that the Gladstone Committee's habitual offender law (inaugurated in 1908) had fallen into disuse in part because of excessive severity. Ironically despite this insight the Committee's own solution to the recidivist enigma failed within twenty years due to its excessive sentences (Radzinowicz and Hood, 1980: 1378).

In the United States, the Kansas Legislature modified its habitual offender law in the direction of greater leniency after its 1936 study suggested that underutilization was due to

Table 4.5 Percent of Convictions Resulting in Incarcerations For Selected States Based on Offense And Criminal History Classifications*

Illinois, 1979-81

Offense class[a]	Number of convictions	Percent
All felonies	**76,787**	**39.3%**
M (murder)	1,092	99.9[b]
X	6,713	100.0
1	1,748	57.0
2	26,591	37.7
3	31,547	26.5
4	9,096	33.0

[a] By statute, there are six classes of felony offenses that are based on the severity of the offense; they are presented in order of decreasing seriousness. In general, a particular class can include property and violent crimes. The class of a particular offense depends upon factors such as injury or loss to the victim, weapons use, etc.

[b] Does not include 54 death sentences.

New York, 1982

	Offender classification							
	Youthful		First offender		Repeat[a]		All offenders	
Felony class[b]	Number of convictions	Percent incarcerated	Number of convictions	Percent incarcerated	Number of convictions	Percent incarcerated	Number of convictions	Percent incarcerated
All felonies	**2,722**	**7.5%**	**16,987**	**42.2%**	**2,578**	**99.1%**	**22,287**	**44.5%**
A	2	50.0	439	95.7	25	100.0	466	95.7
B	165	23.0	2,116	94.1	371	99.7	2,652	90.5
C	587	14.3	2,780	77.2	507	99.4	3,874	70.6
D	1,341	5.0	6,686	29.7	937	99.4	8,964	33.3
E	627	2.2	4,966	12.7	738	98.3	6,331	21.6

[a] Includes persons classified as second felony offenders, persistent felony offenders, second violent felony offenders, and persistent violent felony offenders.

[b] By statute, there are five classes of felony offenses based on severity of the offense; they are presented in order of decreasing seriousness. Violent and property offenses appear in all classes. The class of a particular offense depends upon factors such as injury or loss to the victim, weapons use, etc.

Connecticut, 1979-80 (statewide sample)

	Criminal history[a]							
	None		Moderate		Serious		All offenders	
Felony class[b]	Number of convictions	Percent incarcerated	Number of convictions	Percent incarcerated	Number of convictions	Percent incarcerated	Number of convictions	Percent incarcerated
All felonies	**377**	**45.1%**	**303**	**58.1%**	**327**	**77.8%**	**1,007**	**59.6%**
A	1	100.0	2	100.0	3	100.0	6	100.0
B	111	53.2	92	69.6	108	87.0	311	69.8
C	78	48.7	58	62.1	69	79.7	205	62.9
D	95	49.5	104	61.5	95	76.8	294	62.6
Misdemeanor[c]	92	27.2	47	21.3	52	55.8	191	33.5

[a] Based on number and seriousness of previous convictions.

[b] By statute, there are four classes of felony offenses based on severity of the offense; they are presented in order of decreasing seriousness. In general, a particular class can include property and violent crimes. The class of a particular offense depends upon factors such as injury or loss to the victim, weapons use, etc.

[c] Misdemeanor convictions resulting from plea bargaining where original charge was a felony.

Table 4.5 cont'd

Minnesota, 1978 and 1980-81

Offense severity*	Criminal history score*: None/Low — Number of convictions	None/Low — Percent incarcerated	Moderate — Number of convictions	Moderate — Percent incarcerated	High — Number of convictions	High — Percent incarcerated	All offenders — Number of convictions	All offenders — Percent incarcerated
Before the introduction of presumptive sentencing guidelines								
All felonies	**3,326**	**9.9%**	**732**	**46.2%**	**307**	**70.5%**	**4,365**	**20.2%**
Low severity	1,872	4.7	385	38.4	162	62.2	2,420	13.9
Moderate severity	1,210	10.5	273	46.7	109	73.1	1,592	21.0
High severity	244	47.4	73	85.5	36	100.0	353	60.6
After the introduction of presumptive sentencing guidelines								
All felonies	**4,031**	**6.5%**	**1,018**	**24.3%**	**451**	**70.7%**	**5,500**	**15.0%**
Low severity	2,122	0.6	478	9.6	222	50.4	2,822	6.0
Moderate severity	1,680	4.0	443	24.4	186	88.2	2,309	14.7
High severity	229	79.0	97	95.9	43	100.0	369	85.9

Note: Under Minnesota law, both before and since introduction of sentencing guidelines, a convicted person may have to spend up to a year in jail or workhouse as a condition of a stayed felony sentence. Incarceration rates shown above do not include such confinement.
* The sentencing guidelines in Minnesota use 7 levels of criminal history scores and 10 levels of offense severity, which have been condensed into 3 levels each for this table.

North Carolina, 1979 and 1981-82 (statewide sample)

Offense class	Before Fair Sentencing Act*: Number of convictions	Before Fair Sentencing Act*: Percent incarcerated	After Fair Sentencing Act*: Number of convictions	After Fair Sentencing Act*: Percent incarcerated
All felonies	**9,752**	**54.7%**	**3,034**	**62.8%**
Class 1 (violent felonies)	2,231	79.5	666	84.5
Class 2 (felonious larceny, breaking or entering, receiving stolen goods, etc.)	4,481	55.2	1,452	65.3
Class 3 (fraud, forgery, embezzlement, etc.)	1,061	39.1	336	44.6
Class 4 (drug felonies)	1,642	30.9	515	39.6
Class 5 ("morals" felonies)	117	71.8	25	68.0
Class 6 (other felonies)	220	35.9	40	60.0

* North Carolina's "Fair Sentencing Act" instituted determinate sentencing in July 1981.

Maryland, 1981-82 (entire postguidelines sample)

Type of offense	Prior criminal record: None — No. of convictions	None — Percent incarcerated	Minor — No. of convictions	Minor — Percent incarcerated	Moderate — No. of convictions	Moderate — Percent incarcerated	Major — No. of convictions	Major — Percent incarcerated	All offenders — No. of convictions	All offenders — Percent incarcerated
Total	**1,311**	**39.7%**	**373**	**65.2%**	**443**	**84.6%**	**201**	**89.1%**	**2,928**	**58.3%**
Person	551	55.9	334	76.6	160	91.3	70	87.1	1,115	69.1
Property	449	35.4	440	68.9	219	83.1	104	91.3	1,212	61.0
Drug	311	17.0	199	37.7	64	73.4	27	85.2	601	32.9

* Source: Koppel (1984:Table 2).

Table 4.6 New York: Average (Mean) Sentence Length In Months, By Class of Felony And Offender Characteristics, 1982*

Felony class[b]	Offender classification: Youthful[a] — Number of incarcerative sentences	Youthful — Minimum (months)	Youthful — Maximum (months)	First offender — Number of incarcerative sentences	First offender — Minimum (months)	First offender — Maximum (months)	First offender — Number of maximum life imprisonment sentences
All	**203**	**14 mos.**	**43 mos.**	**7,171**	**40 mos.**	**82 mos.**	**390**
A	1	12	36	420	182	87	390
B	38	14	44	1,991	49	128	
C	84	14	43	2,145	29	79	
D	66	13	41	1,985	19	51	
E	14	14	43	630	15	40	

Felony class[b]	Offender classification: Repeat[c] — Number of incarcerative sentences	Repeat — Minimum (months)	Repeat — Maximum (months)	Repeat — Number of maximum life imprisonment sentences	All offenders — Number of incarcerative sentences	All offenders — Minimum (months)	All offenders — Maximum (months)	All offenders — Number of maximum life imprisonment sentences
All	**2,556**	**42 mos.**	**76 mos.**	**105**	**9,930**	**40 mos.**	**79 mos.**	**495**
A	25	243	108	24	446	184	86	414
B	370	91	177	47	2,399	55	133	47
C	504	51	97	19	2,733	33	81	19
D	931	29	58	14	2,982	22	53	14
E	726	19	38	1	1,370	17	39	1

Note: Life sentences not included in computing mean sentence lengths.

[a] Persons classified as youthful offenders generally are sentenced as though the offense had been a Class E felony, regardless of the actual offense.

[b] By statute, there are five classes of felony offenses based on severity of the offense; they are presented in order of decreasing seriousness. Violent and property offenses appear in all classes. The class of a particular offense depends upon factors such as injury or loss to the victim, weapons use, etc.

[c] Includes persons classified as second felony offenders, persistent felony offenders, second violent felony offenders, and persistent violent felony offenders.

* Source: Koppel (1984:Table 7).

excessive severity (Tappan, 1949: 29). Based on his survey of state attorneys general Tappan (1949) reported that the recidivist laws were generally being circumvented by local authorities mainly because of their excessive severity (and other reasons).

In 1956 Londo Brown (1956: 39) surveyed West Virginia judges and prosecutors as part of his effort to understand the underutilization of their recidivist law. He found that five judges believed the law was too severe but ten did not. Twelve prosecutors thought the law too severe but twenty-two did not. Virtually all the respondents who thought it too severe also thought that this severity was the reason for its underutilization.

The Oregon Legislative Interim Committee on Criminal Law (1961: 36) concluded that

> "[t]he apparent harshness of the Habitual Criminal Law causes prosecuting attorneys and judges to ignore the clear letter and spirit of the law."

The other version of the severity hypothesis focuses on the horrific consequences produced when the legislature tries to assume the functions of the judge and the prosecutor and removes discretion from the local justice officials. Usually this has been done through mandatory enforcement and sentencing laws in tandem with legislative formulas targeting certain groups for severe sentencing. Legislatures have mandated that prosecutors shall initiate the habitual offender allegations and/or that offenders with a certain number of prior convictions shall receive a mandatory sentence e.g. life for third or fourth

convictions.

This fateful combination of a lack of local discretion and severe sentences inevitably results in "horror cases" in which "minor" offenders who meet the technical criteria of the law are sentenced to grossly disproportionate punishments. The main source of these travesties of justice lies in the looseness of the legislative formulas that govern the application of the mandatory habitual offender sentences. Until recently the usual formula was based solely on the number of prior convictions without regard to the dangerous of the offender or to the proportionality between the triggering offense (i.e. the offense for which he is presently convicted) and the punishment mandated by virtue of being a repeater. The predictable injustices which such attempts at justice by formula would produce were anticipated very early on. In 1869 in England when the Habitual Criminals Bill included a clause making seven years penal servitude mandatory on a third conviction for felony, the dangers of the loose formula coupled with the mandatory sentence were graphically raised by Sir Thomas Chambers, a prominent lawyer who put it this way:

> "A boy, for instance, stole a bun, some years afterwards he stole a red herring; and, final two years later, he stole a piece of cheese. Could it be seriously proposed that for this third offense he was to suffer seven years' penal servitude? (Radzinowicz and Hood, 1980: 1335).

The predictable happened. The literature is replete with such "horror stories" (American Criminal Law Review, 1979; Baylor Law Review, 1977; Katkin, 1971); Radzinowicz and Hood, 1980). A

recent example is the South Dakota case in 1983 in which Jerry Helm was sentenced to life imprisonment without the possibility of parole. His present conviction was for writing a $100 check on an nonexistent account. He had six previous, non-violent felony convictions involving a total of $230. The sentence was held by this United States Supreme Court to be "significantly disproportionate" and hence in violation of the Eight Amendment prohibition against cruel and unusual punishment.[1] But, similarly situated defendants have not always found a sympathetic judiciary. A Texas habitual offender law under which William Rummel was sentenced to life imprisonment after being convicted of three felonies by which he amassed $229.11 over nine years was not found to violate the Eight Amendment.[2] Over four decades before the Helms case, Elizabeth Rosencrantz was sentenced to life imprisonment without the possibility of parole for the fourth offense of forging and cashing bad checks. She was unsuccessful in arguing that her punishment was cruel and unusual punishment.[3]

On the other hand, some appellate courts have openly rebelled against these harsh, mandatory and overly-broad habitual offender laws. What is more, at the trial level prosecutors, judges and juries have effectively nullified them by refusing to enforce them. The classic example of judicial rebellion occurred

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1 Solem v. Helm, 463 U.S. 277.

2 Rummel v. Estelle, 445 U.S. 263 (1980).

3 Cf. Rosencrantz, Cal. 271 Pac. 902.

in connection with the New York Baumes Law which mandated life imprisonment for fourth time offenders (see Brown, 1945).

During the first twenty years of Baumes Law's existence the courts were able to ignore its mandatory phraseology because of a procedural difficulty that made the law hardly applicable. But in 1927 in an atmosphere of mass hysteria the procedural difficulty was removed and a collision between the judicial and legislative branches of government was precipitated. In a case involving two fourth offenders whose latest crime had been attempted burglary in the third degree the court obeyed the law and sentenced both men to life imprisonment. The court then criticized its own action, saying that the disproportionate sentence was the result of the mandatory law. In another case the court openly defied the legislature and avoided using the Baumes Law by employing an unusual definition of the term, "conviction." In the third case the court was even more defiant, interpreting the mandatory "shall" as being discretionary.[4]

At the trial court level, the legislative mandates of the recidivist laws have been ignored and defied by prosecutors in part to avoid the penological injustices the legislation created (Tappan, 1949). In his survey of West Virginia practice Londo Brown (1956: 40) reported that prosecutors got around the harshness of the recidivist law by simply refusing to file charges except in cases where the lengthier sentence seemed

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4 For further analysis of the conflict between legislatures and courts over severe recidivist laws see Rubin (1973).

merited. One reckless prosecutor even sent him the following letter.

> "I have ignored the mandatory provisions and used my own discretion as to when such information should be filed. It has been my policy to pick out those cases where the prior convictions were for a wilful and malicious crime of a fairly serious nature in filing information under the Habitual Criminal Act." (Brown, 1956: 40).

Plea Negotiations: Double Underutilization?

Several researchers report that prosecutors use the recidivist laws as a bargaining tool in plea negotiations (Barnes, 1931; Elliot, 1931; Sutherland, 1939; Brown, 1945). The implication is that this unintended use of recidivist laws accounts for the lack of their intended use, i.e. for sentencing.[5] When Cook (1975: 918) found that only 3 or 82 eligible persons were sentenced as habituals he wrote: "The only conclusion that can be drawn is that either the 'mandatory' statute is being used with great degree of arbitrariness or it is being consciously used as a threat to induce pleas of guilty from defendants."

The same conclusion is implied by other writers. Tappan (1949: 28) reports that among his respondents

> ". . . the general circumvention of the statutes by legal authorities was stressed with a resultant nullification of their deterrent value . . . . [A]voidance and nullification of the recidivist provisions are common. The law was described as

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5 See also Klein (1973: 432) who suspects this is true in Canada but is unable to substantiate it. "Unfortunately, data are not available on those who have been threatened with habitual criminal proceedings and those who have been found to be habitual criminals but not so sentenced."

> frankly ineffective in eight states, while others stressed the customary circumvention of legislative intent through the procedures of bargaining with prosecution, of pleading to lesser charges, and of failures to secure the multiple offender indictment."

In his examination of the use of recidivist laws in Texas, Furgeson (1967: 663) wrote:

> ". . . since the operation of the criminal justice system depends upon the bargaining process to insure that the court dockets do not become hopelessly clogged, prosecutors more often use the habitual offender laws as a bargaining tool to strengthen their position in negotiations with defense attorneys on the plea and the sentence."

Notwithstanding these suspicions, there is reason to doubt that the use of recidivist laws for plea negotiation constitutes an explanation for the underuse of these laws for sentencing. A few recent studies suggest that recidivist laws may be doubly underutilized. They may be not only underused for sentencing but for plea negotiating as well. These studies suggest that prosecutors' offices do not take full advantage of the plea negotiation possibilities of habitual offender charges in the majority of eligible cases.

A 1977 California study by Rand (Petersilia et al., 1978) examined the criminal careers of 49 inmates whom Rand called "habitual felons" at a medium security prison. Altogether the 49 had committed over 10,500 felonies. All were currently incarcerated for armed robbery. Although all qualified for special charges of prior offenses to be filed against them, prosecutors did not use the leverage of these special allegations in all cases. It is also noteworthy that a prior record could be used in two different ways under California law to enhance a

sentence either directly or through the habitual offender statute. The direct method was by far the preferred method (probably because it was easier to administer).

> "About 60 percent were threatened with the filing of priors, but only 40 percent had such allegations actually filed; and about half the priors that were filed were dismissed or stricken. Thus, the prosecutor's use of priors appeared to serve ends other than only obtaining a harsher sentence."
>
> "Prosecutors threatened only one-third of the sample with application of California's habitual offender statute. Formal charging of habitual offender status was rare" (Petersilia et al., 1978: viii).

As of July 1, 1977 a major reform in sentencing went into effect in California (Casper et al., 1981). The indeterminate system which had been in effect when the habitual felons studied by Rand were sentenced was replaced by the Uniform Determinate Sentence Law.[6] Among other things the new law created a redundant sentencing system under which prior record could increase the presumptive sentence in either of two ways. It could be used to "enhance" a presumptive sentence. For certain offenses the judge was required to impose a one year term for each prior separate prison term and this term was to be served consecutively to any prison term imposed on the current offense.

Alternatively, certain types of serious prior records could be used to proceed against the defendant as an "habitual criminal" and could result in much lengthier enhancements.[7]

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6 Ann. Calif. Penal Code, 1984 Supp., § 1170.

7 See Chapter 7 in this report for further details on the California law.

Based on samples of cases from three counties during the years 1978 and 1979 Casper et al. (1981) found that the allegations of prior prison terms were infrequently filed and, if filed, were frequently dropped.[8] Casper et al. also present 1979 parole authority data which indicate that a substantial proportion of defendants who got prison terms were eligible for enhanced terms based on prior nonviolent prison terms but were not charged with those allegations (See table 4.4). However, as the data show, there is substantial variation among the three prosecutors' offices in the charging of prior prison term allegations (22.5% in San Bernardino compared to 58.8% in San Francisco and 65.8% in Santa Clara). The explanation for the difference is not given.

Table 4.4. Eligible Offenders Charged With Prior Nonviolent Prison Terms, California, 1979*

	State	San Bernardino	San Francisco	Santa Clara
Offenders with prior nonviolent prison terms	37.6% (10,395)	40.3% (518)	45.7% (600)	40.4% (463)
Of those with prior prison, % against whom allegation is filed	44.2% (3,907)	22.5% (209)	58.8% (274)	65.8% (253)

* Source: Casper et al., 1981: 205.

8 In robbery cases, San Bernardino, 6% filed, 45% dropped; San Francisco, 19% filed, 44% dropped; Santa Clara, 11% filed, 44% dropped. In burglary cases, 6% filed, 23% dropped; San Francisco, 16% filed, 38% dropped; Santa Clara, 11% filed, 29% dropped (Casper at al., 1981: 204).

In McDonald's (1985) analysis of six prosecutors' offices, only one, New Orleans, was found to routinely file habitual offender charges in all eligible cases. The policy there was to reduce the level of the habitual charge (e.g. from fourth to third time offender) in exchange for a guilty plea to the top charge. This preserved the top charge in the present case while invoking the sentencing effects of the law.

The Rand, Casper and McDonald studies do not establish conclusively that the repeat offender laws are being under-utilized for plea bargaining purposes. The Casper and McDonald studies only report whether repeat offender charges were actually filed. It is possible that prosecutors in those jurisdictions could frequently use the threat of filing these charges as a negotiating tactic. Such threats would not have appeared in the case files from which their data were drawn. The Rand study did find that the filing of priors was threatened about 60 percent of the time. But its sample is limited to 49 armed robbers from one state. Thus, the question of whether the literature has established that the repeat offender laws are underutilized for plea bargaining should be regarded as problematic. (Our findings presented later, suggest that they are not.)

Administrative/Procedural/Cost Obstacles

The literature reports a variety of administrative problems that have interfered with the operation of the recidivist laws. The core problem has been to develop and fund the necessary administrative and technological mechanisms to identify eligible

offenders and to obtain the necessary legal proof that establishes the offender's identity and links him to his prior record. This cluster of problems is more challenging than it may seem. Determining whether any given defendant among the thousands passing through a court system has a prior record either in that or another jurisdiction and then obtaining certified copies of those records is no mean trick even in today's computerized society. Historically, the attempt to overcome these practical problems involved in implementing repeat offender laws was the impetus for two major developments in criminal justice technology: state criminal records systems and fingerprinting.

In New York, the Revised Statutes of 1829 made it the duty of the court clerks of record to enter judgment of any conviction in the transcript of the minutes they forwarded to the secretary of state. The sole purpose of filing these transcripts was that they might furnish evidence of prior convictions when a repeat offender was sentenced on a new charge (Inciardi, 1980:61).

In England the records problem began in 1869 with the first Habitual Criminals Law. In order to be able to identify who the habitual criminals were vast lists of names, descriptions and photographs were assembled. The Alphabetical Register of Habitual Criminals, first published in 1877, contained 12,164 persons and 22,115 names (including aliases). But the register system proved useless. It was cumbersome and the photographs were misleading due to the effects of aging on the subjects. It was proposed that habituals be tattooed with two or three small indelible marks on the leg or between the toes. Additional marks

could be added for each successive conviction. The marks could be coded to indicate the crime and the disposition. Thus habituals would carry their criminal records with them for life. (Tallack, 1888:196). Eventually the modern fingerprinting method was developed. The government was persuaded to adopt it as the only reliable and efficient way of identifying repeaters (Radzinowicz and Hood, 1980: 1350).

Having an identification technique solves only the beginning of the problem. Then there comes the costly and time-consuming tasks of obtaining certified prior records from outside the local jurisdiction. These problems have not been solved by the existence of the Federal Bureau of Investigation's central criminal records system nor by statewide records systems (as will be discussed further below). Some officials have blamed the underutilization of their recidivist laws on these problems (Brown, 1945; Brown, 1956; Cook, 1995).

Prison Capacity

Prison capacity is also related to cost but deserves special mention. Again, some policymakers anticipated that the number of recidivists would be large and that sentencing them to long terms could exhaust available prison capacity. One simple expedient for reducing the impact on prison capacity is to set the eligibility criteria a notch or two higher. This was done to the Gladstone proposal, effectively reducing the number of eligibles from 60,000 to 5,000 (Radzinowicz and Hood, 1982: 1365). Similarly the Kansas Legislature modified its 1927 habitual

criminal act when its Legislative Council estimated that if the law were rigorously applied, the prison population of the state would double in ten years (Columbia Law Review, 1948: 252).[9] In places where such adjustments were not made, local officials recognized the financial implications of the law and minimized their use of it (Brown, 1945: 663).

Summary: Underutilizations and Their Explanations

Based on the literature reviewed above one would expect to find that repeat offender laws today are underutilized for sentencing purposes and may or may not be underutilized for plea negotiating purposes. Also one would expect that underutilization for sentencing would be explained by local criminal justice practitioners in terms of one or more of the reasons given in the past: their redundancy; severity; administrative infeasibility; use in plea negotiations; and because of the lack of prison capacity.

As to whether the laws are underutilized for plea negotiation purposes and why, the literature is ambiguous. If indeed the laws are underutilized for plea negotiating purposes then only one of the five categories of reasons explaining the underuse for sentencing would be relevant to underuse for plea negotiating. Conceivably, prosecutors might report that the

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9 It is also alleged to be the reason why the comparatively new determinate sentencing law in Minnesota prescribes such lenient sentences for all offenders and particularly for repeaters. See Chapter 7 in this report for further discussion.

administrative obstacles to obtaining legally acceptable proofs of prior convictions prevent them from filing or even threatening to file repeat offender charges for plea bargaining purposes. However, if prosecutorial bluffing and gamesmanship is as widespread as has been alleged (Alschuler, 1968; but see, McDonald, 1985), then it is equally reasonable to expect that prosecutors would use the threat of filing repeat offender charges as a negotiating tactic even knowing that it may be impossible to obtain the necessary documentation. The empty threat alone could be an effective weapon.

In choosing between the plausible alternative hypotheses one might look at the law and professional ethics for an indication as to which practice is approved, and hence, more likely to prevail. But, the guidance given by this resort is not unequivocal. Although the law[10] allows the practice of using the threat of filing repeat offender charges as a plea negotiating tactic, the professional standards condemn it under certain conditions which vary from one set of standards to the next and which contain ambiguities (McDonald, 1985). For instance the National District Attorneys Association (1977) condemns the use of the charging function solely as a leverage device to obtain pleas. It also prohibits the filing of charges which cannot "reasonably be substantiated by admissible evidence . . . ." Similarly the National Advisory Committee on Criminal Justice Standards and Goals (1973) states that no prosecutor in

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10 Bordenkircher v. Hayes, 434 U.S. 357 (1978).

connection with plea negotiations should threaten "to charge the defendant with offenses for which the admissible evidence available to the prosecutor is insufficient to support a guilty verdict."[11] The ambiguity enters when one asks how certain a prosecutor must be about the feasibility of locating and obtaining legally acceptable proof of a defendant's prior convictions. In theory, the prior records of any American criminal are "available" to any prosecutor's office willing to devote the time and energy to track them down. In practice, many jurisdictions would be unable to produce acceptable proofs in court for substantial portions of their respective eligible populations of repeaters.

The constitutionality of obtaining pleas by threatening to file habitual offender charges was established in Bordenkircher v. Hayes.[12] In that case Paul Hayes had been indicted for forging an $88.30 check--a crime punishable by a term of 2 to 10 years in prison. The prosecutor told Hayes that in view of his prior convictions if Hayes did not plead guilty the prosecutor would also charge him as a habitual criminal. (The question of whether the prosecutor could have produced a legally acceptable proof of Hayes' prior conviction was not at issue.) Despite its constitutionality a sample of prosecutors (of unknown representativeness) disapproved of the practice described in the Bordenkircher case (Farr, 1978). The Los Angeles District

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11 Emphasis added.

12 434 U.S. 357 (1978).

Attorney declared he would not obtain guilty pleas by threatening to file habitual offender charges.

In short, the literature is confusing. It supports conflicting hypotheses regarding the rate of use of repeat offender laws in plea negotiations and the reasons for whatever that rate may be.

Findings

Sentencing Underutilization

Many of the previous studies of repeat offender laws were conducted more than ten years ago. Since then many things have changed. Most importantly the laws themselves have changed. Since 1970, thirty of the forty-nine jurisdictions analyzed have enacted or revised their repeat offender laws. At the same time, plea negotiating has come out of the closet. Prosecutors are more willing to admit to the practice. There have been major advances in computer and telecommunications technology relevant to the problems of rapid criminal identification and record checks. A conservative political environment and a new hardline approach among criminologists and policymakers has developed. Hundreds of millions of dollars in research, demonstrations and program support have been spent by the federal government in understanding habitual criminals and in improving the criminal justice systems' responses to them. In 1975 the Law Enforcement Assistance Administration (LEAA) initiated its Career Criminal Program. It supported local efforts to identify and vigorously prosecute repeat offenders. By 1980 it had funded units in 45

jurisdictions and another 100 jurisdictions established similar units through other funding sources (Institute for Law and Social Research, undated).

Despite all the changes, however, the findings of our survey are remarkably similar to those of earlier studies. George Brown's conclusion that the repeat offender laws have never been successful [at their intended purpose] is as valid today as it was in 1945. Regardless of the legal revisions and innovations of the past fifteen years and with a few notable exceptions, habitual American criminals with qualifying prior records are no more likely to be sentenced under the special habitual-offender-type legal provisions today than they were forty years ago. Substantial numbers of American defendants are eligible for sentencing as habitual offenders but few are sentenced as such. Sixty-eight percent of our national sample of defense attorneys reported that one or more of their last three clients were eligible for repeat offender sentencing; yet, 70 percent of the defense attorneys also reported that none of their last three eligible clients were actually sentenced as habituals (see Tables 4.4 and 4.5).

Table 4.4 Of Last Three Clients, Number Eligible for Repeat Offender Status Per Defense Attorney

Number Eligible of Last Three	% of Defense Attorneys (N=76)
None	32
One	36
Two	14
Three	18
	100%

Table 4.5 Of Last Three Eligible Clients, Number Who Were Actually Sentenced As Repeat Offenders Per Defense Attorney

Number Sentenced of Last Three Eligible	% of Defense Attorneys (N=76)
None	70
One	12
Two	7
Three	11
	100%

Similarly, a substantial majority (83%) of prosecutors estimated that fewer than 51 defendants per year were sentenced as habituals. In many places the number was less than 10 per year. Larger jurisdictions (over 250,000 population) were significantly more likely to sentence more defendants as repeaters than small ones. But, even among large jurisdictions many prosecutors (43%) reported that fewer than 11 defendants per year were sentenced as habituals (see Table 4.6). The inescapable conclusion is that the repeat offender laws continue to go underused for sentencing.

Table 4.6 Prosecutors' Estimates of the Number of Defendants Sentenced As Repeaters By Size of Jurisdiction

Prosecutors' Estimates	Small* Jurisdiction (N=91)	Large*,** Jurisdiction (N=64)	Combined (N=155)
None	18%	16%	17%
1-10	52%	27%	41%
11-50	20%	31%	25%
51-500	11%	27%	17%

* $x^2 = 13.06$ df = 3 p = .00 Eta = .23
** Large is over 250,000 population.

Reasons For Sentencing Underutilization

The reasons for the underutilization for sentencing are the familiar ones. The only surprise is the candor with which contemporary prosecutors admitted to using these laws for plea bargaining purposes. That was the most frequently given reason when they were asked why more eligible habitual offenders were not sentenced as such (see Table 4.7).

Table 4.7 Main Reason Why More Eligible Offenders Are Not Sentenced As Habituals According To Prosecutors (Number of prosecutors giving reasons = 138)

Reason	% Prosecutors Mentioning Reason Among Top Three
Plea Bargaining	62
Normal sentence is adequate	38
Proof problems (e.g., Boykin)	17
Eligibles not identified	11
Essential information not timely/accurate	10
Low priority case	9
Prison overcrowding	5
Trouble/cost obtaining witnesses	1

The second most frequently mentioned reason was the familiar observation that the habitual offender laws are redundant. The normal sentencing provisions are regarded as providing an adequate degree of severity appropriate even for repeat offenders. As was often pointed out by prosecutors, the sentencing provisions of the repeat offender laws are primarily useful in only two kinds of situations. One is the "exceptional" cases where unusually severe sentences seem warranted. (This is discussed further in Chapter 5. See especially Table 5.6 for the frequent mention of the redundancy of the repeat offender laws as a reason for their not being used for sentencing.) The other is when the

judge is regarded as too lenient. Then, if the repeat offender law contains mandatory minima, it can be used to guarantee a stiffer sentence than would otherwise be imposed.

The other reasons for underusage fall into the balance of the familiar categories. Prison capacity was mentioned by 5 percent of the prosecutors. The severity of the laws is alluded to indirectly by the 9 percent of prosecutors who referred to "low priority cases"--meaning that the defendants may qualify for sentencing as habituals but they do not merit the extra effort.

Finally, there are four distinct reasons which fall under our general rubric of administrative/procedural/and cost category. These are: eligibles not identified; essential information not timely or accurate; trouble/cost obtaining witnesses; and special legal proof problems like Boykin.[13] Each of these reasons requires some explanation.

In most jurisdictions surveyed (70%) the responsibility for identifying defendants who are eligible for repeat offender treatment rests with the individual prosecutors assigned to the cases. They often rely on the prior record information supplied by the police but they may supplement it with their own check of the state criminal records office or the FBI. However, a survey of prosecutors' offices by Petersilia (1981) found that the police always supplied the prior record in adult cases in only 44% of the responding offices and rarely or never supplied the juvenile record in 60% of them. Moreover, even when Petersilia

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13 Boykin v. Alabama, 395 U.S. 238 (1969).

combined the criminal history information which prosecutors said they got from the police with that which they obtained on their own inquiries to local or statewide record systems a substantial proportion of jurisdictions reported that they get criminal histories only sometimes (31-69 percent of cases) or rarely (less than 30 percent of cases). For adult records,24% of the responding jurisdictions report they get them sometimes and 4% report it is rare. For juvenile records, 22% said sometimes; 27%, rare; and 14%, never.

It has been estimated that more than 70% of all offenders commit crimes in more than one state and that the vast majority of offenders commit crimes in more than one city or county.[14] Relying on local county records obviously means that the extra-jurisdictional offenses of many offenders will not be discovered. Checking with the state central criminal records files is feasible in 48 of the 50 states but only 17 states have centralized automated data bases.[15] Even where automated

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14 Interview with William Garvie, Assistant Section Chief, Melvin Mercer, and John Donebrake, Identification Division, Federal Bureau of Investigation, August 23, 1984, at FBI Headquarters, Washington, D.C. Hereinafter, Garvie-Mercer-Donebrake interview.

By 1988 the FBI records system will have fully implemented a new automation system which is expected to reduce the turn-around time to a few hours. The FBI currently operates a 24-hour record-checking hotline where laser copies of prints from FBI field offices and local jurisdictions are sent for immediate analysis. However, this is only used in very important cases and it is expensive. Only 75 jurisdictions can afford it.

15 Garvie-Mercer-Donebrake interview.

centralized state records systems do exist substantial delays in obtaining records can occur. In New York City it takes a minimum of 3 to 5 hours to obtain a record from the state's sophisticated automated system. Checking with the FBI's central records system is also time-consuming. It requires sending fingerprints and other information to the FBI and awaiting a response. The FBI's current turn-around time is about 10 to 11 workdays from the time it receives the request. Adding the time needed for the local jurisdiction to process its request, it can take several weeks before local prosecutors learn of a defendant's prior record. The indictment may have been filed or a plea negotiation completed before the existence of an out-of-jurisdiction prior record is known. The problem of delay as described by Dahmann and Lacy in their evaluation of a career criminal unit in the Franklin County (Columbus) Ohio prosecutor's office was frequently reiterated by our respondents. Dahmann and Lacy (1977:72) wrote:

> In all felony arrests, the Prosecuting Attorney's Office receives a copy of the defendant's rap sheet from the FBI. Turnaround time from transmission by the arresting police agency to return from the FBI varies considerably, from two to ten weeks. FBI returns are reviewed daily by the director of the Career Criminal Unit. If the defendant, on the basis of the rap sheet, meets program criteria, his case is sought out for assignment to the unit. Depending upon the time of this decision, the case may be still in the Municipal Court or may already be indicted, arraigned and awaiting trial or may already have been tried.

Once the record is obtained, the job is not over. The record may be incomplete. Criminal records at the local, state and national levels are notorious for their frequent lack of

disposition information. The FBI has criminal records on over 22 million people and 85 million arrests. It estimates it has complete dispositions on only about 50 percent of the 85 million arrests.[16] The problem of linking dispositions with arrests is a complex logistical and political one. Arrests are made by law enforcement agencies while dispositions are (usually) made by judicial agencies. The records systems of the two agencies are not coordinated. Historically police agencies have been more reliable in filing arrest records with the FBI than courts have been with disposition records. Even within local jurisdictions the criminal records systems are not interlinked.

Once a defendant's prior record has been obtained the job of determining whether he or she qualifies as a repeat offender may not be finished. If the case dispositions are missing, they may have to be tracked down.[17] If they are present but unintelligible, the local jurisdiction will have to be contacted. (The abbreviations used in the FBI master records are not standardized nationwide.) If the dispositions are present and intelligible, a special inquiry may still have to be made to establish whether the crime as defined by the out-of-state jurisdiction is equivalent to the crimes necessary to qualify for the host state's habitual offender treatment.[18] Even when they are

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16 Garvie-Mercer-Donebrake interview.

17 The difficulty of determining whether an arrest resulted in a conviction even if one has a copy of the FBI's NCIC data available to them has been documented by researchers who were attempting to measure recidivism (Maltz, 1984:61).

automated, the advantages of automation are defeated by the balkanization of the justice systems. Each agency has its own separate computer system with its own separate identifiers for locating cases. In order to trace a sample of cases from arrest to disposition in some comparatively well-funded jurisdictions one must first consult the police computer, then the prosecutor's computer, then the court's computer, and then correctional system's computer. Ogburn's (1964) theory of culture lag is well demonstrated by the criminal justice information systems. The technology for easy access to case information has existed for years but the justice institutions have been reluctant to develop a fully integrated system.[19]

The sample FBI rap sheets presented in Exhibit 4.1 help illustrate some of the difficulties mentioned above. Note that FBI criminal #205462H has been arrested in two different states and four different cities; and processed by at least nine different justice agencies (not counting court systems). Given

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18 For further discussion of these complications see Buckley (1976).

19 Resistance to integrating the computer systems is sometimes made in the name of the doctrine of the separation of powers. But local insiders often say that the primary reason is the fear of each agency that its case decisionmaking could be easily monitored by the other agencies and exposed to public criticism.

Whether these record systems should be integrated is an important but controversial question of public policy. While it may facilitate certain criminal justice objectives such as identifying repeat offenders, it also represents a potential threat of Big-Brotherism and the infringement of civil rights (see Westin, 1976).

such complexity the fact that the record is as complete as it is must be regarded as a high tribute to the ability of modern bureaucracy to gather information from the four corners of the earth, like Jonesboro, Georgia. Nevertheless, from the point of view of the practicing prosecutor who needs an efficient way of knowing whether criminal 205462H qualifies as a habitual, the "rap" sheet can be criticized. The abbreviations are somewhat cryptic. The experienced prosecutor may or may not be able to interpret the disposition for 10-22-70 which reads "6 yrs SV 3 yrs BP (2cc)" as meaning "6 years, served 3 years, the balance on parole, 2 years served concurrently."

Once all of the problems of determining whether a defendant has a prior conviction have been solved, then the real work begins! Obtaining from the other jurisdictions the documentation necessary to prove prior convictions and thereby establishing a defendant's eligibility for sentencing as an habitual offender was regarded by the majority (77%) of prosecutors as a problem of moderate (32%) to major (35%) proportions (see Table 4.8).

Table 4.8 Prosecutors' Difficulty In Obtaining Complete and Timely Prior Records From Other Jurisdictions

	(N = 171)
No or minor problem	33%
Moderate problem	32%
Major problem	35%
	100%

The details of the problems vary with the jurisdictions; but there are some commonalities. One frequently cited problem is simply finding out where to look for and whom to contact to

Exhibit 4.1 Two Sample FBI Criminal Record Masters

MASTER MASTER MASTER

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
IDENTIFICATION DIVISION
WASHINGTON, D.C. 20537

Use of the following FBI record, NUMBER 205 462 H , is REGULATED BY LAW. It is furnished FOR OFFICIAL USE ONLY and should ONLY BE USED FOR PURPOSE REQUESTED. When further explanation of arrest charge or disposition is needed, communicate directly with the agency that contributed the fingerprints.

CONTRIBUTOR OF FINGERPRINTS	NAME AND NUMBER	ARRESTED OR RECEIVED	CHARGE	DISPOSITION
SO Jonesboro GA	[redacted] #03655	1-18-70	DC	rel W/O prosecuting
SO Macon Ga	[redacted] #19205	1-23-70	Extort by Tel Conv	Refer to 10-22-70 entry
PD Macon Ga	[redacted] #105 764	1-23-70	Robb with off weapon	Refer to 10-22-70 entry
Diagnostic Class Ctr Jackson Ga	[redacted] #D-3813	10-22-70	arm rob; att T by ext	6 yrs SV 3 yrs BP (2cc)
FBI Atlanta Ga	[redacted] 916703	8-31-72	bank robbery	9-8-72 pled glty to vio. of T. 18, USC, Sect 2113(a); 10-10-72 sent to 15 yrs in prison

MASTER

I-4 (Rev. 7-19-77)

MASTER

MASTER

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
IDENTIFICATION DIVISION
WASHINGTON, D.C. 20537

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The of the following FBI record, NUMBER 205 462 H , is REGULATED BY LAW. It is furnished FOR OFFICIAL USE ONLY and should ONLY BE USED FOR PURPOSE REQUESTED. When further explanation of arrest charge or disposition is needed, communicate directly with the agency that contributed the fingerprints.

CONTRIBUTOR OF FINGERPRINTS	NAME AND NUMBER	ARRESTED OR RECEIVED	CHARGE	DISPOSITION
Fed Corr Inst Tallahassee Fla	[redacted] 28625-120	12-14-72	(a) (2) bank Robbery	See Supplement
PD Ormond Bch FL	[redacted] 8623 SID 1466461	11-3-79	attempted armed robbery	Convicted of attempted robbery, 3 yrs
Dept of Corr Lake Butler FL	[redacted] 078124 SID 1466461	5-5-81	attempted robbery	3 yrs less 541 days CJT
US Pen Terre Haute IN	[redacted] 28625 120 F101350	rec'd 8-26-82	PV(parole viol-bank robbery)	3,907 days remaining to serve; transferred to FCI, Talladaga, AL

MASTER (FD-9 (Rev. 7-19-77)) MASTER MASTER

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WASHINGTON, D.C. 20537

3

Use of the following FBI record, NUMBER 205 462 H, is REGULATED BY LAW. It is furnished FOR OFFICIAL USE ONLY and should ONLY BE USED FOR PURPOSE REQUESTED. When further explanation of arrest charge or disposition is needed, communicate directly with the agency that contributed the fingerprints.

CONTRIBUTOR OF FINGERPRINTS	NAME AND NUMBER	ARRESTED OR RECEIVED	CHARGE	DISPOSITION
	#28625-120 12-14-72, 15 yrs; 6-12-73 conv of 2nd bank robbery and on 7-13-73, sent to another 15 yrs under provisions of T.18, USC, Sect.4208(a)(2) to run concurrent with prior sentence; 12-9-73, received at Med Ctr for Fed Prisoners, Springfield, Mo; conviction of 6-12-73 set aside as [redacted] found incompetent to have stood trial; 10-15-74, found guilty of bank robbery at retrial & on 11-15-74 sentenced to 20 yrs under 18 USC 4208(a)(2) to follow earlier sentence now serving; 1-8-75, received at USP, Terre Haute, IN; 10-8-77, received at Med Ctr for Fed Prisoners, Springfield, Mo.; 9-26-78, received back at USP, Terre Haute, IN; Paroled 1-24-79			

SUPPLEMENT

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
IDENTIFICATION DIVISION
WASHINGTON, D.C. 20537

PAGE 1 07/31/84

Use of the following FBI record, NUMBER 462 327 P1 is REGULATED BY LAW. It is furnished FOR OFFICIAL USE ONLY and should ONLY BE USED FOR PURPOSE REQUESTED. When further explanation of arrest charge or disposition is needed, communicate directly with the agency that contributed the fingerprints.

Contributor: Identifier (ORI) Name Case Number (OCA)	Subject: Name State Number (SID)	Arrested or Received	C - Charge D - Disposition

THE SUBJECT'S IDENTIFICATION RECORD APPEARING HEREUNDER HAS BEEN RETRIEVED FROM THE IDENTIFICATION DIVISION FILES BASED ON DESCRIPTORS FURNISHED IN YOUR REQUEST WHICH MATCHED THOSE ON FILE.

ALL DESCRIPTORS ON FILE ARE LISTED BELOW.

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WEIGHT		140			06/26/51
HAIR		BROWN			06/26/61
EYES		BLUE	BIRTH CITY		KINGSTON
			BIRTH PLACE		NEW YORK
			SOC SEC NO.		[redacted]
			MISC ID NO.		
SCARS ETC.		SCAR ON LEFT FOREARM TATTOO ON LEFT HAND SCAR ON NOSE SCAR ON ABDOMEN SCAR ON LEFT HAND TATTOO ON LEFT ARM TATTOO ON RIGHT ARM TATTOO ON RIGHT FOREARM TATTOO ON LEFT FOREARM			

NATIONAL CRIME INFORMATION CENTER FGPT. CLASS: 22 11 10 PI 17 17 09 11 PI 1

NY0010100 POLICE DEPARTMENT ALBANY,NY 45915	[redacted], [redacted] NY3943003J	12/23/75	C-GRAND LARCENY 2ND D-CONVICTED-01/06/76 CONFINEMENT-6M DEF PLED TO A RED CHG,ACP
NY0010200 STATE POLICE LOUDONVILLE,NY GF0N42756	[redacted], [redacted] NY3943003J	03/22/76	C-PL 165-05-1 A M 0 UNAUTH USE MOTOR VEHICLE D-CONVICTED- CONFINEMENT-90D

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			FULTON CO JAIL COMMITTED
NY0110000 SHERIFF'S OFFICE CORTLAND,NY 33013	[redacted] NY3943003J	09/23/76	C-UNAUTHORIZED USE MOTOR VEHICLE D-CONVICTED- CONFINEMENT-15D
NY0556600 TOWN POLICE DEPT WOODSTOCK,NY WPD678	[redacted] NY3943003J	11/17/76	C-2200 BURGLARY 3RD D-CONVICTED- RESTITUTION-PLEAD GUILTY
CT0010400 [redacted]ICE DEPARTMENT NORWICH,CT 4806-77	[redacted]	05/24/77	C-LARCENY 2ND D-CHARGE DISMISSED-06/10/77 C-LARCENY 4TH D-CHARGE DISMISSED-06/10/77 C-USING MV W/O PERM D-CONVICTED-06/10/77 30D SUSP CONC C-LARCENY 4TH D-CONVICTED-06/10/77 30D SUSP CONC
NY1010200 STATE POLICE LOUDONVILLE,NY 50047	[redacted] NY3943003J	08/25/77	C-VIOLATION OF PROBATION D-CONVICTED- PROBATION-3Y
NY0010200 POLICE DEPARTMENT COHOES,NY 819	[redacted] NY3943003J	01/12/78	C-GRAND LARCENY III 155-30 SU 1-ARREST CHARGE C-GRAND LARCENY CHNGD TO PETI LARCENY D-DEFERRED DISPOSITION- 03/31/78 GUILTY PLEA-COND DISCHG

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NY1010200 STATE POLICE LOUDONVILLE,NY G-51795	[redacted] NY3943003J	05/11/78	C-FORGERY 2ND 170-10 PENAL C-PETIT LARCENY 155-25 PENAL D-PENDING
NY0472000 VILLAGE POLICE DEPT COBLESKILL,NY C-807-78	[redacted], NY3943003J	12/11/78	C-PETIT LARCENY 2399 155-25PL D-CONVICTED-04/10/79 CONFINEMENT-9M GUILTY PLEA-MAX
NY0472000 VILLAGE POLICE DEPT COBLESKILL,NY C-831-78	[redacted], NY3943003J	12/22/78	C-CRIM POS STOLEN PROP 3 SECT 165-40 D-CONVICTED-12/28/78 CONFINEMENT-30D PLEADED GUILTY SCHOHARIE CO JAIL
NY1350100 STATE POLICE MIDDLETOWN,NY F-48774	[redacted], NY3943003J	06/29/79	C-VEH THEFT 2404 D-HELD- C-POSSESS STOLEN VEH 2408 D-HELD- C-VEH THEFT RED TO CRIM POSS STLN PROP 3RD D-CONVICTED-07/28/79 CONFINEMENT-1Y ULSTER COUNTY JAIL
NY1350100 STATE POLICE MIDDLETOWN,NY F-52903	[redacted] NY3943003J	02/25/80	C-FRAUD INSUFFICIENT FUNDS CHECK D-CONVICTED- FINE-$10 RESTITUTION-PLED GUILTY
KS0910000 SHERIFF'S OFFICE GOODLAND,KS 80-2053	[redacted]	09/24/80	C-21-3715-BURGLARY D-HELD- C-BURGLARY REDUCED CRIM TRESPASS D-CONVCTD OF LESSER OFNS-

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			CONFINEMENT-26D PG COUNTY JAIL $40 COURT COST
NY1350100 STATE POLICE MIDDLETOWN,NY F-56751	[redacted], [redacted] NY3943003J	05/04/81	C-POSSESSES STOLEN PROPERTY 2804 D-CONVICTED- GUILTY PLEA-FINE $100,FINE PAID PG C-OPER VEH WHILE LIC SU D-CONVICTED- FINE $100,FINE PAID C-VEHICLE REGISTRATION RULES D-CONVICTED- FINE $50,FINE PAID C-UNLICENSED DRIVER D-CONVICTED- FINE $100,FINE PAID C-INSURANCE VIOLATIONS D-CONVICTED- FINE $200,FINE PAID
NY1010200 STATE POLICE LOUDONVILLE,NY 69914	[redacted], [redacted] NY3943003J	07/11/81	C-BURGLARY 3RD DEGREE D-NO FORMAL CHARGE- D-NOT ARR ON BURGLARY C-CRIMINAL TRESPASS 2ND D-CONVICTED-08/24/81 CONFINEMENT-89D GUILTY PLEA-MAX
NY1010200 STATE POLICE LOUDONVILLE,NY 69740	[redacted] [redacted] NY3943003J	08/15/81	C-OBSTRUCTING GOVERNMENTAL ADMINISTRATION D-CONVICTED- CONFINEMENT-89D COUNTY JAIL

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Contributor Identifier (ORI) Name Case Number (OCA)	Subject Name State Number (SID)	Arrested or Received	C - Charge D - Disposition
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NY0470000 SHERIFF'S OFFICE SCHOHARIE,NY 2318	[redacted], [redacted] NY3943003J	08/24/81	C-ISSUING A BAD CHECK D-DEFERRED DISPOSITION- 10/26/81 GUILTY PLEA-CUSTODY & COND DISCHG 1CT NOT ARR ON
NY1010200 STATE POLICE LOUDONVILLE,NY 2G35	[redacted], [redacted] NY3943003J	01/09/82	C-ISSUING A BAD CHECK D-DEFERRED DISPOSITION- 01/20/82 GUILTY PLEA-COND DISCHG ON 1CT
N[redacted]470000 SHERIFF'S OFFICE SCHOHARIE,NY 2326	[redacted], [redacted] NY3943003J	03/05/82	C-PETIT LARCENY D-CONVICTED-04/09/82 CONFINEMENT-130D MAX,PG
NY047013C COUNTY JAIL SCHOHARIE,NY 7589	[redacted], [redacted] NY3943003J	04/09/82	C-PETIT LARCENY D-CONVICTED- CONFINEMENT-130D COUNTY JAIL
NY1010200 STATE POLICE LOUDONVILLE,NY 31G35	[redacted], [redacted] NY3943003J	05/28/82	C-FALSELY REPORTING AN INCIDENT THIRD DEGREE
NY001015C DEPT OF CORRECTIONS ALBANY,NY WANT	[redacted], [redacted]	RECEIVED 04/25/84	C-WANTED-NCIC #W334717132 C-FLIGHT-ESCAPE-CASE #HU83A0813 C-WRT 4-23-84 NOTIFY CONTRB
OHCOP0000 POLICE DEPARTMENT COLUMBUS,OH 52099A	[redacted] [redacted] OHB120583	05/09/84	C-FUGITIVE FROM JUSTICE 4900 D-TOT SO COLUMBUS OHIO

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Contributor: Identifier (ORI) Name Case Number (OCA)	Subject: Name State Number (SID)	Arrested or Received	C - Charge D - Disposition
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NY1340100 STATE POLICE CANANDAIGUA,NY 3743E24 FBI INTERNAL COPY DCFBIWA6Z POSTING SECTION WASHINGTON,DC	[redacted] NY3943003J	05/12/84	C-FORGERY 2ND 8 CTS C-GRAND LARC C-PETIT LARCENY 2 CTS

obtain the documentation. Rap sheets indicate where a defendant was arrested and held in custody but do not identify the court system in which he or she was convicted. At the court system level the degree of cooperation from the clerks varies. Some large jurisdictions were cited as notably uncooperative.

A prosecutor from North Carolina reported that getting records from the District of Columbia and New York City is "impossible." "You need personal contacts." Other places are a little better but it takes time." A prosecutor from Albuquerque, New Mexico reported that the problems "vary by jurisdiction." "California is a pain" because they will not give information over the phone. He says he drops out-of-state priors if some in-state priors exist "just because it's such a pain in the neck at times." A New York prosecutor also said it "depends on the state." "Pennsylvania is good; California and Texas are bad." A prosecutor from Arizona also cited Texas and California as difficult to deal with. An Arkansas prosecutor also mentioned California, as did a prosecutor from Tulsa, Oklahoma who described California as "terrible" because it requires payment for services up front. A Birmingham (Ala.) prosecutor complained that "Chicago is always a tough place to get information from." A California prosecutor reports that Idaho, Wyoming and New Mexico are good states for getting information from. A Colorado prosecutor noted that many of his jurisdiction's criminals are transients on route across country. Thus their prior records are out-of-state. Obtaining them is "extremely difficult." He cited a case he has coming up where three out of five counts are from

Pittsburgh, Pennsylvania. He said it took five months to get the proper information. A New Haven, Connecticut, prosecutor said he "shies away from using prior records (from other jurisdictions) because of proof problems." Several prosecutors criticized the FBI and the NCIC (National Criminal Information Center) systems as "slow," "inadequate" and even "uncooperative."

Some jurisdictions (e.g. California) have established a simple statewide agency whose purpose is to respond to all out-of-state requests for prior record documentation. But, judging from the complaints we heard about that arrangement, it is either not operating up to par or is not the answer.

Part of the difficulty in achieving cooperation lies in the non-standardized nature of the American justice systems. The laws differ. The definitions of crimes differ. And, the requirements for establishing prior records differ. All of this interferes with the routinization of responding to requests for documents. Even the language differs. Colorado requires "exemplified records"; New Mexico requires a "record with seal"; Nebraska requires "authenticated" copies (as opposed to "certified" copies). Alaska requires that the priors have the "same elements." So, for example, if Alaska requires $500 for a felony, the out-of-state charging document is needed to show that the prior was over $500. Some places (e.g. Colorado) require "triple certification." The clerk must certify that the copy of the record is true and accurate. The judge must certify that the clerk is an authorized clerk and the clerk must certify that the judge is an authorized judge. In Nebraska, it must be shown that

a defendant has twice before been physically committed to a penal institution. The most common method of proof of the Nebraska requirement is the receipt given to the county sheriff by the warden of the state penitentiary upon delivery of the prisoner. However, obtaining equivalent evidence for out-of-state cases where no such receipt exists could be cumbersome. Thus, Cook, (1975) who studied the Nebraska system, warns that "[i]t should therefore not be assumed that because official records show prior convictions and commitments which are technically provable that, in fact, the prosecutor could always produce such evidence within a reasonable time."

Even with the certifications the linkage between the defendant and his or her prior record gets challenged. To avoid many of these problems, the director of a career criminal unit recommended that at the time of conviction defendants should be required to give fingerprints into their court case files on the document containing the judgment and that clerks should certify the cases then and there. A prosecutor from New York has worked a system for obtaining out-of-state documents which he finds satisfactory. He has a set of form letters with copies of the New York statute attached and a special Federal Express account.

An indication of the relative frequency of the main categories of problems regarding obtaining out-of-jurisdiction prior records is presented in Table 4.9. Timeliness refers to the problem of delay in obtaining documentation. The completeness and certification category refer to the matter of getting all of the necessary documents with the proper certifications.

The "stiff local requirements" refer to the requirements of the respondent's own jurisdiction, which the respondent regarded as unusually demanding.

Table 4.9 Specific Nature of Problems In Obtaining Prior Records From Other Jurisdictions

Problem		Prosecutors	
		Yes	No
Timeliness	[N=71]*	69%	31%
Completeness/Certification	[N=90]*	74%	26%
Stiff local requirements	[N=46]*	59%	41%

* N's include only those respondents who mentioned specific aspects of the problem.

Another complication to the problem of proving prior convictions which effects local records as well as out-of-jurisdiction records is the result of the 1969 case of Boykin v. Alabama.[20] The Supreme Court held that when a guilty plea is entered the trial court must determine that the plea is knowing and voluntary. This requirement has had serious ramifications for the feasibility of habitual offender laws because most convictions are obtained by guilty pleas; and guilty pleas which were entered without documentary proof that the constitutionally required inquiry was conducted may not be used against habituals. The impact of Boykin has declined somewhat as time has passed and courts have implemented the prescribed inquiry. But, although the inquiries are now regularly conducted (McDonald, 1985), documenting the fact of their occurrence has added another burden

20 395 U.S. 238 (1969).

to the logistical problem of proving not only that prior records exist and can be linked to individual defendant but also meet constitutional and other standards.

The problems of proving prior records are no secret among local practitioners. When defense attorneys were asked what was the best defense tactic against habitual offender charges in their jurisdictions, most (38%) answered that there is no sure-fire, best defense. But the second and third most frequently cited defenses were to attack the constitutional validity of the priors (Boykin and other challenges) (23%) or to attack the adequacy of foreign records (and other procedural problems) (11%) (see Table 4.10).

It should be noted that while these findings clearly indicate that obtaining the documentation necessary to prove defendants are habituals is a problem that is widely experienced, they do not indicate how many cases of the non-use of the habitual offender laws can be explained by this problem. Thus, we cannot say with any certainty how much greater use (for sentencing or for plea negotiations) would be made of habitual offender laws if this problem were solved. In his study of Douglas County, Nebraska, Cook (1975: 918) concluded that the problem of securing sufficient proof of priors could not account for the non-use in the vast majority of the local cases. Our own best guess is that solving the proof of priors problem would not significantly alter the use of the habitual offender laws.

Table 4.10 Defense Attorneys' Opinions As To Best Defense Tactic Against Habitual Offender Charges

Best Tactic	Defense Attorneys [N=96]
None. Habitual status is very easy to prove.	38.5
Appeal to judicial discretion-especially in jurisdictions where prosecutors appear to abuse the statute, or where statute includes a list of mitigating factors, or where prior conviction is old.	6.3
Constitutional arguments against use of the statute in this case: statute is "vague"; "selective prosecution"; statute is "ex post facto" law because it has been significantly changed since time of prior guilty plea.	4.2
Challenge validity of priors; Boykin and other constitutional challenges; delay; foreign prior is not a "felony" in this state; prior was "withheld judgment" or other unique disposition; priors were not entirely separate and unrelated.	21.9
Trial tactics: keep defendant off witness stand to ensure true bifurcation; use same jury if they deliberated a long time because it must have been a close call and they will be reluctant to increase the sentence.	3.1
Proof and procedural problems: challenge elements and their certification; foreign records or records of probated cases are inadequate; live witnesses are required and subject to impeachment; challenge indictment.	11.5
Prison overcrowding/parole board is best hope for early release.	2.1
Don't know.	12.5
	100.0%

Plea Negotiation Utilization

Contrary to the studies (Petersilia et al., 1978; Casper et al., 1981; McDonald, 1985; and Farr, 1978) which suggest that habitual offender charges may be doubly underutilized (not only for sentencing but also for plea negotiating), our survey suggests that prosecutors are making almost maximum use of habitual offender charges as plea negotiating instrument. The majority of prosecutors and defense attorneys surveyed reported that while habitual offender charges are rarely used for sentencing they are regularly used for plea negotiations.

Compare Tables 4.4, 4.5, 4.6 with Tables 4.11 and 4.12 below. Notice that while prosecutors and defense attorneys report that few defendants are being sentenced as repeaters, the repeater laws are being "used" against more than two-thirds of the known eligibles in most jurisdictions (59% of the jurisdictions according to prosecutors and 50% according to defense attorneys). Prosecutors try to be somewhat elliptical about admitting that the "primary" use of the repeat offender laws in their jurisdiction is to obtain guilty pleas (see Table 4.12). They prefer not to flatly state that their sole purpose in using the laws is to obtain pleas. Rather they say that they use the laws for their intended sentencing purposes but then the cases end up being plea bargained. In contrast, defense attorneys just call the pattern for what it ends up being (plea bargaining) rather than what its original motivation may have been (to sentence as a repeater).

While these findings conflict with the earlier studies, they

have an important limitation. We did not distinguish between Bordenkircher-type threats to charge eligibles as habituals if they do not agree to plead guilty as distinct from threats made by filing charges and then negotiating them away. This may seem like the difference between Twiddle-dee-dum and Tweedle-dee-dee but, as noted earlier, some prosecutors regard the former as reprehensible but not the latter.

One enigmatic finding regarding the use of repeat offender laws is the way in which the predominant pattern of usage differs by the size of jurisdiction. Prosecutors in small jurisdictions were more likely to report that the main use of the repeat offender charges was to obtain guilty pleas (rather than influence sentences). Prosecutors in large jurisdictions were more likely to report that the lack of a consistent pattern of use (see Table 4.13).

It is particularly noteworthy to report that the frequency of use for sentencing as well as the pattern of use for plea negotiations in a jurisdiction is significantly related to the degree of specificity in the repeat offender law of the respective state. Those laws can be coded into three categories based on the discussion in Chapter 3 of the specificity of the general recidivist laws. The completely general law is one where both the present and the prior offenses involve general classes of crimes. The moderately specific law is one whether either the present or the prior offense is limited to a narrow class of crimes and the other is a general class. The highly specific law is one where both the present and the prior offenses are limited

Table 4.11 Estimated Proportions of Eligible Offenders Against Whom Repeat Offender Laws Are "Used" (For Plea Bargaining or Sentencing) Per Jurisdiction By Type of Respondent

Proportion of Eligibles	Estimates of: Prosecutors (N=92)*	Defense Attorneys (N=94)
Less than a third	23	15
One to two thirds	18	20
More than two thirds	19	14
Virtually all	40	36
	100%	100%

* N=92 for prosecutors because only one answer per jurisdiction was accepted for this item.

Table 4.12 Estimates of Primary Use of Repeat Offender Laws By Type of Respondent*

Primary Use	Prosecutors (N=179)	Defense Attorneys (N=95)
Obtain guilty pleas	23	40
Influence sentence	33	14
Both	6	2
No pattern, infrequent use	10	21
No pattern, "it depends"	28	23
	100%	100%

* When the "no pattern" and "both" categories are collapsed into one "no primary pattern," there is a significant difference between respondents (X^2=15.13, DF=2, P=.00).

to narrow classes of crime. The three categories represent a continuum of increasing specificity with which the target of the repeat offender law has been designated.

These categories were used to analyze the reports of prosecutors regarding their use of the repeat offender laws. Jurisdictions with the completely general repeat offender laws

Table 4.13 How Repeat Offender Laws Are Used By Size of the Jurisdiction

Repeat Offender Laws are:	Size of Jurisdiction Small (N-56)	Large (N=40)
Used to obtain pleas	32%	10%
Used to influence sentences	30%	35%
No established pattern	38%	55%

$X^2 = 6.74$ DF = 2 p = .03

are significantly more likely to be ones where prosecutors report that the predominant pattern of use is for plea negotiations (see Table 4.14). Also, jurisdictions with the completely general law are significantly more likely to have the fewest number of offenders sentenced as habituals. Jurisdictions with the highest degree of specificity in their repeat offender laws, report the largest number of offenders sentenced under them (see Table 4.15).

Summary

Since 1970 several important changes related to the use of repeat offender laws have occurred. These laws have been enacted or revised in 30 of 51 jurisdictions. A conservative political environment has developed and another public outcry for getting tough with repeat offenders has been heard. The federal and state governments have provided 145 local jurisdictions with special funding to target career criminals for detection and conviction. Yet, despite the changes, the conclusion reached in 1945 that repeat offender laws had never been successful at their

Table 4.14 Reported Pattern of the Repeat Offender Law By Degree of Specificity of Law's Definition of Repeater

Primary Pattern Of Use:	General (N=21)	Moderately Specific (N=40)	Highly Specific (N=39)
To obtain guilty pleas	81	26	33
To influence sentence	19	73	67
	100%	99%*	100%

* Error due to rounding
$X^2 = 17.82$ df = 2 p = .00

Table 4.15 Estimated Number of Offenders Sentenced As Repeat Offenders By Degree of Specificity in Law's Definition Of Repeater

Number of Defendants Sentenced As Repeaters	General (N=37)	Moderately Specific (N=48)	Highly Specific (N=70)
None	24	13	16
1-10	54	50	29
11-50	16	13	37
51 plus	6	25	19
	100%	100%	101%*

* Error due to rounding
$X^2 = 20.03$ df = 6 p = .00

intended purpose continues to be valid today. Substantial numbers of American defendants are eligible for sentencing as

habitual offenders but very few are sentenced as such. In 74% of the jurisdictions with populations over 250,000 it is estimated that 50 or fewer offenders were sentenced as habituals during the preceding year.

The main reasons given by prosecutors for the underutilization of habitual offender laws for sentencing are the familiar ones known since 1945 and anticipated long before that. The most frequently given reason (excluding plea negotiations) is that these laws are not needed. The existing sentencing structures provide adequate sentences for the great majority of offenders who are the targets of the habitual offender laws. Also, the habitual offender sentences were regarded as too severe for some of the offenders who qualified under them.

In addition a familiar assortment of administrative and legal problems were cited as reasons for the underutilization for sentencing. The process of identifying eligibles and obtaining timely, accurate, legally acceptable proof of their prior convictions is time-consuming, expensive and unreliable. Even with modern computerization and telecommunications this process continues to be problematic. Fuller automation and more rapid turn-around time is on the way but will not solve all dimensions of this problem. The documents needed for the proof of prior convictions are not directly identifiable nor accessible through the current or anticipated automated systems. Obtaining certified copies of them from outside the local jurisdiction relies on the cooperation of local authorities who are often less than accommodating and may not comprehend the special certification

requirements required by the law of the requesting jurisdiction. Even when the appropriate documents are obtained their use can be challenged on legal grounds. The constitutionality of the prior convictions can be attacked and the linkage between the offender and the prior record can be contested.

These administrative difficulties could probably be reduced to some noticeable extent by a combination of several nationwide changes: uniform legal requirements for proof of priors; uniform procedures for obtaining out-of-jurisdiction documentation; impressing offenders' fingerprints on court documents at conviction; and greater automation of criminal records. It may be appropriate for the federal government to assume some of the cost and to attempt to facilitate the interstate identification and transfer of the documents necessary to establish prior convictions. However, while such improvements and innovations may be worthy for some other reason, they are not likely to significantly increase the number of offenders sentenced as habituals.

The frequency of use of repeat offender laws for sentencing as opposed to plea negotiating and the absolute number of offenders sentenced under these laws increases as their definitions are more specific. While habitual offender laws are rarely imposed as sentences, they are frequently used for plea negotiating. In over half the jurisdictions the estimates are that the habitual offender laws are "used" against more than two-thirds of the eligible offenders. Thus, while these laws are not being used for the purpose intended by the legislature they are being used to facilitate the administration of justice.

Policymakers, however, may legitimately question whether this unintended result should be allowed to continue. Both the rare imposition of the habitual offender sentences and the use of the threat of mandatory and severe punishments to obtain guilty pleas raise serious questions about the fair, evenhanded, and uncoerced enforcement of the law.

CHAPTER 5
THE CHOICE OF AND DANGEROUSNESS OF THE OFFENDERS SENTENCED AS REPEATERS

> "This study offers the facts that three of 82 persons qualified to receive a recidivist sentence received such a sentence, and that commonly accepted sentencing policies apparently did not account for the great divergence. These facts indicate an arbitrary application of the law and not merely disuse."
> -- William Cook (1975:913)

> "Neither rigorous study nor casual observation provide any evidence for the proposition that violent, or organized, or professional thieves, who may truly be said to represent a serious danger to the social order, are in any way affected by the operation of these laws."
> -- Daniel Katkin (1971:108)

Two of the major criticisms of habitual offender laws are that their enforcement is arbitrary and that the offenders sentenced under them are not truly dangerous predators but only "comparatively petty offenders, from whom society is hardly in urgent need of protection" (Katkin, 1971:106; Cook, 1975; Lew, 1979; Barnes, 1931: 102; and Sutherland, 1939: 613).[1] To these two a third can be added. Conflict theorists would say that habitual offender laws like all laws are biased in favor of the rich and powerful. This chapter reviews these charges and reports the related findings of our survey.

Arbitrariness

The fact that only a few of the many eligible habitual offenders are actually sentenced as such has long been the source

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1 But see Tappan (1960) who believes that the habitual offender laws were being used to deal with organized crime figures and only sporadically used against nonorganized and minor criminals.

of suspicion that the laws were being arbitrarily enforced. After the announcement of Furman v. Georgia,[2] which held the death penalty, as it was then administered, to violate the Eighth Amendment's protection against cruel and unusual punishment, critics of habitual offender laws made the apparent arbitrariness of its enforcement the central focus of their attack. Acknowledging the past ineffectiveness of attacking the authority of the legislatures to enact the habitual offender sentencing provisions, they shifted their attack to how the laws are enforced. They recognized that a proper law can be improperly applied, and that by the appropriate use of empirical data they could show the courts and legislators whether or not arbitrary enforcement was occurring.

A test of arbitrariness in sentencing laws could be constructed from the diverse opinions in Furman (Cook, 1975). Justice Stewart's concept of undue selective harshness suggested that a sentence may not violate the Eighth Amendment for being unusually cruel but may violate it for being cruelly unusual. Justice Stewart thought that the Eighth and Fourteenth Amendments were violated by legal systems which allow capital punishment "to be so wantonly and so freakishly imposed."[3] It was the random and capricious imposition of the death penalty which caused it to be cruel and unusual punishment.

Justice White thought that infrequent imposition of the

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2 408 U.S. 238 (1972).

3 Furman v. Georgia, 408 U.S. 310 (1972).

death penalty caused it to lose all its deterrent value and that to continue it as a penalty, after it had lost all its value to the state, "would be patently excessive and cruel and unusual punishment."[4]

Thus, the elements of a test of arbitrariness which would amount to a violation of the Eighth Amendment's protection against cruel and unusual punishment, at least in death penalty cases, emerged: infrequent application of the law, the absence of an acceptable policy behind those cases where it was imposed and the resulting loss of value to the state as a deterrent to crime. A footnote in Furman suggested the point at which the court considered the use of a law as infrequent. The court noted that only "15% to 20% of those convicted of murder are sentenced to death in states where it is authorized."[5] If such a rate triggers the suspicion of arbitrariness, then habitual offender laws, whose rates of enforcement are four per cent and less,[6] would seem to meet the initial criteria of our test.[7] What remains to be shown is whether there is an acceptable policy guiding their usage and whether they have lost all their value to the state.

What constitutes an acceptable policy is something for the

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4 Id. at 312.

5 Id. at 386 n.10.

6 See Chapter 4 of our report.

7 It should be recognized that the rate of nonusage for habitual offender laws may have to be considerably lower to be regarded as arbitrary because their penalty does not include death.

policymakers and the courts to decide; but for analytic purposes we can identify several policies against which local practices might be judged. One would be whether the pattern of enforcement reflected the intended purpose of the legislation. Thus, if it could be shown that the few offenders who were actually sentenced as habituals had "more serious" prior records or more serious instant offenses (plus some prior record), then the local practice would seem acceptable. Operationally, this would require showing either that when seriousness of the instant offense is held constant, offenders with more serious prior records are more likely to have the laws enforced against them or that when seriousness of prior record is held constant, offenders with more serious instant offenses are more likely to have the law enforced against them.

A second acceptable pattern would be if the local practice did not appear to be achieving the intended purpose of the legislature but that this was the unintended result of some other acceptable local practice. Thus, if it were shown that no correlation exists between being sentenced as an habitual offender and either the seriousness of the prior record or of the instant offense, this in itself would not constitute proof of an unacceptable policy. The lack of any correlations could very well result from the operation of plea negotiations. After all it is the defendant who decides whether to accept the plea offer. If all eligible habituals are offered the chance to negotiate and a few decline the offer, then the lack of a correlation between being sentenced as an habitual and being a more serious offender would not be evidence of an unacceptable local policy. The sentencing

outcome would not be determined by justice officials but by the defendants themselves through plea negotiation, a practice which has been held to be constitutional and a necessary policy in the administration of justice.[8] Under such a system the focus of inquiry into unacceptable enforcement policies must shift away from the sentencing decision and toward the charging and plea negotiating practices of prosecutors. It would have to be shown that prior record and seriousness of the instant offense did not correlate with the charging or plea negotiating uses of the habitual offender laws; or that some constitutionally impermissible factor such as sex, race, religion or social class systematically influenced these decisions; or that no rational policy exists, i.e., that the use of the law was a matter of chance.

If it were shown that among all eligible habituals that certain categories such as those with the least serious records of criminality were more likely to get sentenced as habituals, then the de facto policy would seem unacceptable even though it was the unintended effect of the plea negotiating system. A de facto inversion of priorities should be unacceptable whether it was produced intentionally or not.

Previous Studies

The two previous attempts to determine the arbitrariness of the enforcement of habitual offender laws are fatally flawed.

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8 Santobello v. New York, 92 S.Ct. 495 (1971).

Both established that only a small proportion of the eligible offenders are sentenced as such (only 5.5% of 364 in Brown's (1956) study of West Virginia between 1937 and 1948; and only 4.5% of 82 in Cook's (1975:918) study of Douglas County, Nebraska during 1971 and 1972). Both present some data which seem to show that there is no correlation between the seriousness of the offender and the probability of being sentenced as an habitual. However, the sample sizes are small and, more importantly, the effect of plea negotiations is unaccounted for. Brown recognizes that plea negotiations have some unknown impact on who gets sentenced as an habitual. Nevertheless he claims that his data have established "discriminatory" enforcement.

> When the figures obtained during my study . . . are further broken down, the discrimination becomes more obvious. Of the 20 persons who were sentenced to life imprisonment under the law, ten had only two, nine had three and one had four prior convictions. Of the 364 who could have been so sentenced, but were not, 84 had three, 27 had four, eight had five, two had six and three had seven prior convictions (Brown, 1956:30).

Cook obtained data on prior record and seriousness of the instant offense. Unfortunately, his sample contains only three offenders (out of 82 eligibles) who were sentenced as habituals. He found that neither seriousness of the present charge nor the number of prior felonies seemed to bear any relationship to the probability of being sentenced as an habitual. All three offenders who were sentenced as habituals were ones with the least serious records of the eligible population. They were charged with non-violent offenses and only had two prior felony convictions (see Table 5.1).

Table 5.1 Type of Sentence By Prior Record and Present Charge*

No. of Prior Felonies	Present Charge	Habitual Offender, Sentence Imposed? Yes	No
2	Violent**	--	9
	Non-Vio.	3	35
3	Violent	--	7
	Non-Vio	--	9
4	Violent	--	--
	Non-Vio.	--	8
5	Violent	--	2
	Non-Vio.	--	5
6	Violent	--	--
	Non-Vio.	--	1
7	Violent	--	--
	Non-Vio.	--	3

* Source: Cook (1975: 909).
** Murder, manslaughter, robbery, rape, assault and battery, shooting with intent to kill, wound or maim.

Cook did not obtain data on the frequency with which habitual offender charges were invoked or used in plea negotiations. The sentencing pattern he found could have been an artifact of plea negotiations. The more dangerous offenders may have had habitual offender charges threatened against them but were able to negotiate them away. Thus, in the end, Cook reaches the unsatisfying conclusion that either the habitual offender law is being used with a great deal of arbitrariness or it is being consciously used as a threat to induce guilty pleas from defendants. If Douglas County is like most of the jurisdictions in our survey (where it was found that habitual offender charges are frequently used to obtain guilty pleas), then Cook's analysis

fails to establish the arbitrariness he suspected.

The strongest piece of evidence of apparent irrationality in the use of the habitual offender law was his finding that two of 78 offenders who were not sentenced as habituals despite their eligibility had previously been sentenced as habituals. But, this oddity may simply have been due to evidentiary weaknesses (or other considerations) in the current cases which prompted the prosecutors to negotiate away the habitual offender charges.

In sum, these two prior studies do not establish convincing evidence of arbitrary enforcement of the habitual offender laws. Moreover, because of the small sample sizes involved and the necessity of focusing on the charging and plea bargaining practices of prosecutors (rather than actual sentences imposed) statistical evidence of an arbitrariness will be difficult to obtain. However, while individual studies may be inconclusive, the accumulation of several studies which consistently showed that the least serious offenders were heavily overrepresented among the offenders who were sentenced as habituals would tend to support an inference of irrationality in the policy.

In contrast to the two American studies, an English study of the factors which correlate with the imposition of preventive detention (a special sentence for habituals) among eligible English convicts was based on a large sample of sentenced detainees. After examining the influence of twelve factors the authors concluded that the sentencing of the courts was "rational." Ten of the twelve factors increased the probability of an eligible offender being sentenced as an habitual (preventively detained)

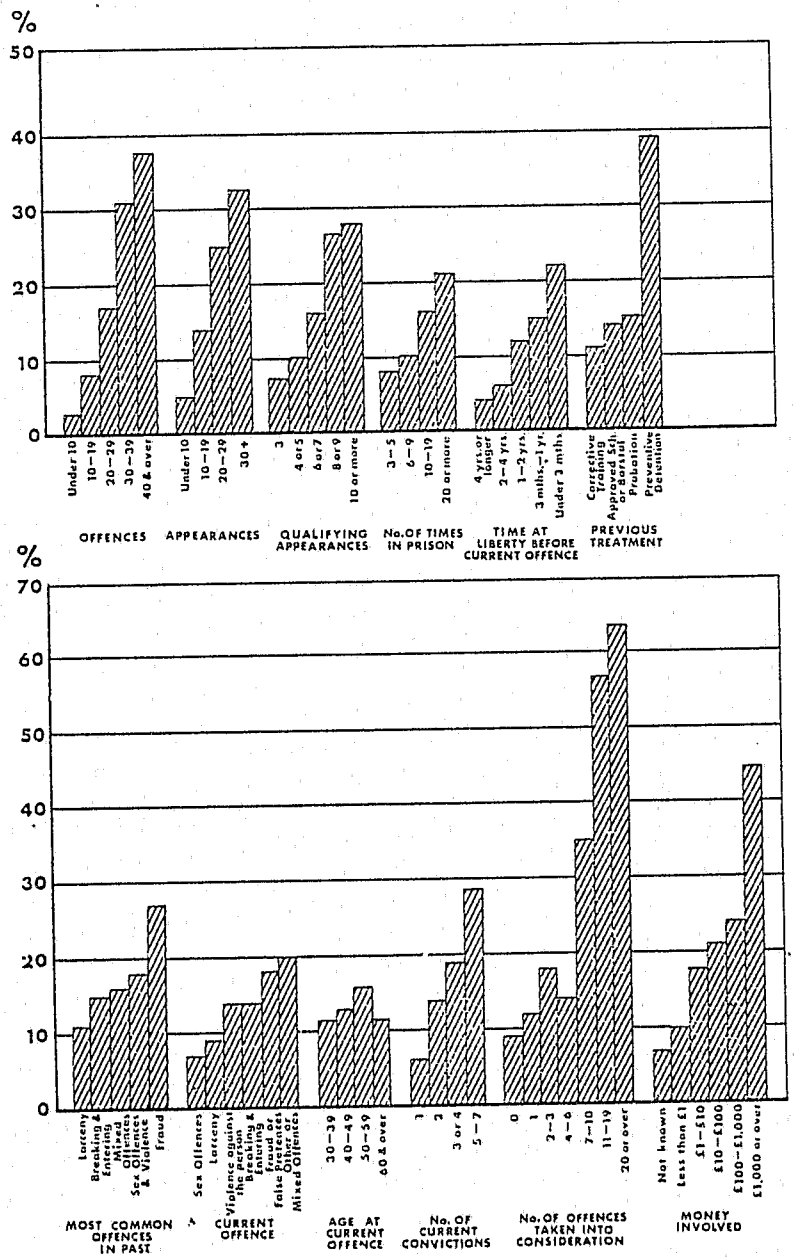
in the direction one would expect from a rational sentencing policy. The chances increased as: the number of offenses committed increased, the number of court appearances increased; the number of qualifying appearances increased; the number of previous times in prison increased; the length of time at liberty before the current offense decreased; if the type of previous correctional treatment were more severe; as the age at current offense increased (until age 60); the number of current convictions increased; the number of offenses taken into consideration increased; and the amount of money involved increased. The meaning of the influence of two factors, namely, most common offenses in the past and current offense, were difficult to interpret (see Exhibit 5.1).

If an American sample of equivalent size could be obtained and if plea negotiations exert nothing other than a random effect on the selection of who gets sentenced as an habitual, then perhaps a similar degree of rationality would be found operating here. Then the argument against the habitual offender laws on the grounds of their arbitrariness would be reduced to one issue alone, the infrequency of their use.

Characteristics of Offenders Sentenced as Habituals

The arbitrariness of the enforcement of the habitual offender laws as well as their effectiveness is further questioned by the assorted portraits of the populations of offenders who have actually been sentenced as habituals. The data suggest that only comparatively petty offenders are

Exhibit 5.1 Percentage of Liable Offenders With Different Characteristics Sentenced to Preventive Detention, England, 1956*



* Source: Hammond and Cheyen, 1963: Figure 6.

sentenced as habituals. The support for this conclusion, however, must be carefully examined. It is strong but not completely convincing. It comes from foreign as well as domestic legal systems; dated as well as more recent studies; but the definition of what is meant by "habitual" offender is not uniform; thus the data may not be comparable. Most importantly, the finding that the comparatively petty offender is being sentenced as an habitual while the serious offender escapes runs so contrary to reasonable expectations that it gives one pause. It is reasonable to assume that plea negotiations are probably involved in many of the cases involving habitual offender charges (both here and abroad). This means that in such cases the defendants (not the state) decide whether to plead guilty and have the charges dropped or fight the case and get sentenced as habituals (if they lose at trial). An overrepresentation of less serious offenders among those sentenced as habituals would require that either of two conditions were operating. Either prosecutors were systematically refusing to drop habitual offender charges in the cases of the less serious offenders or such offenders were more likely to reject such plea offers. Neither of these conditions seem likely. Neither is supported by the research on plea negotiations (McDonald, 1985).

The studies supporting the conclusion that less serious offenders are the ones sentenced as habituals are presented below.

A study of the 108 men who were sentenced in New York from 1926 to 1930 under the Baumes Act showed that the great majority were not desperate criminals (Baumes, 1931). Most of them were

sentenced for relatively trivial offenses. According to Rubin, (1973: 460) who cites the study, this is "very likely a typical pattern." (But Rubin presents no further evidence; and it should be noted that Baumes law is a repeated offender law. It is not the New York habitual offender law--see Chapter 3.) Two other American studies are the ones by Brown (1956) and Cook (1975) previously cited. Brown's study is somewhat equivocal on whether the sentenced habituals are "less serious" offenders. All 20 of them were three-time losers. Ten of them were four-time losers. Unfortunately, Brown does not say what crimes were involved. Thus, they could be chronic lesser offenders or serious criminals.

In his attack on habitual offender laws, Katkin supports his claim that only the comparatively less serious offenders are sentenced as habituals with a quote from H.G. Moeller, Assistant Director of the Federal Bureau of Prisons. Moeller maintains that:

> [w]ithout question, the largest groups of chronic offenders with whom we are acquainted are dependent, socially inadequate men and women who have come to accept prison [rather than crime] as a way of life . . . . In any representative group of such offenders we find a high percentage of chronic alcoholics, a variety of physical and intellectual handicaps and limitations, gross lack of work skill and experience, serious inadequacies in capacities to relate to other human beings, and a wide variety of other socially disabling characteristics (Katkin, 1971: 108).

Moeller's remarks are a fascinating description of chronic prisoners. But they are wholly irrelevant to the question of who is sentenced as an habitual offender or, indeed, to the question of whether chronic offenders are more or less dangerous. All

Moeller is saying is that a large proportion of the population of offenders who may or may not be eligible for habitual offender sentencing are dependent, socially inadequate people with alcohol problems and little work skills. This does not mean they are not dangerous.

Other studies showing that offenders sentenced as habituals tend to be less serious offenders are based on the English and Canadian legal systems. Here the evidence more is convincing but not unequivocal. The English offenders subjected to "preventive detention" (an additional, lengthy sentence due to their habitual criminality) were much more likely to be property offenders than violent offenders. But, the generalizability of these findings should be approached with some caution. They must be interpreted within their respective legal and policy contexts. Moreover, the process by which sentencing patterns were produced is unclear. Specifically no account of the possible impact of plea negotiations on the sentencing patterns observed is given by the studies.[9] Also, among the property offenders are many house breakers who arguably are "dangerous."

Plea negotiations in Canada have been documented by Klein (1976; and 1973) who believes they play a major role in the use of habitual offender legislation. But, he did not document the latter.

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9 Their silence on this matter is in keeping with the official posture that plea negotiations do not occur in the English and Canadian systems. That myth was not exploded until the publication of a 1977 study which caused an uproar and was almost suppressed (Baldwin and McConville, 1977).

In England it was found that under both the Prevention of Crime Act of 1908 (the Gladstone Committee's habitual offender law) and the Criminal Justice Act of 1948 (a revised habitual offender law intended to remedy the defects of the 1908 law) the offender sentenced as a habitual was not likely to have a record of violent or sexual crimes. Rather he had a long record of property crimes including house breaking.[10] However, this is not as surprising as it seems given the ambiguity of purposes behind the legislation. In both cases the definition of who the habitual offender was sufficiently vague that one could read the law as if it were directed at the most callous, violent, heinous offenders of all--the high-rate violent predator. Moreover, one can find language in the legislative histories of these laws which might support this interpretation of their purpose. Gladstone stated that the 1908 law was intended for a small and carefully selected group of the most "formidable" offenders (Radzinowicz and Hood, 1980: 1364). The Home Office stated that the 1948 law was directed at "difficult and dangerous prisoners, for whom maximum security and close control are essential" (Hammond and Cheyen, 1963: 10). The Departmental Committee on Persistent Offenders of 1932 which initially drafted the 1948 law stated that it was for the offenders whose offenses were very serious. This included "certain sexual offenders . . .

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10 Here is an example of the difficulty of defining what constitutes a serious criminal. Arguably a chronic house breaker is a very serious criminal. The crime has a potential for violence if someone happens to be home at the time; and it leaves victims with a sense of insecurity.

particularly those who commit repeated offenses against children or young people and those who corrupt young boys" (Radzinowicz and Hood, 1980: 1380).

On the other hand, these laws could be seen as being targeted at offenders who are persistent but not necessarily the most serious imaginable criminals and not even prone to violence, in other words, the type of offender who in fact was most likely to be sentenced under these laws. For instance, in further defining the target of the 1908 law Gladstone stated it was for "the professional . . . men with an object, sound in mind--so far as a criminal could be sound in mind--and in body, competent, often highly skilled, and who deliberately, and with their eyes open, preferred a life of crime and knew all the tricks and manoeuvers necessary for that life." (Radzinowicz and Hood, 1980: 1365). He offered the following examples of the sort of men he had in mind:

> A., thirty-eight years of age, received his first conviction at twenty-five; had served offenses of two and six years penal servitude for forgery; now undergoing ten years for the same offence; time actually spent in prison, seven and a half years; a well-educated man, a professional forger.
>
> B., forty-five years of age, received his first conviction at twenty nine; served three terms of penal servitude and eleven sentences for stealing; now undergoing three years penal servitude for stealing and receiving; eleven and a half years in prison.
>
> C., forty years of age, received first conviction at twenty-seven; served thirteen sentences for stealing and housebreaking; now serving five years larceny; nine years actually spent in prison" (Radzinowicz an hood, 1980: 1365).

Similarly one finds that while the 1932 Departmental

Committee on Persistent Offenders extended the focus of the revised law to include certain sexual offenders, it defined the primary target of the law in terms of persistent property offenses. The law's target would be primarily "professional criminals who deliberately make a living by preying on the public" (Radzinowicz and Hood, 1980: 1380). One of the concerns of the Committee was the fact that

> "[a] large number of persistent offenders never commit a serious offense at all; and in such cases there [was at that time] no method of dealing with them except by imposing a short sentence each time they are convicted . , , and where a substantial sentence of penal servitude though obviously out of proportion to the offense charged has been passed in order to enable the offender to be dealt with as an habitual offender the Court of Criminal Appeals has not been slow to interfere" (Hammond and Cheyen, 1963: 10).

It is upon these alternative interpretations of the two English habitual offender laws that the English courts seemed to operate, i.e., on the view that these laws were not intended for the most serious, violent type offender.

The earliest evaluation of the English habitual offender law of 1908 was a 1913 study which reported that "more dangerous and enterprising criminals usually escape the net, and Preventive Detention convicts are mostly thieves of a minor kind who have been thieves from childhood and never go far in crime" (Radzinowicz and Hood, 1980: 1370). Those findings were generally confirmed decades later by Norval Morris (1951) who found that only seven of the 325 criminals committed between 1928 and 1945 were sentenced for violence, threat of violence, or danger to the person. They were in the words of the Departmental

Committee on Persistent Offenders:

> with few exceptions . . . men with little mental capacity or strength of character. Some of them may be skilled in the acts of forgery or false pretenses, many are cunning, and most of them have strong belief in their own cleverness, but generally they are the type whose frequent convictions testify as much to their clumsiness as to their persistence in crime (Radzinowicz and Hood, 1980; 1379).

The revised and supposedly improved habitual offender law (the Criminal Justice Act of 1948) has also been shown to have produced similar results. Donald West (1963) of the Institute of Criminology at the University of Cambridge studied a group of 50 recidivists who had been preventively detained (i.e., sentenced to an extended term as habituals). More than 90% of the 692 crimes for which members of the group had been convicted involved offenses against property. Only one of the most recent convictions involved an amount in excess of 1,000 pounds and 76% involved amounts smaller than 100 pounds. Offenses of violence were exceedingly rare. There were none at all among the charges at the most recent conviction. The groups consisted almost entirely "of persistent thieves, a small minority of whom occasionally committed violent or sexual crimes as well" (West, 1963: 14). West classified 29 of the sample as "passive inadequate deviants." Most of the rest (17) were classified as active aggressives.

A second analysis of the impact of the same 1948 law was conducted by Hammond and Cheyen (1963). It is based on all offenders who were eligible for preventive detention. This means the offenders had to be 30 years old; convicted or indictment of

an offense punishable with imprisonment for a term of two years or more; convicted on indictment on at least three previous occasions since attaining age 17 of offenses punishable on indictment with such a sentence; and were on at least two of those occasions sentenced to borstal training. Comparing their findings to those of Morris they found remarkably few differences.

The current offenses of offenders sentenced as preventive detainees (i.e. as habituals) between 1949 and 1961 were primarily property offenses (see Table 5.2). Among the 1956 sample of preventively detained offenders studied in depth, 50% were presently convicted of breaking and entering and a further 43% were convicted of larceny (31%) or fraud (12%). Few were convicted of violence (2%) or sex offenses (2%). Most (60%) of the current offenses were of the same type which the offender had been committing most frequently throughout his career. Most of the offenders' previous offenses also consisted of breaking and entering (40%), larceny (38%) and fraud (17%) (see Table 5.3). Many offenders (56%) were still in their thirties, although one-quarter of them were over 50 at the time they were sentenced to preventive detention. The latter were almost exclusively larceny or fraud offenders. In all cases, the offenders had far more previous convictions than required to be eligible for preventive detention. Fraud or false pretenses offenders had the largest mean number of previous convictions 33; then mixed offenses (27); breaking and entering (25); larceny (23); and sex or violence (21) (see Table 5.4). Overall, Hammond and Cheyen (1963: 185)

Table 5.2 Type of Present Offenses of Preventive Detainees by Year, England 1949-1961*

	Violence		Sex		Breaking and Entering*		Larceny (including receiving)		Fraud and false pretences		Other offences		All groups	
	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
1949 ..	2	1	11	4	130	48	89	33	26	10	10	4	268	100
1950 ..	4	2	2	1	106	48	77	35	23	11	6	3	218	100
1951 ..	4	2	10	5	93	44	92	43	12	6	1	0	212	100
1952 ..	1	1	5	2	122	51	84	35	20	8	7	3	239	100
1953 ..	2	1	10	4	107	48	72	32	22	10	10	5	223	100
1954 ..	3	1	7	3	142	54	86	33	20	8	3	1	261	100
1955 ..	6	3	6	3	98	51	65	34	13	7	3	2	191	100
1956 ..	4	2	4	2	85	50	53	31	20	12	5	3	171	100
1957 ..	3	1	15	7	109	50	66	31	18	8	6	3	217	100
1958 ..	1	1	4	2	117	63	46	25	14	7	4	2	186	100
1959 ..	2	1	7	3	112	51	73	33	19	9	7	3	220	100
1960 ..	6	3	11	5	112	53	50	24	24	11	9	4	212	100
1961 ..	5	2	12	6	107	50	63	29	18	8	10	5	215	100

* This term is used here as elsewhere to denote offenders committing the offence of breaking and entering irrespective of the type of premises entered.

* Source: Hammond and Cheyen (1963: 6).

conclude with the familiar refrain:

> "We found that in some ways the offenders sentenced to preventive detention are less a danger to society than many given long term or other sentences of imprisonment; many of the preventive detainees' current and also past offenses are quite trivial and these offenders include very little violence among their offenses."

Table 5.4 Number of Previous Convictions and Court Appearances by Type of Present Offense - English Preventive Detainees, 1956*

Current Offense	Mean Number of Convictions (estimated from 1/3rd sample)	Mean Number of Appearances at Court
Fraud	33	16.5
Larceny	23	17.3
Breaking and entering	25	15.8
Sex or violence	21	15.9
Mixed offenses	27	15.0

* Source: Hammond and Cheyen (1963: Table 11).

The Hammond and Cheyen study has been cited by critics of habitual offender laws as evidence that these laws catch non-dangerous offenders of low intelligence and competence (Wilkins, 1965; Radzinowicz and Hood, 1980). But Hammond and Cheyen caution against drawing such conclusions. They note that one

Table 5.3 Most Common Offense in the Past by Type of Present Offense English Preventive Detainees, 1956

	Fraud or (fraud and larceny)	Larceny	Breaking and entering	Violence	Sexual Offences	Mixed Offences	All past offences combined
Current offence Fraud or (Fraud and larceny)	24	7	2	0	0	0	33
	64	52	5	0	1	1	123
Larceny	5	32	7	0	0	0	44
	18	260	64	1	2	10	355
Breaking and entering	2	24	52	0	0	2	80
	10	174	290	0	0	16	490
Violence	0	1	4	2	0	0	7
	0	20	16	5	0	11	52
Sexual offences	0	1	2	0	1	0	4
	3	18	7	0	4	8	40
Mixed offences	2	2	5	0	0	1	10
	1	27	19	0	1	5	53
All current offences combined	33	67	72	2	1	3	178
	96	551	401	6	8	51	1,113

* Source: Hammond and Cheyen (1963: Table 10). The figures above the lines are for the 178 offenders sentenced to preventive detention. Those below the lines are for the 1,113 offenders given other sentences.

broad type of offender being caught is the professional house-breaker whose "offenses can be regarded as serious in themselves, both for the loss and hardship they occasion and because the offenses may lead to more serious acts if the offender is disturbed in the course of committing his offense (1963: 187). Moreover, they warn,

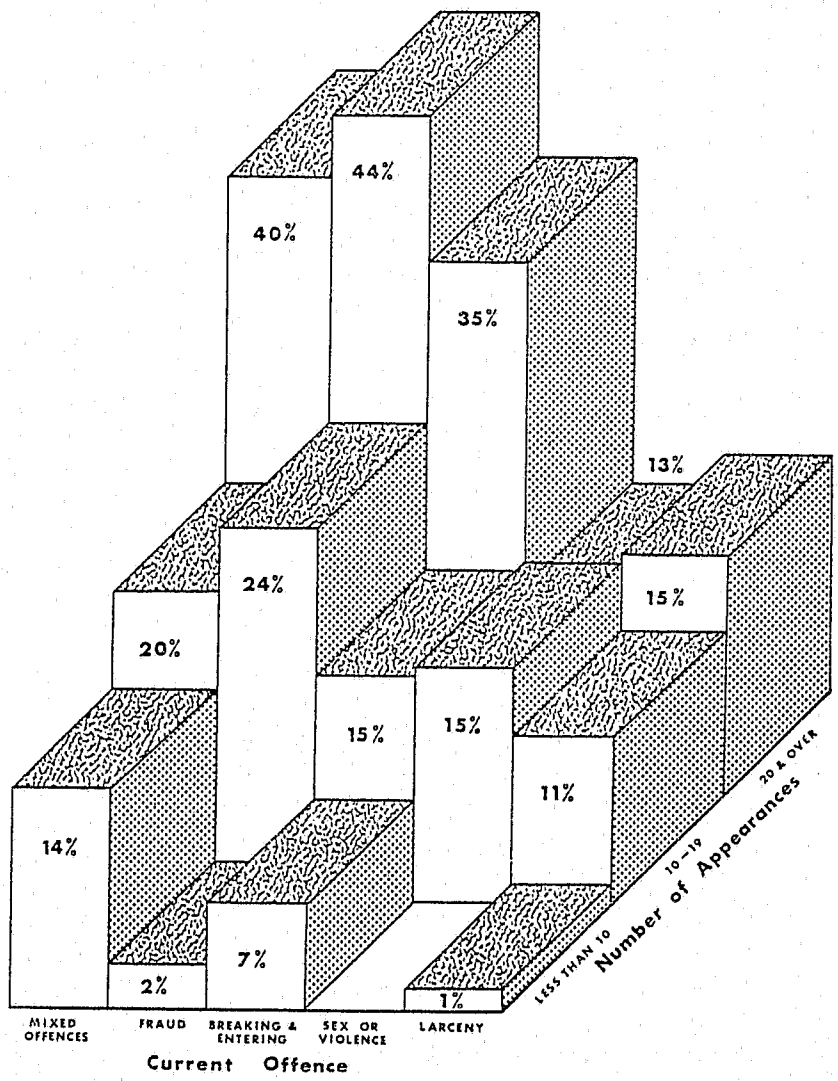
> "[t]here is a danger of preventive detainees being regarded as the dregs of the criminal population . . . [But, contrary to such a conclusion it should be noted that] the intelligence and abilities of preventive detainees were normal and many had 'more than average potential.'" (1963: 187).

A few other findings of the study bear mentioning. First, the basis for the courts' sentencing decisions seemed to differ between liable offenders who were sentenced to preventive detention and liable offenders who were not. "[W]hereas a sentence of preventive detention is governed mainly by the type of offender, any other sentence is determined more by the nature of the current offense" (Hammond and Cheyen, 1963: 79). Thus it appears that the habitual offender law succeeded in having the courts focus upon the offender and his persistence rather than upon his crime. Secondly, the effect of persistence (i.e., length of prior record measured by number of previous appearances at court) varied by type of present offense. Surprisingly, offenders presently convicted of crimes of sex or violence and how had extensive prior records were <u>less</u> likely to be preventively detained than offenders with similar records and convicted of any other crimes (see Exhibit 5.2). Thirdly, and also surprising, were two sentencing patterns among offenders

liable to preventive detention but not so sentenced. Offenders presently convicted of sex offenses were frequently given a sentence which did not involve imprisonment. By contrast offenders who committed violence were all sentenced to imprisonment but a large proportion consisted of sentences of less than one year. This is another reminder that despite their ominous connotations legal categories are technical matters which can catch up within them offenders whom courts will regard as not deserving of lengthy penalties. Thus sentencing formulas based on legal categories alone will need to allow for some discretion in their application in order to screen out these unintended targets of long sentences. Fourthly, the English courts seem to regard the housebreaker and fraud offender with lengthy records as a more serious threat to society than the offender who stands convicted of sex, violence or larceny offenses and has a similar history of crime (see Exhibit 5.2).

Assuming the reasonable position that the English courts believed that the legislatively intended target of their habitual offender laws was the persistent property offender, then the studies reviewed above which show that the offender sentenced as a habitual was indeed more often a property offender than a violent one do not carry as much significance as critics of habitual offender laws imply. They do not persuasively support the proposition that laws which carefully target the serious, violent offender for extended sentences would probably be used mostly against less serious offenders and hence be ineffective. They only suggest that where the targets of habitual offender

Exhibit 5.2 Percentage of Offenders Sentenced to Preventive Detention by Present Offense and Number of Previous Appearances at Court, England, 1956*



* Source: Hammond and Cheyen (1965: Figure 12).

laws are poorly defined and where the legislative history contains a clear concern for persistent, non-violent property offenders, the law is likely to be used against such offenders. Also, the English experience does not support the claim of habitual offender law critics that the offenders sentenced under these types of laws are not dangerous (many are persistent burglars) or that they are intellectually subnormal or otherwise incompetent. What the English experience seems to indicate (to the extent that it can be generalized beyond its cultural and historical contexts) is that sentencing schemes which result in persistent but primarily property offenders being given comparatively lengthy sentences (as compared to persistent but more violent offenders) eventually will be regarded as unjust and will be ignored.

The Class Bias In Habitual Offender Legislation

According to one broad school of sociologists, criminal laws are drafted and enforced in ways which favor the rich and powerful.[11] Evidence for this proposition is hotly contested and equivocal. When the argument is not based on purely ideological grounds, it rests upon competing collections of case studies which either tend to support or challenge the proposition. Recent developments in the debate have seen some its leading contenders contenders assume a mixed position, admitting that some laws are best understood as products of class conflict and

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11 The details of the theories within this conflict paradigm vary (see, Pelfry, 1980).

others are better understood as reflections of strongly held moral dictates of the society (Chambliss, 1976: 9).

Habitual offender laws seem to illustrate both theories at once. Some of the specific recidivist laws protect particular economic or class interests as for example, the vagrancy laws in England and the specific prohibitions against repeated hog stealing in colonial Virginia.[12] However, on the other hand, punishing dangerous repeat offenders is a policy that wins the support of virtually everyone but radical theorists. Moreover, there are a few examples of specific repeat offender laws whose targets are businesses, albeit minor ones, for example, the increased penalties for second violations of laws regulating bucket shops, dead animals in wells, offensive slaughter houses, intoxicating liquors sold by persons unseen, and offensive soap factories (Elliott, 1931: 189).

Nevertheless, when looking at the overall history of the concern with repeaters and the pattern of enforcement there is a discernible imbalance in the overattention given to the persistent criminality of the lower classes. As best can be determined, offenders sentenced as habituals or prosecuted as career criminals have been predominantly from the lower social classes (Taylor, 1960; and Springer et al., 1985: Table 4-2). Defenders of the justice system will retort that this pattern merely reflects the fact that lower class people are more likely to commit crime. An enormous amount of empirical evidence can be

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12 See Chapter 1 for details.

found to support this claim (see e.g., Nettler, 1984). However, this response ignores the fact that repetitiveness per se has played a long and prominent role in stimulating legislation and enforcement. But this repetitiveness has traditionally been limited to the crimes of the working class. It has ignored the extensive history of repeated criminality of what Sutherland (1983) called the white collar criminals.

He studied the criminal careers of the 70 largest manufacturing, mining, and mercantile corporations in the United States. At the time of the study the average life of the corporations was 45 years. He found that each of the corporations had one or more decisions against it for criminal activities: restraint of trade; misrepresentation in advertising, trademarks, and copyrights; unfair labor practices; financial fraud and violation of trust; violations of war regulations, and assorted miscellaneous offenses. Two firms (Armour and Company, and Swift and Company) each had 50 decisions against them. General Motors had 40; Sears Roebuck and Montgomery Ward, 39 each. Altogether the 70 corporations had 980 adverse decisions, with an average of 14 decisions per corporation. As Sutherland pointed out, this makes most of the corporations he studied "habitual offenders." Nevertheless, none of the severe, mandatory legislation that applied to the street criminal was even considered much less applied to the suite criminal. The habitually criminal corporations were never told that the only prudent thing to do with them was to lock them up for the rest of their lives. Legislatures have not invested enormous energies into how to sentence these repetitive-but-not-

too-serious criminals as the Gladstone and other commissions have done for similarly described street criminals. Criminologist have not dubbed these repetitive white collar criminals as "habituals" with innate propensities to crime.

It could be replied that while this was true in the past it will become less so in the future. As sentencing reforms succeed in limiting extended sentences to those repeat offenders whose prior records consist of dangerous violent crimes, the less dangerous but repetitive lower class offender will be treated more like the habitual corporate criminals. Also there has been an unexpected development in a new way to attack certain repetitive criminality of corporate criminals. On July 2, 1985, the Supreme Court ruled that a federal law originally aimed at combatting mobsters may be used against a wide array of fraudulent activities having nothing to do with organized crime but much to do with corporate practices.[13] (Labaton, 1985: A4) As a result businesses are liable for paying treble damages to persons who successfully bring a civil suit under The Racketeer Influenced and Corrupt Organization (RICO) Act. Ironically, the decision overrules the former criteria that a RICO suit could be brought only against a person with a prior criminal conviction associated with racketeering. Now merely two instances of committing fraud through the mail or wire within 10 years are grounds for conviction of racketeering. Thus, with this decision certain types of repeat white collar offenders are suddenly exposed to

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13 Sedima, S.P.R.L. v. Imrex Co., ____ S. Ct. ____ (1985).

punishment not previously available. Conflict theorists, however, will no doubt want to wait and see whether these two changes remove the class bias in habitual offender law. If past is prologue, a health skepticism would be in order.

Findings

Arbitrariness

The first element in the test of arbitrariness suggested by the Furman decision is the infrequent use of the law. Our findings suggest that in about 77% to 85% of American jurisdictions the habitual offender laws are being "used" (for plea negotiating or sentencing) in at least one third or more of the eligible cases (see Table 4.11). Thus in those jurisdictions the frequency-of-use test of arbitrariness would not be met. Whether it is being met in the remaining jurisdictions can not be determined by our data because of the wording of our question. However, it should be noted that in small jurisdictions the number of eligible habitual offenders is small--in some places less than one our year. In such places the rate-of-use test of arbitrariness becomes meaningless.

The second element in our test is the absence of a rational policy behind the use of the law. As explained earlier, because habitual offender laws are used primarily to obtain guilty pleas rather than being applied as sentences, the focus of this part of test must be on the charging and plea negotiating decisions of prosecutors. Two questions arise, is there a rational policy behind prosecutors' decisions as to whether to invoke the use of

habitual offender charges; and, once the charges have been filed or the threat to file them has been made, is there a rational policy behind the decision as to which cases shall have the charges negotiated away.

Our survey found that in 41% of the jurisdictions prosecutors estimate that they "use" the habitual offender charges in less than two-thirds of the eligible cases (see Table 4.11). We did not ask them about what factors influence their decisions to invoke the laws but we did inquire into what factors were most important in deciding which defendants ultimately get sentenced as habituals. Each respondent was permitted to name up to three factors. All of the factors mentioned by prosecutors and their relative frequency give the appearance that prosecutors' decisions to negotiate habitual offender charges are rational. The underlying policy is at least as rational as that of the many career criminal programs that have been established in prosecutors' offices for it relies on the same criteria.[14] The primary criteria are the number or severity of the defendant's prior record or the severity of the present offense or some combination of these three factors (see Table 5.5).

This finding about the rationality of prosecutorial decision-making regarding the negotiation of habitual offender charges generally conforms with the findings of the general literature on prosecutorial discretion. The latter indicates

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14 See Chapter 2 for a description of the targeting criteria used by these programs.

that prosecutors are more likely to seek more severe sanctions against offenders with more serious prior records and instant offenses (see e.g. McDonald, 1985). Nevertheless the finding must be regarded as suggestive rather than definitive. It only measures what prosecutors say they do and hence is subject to a social desirability response bias. It does not mean that in all jurisdictions surveyed or in all relevant cases within those jurisdictions there is a rational policy or that legally acceptable reasons are always determining which cases are selected for habitual offender sentencing. In fact a substantial minority of judges and defense attorneys in the same jurisdictions reported that some questionable factors seemed to at work in some cases (see Table 5.5).

A surprising fifteen percent of the judges and three percent of the defense attorneys cited "prosecutors' personal reasons;" also, punitiveness on the part of prosecutors and external pressures from the press, the policy or the victim were cited. Also, one might wonder about such factors as: defendant's "negative reputation" and "appears to be a professional." While these are rational on their face, they are undoubtedly vague in their operation.

A more detailed account of the reasons why some liable offenders are sentenced as habituals is presented in Table 5.6. In reading the individual responses one notices that while the seriousness of the prior record and of the instant offense are frequently referred to they are rarely defined with any precision. The best one usually gets is a reference to the

Table 5.5 Most Important Factors Determining Which Defendants are Sentenced as Repeat Offenders By Type of Respondent*

[Percentages of each respondent group mentioning factor among the top three]

Factors	Prosecutors [N=180]	Defense Attorneys [N=122]	Judges [N=109]
Number of defendant's priors	33	20	21
Severity of instant offense and defendant's priors	25	11	22
Severity of instant offense	12	20	10
Severity of defendant's priors	10	11	9
Defendant refused to plead guilty	7	11	10
Defendant's "negative reputation" for criminality	7	6	
Depends upon who presiding judge is	3	2	
Strength of evidence in the case	2		3
External pressures (e.g. from police, press, victim) to treat defendant as repeater		6	2
Defendant appears to be a "professional" criminal		6	3
Prosecutor's personal reasons		3	15
Punitiveness against the defendant		2	1
Special purpose would be served		2	
Proof of priors excellent			3
Normal sentence not severe enough			1

*Respondents could name three factors.

requirement that "violence" (unspecified) be involved. More often one sees reference to the "bad actor" which is the practitioner's shorthand solution to the complex problem of defining who the truly dangerous, habitual offender is. Another common response emphasizes that the seriousness of the case must be extreme and that such kinds of cases are rare. In a few places prosecutors use formulas which have a patina of specificity (see e.g. the entry for Washington in Table 5.6). A violent instant offense and certain kinds of priors are used. But undoubtedly considerable discretion has to be exercised in making the final selection.

Characteristics of Offenders Sentenced As Habituals

In order to determine with greater validity than self-reports what factors influence the decision as to which cases are sentenced as habituals it would be necessary to analyze a large sample of liable offenders. This was beyond the limits of our telephone survey. But it was possible to get individual case descriptions of offenders who had been sentenced as habituals. Both prosecutors and defense attorneys were asked to describe certain characteristics of a case in which an offender had been sentenced as an habitual. In order to maximize validity we emphasized that it should be a case which they remembered well (which may or may not have been their last case). They were asked to describe the type of crime involved in the instant offense; the number of prior felony convictions; and the most common type of crime among the priors. Judging from the degree

Table 5.6 Reasons Why Repeat Offender Sentence Would Be Imposed--Specific Comments By State and Type of Respondent

State	Respondent	Comments
AL	--	Prosecutors, defense counsel and judges all agree that almost all repeat offenders are sentenced as such. The state courts have interpreted the statute to allow little or no discretion on this point.
AK	--	Alaska's presumptive sentencing for repeat offenders is applied in almost all eligible cases. In fact, case law in Alaska holds that, even if the prosecutor does not invoke presumptive sentencing, the court may do so on its own motion.
AZ	P	The number of prior offenses and the seriousness of the instant offense are weighed fairly equally.
	P	Because of prison overcrowding, unless the offenses are severe, the prosecutor is generally content to let the judge's discretion rule on need for enhanced sentence.
	D	Violence and length of record are considered fairly equally but violence in the instant offense may be the most important.
	J	Most defendants who come into respondent's court with prior convictions are sentenced to enhanced terms. Sometimes only some of the priors are dropped as part of a plea agreement. In other cases the judge will take priors into account under the statute which allows judges to "aggravate" sentences.
AR	P	In cases of violence, prosecutor simply will not negotiate.
	D	Extreme violence in instant offense seemed most significant in the latest case counsel had tried.
	J	Both judges interviewed agreed that most repeat offenders are sentenced as such.
CA	P	Judge has to give a middle presumption term if "career criminal" status is proven. He can then aggravate or mitigate. He will aggravate if defendant has been to prison many times; if the instant offense was cruel or there were multiple victims, or if defendant shows little remorse. All prosecutors agreed that most repeat offenders are sentenced as such. One said he had never seen a judge fail to exercise the discretion to not enhance the sentence of a repeat offender.

	D	Both respondents argued that prosecutors wield very little discretion here and that most repeat offenders are sentenced a such. However, one respondent pointed out that the prosecutor will sometimes negotiate with repeat offender charges, especially if other enhancements are available.
	J	Respondent said that most repeat offenders are sentenced as such, but that negotiation is done in a significant number of cases. When seeking enhanced punishment, the prosecutor looks not only at standard factors like violence or length of record, but also at whether defendant qualifies under California's "career criminal" statute. This is a very important factor because the seeking of the maximum penalty for a state-defined "career criminal" results in more state funds being made available to the local prosecutor.
CO	D	Although prosecutors appear quick to seek enhancement for offenders labelled "violent," respondent believes the label is applied too easily, and offenders who have never harmed anyone, but who may have simply threatened or appeared threatening are pursued under repeat offender provisions.
	J	Prosecutors appear to be almost always willing to make a plea offer, (though one prosecutor says that his offers sometimes include an enhanced penalty). The defendant then appears to be the key. If he chooses trial, the enhanced penalty will often be sought.
CT	P	Usually the prosecutors are content to settle for a guilty plea especially because its a complex persistent offender law. In rare cases, because of the defendant's personal characteristics, the underlying exposure will not be enough, so they will pursue the enhancement.
DE	P	Three of the responding prosecutors agreed that, under the statute's discretionary provision, judges are far more likely to enhance the sentence if the defendant has been, in prior or instant offenses, violent or physically threatening.
	J	The primary use of the statute for enhancement purposes is against true hardened criminals, with violence somewhere in their records, whom prosecutors want off the streets for life.
DC	J	Only with the "real scoundrels" will prosecutors jump up and down on this issue. But they file it in nearly every eligible cases, not merely because it is a good plea negotiation tool, but because it signals to the judge and the public that the

		defendant has to be treated more seriously. Filing repeat offender charges has become almost symbolic.
FL	P	About 90 percent of the time the prosecutors would be content with a guilty plea, so enhancement decision is really in defendant's hands.
	D	Prosecutors do miss many chances to charge defendants with being habitual offenders. However, it is used sometimes if the defendant chooses to go to trial or opts to exercise any of his Sixth Amendment rights. In such cases, the prosecutor will file the habitual charge after conviction as a way to punish the defendant.
	D	It is used rarely. Usually it will be notorious case where the State has got a conviction on a lesser offense than originally charged. In such cases they try to save themselves some embarrassment by "habitualizing."
	J	It takes a shocking history with a persistent and provable pattern of violent behavior.
GA	P	Sometimes the prosecutor will take into account whether or not the defendant can make restitution to the victim.
HA	P	Respondent cited one case where repeat offender enhancement was pursued because the defendant refused to turn "state's evidence."
	D	There is some judicial discretion in Hawaii and a defendant is more likely to be sentenced to an enhanced term in those jurisdictions where prosecutors use the statute with a good deal of case and circumspection. In some jurisdictions, prosecutors have eroded their credibility with judges on this issue as a result of overcharging.
	J	Respondent believes most repeat offenders are sentenced as such.
ID	P	While there were differences among the four respondents as to how they use the repeat offender law, all stated that the final result depends largely upon which judge is sentencing the defendant. Two of respondents agreed that Idaho judges are generally too lenient on this issue and others.
	J	Respondent believes that statute is best used against those defendants who clearly need to be put away for the sake of public protection.
IL	P	Chapter 38, article 33B-1 is never negotiated. It is for serious, dangerous repeat offenders and is always applied where applicable. Two respondents agreed on this point.

	J	Occasionally the enhancement will be applied because the judge exercises power to reject a guilty plea. One reason for rejecting a plea may be that the judge believes the repeat offender charge should not be dropped.
IN	D	If the arresting officer wants the prosecutor to push for the enhancement, this may be done. Generally, it is simply a situation where the officer is tired of one guy's returning to the area more than once and causing trouble. Theoretically, if it is a real serious defendant with violence involved, the prosecutors would seek the enhancement and judges would follow through but this is extremely rare.
	D	If the defendant has a violent past but only a minor instant offense he may be sentenced as a repeater because the enhancement will make a difference in his sentence. With violent instant offenses, the exposure is already high.
IO	P	Because the enhancement statute does not apply to serious felonies, prosecutors tend to concentrate less on the issue than they otherwise might. However, a very long record or a defendant with a violent past might be enhanced. Generally, three respondents agreed that it is a low priority or not often pursued to the fullest extent in their offices.
	D	Retaliation is definitely a factor in the cases this respondent has seen. Though use of statute is not frequent, it may be used where defendants fail to live up to plea agreements or make themselves difficult for prosecutor to deal with.
	J	It appears to be used most often in cases where defendant has not plead guilty, but instead, has chosen trial. Prosecutors are usually content to drop it for a guilty plea.
KS	P	It appears that, of late, judges are more willing to enhance repeat offender sentences than in the past. Prior or present violence is definitely a factor, but there is a lot of variability from judge to judge.
	P	When considering length of record respondent is really looking for the true "professional" or "career" criminal. Violence is pretty rare and not too important because of substantial underlying exposure anyway, but rape cases may be an exception where the full enhancement is sought.
	D	Use of repeat offender for sentence enhancement is cyclical with prosecutors. Current prosecutors save it for serious offenders.

	J	Two respondents agreed that prosecutors nearly always are satisfied to get a guilty plea and drop the habitual offender charge. Prosecutors will push for the enhancement when the eligible defendant chooses trial, and especially, according to one respondent, when defendant chooses a jury trial.
KY	P	All four respondents agreed that the first degree persistent offender statute is almost always pursued when defendant are eligible. They wield little or no discretion on this point.
	D	A substantial number of eligible defendants are sentenced as repeat offenders. Prosecutors will never negotiate if a gun was involved in the instant offense. They also look for offenders who commit the same type of crime over the years.
	D	The statute is almost always used to enhance the sentence of eligible defendants.
	J	Only very rarely will a defendant who is eligible for sentencing as a first degree persistent offender not be sentenced as such. This matter is almost never negotiated and, after it is proven, juries are generally harsh in their sentences.
LA	P	Two respondents agreed that most repeat offenders are sentenced as such.
	D	One respondent believes that, because there is no permanent habitual offender prosecuting unit in his jurisdiction, use of the law is "indiscriminate." It may be sometimes used merely because the individual prosecutor does not like the defendant.
	J	Respondent believes that most repeat offenders are sentenced as such.
	J	The repeat offender law is not used very often to sentence but it is used against defendants who have real bad records and have refused to plead guilty. It seems to be used to sentence more in the Southern part of the state as well.
MD	P	It is necessary channeling of limited resources for prosecutors to proceed under the statute against only those really bad criminals who displayed violence.
	D	Prosecutors will only negotiate a weak case. They will push for enhancement when they have a strong case against a defendant.
MA	P	An extremely long record of felony convictions is the only reason they will pursue the repeat offender statute. It's rare.

MI	P	Length of record is more important than violence because violent crimes already receive enough exposure and there is no need to enhance the penalty.
	D	There is still a lot of judicial discretion so it depends on the individual judge to a certain extent. The prosecutor has to perceive that the filing of the supplemental information will make a real difference in the sentence.
	D	The repeat offender statute will be used in cases of real violence, especially rape which has become a politicized crime. In addition prosecutorial discretion is so wide that the statute may be used in cases where the prosecutor simply dislikes the defendant.
	J	Almost always, when the repeat offender statute is used to sentence, it is a case of violence.
MN	--	No specific comments. In Minnesota's "point system," criminal history scores are always used to compute sentences when defendants have prior convictions.
MS	P	The instant crime itself is the key. Violence here will result in a charge of repeat offender status.
	P	The repeat offender statute distinguishes between violent and property crimes. Violence can result in life without parole for repeat offenders so it is a good tool for getting really violent offenders off the streets.
	P	If an eligible defendant chooses to go to trial, the prosecutor will always pursue the repeat offender sentence.
	P	Violence is the critical factor. They will never negotiate the repeat offender charge if, for example, the prior is murder.
	D	The threat of the repeat offender charges is effective for the prosecutor in securing guilty pleas. The charge may not be negotiated in cases of violence or, where the case has received a lot of publicity and it is politically beneficial for the prosecutor if he pursues the repeat offender sentence.
	J	A guilty plea makes no difference to the court. The repeat offender sentence is still fairly often applied where defendant has plead guilty.
MO	P	They really will not negotiate if there is violence past or present. However, if defendant really wants to plead guilty to the instant offense, 99 percent of the time the prosecutor will accept the plea and forego the repeat offender charge.
	P	They look for violence and ask whether the defendant is dangerous. If so, they seek the enhancement.

	P	The personal peculiarities of the judge play a big part. Repeat offender sentencing is taken away from the jury and given to the judge. So, if a judge is perceived to be lenient, the prosecutor will not charge the repeat offender statute, but will stick with the jury instead. (Two prosecutors agreed on this point.)
	D	One defense attorney agreed with this last statement and noted, that if prosecutor is going to seek judicial sentencing under the repeat offender statute, violence and repeatedness (same types of crimes) are important.
	J	Length of record is important. Certainly after the third conviction prosecutors are going to file repeat offender charges and they are more likely to pursue it. Violence, especially in the past, is also important.
	J	Prosecutors are probably most likely to pursue the repeat offender charges when they do not believe that the jury's sentence will be harsh enough.
MT	P	Because prosecutors use the repeat offender law in a careful, circumspect manner, judges raise their eyebrows a little when they see it. If the prosecutor charges it, the defendant must be a serious offender and judges will take them very seriously.
	P	The repeat offender law is usually a negotiating device but prosecutors will really push for it where there is a long record indicating that the defendant will not obey the law and become a useful citizen.
	P	Prosecutor asks three questions. Is defendant dangerous? What is the attitude of defendant? Is there violence involved?
	J	the prosecutor really only uses it against real bad defendants in cases where the state will not negotiate anything anyway.
	J	Violence certainly plays a role but respondent believes it might also be defendants who have somehow incurred the special wrath of the system by, for example, assaulting a police officer. This is not personal vindictiveness but a reaction to something defendant has done which prosecutors and police feel is particularly bad.
NB	P	Seriousness of the felony is important but the number of priors is more important. High classes of felonies already have long sentence exposure and the repeat offender law is used to get a plea in such cases.
	P	A long record would be the biggest reason. The repeat offender law would be used against someone who is a real "pain" locally and who needs to be put away a bit longer.

	J	There may be other reasons, but usually the repeat offender charge is pursued because defendant chooses trial. (Two defense attorneys agreed that this is an important factor.)
NV	P	Prosecutor will apply the repeat offender law if defendant is violent or a threat to society and in some cases where defendants are recent returnees to the system.
	D	Repeat offender law is used against "bad actors," especially when the instant offense is violent and the "Big Bitch" (3 priors) applies.
	J	All the usual factors play a part in this; violence, length of record, and to some extent the age or sex of the defendant.
	J	Violence is important, either in priors or in instant offense. The prosecutor will also push for repeat offender sentencing if defendant appears to be a true professional criminal. Length of record may be a factor here but the prosecutor will not seek it if defendant simply has four or five relatively minor priors such as car break-ins.
NH	P	The repeat offender law does not arise often, but if it is applicable, they never negotiate with it. Length of record is important as is violence. However there already exists a separate special extended term provision for dangerousness.
	P	The prosecutor's analysis is fairly subjective and focuses on severity, dangerousness, length of record and the nature of the offenses.
	P	Length of record is key. Violence does not matter. If defendant keeps coming back into the system, priors will be alleged so they can put him away.
	P	Repeat offender extended term is sought only in cases of very extensive prior records.
	D	The repeat offender extended term will be sought against "bad" defendants who have served two terms of much more than the required one year. It will also be sought if defendant chooses trial, if the case is getting publicity, or if the prosecutor simply does not like the defendant.
	D	Repeat offender extended term will be sought if the triggering is serious with extreme violence, or if it is sexual offense. Remember that defendant must have served two separate prison terms so he or she is a "bad actor."
	J	It is used primarily on extremely serious felonies where there is a long history or on sexual assault misdemeanors with history.
NJ	P	The extended term will be pursued against bad actors who managed to get away with relatively high sentences in the past, or against defendants

		accused of particularly egregious offenses such as burglary with a vicious rape.
	D	The repeat offender law will be used against violent or "professional" criminals or, as a punitive measure, against defendants who choose to go to trial.
	D	A typical case would be a very violent instant offense where defendant has a long record or a record that shows he will not become socialized.
	J	The extended term will be pursued against defendants with violent priors or instant offenses, in cases of long records or if defendant chooses trial. In this latter situation the defendant usually has a long record, or is innocent and has nothing to lose by going to trial.
NM	P	In almost all cases they dispose of the habitual offender charges. They do so as part of a long-form plea agreement. New Mexico law allows this charge to be brought at any reasonable time, however. So defendants who fail to live up to the terms of the plea agreement will have habitual charges brought against them later. Habitual charges might also be brought against defendants who choose trial in the first place instead of pleading guilty.
	P	They look at all the standard considerations such as violence and length of record and they also look very carefully at defendants who have been pegged by Albuquerque's police "major violators" unit. In addition, as part of plea negotiations, there are some third offenders who plea guilty in exchange for sentence as second offender.
	P	Usually the most important factor would be violence. Even if there is only one prior, if it is violent, respondent pursues the repeat offender charge. If there are three or four priors, respondent looks for a pattern of similar types of crimes.
	J	Usually the prosecutor will try to reach some sort of an agreement with the defendant. Also, he will use other enhancements, such as that for use of a firearm, or for crimes involving certain drugs.
	J	"Extenuating circumstances" or crimes, like rape, that "shock society and result in use of the repeat offender law to actually sentence.
NY	P	Two prosecutors agreed that almost all defendants are offered some sort of deal but that many choose to be indicted so repeat offenders are tried on that charge.
	D	Prosecutors are likely to push for repeat offender sentencing when they know the defendant and he or she keeps coming back into the system, with maybe

		one or two of the priors' being more than mere shoplifting.
	D	Even if the prosecutor offers a deal, it is usually a bad one for defendant and many opt for trial anyway.
	J	Most eligible defendants are sentenced as repeat offenders.
NC	P	All argued that it is extremely rare or never used at all.
	D	Defendant has to be a very serious offender with a violent background; someone whom prosecutors want to put off the streets for a long time.
ND	P	No one gets sentenced as a repeat offender.
	P	Respondent would only use the repeat offender law if there were a long pattern of criminal activity with recent re-entry into the system, i.e., a totally incorrigible offender.
	D	Prosecutors will look at defendant's record and his general character. It has to be someone they want off the street for a very long time.
	D	Repeat offender law would only be used if a high degree of public pressure could be brought to bear upon the prosecutor.
	J	Actual repeat offender sentencing would require a violent instant offense and probably a violent past as well.
	J	Never seen it used.
OK	P	All four respondents agreed that most repeat offenders are actually sentenced as such. One noted that violent repeaters were always sentenced under the statute. Another suit that in rare cases, where defendant had two priors and qualified for 20 years/no probation, the charge would be dropped if the instant offense was minor.
	D	Most eligible defendants are sentenced as repeat offenders.
	J	Most eligible defendants are sentenced as repeat offenders.
OR	P	Real dangerousness is the key. Respondent likes to use certain predictive factors from studies such as Samenow's to show who is likely to repeat.
	P	Real dangerousness is necessary.
	P	There must be a very serious crime like murder or rape/kidnapping, and there would have to be some sort of preliminary indication of a psychiatric disorder because the statute requires an examination and positive finding on this.
	D	Repeated physical dangerousness and perhaps outside pressure are required.

PA	--	No specific comments. In Pennsylvania: "point system" criminal history scores are always used against defendants who have prior convictions.
RI	P	It may take six or seven property crimes, or only two violent priors, for prosecutor to seek repeat offender sentencing.
	D	Prosecutors definitely save it for defendants with very lengthy records, well over the required three convictions. It is also used if prosecutors believe defendant is a "gangster" or "professional" criminal.
SC	P	Two respondents agreed that it almost never comes up.
	D	Neither respondent had ever seen it used.
	J	Respondent cannot recall anyone's having been indicted as a repeat offender in his circuit.
SD	P	Length of record and violence are looked at together, as well as the personal peculiarities of the judge involved.
	P	Two other respondents agreed that length of record and violence combined are the most likely reason why repeat offender sentencing will be pursued by them.
	J	There is no clear reason why it is used when it is used. Maybe it is a matter of diligence on the part of the prosecutor, though it certainly is not difficult to prove.
TN	P	Two respondents agreed that it is a combination of violence and length of record that is important.
	P	Most repeat offenders are sentenced as such.
	P	Length of record is really important but if there is a violent past prosecution will consider defendants who have fewer priors.
	J	Most repeat offenders are sentenced as such.
	J	Prosecutors do consider violence and length of record aNd it appears that all the defendants seen by this respondent have been over-qualified, with five or more priors.
TX	P	Usually the defendant will have to have more than the two required priors to start off. Then they look at violence, defendant's abuse of the legal system to delay unfairly, and, they ask if defendant is a really hardened criminal. As to this last issue, respondent sees three types of criminals: those who commit crimes because they are drunk, stoned or psychologically impaired, those who need the money, and hardened criminals.

	P	Two respondents agreed that most repeat offenders are sentenced as such.
	D	If it is available the prosecutor will always threaten it, and, if defendant chooses trial, he will push for it.
UT	P	There are three factors. One, if defendant is dangerous, is the underlying penalty strong enough. Two, what is the defendant's level of culpability? Three, is defendant really a career, non-rehabilitative type of criminal?
	P	Defendants who have shown violence but are not subject to the five to life sentence without an habitual offender charge, will be tried as habituals.
	D	Prosecutors only use the repeat offender law in cases where defendant has done something relatively minor but has a long prior record and is a thorn in the side of local law enforcement. They use the law to get this defendant off the street a little longer.
	D	Respondent said that the key was "the attitude test." The repeat offender law is used to sentence defendants who have been in trouble in prison, or committed crimes while escaping, or on parole or probation. Many are from halfway houses where they receive stolen property for example.
VT	--	No specific comments.
WA	P	Prosecutors look at a combination of violence and length of record; but use of the repeat offender law is rare. Crimes may have to be within a relatively short time span.
	P	Two respondents in an office had written standards which require a violent instant offense and two prior convictions, both of which had either violence or a separate prison term served.
	D	Violence is a crucial factor but use of the repeat offender law is very rare and the only case he has seen involved an assault of a prison guard.
WV	P	Recent re-entry into the system may be important.
	D	Repeat offender law will usually be used to sentence defendants with multiple, extensive priors. Usually this means there were many charges. Often defendant is uncooperative.
WI	P	They look at the strength of the case and ask if they have to negotiate. Also, will the enhancement make a difference? The particular judge who will sentence may also be a factor.

	P	It would have to be a very unusual case with a "horrible" crime and a defendant who is not interested in any plea agreement.
	P	Length of record is most important. If the instant offense is a serious one the repeat offender enhancement will make very little difference.
WY	P	Respondent limits use of repeat offender law to serious crimes and extensive histories with some violence. They do not want to abuse it for fear of losing it. The public is very concerned about overcrowding in prisons.
	P	Almost all eligible repeat offenders are sentenced as such.
	D	Rape causes stand out here and this may be justified statistically because there is a very high propensity to commit rape again. The repeat offender law is also used if there are acts of violence (especially with resulting injury), if defendant has a long record (unless they have been all relatively minor crimes) and if defendant choose a trial.
U.S.	P	They look at the "quality" of the record. Does defendant have a violent or quasi violent past?
	D	The repeat offender law is just never used.

of detail that respondents were able to give and other spontaneous remarks it seemed that the information we obtained this way is reasonably valid. The main problem with the data is that there was no way to guarantee that respondents in the same jurisdiction were not describing the same case. Thus, to some unknown but probably small extent, some cases may have been double counted in our sample.

Because the sample is limited to offenders who were sentenced as habituals, it is not possible to determine whether liable offenders with more serious records and instant offenses are escaping the habitual offender sentence. But it is possible to test the claim of habitual offender law critics that the laws are being applied primarily to non-violent, property offenders who represent little danger to the community (e.g. Katkin, 1971; Radzinowicz and Hood, 1980; Rubin, 1973). And, the self-reported reasons why certain offenders are sentenced as habituals as given by our respondents can be partially checked. Given the frequent report that the presence of violence in an offender's record (either in his priors or his instant offense) is a more important factor than the mere number of priors, one would expect to find that among sentenced habituals those with violence in their records would tend to have shorter records than those without violence. However, without any cases of liable-but-not-sentenced-as-habituals in our sample, this latter analysis can not be conclusive.

Our data challenge the claim of habitual offender law critics that these laws are enforced primarily against the non-

serious offender. In our sample of 139 offenders sentenced as habituals, violent serious crime was the most frequent type of present and past offense in their criminal histories. In 47% of the cases the instant offense was a serious violent one (homicide/aggravated assault/forcible rape/robbery or other crime with violence); in 24% it was burglary or felony breaking-and-entering; in 17%, felony theft (bad checks; other property offense excluding felony burglary and breaking-and-entering); in 12%, other felonies or misdemeanors (including drag possession or sale, gambling, sex other then forcible rape, and other felonies or misdemeanors). Violent serious crime (felony burglary included) was also the most frequent type of prior convictions among our sample (71% serious violent including felony burglary; 18% theft over $100; 11% other felony and misdemeanors). In addition to 53% the sample had three or more prior convictions and 38% had four or more priors.

These findings partially refute the contention of critics of habitual offender laws who believe that they operate in an irrational and capricious manner. The fact that sentenced habitual offenders are more likely to have past and present records of serious violent crime (as opposed to less serious crime) suggests that the ultimate sentencing effect of the laws (allowing for the impact of the state's and the defendant's options to refuse to plea negotiate) is a policy of more serious offenders being more likely to be sentenced under them. This would seem to partially meet the requirement in our test of nonarbitrariness, i.e., that there be a rational social policy guiding the operation of these

laws. However, it must be emphasized that this is merely a partial test of the arbitrariness of sentencing under the habitual offenders. It shows that most sentenced habituals are serious violent criminals. But remember our data base does not contain cases of eligible-but-not-sentenced-as-habitual cases. It could be that there are many other eligible habituals who have histories of equal or greater violence but who are not sentenced as habituals. Without them in our data base we are precluded from examining whether the choice as to which of all the serious violent offenders gets sentenced as habituals operates according to some rational and legally acceptable policy. Thus, the issue of the arbitrariness of the imposition of habitual offender sentences has not been resolved by our findings. Given its importance, it should be further examined with an appropriate data base.

Returning to our analysis, it was found that the data, do not support prosecutors' reports that among sentenced habitual offenders there is an inverse relationship between the seriousness of the offender's overall record (i.e., violence or potential violence in the record) and the number of his prior convictions. In their self-reports many prosecutors indicate that violence is a critical factor in selecting whom they seek to impose the habitual offender sentence upon. They further report that when the sentence is imposed on offenders whose criminal histories involve mostly non-violent crime, it is because the lack of violence is offset by an exceptionally lengthy record.

A little over half (57%) of our sample of sentenced

habituals had three or more prior convictions. Contrary to expectations those cases where the instant offense was serious-violent did not have significantly shorter prior records, see Table 5.7. The trend of the data is in the direction prosecutors claim it would be. The offenders with serious-violent instant offenses are more likely to have shorter (three or fewer) records than those whose instant convictions are for "other felonies and misdemeanors" (71% compared to 46%). But the differences are less dramatic than the self-reports of prosecutors would lead one to expect.

Given that some prosecutors emphasize that the gravity of a prior record can not be measured solely by the number of prior convictions without regard to their quality, we asked our respondents to describe what kinds of offense were involved in the prior records. Because of the small numbers involved these answers were collapsed into three categories: serious-violent (homicide, aggravated assault, forcible rape, robbery and burglary);[15] mostly property over $100 (except burglary and robbing); and all other. The sentenced habitual offenders whose prior records were mostly for crimes of violence were also somewhat more likely to have shorter records than those with mostly property or other types of offenses (see Table 5.9). But again the differences are not substantial and do not confirm the

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15 Notice that burglary is included here but is excluded from the serious-violent category used for classifying the instant offense. This was necessary because here we are summarizing a record of multiple crimes as opposed to classifying one crime.

Table 5.7 Type of Instant Offense By Number of Prior Felony Convictions Among Offenders Sentenced As Habituals

Number of Priors	Type of Instant Offense				
	Serious violent [N=65]	Felony theft except burglary [N=24]	Burglary or felony B&E [N=33]	Other felony or misd. [N=17]	Total [N=139]
One	16.9	12.5	12.1	11.8	14.4
Two	36.9	25.0	15.2	29.4	28.8
Three	16.9	16.7	33.3	5.9	19.4
Four	13.8	20.8	15.2	5.9	14.4
Five or more	15.5	25.0	24.2	47.0	23.0
Total*	100.0%	100.0%	100.0%	100.0%	100.0%

* Percentages rounded to 100. Chi-square for columns 1x2 with priors dichotomized at 4 or more = 2.775, not significant at .05 level. Chi-square for columns 1x4 with priors dichotomized at 4 or more = 3.3685, not significant at .05 level.

substantial and do not do not confirm the frequent report that when the habitual offender sentence is applied to the less-than-serious-violent offender it is because that offender has a remarkably longer record.

Prosecutors might righly criticize the analysts related to Tables 5.8 and 5.9 on the grounds that it is neither the instant offense nor the number of offenses nor the quality of the priors taken by themselves that constitute what they mean by the truly "bad actor" deserving to be sentenced as an habitual. Rather, it is the joint effect of these three factors. Consequently, we conducted such a multivariate analysis (see Table 5.10). Due to

Table 5.8 Most Common Type of Prior Convicted Offense By Number of Prior Convictions Among Offenders Sentenced As Habituals

Number of Priors	Most Common Type of Prior Convicted Offenses		
	Most property Over $100 except Burglarly & Robbery [N=25]	Serious violent including Burglary [N=97]	Other [N=15]
One	8.0	15.5	20.0
Two	32.0	29.9	26.7
Three	16.0	20.6	6.7
Four	24.0	11.3	20.0
Five or more	20.0	22.7	26.7
Total*	100.0%	100.0%	100.0%

Percentages rounded to 100.

Table 5.9 Type of Instant Offense by Number of Prior Felony Convictions Controlling for Most Common Type of Prior Convicted Offense Among Offenders Sentenced as Habituals

Number of Prior Convictions	Most Common Type of Prior Convicted Offense Type of Instant Offense			
	Serious Violent Including Burglary		All Other	
	I Serious violent including burglary [N=78]	II Other felony & misd. [N=18]	III Serious violent including burglary [N=18]	IV Other felony & misd. [N=23]
1 - 3	68	56	61	48
4 or more	32	44	39	52
	100%	100%	100%	100%

x^2 for columns I x II = 0.9956, df=1, not significant at .05 level.

x^2 for columns I x III = 0.3108, df=1, not significant at .05 level.

x^2 for columns I x IV = 0.7342, df=1, not significant at .05 level.

the small sample size the results must be regarded with caution. The data suggest that the most serious offenders were somewhat more likely to have shorter prior records than the less serious offenders. But, the differences do not even begin to approach statistical significance. The offenders whose instant offense was a serious violent one (including burglary) and whose most common prior crimes were serious violent ones (including burglary) were somewhat more likely than all the other types of offenders to have shorter records. (Compare column I with columns II, III, IV.) The least serious offenders were somewhat more likely to have longer prior records than all the other types of offenders. (Compare column IV with columns I, II, III.) Moreover, when the instant offense was a serious violent one but the prior record consisted of mostly less serious crimes, the sentenced habitual was more likely to have a shorter prior record than when the instant offense was less serious but the priors were mostly serious. (Compare column III with column II.)

All of these slight trends are in the directions which one would generally expect from the self reports of prosecutors as to why certain eligible offenders get sentenced as habituals. But the trends are so minimal that with this small sample size it would be imprudent to regard them as supporting the claims of prosecutors. On the contrary, taking the results of all these quantitative analyses together, the appropriate conclusion is that the prosecutors' description of the relationship between the seriousness of the crimes in a sentenced habitual offender's record and the number of prior convictions is not substantiated

by the data. Among offenders sentenced as habituals those with records involving less serious present and past crimes are not significantly more likely to have longer records. In more specific terms, a sentenced habitual offender whose present and past crimes were non-violent felony thefts is not likely to have a significantly longer prior record than one whose present and past offenses involved violence.

Quantitative analyses such as those just presented have the advantage of showing central tendencies over a large number of cases. But, they inevitably distort the phenomenon examined by forcing it into a limited set of fixed categories. As a check against this bias we present the qualitative descriptions of the cases as reported by our respondents, in Table 5.10.

The qualitative descriptions generally confirm the conclusions already drawn. One can see that the great majority of the sentenced habituals are involved in serious violent crime or burglary (which has a potential for violence). There are a few cases which would cause most observers to doubt whether they constituted such exceptional threats to the safety of the community that the extraordinary sentence of the habitual offender law was warranted. See, for example, the Fairbanks, Alaska offender convicted of eight counts of forgery with one prior, a second degree burglary; and the Johnson, Kansas offender convicted of theft with two prior thefts. In addition, there are two other types of fact patterns about which there would be much less consensus about the appropriateness of applying habitual offender laws. One is where the prior record is lengthy but the

Table 5.10 Characteristics of Offenders Cases Sentenced As Habituals By State and Type of Respondent

Jurisdiction	Respondent*	Description of Case
Jefferson, AL	D	- Defendant was convicted of robbing a hamburger stand and possessing a handgun. He had 1 prior robbery and 2 prior burglaries; he pleaded guilty to all 3 at one time in 1964 and served 5 years in prison. As a habitual offender his sentence is life without parole. Prosecutor had offered 20 years/no parole, but defendant chose to go to trial.
Tuscaloosa, AL	--	- No Examples.
Anchorage, AK	P	- Defendant was convicted of sale of cocaine. He had 1 prior, a burglary in Texas.
	D	- Defendant was convicted of burglary of a business. He had 1 similar prior.
Fairbanks, AK	P	- Defendant was convicted of 1st degree burglary. He had 2 priors in Oregon: 1 burglary and 1 grand larceny.
	D	- Defendant was convicted of 8 counts of forgery. He had 1 prior, a 2d degree burglary.
Yavapai, AZ	P	- Defendant was convicted of a serious violent type of crime. He had 1 prior, a sexual abuse or molestation offense.
	D	- Defendant was convicted of hiring children to commit burglaries for her. She had 6 prior convictions but only 1 was proven here because she pled guilty to the instant offense. The priors were robbery, burglary and weapons charges.
Pima, AZ	P	- Defendant was convicted of fraud, as part of an organized crime "sting" operation. He had 4 priors which were property offenses worth over $100.
	P	- Defendant was convicted of burglary and had 3 priors: 2 burglaries and 1 drug offense.

* P = Prosecutor; D = Defense Counsel

Jurisdiction	Respondent	Description of Case
	D	- Defendant was convicted of burglary. He is a drug addict who had 5 or 6 priors. (Respondent has periodically represented defendant over past 10 years.) Priors were mostly burglaries, maybe 1 strong-arm robbery.
White, AR	--	- No examples.
Pulaski, AR	D	- Defendant was convicted of armed robbery. It was a rather violent incident though no one was injured. He had 5 priors, mostly similar robberies. Defendant received life plus 20 years, "stacked." Prosecutor told the jury he really wanted Defendant off the streets.
Placer, CA	P	- Defendant was convicted of child molesting (fondling). He had 2 priors, both sex offenses: sexual assault of a woman, and another molestation of a child.
	D	- Defendant was convicted of child abuse/ simple assault.
Orange, CA	P	- Defendant was convicted of 2 counts of robbery, 1 count of car theft. He had 3 priors but only 2 were provable in court. These were all robberies.
	D	- Defendant was convicted of burglary, for which the normal, unenhanced sentence would be 4 years. He had 3 priors, all burglaries, and now faces up to 19 years for latest crime.
Adams, CO	P	- Defendant was convicted of arson and murder. He had 2 priors which were aggravated robbery and some drug-related crime.
	P	- Defendant was convicted of burglary and had 7 priors, all property crimes and burglaries.
	D	- Defendant was convicted of aggravated robbery. Five separate repeat offender counts were filed though there may have been more. These were 1 attempted murder, 1 assault and 2 robberies (and the last is forgotten).

Jurisdiction	Respondent	Description of Case
Arapahoe, CO	D	- Defendant was convicted of sexual assault/rape. He had 3 priors, 2 of which were serious property crimes, the third was violent.
Middlesex, CT	P	- Defendant was convicted of sexual assault and attempted kidnapping. He had 1 prior, an attempted rape.
	D	- Defendant was convicted of kidnapping and robbery. He had 2 priors, both manslaughter.
New Haven, CT	--	- No examples.
Kent, DE	--	- No examples.
New Castle, DE	D	- Defendant was convicted of burglary and had 3 priors, all burglaries.
District of Col.	--	- No examples.
Pasco, FL	P	- Defendant was convicted of bank robbery and had 1 similar prior.
Palm Beach, FL	P	- Defendant was convicted of forcible rape. He had 4 priors, all were serious personal crimes and all were violent.
	D	- Defendant was convicted of burglary. He had 4 priors, all burglaries.
Clayton, GA	P	- Defendant was convicted of selling illegal drugs. There were 3 priors: 1 sale of illegal drugs, 1 interstate stolen automobile, and another federal property (possession) crime.
	P	- Defendant was convicted of a serious, violent crime and had 4 priors, mostly serious, personal, violent crimes.
Cobb, GA	P	- Defendant was convicted of burglary. He had one prior which was valued under the statute but which involved 5 or 6 separate adjudicated on the same day. They were mostly serious, personal, violent offenses.
	P	- Defendant was convicted of a serious, personal, violent crime and escape. He had 3 priors which respondent could not recall.

Jurisdiction	Respondent	Description of Case
	D	- Defendant was convicted of rape. He had 3 priors: 2 armed robbery, 1 rape, 1 burglary.
Maui, HA	P	- Defendant was convicted of multiple counts of rape. He had 1 prior felony, a burglary and several misdemeanors.
	D	- Defendant was convicted of burglary. He had 2 priors but they were pled out concurrently. Both were burglaries. Defendant received a 10 year sentence with a 4 year mandatory minimum. Prosecutor asked for an extended term maximum under the other repeat offender provision which would have meant 20 years. Judge refused to do this.
Honolulu, HA	P	- Defendant was convicted of a serious, personal, violent crime. He had numerous priors but only 2 were provable under the statute because many had been consolidated for trial. Priors included 3 robberies, 3 kidnappings, 2 1st degree burglaries, 1 1st degree rape and 1 1st degree assault.
	D	- Defendant was convicted of armed robbery. He had 1 prior, a purse snatching offense. Mandatory minimum was invoked for repeat status.
Bannock, ID	P	- Defendant was convicted of burglary. He had 2 prior burglaries.
Canyon, ID	P	- Defendant was convicted of 1st degree burglary. He had 4 priors: 1 grand theft and a couple of forgeries.
	P	- Defendant was convicted of grand theft (he stole a pick-up truck). He had 5 priors, all similar property crimes, auto thefts, etc.
	D	- Defendant was convicted of rape. He had 3 priors, 2 of which were 2nd degree murder.
Henry, IL	--	- No examples.
Lake, IL	P	- Defendant was convicted of murder. He had 2 prior armed robberies.
Hendricks, IN	--	- No examples.

Jurisdiction	Respondent	Description of Case
Lake, IN	P	- Defendant was convicted of 4 counts of armed robbery. He had 3 priors: 2 armed robberies and 2nd degree murder.
	D	- Defendant was convicted of murder. He had 4 priors consisting of 1 prostitution/pimping, 1 sale of illegal drugs, 1 transportation of a stolen vehicle across state lines, and 1 burglary.
Linn, IO	P	- Defendant was convicted of 2nd degree theft of garden tractors (from tractor dealer). He had 4 priors which were all property offenses involving more than $100.
	P	- Defendant was charged originally with 1st degree armed robbery but, because this is not subject to habitual offender enhancement, the charge was lowered to 2nd degree armed robbery. Defendant pled guilty to this charge which included at 15 year habitual offender penalty. Defendant had 2 priors, an assault and a burglary.
	D	- Defendant was convicted of attempted murder. He had 2 priors, both of which were forcible felonies.
Polk, IO	P	- Defendant was convicted of burglary. He had 3 priors: 1 auto theft and 2 burglaries.
Leavenworth, KS	P	- Defendant was convicted armed robbery. He had 4 or 5 priors. One was a burglary, the others were assault or assaultive type behavior.
Johnson, KS	P	- Defendant was convicted of shoplifting. There were at least 6 prior shopliftings.
	P	- Defendant was convicted of burglary. He had 4 priors, all burglaries.
	D	- Defendant was convicted of theft and had 2 prior thefts (over $100 each).

Jurisdiction	Respondent	Description of Case
Fayette, KY	P	- Defendant was convicted of knowingly receiving stolen property. The arrest was part of a large "sting" operation aimed at local professional crime ring. Defendant had at least 2, possibly 3, priors which were property offenses worth over $100. He may have also had at least 1 prior robbery conviction.
	P	- Defendant was convicted of cocaine possession. There were 7 priors including armed robbery, burglary, drug possession, break-ins and theft.
	D	- Defendant was convicted of burglary. He had at least 8 priors and so was subject to prosecution as a "persistent felony offender in the 1st degree (PFO1). He pled guilty and was sentenced as a PFO-2 (requiring only 1 prior). Most of his priors were burglaries but there were some car thefts (a federal charge here) and stolen property charges too.
Jefferson, KY	P	- Defendant was charged with murder but a jury convicted him of manslaughter. He had 1 prior which was also manslaughter.
	P	- Defendant was convicted of 3rd degree burglary. He had 2 priors: 1 robbery and 1 burglary.
Calcasien, LA	P	- Defendant was convicted of 2 counts robbery. He had 2 priors: 1 simple robbery and 1 burglary.
	P	- Defendant was convicted of 2 armed robberies. He had 2 priors, both from Texas. Both were armed robberies.
	D	- Defendant was convicted of armed robbery. He had 2 priors, both armed robberies.
Caddo, LA	P	- Defendant was convicted shoplifting (an air conditioner). He had 2 priors. The judge sentenced him to 18 years under the habitual offender statute.
	P	- Defendant was convicted of armed robbery and attempted murder. He had 1 prior, a burglary.

Jurisdiction	Respondent	Description of Case
	D	- Defendant was convicted of robbery. He had 1 prior, which was also a robbery. He got 12 years as a repeat offender, with no parole or good time, for a crime that would normally carry a 10 year maximum sentence, with parole and good time for earlier release.
	D	- Defendant was convicted of burglary. He had one prior burglary and received a repeat offender sentence of 24 years.
	D	- Defendant was convicted of possession of illegal drugs. There were several priors but none involved serious, personal violence. Sentenced as a repeat offender to life without parole. This case is currently (8/6/84) on appeal.
Cecil, MD	P	- Defendant was convicted of armed robbery. He had 4 priors. They were breaking and entering, and theft.
Baltimore, MD	P	- Defendant was convicted of rape and assault with intent to murder. He had 2 priors: 1 rape and 1 armed robbery.
Barnstable, MA	P	- Defendant was a real estate agent who was convicted of larceny. He had 10 to 20 priors, all larceny-type crimes.
Suffolk, MA	--	- No examples.
Ionia, MI	D	- Defendant was already incarcerated. He was convicted of possessing a knife in prison. Original charge was aggravated assault, but it was dropped down for lack of any cooperative complaining witness. Defendant had 8 priors, at least 2 of which were armed robberies and 1 of which was "criminal sexual conduct," knocked down from original rape charge. There were also several in-prison criminal episodes.
Kent, MI	P	- Defendant was convicted of larceny (over $100). He had 2 priors: 1 murder and 2 armed robbery.
	P	- Defendant was convicted of breaking and entering. He had 3 priors, all breaking and entering.

Jurisdiction	Respondent	Description of Case
St. Louis, MN	P	- Defendant was convicted of 2nd degree burglary. He had 4 priors. Two were burglaries, the others were theft and unauthorized use of a motor vehicle.
	D	- Defendant was convicted of escape, which requires a consecutive sentence. He had a very long record but most were juvenile offenses. He had 1 burglary as an adult.
Ramsey, MN	P	- Defendant was convicted of receiving stolen property. He had 2 priors, both property offenses worth over $100.
Jackson Co., MS	P	- Defendant was convicted of rape. He had 2 priors: 1 rape and 1 burglary.
	P	- Defendant was convicted of burglary and larceny of a business. He had 4 priors, all the same as the instant offense.
	D	- Defendant shot a police officer and was convicted of aggravated assault as well as 4 drug-related counts. He had 2 priors: 1 receipt of stolen property and 1 possession of marijuana.
Hinds, MS	P	- Defendant was convicted of forgery and was sentenced under the "little bitch." He had 2 priors, both non-violent, property offenses.
	P	- Defendant was convicted of armed robbery. He had 2 priors: 1 armed robbery and 1 strong-arm robbery.
Clay, MO	P	- Defendant was convicted of robbery and attempted kidnapping. He had 2 priors, both robberies.
	P	- Defendant was convicted of burglary. He had 3 priors: 1 aggravated assault, 1 burglary and 1 forgery.
	D	- Defendant was convicted of car theft. He had a long criminal history with at least 5 priors including burglary and other car thefts, though none of the priors involved violence.
Jackson, MO	P	- Defendant was convicted of robbery. He had 2 priors, both robberies.

Jurisdiction	Respondent	Description of Case
	D	- Defendant was convicted of stealing 6 pairs of blue jeans from a department store. She had 2 priors. Both were felony thefts over $150 each. Jury sentenced her to 10 months. She was found to be a "persistent offender" and the judge overruled the jury, sentencing here to 10 years, no probation, no parole, no good time.
Missoula, MT	P	- Defendant was convicted of rape. He had 3 priors which were "intimidation" (threats) and sexual assault.
	P	- Defendant was convicted of 2 counts of burglary, 1 count of escape and 1 count of tampering with a witness. He had 2 priors: 1 theft and 1 burglary.
Flathead, MT	P	- Defendant was convicted of stealing a car and, because he aimed the car at a pursuing sheriff, he was also found guilty of aggravated assault. He had 1 prior, a robbery.
	D	- Defendant was convicted of rape. Defense counsel could not recall number or type of priors. Clearly the nature of the instant offense was, he believed, most important to the prosecutors anyway.
Sarpy, NE	P	- Defendant was convicted on a weapons possession charge involving a sawed-off shotgun. He had 2 priors: 1 escape and 2 sexual assaults.
	P	- Defendant was convicted of felony possession of a firearm. He had 6 priors, 2 of which were proven in court for repeat offender sentencing. These 2 were robbery and use of a firearm in committing a felony. Other priors included assault.
	D	- Defendant was convicted of several counts of burglary. Defense counsel could not recall the number of priors involved but there were at least 5. Defendant was about 45 years old and had been in and out of prisons for the past 30 years. He had committed a lot of burglaries and thefts. There was never any violence.

Jurisdiction	Respondent	Description of Case
Douglas, NE	P	- Defendant was convicted of receiving a stolen automobile. He had 4 priors, 2 of which were burglaries and 1 of which was controlled substance possession.
	D	- Defendant was charged with 3 counts of burglary. The prosecutor offered a deal if defendant would plead guilty to 2 of them. Defendant refused. He had 3 priors, all burglaries, though there was no violence involved. Had he accepted the deal, defendant would have received a 6-10 year sentence. As a repeat offender he is now serving 10-60.
Washoe, NV	P	- Defendant was convicted of sexual assault. He had 4 priors. Two were armed robberies, 1 was grand larceny.
Clark, NV	P	- Defendant was convicted of grand larceny. She had a tremendous number of priors. She was basically a thief since 1946. Most priors were misdemeanors but there were several felonies too.
	D	- Defendant was convicted of attempted murder. He had 3 priors. Defense counsel could not remember what they were but believed it made little or no difference. Habitual offender law would have been applied based on the instant offense anyway.
Strafford, NH	P	- Defendant was convicted of forgery. There was a very long list of priors including several burglaries and at least 1 armed robbery.
	P	- Defendant was convicted of arson. There were at least 6 priors but only 2 were proven. Priors included kidnapping to terrorize, arson, burglary and assaults.
Hillsborough, NH	P	- Defendant was convicted of rape. He had 2 prior rapes.
	D	Case is currently on appeal. Defendant was convicted of 1st degree assault. He had several priors; defense counsel only recalled that none of the priors involved violence.

Jurisdiction	Respondent	Description of Case
Cumberland, NJ	P	- Defendant was convicted of firearm possession. He had 21 priors, most of which were residential burglary.
	P	- Defendant was convicted of sexual assault. He had 2 priors, both were burglaries.
	D	- Defendant was convicted of receiving stolen property. He was a "fence" for interstate stolen automobiles. He had 8 priors and was considered a professional criminal. Priors included fraud, theft and receiving stolen property.
Burlington, NJ	D	- Defense counsel could not recall exact charge but defendant was convicted of either armed robbery or a very violent assault. He had at least 5 priors, though some of these may have occurred, or been adjudicated, together, on same day. Most of the priors were burglaries.
Bernalillo, NM	P	- Defendant was convicted of commercial burglary and larceny. He had 3 priors: 1 armed robbery, 1 murder and 1 cocaine possession.
	P	- Defendant was convicted of serious, violent personal crime. He had 2 priors. Usually prosecutor would require more than 2 priors before pushing for it, but both priors were also serious, violent personal crimes. (Defense counsel could not remember any details.)
Valencia, NM	P	- Defendant was convicted of shoplifting (over $100). There were 4 priors: 2 burglary and 2 (maybe even 3) larceny.
	D	- Defendant was convicted of rape. He had 2 priors: 1 larceny and 1 forgery. Neither prior involved any violence.
Broome, NY	P	- Defendant was convicted of criminal mischief stemming from an incident where he trashed his ex-girlfriends's house. He had 2 priors, 1 burglary and 1 robbery, but both had been pleaded out on the same day. (So only 1 prior could be charged.)
	P	- Defendant was convicted of burglary. He had 1 prior, also a burglary.

Jurisdiction	Respondent	Description of Case
	D	- Defendant was convicted of 2nd degree attempted burglary. He had at least 5 priors. Most were property offenses worth less than $100 each. The prosecutor did not offer any of the usual deals here because defendant's record was so long. Prosecutor just wanted to get rid of defendant for a while.
Albany, NY	P	- Defendant was convicted of possession of a forged instrument. He had 3 priors: 2 armed robberies and 1 escape.
	P	- Defendant was convicted of the theft of 7 men's suits from a store. He had 3 prior felonies plus a whole line of minor convictions over the past 30 years. All his priors were property offenses. Many were thefts similar to instant offense in their significance.
	D	- Defendant was convicted of possession of stolen property and possession of a weapon. He had 4 prior convictions on about 19 felony counts. Most were property offenses worth over $100 but there were also a couple of more serious robberies.
Forsyth, NC	--	- No examples.
Mecklenburg, NC	--	- No examples.
Burleigh, ND	--	- No examples.
Grand Forks, ND	--	- No examples.
Comanche, OK	P	- Defendant was convicted of rape and robbery. He had 1 prior, a 2nd degree arson (unoccupied building). In this case, the instant offense was probably so bad that the enhancement did not make much difference. He would have received a lot of time anyway. A more common case where enhanced sentence is sought, and where it does make a difference is 2nd degree burglary.
	P	- Prosecutor has not had one recently but commented that most defendants plead guilty to habitual status. This way, the prosecutor asks for minimum enhancement and defendant avoids jury sentencing which, with priors taken into account, may be much more severe.

Jurisdiction	Respondent	Description of Case
	D	- Defense counsel has never had a client sentenced under the "big bitch" though he has had several sentenced under the "little bitch." He could not remember specifics but it means that all have had only 1 prior.
Tulsa, OK	P	- Defendant was convicted of aggravated rape. He had 9 priors plus several pending charges. Most of the priors were burglaries. Some were other kinds of theft. None of the priors was a violent, sexual crime as was the instant offense.
	P	- Defendant was convicted of robbery. He had 2 priors: 1 grand larceny and 1 receiving and concealing stolen property.
	D	- Defendant was convicted of armed robbery. He had 4 priors, all were armed robberies. Defendant was sentenced by the jury to 563 years in prison.
Douglas, OR	--	- No examples.
Lane, OR	--	- No examples.
Venago, PA	--	- No examples.
York, PA	--	- No examples.
Washington, RI	D	- Defendant was convicted of murder. He had a lot of priors, at least 5. Many of these involved violence.
Providence, RI	P	- As a result of a police "sting" operation, defendant was convicted of several car thefts. He had many priors but only 3 were proven. They were all car thefts, and all from the New York State.
	D	- Defendant was convicted of breaking and entering. He had at least 5 priors but some of these felony counts may have arisen out of the same transactions or the same court proceedings. The separate admissibility of such convictions is currently (8/22/84) being litigated. Most of the priors were similar breaking and enterings.
Laurens, SC	--	- No examples.
Charleston, SC	--	- No examples.

Jurisdiction	Respondent	Description of Case
Pennington, SD	P	- Defendant was convicted of narcotics distribution (cocaine and LSD). He had 5 priors, plus a lot of juvenile convictions. The priors were mostly grand theft (motor vehicles) and some 2nd degree burglary.
	D	- Defendant was convicted of 1 count of 3rd degree burglary and 2 counts of forgery. Both charges were strong cases for the prosecutor, very difficult to defend. Prosecutor charged the "big bitch" twice, i.e., once for burglary and once for forgery. Defendant had 3 priors, one from California and the others from South Dakota. All 3 were burglary. Defendant pleaded guilty in exchange for the prosecutor's dropping one of the "big bitch" charges. He was sentenced under the other count though. Whereas the maximum on the instant offense was 10 years (burglary of any unoccupied structure, including an automobile), defendant was sentenced as a repeater, without violence, to 20-25 years.
Minnehaha, SD	P	- Defendant was convicted of robbery. He had 8 priors, mostly robberies.
	D	- Defendant was convicted of failure to appear to a hearing on a felony charge. That original felony charge was dropped anyway, so defendant really hurt himself badly. He had 4 priors. They were all bad check charges. For failure to appear at a hearing on a charge that was dropped later anyway, defendant was sentenced to 2 years as a repeat offender.
Madison, TN	P	- Defendant was convicted of larceny/theft. He had 16 priors, most were similar larceny and theft crimes. None were violent or serious crimes.
	P	- Defendant was convicted of burglary. He had 6 priors. Most of these were burglary too.
	D	- Defendant was convicted of petit larceny. He had 3 priors. They were all 3rd degree burglaries. This case was an exception to the rule. Defendant must have done something prosecutors did not like because, usually, they would not pursue enhanced sentencing with these types of priors, unless defendant had a much longer record.

Jurisdiction	Respondent	Description of Case
Knox, TN	P	- Defendant was convicted of 3 counts of armed robbery. He had 9 priors including 1 armed robbery as well as several burglaries and some larceny.
	D	- Defendant was convicted of armed robbery. He had 4 priors: 2 murders and 2 armed robberies.
Randall, TX	P	- Defendant was convicted of auto theft. He had several priors, mostly burglaries.
	D	- Defendant was convicted of murder. He had 1 prior, a burglary.
Tarrant, TX	P	- Defendant was convicted of aggravated rape. He had 2 priors: 1 stolen credit card use (or possession) and 1 auto theft.
	D	- Defendant was convicted of aggravated robbery. He had 2 priors, one of which was also aggravated robbery.
Cache, UT	--	- No examples.
Salt Lake, UT	P	- Defendant was convicted of 1 count of 2nd degree burglary, 1 count of 3rd degree burglary and several misdemeanor theft counts. He had 3 priors, all burglaries.
	P	- Defendant was convicted of kidnapping and escape. Prosecutor could not recall number or type of priors, but defendant was under another felony sentence at the time of the commission of the instant offense.
	D	- Defendant was convicted of aggravated assault. Counsel could not recall number or type of priors.
Rutland, VT	--	- No examples.
Windsor, VT	--	- No examples.
Skagit, WA	P	- Defendant was convicted of armed robbery. He had 4 priors, 3 of which were also armed robberies.
	D	- Defendant was convicted of armed robbery. He had 3 priors which were proven in court. All of these were armed robberies. He also had priors of escape and assaulting a prison guard.

Jurisdiction	Respondent	Description of Case
Snohomish, WA	P	- Defendant was convicted of indecent liberties. He had 2 similar priors.
	D	Defense counsel gave the same case as an example. He did elaborate and stated that the instant offense was assaultive. Also noted that one of the priors was actually statutory rape.
Cabell, WV	P	- Defendant was convicted of drug possession. He had brought 5,000 "Qualudes" into the state. He had 7 or 8 priors which included 1 murder and 3 breaking and entering convictions.
	P	- Defendant was convicted of breaking and entering. He had 3 priors: 1 breaking and entering, 1 bad check writing and 1 grand larceny.
Harrison, WV	--	- No examples.
Portage, WI	P	- Defendant was convicted of burglary. He had 9 priors but only 3 within the 5 year statutory period. Most of the propers were drug-related and there were a couple of burglaries too.
	P	- Defendant was convicted of an assaultive type of crime. He was a barroom brawler who had only 1 prior felony, another assault. However, he had 9 prior misdemeanors and had served the maximum sentence for the misdemeanor of battery.
Waukesha, WI	P	- Defendant was convicted of kidnapping. He was an escapee at the time of the incident. He had 3 priors, all burglaries.
	P	- Defendant was convicted of a misdemeanor. Prosectuor could not recall number or nature of priors, but noted that instant offense's maximum sentence of 9 months because 3 years because of defendant's repeat offender status.
	D	- Defendant was convicted of a retail theft misdemeanor involving several magazines. He had a very long record (more than 5 priors). Most priors were similar retail thefts. Defendant received a sentence of 3 years.

Jurisdiction	Respondent	Description of Case
Laramie, WY	P	- Defendant was convicted of a serious, violent crime. He had five or more priors which were also serious, personal, violent crimes.
	P	- Defendant was convicted of Both prosecutors gave the same example here. No details other than those above.
	D	- Defendant had 3 priors. All were assaultive crimes and 2 involved weapons. All stemmed from fights in bars. The instant offense involved a drunken fight, after a car accident and ensuing argument involving racial insults. The victim hit his head on the curb and died. Prosecutor offered a plea to 1st degree murder in exchange for dropping the habitual offender charge. Defendant chose a trial by jury and was convicted of involuntary manslaughter. After convicting defendant, the jury was told to decide the repeat offender issue. They were incensed. They thought their work was finished. Many felt they would have probably acquitted the defendant had they known about the enhancement. Case is currently (8/28/84) on appeal. Defense counsel believes defendant was denied procedural due process because he was not allowed to present evidence in mitigation of habitual criminal status.
Natrona, WY	P	- Defendant was convicted of burglary. He had at least 5 priors including 2 auto thefts and 3 escapes. Two of the escapes involved violence and other crimes such as auto thefts and burglaries, which were never prosecuted.
	P	- Defendant was convicted of arson and a felony murder stemming from this incident (accidental death of a pedestrian). He had at least 5 priors, most of which were property crimes worth over $100 each.
	D	- Defendant was convicted of burglary. Prosecutor offered 5 years but defendant chose trial against the advice of counsel. Defendant had 5 or 6 priors including burglary, theft, larceny and escape.
Federal District	--	No examples.

crimes involved are not serious violent ones, see e.g., the Johnson, Kansas offender with eight shoplifting convictions; and the Albany, N.Y. offender with a thirty-year history of theft. The other is where some crime of violence or moderately serious offense is involved in the record but the record is very short, see, e.g., the Anchorage, Alaska offender convicted of sale of cocaine with one prior burglary; or the Honolulu, Hawaii offender convicted of armed robbery with one prior purse snatching. The cases of the lengthy-but-non-violent-crime-record raise the long-standing objection of the disproportionality between the seriousness of the crimes committed and the severity of the sentence imposed. The cases of the violent-but-short-record raise the objection that these cases do not fall within the meaning of habitual criminality and therefore should be sentenced under the non-habitual, normal sentencing provisions.

Summary

Three important criticisms of habitual offender laws are that their enforcement is arbitrary; the offenders sentenced under them are not truly dangerous predators but comparatively petty offenders; and the laws are biased in favor of the rich and powerful. The case for arbitrariness rests on a three-point test: the infrequent use of the law, the lack of a rational policy behind its use and the lack of social value in its existence. The claim that the law is applied primarily to non-dangerous offenders is supported mostly by studies of the English habitual offender laws. Those studies show that both a 1908 and

a revised 1948 version of the English law were enforced primarily against non-violent offenders. According to the most comprehensive of these studies, among a 1956 sample of sentenced habituals 50% were presently convicted of breaking and entering; 43% of larceny or fraud. Few were convicted of violence (2%) or sex offenses (2%). Most of the offenders prior offenses were breaking and entering (40%) or larceny (38%) or fraud (17%).

The present study could not rigorously test the arbitrariness hypothesis. In particular, it could not determine whether the selection for sentencing among eligible offenders (controlling for seriousness present and past criminal history) operated in a rational, nonbiased, nonrandom, legally acceptable manner. We recommend that such a test be done on an appropriate data base. The present study, however, does provide some insights related to the test of arbitrariness. It found that whereas the habitual offender sentences are rarely imposed, they are frequently used in plea negotiations. In over two-thirds of the eligible cases in 41% of the jurisdictions surveyed they are so used.

Contrary to the findings of previous studies we found that offenders sentenced as habituals in a sample of 139 cases reported by our survey respondents were not comparatively minor offenders. Most were presently convicted of a serious violent crime (47%) or burglary (24%); most (71%) had prior histories of serious violent crime (including burglary); and the majority (53%) had three or more prior convictions. These findings indicate that when the habitual offender sentence is imposed it

is usually against a serious violent criminal. This suggests that in the aggregate of cases from around the country there appears to be some rationality to the choice of who is sentenced as an habitual. But, this conclusion must be regarded as cautiously because our data base did not permit an analysis of the crucial question of whether the selection for sentencing among the total population of eligible offenders with records of serious violence operates in a fair and rational manner.

This latter issue was explored further in two ways. Prosecutors, defense attorneys and judges were asked what factors determine which eligible offenders get sentenced as habituals. The most common responses referred to one or another or a combination of the gravity of the instant offense or the length or gravity of the prior record. A substantial minority of the judges (15%) and some defense attorneys (3%) reported that a key factor is the prosecutor's personal reasons. A substantial minority of each group mentioned that it is sometimes due to the offender's refusal to plead guilty. Also, a substantial minority of prosecutors and defense attorneys reported that it is sometimes based on the offender's bad reputation. Other factors mentioned by smaller proportions (less than 7%) of the respondents included: it depends on who the judge is; evidentiary strength of the case; external pressures from victim, police, or press; the offender appears to be a "professional"; prosecutorial punitiveness against the offender; a special purpose would be served; proof of priors is excellent; and the normal sentence would not be severe enough.

The prosecutor's accounts of the relationships among the seriousness of the present and prior crimes and the length of the prior record were examined in a multivariate analysis of the cases reported by our respondents. Prosecutors suggest that when an offender with nonviolent and comparatively less serious criminal histories are sentenced as habituals it is because they have particularly lengthy prior records and vice versa. Offenders with serious violent criminal histories who are sentenced as offenders are more likely to have shorter prior records. This inverse relationship between gravity of criminal history and length of prior record was not supported by the statistical analysis. This finding that there is no statistically significant relationship may be entirely an artifact of the limitations of the sample; or it may have been produced by the differential operation of plea negotiations. Non-serious offenders with short prior records may be less likely to accept plea offers than serious offenders with similar records. It does not necessarily contradict prosecutors' reports of how they choose which eligible offenders they attempt to have sentenced as habituals; nor does it prove that the selection process is capricious. At best it suggests that the habitual offender laws as they operate across the country do not yield an aggregate population of sentenced habituals who can be distinguished into categories according to a formula in which a lower degree of gravity of crimes committed is offset by some increase in the number of convictions.

The evidence for the class bias in habitual offender legislation is of two kinds. The offenders sentenced as habituals

have been from the lower classes. This cannot be explained solely in terms of the repetitiveness of criminal behavior among the lower classes. Sutherland has documented that the major American corporations have had an average of 14 adverse decisions against them, well in excess of the usual number of prior convictions required by habitual offender laws. An attempt might be made to explain it in terms of the kinds of crimes involved. At least in America offenders sentenced as habituals are likely to be involved in serious, violent crime. But, such an explanation is not entirely convincing. It does not account for the long history of scientific and public concern for the repetitive criminality of certain not-too-serious criminals like petty thieves and the striking lack of concern for the repetitive history of fraud, restraint of trade, violations of war regulations and other anti-social actions of the corporations.

CHAPTER 6
PERCEPTIONS OF REPEAT OFFENDER LAWS AND SUGGESTED CHANGES

It has been clear for forty years that habitual offender laws are rarely used for sentencing and have produced isolated instances of unjust sentences. Nevertheless, legislatures still believe in them as evidenced by the fact that most jurisdictions still have them and many have enacted or modified them since 1970. We have now been established that these laws are frequently used in plea negotiations (see Chapter 4). It also appears now that offenders sentenced as habituals tend to be serious violent criminals although it has not been determined whether they are the most serious-violent criminals (see Chapter 5). Thus one develops a mixed and incomplete picture as to whether the habitual offender laws operate in a fair, effective and just way. There is no simple answer to such a complex question but one might think that some insights could be obtained by asking local practitioners for their views and recommendations. Do they think these laws operate in the practitioner's own jurisdiction in a fair, effective and just manner; and, what changes would they recommend? We put these questions to the prosecutors, defense attorneys, and judges. This chapter reports their responses.

Previous Research

In 1949 Paul Tappan (1949) asked the attorneys general or the crime commissioners of the 48 states for their evaluation of the effectiveness of their habitual offender laws. Twenty states

Table 6.1 Perceived Effectiveness of Habitual Offender Laws in 1949*

STATE	EFFECTIVENESS	STATE	EFFECTIVENESS
AL	Fairly effective	AZ	NE
AK	NL	CA	NCR
CO	NE	CT	NE
DE	NE	DC	NCR
DC	NCR	FL	Fairly effective
FL	Fairly effective	GA	Not effective
GA	Not effective	ID	NE
IL	Not effective	IN	Fairly effective
IO	Fairly effective	KS	Fairly effective
KY	NE	LA	Very effective/ deterrent
ME	NE	MD	NL
MA	NE	MI	Fairly effective
MI	Fairly effective	MN	NCR
MS	NL	MO	Fairly effective
MI	NE	NB	NCR
NV	NCR	NH	NE
NJ	Fairly effective	NM	Fairly effective
NY	Fairly effective	NC	NL
ND	Not effective	OH	Not effective
OK	NE	OR	Not effective
PA	NE	RI	Not effective
SC	NL	SD	Fairly effective
TN	Fairly effective	TX	NE
UT	NL	VT	NE
VA	Fairly effective	WA	NCR
WV	NCR	WI	Very effective/ deterrent

NE = no evidence.
NL = no law.
NCR = non-classifiable response.
Source: Tappan (1949)

responded that they had no evidence or their answers were unclassifiable. Twenty-one states gave classifiable responses. Two reported their laws were very effective; 13 said they were fairly effective; and 6 said they were ineffective. However, it is clear that the respondents interpreted the word "effective" in different ways.

Findings

In our survey we asked respondents about local practice regarding the use of their repeat offender law and about aspects of the law itself. Regarding the local practice they were asked five questions: (1) did they think the law was being applied (either as a sentence or used in plea negotiations) to too many, too few, or about the right number of offenders; (2) how effective did the law appear to be; (3) how confident were they that the law would have a future deterrent effect upon the offenders against whom it was used; (4) whether they thought the sentencing outcomes resulting from the use of the repeat offender law (either through sentencing or plea negotiations) were too harsh, too lenient or about right; and, (5) whether the use of the repeat offender laws in their jurisdictions resulted in sentencing outcomes that were more just than would have occurred but for the repeat offender law's use.

Regarding the law itself, we asked our respondents; (1) whether they thought the statutory sentences provided by it were too long, too short, or about right; (2) whether the number of distinct types of repeat offenders differentiated by the law was too many, too few or about right; (3) whether the amount of judicial discretion permitted by the law was too broad, too restricted or about right; (4) whether they were on the whole dissatisfied or satisfied with the law itself; (5) whether they would recommend changing the law; (6) what specific changes they would recommend; and (7) whether they thought that the criterion for eligibility for sentencing as a repeater should be limited to violent felons with previous violent felonies or extended to

broader categories.

The results of these inquiries are presented in tables 6.2 through 6.13. There are several remarkable findings. First of all, it should be remembered that the repeat offender laws vary enormously from state to state. Our respondents are not referring to the same law or the same practice. Nevertheless, despite all the variation, their responses show a remarkable pattern and degree of consistency. For virtually all items defense attorneys differ from prosecutors in their views. This difference is statistically significant in ten of the eleven relevant analyses. Moreover, it is always in the direction one of the institutional interests of the respective attorneys. When compared to prosecutors, defense attorneys were somewhat more likely than prosecutors to believe that their respective repeat offender laws were being used against too many offenders. Defense attorneys were significantly[1] more likely to believe that the laws were ineffective; lacked any special deterrent effect; resulted in sentences that were too harsh (either the repeat offender sentences itself or the sentence negotiated with the help of the repeat offender law); resulted in sentencing outcomes which were less just than would have been if there were no repeat offender law; provided statutory sentences which are too long; did not make enough distinctions among the types of repeat offenders; restricted judicial discretion too much;

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1 In some analyses statistical significance was not obtained with the tables in the format presented here because of cell size problems. However, the trend is obvious and when the cells were collapsed statistical significance was obtained as indicated in the tables.

were unsatisfactory on the whole; should be changed; and should limit the scope of their eligibility criteria to repeat offenders whose past and present crimes involve violence.

On all the above points except one judges are more like prosecutors in their opinions than like defense attorneys (including being less in favor of judicial discretion than defense attorneys). The one item where judges are more like defense attorneys than prosecutors is in wanting their respective laws changed. This overall pattern of judicial response is not as easily interpreted as an affinity with an institutional position. In theory judges are impartial and should be no more sympathetic to prosecutors than defense attorneys in individual cases. One might expect that thus impartiality should carry over to their opinions about sentencing structures at the institutional level. But, evidently it does not.

The above findings may strike the reader as a discovery of the obvious. With the advantage of the "retrospectroscope the Proxmirian type may snicker that anyone could have guessed that defense attorneys would have been dissatisfied with repeat offender laws and prosecutors and judges satisfied with them. But, policymakers often operate on the opposite assumption. They consult their practitioners and proceed as if the evaluations given by them can be regarded as impartial and disinterested. Our findings suggest they cannot. In regard to repeat offender laws, the opinions and evaluations of prosecutors, defense attorneys and judges are biased in favor of the institutional interest they represent in the court social structure.

Table 6.2 Satisfaction with the Frequency of Local Use (For Any Purpose) of Repeat Offender Law by Type of Respondent

Law Applied To:	PROSECUTORS (N = 169) I.	DEFENSE ATTORNEYS (N = 83) II.	JUDGES (N = 67) III.
Too many	1	34	6
Too few	25	2	16
About right	74	64	78
	100%	100%	100%

X2 for columns IxII not significant even after collapsing categories.

Table 6.3 Perceived Effectiveness of Repeat Offender Laws By Type of Respondent

	PROSECUTORS (N = 144) I.	DEFENSE ATTORNEYS (N = 77) II.	JUDGES N = 73) III.
Effective	65	16	36
Fairly effective	23	29	59
Ineffective	13	56	5
	100%	100%	100%

X2 for columns IxII = 60.15 df = 2 p = .00

Table 6.4 Perceived Special Deterrent Value of Repeat Offender Laws by Type of Respondent*

Degree of Confidence	PROSECUTORS (N = 143)	DEFENSE ATTORNEYS (N = 91)	JUDGES (N = 78)
	I.	II.	III.
Low	76	96	62
Medium to high	24	4	38
	100%	100%	100%

X2 for columns IxII = 13.96 df = 1 p = .00

*Special deterrence = does it deter the sentenced habitual offender from future criminality.

Table 6.5 Satisfaction with the Severity of Sentences Under or Results from Plea Negotiations Regarding Repeat Offender Laws by Type of Respondent

Outcomes are:	PROSECUTORS (N = 160)	DEFENSE ATTORNEYS (N = 67)	JUDGES (N = 65)
	I.	II.	III.
Too harsh	--	46	3
Too lenient	13	--	9
About right	80	46	82
It varies	8	8	6
	100%	100%	100%

X2 for columns IxII = 90.08 df = 3 p = .00

Table 6.6 Perceptions of Effect of Repeat Offender Laws on the Justness of Sentences and Plea Outcomes in Local Jurisdiction

	PROSECUTORS	DEFENSE ATTORNEYS	JUDGES
Sentences and and Plea Outcomes are:	(N = 149)	(N = 71)	(N = 67)
	I.	II.	III.
Move just	84	31	61
Less just	4	41	12
About the same as if no repeat offender law existed.	12	28	27
	100%	100%	100%

X2 for columns IxII = 68.32 df = 2 p = .00

Table 6.7 Satisfaction with the Length of the Statutory Sentences Provide. By the Repeat Offender Law by Type of Respondent

	PROSECUTORS	DEFENSE ATTORNEYS	JUDGES
Statutory Sentences Are:	(N = 168)	(N = 77)	(N = 73)
	I.	II.	III.
Too long	1	48	3
Too short	8	-	5
About right	82	33	75
It varies	8	20	17
	99%*	101%*	100%

* Error due to rounding.
X2 for columns IxII is significant at .05 level when categories are collapsed to "about right" or "other".

Table 6.8 Satisfaction with the Number of Statutorily Distinguished Types of Repeat Offenders by Type of Respondent

	PROSECUTORS	DEFENSE ATTORNEYS	JUDGES
Number of Distinct Types Is	(N = 168)	(N = 67)	(N = 71)
	I.	II.	III.
Too many	4	14	-
Too few	15	32	18
About right	81	54	82
	100%	100%	100%

for columns IxII is significant at .05 level when categories are collapsed to "about right" and "other".

Table 6.9 Satisfaction with Amount of Judicial Discretion Permitted by Repeat Offender Law by Type of Respondent

	PROSECUTORS	DEFENSE ATTORNEYS	JUDGES
Judicial Discretion Is:	(N = 162)	(N = 73)	(N = 77)
	I.	II.	III.
Too broad	12	6	1
Too restricted	8	53	25
About right	79	38	72
It varies	1	3	2
	100%	100%	100%

X2 for columns IxII is significant at .05 level when categories are collapsed to "about right" and "other".

Table 6.10 Overall Satisfaction with the Repeat Offend Law Itself by Type of Respondent

	PROSECUTORS (N = 171)	DEFENSE (N = 74)	JUDGES (N = 76)
	I.	II.	III.
Very dissatisfied	3	41	4
Somewhat dissatisfied	5	47	13
Somewhat satisfied	33	12	65
Very satisfied	60	-	18
	101%	100%	100%

*Error due to rounding.
X2 for columns IxII is significant at .05 level when categories are collapsed to "about right" and "other".

Table 6.11 Whether Change in Repeat Offender Law is Recommended by Type of Respondent

Law Should Be:	PROSECUTORS (N = 172)	DEFENSE ATTORNEYS (N = 86)	JUDGES (N = 52)
	I.	II.	III.
Changed	57	81	75
Not changed	43	19	25
	100%	100%	100%

X2 for columns IxII = 12.58 df = 1 p = .00

Table 6.12 Recommends as to Breadth of Eligibility Criteria for Repeat Offender Laws by Type of Respondent

Limit Repeat Offender Law to:	PROSECUTORS (N = 162)	DEFENSE ATTORNEYS (N = 80)	JUDGES (N = 75)
	I.	II.	III.
Habitual violent felons only	7	50	7
Any felons with prior felony convictions	72	48	89
Any offenders whether current or prior offenses are felonies or misdemeanors	21	3	4
	100%	101%*	100%

*Error due to rounding.
X2 for columns IxII = 64.86 df = 2 p = .00

One of the main effects of any change in the provisions of the repeat offender laws will be to tilt the relative advantages in the negotiating positions among the three roles in a new direction. Given that the repeat offender laws are rarely used for sentencing, this may be the only significant effect of any change (short of total abolition). It is with these cautions in mind that one should read the specific changes our respondents recommended for their respective repeat offender laws (see Table 6.13). Notice that whereas all three groups most frequently mentioned that the classification of how the repeat offender is defined should be adjusted, the type of refinements recommended go in different directions for prosecutors, defense attorneys and judges. Prosecutors were more likely to want to expand the

Table 6.13 Recommended Changes in Local Repeat Offender Law by Type of Respondent*
[Percent of Respondents Mentioning the Specific Change]

	PROSECUTORS	DEFENSE ATTORNEYS	JUDGES
	(N = 152)	(N = 136)	(N = 55)
Refine Classification of Repeat Offenders (Unspecified)	23	18	36
Add Mandatory Minimum Sentences	13	1	
Establish Easier Standards of Proof	12	-	2
Build More Prisons	8	-	5
Increase Sentences	7	1	2
Increase Judicial Discretion	5	14	29
Decrease Judicial Discretion	5	1	2
Expand Law to Include Minor Offenses	5	-	5
Reduce Law's Inclusion of Minor Offenses	5	6	2
Allow Use of Juvenile Records	3	-	-
Increase Prosecutor's Discretion	3	4	2
Include all Separate Offenses Regardless of Joinder for Trial or Other Legal Purposes	3	-	-
Include "Suspended Imposition," "Supervised Probation," "Withheld Sentence"	2	-	-
Expand Time Limit on Eligible Priors	2	-	-
Decrease Sentences	1	4	-

Greater Specification of Notice and Procedure Requirements	1	1	-
Greater Specification Regarding Use of Convictions Outside the State	1	-	-
Repeal the Repeat Offender Laws	-	14	4
Increase Procedural Protections for the Defense	-	10	5
Remove Mandatory Minimums	-	5	-
Limit Repeat Offender Laws to Violent Criminals	-	5	2
Reduce Time Limit on Eligible Prios	-	4	-
Reduce the Classification of Repeat Offenders	-	5	2
Examine Prior Convictions for Mitigating Factors	-	3	2
Reduce the Eligible Priors	-	3	-
Restore "Good Time"	-	1	-
Decrease Prosecutorial Discretion	-	-	2

* Respondents could mention numerous recommendations. Up to the three were coded.

Summary

A survey of the opinions of prosecutors, defense attorneys and judges regarding their respective repeat offender laws and their local enforcement has found that the majority of each type of respondent think that the frequency with which the law is currently being used either to obtain guilty pleas or to sentence is about right; that the law does not deter repeaters from future

qualifying criteria to include minor offenses; juvenile records; all separate offenses regardless of joinder; all priors regardless of time limits; and all convictions regardless of whether the sentences were suspended. In contrast, defense attorneys were more likely to reduce the scope of the definition to violent crimes. The tendencies of the judges is less clear because of the small numbers.

Although the differences among three types of respondents are the most striking feature of the findings, the answers to some of the specific questions are remarkable. Particularly noteworthy are those items when the majorities of each respondent type express the same opinion even though there is sufficient difference among the majorities to be significant. For instance, the majority of prosecutors, defense attorneys and judges think that the frequency of use (for any purpose) of the local repeat offender law is about right (Table 6.7); that the law has little special deterrent value (Table 6.4);[2] that the number of types of repeaters distinguished by the law is about right (Table 6.8); and that their local repeat offender laws should be changed (Table 6.11).

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2 While respondents believe the law will not deter habituals from future crime after release from prison, many respondents volunteered the view that at least the law served to protect the public while the offender was incarcerated. This incarcerate effect seemed to be the purpose their respondents felt the law served. Still other respondents who misunderstood our question initially stated that they thought the existence of the repeat offender law had not deterred first offenders from repeating their criminality.

criminality (beyond its incarcerative effect); and that the number of types of repeat offenders distinguished by the law is about right. Nevertheless, the majority also recommended that their repeat offender laws be changed.

However, the most striking finding is that despite the enormous variation among the states in the terms of their repeat offender laws our natural sample of respondents differ significantly in virtually all of their opinions about the fairness, effectiveness, justness and need for change of these laws.

Almost all the differences are statistically significant. All differences between prosecutors and defense attorneys are in the directions that favor the institutional interests of the respective type of respondent. Defense attorneys are more likely to see the local enforcement of the offender laws as ineffective, non-deterrent, too harsh in its consequences; less just in its consequences. They are more likely to believe that their repeat offender laws have sentences that are too long; do not make enough distinctions among the types of repeat offenders; restrict judicial discretion too much; are unsatisfactory overall; should be changed; and should limit their eligibility criteria to offenders with violent past and present records.

Judges are more similar to prosecutors than defense attorneys on all items except the need for changing their respective repeat offender laws.

Shifting the balance of power between these institutional interests may be something which policymakers want to do. If so

they should address it in these terms and not deceive themselves with discussions about the effectiveness and fairness of the repeat offender law. The appropriate vocabulary for any discussion of changing the repeat offender laws of a state should be in terms of changing the power of the state to convict and sentence the accused.

CHAPTER 7

REPEAT OFFENDER LAWS AND DETERMINATE SENTENCING

The Rise and Decline of the Indeterminate Sentence

In 1959 two reknown historians of American penology, Barnes and Teeters, (1959:437) wrote, "All experience since 1870 has confirmed the wisdom of the indeterminate sentence . . . ." Within a decade that conclusion was under serious attack. A sea change in American correctional thought was underway. Between 1970 and 1985, 16 states enacted major sentencing reforms. New sentencing structures with new emphases on different philosophical rationales were enacted. The main direction of the reform movement has been away from indeterminate systems and towards systems with greater degrees of determinacy, severity and equity.

The indeterminate rationale for sentencing had come to dominate American corrections since 1870 when the then National Prison Association called for its adoption. The aim of indeterminate systems is reformatory. The usual procedure is for the court to sentence offenders to a range of time within a minimum and a maximum set by the legislature. The final release decision is made by a parole board after a certain portion of the sentence has been served and when the offender was deemed to be reformed and/or not a danger to society.

Historically, the indeterminate sentencing system had represented a triumph of the positivist (scientific) school of criminology over the tenets of the classical school advanced by Caesare Beccaria. The goals of the classical school were to

reduce the severity and increase the equity and effectiveness of the criminal justice system. The underlying assumptions and ideological preferences of the classicists were as follows (Beccaria, 1963):

-- Punishment should fit the crime, not the criminal.[1]

-- The seriousness of the crime should be measured in terms of the social injury it caused.

-- The purpose of punishment is to deter.

-- The certainty of punishment is a more effective deterrent than its severity.

-- Inequities in sentencing reduce the deterrent value of sentences and and should not be allowed.

-- Discretion in sentencing reduces the certainty of punishment should not be allowed.

-- Punishments which are in excess of what is necessary to deter are philosophically unjustifiable.

The tenets of the Classical school were quickly put into practice. The French code of 1781 incorporated Beccaria's principle of "equal punishment for the same crime," fixing definite penalties for specific offenses with gradations in penalty according to the gravity of the offense. However, this attempt to eliminate all discretion from the courts proved unworkable because it required many minute differentiations in

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1 Bentham, a noted classicist, departed slightly from this principle. He recognized that the circumstances influencing the criminal should always be taken into account (Elliott, 1931:11).

the law to cover all types of offenses. Many injustices resulted, and hence the law was revised. In 1810 the new French code established maximum limits within which the judge might fix the penalty. However, no considerations of the nature of the criminal or aggravating or mitigating circumstances were taken into account in the sentencing code (Elliott, 1931:11).

The assumptions of the classicists were diametrically opposed to those of the positivists. For them, punishment should fit the criminal. The purpose of punishment should be to protect society but this should be done by reforming the criminal. For this purpose they should be sentenced to indeterminate periods until they have been reformed. Some types of criminals were deemed by some leading positivists as beyond reformation. Lombroso thought that some repeat murderers should be given the death penalty. Garofalo held that murderers who killed for brutal enjoyment or rape should be executed. Habitual criminals he would intern for life in overseas penal colonies. Ferri believed that indeterminate sentences should be set with ranges determined by the circumstances of the crime, the personality of the criminal and especially the dangerousness of the criminal (Elliott, 1931:12ff).

In America the indeterminate sentencing laws spread rapidly between 1877 and 1900. But by 1927 the pattern of legislation revealed a major inconsistency in correctional philosophy. Most of the states surveyed by Elliott (1931) had adopted indeterminate sentences but had restricted their application to the least serious offenses. The rehabilitative ideal was not fully

embraced as the correctional goal for all offenders, at least not initially. However, by 1974 43 states had indeterminate sentencing laws applicable to common felonies (Singer and Hand, 1974).

The attack on indeterminate sentencing which arose in the 1970's was multidimensional. Reformers who advocated determinate sentencing systems represented a disparate coalition of critics.[2] They agreed that indeterminate sentencing was problematic but they differed in their perceptions of the nature of the problem and in the goals to be achieved by the reformers. Some common perceptions were that the experiment in rehabilitation had failed and had resulted in gross disparities in sentencing. Common among the goals of the reformers was a renewed emphasis on the Classical goals of deterrence, equality and uniformity in sentencing (and hence minimal use of discretion), and on proportionality between the punishment and the crime. But also common was a revised version of the positivist's emphasis on the characteristics of the offender. But now the penalty should fit the criminal not for the sake of assuring his rehabilitation. Rather it should be done either out of punitiveness for his prior criminality or for the purpose of predicting his future criminality. The latter goal was emphasized by those reformers concerned with growing offender populations, limited prison capacity, fiscal conservation, cost-benefit ratios and the efficiency of correctional policies. Their goal was crime

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2 For a review of the reform movement see Springer (1985).

reduction at less cost through differential incarceration of offenders based on predicted risk of recidivism.

Three Paths Towards Determinacy

The move toward greater determinacy in sentencing has raised anew the two fundamental issues that have plagued public policy regarding the sentencing of repeat offenders. How should prior criminality be weighed in sentencing; and how much discretion should be left to the courts and prosecutors in determining the final sentence?

To an advocate of determinate sentencing the ideal-type solution of these questions would be a comprehensive sentencing system with sentencing matrices which specified fixed mandatory sentences based on graded mixes of seriousness of prior record and seriousness of instant offense together with a small degree of discretion to allow for small adjustments in the interests of justice. The system would not contain any redundant provisions which would allow for similar offenders to be sentenced to two or more widely varying sentences.

The determinate sentencing reforms which have been enacted have approximated this ideal-type model system to greater or lesser degrees. Some states have adopted sentencing systems which are virtually identical to our model (Minnesota, Ohio and Washington).[3] They have complex guidelines with rules for

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3 Washington's habitual offender law was not repealed until July 1, 1984. Our survey was conducted during July 1984 and respondents were asked about the habitual offender law, not the new sentencing guidelines.

weighing seriousness of prior record and seriousness of current offense. They prescribe fixed sentences and they have no redundant sentencing provisions. Their old habitual offender laws have been rescinded and the impact of prior record is specified entirely within the guideline matrices (see Exhibits 7.1 through 7.3 for illustrations).

A second approach (Alaska, Arizona, Connecticut, New Mexico, Tennessee) is almost as close a fit as the first. A presumptive sentence or sentence range is established and each prior conviction results in a specific increase in the sentence or the range. There are no redundant laws. "Habitual" offender provisions have either been eliminated or are simply the convenient name for those provisions in which the effect of priors is stated.

A third approach is considerably distant from the ideals of determinate sentencing (California, Colorado, Florida, Illinois, Indiana, New Jersey, North Carolina and Pennsylvania). Some degree of determinacy has been achieved but redundancies have been built into the system. Old habitual offender or other special recidivist laws have been allowed to continue or have been enacted. They coexist along with the new determinate provisions and thereby some repeat offenders eligible for two or more widely differing sentences. Rather than a comprehensive, well-integrated, finely graded systems of penalties, some of these systems represent a sort of legislative schizophrenia with a progressive reformist sentencing structure coexisting with regressive habitual-offender-type provisions which have many of

Exhibit 7.1 Sample Proposed Sentencing Guidelines For Armed Robbery, Wisconsin

STATE OF WISCONSIN
(FOR USE BEGINNING 1-83)

FELONY GUIDELINES SCORING AND SENTENCING INFORMATION

ARMED ROBBERY - 1983

1-Court Case No.	2-County	3-Sentencing Judge	4-Sentencing Date

5-Offender's Last Name	First	M.I.	6-Sex 1 ☐M 2 ☐F	7-High School Diploma or G.E.D. 1 ☐Yes 2 ☐No	8-Birthdate

9-Employed At Time of Offense 1 ☐Yes 2 ☐No	10-Race 1 ☐White 3 ☐Am. Indian 5 ☐Asian 2 ☐Black 4 ☐Hispanic 6 ☐Other	11-In Custody At Time of Adjudication 1 ☐Yes 2 ☐No	12-Offense Date

13- This is: 1 ☐ an original sentence 2 ☐ a new sentence imposed after a sentence modification hearing 3 ☐ a sentence imposed after revocation of probation	14- Final Plea entered 1 ☐Guilty 3 ☐No Contest 2 ☐Not Guilty	15- Was pre-sentence investigation ordered before sentencing? 1 ☐Yes 2 ☐No If yes, name of agent who prepared it:

CRIMINAL HISTORY SCORING

		POINTS
16-Did offender have legal status associated with an adult felony at time of current offense?	1 ☐ Yes = 1 point 2 ☐ No = 0 points	
17-If yes, type of legal status: 1 ☐ Probation 2 ☐ Bail 3 ☐ Parole/Supervised Release 4 ☐ Other (e.g., escapee)		
18-Does offender have MORE THAN three felony-type juvenile adjudications? (If yes, list four such adjudications below.)	1 ☐ Yes = 4 points 2 ☐ No = 0 points	

19-OFFENSE TITLE	DISPOSITION DATE Mo.	Yr.	OFFENSE TITLE	DISPOSITION DATE Mo.	Yr.
(1)			(3)		
(2)			(4)		

20-Number of offender's prior adult felony convictions: _____ Multiply by 2 = _____ points
(List prior adult felony convictions below. If more than eight, list others on a separate sheet and attach.)

21-OFFENSE TITLE	DISPOSITION DATE Mo.	Yr.	OFFENSE TITLE	DISPOSITION DATE Mo.	Yr.
(1)			(5)		
(2)			(6)		
(3)			(7)		
(4)			(8)		

22-Does offender have any prior convictions for violent felonies? (If yes circle at least one violent prior conviction on listing above.)	1 ☐ Yes = 8 points 2 ☐ No = 0 points	
23- TOTAL CRIMINAL HISTORY SCORE (A SCALE)		

SEVERITY OF OFFENSE SCORING

		POINTS
24-Did offender have an operable gun while committing offense?	1 ☐ Yes = 1 point 2 ☐ No = 0 points	
25-Was offender convicted of concealing identity during offense?	1 ☐ Yes = 2 points 2 ☐ No = 0 points	
26-Did the victim suffer "bodily harm" (as defined in the statutes)?	1 ☐ Yes = 3 points 2 ☐ No = 0 points	
27-List all other charges an offender has been convicted of and is being sentenced on at this time, below. If more than eight, list others on a separate sheet and attach.		

OFFENSE TITLE	OFFENSE DATE Mo.	Yr.	OFFENSE TITLE	OFFENSE DATE Mo.	Yr.
(1)			(5)		
(2)			(6)		
(3)			(7)		
(4)			(8)		

28- Circle all charges listed above that are Class B or Class A felonies. Number of circled Class B or A felonies. _____ Multiply by 4 = _____ points		
29- TOTAL SEVERITY OF OFFENSE SCORE (B SCALE)		

ARMED ROBBERY MATRIX

Offender Criminal History (A Scale)

Offense Severity (B Scale)	0	1-6	7-12	13-
0	**24-42 Months % Incar. = 45**	42-60 Months % Incar. = 74	60-78 Months % Incar. = 100	78-102 Months % Incar. = 88
1-2	42-60 Months % Incar. = 62	60-72 Months % Incar. = 95	78-90 Months % Incar. = 100	102-108 Months % Incar. = 95
3-7	60-72 Months % Incar. = 74	72-90 Months % Incar. = 95	90-108 Months % Incar. = 98	108-132 Months % Incar. = 100
8-	72-84 Months % Incar. = 91	90-102 Months % Incar. = 93	108-132 Months % Incar. = 91	132-156 Months % Incar. = 93

NOTE: Sentence ranges in the probation cells (the shaded cells) apply only if offenders are not placed on probation.

30 - Does the matrix indicate probation for the offender? 1 ☐ Yes 2 ☐ No → 31 - If no, what length of prison time is indicated? _____ to _____ Months

ACTUAL SENTENCE

32 - Was the offender placed on probation? 1 ☐ Yes → 33 - If yes, what length of probation was imposed? _____ Months, and
2 ☐ No

34 - Was prison time 1 ☐ Stayed, or 2 ☐ Withheld, and

35 - Was county jail time imposed as a condition of probation? 1 ☐ Yes → 36 - _____ Months
2 ☐ No

37 - If no, how much prison time was imposed? _____ Months

38 - Terms of this Sentence: 1 ☐ Single Charge 2 ☐ Concurrent with _____
3 ☐ Consecutive to _____ 4 ☐ Other

39-MITIGATING CIRCUMSTANCES

1. ☐ Victim does not want defendant severely punished.
2. ☐ Defendant's involvement in actual offense minimal or due to coercion, duress, or ignorance of commission of crime.
3. ☐ Defendant cooperated with authorities in apprehending or prosecuting other offenders.
4. ☐ Defendant's life, conduct or behavior has become stable since offense.
5. ☐ The defendant has maintained a substantial crime-free period, adult and/or juvenile, before this offense occurred.
6. ☐ Offender has demonstrated responsible action and judgment in other aspects of his or her life.
7. ☐ Defendant has made or will make restitution.
8. ☐ Defendant will participate in drug or alcohol treatment, or emotional/mental treatment, and it has been determined that such treatment will likely deter further criminal activity.
9. ☐ The offender lacked substantial capacity for judgment due to physical or mental impairment (does not include voluntary use of intoxicants, e.g., drugs or alcohol).
10. ☐ Defendant's age impaired judgment (extreme youth or extreme age).
11. ☐ Recommendation of the District Attorney.
12. ☐ Other circumstances that are listed below.

40-AGGRAVATING CIRCUMSTANCES

1. ☐ Special vulnerability of victim, such as victim young, elderly, handicapped or visibly pregnant.
2. ☐ Extreme injury to victim, including permanent physical or mental injury, disfigurement, or permanently handicapped (blinded, for example).
3. ☐ Wanton or extreme cruelty or depravity toward victim.
4. ☐ Offender used or threatened to use a firearm or other particularly menacing or dangerous weapon (if not included in matrix scoring).
5. ☐ Circumstances of offense indicate premeditation or extensive planning.
6. ☐ Extensive property damage, or contraband of unusual or great value, (e.g., artwork) or large amount of money.
7. ☐ If multiple participants, offender took major role or directed offense.
8. ☐ Multiple victims involved.
9. ☐ Prior juvenile offenses, especially prior violent juvenile offenses (if not included in matrix scoring).
10. ☐ Prior adult misdemeanors, especially prior violent misdemeanors.
11. ☐ Read-in offenses (if not included in matrix scoring).
12. ☐ Attitude or behavior of offender shows lack of remorse.
13. ☐ Other circumstances that are listed below and that are not included in the matrix scoring.

41 - JUDGE'S STATEMENT (Check one)

☐ The sentence imposed for this offense fits within the guidelines as shown on the matrix above.

☐ I have sentenced outside the guidelines. The aggravating or mitigating circumstances I have checked above plus any other factors listed here are the reasons for this decision.

Additional factors are:

_____ Signature of Sentencing Judge

_____ Date

FOR OFFICE USE ONLY

Within five days, mail this scoring sheet to: Office of Court Operations, Felony Sentencing Guidelines Study, 110 E. Main St., Room 503, Madison, WI 53703

ARMED ROBBERY: SCORING COMMENTARY

The A Scale is a measurement of the defendant's prior criminal record. The A Scale Score indicates an increase in extent of prior record from left to right on the matrix.

A SCALE SCORING COMMENTARY

One point should be added if the defendant has legal status when committing the offense. Having legal status in this sense includes being on parole, probation for a prior felony, Huber, or being an escapee from a correctional institution. Only one point may be added even if the defendant had double status (e.g., on probation and also on bail).

Four points are added if the defendant has more than three formal felony-type juvenile adjudications, but no more than four points can be added no matter how many juvenile adjudications have occurred. Juvenile status offenses, such as uncontrollable and runaway, should not be counted.

For each prior adult felony conviction regardless of the sentence (i.e., fine, probation, etc.) two points are added to the A Score.

Eight points are added if the defendant has any prior adult conviction for violent felonies. Only eight points may be added regardless of the number of previous violent felony convictions. A violent felony is one which involves the threat or use of force, such as robbery, sexual assault, armed robbery, etc.

The B Scale is a measurement of the seriousness of the offense. The B Scale indicates an increase in the severity of the offense or case from the top to the bottom of the matrix.

B SCALE SCORING COMMENTARY

One point is added if the offense was committed with an operable gun. It need not have been fired. Starters' pistols and similar guns which may cause serious injury are included. However, a point is not added if the gun was a toy, feigned, or inoperable.

Two points should be added if the defendant is convicted of concealing identity, statute number 946.62.

Three points should be added if there is "bodily harm" to the victim (as defined in the statutes).

Four points should be added for each additional conviction now being sentenced that is more serious or as serious as the conviction being scored. Seriousness is based on statutory designation of Class A, B, C, D, and E felonies.

AFTER CALCULATING THE SCORES FOR THE A SCALE AND B SCALE THE INTERSECTION OF THE TWO SCORES IS PLOTTED ON THE MATRIX. THE CELL IN WHICH THE INTERSECTION OCCURS CONTAINS THE APPROPRIATE SENTENCE RANGE. Aggravating circumstances may require that the maximum legal sanction be imposed regardless of the indicated guideline sentence. Note, also, that shaded cells indicate the greater likelihood of a sentence of probation. If incarceration is imposed, the sentence range in months is indicated. Sentence ranges in the shaded cells do not apply to the length of probation.

SAMPLE ARMED ROBBERY CASE

(See pages 16 and 17 for a sample score sheet filled in for this sample offense.)

Name: John D. Case Number: 2527
Date of Birth: 7/29/49
Sex: Male
Race: Black
Level of Education: High School Graduate
Employment at the time of offense: Unemployed
Marital Status: Divorced

OFFENSE INFORMATION

Police reports indicate that the defendant with a sawed-off shotgun held up an adult male in a parking lot. The offense took place in Milwaukee County on November 6, 1976. Acting alone, the defendant obtained contraband with a value of less than $500. The victim was threatened, but was not physically harmed.

CONVICTION/PLEA

The defendant entered a plea of guilty to one count of armed robbery. Another count of armed robbery is to be read into the record at the time of sentencing. The defendant has been in jail since his arrest. Sentencing is scheduled for April 8, 1977.

PRIOR RECORD

Juvenile Adjudications: Unknown

Offense	Date	Disposition	Jurisdiction
Adult Misdemeanors:			
Carrying a Concealed Weapon	5/24/74	30 days	Milwaukee
Hindering an Officer	1/19/76	$150	Milwaukee
Adult Felonies:			
Burglary	8/1/69	2 yrs. Prob.	Milwaukee

Exhibit 7.2 Sentencing Grid, Washington

SERIOUSNESS SCORE	OFFENDER SCORE									
	0	1	2	3	4	5	6	7	8	9 or more
XIV	Life Sentence without Parole/Death Penalty									
XIII	23y4m 240- 320	24y4m 250- 333	25y4m 261- 347	26y4m 271- 361	27y4m 281- 374	28y4m 291- 388	30y4m 312- 416	32y10m 338- 450	36y 370- 493	40y 411- 548
XII	12y 123- 164	13y 134- 178	14y 144- 192	15y 154- 205	16y 165- 219	17y 175- 233	19y 195- 260	21y 216- 288	25y 257- 342	29y 298- 397
XI	6y 62- 82	6y9m 69- 92	7y6m 77- 102	8y3m 85- 113	9y 93- 123	9y9m 100- 133	12y6m 129- 171	13y6m 139- 185	15y6m 159- 212	17y6m 180- 240
X	5y 51- 68	5y6m 57- 75	6y 62- 82	6y6m 67- 89	7y 72- 96	7y6m 77- 102	9y6m 98- 130	10y6m 108- 144	12y6m 129- 171	14y6m 149- 198
IX	3y 31- 41	3y6m 36- 48	4y 41- 54	4y6m 46- 61	5y 51- 68	5y6m 57- 75	7y6m 77- 102	8y6m 87- 116	10y6m 108- 144	12y6m 129- 171
VIII	2y 21- 27	2y6m 26- 34	3y 31- 41	3y6m 36- 48	4y 41- 54	4y6m 46- 61	6y6m 67- 89	7y6m 77- 102	8y6m 87- 116	10y6m 108- 144
VII	18m 15- 20	2y 21- 27	2y6m 26- 34	3y 31- 41	3y6m 36- 48	4y 41- 54	5y6m 57- 75	6y6m 67- 89	7y6m 77- 102	8y6m 87- 116
VI	13m 12+- 14	18m 15- 20	2y 21- 27	2y6m 26- 34	3y 31- 41	3y6m 36- 48	4y6m 46- 61	5y6m 57- 75	6y6m 67- 89	7y6m 77- 102
V	9m 6- 12	13m 12+- 14	15m 13- 17	18m 15- 20	2y2m 22- 29	3y2m 33- 43	4y 41- 54	5y 51- 68	6y 62- 82	7y 72- 96
IV	6m 3- 9	9m 6- 12	13m 12+- 14	15m 13- 17	18m 16- 20	2y2m 22- 29	3y2m 33- 43	4y2m 43- 57	5y2m 53- 70	6y2m 63- 84
III	2m 1- 3	5m 3- 8	8m 4- 12	11m 9- 12	14m 12+- 16	20m 17- 22	2y2m 22- 29	3y2m 33- 43	4y2m 43- 57	5y 51- 68
II	0-90 Days	4m 2- 6	6m 3- 9	8m 4- 12	13m 12+- 14	16m 14- 18	20m 17- 22	2y2m 22- 29	3y2m 33- 43	4y2m 43- 57
I	0-60 Days	0-90 Days	3m 2- 5	4m 2- 6	5m 3- 8	8m 4- 12	13m 12+- 14	16m 14- 18	20m 17- 22	2y2m 22- 29

NOTE: Numbers in the first horizontal row of each seriousness category represent sentencing midpoints in years(y) and months(m). Numbers in the second and third rows represent presumptive sentencing ranges in months, or in days if so designated. 12+ equals one year and one day.

Exhibit 7.3 Offender Score Matrix, Washington

Prior Adult Convictions

Current Offenses	Serious Violent	Burglary 1	Other Violent	Other ((Negligent)) Vehicular Homicide	Escape
Serious Violent	3	2	2	((1))2	1
Burglary 1	2	2	2	((1))2	1
Other Violent	2	2	2	((1))2	1
((Negligent)) Vehicular Homicide	0	0	0	((1))2	0
Escape	0	0	0	0	1
Burglary 2	1	2	1	1	1
Other Non-Violent	1	1	1	1	1
Drug	1	1	1	1	1

Current Offenses	Burglary 2	Felony ((Hit-and-Run)) Traffic	Serious Traffic	Other Non-Violent	Drug
Serious Violent	1	1	0	1	1
Burglary 1	2	1	0	1	1
Other Violent	1	1	0	1	1
((Negligent)) Vehicular Homicide	0	1	1	0	0
Escape	0	0	0	0	0
Burglary 2	2	1	0	1	1
Other Non-Violent	1	1	0	1	1
Drug	1	1	0	1	2

Prior Juvenile Convictions

Current Offenses	Serious Violent	Burglary 1	Other Violent	Other ((Negligent)) Vehicular Homicide	Escape
Serious Violent	3	2	2	((1/2))2	1/2
Burglary 1	2	2	2	((1/2))2	1/2
Other Violent	2	2	2	((1/2))2	1/2
((Negligent)) Vehicular Homicide	0	0	0	((1))2	0
Escape	0	0	0	0	1/2
Burglary 2	((1))1/2	2	((1))1/2	1/2	1/2
Other Non-Violent	((1))1/2	((1))1/2	((1))1/2	1/2	1/2
Drug	1/2	1/2	1/2	1/2	1/2

Current Offenses	Burglary 2	Felony ((Hit-and-Run)) Traffic	Serious Traffic	Other Non-Violent	Drug
Serious Violent	1/2	1/2	0	1/2	1/2
Burglary 1	1	1/2	0	1/2	1/2
Other Violent	1/2	1/2	0	1/2	1/2
((Negligent)) Vehicular Homicide	0	1/2	1/2	0	0
Escape	0	0	0	0	0
Burglary 2	1	1/2	0	1/2	1/2
Other Non-Violent	1/2	1/2	0	1/2	1/2
Drug	1/2	1/2	0	1/2	1

Definitions:
Serious Violent: Murder 1, Murder 2, Assault 1, Kidnapping 1, Rape 1
Escape: Escape 1, Escape 2, Willful Failure to Return From Work Release or Furlough
Serious Traffic: Driving While Intoxicated, Actual Physical Control, Reckless Driving, Hit-and-Run
Felony Traffic: Felony Hit-and-Run, Vehicular Assault, Attempting to Elude a Police Officer
Drug: All felony violations of chapter 69.50 RCW except possession of a controlled substance

the notorious drawbacks associated with such laws since the 1920's.

The Repeat Offender In the Ideal-Type Determinate System: Minnesota

Our telephone interviews provide a brief glimpse at how satisfactorily the problem of repeated criminality has been handled in a determinate sentencing system which seems to fit the ideal-type model of such a system. Under Minnesota law all sentences are controlled by the guidelines.[4] Under the guidelines judicial discretion has been minimized. Mandatory, fixed sentences or narrow ranges are determined by a matrix of offense severity and prior criminal history. All offenses are listed in an offense severity scale with ten ranked categories. Prior criminal history scores range from zero to six. An offender is assigned one point for each felony conviction for which a felony sentence was stayed or imposed before the current sentencing. He is assigned one "unit" for each prior misdemeanor conviction and two "units" for each prior gross misdemeanor conviction. Four units are required to equal one point. In addition, an offender is assigned one point for every two offenses committed and prosecuted as a juvenile that would have been felonies if committed by an adult.[5]

The official purpose of Minnesota sentencing guidelines is

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4 Except first degree murder which has a mandatory life sentence. Minn. Stats. Ann. 1984 supp., Vol. 16, § 221 to 244.

5 All prior convictions are subject to certain qualifications as to recency and arising from separate incidents.

to achieve equity and rationality in sentencing. The legislature explained its purpose as follows:

> "The purpose of the sentencing guidelines is to establish rational and consistent sentencing standards which reduce sentencing disparity and ensure that sanctions following conviction of a felony are proportional to the severity of the offense of conviction and the extent of the offender's criminal history.
>
> Development of a rational and consistent sentencing policy requires that the severity of sanctions increase in direct proportion to increases in the severity of criminal offenses and the severity of criminal histories of convicted felons."[6]

A unique and noteworthy feature of the Minnesota guidelines is the way they handle prior criminal history and other factors relating to the status of the defendant. They specifically eliminate any influence of certain status factors such as race, sex, employment-related factors (such as employment history and status at time of offense) and other social factors (such as educational attainment, martial status, length of residence). Many of these factors have traditionally been relied upon by judges in their sentencing decisions. Other things being equal offenders with steady employment histories were regarded as a safer risk for probation, for instance. But these same status factors have racial, sexual and social class biases associated with them which the guidelines sought to eliminate.[7]

As for prior criminal history, the guidelines do not

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6 Minn. Stats. Ann., 1983 supp., Vol. 16, § 224: Appendix.

7 The Minnesota Commission's study had found that unlike other states these factors had not been important in Minnesota dispositional decisions. Id.

eliminate its influence but do downgrade it and attempt to bring consistency to its influence by providing the unequivocal rules for calculating the weight to be given various types of prior convictions. The guidelines state that prior criminal history is being downgraded to a "secondary factor in dispositional decisions" so that the offense at conviction will be the primary factor.

These policy choices of eliminating and downgrading the influence of status variables seem to be designed to achieve the correctional philosophy of classical criminology and of retributivism both of which emphasize that punishment should fit the crime not the offender. However, according to some of the eight judges, prosecutors and defense attorneys in the two Minnesota jurisdictions (Ramsey County (St. Paul) and St. Louis County (Duluth)) we surveyed, the real reason for the policy of downgrading the effect of prior records was purely pragmatic. It was done to reduce the prison population.

The opinion of our eight respondents regarding Minnesota's experiment in determinate sentencing was remarkably uniform. They disliked it, some of them vehemently. Their complaints echoed the problems which developed with the French penal code of 1791, the West's first attempt at strictly determinate sentencing. They thought it had no deterrent[8] value; it produced unjust sentences; it was too mechanical and inflexible; and it removed

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8 Special deterrence, i.e. it did not deter the present offender from future criminality.

accountability in sentencing. On the other hand, they agreed that it had virtually eliminated plea bargaining that involved prior records;[9] and it did produce greater consistency in sentencing. But, they reported that consistency in sentencing produces injustices of its own kind. Several recommended a return to the indeterminate system and the parole board. (Although one prosecutor favored retaining the guidelines but revising them.)

Three kinds of sentencing injustices were reported: the general leniency of the sentences; the inflexibility of the system; the inappropriate weighing of factors within the sentencing matrix. All respondents agreed that the sentences prescribed by the new law are lenient. As a result some offenders who should be serving larger sentences are not. It also means that any incapacitative effect of sentencing on crime rates is minimal. Yet while the shorter sentences favor offenders in general the inflexible and mandatory provisions have disfavored certain types of offenders who now have to be sentenced to prison but formerly had been given local jail time plus probation.

The complaints about the inappropriate weighing of factors focused specifically on prior criminal history. Prosecutors and judges were highly critical of the policy of downgrading the weight given to prior records. In their view this was not the

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9 Although plea bargaining involving the reduction of the grade of the instant offense occurs.

way to adjust for limited prison capacity. It resulted in sentences which were in their view "ridiculous." One prosecutor (#077) cited as an example one of his current cases in which a burglar with seven priors plus being a parole violator is being sentenced under the guidelines to 41 months which with good time credit will mean about two and a half years to serve. Another prosecutor (#078) cited an example of a first degree rapist with four or five priors who was sentenced to six years (minus good time). In short, these respondents believed that repeat offenders are better off in Minnesota than anywhere in the country and that this policy should be changed.

The other complaint about the weighing of the prior record was that it is insensitive to differences in the seriousness of different kinds of priors. One point is given for every felony conviction (or its equivalent as noted earlier). All prior felonies are treated equally even though one may involve a death and the other merely a bad check. No distinction between property offenses and violent offenses is made.

The Minnesota guidelines succeeded in having prior records treated uniformly and consistently but failed at capturing the qualitative differences among different types of prior criminal histories. Whether this is an inherent limitation of the quantified formula approach to the rating of prior criminal histories remains to be seen. Such formulas can be weighed for seriousness as is being done in Washington (see Exhibit 7.3) where violent priors are counted more heavily than nonviolent ones. But, whether the problem can be solved by such refinements

without also reintroducing more judicial discretion has yet to be demonstrated.

The complaint about the lack of accountability under the guidelines referred to the fact that the system operated so automatically and with so little discretion that no one at the local level (particularly the judge) bore any major responsibility for sentencing outcomes. All the important decisions had already been made by some nebulous sentencing commission (with the approval of the legislature) which was not directly responsible to the local community. This restriction on discretion and the relocation of power and responsibility from the local judges to the sentencing commission/legislature was resented and was regarded as a mistake.

Something Old and Something New: Determinate Sentencing Systems With Redundancies

In contrast to Minnesota's attempt to achieve a model determinate sentencing system, other reform jurisdictions have created redundant sentencing structures (California, Colorado, Florida, Illinois, Indiana, New Jersey, North Carolina, Pennsylvania). In these systems prior criminal record can effect the sentence in either one of two ways. It is listed as an aggravating factor which may justify an enhanced sentence over the normal presumptive sentence. But in addition, it operates through a separate habitual-offender-type law. The functions of these habitual offender laws vary. In some places (Colorado, Florida, Indiana, New Jersey) they are wholly redundant and provide prosecutors with the option of pursuing more severe

sentences than those established by the complex formulas of the sentencing guidelines. For instance, under the Florida sentencing guidelines a person convicted of one count of third degree theft with one prior third degree felony conviction would receive a score of 18 on the guidelines for which the recommended sentence is "any nonstate prison sanction" (Florida Sentencing Guidelines Commission, 1983). Under the Florida habitual offender statute the same offender is eligible for imprisonment for up to ten years.[10]

The Florida sentencing guidelines took effect in October 1983. By the summer of 1984 when we conducted our telephone survey, the Florida courts had not yet decided whether the habitual offender law would be allowed to operate in tandem with or be superseded by the new sentencing guidelines.[11] Florida prosecutors were uncertain as to how they would use the habitual offender law. A Pasco County prosecutor (#032) noted that under the old system the habitual offender law was frequently used to obtain guilty pleas. Because the new sentencing guidelines include prior record in calculating the sentences, he was unsure whether he could still use the habitual offender changes for plea negotiations. A West Palm Beach prosecutor (#188) reported that under the new sentencing guidelines the judges have been

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10 West's Fla. Stat. Ann., 1983 Supp., Vol. 22 Title 44, § 775.084.

11 The legislature specifically provided that the two systems would co-exist, see West's Fla. Stat. Ann., 1981, § 777.084 and § 775.087.

reluctant to find "clear and convincing" reasons to depart from the recommended sentence. Therefore he is planning to file habitual offender charges as a tactic to get judges to impose more severe sentences. The head of the career criminal unit (#187) reported that the unit attorneys had considered the possibility of using the habitual offender charge to circumvent the sentencing guidelines but had not yet done so. The two Florida defense attorneys (#317 and #318) surveyed favored repealing the habitual offender law because of its redundancy.

Under Indiana law all sentences are to specific terms.[12] Prior record is an aggravating factor which can be used to enhance the fixed term by up to a specified amount (e.g. class A felony gets a fixed term of 30 years with up to 20 more years in aggravation). An "habitual" offender is based upon having any two prior unrelated felony convictions. Invoking the habitual offender statute can add a mandatory 30 additional years to the basic sentence. Thus a class D felon whose basic sentence must be between one and four years can be faced with a possible sentence of from 31 to 34 years. A class A felon may be sentenced up to 50 years (30 fixed plus up to 20 in aggravation) plus an additional 30 for being an habitual. Thus in Indiana even after sentencing reform the habitual offender law retains its much criticized characteristics of providing severe sentences for crimes of lesser severity (i.e. class D felonies). In addition, because of its mandatory nature it gives prosecutors a

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12 Indiana Code Ann., 1983 Supp., § 35-50-2-1 through § 35-50-2-8.

means of countering the sentencing tendencies of judges who use the limited discretion they have left under the new system to impose "lenient" sentences. The Indiana prosecutors we interviewed were very satisfied with the law. They use it primarily for plea negotiations.

In North Carolina, an habitual offender is defined as having any three prior felony convictions and carries a mandatory minimum sentence of seven years.[13] Prior convictions can also be used as aggravating factors justifying sentences above the fixed presumptive term. Thus a class J felon with three prior felonies could be sentenced either to an aggravated sentence of three years or as an habitual with a presumed sentence of 14 years and a mandatory minimum of seven.[14]

In other places (California, Illinois, Pennsylvania) where determinate sentencing operates in tandem with a habitual offender law the latter is only partially redundant. Typically it targets some special class of serious repeater for mandatory and severe sentences. Usually it creates a plea negotiating opportunity for prosecutors because it overlaps fact patterns already covered by the basic sentencing provisions. For instance, the Illinois determinate sentence law provides that "prior delinquency or criminal activity" is an aggravating factor which can justify the imposition of extended terms.[15] For murder, the

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13 N.C. Gen. Stats., 1983 Supp., Vol. 1B, § 14-7.6.

14 Id. at § 15A-1340.4.

15 Ill. Criminal Code, 1983 Supp., § 1005-5-3.2.

presumptive sentence range is not less than 20 years nor more than 40 years. For class X felonies it is 6 to 30 years.[16] "Prior criminal activity" can extend these ranges to 40 to 80 years for murder and 30 to 60 years for class X felonies.[17] But Illinois also provides that a third conviction for murder or a class X felony constitutes an "habitual criminal" and such offenders shall be sentenced to life imprisonment.[18]

California law targets offenders with records of serious crimes for special sentencing but provides three different and partially inconsistent ways of skinning the same cat. For example, a person convicted of a "serious" felony with a prior conviction for a "serious" felony shall receive an additional five year enhancement for each such conviction.[19] Some "serious felonies" are also listed as "violent felonies" in a separate provision (§ 667.5) which provides for a mandatory three year enhancement per prior violent felony conviction. Finally, some "serious" felonies which are also listed as "violent" felonies would also qualify under yet another section of the code (§ 667.7) which provides for a mandatory life sentence for conviction of offenses involving force likely to produce great bodily harm plus two prior convictions for "violent" felonies. Thus, the same third-time loser could be sentenced either to a

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16 Id. at § 1005-8-1.

17 Id. at § 1005-8-2.

18 Ill. Crim. Code, 1983 Supp. § 33B-1.

19 Calif. Penal Code, 1984 Supp. § 667.

mandatory additional ten years or a mandatory additional six years or a mandatory life sentence. Such inconsistencies are particularly glaring when the stated legislative intent is to achieve uniformity in sentencing. In explaining the goals of its reformed sentencing system, the California legislature states as follows:

> "The Legislature finds and declares that the . . . purpose of imprisonment for crime is punishment. This purpose is best served by terms proportionate to the seriousness of the offense with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances. The Legislature further finds and declares that the elimination of disparity and the provision of uniformity of sentences can best be achieved by determinate sentences fixed by statute in proportion to the seriousness of the offense as determined by the Legislature to be imposed by the court with specified discretion.[20]

But, the inconsistencies are due in part to contingencies beyond the legislature's control. The California "habitual offender law" was added to the new determinate sentencing system by an Initiative Measure approved by the people on June 8, 1982.[21]

Pennsylvania has implemented a sentencing guidelines system in which prior records are scored between zero and six and taken

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20 Calif. Penal Code, 1984 Supp., § 1170(a)(1).

It is noteworthy that this statement of purpose completely ignores the matter of prior criminality. This omission seems to be more than a mere oversight on the part of the author of the statement. The fact that offenders with the same prior record and instant offense could be sentenced to three substantially different terms suggests that the failure to address the impact of prior record on achieving uniformity in sentencing was a basic flaw in the California reform effort.

21 Calif. Penal Code, 1984 Supp., § 667.

together with an offense gravity score set the recommended sentence ranges.[22] Courts can depart from the ranges if they give written reasons. There is no reference in the sentencing laws to "habitual" offenders; but a mandatory minimum sentence of five years is provided for persons convicted of certain violent offenses and with one or more prior convictions for certain violent offenses, e.g. second conviction for aggravated assault.[23]

Prior Criminality and Determinate Sentencing: A Summary

The sixteen states[24] which have reformed their sentencing laws in the direction of greater determinacy have addressed the problem of prior criminality in two ways. Half have created a single sentencing structure in which prior criminality may or must increase the presumptive sentence (or range) in a prescribed way. The other half have created redundant sentencing structures under which the same defendant with the same prior record might be sentenced to either of two widely different sentences.[25] The redundancy is created by allowing habitual offender laws to co-exist in tandem with a determinate sentencing system which

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22 Penn. Consol. Stats. Ann., 1982, Title 42, § 9721.

23 Id. at § 1714.

24 Alaska, Arizona, California,* Colorado,* Connecticut, Florida,* Illinois,* Indiana,* Minnesota, New Jersey,* New Mexico, North Carolina,* Ohio, Pennsylvania,* Tennessee and Washington.

25 States with redundancies are the ones with asterisks in footnote 24.

already provides for prior criminality to be taken into account. In some cases (California, Illinois, Pennsylvania) these habitual offender laws are applicable only to the more serious offenders. Typically they provide mandatory sentences in contrast to the rest of the sentencing structure which allows for more discretion. Sometimes the legislature states that these mandatory habitual offender laws represent its way of expressing special condemnation of the type of criminal they describe. However the wisdom of using redundant laws to achieve such an objective is doubtful. Such condemnations (i.e., severe penalties for certain mixes of serious instant and prior criminality) could be achieved through a nonredundant sentencing system; and, doing so through a redundant special law serves only to create a plea bargaining option and to diminish the determinate sentencing reform goals of predictable, consistent, uniform sentencing. In California, for example, certain types of offenders may be sentenced under any of three different provisions. Depending upon the provision chosen the same offender may be subject to either a three year enhancement for each prior conviction, a five year enhancement or a mandatory life sentence. But the redundancy in California illustrates another complication in American penal reform. The California habitual offender law was appended to the determinate sentencing law via a citizen initiative measure. Rationality in sentencing reform can be undone by populist action.

The extent to which the goal of consistent sentencing is diminished by the co-existence of redundant habitual offender laws is even greater in those states where the habitual offender

law is not narrowly limited in its applicability (Colorado, Florida, Indiana, New Jersey). In those states sentencing reform has produced an irrational melange of sentencing options. Finely wrought sentencing grids in which carefully calibrated offender and offense seriousness matrices are linked to gradually increasing punishments exist side by side with the old blunderbusts of habitual offender laws. In Florida, the same minor offender whom the sentencing grid indicates should not receive a state prison sanction is eligible for up to ten years of imprisonment under the habitual offender.

In states with redundant laws for dealing with repeated criminality, sentencing reform has failed to address the traditional criticisms of habitual offender laws. In some places those laws still provide for severe and usually mandatory sentences for relatively minor offenders. They are rarely used to sentence people; and, hence they provide the opportunity for arbitrary, capricious, or biased enforcement. When they are used, it is primarily for plea negotiations. Thus both the goals of uniform sentencing for all and punitive sentencing for selected serious offenders are defeated.

Policymakers intent upon achieving both of these goals would do well to consider determinate sentencing systems which do not have redundant habitual, persistent other repeat offender provisions tacked on. Sentencing guideline grids can go a long way toward solving the perennial problem of repeat/dangerous offender legislature, namely, specifying with considerable precision who the target(s) of such laws are. In addition the

experience in Minnesota suggests that through such nonredundant determinate systems the legislature can effectively assure itself that an offender's prior record will be given the weight which the legislature desires.

However, the Minnesota experience also seems to reconfirm a lesson in the limits of determinacy in sentencing, a lesson which was first learned when the French Penal Code of 1791 tried to achieve Beccaria's ideal of a discretionless sentencing structure. Finely calibrated sentencing structures cannot eliminate the need for some discretion. Otherwise, uniformity in sentencing is obtained at the price of injustices to those cases which fit the technical definitions of the law but should not be included. The Minnesota experience also suggests two other conclusions. Should a legislature choose to downgrade the weight given to prior criminal history, the resulting sentences will probably be perceived as unjust by local prosecutors and judges. Similarly, should serious prior criminal histories be measured by a formula which weigh all prior felony convictions equally without regard to the differences in seriousness among them, the resulting sentences will probably be perceived as unjust by local prosecutors, judges and defenses.

Determinate sentencing holds the promise of dealing with the problem of the repeat offender in a rational and consistent way. It provides a possible solution to several of the perennial problems of traditional repeat offender legislation. But, that potential has been compromised by half the states which have moved toward sentencing determinacy.

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