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

EXECUTIVE SUMMARY*

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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

For well over a century policymakers at home and abroad have wrestled with developing an effective, fair and efficient sentencing policy for the offender who recommits crime after being punished (or treated) for a first offense. Special sentencing laws for the repeat, habitual or persistent offender were enacted as early as 1797 in the United States but as of 1949 these laws were rarely invoked for sentencing purposes and when enforced were allegedly applied against less serious offenders. No systematic, nationwide research of the use or characteristics of these laws has been done. But the problem of the repeat offender continues to be a central concern of the general public, crime commissions and other policymakers.

This study examines the history, content and operation of these laws. It integrates the findings of previous research, sometimes confirming or extending them, sometimes challenging them. Its main contributions to the state of knowledge on the topic are:

- its updated synthesis of existing research;
- its historical analysis of the development of these laws;
- its analysis of the crucial characteristics of these laws;
- its national survey of the use of the laws and the perceptions of judges, prosecutors and defense attorneys regarding their value and need for changing them;
- its analysis of the conceptual and moral problems involved in defining the targets of these laws;
- the analysis of the characteristics of a national sample of offenders sentenced as repeaters;
- the analysis of how the problem of the repeat offender has been handled by the new determinate sentencing systems.

THE APPROACH

The past decade has witnessed a sea change in American correctional policy (Shane-Dubow et al., 1985). Driven by a convergence of public and professional dissatisfaction with the effectiveness and fairness of American corrections a reform movement has been launched. Indeterminate sentencing systems are being replaced by determinate ones.

The search for new correctional policies has been fed by research that has documented the long-suspected fact that a small proportion of all offenders commit a vastly disproportionate share of serious crime (e.g. Wolfgang et al., 1972). Such studies rekindled the perennial interest in policies focused on the "serious," "repeat," "career," "habitual" offender. Special "career criminal" programs were established in police agencies and prosecutors' offices; and sentencing reformers were advocating a policy of selective incapacitation whereby serious, repeat offenders would be sentenced to longer terms and the rest would be given comparatively lenient terms (Greenwood and Abrahamse, 1982).

Against this background it was to be expected that a new look at existing laws and practices relating to the sentencing of repeat offenders would be taken. The present study does that. It was designed in response to a solicitation from the National Institute of Justice (NIJ). The approach taken, the logic of the sampling designs, and the content of questions were dictated by the purpose and financial constraints of the grant. NIJ decided that before any in-depth studies of the operation of the repeat

offender law in particular jurisdictions should be done, a broad survey of the law and practice was needed. Accordingly our approach consists of two surveys: one of the laws relating to the sentencing of the repeat offender; the other, the administration of these laws. The former involves an analysis of all the repeat offender laws (as we define them). The latter consists of telephone surveys of nationwide samples of prosecutors, judges and defense attorneys who are familiar with the administration of the repeat offender laws in their jurisdictions.

For our legal analysis we adopted Brown's (1945) distinction between recidivist sentencing laws that provide enhanced penalties for subsequent convictions of the identical offense and those laws whose qualifying criteria are cast in more general terms. We focus exclusively on the latter. Thus, laws which provide enhanced penalties for an identical second offense (petty theft or drunk driving, for example) were excluded. Our study deals only with laws which provide an enhanced penalty for the second conviction of any felony following a first felony or misdemeanor conviction (or any other combination of general category of present and/or prior offense). We will refer to them as "general" recidivist laws but we will also show that these general laws vary in their degree of specificity from completely general to highly specific. Also, we use the terms repeat, recidivist, habitual and persistent offender interchangeably.

The Samples

The survey of the law included all general recidivist sentencing-related laws in effect on December 31, 1982, in all American jurisdictions. This amounted to 47 states plus the District of Columbia and the federal system.

Within each state which had a repeat offender law two local jurisdictions were randomly chosen, one from localities with 1980 populations between 50,000 and 250,000 and one from larger localities. In the nine states that lack localities with populations over 250,000, a second jurisdiction was chosen from among those with 50,000 to 250,000. With the District of Columbia and one federal district included our sample consists of 96 jurisdictions. Within these jurisdictions 179 prosecutors, 91 defense attorneys, and 89 judges were interviewed by phone between May 15, 1984, and October 30, 1984.

The selection of the respondents to be interviewed was based on a nonprobability, "purposive" sampling strategy. It was intended to maximize the validity of our findings by ensuring that our respondents had direct, firsthand experience with the administration of the repeat offender laws in their jurisdiction. We sought respondents who were among those actors in the local system who were the most familiar with the operation of their repeat offender law. Identifying such people was done by calling the appropriate official (chief prosecutor, chief criminal court judge, chief public defender) in a jurisdiction, explaining our purpose, and asking him/her to identify the most knowledgeable

respondent(s) in his/her office. When the designated knowledgeable respondent was contacted, we made an additional check for validity. At the outset of each interview we asked them to tell us how familiar they were with the local administration of the repeat offender law. If they indicated they were not very familiar, we asked him/her to identify someone else who was more familiar and then terminated the interview excluding it from our sample. However, in most small jurisdictions the law was rarely invoked and consequently no one was very familiar with its use. In such places we interviewed respondents who were among the most familiar of the available pool of relevant respondents. At the end of all interviews the interviewer rated the respondent's familiarity with the repeat offender law based on the quality and level of detail of the respondent's overall response. In almost all cases we were satisfied that our respondents knew what they were talking about.

We concluded early in the survey process that our method of identifying knowledgeable respondents was working. There was rarely any doubt among the people we called as to who the relevant respondents were; nor was there any doubt in our own minds as to how familiar individual respondents were regarding the administration of the local law. In large jurisdictions we were directed to the heads of career criminal units in prosecutor's offices and public defenders who had devoted special attention to the repeat offender laws. In smaller jurisdictions we were directed to the attorneys who handled the few cases where the law was invoked.

In sum, then, our findings represent the experiences and opinions of samples of prosecutors, judges and defense attorneys drawn from local practitioners who are the most knowledgeable about the use of their local repeat offender law. Jurisdictions represented in the samples consist of one large and one small jurisdiction from all American states which have repeat offender laws (except for the nine rural states where both jurisdictions are small) plus the District of Columbia and a federal jurisdictions.

Through the interview process we also generated a sample of cases in which eligible defendants had actually been sentenced as repeat offenders. This sample was created by asking all defense attorneys and prosecutors to describe one recent case which they remembered well in which a local offender had been sentenced as a repeat offender. This produced a sample of 139 cases of offenders sentenced as habituals. This sample cannot be generalized to any known population of state or federal offenders sentenced as habituals. Rather the value of the sample lies in its use as a heuristic device and tentative counterbalance to some of the general conclusions that have been drawn in the very limited and inadequate literature on who is sentenced as habituals. The value of this sample is to be appreciated by looking at it from the perspective of what else is available rather than from the ideal of what one would want if resources permitted a fuller study.

The interviews were structured by questionnaires consisting primarily of closed-ended items. The interviews took between ten and twenty minutes.

Qualifications of the Approach

There is a slight time lag between the cut-off date (December 31, 1982) for our legal analysis and the dates when the telephone surveys were conducted (May 1984 - October 30, 1984). During that time the laws in a few states changed. In order to be consistent with our legal analysis, we directed our respondents to discuss the old repeat offender law that was in effect on December 31, 1982.

Obtaining valid and reliable measures of local court practice as well as the characteristics of a sample of convicted criminal cases is difficult under the best of circumstances. Obtaining them by asking local practitioners for their estimates invites a sizeable amount of measurement error. These are important limitations of our methodology but they do not vitiate our findings. Just as a weak hand in a card game does not mean you cannot make a bid, so too a limited methodology does not mean you cannot draw any conclusions from your findings. One must simply not overbid one's hand.

We do not try to give precise descriptions of local practices or complete details on the sample of sentenced habituals. We necessarily used gross categories. This was part of the trade-off made in order to achieve national representativeness. Future research involving in-depth studies in several local jurisdictions should be done to confirm our results with greater precision. In the meantime, we believe that our findings provide an accurate, if not highly precise insight into the operation of

general recidivist laws.

The History of Legislative Concern

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 came somewhat later. They were first enacted in the United States in New York in 1797 and in England in 1869. The popularity of general recidivist laws (which became known as "habitual" offender laws) peaked in the United States in the 1920's when six states enacted them. The major English general recidivist law was enacted in 1908 and revised in 1948. In both nations these general recidivist laws provided harsh sentences. In both cases the origins of these laws have been explained as repressive reactions both to perceived increases in crime and to 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 now are 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 separate, nonpunitive but lengthy detention to be served consecutively to the sentence for the underlying conviction.

The American habitual offender laws have also been regarded

as deadletters by earlier studies which showed that they were rarely used for sentencing (Brown, 1945). But American policymakers have not given up hope of devising a workable formula. Almost all groups and commissions which have recommended sentencing reforms since the 1960's have agreed that the repeat offender should be sentenced to lengthy incarceration. But, they have also sought to correct some of the defects of the earlier habitual offender laws. Several remedies have been recommended. Most have been in the direction of narrowing the scope of the definition of who is the habitual offender. It has been recommended that 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. More than one prior felony conviction should be required. The prior felony conviction should be for serious crimes and should have resulted in some incarceration. The length of time since the last conviction should be limited to a short interval such as five years. And 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 should be integrated into an overall presumptive sentencing structure.

ISSUES IN THE DEVELOPMENT AND STUDY OF REPEAT OFFENDER LAWS

The Problem of Definition

The problem of defining who the habitual offender is has plagued policy efforts in this area. Radzinowicz and Hood (1980) concluded that the failure of the English habitual offender laws can be directly attributed to this problem. The laws failed to unequivocally specify a distinct type of offender for whom the special sentencing was warranted. The laws fell into disuse because English judges came to believe that the sentences were disproportionate to the underlying offenses and that offenders of widely different degrees of seriousness were being sentenced under them.

This same problem has been true in America. The habitual offender laws have not narrowly defined their targets. This situation has been improved somewhat since 1970. Of the 49 states currently with recidivist laws, 30 have enacted or modified them during the past decade and a half; and, generally, these changes have been in the direction of narrowing the scope of the eligible population. But these revisions have not fully incorporated all the recommended limitations proposed by sentencing reform groups. Moreover, despite these changes local practitioners still regard the definitions as overly broad. We have found that prosecutors as a whole prefer the overbreath in the definition of the repeat offender because of the additional leverage it gives them in plea negotiation. But, even they readily admit that most of the offenders who qualify for repeat

offender sentencing do not deserve enhanced sentences.

The problem of achieving a viable definition of the habitual offender requires the successful resolution of four related issues: (1) the choice and consistent pursuit of a philosophical rationale for these laws; (2) an adequate conceptualization of the nature and dimensions of the problem of criminality the laws are supposed to address; (3) a reduction as far as possible of the ambiguity in the language used in the definition; (4) and a resolution of the ethical dilemmas of using prediction instruments as a way of refining one's definition of the habitual offender.

The choice of penal rationale is between the backward-looking orientation of retribution and the forward-looking orientation of utilitarianism. Are the laws intended to ensure the offender gets his just desert for past crimes or are they supposed to protect the community from future crime? If the latter, then is this to be accomplished by general deterrence, special deterrence, incapacitation or some combination or variation of these? While it can be argued that these various penal objectives are not entirely mutually exclusive (Moore et al., 1983), the failure to give primacy to one or another of them has contributed to the ambiguity of the concept of who the habitual offender is. Moreover, this incoherence in penal objectives may promote inconsistent enforcement of these laws thereby reducing the fairness and certainty of their application.

Much of the difficulty with the definitions of the habitual offender stems from the conceptual blurring of four distinguish-

able dimensions of the problem. These are: seriousness, repetitiveness, intensity and dangerousness. **Seriousness** refers to the **gravity** of the crime(s) committed. **Repetitiveness** refers to the **number** of crimes committed over an offender's career (without regard to the time interval between the offenses). **Intensity** refers to the **rate** of criminal activity over a unit of time (such as one year).

In contrast, **dangerousness** does not refer to the quality, number or intensity of particular criminal acts committed by an offender but rather it refers to a **prediction** that the offender may do serious criminal mischief to the community in the future.

These four dimensions can vary independently of each other and these variations represent a wide range of qualitatively different crime problems. The offender who commits five serious crimes in a year represents a different threat to society than one who commits five serious crimes in twenty years or five minor crimes in a year.

Yet despite these qualitative differences the concept of habitual criminality has been stretched to cover all of them. What is more, if the concept of dangerousness is not given a narrow operational definition such as a predicted high probability (e.g. 90%) of committing a serious crime within a reasonable time period (e.g. two years), it too can be (and has been) loosely used to justify penal policies directed at vastly different criminal problems. Repetitiousness becomes synonymous with dangerousness regardless of the seriousness of the crimes involved or the length of time between crimes. Thus some

advocates of habitual offender laws have argued that these laws should be applied to chronic public drunks and other petty offenders in the name of preventing danger to the community (e.g. Waite, 1943). In England the habitual offender laws were directed at the repeat offender whose crimes were only moderately serious. It was felt that the repeater whose crimes were very serious did not need special sentencing laws because existing laws already provided adequate punishments for such cases (Radzinowicz and Hood, 1980).

Against the background of concern about government spending and the findings of studies indicating that a small proportion of all offenders are responsible for a large proportion of all crime, American criminal justice policy over the past decade and a half has shifted toward a renewed emphasis on the habitual offender, now reformed to as the career criminal. The logic of the policy is efficiency incarnate. Concentrate one's limited resources on the few criminals who generate the most serious crimes. This has focused new attention on the problem of defining career criminal and has generated proposals to use prediction methods and selective incarceration of offenders predicted to be dangerousness (Greenwood and Abrahamse, 1984).

The new definitions of the habitual offender are generally narrower than in the past and generally emphasize serious violent crime. But at both the legislative and the local enforcement levels there continues to be considerable breath retained in the new definitions. Prosecutors operating career criminal programs have been reluctant to limit potential target population too much

(see Institute for Law and Social Research, 1980). Even if attempts are made to further refine the definition of the habitual offender such efforts eventually are limited by the inherent ambiguity of language. No legislative formulas can completely eliminate ambiguity. Thus, for instance, two offenders with identical prior records may represent qualitatively different problems.

The high school student charged with aggravated assault arising from a schoolyard scuffle with a classmate and who has a prior conviction for arson arising from a prank involving throwing a firecracker at a teacher's house does not represent the same threat to society as does the high school dropout who seriously beat up an old lady for kicks and set fire to a building for a fee from its owner who was perpetrating an insurance fraud. Both offenders would qualify as habituals under definitions written in the language of legal categories. But it is only the latter offender who seems to meet the level of serious threat to society that warrants the special sentencing provisions of these laws.

Legal definitions of the dangerous habitual offender can be focused more finely by the use of prediction techniques. But this solution raises additional ethical complications.

Predictions and Ethics

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 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.

Habitual Offender Laws as Class Biased

A less visible but nonetheless important policy concern regarding habitual offender legislation is the potential class bias in the application of these. These laws have been advanced as necessary measures for offenders who repeatedly violate the law regardless of prior convictions. These punitive measures have even been proposed for and used against repeat offenders whose criminality amounts to no more than petty, nuisance offenses (Waite, 1943). But, this zeal for repressing repetitive criminality has had a distinct class bias in its selective focus on lower class and powerless groups. With rare exception (see Elliot, 1931), similar zeal has not been shown for punishing or deterring corporate criminals despite the fact that their records of repetitive violations are far in excess of what most habitual offender laws require. As early as the 1940s Sutherland (1983) had documented that the major American corporations were habitual law violators. At the time of his study they averaged fourteen adverse decisions per corporation.

If repetitive criminality is to be the basis for special

punishment and if justice is to be blind as to class, then future repeat offender laws must consider the corporate and white collar criminal in their definitions.

Characteristics of General Recidivist Laws

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.

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) (see Table XS.1). 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 (see Table XS.2). 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

Table XS.1 Repeat Offender Laws: Type of Triggering Offense By Type of Prior Offense, By Number of Subtypes of Offenders Specified and By State

Type of Prior	Type of Triggering Offense Is: General — Number of Subtypes Specified: 1	General — 2 to 7	General — 8 or more	Specific — Number of Subtypes Specified: 1	Specific — 2 to 7	Specific — 8 or more
General	DC; ID; IN; NB; NC; RI; US; VT	GA; MT GA; MT; NM; WV	--	IO; OR	AK; CO*; KY; NJ	AL; AR; KS; MI; MN
Specific	MA	NV; WA	--	SC; UT	CA*; CT*; DE; FL; HA; IL; LA; MD; MMS; NH; OK*; TN; WI*	AZ; MO; NY; ND; PA; SD; TX

* Most of the subtypes enumerated by these states are predicated upon a specific triggering offense (or class of offenses). But, at least one subtype is based on a general triggering class of offenses.

Table XS.2 Repeat Offender Laws: Life Sentence Provisions by Mandatory or not by Qualifying Criteria and by State

State	Type of Triggering Offense	Number and Type of Priors
I.	**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 Felonies and Misd.
GA	Any Felony	1 Felony
MA	Any Felony	2 Felonies (limited class)
OK	Felony Punishable by life	1 Felony or Misd., e.g., 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	2 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	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

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.

The Use of Habitual Offender Laws

Use, Underuse and Reasons

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 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 (see Tables XS.3-5).

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 (see Table XS.6). 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

Table XS.3 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 XS.4 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%

Table XS.5 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.

Table XS.6 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

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.

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 (see Tables XS.7-8). 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.

One interesting finding is that in those jurisdictions where the habitual offender law is more narrowly defined, prosecutors are more likely to report that the law is used primarily to directly influence the sentence rather than as a plea negotiating tool (Table XS.9). This suggests that narrowing the scope of these laws reduces their usefulness as plea negotiating tools.

Arbitrary Use

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

Table XS.7 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%

Table XS.8 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).

Table XS.9 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

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 the 1908 and the revised 1948 version of the English law were enforced primarily against non-violent offenders. According to the most comprehensive of these studies (Hammond and Cheyen, 1963), 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 (Tables XS.10 and 11). 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.

Table XS.10 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.

Table XS.11 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 by property Over $100 except Burglary & 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.

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 (Table XS.12). 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

Table XS.12 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.

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 (Table XS.10). 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.

Perceptions of the Value of Habitual Offender Laws

A survey of the opinions of prosecutors, defense attorneys and judges regarding their respective habitual 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

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 (Tables XS.13-24).

However, the most striking finding is that despite the enormous variation among the states in the terms of their repeat offender laws our national 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,

Table XS.13 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 XS.14 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 XS.15 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 XS.16 Satisfaction with the Severity of Sentences Under or Results from Plea Negotiations Regarding Repeat Offender Laws by Type ofRespondent

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 XS.17 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 XS.18 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 XS.19 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 XS.20 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 XS.21 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 XS.22 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 XS.23 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

Table XS.24 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 Priors	-	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.

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.

PRIOR CRIMINALITY AND DETERMINATE SENTENCING

The sixteen states[1] 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.[2] The redundancy is created by allowing habitual offender laws to co-exist in tandem with a determinate sentencing system which 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

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1 Alaska, Arizona, California,* Colorado,* Connecticut, Florida,* Illinois,* Indiana,* Minnesota, New Jersey,* New Mexico, North Carolina,* Ohio, Pennsylvania,* Tennessee and Washington.

2 States with redundancies are the ones with asterisks in footnote 24.

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 st tes 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 defense attorneys.

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.

Conclusion

The search for a viable policy for sentencing the repeat offender has led down many blind alleys and into a thicket of

ethicopolitical and social scientific issues. The specter of the habitual offender wantonly preying upon the community undaunted by prior punishments has prompted legislatures to seek quick fixes in the form of grafting onto their indeterminate sentencing systems special sentencing provisions for repeat or "habitual" offenders. This approach has never succeeded in the narrow sense of resulting in most or even many eligible offenders being sentenced as repeaters. Only a small minority of eligible repeat offenders are currently being sentenced as such. Even where legislatures have mandated that these laws be enforced, local prosecutors have ignored them.

The failure to use the habitual offender laws is the result of several factors chief among which are the fact that local justice actors believe that the normal sentencing scheme provides ample opportunity for tailoring sentence severity to the defendant's prior criminality. Thus while repeat offender laws are not used much for sentencing they are used extensively for plea negotiating. From the prosecutor's perspective they can be exchanged for a guilty plea without diminishing the punishment deemed appropriate.

Formerly repeat offender laws were written in broad terms thereby contributing to their nonuse and raising suspicions about their susceptibility to arbitrary use. Recent reform thinking has gone in two directions: either narrow the definition of the repeat offender to truly serious, high rate, dangerous offender or abandon the traditional approach and integrate the concern for prior criminality into a determinate sentencing system.

Future policy choices regarding the sentencing of habitual offenders should recognize that alternative policies will achieve different purposes and 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.

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