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# Criminal Procedure--Recidivism--Constitutionality of the West Virginia Recidivist Statute

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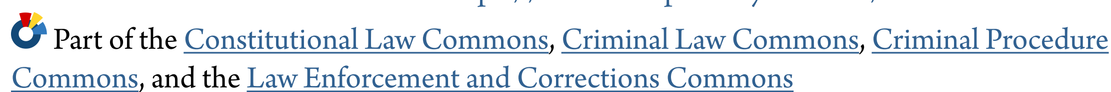
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# CASE COMMENTS

## CRIMINAL PROCEDURE—RECIDIVISM—CONSTITUTIONALITY OF THE WEST VIRGINIA RECIDIVIST STATUTE

In 1949 Dewey Hart wrote a check for fifty dollars without sufficient funds and was convicted of a felony. A second felony conviction, interstate transportation of forged checks, followed in 1955. In 1968 Hart was convicted of perjury for falsely testifying at his son's murder trial. As required by chapter sixty-one, article eleven, section nineteen, of the West Virginia Code,[1] the prosecution filed a recidivist information prior to Hart's sentencing for the third felony conviction. Following jury determination that Hart was the same person who had sustained two prior felony convictions, the court imposed a sentence of life imprisonment as required by chapter sixty-one, article eleven, section eighteen, of the West Virginia Code.[2]

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[1] W. VA. CODE ANN. § 61-11-19 (1966) provides in part:

It shall be the duty of the prosecuting attorney when he has knowledge of former sentence or sentences to the penitentiary of any person convicted of an offense punishable by confinement in the penitentiary to give information thereof to the court immediately upon conviction and before sentence. Said court shall, before expiration of the term at which such person was convicted, cause such person or prisoner to be brought before it, and upon an information filed by the prosecuting attorney setting forth the records of conviction and sentence, or convictions and sentences, as the case may be, and alleging the identity of the prisoner with the person named in each, shall require the prisoner to say whether he is the same person or not. If he says he is not, or remains silent, his plea, or the fact of his silence, shall be entered of record, and a jury shall be impanelled to inquire whether the prisoner is the same person mentioned in the several records. If the jury finds that he is not the same person, he shall be sentenced upon the charge of which he was convicted as provided by law; but if they find that he is the same, or after being duly cautioned if he acknowledged in open court that he is the same person, the court shall sentence him to such further confinement as is prescribed by section eighteen [§ 61-11-18] of this article on a second or third conviction as the case may be.

[2] W. VA. CODE ANN. § 61-11-18 (1966) provides:

When any person is convicted of an offense and is subject to confinement in the penitentiary therefor, and it is determined, as provided in section nineteen [§ 61-11-19] of this article, that such person had been

Hart brought a petition for a writ of habeas corpus, challenging the life sentence on the ground that the West Virginia recidivist statute,[3] as applied in his case, violated the cruel and unusual punishment clause of the eighth amendment to the United States Constitution. He contended that the mandatory life sentence was excessive and disproportionate to the offenses involved. *Held*, reversed and remanded. The mandatory life sentence imposed upon a third time felony offender pursuant to the West Virginia recidivist statute was so disproportionate to the underlying offenses, writing a fifty dollar check without sufficient funds, transporting forged checks in the amount of one hundred forty dollars across state lines, and perjury, as to be cruel and unusual punishment. *Hart v. Coiner*, 483 F.2d 136 (4th Cir. 1973), *cert. denied*, 415 U.S. 983 (1974).

Prior to *Hart*, the West Virginia recidivist statutes had survived constitutional challenge on both due process and equal protection grounds.[4] The constitutional attack made against the stat-

before convicted in the United States of a crime punishable by imprisonment in a penitentiary, the court shall, if the sentence to be imposed is for a definite term of years, add five years to the time for which the person is or would be otherwise sentenced. Whenever in such case the court imposes an indeterminate sentence, five years shall be added to the maximum term of imprisonment otherwise provided for under such sentence.

When it is determined, as provided in section nineteen hereof, that such person shall have been twice before convicted in the United States of a crime punishable by confinement in a penitentiary, the person shall be sentenced to be confined in the penitentiary for life.

[3] Hart's petition for a writ of habeas corpus was denied in the district court. Thereafter, the prisoner appealed to the Court of Appeals for the Fourth Circuit, where the decision was reversed and the case remanded with instructions.

[4] The recidivist statutes applied to Hart were a part of the Virginia law adopted by West Virginia upon becoming a separate state. Brown, *West Virginia Habitual Criminal Law*, 59 W. VA. L. REV. 30, 33 (1956). They provide for the imposition of an additional sentence of five years upon the second felony conviction and a life sentence following a third such conviction. West Virginia case law clearly sets forth a three-fold justification for the existence of recidivist statutes. In State v. Stout, 116 W. Va. 398, 402, 180 S.E. 443, 444 (1935), the court stated that "[t]he purpose of the [recidivist] statute is to permit trial courts to *protect society* from habitual criminals by the imposition of more severe sentences than would be justified by the conviction for the offense under trial alone." (emphasis added). Dye v. Skeen, 135 W. Va. 90, 103, 62 S.E.2d 681, 689 (1950), indicates that the legislature, in enacting a habitual criminal statute, "intended it to serve as a warning to first offenders and to afford a convict an opportunity to reform." Procedures for applying the additional punishment provisions are found in W. VA. CODE ANN. § 61-11-19 (1966). The habitual criminal accusation, once raised by an information filed by

utes in *Hart* followed a trend set by other decisions that had invalidated established punishments because they were cruel and unusual.[5] The court's decision in *Hart* was influenced significantly by the Supreme Court's decision of *Furman v. Georgia*[6] where in sepa-

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the prosecuting attorney, requires a two-fold proof of identity of offender and of the existence of prior convictions. Provision is made for the impanelling of a jury to determine identity in the event the defendant either denies that he is the same individual adjudged guilty of the prior offenses or stands silent on the matter. See note 1 *supra*.

[5] In State v. Graham, 68 W. Va. 248, 69 S.E. 1010 (1910), *aff'd*, 224 U.S. 616 (1912), the West Virginia Supreme Court of Appeals held that application of habitual criminal punishments did not constitute double jeopardy because the convict is not held to answer for a crime for which he has already been convicted. Rather, his status as a repeat offender is the ground upon which the additional punishment is imposed. The United States Supreme Court upheld the West Virginia court's decision, and further determined that the statutorily prescribed procedure did not constitute a denial of due process:

> It cannot be said that the prisoner was deprived of due process of law because the question as to former conviction was passed upon separately. While it is familiar practice to set forth in the indictment the fact of prior conviction of another offense, and to submit to the jury the evidence upon that issue together with that relating to the commission of the crime which the indictment charges, still in its nature it is a distinct issue, and it may appropriately be the subject of separate determination. Provision for a separate, and subsequent, determination of his [the prisoner's] identity with the former convict has not been regarded as a deprivation of any fundamental right.

224 U.S. at 625.

In Peer v. Skeen, 108 F. Supp. 921, 922 (N.D.W. Va. 1952), the court, quoting from U.S. *ex rel* Collins v. Claudy, 106 F. Supp. 367, 373 (W.D. Pa. 1952), determined that the recidivist scheme was "not to be viewed as either a new jeopardy or additional penalty for the earlier crimes. It is stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one." With regard to the propriety of the conviction-upon-information procedure, the district court said: "An indictment as an habitual criminal is not necessary because defendant is not on trial as an habitual criminal, but is sentenced to a heavy penalty because he is one." 108 F. Supp. at 922.

In Oyler v. Boles, 368 U.S. 448 (1962), application of the West Virginia recidivist statute was held not to constitute denial of either due process or equal protection. Failure to prosecute all offenders under the statute was held to be justified absent a showing of reasons other than reasonable selectivity or lack of knowledge of prior convictions.

[6] The principal thrust of the cruel and unusual concept appears to be that of prohibiting excessiveness. "The whole inhibition is against that which is excessive either in the bail required, or fine imposed, or punishment inflicted." O'Neil v. Vermont, 144 U.S. 323, 340 (1892) (dissenting opinion). In Weems v. United States, 217 U.S. 349, 378 (1910), the Court recognized that the constitutional proscription is a fluid concept that "is not fastened to the obsolete but may acquire meaning as

rate concurring opinions Justices Marshall and Brennan focused on a proportionality theory of punishment analysis—an examination of the constitutionality of a given criminal sanction from the perspective of its "excessiveness." Part of Justice Brennan's analy-

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public opinion becomes enlightened by a humane justice." Trop v. Dulles, 356 U.S. 86, 101 (1958), supported this idea of an evolving concept with the statement that "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."

A number of cases have dealt with the problem of outlining the parameters of "cruel and unusual." In *Weems*, the Court determined that a fifteen year sentence imposed on an official of the United States Government in the Philippine Islands for falsifying public documents was too severe. The Court reached this conclusion by comparing the given punishment with punishments imposed for more violent crimes within the jurisdiction of the Philippine Islands and with punishments levied in another jurisdiction, the American penal system. The fifteen year sanction was found to be a more severe punishment than punishments imposed for more violent crimes within the same jurisdiction; it had no counterpart in the American system. The Court stated:

> Such penalties for such offenses amaze those who have formed their conception of the relation of a state to even its offending citizens from the practice of the American commonwealths, and believe that it is a precept of justice that punishment for crime should be graduated and proportioned to offense.

217 U.S. at 366-67.

In State v. Evans, 73 Idaho 50, 57-58, 245 P.2d 788, 792 (1952), the court stated that:

> Cruel and unusual punishments were originally regarded as referring to such barbarous impositions as pillory, burning at the stake, breaking on the wheel, drawing and quartering, and the like. But it is now generally recognized that imprisonment for such a length of time as to be all out of proportion to the gravity of the offense committed, and such as to shock the conscience of reasonable men, is cruel and unusual within the meaning of the constitution.

The court in Workman v. Commonwealth, 429 S.W.2d 374 (Ky. 1968) suggested that a three-factor test be applied to determine if a given punishment is cruel and unusual: (1) determine whether a given punishment is of such character as to shock the general conscience and violate the principles of fundamental fairness, in light of developing concepts of elemental decency; (2) compare the offense and its punishment to determine if disproportionality exists; and (3) determine whether the punishment exceeds that which would be necessary to accomplish the public intent expressed by a given legislative act. 429 S.W.2d at 377-78. *See also* Annot., 33 A.L.R.3d 335 (1970). In Ralph v. Warden, 438 F.2d 786 (4th Cir. 1970), a rapist's failure to take or endanger the life of his victim was viewed as a mitigating factor and prompted the court's refusal to apply the death penalty prescribed by statute. Such consideration of the specific circumstances surrounding the commission of a crime constitutes a significant step toward increased scrutiny in punishment application. A further development of the decency test applied in prior cases occurred in People v. Lorentzen, 387 Mich. 167, 194 N.W.2d 827 (1972), in which the court recommended that the decency of a punishment be determined by comparing it to

sis for determining whether a given punishment is cruel and unusual was employed by the majority in *Hart*.[7]

The *Hart* court cited four objective factors as relevant to an examination of Hart's sentence: (1) the nature of the offense; (2) the legislative purpose behind the punishment; (3) a comparison of the punishment with that which would have been inflicted in other jurisdictions; and (4) a comparison of punishment for other offenses within the same jurisdiction.[8]

With regard to the first factor, the court noted that none of Hart's three convictions had involved crimes of violence or danger to the person.[9] The opinion focused on the relatively trivial nature of the three crimes and noted that the fifty dollar bad check offense would have been a misdemeanor if the check had been a penny

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that used for similar crimes in other jurisdictions. Two other important points made by the court were that: (1) a given punishment may be so excessive as to shock the conscience if it is applied without consideration of the offender's personality and history; and (2) long or severe punishments have not been shown to serve the legislative purpose of rehabilitating criminal offenders. *Id.* at 178-81, 194 N.W.2d at 832-34. With regard to this latter point, the court noted that "experts on penology and criminal corrections tend to be of the opinion that, except for extremely serious crimes or unusually disturbed persons, the goal of rehabilitating offenders with maximum effectiveness can best be reached by short sentences of less than five years' imprisonment." *Id.* at 181, 194 N.W.2d at 833.

Two recent decisions that have employed the proportionality analysis utilized in *Hart* were Furman v. Georgia, 408 U.S. 238 (1972), and *In re* Lynch, 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1972).

[7] 408 U.S. 238 (1972).

[8] Justice Brennan outlined four factors for punishment analysis. First, a punishment must not be so severe as to be degrading to the dignity of human beings. Second, a severe punishment must not be arbitrarily inflicted. Brennan recognized that there is little danger of extremely severe punishments, such as the death penalty, being widely applied. He argued that the more significant function of the cruel and unusual punishment clause has been to protect against the arbitrary imposition of such punishments. Third, a severe punishment must not be unacceptable to contemporary society. Brennan advocated the use of objective analysis rather than the subjective "shocks the fundamental instincts of civilized man" approach. He suggested that due consideration be given to the history of a given punishment and its use in other jurisdictions. Fourth, a severe punishment must not be excessive; it must be neither disproportionate to the crime nor fail to serve the penal purpose more effectively than a less severe punishment. 408 U.S. at 269-80 (concurring opinion). The *Hart* court used the third and fourth factors of Brennan's analysis to reach the conclusion that the mandatory life sentence imposed by the West Virginia recidivist statute was cruel and unusual because it was disproportionate to the offenses involved.

[9] 483 F.2d 136, 139-42 (4th Cir. 1973).

less.[10] The court admitted that perjury was a more serious offense than the previous two offenses, but the moral dilemma that confronted Hart at the time of this offense—the choice between "his duty to tell the truth and family loyalty"[11]—mitigated this offense.

The second factor, the legislative purpose behind the punishment, was taken from Justice Brennan's opinion in *Furman.*[12] Prior West Virginia case law had established a three-fold justification for the existence of recidivist statutes—isolation, deterrence, and rehabilitation.[13] In *Hart*, the court lambasted legislative use of the "penultimate punishment" of life imprisonment to combat "petty crime in America."[14] It emphasized the unreasonableness of placing one who stands guilty of offenses that "rank relatively low in the hierarchy of crimes" behind bars for the remainder of his life and pointed out that it was unlikely that one who has passed bad checks will be reformed into a truthful man by experiencing such an extreme punishment.[15] Other factors that contributed to the unreasonableness of life imprisonment in this situation were the already over-crowded condition of the penal institutions and the financial burden imposed on the state by incarcerating an individual for life.[16] By employing Justice Brennan's logic in *Furman* —where significantly milder punishment could be used to achieve the purposes for which the stricter punishment was inflicted, the stricter punishment was unnecessary and, hence, excessive[17]— the

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[10] *Id.* at 141. In support of its position, the court cited Ralph v. Warden, 438 F.2d 788 (4th Cir. 1970), which recognized that "there are rational gradations of culpability that can be made on the basis of injury to the victim."

[11] 483 F.2d at 141. Under W. VA. CODE ANN. § 61-3-39 (1966), passing a bad check for less than fifty dollars is punishable by confinement in the county jail instead of the penitentiary.

[12] 483 F.2d at 140.

[13] *Id.* at 141. Brennan favors the Court's consideration of whether there are less severe punishments that would adequately serve the penal purpose. See note 7 *supra.*

[14] See note 3 *supra.*

[15] 483 F.2d at 141.

[16] *Id.*

[17] Recent studies have shown that the cost of prisoner care has increased appreciably. It is estimated that construction of penal institutions requires an expenditure of approximately $40,000 per bed. Added to this initial cost are the financial burdens imposed by increased recidivism and prison riots. *See* Baer, *Recidivism, Discretion, and Deferred Prosecution,* 29 RECORD OF N.Y.C.B.A. 141 (1974). The House Select Crime Committee summarized the situation as follows: "American taxpayers paid $1.5 billion to keep . . . men and women in prison . . . while being victimized by crimes, eighty per cent of which were committed by former inmates." N.Y. Times, June 27, 1973, at 36, col. 3.

court determined that none of the legislative purposes behind a life sentence would be served and that, therefore, such a sentence was unnecessary.[18]

The third consideration of the *Hart* court was a comparison of the punishment imposed on defendant Hart as a third felony offender with the punishment that has normally been imposed on a defendant in a similar situation in other jurisdictions. Examination of habitual offender provisions reveals that a mandatory life sentence for a third felony conviction is prescribed in only three other states, Indiana, Kentucky, and Texas.[19] Two states provide for discretionary application of a life sentence in such a situation thereby allowing for consideration of the individual case and the nature of the offenses involved.[20] The court cited West Virginia's recidivist scheme as one of the four most severe in the nation[21] and pointed out that had the statute allowed judicial discretion, Hart would probably not have been given such a severe sentence.[22]

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[18] Furman v. Georgia, 408 U.S. 238, 279 (1972) (concurring opinion). The fourth factor applied by Justice Brennan in analyzing the constitutionality of a given punishment focused on the excessiveness of the punishment in light of the purpose or purposes for which it is imposed. The idea that the least severe punishment that can be applied to achieve a penal purpose is constitutionally proper is derived from the earlier case of Weems v. U. S., 217 U.S. 349, 381 (1910).

[19] 483 F.2d at 141. The court stated that:

> [A] sentence of life imprisonment, the most severe punishment available under West Virginia law, is unnecessary to accomplish the legislative purpose to protect society from an individual who has committed three wholly nonviolent crimes over a period of twenty years. Nor, except on the theory that more is better, is it necessary to deter others. Ten years' possible imprisonment for perjury is calculated to make one stop and think—whether or not it does.

[20] *Id.* An appendix to the opinion contains a survey of state recidivist provisions. *Id.* at 143-44. This survey indicates that Washington also provides for a mandatory life sentence after a third felony conviction. Its exclusion from the majority opinion in *Hart* is unexplainable.

[21] Kansas and New York provide for the discretionary imposition of a life sentence after a third felony conviction. Alaska, Delaware, Louisiana, Michigan, North Carolina, North Dakota, Pennsylvania, South Dakota, and Vermont allow for discretionary imposition after a fourth felony conviction. New Jersey might also be included in this category; the only difference is that New Jersey specifies imposition after a fourth conviction of a high misdemeanor.

[22] The court fails to elaborate on the three other jurisdictions it considers to be most severe. Since Kentucky, Texas, and Indiana have a third felony offender punishment which is the same as that in West Virginia, they are at least as severe. Three other states have recidivist statutes which could be considered as severe. Maine and Washington provide for a discretionary life sentence after a second

Finally, the court looked at West Virginia's entire criminal punishment system. Only three situations other than a third felony mandate a life sentence.[23] Even the second offense of a comparatively violent crime would merit only five additional years beyond the prescribed punishment.[24] One who has committed second degree murder for the second time, for example, could get a maximum of twenty-three years (eighteen years for the offense itself and five additional years under the recidivist statute), while Hart, whose crimes posed no threat of violence, received a life sentence merely because his third conviction was a felony.

After consideration of these relevant factors, the court concluded that: (1) the mandatory life sentence imposed on Hart was "constitutionally excessive"; (2) such sentence was likewise "wholly disproportionate to the nature of the offenses he [Hart] committed"; and (3) such sentence was "not necessary to achieve any legitimate legislative purpose."[25]

Judge Boreman took issue with the court's examination on an individual case basis of the disproportionality created by an application of the recidivist provisions.[26] He argued that the mandatory nature of such provisions precluded case-by-case consideration, and he further disagreed with the majority's subjective judgment of the nature of Hart's crimes. From his perspective, it was improper to employ such an analysis where the constitutionality of clearly defined statutory provisions was in question.[27] Judge Boreman's final criticism was that the reasoning employed by the majority afforded no standard or formula for applying this disproportionality analysis to other cases. The *Hart* decision, in his view, left a multitude of unanswered questions and offered no solu-

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felony conviction. Virginia provides for a life sentence, likewise discretionary in its application, after what is termed a second prison offense. See the appendix of the opinion, 483 F.2d at 143-44.

[23] 483 F.2d at 142.

[24] *Id.* A life sentence for first degree murder is mandatory. W. VA. CODE ANN. § 61-2-2 (1966). A life sentence for rape is mandatory, except where the accused pleads guilty or the jury recommends mercy. W. VA. CODE ANN. § 61-2-15 (1966). In kidnapping, a life sentence is prescribed unless the victim is returned unharmed or without ransom payment. W. VA. CODE ANN. § 61-2-14a (1966).

[25] 483 F.2d at 142.

[26] *Id.* at 143.

[27] *Id.* at 145 (dissenting opinion). Judge Boreman would have granted habeas corpus relief solely on the ground that Hart's 1949 bad check conviction was invalid because of denial of effective assistance of counsel.

tion to other courts that will be faced with "a dilemma in every case of recidivism."[28]

The *Hart* case represented the first successful challenge to the West Virginia recidivist statutes.[29] The legal reasoning on which it was based evidenced a development in eighth amendment analysis consistent with a judicial trend toward humanizing and equalizing criminal punishment. The punishment in *Hart* was held unconstitutional because it was disproportionate to the underlying offenses.[30] The Fourth Circuit similarly employed this proportionality analysis when deciding the capital punishment case of *Ralph v. Warden*,[31] and it is reasonable to assume that *Ralph* was particularly influential on the *Hart* decision. *Ralph* manifested a predisposition to view a prescribed punishment as too severe to be applied in a situation where particluar circumstances are involved. The *Hart* court, having already recognized in *Ralph* that mitigating facts are often involved in an individual criminal conviction, was more willing to view Hart's particular situation as unique and to scrutinize any over-the-board application of a prescribed punishment to him.

Proportionality analysis may be viewed within the context of an even broader scheme of punishment analysis. The dissenting opinion of Justice Goldberg in *Rudolph v. Alabama*[32] suggests the development of a trend in punishment examination based on substantive due process. With such an approach, the consideration becomes one of balancing the state's interest promoted by the

[28] 483 F.2d at 148 (dissenting opinion).

[29] *Id.* at 149 (dissenting opinion).

[30] See note 4 *supra*.

[31] The proportionality analysis is a means employed by the court for justifying its finding that a given punishment is excessive and, hence, cruel and unusual. This type of analysis gained particular attention in cases dealing with the legality of capital punishment. For a discussion of the significance of the proportionality theory in the *Hart* decision, see Note, *Criminal Procedure—Eighth Amendment Proportionality Analysis In Its Infancy*, 52 N.C.L. REV. 442 (1973).

[32] 438 F.2d 786 (4th Cir. 1970). The court rejected an application of the death penalty for a rapist where the facts of the particular case showed that the victim's life had not been taken or endangered. The court based its determination that the death penalty was disproportionate to the underlying offenses upon two factors: (1) most other jurisdictions, in keeping with a legislative trend toward abolishing the death penalty, considered it too excessive for rape, and (2) when there was a statutory provision for alternative punishments, the choice of the death penalty was deemed anomalous when compared to the many rapists sent to prison. *Id.* at 793. The court cited infrequent imposition of the punishment as an indication that it was both excessive and arbitrarily inflicted. *Id.* at 792.

criminal sanction against the infringement of the individual interests of the person punished. The state's interest versus individual interest approach provides for a focusing on the particular circumstances and *needs of the offender* himself. It is a step beyond the proportionality analysis employed in *Hart* and similar cases that have looked more to the *nature of the offense* rather than to the nature of the individual offender. When determining a particular punishment's constitutionality, the balancing process of substantive due process offers myriad possibilities for increasing the humanization of punishment.

Another possible consideration is that of examining the rationale behind a legislative choice of a particular punishment to fit a given crime. This approach embodies a potential that is relevant to the use of recidivist schemes in general and to their use in West Virginia in particular. Three theoretical bases for the application of recidivist statutes have been cited—isolation, deterrence, and rehabilitation.[33] The application of the recidivist statutes in West Virginia has been justified on all three of these grounds. Imposition of habitual criminal sanctions in every case where they ought to be applied would be consistent with their mandatory language and should, ideally, serve some of the purposes specified. As a practical matter, however, use of the recidivist statutes in West Virginia is sporadic and discretionary and governed largely by the convenience or inconvenience of gathering evidence sufficient to apply it to individual cases.[34] Absent consistent use in all pertinent cases, the West Virginia recidivist scheme ought logically to be attacked on the ground that it is not, in fact, serving any rational legislative purpose. Such an attack could be approached from two perspectives: (1) the three purposes for which recidivist statutes are em-

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[33] 375 U.S. 889 (1963) (dissenting opinion). Goldberg outlined the following questions as relevant to punishment analysis under the eighth amendment: (1) does the given punishment violate evolving standards of decency? (2) does the taking of human life to protect a value other than human life (death penalty imposed where rape victim's life not endangered) constitute a punishment disproportionate to the offense, therefore being excessive? (3) could the purposes of the more severe punishment be served by a less severe punishment? *Id.* at 889-90.

It is noteworthy that a decision against use of the death penalty in rape cases where the victim's life was not endangered was eventually made in Ralph v. Warden, 438 F.2d 786 (4th Cir. 1970), and that the abrogation of the death penalty in Furman v. Georgia, 408 U.S. 238 (1972), was based on a method of punishment analysis that incorporated all of the considerations suggested by Goldberg. See note 7 *supra*.

[34] See note 3 *supra*.

ployed are irrational in themselves, because recidivist statutes don't really produce such results;[35] or (2) the purposes underlying the statutes are rational, but the actual method of implementing the statutes is so irregular and subjective as to be irrational. In view of the fact that the West Virginia recidivist statutes have withstood prior constitutional challenges, the possibilities for attacking these statutes using this substantive due process approach warrant serious consideration.[36]

Legislative revision of the statutes, which has been proposed

[35] *See* Brown, *West Virginia Habitual Criminal Law*, 59 W. VA. L. REV. 30, 40, 46-47 (1956). A survey of judges and prosecuting attorneys in West Virginia conducted in 1956 indicated that the majority viewed the State's recidivist scheme as too severe. This severity, as well as the difficulty of proving prior convictions, prompted many prosecutors to ignore the statute's mandatory provisions. A letter from one prosecutor indicated that:

> [T]he necessity of producing the several fingerprint records of a defendant for the purpose of identifying him as a defendant in a prior felony and of vouching those records by the proper witnesses frequently presents a considerable expense, time expenditure, and practical difficulty which make the average West Virginia prosecuting attorney inclined to forego the whole matter, particularly when the prior offenses are committed outside the State of West Virginia.

*Id.* at 46.

[36] Empirical studies of criminal punishment indicate that recidivist statutes do not serve the three purposes of isolation, deterrence, and rehabilitation. It has been shown that:

> habitual offender laws are undesirable as a matter of public policy for the reason that they serve to isolate from society only a group of unfortunate inadequates [persons with social adjustment problems who are chronic alcoholics, drug addicts, or who engage in persistent minor offenses]. 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.

Katkin, *Habitual Offender Laws: A Reconsideration*, 21 BUFFALO L. REV. 99 (1971). That recidivist statutes do not serve as deterrents has been shown by studies which indicate that length of imprisonment does not curb an offender's future commission of crimes. *See* L. ORLAND, JUSTICE, PUNISHMENT, & TREATMENT 88-89 (1973). A study of the effectiveness of correctional programs in California reveals that, rather than rehabilitating offenders, incarceration often causes them to deteriorate. The report indicated that:

> It is difficult to escape the conclusion that the act of incarcerating a person at all will impair whatever potential he has for crime-free future adjustment and that, regardless of which "treatments" are administered while he is in prison, the longer he is kept there the more likely will he deteriorate and the more likely is it that he will recidivate. In any event,

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but not yet accomplished,[37] will probably only change the criteria for applying such statutes ignoring the constitutional legitimacy of the recidivist scheme itself. A change in the method of implementing a system that has inherent constitutional defects will serve only as a temporary resolution for a basic difficulty.

*Cynthia L. Turco*

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> it seems almost certain that releasing men from prison earlier than is now customary in California would not increase recidivism.

Robison, *The Effectiveness of Correctional Programs*, 17 CRIME & DELINQUENCY 67, 71-72 (1971).

[37] Telephone conversation with Ms. Janice Evans, Secretary to Mr. Richard Frum, Special Assistant to Governor Arch A. Moore, Jr., September 27, 1974. The revision of the West Virginia recidivist scheme was a part of the Governor's call submitted at a special session of the Legislature in June, 1974. Little information is available concerning who was originally responsible for submitting this item to the Governor for inclusion in the call. The matter was referred to the Governor by the Office of the Attorney General. Apparently, the item died in committee and never reached the floor for vote.