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HABITUAL OFFENDER LAWS: A RECONSIDERATION

DANIEL KATKIN*

I. HISTORY AND PURPOSE

Recidivism is a comparatively new social problem. Prior to the movement for penal reform in England (1750-1833) even the most trifling offenses were punishable either by hanging or by imprisonment which was considered to be only a slightly more protracted death.¹ Thus, while there were unquestionably habitual criminals, there were few whose careers were not ended by a first conviction.

By the end of the nineteenth century this unexpected consequence of reform—the presence of the habitual criminal—was clearly recognized and attention was focused on the resultant issues of social protection and deterrence.² The concept of preventive detention for repeated offenders was initially suggested in the Gladstone Committee Report of 1895,³ which is generally regarded as a landmark in the history of progressive penology.⁴ While the Committee urged the acceptance of rehabilitation as a goal of the penal system,⁵ it was skeptical about the capacity for reformation of recidivist offenders:

There is evidently a large class of habitual criminals—who live by robbery and thieving and petty larceny—who run the risk of comparatively short sentences with comparative indifference. They make money rapidly by crime, they enjoy life after their fashion,

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1. See N. MORRIS, *THE HABITUAL CRIMINAL* 18 (1951) [hereinafter referred to as MORRIS]. L. RADZINOWITZ, *A HISTORY OF ENGLISH CRIMINAL LAW—THE MOVEMENT FOR REFORM 1750-1833*, at 301-96 (1948). Note, *New Jersey's Habitual Criminal Act*, 11 *RUTGERS L. REV.* 654 (1957).

2. See, e.g., W. TALLACK, *PENOLOGICAL AND PREVENTIVE PRINCIPLES* 206-20 (1896) [hereinafter cited as TALLACK].

3. HOUSE OF COMMONS, *REPORT OF THE COMM. ON PRISONS* (1895).

4. MacDONALD, *A Critique of Habitual Criminal Legislation in Canada and England*, 4 *U.B.C. L. REV.* 87 (1969) [hereinafter referred to as MacDONALD].

5. The report, for example, recommended that special programs of training be instituted for offenders between the ages of 16 and 21. This resulted in the establishment of the borstal system by the Prevention of Crime Act of 1908, 8 *Edw. 7, c. 59*. It is perhaps worth noting that the Home Secretary who was active in securing the passage of the Act was none other than Mr. H. J. Gladstone.

and then, on detection and conviction, serve their time quietly, with the full determination to revert to crime when they come out. We are inclined to believe that the bulk of habitual criminals at large are composed of men of this class. When an offender has been convicted a fourth time or more he or she is pretty sure to have taken to crime as a profession and sooner or later to return to prison. We are, therefore, of opinion that further corrective measures are desirable for these persons. When under sentence they complicate prison management—when at large they are responsible for the commission of the greater part of the undetected crime; they are a nuisance to the community. To punish them for the particular offense is almost useless; the real offense is the willful persistence in the deliberately acquired habit of crime.⁶

This analysis led to the suggestion that a system of extended sentences for repeated offenders be created. Loss of liberty was envisioned primarily as a deterrent; but it was recognized that should it fail to serve that purpose, it would still protect society by isolating the offender for lengthy periods.⁷ The Gladstone Committee did not intend for the sentence to be excessively punitive. Indeed the report suggested that habitual criminals “not be treated with the severity of first-class hard labour or penal servitude,”⁸ which was generally not only hard, but also dull, useless, uninteresting and monotonous,⁹ but rather that they be kept “under less onerous conditions.”¹⁰

The Committee’s recommendations for the treatment of habitual offenders were operationalized in The Prevention of Crime Act of 1908,¹¹ which authorized courts to sentence offenders to periods of preventive detention. Such a sentence could be given only if, after conviction, the offender admitted or was found by the jury to have had at least three prior convictions since the age of 16, or had been found to be a habitual offender on the occasion of an earlier conviction and been sentenced then to preventive detention. The sentence was to be not less than five nor more than ten years, and was to be consecutive rather than concurrent with the term awarded for the substantive offense. This “dual track” system of sentencing was criticized by opposition

6. REPORT OF THE COMM. ON PRISONS, *supra* note 3, at 31.

7. *Id.*

8. *Id.*

9. L.W. FOX, THE ENGLISH PRISON, AND BORSTAL SYSTEMS 40-48 (1952); MacDonald, *supra* note 4, at 88.

10. REPORT OF THE COMM. ON PRISONS, *supra* note 3, at 31.

11. 8 Edw. 7, c. 59, § 10.

members on the ground that society ought not to inflict two pains on a prisoner. The government, however, refused to yield, and consecutive sentences remained the law in England until passage of the Criminal Justice Act of 1948.¹²

Even during the years when Gladstone was helping to fashion the law of England, alternatives to preventive detention were being considered. The least harsh of the proposals called for supervision of habitual criminals while allowing them to remain out of prison. The offender would be obliged to discuss his activities at least once a month at a meeting with his supervisor; in addition he would have to report all changes of address. Failure to comply with these rules would result in reimprisonment.¹³ There was concern on the part of some civil libertarians that the power of supervision not be vested in the police; however, Discharged Prisoners' Aid Societies, or "private patrons of judicious character" were seen as acceptable.¹⁴

Supervision was not proposed as an alternative to all imprisonment, but rather as form of after-care to be used in conjunction with a system of very gradual cumulations of imprisonment. Each successive conviction would carry with it a term of imprisonment a bit longer than the one before. Faced with the prospect of such steady escalation the prospective recidivist, the argument had it, would very likely drop out of crime before a third or fourth offense. The accretion, even though gradual, would provide those who continued to fifth or sixth convictions with rather extensive terms of imprisonment.¹⁵ This threat, combined with the assistance of supervision, would both protect society and facilitate rehabilitation.

Perhaps the greatest flaw in the scheme is that it sought to make sentencing a function solely of the frequency of offense, without regard to the character of each individual act. A third conviction would automatically carry a stiffer sentence than a second without regard to the specific nature of the crimes in-

12. See MORRIS, *supra* note 1, at 40; MacDonald, *supra* note 4, at 89.

13. TALLACK, *supra* note 2, at 208.

14. *Id.* at 207.

15. *Id.* at 206-11.

volved.¹⁶ Punishment would be made to "fit" neither the crime nor the individual needs of the offender.¹⁷

This plan has never been operationalized in its pure form. The closest that some American jurisdictions have come is the enactment of statutes which require that the longest permissible term of imprisonment for a particular offense be given to recidivists guilty of that offense.¹⁸ Some jurisdictions allow for a term of imprisonment which is a multiple of the maximum which could be given to a first offender.¹⁹ Neither approach can fairly be characterized as involving the gradual accretion of terms of imprisonment. While probation and parole systems are now nearly universal, effective programs of after-care for offenders leaving prison after serving a full term are still very uncommon.²⁰

The other, and substantially harsher alternative that was considered as early as the 1890's involved life imprisonment for recidivists.²¹ It has received wide-spread acceptance and has been enacted into law in many jurisdictions.²²

16. *Id.* at 211.

17. Devising sentences to fit the needs of individual offenders is a somewhat newer practice than fitting punishments to crimes; however, individualization has emerged as a guiding principle of contemporary rehabilitation-oriented penology. See Katkin, *Presentence Reports: Uses, Limitations and Civil Liberties Issues*, 55 MINN. L. REV. 15 (1970).

18. See, e.g., MASS. GEN. LAWS ANN. ch. 279, § 25 (1959).

19. See, e.g., ORE. REV. STAT. § 168.085 which requires that a fourth conviction occasion a sentence to a term of imprisonment of not less than twice the maximum provided for the offense.

20. 2 U.S. DEPT OF JUSTICE, ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES 247 (1939). THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 60-71 (1967). The report noted that 60% of all inmates are released on parole, and discussed the existing programs of after-care for parolees; no mention was made of similar programs for the 40% of all inmates who do not get parole. See also E.H. SUTHERLAND & D. CRESSLY, PRINCIPLES OF CRIMINOLOGY (7th ed. 1966); the only reference made to after-care in this exhaustive text pertains to programs of parole.

For an excellent discussion of the possible benefits of an elaborate after-care system designed to help all inmates rejoin the community see T. PARKER, THE UNKNOWN CITIZEN (1965).

21. TALLACK, *supra* note 2, at 209.

22. Legislation in twenty-three states authorizes or requires a life sentence for a recidivist. ALASKA STAT. § 12.55.050 (Supp. 1966) (fourth offense); CAL. PENAL CODE § 641 (West 1955) (third offense); COLO. REV. STAT. ANN. § 39-13-1 (1964) (third offense); DEL. CODE ANN. tit. 11, § 3912 (Supp. 1968) (fourth offense); FLA. STAT. ANN. § 775.10 (1965) (fourth offense); IDAHO CODE § 19-2514 (1948) (third offense); IND. ANN. STAT. § 9-2207 (1956) (third offense); KY. REV. STAT. ANN. § 431.190 (1963) (third offense); LA. REV. STAT. ANN. § 15.529.1 (1967) (third offense); NEV. REV. STAT. § 207.010 (1965) (fourth offense); N.J. STAT. ANN. § 2A:85-8 (Supp. 1966) (fourth offense); N.M. STAT. ANN. § 40A-29-5 (Supp. 1964) (fourth offense); N.Y. PENAL

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Proponents of such plans do not generally justify them on the basis of the social utility of punitiveness despite the fact that other types of harsh punishment have frequently been rationalized by the argument that society has a right, if not an obligation, to respond to "awful" acts with "awful" denunciations.²³ Deterrence and social protection are the usual justifications for life sentences. Almost a century ago Professor Francis Wayland, a Yale penologist, argued that life terms in penal institutions were necessary to safeguard communities against the anti-social acts of "incurribles."

If it be argued that police supervision, after release, would avert the danger, I answer that it is far more easy, wise and safe, to exercise it within prison walls. The authorities of a hospital might, with just as much show of reason, release a smallpox patient in the most contagious period of that dreaded disease, and then provide that while the dangerous symptoms continued he should remain under supervision. I believe that there is but one cure for this great and growing evil, and that is to be found in the imprisonment for life of the criminal once pronounced incurrible.²⁴

More recently Norval Morris has commented that: "[p]roviding society has expended its best efforts to protect itself from an habitual criminal and had used all the practical means within its power to make him live a life that society was prepared to tolerate, it would be rational to destroy him. It would certainly be rational to keep him from again entering society."²⁵

LAW § 70.10 (McKinney 1967) (third offense); OHIO REV. CODE ANN. § 2961.12 (Baldwin 1954) (third offense); ORE. REV. STAT. § 168.085 (1963) (fourth offense); PA. STAT. ANN. tit. 18, § 5108 (1963) (fourth offense); S.C. CODE ANN. § 17.553.1 (1962) (fourth offense); S.D. CODE § 13.0611 (1939) (fourth offense); TENN. CODE ANN. § 40-2801 (1955) (third offense); TEX. PEN. CODE art. 63 (Supp. 1952) (third offense); VT. STAT. ANN. tit. 13, § 11 (1958) (fourth offense); WASH. REV. CODE ANN. § 9.92.090 (1961) (third offense); W. VA. CODE ANN. § 61-11-18 (1966) (third offense).

In addition, two states permit imprisonment "for any term of years" for recidivists. ME. REV. STAT. ANN. tit. 15, § 1742 (1964) (upon conviction of second felony); VA. CODE ANN. § 53-296 (1967) (third offense). In twelve states life terms are mandated by law. COLO. REV. STAT. ANN. § 39-13-1 (1964); IND. ANN. STAT. § 9-2207 (1967); KY. REV. STAT. ANN. § 431.190 (1963); NEV. REV. STAT. § 207.101 (1965); N.M. STAT. ANN. § 40A-29-5 (1964); OHIO REV. CODE ANN. § 2961.12 (Baldwin 1954); S.C. CODE ANN. § 17.553.1 (1962); TENN. CODE ANN. § 40-2801 (1955) (life without parole); TEX. PEN. CODE art. 63 (Supp. 1952); WASH. REV. CODE ANN. § 9.92.090 (1961); W.VA. CODE ANN. § 61-11-18 (1966); WYO. STAT. ANN. § 6-11 (1959).

23. See, e.g., P. DEVLIN, *THE ENFORCEMENT OF MORALS* (1965).

24. F. WAYLAND, *THE INCORRIGIBLE*, cited in TALLACK, *supra* note 2, at 209.

25. MORRIS, *Introduction*, 13 MCGILL L. J. 533, 549 (1967).

Debate over the wisdom and humanity of such "rationality" was most intense during the 1920's. New York State enacted the Baume's Law²⁶ which required that judges sentence offenders with three prior convictions to life terms of imprisonment. A look at the legislative history of that act indicates that its purposes were to deter potential recidivists by making the risks too great, and also to isolate from the society upon which they preyed those offenders who would not be deterred.²⁷

Laws designed to serve those purposes exist in virtually all jurisdictions. In twenty-three states life terms of imprisonment are either mandated or permitted.²⁸ Of the remaining states, nine have statutes which impose mandatory minimum sentences ranging in severity from not less than 20 years in Alaska and Louisiana to not less than five years in Idaho.²⁹ In all other states extended terms are permitted but not mandated.³⁰ In addition, the United States Code has recently been amended to permit extended terms of imprisonment ranging up to 25 years for offenders convicted of a third felony.³¹

26. [1926] N.Y. Sess. Laws, ch. 457.

27. J.E. JOHNSON, *THE BAUME'S LAW* (1929).

28. See statutes cited in *supra* note 22.

29. ALASKA STAT. § 12.55.050 (3) (Supp. 1966) (fourth conviction; not less than twenty years); ARIZ. REV. STAT. ANN. § 13-1649 (1956) (second conviction; not less than five years); IDAHO CODE ANN. § 21-107a (1964) (third conviction; not less than five years); KAN. STAT. ANN. § 21-107a (1964) (third conviction not less than fifteen years); LA. REV. STAT. ANN. § 15:539.1 (1967) (fourth conviction; not less than twenty years); MASS. GEN. LAWS ANN. ch. 279, § 25 (1959) (second offense; not less than maximum provided for offense); NEB. REV. STAT. § 2221 (1965) (third conviction; not less than ten years); ORE. REV. STAT. § 168.085 (1963) (fourth conviction; not less than twice the maximum provided for the offense); UTAH CODE ANN. § 76-1-18 (1953) (third conviction; not less than fifteen years).

30. See *Spencer v. Texas*, 385 U.S. 554, 559 (1965). See also Annot., 58 A.L.R. 20 (1929); Annot., 82 A.L.R. 345 (1933); Annot., 79 A.L.R.2d 826 (1961).

31. Title 18 U.S.C. § 3575 provides:

(a) Whenever an attorney charged with the prosecution of a defendant in a court of the United States for an alleged felony committed when the defendant was over the age of twenty-one years has reason to believe that the defendant is a dangerous special offender such attorney . . . may sign and file with the court, and may amend, a notice (1) specifying that the defendant is a dangerous special offender who upon conviction for such felony is subject to the imposition of a sentence under subsection (b) of this section, and (2) setting out with particularity the reasons why such attorney believes the defendant to be a dangerous special offender. In no case shall the fact that the defendant is alleged to be a dangerous special offender be an issue upon the trial of such felony, be disclosed to the jury, or be disclosed before any plea of guilty or nolo contendere or verdict or finding of guilty to the presiding judge without the consent of the parties. . . .

(b) Upon any plea of guilty or nolo contendere or verdict or finding of guilty of the defendant of such felony, a hearing shall be held, before sentence

II. THESIS

It is the thesis of this paper that these statutes, characterized by indefensible harshness,³² serve neither to deter potential recidivists nor to protect the public by isolating offenders who are truly dangerous. Despite a judicial history which suggests the contrary, this writer believes that the new federal legislation as well as many existing state statutes may be found to violate the cruel and unusual punishment provision of the United States Constitution.³³ Even if that is not the case, as a matter of public policy, Congress would have done well to have defeated the section of the recently passed Organized Crime Act which deals with dangerous offenders, and state legislatures would do well to revise or abolish much of the similar existing legislation.

is imposed, by the court sitting without a jury. . . . If it appears by a preponderance of the information, including information submitted during the trial of such felony and the sentencing hearing and so much of the presentence report as the court relies upon, that the defendant is a dangerous special offender, the court shall sentence the defendant to imprisonment for an appropriate term not to exceed twenty-five years and not disproportionate in severity to the maximum term otherwise authorized by law for such felony. Otherwise it shall sentence the defendant in accordance with the law prescribing penalties for such felony. The Court shall place in the record its findings, including an identification of the information relied upon in making such findings, and its reasons for the sentence imposed.

.
(e) A defendant is a special offender for purposes of this section if

(1) The defendant has previously been convicted in courts of the United States, a State, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof for two or more offenses committed on occasions different from one another and and from such felony and punishable in such courts by death or imprisonment in excess of one year, for one or more of such convictions the defendant has been imprisoned prior to the commission of such felony, and less than five years have elapsed between the commission of such felony and either the defendant's release, on parole or otherwise, from imprisonment for one such conviction or his commission of the last such previous offense or another offense punishable by death or imprisonment in excess of one year under applicable laws of the United States, a State, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, any political subdivision, or any department, agency or instrumentality thereof

32. A.B.A. ADVISORY COMMITTEE ON SENTENCING AND REVIEW 162 (1967). Examples of brutal sentences resulting from the application of habitual offender laws include: *State v. Smith*, 99 Ariz. 106, 407 P.2d 74 (1965) (sentencing defendant with one prior offense; petit larceny; a misdemeanor); *State v. Sedlacek*, 178 Neb. 322, 133 N.W.2d 380 (1965) (sentencing a sixty-four year old defendant with two prior offenses to fourteen years for stealing a shotgun from his neighbor). See also Hallheimer, *Justice by Formula*, 117 CENTURY 232-40 (1928).

33. U.S. CONST. amend. VIII.

III. AN EVALUATION OF THE LAW IN OPERATION

The first point to be made is that habitual offender laws are wholly unnecessary to deter serious offenses. This would seem to be true almost as a matter of definition. Courts sentencing truly dangerous felons, such as murderers, rapists or armed robbers can impose lengthy terms of imprisonment (in some cases even the death penalty) without regard to the existence of habitual offender laws or the issue of habitual criminality. Surely the fear of being sentenced to an extended term of imprisonment cannot be said to be effective in deterring the commission of crimes for which lengthy terms could be imposed even on first offenders. It must be recognized that at best these harsh habitual offender sentences may have some effect in helping to deter only those comparatively petty offenses which are not deemed to deserve, in and of themselves, long terms of confinement.

The corollary of this argument is that habitual offender laws serve to isolate from society only comparatively petty offenders, from whom society is hardly in urgent need of protection. An excellent study which tends to prove that this as indeed the case has been done by Donald West of the Institute of Criminology at the University of Cambridge.³⁴ Dr. West interviewed, administered psychological tests to, and reviewed the records of a group of fifty recidivists serving terms as preventive detainees in English prisons.³⁵ Offenses of violence by members of this group were exceedingly rare. There were none at all among the charges at the latest conviction.³⁶ The group consisted almost entirely "of persistent thieves, a small minority of whom occasionally committed violent or sexual crimes as well."³⁷ Most of the prisoners studied by West "seemed woe-

34. D. WEST, *THE HABITUAL PRISONER* (1963).

35. *Id.* at 1.

36. *Id.* at 13. Indeed, only eight of the fifty had ever been convicted for violence, and none of the group could be considered dangerously violent at the time of the study.

37. *Id.* at 14. More than 90% of the 692 crimes for which members of the group had been convicted involved offenses against property. Only one of the most recent convictions involved an amount in excess of 1,000 pounds (\$2,400) and 76% involved amounts smaller than 100 pounds (\$40). *Id.* at 116, table 6.

fully lacking in ability to fulfill ordinary social expectations in any sphere of life."³⁸

Perhaps most significant, West found that only four of the fifty men could be characterized as non-deviant.³⁹ Twenty-nine were diagnosed as passive-inadequates,⁴⁰ that is, men who suffer

a generalized instability, a failure to cope with ordinary frustrations . . . [and who] tend to collapse into passive resistance and querulous dependency. Inadequates tend to be typically feckless people, grossly lacking in drive and initiative. They are always complaining and demanding help from authorities, without exerting any effort themselves. They tend to form one-sided, parasitic relationships with whoever will put up with them. They never seem able to fend for themselves. Their spinelessness and sloth suggest that they have found social demands too much for them, and have contracted out of the system altogether, so that they no longer bother to try to do the things expected of a normal citizen.⁴¹

The remaining seventeen men were diagnosed as active-aggressives.⁴² Unlike the inadequate, who has never even begun to learn to perform social roles effectively, the active-deviant may often seem to be very highly socially skilled. However, it is as if he "were playing an imitative role rather than living up to real adult responsibilities."⁴³

West's findings suggest that persistent offenders are neither violent, nor efficiently organized professional criminals. The majority of the men studied were shiftless, work-shy characters for whom petty stealing represented the line of least resistance.⁴⁴

Other observers have noticed much the same pattern described by West. M.L. Lynch, a member of the National Parole Board of Canada, has commented that:

38. *Id.* at 20. Half of the group had never married (although the average age of the group was almost 40), and only eight were actually living with their wives at the time of the latest arrest. Few had any long-lasting friendships, and about half suffered from undue diffidence or shyness which predated their first convictions.

39. *Id.* at 118, table 12.

40. *Id.*

41. *Id.* at 25-26.

42. *Id.* at 118, table 12. The term aggressive used in this context does not refer to violent or acting-out behavior, but rather to drive, motivation and the ability to plan. Thus, West reports that the offenses of the active-deviants were generally carefully planned endeavors in pursuit of a particular prize. In this regard they were a marked contrast to the inept and usually petty thefts of the inadequates, which were quite frequently committed on the spur of some depressing moment. *Id.* at 27-28.

43. *Id.* at 26.

44. *Id.* at 101.

As a general rule, persons serving an indeterminable sentence as habitual criminals are not dangerous. A great many of them are drug addicts, others are persons who have persistently committed minor 'nuisance' type offenses such as burglary, and shoplifting. There are far more sneak thieves than armed robbers in the group.⁴⁵

....
... [M]ost of them are unfortunate inadequate people, who have never had a chance in life and who are either drug addicts or men with a serious drinking problem.⁴⁶

Many American observers have reached the same conclusions. H.G. Moeller, Assistant Director of the Federal Bureau of Prisons, maintains that:

[w]ithout question, the largest group of chronic offenders with whom we are acquainted are dependent, socially inadequate men and women who have come to accept prison [rather than crime] as a way of life. . . . In any representative group of such offenders we find a high percentage of chronic alcoholics, a variety of physical and intellectual handicaps and limitations, gross lack of work skill and experience, serious inadequacies in capacities to relate to other human beings, and a wide variety of other socially disabling characteristics.⁴⁷

IV. AN ARGUMENT FOR CHANGE DERIVED FROM CONSIDERATIONS OF PUBLIC POLICY

The observations of Dr. West and others indicate 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. 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.⁴⁸

45. Lynch, *Parole and the Habitual Criminal*, 13 MCGILL L.J. 632, 638 (1967). There is a considerable question about the extent to which drug addicts contribute to violent or aggressive crime. However, there are no reliable statistical studies on the issue.

46. *Id.* at 644.

47. *Hearings Before the Subcomm. on National Penitentiaries of the Senate Comm. on the Judiciary*, 88th Cong., 2d Sess. 195-96 (1964). See also *Hearings on S. 30 Before the Subcomm. on Criminal Laws and Procedure of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 215, 218, 249, 251 (1969).

48. P. TAPPAN, *ORGANIZED CRIME AND LAW ENFORCEMENT* (1952).

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This argument, that habitual offender laws do not represent sound public policy, is strengthened by an examination of the interaction between the statutes and the practice of plea-bargaining. On the face of it, it would appear that the threat of extended sentences greatly enhances the bargaining power of the prosecutor. However, it may be that in operation the amassment of too much power in the prosecutors' hands actually limits effective functioning. The cases in which organized and professional criminals are involved are frequently so complex in nature that prosecutors get better deals by bargaining for guilty pleas than by proceeding to trial.⁴⁹ From the viewpoint of the defendant, however, no deal is likely to be acceptable unless it guarantees exemption from the possibility of an extended sentence. Thus, in cases where a conviction might make an offender eligible for sentencing as a recidivist, the state may have to agree to prosecute for a misdemeanor in order to obtain a plea. Such a practice actually undermines the safety of the public by working to the advantage of organized and professional thieves.⁵⁰

V. AN ARGUMENT FOR CHANGE DERIVED FROM CONSIDERATIONS OF CONSTITUTIONAL LAW

An argument derived from considerations of public policy goes only to the undesirability of habitual offender laws. However, it may well be that the data obtained empirically by Dr. West and the supporting observations of people engaged in prison administration justify a reconsideration of the issue of the constitutionality of recidivism statutes.

At the outset it must be pointed out that there is an extensive judicial history which points in the direction of constitutionality. Indeed, habitual offender statutes have withstood a variety of constitutional attacks.⁵¹

49. See generally *Hearings on S. 30 Before the Subcomm. on Criminal Laws and Procedure of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. (1970).

50. A study in New York State in 1927 found that 65 offenders were formally charged with recidivism. Of those 65, 25 were acquitted of the most recent offense; another nine cases were not concluded during that year. Of the remaining 33 offenders, 16 were permitted to plead guilty to misdemeanors; thus not only avoiding the operation of the recidivism statute, but also getting off more lightly than a first offender initially accused of the same felony might have. In fact, 8 of the 16 were sentenced to terms of less than six months imprisonment. 1928 N.Y. STATE CRIME COMM'N REP. 42-50.

51. For an excellent discussion of the constitutional history of habitual offender laws, see Note, 48 VA. L. REV. 597, 602-07 (1962).

To this writer it seems that the law relating to three of the traditional lines of attack—ex post facto, due process, and double jeopardy—is well settled. However, the cases holding that recidivism statutes do not violate the eighth amendment prohibition against cruel and unusual punishment seem uniquely unpersuasive; and it seems appropriate to reexamine both those cases and others dealing with the equal protection issue in light of the evidence from the social sciences to which reference has already been made.

A. A Review of Constitutional History Relating to Ex Post Facto, Due Process and Double Jeopardy

1. *Ex post facto.* The cases are quite clear that recidivism statutes are not ex post facto even where the finding of habitual criminality is based on crimes committed before their enactment.⁵² The rationale maintains that an ex post facto objection can be made only against a statute which seeks to punish an act which was legal when done, or which increases the punishment for a crime already committed. So long as the most recent crime was committed after the enactment of the recidivism statute, no ex post facto argument can be made because the extended sentence is imposed only for that last offense. In short, the extended sentence is imposed not as a direct consequence of earlier offenses, but as a direct and predictable consequence of the offender's most recent crime which, presumably, he was free to avoid.⁵³

2. *Due process.* It has been consistently held that recidivism statutes are not inconsistent with notions of procedural due process.⁵⁴ Central to the rationale is the argument that no

52. With the single exception of *State v. Sudekatus*, 72 Ohio App. 165, 51 N.E.2d 22 (1943), reversing a conviction under Ohio's Habitual Criminal Act where a prosecution for a fourth offense failed and the three prior convictions charged were for crimes committed before the act was passed, all attempts to have enhanced sentences declared ex post facto have been unsuccessful.

53. See, e.g., *Gryger v. Burke*, 334 U.S. 728 (1948); *Lindsey v. Washington*, 301 U.S. 397 (1937); *Wey Him Fong v. United States*, 287 F.2d 525 (9th Cir.), cert. denied, 366 U.S. 971 (1961) (federal narcotic laws); *State v. Dowden*, 137 Iowa 573, 115 N.W. 211 (1908); *Ross' Case*, 19 Mass. (2 Pick.) 165 (1824); *Rand v. Commonwealth*, 50 Va. (9 Gratt.) 738 (1852). See generally Annot., 167 A.L.R. 845 (1947).

54. For fifth amendment cases see, for example, *Sherman v. United States*, 241 F.2d 329 (9th Cir.), cert. denied, 254 U.S. 911 (1957); *Beland v. United States*, 128 F.2d 795 (5th Cir.), cert. denied, 317 U.S. 676 (1942). For fourteenth amendment cases, see, for example, *Graham v. West Virginia*, 224 U.S. 616 (1912); *State v. Zywicki*, 175 Minn. 508, 221 N.W. 900 (1928); *State v. Hicks*, 213 Ore. 640, 325 P.2d 794 (1958).

separate offense is charged. The statutes are perceived not as creating or defining a new or independent crime, but as prescribing "circumstances wherein one found guilty of a specific crime may be more severely penalized because of his previous criminalities."⁵⁵

3. *Double jeopardy.* The courts have been quite emphatic in dismissing the double jeopardy objection. Recidivism statutes are not perceived as authorizing additional punishment for an earlier offense. The "repetition of criminal conduct aggravates . . . [the offenders' immediate] guilt and justifies heavier penalties when they are again convicted."⁵⁶ Because an extended sentence is imposed only for the most recent offense, and not as an additional punishment for earlier conduct, no double jeopardy problem is presented.

B. A Reconsideration of the Constitutional Issues Relating to Equal Protection, and Cruel and Unusual Punishment

1. *Equal protection.* Upon casual examination this issue seems to be well settled. The courts have taken the position that habitual offender laws do not, by applying to a certain class of offenders, deny the accused equal protection of the law.⁵⁷ However, the cases are old, and both the evidence available to the courts and the breadth of the fourteenth amendment have expanded over the years. Reconsideration of the cases might well result in their reversal.

Traditionally the fourteenth amendment has been interpreted to require not that all people or classes of people be treated identically, but rather that differential treatment authorized by statutory classifications be reasonably related to some legitimate state purpose.⁵⁸ The courts have recognized that habitual offender laws do authorize unequal treatment; however, they

55. *Goodman v. Kunkle*, 72 F.2d 334, 336 (7th Cir.), *cert. denied*, 293 U.S. 619 (1934).

56. *Graham v. West Virginia*, 224 U.S. 616, 623 (1912). *See also* *Gryger v. Burke*, 334 U.S. 728, 732 (1948); *McDonald v. Massachusetts*, 180 U.S. 311, 312 (1901); *McIntyre v. Commonwealth*, 154 Ky. 149, 153, 156 S.W. 1058, 1060 (1913); *Ross' Case*, 19 Mass. (2 Pick.) 165, 171 (1824).

57. *See, e.g., McDonald v. Massachusetts*, 180 U.S. 311 (1901); *Moore v. Missouri*, 159 U.S. 673 (1895); *Barr v. State*, 205 Ind. 481, 187 N.E. 259 (1933), *noted in* 9 IND. L.J. 534 (1934); *Surratt v. Commonwealth*, 187 Va. 940, 944, 48 S.E.2d 362, 364 (1948).

58. *See, e.g., Levy v. Louisiana*, 391 U.S. 68 (1968); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942).

have held that special treatment for a class of recidivists is constitutionally permissible because it is reasonably related to a legitimate purpose—public protection.⁵⁹ At the time of these decisions there was no reason to doubt the existence of such a reasonable relationship. It is not clear that that is still the case.

Empirically obtained evidence such as the West study, already referred to in this paper,⁶⁰ indicates that the purpose of public protection is not effectively served by recidivism statutes. It will be remembered that both social scientists and prison administrators seem agreed that habitual offender laws operate only to isolate from society those unfortunate inadequates from whom comparatively little need be feared. More dangerous offenders from whom the public truly needs to be protected seem not to be affected. This evidence is of compelling importance for it goes to the very heart of the rationale for constitutionality. The cases have merely assumed a relationship between recidivism statutes and a legitimate purpose—protection of the public. Surely the existence of evidence which indicates that such a relationship is illusory justifies the reconsideration and quite possibly reversal of the old cases.

The position that reconsideration would indeed result in reversal is strengthened by the fact that the past few years have witnessed a broadening of the interpretation of the equal protection clause. The old cases required only a showing of a reasonable relationship between a statute and a legitimate state purpose to support a finding of constitutionality.⁶¹ More recently cases which involve the exercise of a fundamental constitutional right have been differentiated. A classification which serves to limit the exercise of a fundamental constitutional right must be shown to be "necessary to promote a *compelling* governmental interest."⁶² Thus, habitual offender laws which affect the fundamental

59. See, e.g., *McDonald v. Massachusetts*, 180 U.S. 311 (1901); *Moore v. Missouri*, 159 U.S. 673 (1895).

60. See sources cited in *supra* notes 33-45.

61. See, e.g., *Railway Express Agency, Inc. v. New York*, 336 U.S. 106 (1949); *Goesaert v. Cleary*, 335 U.S. 464 (1948); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

62. *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969) (emphasis added). See also *Sherbert v. Verner*, 374 U.S. 398, 406 (1963); *Bates v. Little Rock*, 361 U.S. 516, 524 (1960). In *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942), the Supreme Court struck down a state plan which authorized the sterilization of some but not all habitual offenders (embezzlers, for example, were excepted). The court commented that "*Extreme sensitivity*" to equal protection issues is appropriate in cases which involve "basic civil rights." *Id.* at 541 (emphasis added).

constitutional right to liberty must now meet a tougher standard if they are to be upheld. In the face of all the evidence which casts doubt on even their minimal effectiveness, it may prove quite difficult to demonstrate that they are *necessary* to promote such a *compelling* interest. Unless the direction in which the law has been developing is about to be substantially altered, it is quite possible that a new constitutional challenge based on the equal protection clause will succeed.

2. *Cruel and unusual punishment.* Cases dealing with the cruel and unusual punishment issue are notable for the absence of lucid analysis. Indeed, few of the cases do more than make reference to precedent. The case most frequently cited as precedent is *Moore v. Missouri*.⁶³ Yet the issue was barely touched upon in that case.

The reason for holding that the accused is not again punished for the first offence is given in *Ross's Case* by Chief Justice Parker, that 'the punishment is for the last offence committed, and it is rendered more severe in consequence of the situation into which the party had previously brought himself;' in *Plumby v. Commonwealth*, by Chief Justice Shaw, that the statute 'imposes a higher punishment for the same offence upon one who proves, by a second or third conviction, that the former punishment has been inefficacious in doing the work of reform for which it was designed;' in *People v. Stanley*, that 'the punishment for the second is increased, because by his persistence in the perpetration of crime, he has evinced a depravity, which merits a greater punishment, and needs to be restrained by severer penalties than if it were his first offence;' and in *Kelly v. People*, 'that it is just that an old offender should be punished more severely for a second offence—that repetition of the offence aggravates guilt.' It is quite impossible for us to conclude that the Supreme Court of Missouri erred in holding that plaintiff in error was not twice put in jeopardy for the same offence, or that the increase of his punishment by reason of the commission of the first offence was not cruel and unusual.⁶⁴

The conclusion that the eighth amendment is not violated seems to have been drawn entirely from an analysis of the double jeopardy issue. It seems an after-thought, not directly related to the stream of the text. That is characteristic of the early cases which are frequently cited in dismissing eighth amendment arguments.

63. 159 U.S. 673 (1895).

64. *Id.* at 677.

*McDonald v. Massachusetts*⁶⁵ relies on an analysis similar to that in *Moore*. The point is made that an extended punishment is not given for the earlier offense, but rather that the earlier conviction aggravates the immediate crime. That argument, combined with the frequently made assumption that punishments are cruel only when they involve torture or a lingering death, justified the very curt dismissal of an eighth amendment claim.⁶⁶

In *Graham v. West Virginia*⁶⁷ there is only one fleeting reference to the cruel and unusual punishment issue. After a lengthy discussion of due process and equal protection issues, the Court concluded, in the very last paragraph of text, that:

What has been said, and the authorities which have been cited, sufficiently show that there is no basis for the contention that the plaintiff in error has been put in double jeopardy or that any of his privileges or immunities as a citizen of the United States have been abridged. Nor can it be maintained that cruel and unusual punishment has been inflicted.⁶⁸

Yet, despite the paucity of analysis outlined above, recent cases have not opened the issue to re-examination.⁶⁹ Indeed, in *Oyler v. Boles*⁷⁰ the Court commented that: "Petitioners recognize that the unconstitutionality of the practice of inflicting severer criminal penalties upon habitual offenders is no longer open to serious challenge."⁷¹ That conclusion rested only upon a citation to *Moore* and *Graham*. In *Spencer v. Texas*,⁷² the same summary dismissal of the constitutional issue was made, and the same cases, along with *McDonald* and *Oyler*, were cited.⁷³

Nowhere has the issue been squarely faced. The cases do no more than argue for the proposition that society has a legitimate stake in protecting itself from habitual criminals. That is undeniable. Presumably, however, such protection cannot be

65. 180 U.S. 311 (1901).

66. *Id.* at 313; see *In re Kemmler*, 136 U.S. 436, 447 (1890); Granucci, "Nor Cruel and Unusual Punishment Inflicted": The Original Meaning, 57 CALIF. L. REV. 839, 841, 865 (1969).

67. 224 U.S. 616 (1912).

68. *Id.* at 631.

69. See *Spencer v. Texas*, 385 U.S. 554 (1967); *Oyler v. Boles*, 368 U.S. 448 (1962); *Price v. Allgood*, 369 F.2d 376 (5th Cir. 1966); *Beland v. United States*, 128 F.2d 795 (5th Cir.), cert. denied, 317 U.S. 676 (1942).

70. 368 U.S. 448 (1962).

71. *Id.* at 451.

72. 385 U.S. 554 (1967).

73. *Id.* at 560.

obtained through the infliction of unconstitutionally cruel punishments. A mere recital of the legitimate objectives of a statute ought not be considered sufficient analysis to defeat a claim that the means used are not constitutionally permissible. It is this writer's belief that upon re-examination of this issue too, the Supreme Court might well strike down habitual offender laws.

Such a holding would be predicated upon a finding that the language of the amendment prohibits not only barbaric methods of punishment but also penalties which are merely excessive. While legal literature has generally accepted a restrictive view of the prohibition against cruel and unusual punishments, there is substantial reason to believe that the language was originally intended to extend to the issue of excessiveness.⁷⁴

The legislative history of the eighth amendment offers support for both positions. It appears that the framers strove to be faithful to the original intention of the Puritans who first drafted the prohibition against cruel and unusual punishments into the English Bill of Rights of 1689.⁷⁵ Further, it appears that the American draftsmen believed that the original intention was to prohibit the inflicting of barbarous physical punishments.⁷⁶ From this it certainly seems that the eighth amendment was intended to be limited in scope. The matter, however, is not so easily resolved; it also appears that the American draftsmen were mistaken in their interpretation of the English experience. Even prior to 1689 Britain had developed a general policy against excessiveness in punishments. For a long time after 1689 barbarous punishments that were proportionate to an offense were permitted.⁷⁷ Thus, it can be argued that because the framers of the amendment were trying to duplicate the English experience, the amendment should be broadly construed as a prohibition against excessiveness.

74. For an excellent discussion of the historical issues see, Granucci, "*Nor Cruel and Unusual Punishments Inflicted*": *The Original Meaning*, 57 CALIF. L. REV. 839 (1969).

75. *Id.* at 843.

76. *Id.* at 844.

77. *Id.* at 843-44. Note that many of the bloody practices in vogue prior to the passage of the Bill of Rights of 1689 were continued for quite some time. Drawing and quartering continued with all its embellishments until 1814 when disembowelment was eliminated by statute. The burning of female felons at the stake was continued until 1790. *Id.* at 855-56.

While evidence as to the original meaning of the "cruel and unusual punishment" language may be persuasive, it is not sufficient to resolve the conflict over the scope of the eighth amendment.

The issue of whether excessiveness is prohibited seems actually to have been decided by the Supreme Court in *Weems v. United States*.⁷⁸ A minor public official in the Philippines had been convicted of falsifying an official document to conceal the wrongful disposition of a small sum of money. The minimum punishment authorized for the offense was twelve years of *cadena temporal*, an Hispanic punishment involving hard and painful labor while constantly enchained. The Supreme Court declared the entire statutory penalty unconstitutional under the Philippine Bill of Rights, a portion of which was "construed and applied [as] identical with the cruel and unusual punishment clause of the Eighth Amendment."⁷⁹

While the decision certainly rested in part on the view that the penalty was inherently cruel, it rested also on the assertion that the sentence was cruelly excessive in relation to the crime committed. The Court specifically declared that it is a "precept of justice that punishment for crime should be graduated and proportioned to offense."⁸⁰ The argument was made to the Court that the framers of the Bill of Rights intended to prohibit only sentences that were barbarous, not those that were merely excessive; but the Court responded that it must have occurred to the framers

that there could be exercises of cruelty by laws other than those which inflicted bodily pain or mutilation. . . . Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore, a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions.⁸¹

78. 217 U.S. 349 (1910).

79. *Id.* at 383 (White, J., dissenting).

80. *Id.* at 367.

81. *Id.* at 372-73.

The *Weems* decision has been generally accepted by both federal and state courts as establishing the rule that mere excessiveness may render a punishment unconstitutionally cruel.⁸²

In fact, the *Weems* decision may be seen as having influenced the recent landmark case, *Robinson v. California*,⁸³ which held that it is not permissible to treat as a criminal one who is afflicted with the sickness of drug addiction. The statement that "even one day in prison would be cruel and unusual punishment for the 'crime' of having a common cold"⁸⁴ reflects the Court's concern with the relationship between a punishment and the "behavior" which occasioned it.⁸⁵ It cannot be argued that one day in prison is a barbarous physical punishment. Yet the Court maintained that such a punishment for the "crime" of having a common cold would be prohibited by the eighth amendment. Surely then, that amendment prohibits more than barbarity; it must also prohibit excessiveness.

This line of reasoning is clearest in the concurring opinion of Mr. Justice Douglas.⁸⁶ He specifically noted that the eighth amendment prohibits both inherently cruel punishments and punishments which are excessive in light of the offense.

Yet one of the most striking characteristics of habitual offender laws is that they mandate or permit the imposition of sentences the severity of which is out of all proportion to the specific offense which "triggers" them. The new federal law, for example, permits a judge to extend the sentence of an offender convicted of a third felony to twenty-five years. Yet, there are more than forty felonies in title 18 of the United States Code that carry a maximum sentence of two years.⁸⁷ Thus, the interstate

82. Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635, 640 (1966). On the issue of disproportionate severity of punishment, see the following cases: *Roberts v. Pegelow*, 313 F.2d 548, 550-51 (4th Cir. 1963); *Sostre v. Rockefeller*, 312 F. Supp. 863 (S.D.N.Y. 1970), *aff'd and modified sub nom.* *Sostre v. McGinnis*, 442 F.2d 178 (2d Cir. 1971); *Jordan v. Fitzharris*, 257 F. Supp. 674 (N.D. Cal. 1966); *United States ex rel. Hancock v. Pate*, 223 F. Supp. 202, 205 (N.D. Ill. 1963); *Fulwood v. Clemmer*, 206 F. Supp. 370 (D.D.C. 1962).

83. 370 U.S. 660, 668 (1962) (Douglas, J., concurring).

84. *Id.* at 667.

85. See Note, *Revival of the Eighth Amendment: Development of Cruel-Punishment Doctrine by the Supreme Court*, 16 STAN. L. REV. 996, 1010 (1964).

86. 370 U.S. at 668 (Douglas, J., concurring).

87. *Hearings on S. 30 Before the Subcomm. on Criminal Laws and Procedure of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess., at 185 (1969).

transportation of lottery tickets,⁸⁸ for example, could trigger a twenty-five year term of imprisonment. It may well be that a recidivist who has served two previous jail sentences has manifested a resistance to the corrections process that justifies an increased sentence for the third offense. However, "it defies all sense of just proportion to suggest that the limit for a second offender should be two years and for a third offender [twenty-five]. And this is particularly true when an offender who commits a very serious offense for the third time is subject to the same [twenty-five] year maximum."⁸⁹

It may well be that such offenses to the "sense of just proportion" constitute a violation of the prohibition against excessiveness which the *Weems* and *Robinson* courts found in the eighth amendment.

It is interesting to note that after listening to Professor Low's criticism of S. 30, the Committee on the Judiciary reported out a somewhat changed version. Thus, subsection (b) of section 3575 of title 18 of the United States Code provides that upon finding that a defendant is a dangerous special offender "the court shall sentence the defendant to imprisonment for an appropriate term not to exceed twenty-five years and *not disproportionate in severity to the maximum term otherwise authorized by law for such felony*."⁹⁰ While this language indicates Congressional acceptance of the principal of proportionality in sentencing, it hardly constitutes an effective assurance of constitutional rights. The statute leaves tremendous discretion with judges and though it exhorts them to adhere to the principal of proportionality, it does not limit discretion in such a way as would assure that result.

If the federal statute is upheld as constitutional, the states will have to do no more than make simple amendments in order to conform to the rule. Over time there will certainly be appeals of sentences on the grounds that the statutes' ambiguous requirement of proportionality have not been satisfied. Perhaps as the appellate courts sustain some sentences and modify others a set of coherent principals relating to proportionality will

88. 18 U.S.C. § 1301 (1964).

89. Hearings on S. 30, *supra* note 87, at 185.

90. 18 U.S.C. § 3575 (b) (1970) (emphasis added).

emerge. But that is an uncertain proposition, and further, it represents an abdication of legislative authority to the judiciary.

Congress might easily have devised a more rational and more clearly constitutional recidivism statute than section 3575 of title 18. The law might have authorized the imposition of sentences which are a multiple of the maximum sentence that could be imposed for the trigger offense. Or, a schedule might have been devised providing extensions of various lengths which are directly proportionate to the immediate offense. Such a plan as either of those would operate to reserve the lengthiest sentences for those offenders whose most recent crimes indicate that they do in fact constitute a danger of great magnitude to the public. Comparatively petty offenders, who seem to receive the harshest treatment under present laws, would thus be safeguarded.

VI. CONCLUSION

The new federal recidivism statute, and a great many similar state statutes, are of dubious constitutionality. The argument has been made that such statutes work a deprivation of equal protection of the law, and also that they authorize the infliction of cruel and unusual punishments. The arguments are not unrelated.

Presumably the justification for extended sentences is that they are necessary to protect the public. But that purpose is not satisfied by legislation such as section 3575 of title 18 of the United States Code which permits a man who has twice committed a crime of violence to go free in less time than a man who has three times committed a lesser offense. Indeed, it is exactly the failure of the law to achieve that purpose which raises the equal protection issue for a statute which authorizes different treatment for individuals who have committed the same offense is constitutionally permissible only if the special treatment of some of the offenders is necessary to achieve some compelling state purpose. Both logic and the empirical evidence that exists in this area suggest that recidivism statutes operate to limit the liberty of a group of offenders characterized neither by violence nor dangerousness as much as by inadequacy. To treat such a class of offenders so harshly is not constitutionally permissible. The

data obtained from the West study, adds immediate relevance to the eighth amendment argument. If the offenders actually sentenced as recidivists were characterized by violence and dangerousness, it would be difficult and perhaps irresponsible to argue that the extended sentences were excessive. But the data indicates that the sentences imposed are excessive not only in relation to the trigger offense, but also in relation to an objective assessment of dangerousness.

The eighth amendment argument is particularly useful because it implies a standard—proportionality. It is within the power of legislative bodies to authorize extended sentences for habitual offenders. However, the legislative schemata must safeguard against excessively harsh sentences for comparatively petty offenders. If, for example, the federal statute had permitted the imposition of sentences up to three times greater than the maximum permitted for the trigger offense, then offenders found to be dangerous special offenders upon the commission of one of the more than forty felonies in title 18 that are punishable by a maximum sentence of two years could be sentenced to a term of imprisonment not to exceed six years. Other, more serious offenders, could be imprisoned for substantially longer terms. Thus, the objective of protecting the public against dangerous offenders would still be served.

Unfortunately, however, Congress was not so innovative. Thus, we are left with a recidivism statute which will do little either to protect the freedom of offenders or to safeguard the public from truly dangerous criminals. It can only be hoped that the courts will extend the rule of the *Weems* case, and strike down section 3575. By reaffirming the principle of just proportionality in sentencing the courts can do much both to eliminate present injustices and to motivate legislative bodies to devise effective and fair responses to a social problem of great magnitude.