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Recidivism: The Treatment of The Habitual Offender

RECIDIVISM: THE TREATMENT OF THE HABITUAL OFFENDER

I. INTRODUCTION

Penal law and theory generally addresses itself to two types of criminals: first offenders and habitual offenders or recidivists.[1] Those in the latter group have been referred to as failures for two reasons: first, they have failed to alter their previous behavior and make an adequate adjustment upon returning to society; second, society has failed with them in terms of its efforts at correction, treatment, and rehabilitation.[2] The traditional method of dealing with the recidivist has been to increase the punishment—"increasing the dosage of a medicine which failed to cure when administered in small quantities."[3] Indeed, upon conviction for a crime, a person with prior convictions will often be subject to recidivism laws.[4] It is the purpose of this comment to examine the theory and operation of these laws in an attempt to point out their faults and to suggest means for their re-evaluation.

II. WHAT IS RECIDIVISM?

A. Origin and History

Prior to the penal reform movement in England, there was no problem with habitual criminals, chiefly because the punishment for the first offense was so severe that, although the individual may have habitually resorted to crime, his first offense usually proved to be his last.[5] With the reform movement came a reduction in the use of the death penalty and in the length

[1] Theoretically, recidivism is only evidence of habitual criminality. Other factors that should be considered in defining the habitual criminal are the types of crimes committed, seriousness of the crimes, potential danger to the public, age and mental condition of the offender, biological and social background of the offender, and susceptibility of the offender to rehabilitation. Nevertheless, a majority of the states define the habitual criminal in terms of general recidivism. Brown, *The Treatment of the Recidivist in the United States*, 23 CAN. BAR REV. 640, 643 (1945); Note, *Recidivism and Virginia's "Come-Back" Law*, 48 VA. L. REV. 597, 599 (1962).

[2] Van West, *Cultural Background and Treatment of the Persistent Offender*, 28 FED. PROB. 17 (1964).

[3] Sellin, *Foreword to Brown, The Treatment of the Recidivist in the United States*, 23 CAN. BAR REV. 637 (1945).

[4] *See, e.g.*, State v. Smith, 99 Ariz. 106, 407 P.2d 74 (1965) (sentencing a defendant with one prior offense, petit larceny, to ten to eleven years for passing a forged check); State v. Sedlacek, 178 Neb. 322, 133 N.W. 2d 380 (1965) (sentencing a sixty-four year old defendant with two prior convictions to fourteen years for stealing a shotgun from his neighbor); Application of Boatwright, 119 Cal. App. 420, 6 P.2d 972 (1931) (defendant sentenced to life imprisonment for stealing a tire worth $25).

[5] RADZINOWCZ, A HISTORY OF ENGLISH CRIMINAL LAW—THE MOVEMENT FOR REFORM 1750-1833, 301-96 (1948).

of sentences, thus greatly increasing the affected individual's opportunity to return to society, and contributing to the creation of a class of habitual offenders.

To deal with this problem, the concept of preventive detention for repeating offenders was initially suggested by the Gladstone Committee Report of 1895.[6] While the Committee recognized rehabilitation as the goal of the penal system, it believed loss of liberty would deter repeaters and, should it fail to be effective as a deterrent, would at least protect society by isolating the offenders.[7]

The earliest laws dealing with habitual offenders in America were "specific" in that the penalty was increased only when a specific crime was repeated.[8] Most states have supplemented these "specific" recidivism laws with "general" recidivism laws that provide for increased penalties when the subsequent crime is of a certain type.[9] The passage of the famous *Boeumes Laws* in New York in 1926 attracted great publicity and provided the impetus for the movement toward passage of recidivism laws in other states.[10] Today almost every state has some type of recidivism law.[11] In addition, the United States Code has been amended to permit extended terms of imprisonment for offenders convicted of a third felony.[12]

B. Purpose

The primary purpose of statutes authorizing additional punishment of persons convicted of a second or a subsequent offense is to warn first offenders and thus deter their criminal tendencies.[13] By making the risks involved in perpetuating the crime so great, the intention is to deter potential recidivists. However some have argued that habitual offender laws are un-

[6] House of Commons, Report of the Committee On Prisons (1895).

[7] Katkin, *Habitual Offender Laws: A Reconsideration*, 21 BUFF. L. REV. 99 (1972).

[8] 3 Laws of Va. 276-77 (Hening 1823). This Statute provided for an increased penalty for the second offense of hog stealing.

[9] Brown, *supra* note 1, at 641.

[10] *Id.* at 642 n.11.

[11] *See, e.g.*, CAL. PENAL CODE § 641 (West 1955); FLA. STAT. ANN. § 775.10 (1965); ILL. ANN. STAT. ch. 38, 1-7(e) (Smith-Hurd Supp. 1970); MASS. GEN. LAWS ANN. ch. 279, § 25 (1959); N.Y. PENAL LAW § 70.10 (McKinney 1967); N.C. GEN. STAT. § 15-147 (1965); PA. STAT. ANN. tit. 18, § 5108 (1963); VA. CODE ANN. § 53-296 (Repl. Vol. 1972); W. VA. CODE ANN. § 61-11-18 (1966).

[12] Crimes and Criminal Procedure 18 U.S.C. § 3575.

[13] *See, e.g.*, Cobb v. Commonwealth, 267 Ky. 176, 101 S.W.2d 418 (1936); State v. Baldonado, 79 N.M. 175, 441 P.2d 215 (1968); People v. Tramonti, 153 Misc. 371, 275 N.Y.S. 517 (1934); Arbuckle v. State, 132 Tex. Crim.R. 371, 105 S.W.2d 219 (1937); Commonwealth v. Calio, 155 Pa. Super., 355, 38 A.2d 351 (1944); State v. Hamilton, 340 Mo. 768, 102 S.W.2d 642 (1937); Tyson v. Hening, 205 Va. 389, 136 S.E.2d 832 (1964), *cert. denied*, 379 U.S. 867 (1964); Sims v. Cunningham, 203 Va. 347, 124 S.E.2d 221 (1962), *cert. denied*, 371 U.S. 840 (1962); Dye v. Skeen, 135 W. Va. 90, 62 S.E.2d 681 (1950).

necessary to deter serious offenses.[14] Because the courts can impose lengthy terms of imprisonment when sentencing truly dangerous felons, one cannot validly say the fear of being sentenced to an additional term as a recidivist would deter the commission of crimes for which lengthy terms could be imposed even on first offenders. Thus, the net effect of recidivism laws may well be to deter only comparatively petty offenses.

The chief merit of imposing an increased sentence lies in the fact the offender is temporarily removed from society. If in fact isolation is a major purpose of recidivism laws,[15] then the recidivists are nothing more than a custodial problem.[16]

Others contend that the purpose of recidivism laws is to rehabilitate offenders.[17] However, it is difficult to imagine increased punishment as a rehabilitative device when one considers that offenders will be detained in the same system that has failed to rehabilitate them during their first incarceration. It would be improper to impute the failure of rehabilitation entirely to the penal system, but to deny that it has shortcomings is equally naive. A crime committed by an offender with a previous criminal record should prompt examination concerning why previous treatment has failed and what can be presently done for the offender.

Thus, deterrence and rehabilitation cannot be accepted as valid purposes of the recidivism statutes. Rather, punishment,[18] protection, and retribution[19] seem to be the basis for their continued use.

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[14] Katkin, *supra* note 7, at 106.

[15] *See, e.g.*, People v. Richardson, 74 Cal. App. 2d 528, 169 P.2d 44 (1946); Reynolds v. Cochran, 138 So. 2d 500 (Fla. 1962); Joyner v. State, 158 Fla. 806, 30 So. 2d 304 (1947); State v. George, 218 La. 18, 48 So. 2d 265 (1950), *cert. denied*, 340 U.S. 949 (1951); People v. Marinello, 11 Misc. 2d 1026, 179 N.Y.S.2d 209 (1957); State v. Wood, 2 Utah 2d 34, 268 P.2d 998 (1954), *cert. denied*, 238 U.S. 900 (1954); Tyson v. Hening, 205 Va. 389, 136 S.E.2d 832 (1964), *cert. denied*, 379 U.S. 867 (1964); Wesley v. Commonwealth, 190 Va. 268, 56 S.E.2d 362 (1949); In re Hendrickson, 12 Wash. 2d 600, 123 P.2d 322 (1942); State v. Stout, 116 W. Va. 398, 180 S.E. 443 (1935).

[16] Sellin, *supra* note 3, at 638. *See also* D. WEST, THE HABITUAL PRISONER (1963). Studies conducted by West suggest that persistent offenders are neither violent nor organized professional criminals.

[17] *See, e.g.*, State v. Owen, 73 Idaho 394, 253 P.2d 203 (1953); Brown v. Commonwealth, 100 Ky. 127, 37 S.W. 496 (1896); State v. Hamilton, 340 Mo. 768, 102 S.W.2d 642 (1937); People v. Spellman, 136 Misc. 25, 242 N.Y.S. 68 (1930); Commonwealth v. Sutton, 125 Pa. Super. 407, 189 A. 556 (1937); Kinney v. State, 45 Tex. Crim. R. 500, 78 S.W. 225 (1904).

[18] *See*, Scherer v. State, 278 F.2d 469 (10th Cir. 1960); People v. Poppe, 394 Ill. 216, 68 N.E.2d 254 (1946), *cert. denied*, 329 U.S. 798 (1946); *Ex parte* Jerry, 294 Mich. 689, 293 N.W. 909 (1940).

[19] *See*, People *ex rel.* Brooks v. Warden, 175 Misc. 663, 24 N.Y.S.2d 931 (1941); Ervin v. State, 351 P.2d 401 (Okla. Crim. App. 1960); Wesley v. Commonwealth, 190 Va. 268, 56 S.E.2d 362 (1949).

III. Types of Recidivist Proceedings

There are very important procedural problems inherent in the application of any recidivism law, chiefly involving how and when the prior conviction or convictions are to be alleged and proved. Several methods of handling these problems have been adopted by statute and case law.

A. The Common Law Procedure

The application of a recidivism statute under the common law method requires both an allegation of former convictions in the present indictment or information, and proof of that allegation at the trial.[20] This is the only procedure for determining recidivist liability in which the issue of guilt for the present offense and the issue of recividism are decided simultaneously.

Ordinary rules of evidence have long recognized that while evidence of prior convictions is relevant and of probative value,[21] it is excluded.[22] This rule is based upon the rationale that any evidence of prior unlawful behavior unrelated to the offense presently charged would so unduly prejudice the jury as to deny the defendant a fair trial.[23] The common law procedure is an additional method by which this highly prejudicial evidence can be placed before the jury. The presentation of this evidence is allegedly justified because it is necessary to prove prior conviction to justify the additional penalty.[24] A further attempt at justification contends that the jury is instructed to suppress knowledge of the prior convictions in deciding the issue of guilt in the present case.[25] Due to the prejudicial effect of such

[20] *See, e.g.*, Ga. Code Ann. § 27-2511 (1972); Ind. Stat. Ann. § 9-2208 (Repl. Vol. 1956); Ky. Rev. Stat. § 431-190 (1969); N.C. Gen. Stat. § 15-147 (1965). Until recently, the majority of jurisdictions employed the common law procedure, although many have now discarded it. *E.g.*, State v. Ferrone, 96 Conn. 160, 113 A. 452 (1921); Harris v. State, 369 P.2d 187 (Okla. Crim. 1962).

[21] Generally, such evidence is admitted only where the defendant raises the question of his own character or offers himself as a witness. McCormick, Evidence § 190 (2d ed. 1972); 1 Wigmore, Evidence § 57 (3d ed. 1940).

[22] *See, e.g.*, Michelson v. United States, 335 U.S. 469 (1948); State v. Tessnear, 265 N.C. 319, 144 S.E.2d 43 (1965); State v. Myrick, 181 Kan. 1056, 317 P.2d 485 (1957); *See generally* McCormick, Evidence § 190 (2d ed. 1972); 1 Wigmore, Evidence § 57 (3d ed. 1940).

[23] 1 Wigmore, Evidence §§ 57 and 192 (3d ed. 1940).

[24] Thus, while the exceptions in note 21 *supra*, have some relation to the defendant's guilt of the primary offense, the exception to accepted rules of evidence created by the common law procedure is based on an issue irrelevant to defendant's guilt of the primary offense.

[25] *See, e.g.*, State v. Lutz, 135 N.J.L. 603, 52 A.2d 773 (1947); State v. Martin, 275 S.W.2d 336 (Mo. 1955); State v. Meyer, 258 Wis. 326, 46 N.W.2d 341 (1951). There is some question as to how effectively jurors can accomplish this task. Krulewitch v. United States, 336 U.S. 440 (1949); Blumenthal v. United States, 332 U.S. 539 (1947); United States v. Banmiller, 310 F.2d 720 (3d Cir. 1962).

evidence many courts[26] and legislatures[27] have adopted other procedures for determining liability under recidivism statutes.

B. The Supplemental Procedure

A number of states have statutes which provide for the trial of the recidivism charge after there has been a verdict of guilty to the present charge.[28] These statutes generally provide that if after conviction for the present offense it is found that the defendant is a multiple offender, the prosecutor must file an information alleging his prior convictions. The defendant is then brought to court and asked if he is the same person who had been previously convicted. If he replies affirmatively he is sentenced and returned to prison. If he replies in the negative a jury is empaneled to decide (beyond a reasonable doubt) the question of identity and the existence of the prior convictions.

This type of separate determination of status is superior to the common law procedure in two respects. By providing for a separate trial to determine liability under the recidivism statute and by introducing evidence of prior convictions at that trial, the serious prejudicial effects of the common law procedure are eliminated.[29] Under the common law procedure if the state does not learn of the prior convictions until after the present trial, it is barred from invoking the recidivism statute, which frustrates the legislative intent. However, under the supplementary procedure, the state can invoke the statute after the offender has been convicted for the present crime.[30]

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[26] State v. Ferrone, 96 Conn. 160, 113 A. 452 (1921); State v. Johnson, 86 Idaho 51, 383 P.2d 326 (1963); Harris v. State, 369 P.2d 187 (Okla. Crim. 1962); State v. Stewart, 110 Utah 203, 171 P.2d 383 (1946).

[27] See note 11 *supra.*

[28] *See, e.g.,* ALAS. STAT. § 12.55.060 (1966); DEL. CODE ANN. tit. 11, § 3912(b) (Supp. 1968); FLA. STAT. ANN. § 775.11 (1965); N.J. STAT. ANN. § 2A:85-8 (Supp. 1966); N.Y. PENAL LAW 70.10 (McKinney 1967); VA. CODE ANN. § 53-296 (Repl. Vol. 1972); W. VA. CODE ANN. § 61-11-18 (1966).

[29] Shargaa v. State, 102 So. 2d 814 (Fla. 1958), *cert. denied,* 358 U.S. 873 (1958).

[30] Many states providing for the supplementary procedure allow its use at any time. *See, e.g.,* FLA. STAT. ANN. § 775.11 (1965); N.Y. PENAL LAW § 1943 (McKinney 1967); OHIO REV. CODE ANN. § 2961.13 (1954). These statutes have even been interpreted to mean that the proceeding can be instituted even after the defendant has served the sentence for the present offense. People v. Kaiser, 230 App. Div. 646, 246 N.Y.S. 309 (1930); *aff'd mem.,* 256 N.Y. 581, 177 N.E. 149 (1931); State v. Sudekatus, 72 Ohio App. 165, 51 N.E.2d 22 (1943). *Contra,* Reynolds v. Cochran, 138 So. 2d 500 (Fla. 1962); State v. Shank, 115 Ohio App. 291, 185 N.E.2d 63 (1962) (dictum). Several statutes authorizing the supplementary procedure limit the time at which it can be invoked to before verdict in the present case. ALAS. STAT. § 12.55.060 (1962); MO. REV. STAT. § 556.280(2) (Supp. 1964). Virginia allows the statute to be invoked at any time prior to the offender's release from the penitentiary. Lawrence v. Commonwealth, 206 Va. 51, 141 S.E.2d 735 (1965).

The supplementary procedure, though more desirable than the common law procedure, is not without its faults. The procedure is both time-consuming and expensive, in that it requires two separate trials with the possible necessity for two juries. Far more serious problems arise concerning the necessity of timely notice of the entire charge, when a defendant, charged with a present crime, is unaware that he will later be charged as a recidivist.[31]

The response to this criticism alleges there is no need for notice of any impending recidivist charge prior to the trial for the present offense, because recidivism is a status and is extrinsic to the issues involved in the present crime.[32] Proponents fail to realize that notice of the recidivism charge before trial can be vital in that it may drastically affect not only the defense at the trial, but also the decision to plead guilty or not guilty.[33] To insure fundamental fairness, the state should be prevented from requiring a defendant to plead to a criminal charge without first apprising him of what may well be the most important aspect of the charge.[34]

C. Court Determination of Recidivism

A few jurisdictions provide that the counts charging the defendant under the recidivism statute may be alleged in the present indictment, and that proof thereof shall be made after conviction of the present offense before the court sitting without a jury.[35] Under this procedure the evidence of the defendant's prior conviction is not introduced until after the jury has reached a verdict in the trial for the present offense. Thus, the jury would not be prejudiced or confused by the introduction of evidence of prior crimes.

This procedure, however, raises a constitutional question because recidivist proceedings are criminal in nature,[36] and the denial of a trial by jury could be construed as a denial of due process of law.

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[31] Doubtless he is aware of his prior convictions, but he cannot be charged with knowledge of the possibility of increased punishment nor with the legal knowledge necessary to determine if his prior convictions fall within the purview of the statute.

[32] Oyler v. Boles, 368 U.S. 448 (1962); Williams v. New York, 337 U.S. 241 (1949).

[33] Knowledge of an impending recidivism charge would fundamentally change the defendant's trial tactics. Clearly a defendant would not attempt to seek clemency with a guilty plea if he knew that he was also subject to a greatly increased sentence under a recidivism statute.

[34] The present crime may carry a penalty of a year or two; if it is the defendant's third or fourth conviction, the recidivism statute may raise the penalty to life imprisonment. *See, e.g.*, CAL. PEN. CODE § 641 (West 1955) (third offense); FLA. STAT. ANN. § 775.10 (1965) (fourth offense); W. VA. CODE ANN. § 61-11-18 (1966) (third offense).

[35] *See, e.g.*, KAN. GEN. STAT. ANN. § 21-107a (1964); MINN. STAT. ANN. § 609.16 (1964); NEB. REV. STAT. § 29-2221(z) (1964); ORE. REV. STAT. § 161.725 (1971).

[36] Recidivist proceedings are criminal in nature. Oyler v. Boles, 368 U.S. 448 (1962); Chewning v. Cunningham, 368 U.S. 443 (1962); Application of Boyd, 189 F. Supp. 113

D. The Connecticut Method

The preceding analysis leaves little doubt that the Connecticut recidivism procedure, taken from an English statute[37] and adopted by the Connecticut supreme court,[38] is clearly the most desirable. Under this procedure, a two part indictment containing both the present charge and the allegation of prior convictions is prepared and read to the defendant in the absence of the jury.[39] Only the allegations relating to the present crime are read and proved to the jury at the first trial, thus preventing any prejudice created by the introduction of evidence of prior crimes to the jury before it has reached a decision regarding the present crime. If the defendant is found guilty of the present crime, the allegations of recidivism are then read and proved to the jury who in turn determine liability under the recidivism statute at that time. If the defendant is found not guilty of the present crime the matter is dropped.

This procedure has been recognized as the most desirable because it gives the state a speedy and inexpensive method of determining all issues, and affords the benefit of a jury trial without the prejudicial evidence of prior crimes.

IV. Constitutionality

The recidivism statutes, although generally held constitutional in every respect, have frequently come under attack.[40] Critics alleging unconstitutionality contend: (1) where crimes committed before enactment are used, the statutes are ex post facto; (2) such statutes place the defendant in double jeopardy; (3) the statutes deny the defendant due process of law; (4) because the statutes apply only to certain classes of offenders, they deny a defendant equal protection of the laws; (5) the increased penalty is cruel and unusual punishment.

Clearly, recidivism statutes are not ex post facto, even where the finding of liability under the statute is based on crimes committed prior to enact-

(M.D. Tenn. 1959), *aff'd mem. sub nom.* Bomar v. Boyd, 281 F.2d 195 (6th Cir. 1960). See note 64 *supra.*

[37] Coinage Offences Act, 1861, 24 and 25 Vict., c. 99.

[38] State v. Ferrone, 96 Conn. 160, 113 A. 452 (1921).

[39] This procedure affords the defendant adequate notice and eliminates the possibility that he will plead guilty with the expectation that the only punishment he could receive would be that provided as punishment for the present offense. See note 33 *supra.*

[40] *See, e.g.,* Spencer v. Texas, 385 U.S. 554 (1967); United States v. Skeen, 126 F. Supp. 24 (N.D. W. Va. 1954); People v. Ashley, 42 Cal. 2d 246, 267 P.2d 271 (1954); Cross v. State, 96 Fla. 768, 119 So. 380 (1928); People v. Wilson, 246 N.Y.S.2d 608, 196 N.E.2d 251 (1963); Surratt v. Commonwealth, 187 Va. 940, 48 S.E.2d 362 (1948); State v. Lawson, 125 W. Va. 1, 22 S.E.2d 643 (1942). *See generally* Annot., 58 A.L.R. 20 (1929); Annot., 82 A.L.R. 345 (1933); Annot., 116 A.L.R. 209 (1938); Annot., 132 A.L.R. 91 (1941); Annot., 139 A.L.R. 673 (1942).

ment of the statute.[41] No ex post facto argument can be made as long as the most recent crime has been committed after the enactment of the statute. The additional punishment is imposed as a direct consequence of the most recent crime; and not a consequence of the earlier convictions.[42]

Others argue that when sentenced as a recidivist, the defendant is sentenced a second time for his prior convictions, and is thus placed in double jeopardy. This argument has repeatedly been held to be erroneous[43] because defendants "are not punished the second time for the earlier offense, but the repetition of criminal conduct aggravates their guilt and justifies heavier penalties when they are again convicted." [44]

Neither the fifth[45] nor the fourteenth[46] amendments are violated by proceeding on an information, because no separate offense is charged. The recidivism statutes do not create a new crime, but merely provide a basis for increasing the penalty for a present crime because of past criminal behavior.[47]

Courts have taken the position that recidivism laws do not, by their application to a certain class of offenders, deny equal protection of the

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[41] *See, e.g.*, Payne v. Nash, 327 F.2d 197 (8th Cir. 1964); United States v. Sierra, 297 F.2d 531 (2d Cir. 1961); Oliver v. United States, 290 F.2d 255 (8th Cir. 1961); Wey Him Fong v. United States, 287 F.2d 525 (9th Cir. 1961); *cert. denied*, 360 U.S. 971 (1961); Sherman v. United States, 241 F.2d 329 (9th Cir. 1957); Washington v. Mayo, 91 So. 2d 621 (Fla. 1956); Thompson v. State, 195 Kan. 318, 403 P.2d 1009 (1965).

[42] *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. 1961), *cert. denied*, 360 U.S. 971 (1961); 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); State v. Let Pitre, 54 Wash. 166, 103 P. 27 (1909).

[43] *See, e.g.*, Gryger v. Burke, 334 U.S. 728 (1948); Carlesi v. New York, 233 U.S. 51 (1914); Graham v. West Virginia, 224 U.S. 616 (1912); McDonald v. Massachusetts, 180 U.S. 311 (1901); Kelley v. People, 115 Ill. 583, 4 N.E. 644 (1886); Goeller v. State, 119 Md. 61, 85 A. 954 (1912); People v. Shastal, 26 Mich. App. 347, 182 N.W.2d 638 (1970); State *ex rel.* Hines v. Tahash, 263 Minn. 217, 116 N.W.2d 399 (1962).

[44] Graham v. West Virginia, 224 U.S. 616, 623 (1912).

[45] *See, e.g.*, Sherman v. United States, 241 F.2d 329 (9th Cir. 1957), *cert. denied*, 254 U.S. 911 (1957); Beland v. United States, 128 F.2d 795 (5th Cir. 1942), *cert. denied*, 317 U.S. 676 (1942).

[46] *See, e.g.*, Graham v. West Virginia, 224 U.S. 616 (1912); Smith v. State, 237 Ind. 532, 146 N.E.2d 86 (1958); State v. Salyer, 196 Kan. 32, 410 P.2d 248 (1966); State v. Zywicki, 175 Minn. 508, 221 N.W. 900 (1928); State v. Hicks, 213 Ore. 640, 325 P.2d 794 (1958).

[47] *See, e.g.*, Oyler v. Boles, 368 U.S. 448 (1962); Chandler v. Fretag, 348 U.S. 3 (1954); Graham v. West Virginia, 224 U.S. 616 (1912); Cross v. State, 96 Fla. 768, 119 So. 380 (1928). It is also generally held that recidivism is not an element of the present offense. United States v. Modern Reed and Ratlan Co., 159 F.2d 656 (2d Cir. 1947), *cert. denied*, 331 U.S. 831 (1947); Jones v. United States, 18 F.2d 573 (8th Cir. 1927); People v. Roberson, 167 Cal. App. 2d 429, 334 P. 2d 666 (1959).

law.[48] It is recognized that people or classes of people may be treated differently provided the basis for the different treatment is related to some legitimate state purpose.[49] With this requirement in mind, courts have held that recidivism statutes, while authorizing unequal treatment, are permissible because they relate to a legitimate state of interest, *i.e.*, public protection.[50]

The statutes have also withstood countless eighth amendment attacks which claim that the increased punishment amounts to the imposition of cruel and unusual punishment.[51] In denying this allegation the courts have given the issue very little consideration, merely relying on precedent to support their conclusions.[52] A few courts have given the issue more consideration, and while not declaring the statutes themselves unconstitutional, have held the punishment in specific cases to be cruel and unusual.[53]

V. Virginia's Recidivism Law

The Virginia recidivism law,[54] typical of those using the supplemental

[48] *See, e.g.*, McDonald v. Massachusetts, 180 U.S. 311 (1901); Moore v. Missouri, 159 U.S. 673 (1895); Wessling v. Bennett, 410 F.2d 205 (8th Cir. 1969); Barr v. State, 205 Ind. 481, 187 N.E. 259 (1933); State v. Sandoval, 80 N.M. 333, 455 P.2d 837 (1969); Surratt v. Commonwealth, 187 Va. 940, 48 S.E.2d 362 (1948); State v. Matte, 1 Wash. App. 510, 462 P.2d 985 (1969).

[49] Levy v. Louisiana, 391 U.S. 68 (1968); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942).

[50] *See, e.g.*, McDonald v. Massachusetts, 180 U.S. 311 (1901); Moore v. Missouri, 159 U.S. 673 (1895). It has been argued that, because it is doubtful that the purpose of public protection is served by recidivism statutes, this contention is no longer valid. Katkin, *Habitual Offender Laws: A Reconsideration*, 21 Buff. L. Rev. 99, 112 (1972).

[51] *See, e.g.*, Spencer v. Texas, 385 U.S. 554 (1967); Oyler v. Boles, 368 U.S. 448 (1962); Graham v. West Virginia, 224 U.S. 616 (1912); McDonald v. Massachusetts, 180 U.S. 311 (1901); Wessling v. Bennett, 410 F.2d 205 (8th Cir. 1969); Price v. Allgood, 369 F.2d 376 (5th Cir. 1966); *In re* Boatwright, 119 Cal. App. 420, 6 P.2d 972 (1931). *See generally* Annot., 33 A.L.R.3d 335.

[52] Katkin, *Habitual Offender Laws: A Reconsideration*, 21 Buff. L. Rev. 99, 113 (1972).

[53] *See, e.g.*, Goss v. Bomar, 337 F.2d 341 (6th Cir. 1964); Stephens v. State, 73 Okla. Crim. 349, 121 P.2d 326 (1942).

[54] Va. Code Ann. § 53-296 (Repl. Vol. 1972).

> When a person convicted of an offense, and sentenced to confinement therefor in the penitentiary, is received therein, if it shall come to the knowledge of the Director of the Department of Welfare and Institutions that he has been sentenced to a like punishment in the United States prior to the sentence he is then serving, the Director of the Department of Welfare and Institutions shall give information thereof without delay to the Circuit Court of the city of Richmond. Such court shall cause the convict to be brought before it, to be tried upon an information filed, alleging the existence of records of prior convictions and the identity of the prisoner with the person named in each. The prisoner may deny the existence of any such records, or that he is the same person named therein, or both. Either party may, for good cause shown, have a continuance of the case for such reasonable time as may be fixed by the court. The existence of such

procedure,[55] provides for the determination of the question of prior convictions after conviction and sentencing for the principal offense.

For security reasons, the recidivist proceedings are held in a building adjacent to the penitentiary. An information is prepared for the prisoner-defendant and is read to him. If he admits the allegations, he is sentenced and returned to the penitentiary; if he denies the allegations, the court determines whether records of the prior convictions exist. If the records do exist, but the prisoner denies that he is the same person named in the records, he is entitled to a jury trial on that issue.[56] Even if it is determined that the prisoner is the same person named in the record, the prior convictions are still subject to attack.[57]

VI. Conclusion

A. Faults and Virtues of the Virginia Procedure

The chief virtue of the Virginia procedure is that it isolates the recidivist from society and exposes him to its rehabilitative programs for longer periods of time. Also, because the proceedings are centralized,[58] the sentencing is somewhat uniform. However, there are some undesirable consequences attending Virginia's supplemental procedure.

Perhaps the most atypical feature of Virginia's law is the broad discretionary power vested in the court for sentencing purposes. The Virginia Code

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records, if denied by the prisoner, shall be first determined by the court, and if it be found by the court that such records exist, and the prisoner says that he is not the same person mentioned in such records, or remains silent, his plea, or the fact of his silence, shall be entered of record, and a jury shall be impaneled to inquire whether the convict is the same person mentioned in the several records. If they find that he is not the same person, he shall be remanded to the penitentiary; but if they find that he is the same person, or if he acknowledge in open court after being duly cautioned, that he is the same person, he may be sentenced to be confined in the penitentiary for such additional time as the court trying the case may deem proper. This section, however, shall not apply to successive convictions of petit larceny.

If the Circuit Court of the city of Richmond cannot, on the evidence available, make a determination of the convict's allegation of illegality of his prior conviction by reason of unrecorded matters of fact relative to his prior conviction, the Circuit Court of the city of Richmond may certify such question for hearing and determination to the court of said conviction which court shall conduct a hearing and make a finding of fact and determination of such unrecorded matters of fact, sending a certified copy of its order to the Circuit Court of the city of Richmond.

[55] See text at note 28 *supra.*

[56] For a detailed discussion of the procedure used in Virginia, *see* Note, *Recidivism and Virginia's "Come-Back" Law*, 48 Va. L. Rev. 597 (1962).

[57] Wesley v. Commonwealth, 190 Va. 268, 56 S.E.2d 362 (1949).

[58] The proceedings are held in the Circuit Court of the City of Richmond. Va. Code Ann. § 53-296 (Repl. Vol. 1972).

limits only the length of sentence imposed on second offenders.[59] In exercising discretion, a judge may rely upon information revealed by the pre-sentence report.[60] This information is designed to enable a judge to determine the offender's susceptibility to rehabilitation and thus the length of the sentence that he should receive. If it is accepted that rehabilitation of the offender and isolation from society are the purposes of the additional punishment, the length of the sentence should reflect the rehabilitative needs of the offender and the danger presented to society by the offender. Even so, sentences drawn by recidivists tend to follow a standardized pattern.[61] The pre-sentence report, though often very complete, is, nevertheless, a report, and by itself does not provide a sufficient basis for determining in advance the proper sentence to impose in recidivism cases.

Because of the use of a second hearing subsequent to the trial for the primary offense, the procedure is both time consuming and expensive. The delay in imposing the increased sentence under the recidivism law may cause the recidivist not to recognize the significance of the additional penalty. Both problems could be solved by providing for a hearing under the recividism law immediately after the trial for the principal offense.

Aside from the question of double jeopardy,[62] a principal disadvantage to the present procedure is that the defendant may have no knowledge of the recidivism law until after he has pleaded in the trial for the principal offense. Obviously from the standpoint of trial tactics, knowledge of this impending additional punishment is very important.[63]

B. Some Possible Improvements

It would be presumptuous to assume that the recidivist problem can be solved merely by modification of the present Virginia statute or by the enactment of any statute. More study and evaluation must be conducted in search of answers to the questions surrounding the recidivist problem. Why did he return to crime? Is it because of his environment, his association with other criminals while an inmate of the penitentiary; the failure of the penal system to properly prepare him for return to society? The answers to these

[59] VA. CODE ANN. § 53-296 (Repl. Vol. 1972).

[60] VA. CODE ANN. § 53-250 (Repl. Vol. 1972). Because the pre-sentence report contains information concerning the defendant's prior convictions, the trial judge could possibly take the defendant's bad record into consideration when setting the sentence for the present offense. This, in effect, would result in the defendant's receiving two penalties for recidivism, one immediately by the trial judge, and one later under the recidivism law.

[61] Note, *Recidivism and Virginia's "Come-Back" Law*, 48 VA. L. REV. 597, 628 (1962).

[62] See text at note 43 *supra*.

[63] See note 31 *supra*.

questions will provide the basis for renewed attention to the first offenders, for they are the latent recidivists.

In addition to placing an increased emphasis on preventing the first offender from becoming a recidivist, the present law must be altered to remove its inadequacies. Any law which is adopted must be flexible in order to fit the needs of the individual offender and the needs of society in relation to him. The law must also be applied uniformly and in such a way that the recidivist will realize that the additional sentence is being imposed for a specific crime. Finally, any recidivism law must be applied to reach all who are subject to it.

Many courts[64] and commenators[65] favor the "Connecticut Plan." [66] Under this procedure, the offender is given complete notice of the entire punishment to which he can be subjected before he is asked to plead to the present offense. Further, the offender can receive a trial by a judge or jury who is familiar with the defendant and the surrounding circumstances of the primary offense. Since the evidence of prior convictions is not introduced unless and until the defendant is found guilty of the primary offense, it does not prejudicially influence the determination of guilt. In addition, due to the immediate determination of the recidivism issue, the defendant is more likely to understand the reason for the additional punishment. Although the procedure entails two deliberations by the same judge or jury, it is less time-consuming than the present Virginia procedure utilizing two separate trials.

As noted, the "Connecticut Plan" has many advantages, but it is not without its faults. Chief among these is that because the recidivism issue is tried in the locality immediately following the trial for the primary offense, the procedure lacks a uniform sentencing philosophy.[67] It is also possible that through neglect and bargaining, not everyone subject to the law would be prosecuted as a recidivist.[68] These objections can be met, and the advantages of the "Connecticut Plan" retained, through the use of the "Connecticut

[64] Lane v. Warden, 320 F.2d 179 (4th Cir. 1963); Higgins v. State, 235 Ark. 153, 357 S.W.2d 499 (1962); Heinze v. People, 127 Colo. 54, 253 P.2d 596 (1953); State v. Ferrone, 96 Conn. 160, 113 A.452 (1921); People v. Sickles, 156 N.Y. 541, 51 N.E. 288 (1898).

[65] Note, *Recidivist Procedures, Prejudice and Due Process,* 53 CORNELL L. REV. 337 (1968); Note, *Recidivist Procedures,* 40 N.Y.U. L. REV. 332 (1965); Note, *The Pleading and Proof of Prior Convictions in Habitual Criminal Prosecutions,* 33 N.Y.U. L. REV. 333 (1958); 45 N.C. L. REV. 1039 (1967).

[66] See text at note 38 *supra.*

[67] Note, *Recidivism and Virginia's "Come-Back" Law,* 48 VA. L. REV. 597, 634 (1962).

[68] Prosecutors could bargain with defendants for a guilty plea to the present offense in return for a promise not to prosecute for recidivism. Brown, *West Virginia Habitual Criminal Law,* 59 W. VA. L. REV. 30, 38 (1956).

Plan" with an indeterminate sentence as a primary alternative to the existing plan.

As to curbing recidivist crime, one method is to impose an indeterminate sentence under the recidivism charge instead of an arbitrary term.[69] Many states follow this practice, limiting the sentence to a maximum term.[70] This procedure would satisfy the objection to the "Connecticut Plan" that it lacks sentencing uniformity, because the length of incarceration would be determined by one review board. Their decision would be based upon the rehabilitative progress of the offender and upon his relative danger to society. Such a system more properly reflects the rehabilitative design of our penal system.[71]

The other objection to the "Connecticut Plan" can easily be eliminated by allowing the present Virginia procedure, with an indeterminate sentence to be used if for some reason the recidivism charge is not alleged at the trial for the primary offense.

There is much room for improvement in the handling of the recidivism problem. It is time to recognize that the present procedure, though successful in insulating society from the recidivist, turns its back on the rehabilitative needs of the offender and thus provides no solution to the problem. With an increased emphasis on the rehabilitation of first offenders and through the use of the indeterminate sentence in conjunction with the "Connecticut Plan," progress can be made in solving the recidivist problem.

M. R. E.

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[69] Schreiber, *Indeterminate Therapeutic Incarceration of Dangerous Criminals: Perspectives and Problems*, 56 VA. L. REV. 602, 603 (1970).

[70] *See, e.g.*, HAWAII REV. LAWS § 711-76 (1968); ILL. ANN. STAT. ch. 38, § 1-7(e) (Smith-Hurd Supp. 1970); MINN. STAT. ANN. § 609.11, 609.12(1) (1964); WASH. REV. CODE ANN. §§ 9.95, 9.010, 9.040 (1961).

[71] Schreiber, *Indeterminate Therapeutic Incarceration of Dangerous Criminals: Perspectives and Problems*, 56 VA. L. REV. 602, 604 (1970).