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**West Virginia Habitual Criminal Law**

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AN HABITUAL CRIMINAL is a person who makes a habit of committing crimes, and under the laws of West Virginia the second commission of a felony, if both result in convictions, is sufficient to be considered a habit. Habitual criminal laws impose an additional penalty in case of a certain number of convictions. There are some such laws in connection with misdemeanors, but this study is confined to a consideration of habitual criminal laws dealing with felonies.

The theory of these laws is that the oftener one commits crimes, the more a menace to society he becomes and the longer he should be removed from society for its protection.

There is very little motive for reform behind habitual criminal laws. They are strictly for the purpose of punishing the offender and to keep him separated from society for a longer time than first offenders. However, parole laws cut across such laws to a certain extent in most states today so that there is some incentive for reform on the part of habitual criminals.

The element of punishment was really present in one of the earliest habitual criminal laws in this country. The following law was in force in the early history of our mother state, Virginia. For the first offense of hog stealing the convicted person was to be whipped and had to pay two hundred pounds of tobacco to the owner of the hog and two hundred pounds to the person informing against him. The statute further provided:

"And if any person or persons, shall for the second time offend, by stealing any hog, shoat, or pig, he or she so offending, and being thereof the second time convicted, shall stand two

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* This article is the result of a study made by the author for the Joint Committee on Government and Finance and the Commission on Interstate Cooperation of the West Virginia Legislature.

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1 W. Va. Code c. 61, art. 11, § 18 (Michie 1955).
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hours in the pillory, on a court day, and have both ears nailed thereto, and at the end of said two hours, have the ears cut loose from the nails." 2

Upon a third conviction of hog stealing the statute provided for a death penalty. 3

The element of punishment is present today in all habitual criminal laws in the form of an additional sentence, but it is still present in some in the form of physical punishment. In Delaware, a person convicted of robbery for the first time is punished by confinement in prison for not less than three nor more than 25 years and may be whipped with forty lashes, but upon second conviction of robbery the 40 lashes is mandatory. 4 Protection of society is also present in the habitual criminal laws of some states which provide that a person who has been convicted of a certain number of felonies can be sterilized. Delaware has such a law. 5

The older habitual criminal laws were more severe than those enacted later. Most older laws, like West Virginia's, were mandatory, that is, the court has to impose the penalty once the fact of prior convictions was established, while most of those enacted later were made discretionary, that is, the court has the power to impose the penalty or not to impose it in such case.

Several of the older laws have been made more lenient by amendment in the last 25 years. For example, in Michigan, prior to 1949, the court had to sentence a person who had been convicted of a second felony to a term not less than one-half the longest term, nor more than one and one-half the longest term, to which he could be sentenced for the present offense, or a minimum of five years, depending upon the present offense. There was a similar, but more severe, type additional penalty for third and fourth offenses. 6 In 1949 the minimum additional sentences were deleted and the court could impose the former maximum additional penalty or a lesser term in its discretion. 7

2 3 Laws of Virginia 276 (Hening, 1823).
3 Id. at 278.
5 Id. § 5703. Idaho, Iowa, North Dakota, Oregon, Utah and Washington are listed as having such laws. See Brown, The Treatment of Recidivism in the United States, 23 Can. B. Rev. 640 (1945).
Kansas did have an act similar to West Virginia’s present act in that a life sentence was mandatory in case of a third felony conviction. This part of the law was left out of a new habitual criminal law enacted in 1839 after the old law was repealed in 1837. The Kansas law now provides for a mandatory doubled term upon a second felony conviction and not less than 15 years upon a third conviction. This change followed a study of the Kansas habitual criminal law by the Kansas Legislative Council in 1936, which resulted in a report that the law was too severe. The report showed that while 41.3% of the persons committed to Kansas prison over a seven year period were repeat offenders, and so were subject to the imposition of the habitual criminal law, only 9.5% were committed under that law.

Since the old Kansas law was like our present law and since the Kansas law was made more lenient, I wrote Kansas officials asking how many of the persons committed to Kansas prisons in the seven year period following 1939 had prior felony convictions, and how many were committed under the present habitual criminal law. The response from the Warden of Kansas State Penitentiary contained the following paragraph:

"From the 1st of January, 1940, up to and including the end of December, 1947, a total of 925 prisoners had prior convictions, and thus were eligible to be sentenced under the Habitual Criminal Act. Of this number, 146 were thus sentenced."

So, under the more lenient law, only about 15.7% of those subject to the law were sentenced under it over an eight year period in spite of the fact that the law made it mandatory that it be imposed in every case where it was applicable.

Forty-five states, the District of Columbia and Alaska, now have some type of habitual criminal law. Only the three southern states of Maryland, Mississippi and North Carolina have no such laws. However, one of these states, Mississippi, provides in its parole law that no prisoner whose record shows him to be a confirmed and habitual criminal or who has been three times convicted of a felony shall be eligible for parole.

9 See Tappan, Habitual Offender Laws in the United States, 13 Fed. Probation 28 (1949). This article also states that Louisiana, New York and Oregon have modified the severity of their habitual criminal laws.
10 See Miss. Code § 4004.03 (Supp. 1954).
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While many of these laws are very old (West Virginia’s having been carried over from Virginia), Delaware enacted its first real habitual criminal law in 1953,11 and South Carolina enacted its first such law in 1955.12

Constitutionality

The habitual criminal laws of the various states have been attacked on the grounds that they violate the due process and equal protection clauses of the Constitutions of the United States and of the states, that they are ex post facto laws and that they place the person against whom they are sought to be imposed in double jeopardy.

These laws have generally been held constitutional, and the case of State v. Graham,13 in which the Supreme Court of Appeals of West Virginia held West Virginia’s habitual criminal law to be constitutional, which decision was affirmed by the United States Supreme Court, is one of the most cited cases on this issue. In that case our Supreme Court stated,

“Since the imposing of the additional sentence warranted by law is not holding to answer for a crime, is not a second jeopardy or punishment for the offense itself to which the sentence rightfully belongs, and is clearly due process of law, what constitutional limitation has been placed upon the legislature in this particular? None.”14

When the case reached the United States Supreme Court on appeal, that court quoted the West Virginia court when it stated,

“The proceedings under the statute are for identification only. They are clearly not for the establishment of guilt. The question of guilt is not reopened.”15

Types of Habitual Criminal Laws

The laws of the various jurisdictions in regard to habitual criminals vary to a great extent, yet many have several features in common. A majority of them provide for a life sentence upon a third

11 Del. Code tit. 11, § 3911 (Supp. 1954.)
14 68 W. Va. at 253, 69 S.E. at 1011.
15 224 U.S. at 624.
or fourth felony conviction; seven for a third conviction,\(^\text{16}\) and 19 for a fourth conviction.\(^\text{17}\) One provides for a maximum of life on a fourth conviction.\(^\text{18}\) Some do not provide for a life sentence for any number of convictions. They provide only for an increased penalty for second or third convictions or for repeat offenders. Examples of such laws are: Illinois law makes the maximum sentence mandatory for second offenders and a minimum of 15 years mandatory for third offenders.\(^\text{19}\) Kansas law provides that a doubled sentence upon a second felony conviction and a period of not less than 15 years upon a third such conviction are mandatory.\(^\text{20}\) Arkansas law provides that a graduated increase in the minimum term, according to the number of former convictions is mandatory for repeat offenders.\(^\text{21}\) This is supplemented by a statute which denies release from prison until the expiration of the minimum sentence.\(^\text{22}\) Mississippi, which has no habitual criminal law, gives an additional sentence to repeat offenders in effect by denying parole to persons convicted three times of felonies.\(^\text{23}\)

Practically all jurisdictions which provide for a life sentence upon a third or fourth felony conviction also provide for increased penalties upon second or third convictions. Exceptions are Delaware, Tennessee and Vermont which provide only for a life sentence upon a fourth conviction.

Only five states restrict the application of their habitual criminal laws to specifically enumerated crimes.\(^\text{24}\) The recently enacted South Carolina statute and the Illinois and Pennsylvania statutes are examples of this type habitual criminal law.\(^\text{25}\) Most such statutes apply to any felony or, like West Virginia's, any offense punishable by imprisonment in a penitentiary.

\(^{16}\) California, Idaho, Indiana, Kentucky, Texas, Washington and West Virginia.

\(^{17}\) Alaska, Colorado, Delaware, Florida, Michigan, Minnesota, Missouri, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Vermont and Wyoming.

\(^{18}\) New York.

\(^{19}\) ILL. REV. STATS. c. 38, § 602 (1955).

\(^{20}\) KAN. STATS. c. 21, § 107a (1949).

\(^{21}\) ARK. STATS. tit. 43, §§ 2328, 2329 (Supp. 1955).

\(^{22}\) Id. § 2307.

\(^{23}\) MISS. CODE § 4004.03 (Supp. 1954).

\(^{24}\) ILLINOIS LEGISLATIVE COUNCIL, HABITUAL CRIMINAL STATUTES (Publication 122, 1955).

\(^{25}\) See notes 12 and 19 supra, and 27 infra.


Thirty-four of such laws make the prescribed punishment mandatory and thirteen leave the imposition of the additional penalty to the courts’ discretion. The American Law Institute’s Model Penal Code makes the additional penalty discretionary.  

Very few habitual criminal laws provide that the subsequent offense must be committed within a certain time from the previous conviction. Thus, under several such laws, a person could be convicted of two offenses while he is under 25 years of age, live a law abiding life for 25 years, and then commit another felony and be adjudged an habitual criminal and sentenced to prison for life. However, the law of our neighbor state, Pennsylvania, provides that the subsequent felony must be committed within five years after the previous offense, or within five years from the time the person is released from prison if he was imprisoned for the prior offense, before the additional penalty can be imposed. Wisconsin has a similar law.  

If the habitual criminal law is discretionary, such a provision is probably not necessary as very few judges or courts would impose an additional penalty if there were a mitigating circumstance such as a long period of good behavior between convictions. This is also probably true in jurisdictions like West Virginia where the law is mandatory in theory, but discretionary in practice, which feature of West Virginia’s law will be referred to again in this report.  

A more important time element in these laws is whether the convictions must be separated for a certain time; that is, whether a person must have had a time for reform between one conviction and the commission of a subsequent felony. Many statutes so provide and, while West Virginia’s does not, the question was settled in a case where our court held that two convictions at one term of court could not be counted as two offenses under our habitual criminal law, because there must be a time for reform between convictions in such case.  

An element of habitual criminal laws which has often been criticized is the fact that many such laws require the person to be indicted as an habitual criminal before the law can be imposed. The

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28 Wis. Stats. § 359.12 (1953).  
issue of prior convictions is tried along with the issue of guilt on the present charge under such laws. It is said that this prejudices the jury against the person so that it may find him guilty of the present offense solely because of his past record. On the other hand, some prosecuting attorneys say that in some cases a jury, knowing that a guilty verdict will result in a life sentence, will find a defendant not guilty of the present offense regardless of the evidence because of the harsh penalty involved.

Our court reversed a verdict in one case because the prosecutor emphasized the prior convictions by introducing too much evidence on that point.30

West Virginia's law was amended in 1943 so that the former convictions are not alleged in the indictment and the habitual criminal law does not enter the case until after conviction of the present offense. This type procedure is fairer to all concerned and the change was a desirable one.

Severity of West Virginia's Habitual Criminal Law and Resultant Discrimination in its Application

While West Virginia's habitual criminal law compares with the best in regard to the time when the prior convictions are brought into the case, it does not do so in some other particulars.

Our law is one of the most severe of its kind in the country today in that it makes it mandatory upon the court to impose a life sentence in case of a third felony conviction regardless of the type or seriousness of the present and prior convictions. Only six other states impose life sentences upon a third felony conviction,31 and in one of them such sentence is discretionary with the court.32 Nineteen jurisdictions provide for life sentences in case of a fourth felony conviction,33 and in four of them such sentence is discretionary with the court.34 New York provides for a maximum of life upon a fourth conviction. Twenty-one jurisdictions do not provide for a life sentence for any number of convictions and in

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31 See note 16 supra.
32 Idaho.
33 See note 17 supra.
34 Delaware, North Dakota, Pennsylvania and South Dakota.
nine of them the less than life additional penalty is discretionary with the court.\textsuperscript{35}

Thus, only five other jurisdictions have habitual criminal laws as severe as West Virginia's. All others range from less severe to far less severe.

As a result of our severe law one man was sent to our penitentiary for life for the following crimes: First felony—breaking and entering a dwelling house and stealing goods to the value of five dollars. Second felony—breaking and entering a dwelling house and stealing goods to the value of \$17.65. Third felony—forging a check for five dollars. The first two convictions were for felonies committed when the convicted person was seventeen years of age.\textsuperscript{36} When I interviewed inmates of the penitentiary and studied their records during the course of this study, I found others serving life sentences for three relatively minor felonies.

Another result of the severity of our law is that most persons who have been convicted of three or more felonies are not sentenced to life in this state. In a report of a study of habitual criminal laws in the United States which was made in 1949 it was stated that the effect of West Virginia's law was nullified in practice.\textsuperscript{37} This is borne out to a large extent by a study of the commitment records of West Virginia Penitentiary made by an habitual lifer in that institution. His study showed that over the period from 1940 to 1956 eleven persons subject to be sentenced to life imprisonment under West Virginia's habitual criminal law were not so sentenced to every person who was so sentenced. The study showed that over that period only 79 persons were sentenced to life under the law while 904 who could have been sentenced to life under it were not so sentenced.

A few spot checks of the penitentiary records showed that the maker of the study had missed several repeat offenders in his check of the commitment records and that the discrimination was probably

\textsuperscript{35} Discretionary with the court: Connecticut, District of Columbia, Maine, Massachusetts, Montana, New Hampshire, Oklahoma, Virginia and Wisconsin.

\textsuperscript{36} See Dye v. Skeen, 135 W. Va. 90, 62 S.E.2d 681 (1950). The life sentence in this case was held invalid by the Supreme Court of Appeals of West Virginia after ten years because the first two convictions were at one term of court. The convicted person had to serve an additional five years as a second offender.

\textsuperscript{37} Tappan, supra note 9.
greater than his study indicated. I made my own study of the commit-
mment records of West Virginia Penitentiary for the years of 1937, 1938, 1947 and 1948. During those four years only twenty persons, an average of five persons per year, were sentenced to life imprison-
ment under the habitual criminal law, and 364 persons subject to being sentenced under that law were not so sentenced.

When the figures obtained during my study of the commitment records are further broken down, the discrimination becomes more obvious. Of the 20 persons who were sentenced to life imprisonment under the law, ten had only two, nine had three and one had four prior convictions. Of the 364 who could have been so sentenced, but were not, 84 had three, 27 had four, eight had five, two had six and three had seven prior convictions. All this in spite of the fact that our habitual criminal law is mandatory in nature.

In regard to counties, one county did not commit a person to the penitentiary under a life sentence as an habitual criminal during those four years although 42 prisoners committed from that county during that time had two or more prior convictions and so were subject to life imprisonment under the law. Another county com-
mitted 27 prisoners during those four years who could have received a life sentence under the law and only one of this group was so sentenced. The ratio was one out of five in another county, one out of six in another, one out of seven in another, one out of eight in another, and three out of eight in another. Two counties com-
mitted one prisoner each who was subject to be sentenced to life imprisonment under the law during those four years and each of them was so sentenced.

In view of these figures it is easy to see why the few prisoners who have been sentenced to life imprisonment under our habitual criminal law feel that they have been discriminated against. This is one of the chief complaints against West Virginia's habitual crim-
inal law.

Of course, the reason the law was not imposed in many cases was due to the fact that the person plead guilty to the present charge in consideration of the law not being imposed. Bargain justice enters the picture and the record doesn't show the whole picture insofar as the part played by the habitual criminal law in our system of criminal justice is concerned.
West Virginia's law is not the only one which is virtually nullified in practice. Florida, North Dakota and Vermont have habitual criminal laws which provide for a life sentence upon a fourth felony conviction. In Florida and Vermont the law is mandatory and in North Dakota it is discretionary. In an article on habitual criminal laws, Paul W. Tappan stated,

"From other sources comes even more impressive evidence of the disfavor in which the recidivist laws are held. Thus, Florida, where the law imposing a mandatory life sentence on the fourth offender was described as fairly effective, shows only two reported cases in 20 years where the penalty was applied. North Dakota similarly reveals only two such cases and in Vermont--from which no reply to the questionnaires and letters was received--there have been no reported cases under its statutes."38

A writer, commenting upon the Indiana law, which is like West Virginia's in that it imposes a mandatory life sentence in case of a third felony conviction, stated that although the law had been in effect since 1907, it had seldom been invoked, convictions under it having averaged only one a year.39

In response to a questionnaire sent during the course of this study to the judges and prosecuting attorneys in West Virginia, the group which administers the habitual criminal law, a majority of those answering indicated that they did not believe that our law is too severe. Ten answering judges did not believe the law to be too severe and five believed it to be. Twenty-two prosecuting attorneys did not believe the law to be too severe and twelve believed it to be. Of the judges and prosecutors who indicated that they believed the law to be too severe, all but one indicated that they believe that this is the reason it is not imposed more often.

But a great majority of this group indicated that they believed that the law should be changed. Only 16 out of the 59 who returned completed questionnaires indicated that they believed that the law should be retained as it is. Thirty-two believed that the imposition of the life sentences provided in the act should be left to the court's discretion and 20 believed that it should not be. Four of the group favored making a life sentence mandatory in case of a

38 Id. at 29.
39 Note, 9 Ind. L.J. 534 (1934), which cites a report of Indiana Committee on Observance and Enforcement of Law, Jan. 5, 1931.
fourth felony conviction and six favored making a life sentence discretionary in such case.

Nine of the group favored more leniency by making a life sentence mandatory in case of a third conviction of certain enumerated serious felonies and a similar number favored additional leniency by making a life sentence discretionary in such case. Twelve favored greater leniency by giving the court the discretion to sentence for life in case of a third conviction of certain enumerated serious felonies, and to add a certain number of years in case of a second felony conviction, a greater number of years in case of a third conviction of felonies, all of which were not of the enumerated type, and so on.

Therefore, it seems that a great majority of this group is in favor of a more lenient habitual criminal law. It seems further that the majority believe that if the life sentence feature is retained, it should only be imposed at the court’s discretion, as it is in five jurisdictions, or for certain enumerated serious felonies.

Making the law discretionary might not do any more than make the present practice legal. It is hard to see where such a change would change the situation insofar as discrimination is concerned. As a practical matter the prosecuting attorneys get around the harshness of the law in many cases by just refusing to file the required information except in cases where the additional sentence seems merited. One prosecutor in a letter to me on the subject stated,

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

Another prosecuting attorney suggested that the law should be made discretionary so that the prosecutor’s duty could be discharged rather than overlooked.

Since our law is one of the most severe habitual criminal laws in the United States perhaps some thought should be given to making it more lenient. This could be done by making the law discretionary as suggested by several judges and prosecutors, but this would probably not help the situation as far as discrimination in sentencing is concerned. However, it should be noted that a change from a mandatory life sentence upon a third felony conviction to
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a mandatory doubled sentence upon a second conviction and not less than 15 years upon a third conviction did not materially aid this situation in Kansas. As pointed out before, only 15.7% of those subject to the more lenient law were sentenced under it over an eight year period.40

The law could also be made more lenient by making a life sentence mandatory upon a fourth conviction, or by making such sentence discretionary in such case. The life sentence feature could be eliminated altogether and additional years could be imposed in case of subsequent convictions. If the life sentence is retained it could be made mandatory or discretionary upon a third or fourth conviction of certain enumerated serious felonies. Pennsylvania's habitual criminal law makes a life sentence discretionary upon a fourth conviction of certain enumerated felonies. It provides in part:

"Whoever after having been convicted within or without this Commonwealth of the crime, or attempt to commit the crime, of treason, murder, voluntary manslaughter, sodomy, buggery, burglary, entering with intent to steal, robbery, arson, mayhem, kidnapping, sale of narcotics, perjury, abortion, pandering, incest, or any offense committed or attempted to be committed through the instrumentality of or with the aid of a deadly weapon or gunpowder or other explosive substance or corrosive fluid, may upon conviction of any of such crimes for a second offense committed within five (5) years after the prior offense, or subsequent offense committed within five (5) years after the prior offense, be sentenced to imprisonment for a term, the maximum of which shall not be more than twice the longest term prescribed upon a first conviction of the crime in question."41

The statute then provides for a discretionary life sentence upon a fourth conviction of the enumerated crimes within five years of a prior conviction. The list of enumerated crimes in the Pennsylvania law is longer than in most states which enumerate the applicable crimes, perhaps because of the time limit involved.

The recently enacted South Carolina statute lists only murder, voluntary manslaughter, rape, armed robbery, highway robbery, assault with intent to ravish, bank robbery, arson, burglary, or safe

40 This information was obtained in a letter from the Warden of Kansas State Penitentiary.
cracking as crimes which bring the habitual criminal law into operation.\footnote{S.C. Acts 1955, No. 181.}

In considering the West Virginia habitual criminal law it is easy to overlook the fact that in addition to the life sentence feature it also contains a provision making it mandatory to sentence second felony offenders to an additional five years. The harshness of the life sentence on third conviction overshadows this lesser feature to a very great extent. Like the life sentence, this additional penalty is to be imposed regardless of the seriousness of the felonies involved.

A study of the commitment records at West Virginia Penitentiary for the years 1937, 1938, 1947 and 1948 showed that the additional five year sentence was imposed in 145 cases and was not imposed in 954 cases where it could have been imposed. In 51 cases where it was imposed, it was imposed in lieu of a life sentence as the prisoner had two or more prior convictions.

The figures for the years 1937 and 1938 are somewhat misleading. The definite type of sentence could be used at that time and generally was used. The statute provides that the additional time shall be imposed upon second offenders by adding five years to the time for which the person is or would otherwise be sentenced if the sentence is a definite sentence. If the sentence is indeterminate, the five years shall be added to the maximum term provided by law for the offense. So, in 1937 and 1938, the court, in imposing the additional time, would often give the minimum sentence, usually one year, as the definite sentence and then add the five years, making a total of six years. Since there was usually over five years difference between the minimum and maximum sentences, the courts often ignored the procedure of sentencing for second conviction and imposed the maximum, or near the maximum, sentence. To illustrate, two persons, one a first offender and the other a second offender, were sentenced in Nicholas County for breaking and entering on November 18, 1937. The prescribed sentence for this offense is and was not less than one nor more than ten years.\footnote{W. Va. Code c. 61, art. 3, § 12 (Michie 1955).} The court sentenced the first offender to two and one-half years and the second offender to eight years in prison. In Wood County, on September 10, 1937, a second offender was sentenced under the habitual criminal law to six years in prison for breaking and entering.
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The records for 1937 and 1938 show a total of 78 cases where repeat offenders were not procedurally sentenced as second offenders but were probably given an extra five years because of former offenses. Those records also indicate that repeat offenders were probably often given additional time because of prior offenses, but were only given one, two or three additional years.

Since 1939, most sentences must be of the indeterminate type and so if the additional penalty is imposed it must be imposed by proving prior convictions and adding the additional five years to the maximum sentence. Thus, it will necessarily show up in every case where it is imposed if the sentence is of the indeterminate type.

The laws of 32 jurisdictions provide for an additional penalty upon a second felony conviction. Twelve impose no additional penalty until a third felony conviction. Several of them make the maximum sentence mandatory upon a second or third conviction. Others, like West Virginia, make a certain number of additional years mandatory in such case. Some make the additional years discretionary.

In Michigan, the court is given the discretion to impose a sentence upon second offenders up to one and one-half the maximum sentence prescribed for the present offense. Several others make two times such maximum either mandatory or discretionary. Kansas makes double the minimum and maximum mandatory on second offense.

Some of these laws are more severe than West Virginia's insofar as second offenders are concerned. That is the case in those states where twice the maximum sentence is mandatory upon a second conviction. However, West Virginia's second offender law may be too severe and this may be the reason why the additional penalty is not meted out more often.

This feature of our law could be made less severe in several ways. One way would be to make the law discretionary, but this

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44 Mandatory on second conviction: Georgia, Illinois and Texas; mandatory on third conviction: Massachusetts, Ohio and South Carolina.
45 Maine and Wisconsin.
46 See note 7 supra.
47 Double the maximum mandatory: Florida, Kentucky, Louisiana and New York; double the maximum discretionary: Connecticut, New Jersey, Oregon, Pennsylvania and South Dakota.
would not help matters insofar as discrimination is concerned. Another way would be to make it mandatory that the court impose an additional sentence of not less than one year nor more than five years upon a second conviction. Thus, the court could take into consideration the seriousness of the felonies involved. A third way would be to make it mandatory for the court to increase both the maximum and the minimum sentences not less than one nor more than five years in such case where the prescribed sentence is of the indeterminate type. In conjunction with the parole law requiring that the minimum sentence be served before a person is eligible for parole, this type additional sentence seems fair. If the sentence is of the definite type, as a few still are, the law should make it mandatory for the court to add not less than one nor more than five years to the sentence which would otherwise be imposed. The present parole law requires that one-third of a definite sentence be served before a person is eligible for parole. This parole eligibility law could be amended so as to make first offenders serving definite sentences serve one-fourth, second offenders one-third, and third and subsequent offenders one-half of such sentences before they would be eligible for parole.

There is, perhaps, a practical reason why the habitual criminal law should be less severe. As stated above, a study of the commitment records at West Virginia Penitentiary for the years 1937, 1938, 1947 and 1948 showed that only one out of 19 persons were sentenced to prison for life upon three or more felony convictions. A great majority of the 18 out of 19 persons with three or more convictions who were not so sentenced received an indeterminate sentence of one to ten years and were eligible for parole at the end of one year. While the records for the above referred to years indicate that very few prisoners with three or more convictions who received a one to ten year sentence were paroled, they were finally discharged within five to ten years depending upon the good time earned.

If these years are average years then only one out of 19 persons subject to life imprisonment under the habitual criminal law receive such sentence. If all persons subject to the law were sentenced to life imprisonment they would have to be kept in prison for life unless sooner paroled (excluding pardon and commutation of sentence which rarely occur). They would almost all serve far longer terms than they have been serving; they would not even be eligible for parole until they have served 15 years, and not too many of them
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would be paroled until later than that, if at all. Thus, the present overcrowded condition of our penitentiary would become progressively worse.

In the Kansas study referred to above it was estimated that if the law were applied in every applicable case the prison population in the state would be doubled in ten years.\textsuperscript{49}

Repeal

Several writers on the subject of habitual criminal laws have advocated outright repeal of these laws on the ground that they have failed to achieve their purpose and have had harmful results. But, instead of repealing their existing laws in this field, most states which have made any change merely make their laws less severe. Others, Delaware and South Carolina, which had no habitual criminal laws, have recently enacted such laws as has been pointed out earlier in this report.

In replies to the questionnaire on the subject sent to the judges and prosecuting attorneys in West Virginia only two prosecuting attorneys indicated that they favor repeal of West Virginia's law, and they also indicated that they favored a more lenient law. They may have meant that they favored a repeal of the existing law and the enactment of a new and more lenient law.

West Virginia's habitual criminal law has largely failed to achieve its purpose if its purpose is to put a severe penalty upon third felony offenders and to rid society of such offenders for a long period of time. Available figures show that it is seldom imposed in applicable cases. It may often be used as a weapon to obtain guilty pleas to present indictments, but this is certainly not its purpose.

Our law has resulted in discrimination and consequent dissatisfaction and unrest among the few upon whom the life sentence has been imposed. Prisoners sentenced under the law complain of the discrimination even more than they do of the severity of the law. Prison officials interviewed during the course of the study said that the law as presently administered is worse than no habitual criminal law.

\textsuperscript{49} Note, 48 Col. L. Rev. 238, 252 n.121 (1948).
As shown earlier in this report a more lenient law did not result in the achievement of the purpose of such laws in Kansas. However, the experience of one state may not be indicative of the experience of the majority of the states which have made their laws less severe.

As is also shown earlier in this report, most of the judges and prosecutors who indicated on the questionnaire that they thought our law too severe thought that it would be imposed oftener if it were less severe.

All six of the prisoners sentenced to life under our habitual criminal law whom I interviewed at the penitentiary indicated that they believed that the law should provide some additional penalty for habitual offenders, but not such a severe penalty. They all also stated that they believed that all or none subject to the law should receive the additional sentence.

The answer to the problem in West Virginia, at least at the present time, does not seem to be a repeal of the law, but to amend the law so that it will more nearly achieve its purpose.

Procedure

Another reason that our habitual criminal law is not invoked more often is that the procedure of proving prior convictions is too difficult, and many prosecuting attorneys are inclined to forego the filing of the information for this reason. Several prosecutors, in letters, and in comments written upon the questionnaires which they returned to me, stated that they favored an easier method of proving prior convictions. The following comment is quoted from a letter from a prosecuting attorney:

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

Another prosecuting attorney cited a case where, after a verdict of guilty was brought in by the jury, the jury panel was discharged.
for the term before he had time to file an information charging previous convictions against the person found guilty.

In answering the questionnaire 23 prosecutors indicated that they thought that the habitual criminal law would be invoked oftener if an easier method of proving prior convictions were provided by statute, and 12 indicated that they did not think it would be. I believe that if they had been asked if they were in favor of providing an easier method of proving prior convictions by statute the affirmative replies would have been much greater in number.

Our statute now provides that if the person presently convicted stands silent, or pleads not guilty, when asked if he is the same person who was convicted of the previous felonies alleged in the information, a jury be impaneled to try the issue of identity. While the issue is one of fact, it has nothing to do with the guilt or innocence of the convicted person. It simply deals with the sentence which the court is to impose in the case and so could, and probably should be tried by the court and not a jury.

There are really two issues involved in the proof that a person is subject to the habitual criminal law. One is the issue of whether there has been a prior conviction, and the other is whether the person presently convicted is the person who was previously convicted. The first issue does not cause the court nearly as much trouble as the second. They are generally spoken of as if they are one issue.

The laws of six states, Alabama, Kansas, Louisiana, Nebraska, South Carolina and Vermont, provide that the question of prior convictions in habitual criminal cases be tried by the court. Wisconsin law provides that the issue shall be tried by a jury if demanded, otherwise it shall be tried by the court.50 All other laws, including West Virginia's, require a jury trial on that question.

In addition to the states providing for a determination of the issue of prior convictions by the court the American Law Institute's Model Penal Code, drawn up in 1954, provides that the court shall determine this issue.51 This was also true of the Institute's Model Code of Criminal Procedure, drawn up in 1931.

50 Wis. Stats. § 859.12 (1953).
There is a split of authority on the question of whether a statute giving the court the power to try the issue of prior convictions is constitutional. But the later cases generally take the position that no constitutional right is involved, even though most of them arose in states having constitutional guarantees of jury trial in criminal cases similar to West Virginia's.

In a Louisiana case the court stated in the syllabus that "Act No. 15 of 1928, providing for increased punishment for second and subsequent offenders, does not require that proceeding to so punish be tried by a jury, since, though the questions involved are purely questions of fact, they do not relate to the question of guilt or innocence of the defendant." 64

Article III, section 14 of the constitution of West Virginia provides that trials of crimes shall be by a jury of twelve men. But, as our court has indicated, the person alleged to have been previously convicted is no longer accused, he is convicted, and the question of guilt is no longer an open question. It is just a question of what sentence authorized by the legislature shall be imposed. The Kansas constitution that in all prosecutions the accused shall be allowed a trial by an impartial jury, and the Nebraska constitution provides that in all criminal prosecutions the accused shall have the right to trial by an impartial jury. In both these states the courts

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62 An old annotation in 58 AM. JUR., Habitual Criminals § 93 (1940), states that it is stated that the question of prior convictions is generally held to be an issue of fact to be determined by a jury. This is true in most cases because a trial, like West Virginia's, requires that the issue be so determined.

63 See State v. Hardy, 174 La. 458, 141 So. 27 (1932); Levell v. Simpson, 142 Kan. 892, 52 P.2d 372, appeal dismissed, 297 U.S. 695 (1935), for lack of a substantial federal question; Glover v. Simpson, 144 Kan. 153, 58 P.2d 73, appeal dismissed, 299 U.S. 506 (1936), for lack of a substantial federal question; Huff v. State, 149 Neb. 83, 30 N.W.2d 462 (1946). But see State v. Furth, 5 Wn.2d 7, 104 P.2d 925 (1940), where the court stated that even though the statute did not require it, the issue must be determined by a jury under the Washington constitution which guarantees a right to jury trial where a person is charged with the commission of an offense. (Most states, including West Virginia, as is later pointed out, take the view that in such case a person is not charged with the commission of an offense.)

64 State v. Guidry, 169 La. 215, 124 So. 892 (1929). In Levell v. Simpson, supra note 53, the court stated, "In this case it is of no concern of the jury the penalty for a crime may be . . . ."


66 KAN. CONST., Bill of Rights, § 10.

67 See NEB. CONST. art. 1, § 11.
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have held that these provisions do not entitle one to a jury trial on the issue of prior convictions under their habitual criminal laws.58

In two Kansas cases, the United States Supreme Court has, in effect, upheld such holding by dismissing appeals on the ground that there was no substantial federal question involved,59 and such would not have been the case if the appellants had been denied due process of law as set out in the constitution of their state.

The West Virginia case of Graham v. West Virginia60 was affirmed by the United States Supreme Court. In that case our supreme court stated,

"Since the mere imposing of the additional sentence warranted by law is not a holding to answer for crime, is not a second jeopardy or punishment for the offense itself to which the sentence rightfully belongs, and is clearly due process of law, what constitutional limitation has been placed upon legislation in this particular? None."61 (Emphasis supplied.)

Our court further stated in that case that,

"By these proceedings he is not held to answer for an offense. He is not made to defend against a charge of crime. He is no wise called upon to answer in relation to alleged crime. No allegation of crime is in the information. It alleges only his status as a convict. It alleges that he has been held to answer for crime and that he stands convicted of it through the indictment of a grand jury. It points him out as a convict already held, upon whom rests the general sentence of the law of life imprisonment. . . . The proceedings under the statute are for identification only. They are clearly not for the establishment of guilt. The question of guilt is not reopened."62

Our court also quoted a Massachusetts case in the Graham case when it stated that,

"This is not an information of an offense for which a trial is to be had, but of a fact, namely, that the prisoner has already been convicted of an offense; and this fact must appear, either by his own confession, or by the verdict of a jury or otherwise...

61 68 W. Va. at 253, 69 S.E. at 1011.
62 68 W. Va. at 251, 69 S.E. at 1011.
that conviction 21, The last two quotations were also quoted by the United States Supreme Court upon appeal to that Court.64 In view of this it seems that the court could determine the issue of prior convictions in West Virginia without any constitutional bar if the legislature gave it such power.

A further step in simplifying the procedure of proving prior convictions alleged against a person presently convicted would be to make the proof of such allegations easier. This could be done by making properly authenticated copies of records of court proceedings and commitment records of penitentiaries of this and other states prima facie proof that there were such convictions as is the case in some states.65

The proof that the person presently convicted is the same person as the one previously convicted would be made easier by making admissible in evidence an authenticated certification of the officer in charge of the criminal identification bureau of the West Virginia Department of Public Safety to the effect that he had received attached authenticated copies of fingerprints of the person previously convicted from the person, in or out of this state, in whose lawful custody the originals were kept, that he had received copies of the fingerprints of the person presently convicted from a member of said Department of Public Safety, and that he had compared both copies and found them to be copies of the fingerprints of one and the same person.

These procedures would make it much easier and far less expensive to prove the prior conviction and that the person presently convicted is the person who was previously convicted. It would

63 68 W. Va. at 253, 69 S.E. at 1012.
64 The first of the two quotations appears in 224 U.S. at 628, and the second in 224 U.S. at 628. This case is cited in an annotation in 85 A.L.R. 1099, 1108 (1933), and in 25 Am. Jur., Habitual Criminals, § 33 (1940), for the proposition that the issue of identity must be determined by a jury. These conclusions were reached by taking a sentence of the opinion out of its context. The court really stated that under the West Virginia statute the issue had to be determined by a jury, which is true, of course.
65 E.g., IOWA CODE § 747.3 (1954); ALASKA COMP. LAWS c. 66, art. 21, § 2 (1949), provides that properly authenticated court records showing a conviction shall be conclusive evidence that there was such a conviction and that the person named therein was convicted.
seem that in such case prosecuting attorneys would be more willing to file informations, especially in cases where the prior convictions were in another county or in another state.

These two changes, if made, would probably be objected to on the ground that they violate our constitutional provision which provides that the accused shall be confronted with the witnesses against him.66

This, too, could be met with the argument that this is not a trial inquiring into the guilt or innocence of an accused person, but simply a proceeding to determine what punishment should be meted out to a person convicted of a crime. Most of the court decision upholding the right of the court and not the jury to determine the issue of prior convictions would be applicable in determining the validity of a procedure of this type.

However, I have not been able to find any jurisdiction which has a procedure for proving prior convictions such as the last procedure outlined above.

Some jurisdictions have attempted to cope with discrimination in filing informations by making it the duty of the prosecuting attorney to file such information when he learns of former convictions even though the person may be in prison serving his sentence. They have statutes providing that the additional sentence can be imposed at any time after conviction or sentence. They further provide that whenever it shall become known to any warden or prison, probation, parole or police officer, or other peace officer, that a person convicted of a felony has previously been convicted of a felony or felonies, it shall become his duty to report the facts to the prosecuting attorney of the county where the person was last convicted. The statutes further provide that in such case it shall be the duty of such prosecuting attorney to file an information, and then the court in which the last conviction was had shall have said person, whether confined in prison or otherwise, brought before it to determine if he has been previously convicted, and if it is found that he has been, the court shall sentence him under the habitual criminal law, after vacating any prior sentence. New York, Michigan and several other jurisdictions have such statutes.67

67 N. Y. PENAL LAW § 1943 (Supp. 1956); MICH. COMP. LAWS §§ 169.10-12 (1948).
Such statutes should go a long way toward eliminating the discrimination found in the application of habitual criminal laws. There is an express duty upon persons, some of whom are bound to know or learn of any prior convictions, to inform the prosecutor of such convictions, and an express duty on the part of the prosecutor to apply the habitual criminal law when such knowledge is conveyed to him.

West Virginia has no such provisions in its habitual criminal law, but a separate statute, Code 62-8-4, provides a procedure whereby the warden of West Virginia Penitentiary may file information of prior convictions against convicts in the penitentiary in the Circuit Court of Marshall County in cases where the information was not filed by the prosecuting attorney. The statute further provides that that court shall sentence such convicts under the habitual criminal law if they are found to have been previously convicted.

But this statute makes the filing of such information discretionary with the warden and a study of the records at the penitentiary shows that no such information has been filed by the warden since the statute was made discretionary in 1951. Prior to that time the statute was mandatory, but only one or two informations were filed under it during a ten year period prior to 1951 although there were hundreds of convicts in the penitentiary during that time subject to having such information filed against them. The present warden and the immediate past warden, to both of whom I talked during this study, feel the statute imposes too great a burden upon them and the Circuit Court of Marshall County inasmuch as there are probably an average of 371 prisoners per year committed to the penitentiary who have one or more former convictions without an additional sentence for that reason if the commitment records for the years 1937, 1938, 1947, and 1948 were average years.

As a practical matter this statute is entirely ineffective and might as well be repealed. A statute requiring the prosecuting attorney to have them brought back to the sending county for sentence when he is notified of former convictions would probably be far more effective. Two prosecuting attorneys, in letters to me, suggested such a procedure.

Our present law makes it the duty of the prosecutor to file the information after conviction and before sentence when he has knowledge of former convictions. Thus, if he has no knowledge of
prior convictions, or if he acquires such knowledge after sentence, there is no duty on his part to act. Our law then leaves it up to the warden to act under Code 62-8-4, and as has been shown, he does not act as a practical matter. Under the law of New York and other jurisdictions as described above, the prosecutor is almost bound to learn of prior convictions if there are such and the information can be filed by him at any time prior to the expiration of the sentence.

In response to the questionnaire on the habitual criminal law 19 judges indicated that they believed that it should be the duty of the prosecuting attorney to ascertain the prior criminal record of every person convicted of a felony in his county and file an information alleging prior convictions when it is ascertained that such person has been previously convicted, and only one judge indicated that he did not believe the prosecuting attorneys should have this duty. Nineteen prosecutors were in favor of their having such a duty and 18 were opposed to it. The group as a whole was two to one in favor of imposing this duty upon the prosecuting attorney.

Habitual Criminal Laws and Probation and Parole

Probation and parole laws cut across habitual criminal laws to a certain extent. As has been said, one of the purposes of habitual criminal laws is to rid society of repeat offenders for a greater length of time. Where repeat offenders can be released on probation or parole, this purpose is defeated to a certain extent, but rehabilitation of prisoners is aided. Where the habitual criminal laws are very severe, as in West Virginia, parole helps the situation to some extent.

In 16 states and the District of Columbia, probation is denied habitual offenders; most of such jurisdictions bar probation upon a second conviction of a felony, as does West Virginia. So, in West Virginia, and other jurisdictions with similar laws, habitual offenders are not eligible for probation and the court must sentence them to prison where they must be kept until released on parole or discharged at the expiration of their sentences.

The laws of several jurisdictions bar parole for habitual offenders. In fact, the habitual criminal law of Tennessee bars parole

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69 See laws of Mississippi, New Jersey, New Mexico, North Dakota, Oregon and Tennessee.
and commutation of sentence, but not pardon, to persons sentenced to life as habitual criminals.\textsuperscript{70}

The majority of jurisdictions having habitual criminal laws allow parole, some without regard to prior offenses, but others provide that persons with a certain number of prior convictions cannot be paroled until they have served their minimum sentence or some certain number of years. The jurisdictions which allow parole without regard to prior offenses leave it up to the paroling authority to consider this feature of the individual case.

Parole for habitual criminals is nowhere specifically mentioned in West Virginia laws. Prisoners in the penitentiary with two prior convictions are not eligible for parole until they have served their minimum sentence in West Virginia, but this is also true in the case of first and second offenders.\textsuperscript{71} No person sentenced for life may be paroled until he has served 10 years, or 15 years if he has twice previously been convicted of felonies.\textsuperscript{72}

Thus, it appears that the persons in West Virginia who have been among the select few to have the life sentence imposed upon them for a third conviction are not eligible for parole until they have served 15 years. Third, fourth, or even seventh offenders who escaped such penalty at the hands of the court are eligible for parole at the expiration of the minimum of their indeterminate sentence, which is often one year, or at the expiration of one-third of their definite sentence. In such case, the two prior convictions hit the habitual lifers twice; once in causing the life sentence to be imposed upon them and again by delaying their eligibility for parole for several years.

The Committee on the Standard Probation and Parole Act of the National Probation and Parole Association take the view that there should be no restrictions on the parole boards’ discretion in the consideration of habitual criminals for parole and oppose restrictions such as those in West Virginia’s law.\textsuperscript{73}

It does seem that our parole law should be somewhat more uniform in the treatment of repeat offenders. As it is, all are treated

\textsuperscript{70}TENN. CODE §§ 11883.2 & 3 (Williams, Supp. 1952).
\textsuperscript{71}W. VA. CODE c. 62, art. 12, § 12 (Michie 1955).
\textsuperscript{72}Ibid.
\textsuperscript{73}NATIONAL PROBATION AND PAROLE ASS'N, STANDARD PROBATION AND PAROLE ACT, comment on § 18 (1955).
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the same as first offenders except those sentenced to life imprisonment. A prisoner who happens to be one of the one out of 19 persons with three or more convictions who has been sentenced to life imprisonment for that reason may only have been convicted of three relatively minor felonies. Such a person sees other prisoners with as many as seven convictions not so sentenced become eligible for parole after having served but one year, while he does not become eligible until he has served 15 years. He also sees prisoners sentenced to five to 18 years for second degree murder, some with prior convictions, become eligible for parole after five years; and others sentenced to life for first degree murder, some with a prior conviction, become eligible for parole after ten years.

However, it should be pointed out that the penitentiary release records for 1937, 1938, 1947 and 1948 show that few prisoners committed during those years with two or more prior convictions were released on parole. Six of the 20 who were committed during those years with a life sentence under the habitual criminal law have been paroled after serving over 15 years. Others of this group committed during 1947 and 1948 are not yet eligible for parole.

Twenty-seven prisoners with two or more prior convictions out of the 364 such prisoners committed during those years under less than life sentences were paroled. But most of these were paroled after serving a substantial part of their sentence, so that they would have been eligible for unconditional discharge within a short time if they had not been paroled. Very little could be lost by paroling them at that time as they could be returned to finish out their terms without credit for the time on parole if they violated the conditions of their parole.\(^\text{74}\)

\(^{74}\) See Watts v. Skeen, 132 W. Va. 737, 54 S.E.2d 563 (1949), where the court held that parole suspends the sentence so that time served on parole does not count as served on the prison sentence.