The Constitutional Infirmities of Indiana's Habitual Offender Statute

I. INTRODUCTION

Confronted with the difficult problems created by repetitive criminal conduct, the American legal system has countered with habitual offender laws. Nearly all American jurisdictions have enacted habitual offender laws.[1] Habitual offender or recidivist stat-

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[1]Presently, habitual offender statutes are effective in 45 states, the District of Columbia, Puerto Rico, the Virgin Islands, and all federal courts. ALA. CODE tit. 13A, § 13A-5-9 (Supp. 1979) (mandatory enhancement of any class A, B, or C felony upon second conviction); ALASKA STAT. §§ 12.55.125, .145 (Supp. 1979) (mandatory enhancement for repetition of any class A, B, or C felony committed within 7 years after a previous felony conviction); ARIZ. REV. STAT. ANN. §§ 13-604, -702, -703 (1978) (second felony: maximum of double or treble maximum penalty; third felony: maximum of treble or quadruple maximum penalty); ARK. STAT. ANN. §§ 41-1001 to -1005 (1975) (discretionary enhancement by a prescribed number of years depending upon the felony classification); CAL. PENAL CODE § 667.5 (West Supp. 1979) (second specified violent felony within 10 years: 3 additional years for each prior offense); COLO. REV. STAT. §§ 16-13-101 to -103 (1973) (third felony punishable by term greater than 5 years after conviction of prior felony within 10 years: not less than 25 years nor more than 50 years; fourth felony: life); CONN. GEN. STAT. ANN. §§ 53a-40 (West Supp. 1979) (second felony: 10 years, 20 years, or life, depending on classification of triggering offense); DEL. CODE ANN. tit. 11, §§ 4214-4215 (Supp. 1979) (third specified violent felony: life without parole; fourth felony: up to life); D.C. CODE ANN. §§ 22-104 to -104a (1973) (third felony: any term up to life); FLA. STAT. ANN. § 775.084 (West 1976 & Supp. 1979) (second felony within 5 years: maximum of 10 years, 30 years, or life, depending on offense); GA. CODE ANN. § 27-2511 (1978) (second felony after prior prison term: maximum prescribed for that offense; fourth felony: maximum without parole); HAW. REV. STAT. §§ 706-661 to -662 (1976 & Supp. 1978) (third felony: 10 years, 20 years, or life depending on the offense); IDAHO CODE § 19-2514 (1979) (third felony: 5 years to life); ILL. ANN. STAT. ch. 38, § 33B-1 (Smith-Hurd Supp. 1979) (third specified violent felony: life without parole); IND. CODE § 35-50-2-8 (Supp. 1979) (third felony: additional 30 years to fixed term for triggering felony); IOWA CODE ANN. §§ 902.8-.9 (West 1979) (third felony: minimum 3 years up to maximum of 15 years for enumerated felonies); KAN. STAT. § 21-4504 (1978) (second felony: maximum of double maximum; third felony: maximum of triple maximum); KY. REV. STAT. ANN. § 532.080 (Baldwin Supp. 1977) (third felony: from 10 years to life); LA. REV. STAT. ANN. § 15:529.1 (West 1967 & Supp. 1980) (third felony: from one-half maximum to life without parole; third violent felony: from 20 years to life without parole); MD. ANN. CODE art. 27, §§ 293, 643B (1976 & Supp. 1979) (second offense: double prescribed term; third enumerated violent offense or attempted offense: at least 25 years; fourth enumerated violent offense: life without parole); MASS. GEN. LAWS ANN. ch. 279 § 25 (West 1972) (third felony: maximum for offense); MICH. COMP. LAWS ANN. §§ 333.7413, 769.10-.12 (Supp. 1979) (second felony: 1½ maximum; second specified drug offense: from double maximum to life without parole; third felony: double maximum; fourth felony: from 15 years to life depending on felony classification); MINN. STAT. ANN. § 609.346 (West Supp. 1980) (second specified violent offense: additional 3 years to life); MISS. CODE ANN. §§ 99-19-81, -83 (Supp. 1979) (third felony: max-

utes typically prescribe enhanced sentencing upon conviction of a third or fourth felony. Proffered purposes for such statutes include the protection of society from dangerous or incorrigible offenders, deterrence of career criminality, and retribution.[2]

Indiana's habitual offender statute provides for a mandatory increased penalty of thirty years upon conviction of a third felony.[3]

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imum without parole; third felony with at least one prior violent felony: life without parole); MO. ANN. STAT. §§ 558.016, 571.015 (West Supp. 1979) (second armed felony: 5 years without parole; third armed felony: 10 years without parole; second dangerous or any third felony: up to 30 years depending on felony classification); MONT. REV. CODES ANN. § 95-1507 (Supp. 1977) (second felony within 5 years of prior felony: from 5 years to life); NEV. REV. STAT. § 207.010 (1977) (third felony: 10 to 20 years; fourth felony: maximum of life without parole but judge can dismiss habitual offender count); N.H. REV. STAT. ANN. § 651.6 (Supp. 1975) (third felony: 10 to 30 years or life); N.M. STAT. ANN. § 31-18-17 (Supp. 1979) (second felony: 1 year additional; third felony: 4 years additional; fourth felony: 8 years additional); N.Y. PENAL LAW §§ 70.04, .06, .08, .10 (Supp. 1979-80) (second felony: from 3 years to life; second violent felony: from 5 to 25 years; third violent felony: from 6 years to life); N.C. GEN. STAT. §§ 14-7.1 to -7.6 (1969 & Supp. 1977) (fourth felony: from 20 years to life); N.D. CENT. CODE § 12.1-32-09 (Supp. 1979) (third felony: 10 years, 20 years, or life); OKLA. STAT. tit. 21, §§ 51-52 (1958 & Supp. 1979-80) (second felony: up to 5 years, up to 10 years, or not less than 10 years depending on the triggering offense); OR. REV. STAT. §§ 161.725, 166.230 (1977) (second violent felony within 7 years: 30 years; fourth armed felony: life); P.R. LAWS ANN. tit. 33, §§ 3301-3302, 3375-3375a (Supp. 1978) (second felony within 10 years: prescribed minimum and maximum penalties increased by one-half; third felony: 12 years to life); R.I. GEN. LAWS § 12-19-21 (1969) (third felony: up to 25 additional years); S.C. CODE § 17-25-40 (1976) (third enumerated violent felony: maximum for offense; fourth enumerated violent felony: life); S.D. COMPILED LAWS ANN. §§ 22-6-1, 22-7-7 to -9 (Supp. 1979) (second and third felonies: increase degree of felony class; fourth felony: life term); TENN. CODE ANN. §§ 40-2801 to -2806 (1975) (fourth felony except petty larceny with 2 prior enumerated violent offenses: life without parole); TEX. PENAL CODE ANN. tit. 3, § 12.42 (Vernon 1974) (second felony: next highest felony classification or 15 years to 99 years, depending on classification of triggering felony; third felony: life); United States, 18 U.S.C. §§ 3575-3576 (1976); UTAH CODE ANN. §§ 76-8-1001 to -1002 (Supp. 1978) (third felony: 5 years to life); VT. STAT. ANN. tit. 13, § 11 (1974) (fourth felony: life term); V.I. CODE ANN. tit. 14, §§ 61-62 (Supp. 1978) (third felony: 10 years to life); VA. CODE § 53-296 (1978) (second felony: 1 year; third felony: 3 years; fourth felony: 5 years); WASH. REV. CODE ANN. § 9.92.090 (1977) (second felony: minimum of 10 years; third felony: life); W. VA. CODE §§ 61-11-18 to -19 (1977) (second felony: additional 5 years; third felony: life); WIS. STAT. § 939.62 (1977 & Supp. 1979-80) (second felony within 5 years: 3, 6 or 10 years depending on sentence length of triggering offense); WYO. STAT. §§ 6-1-109 to -110 (1977) (third felony: 10 to 50 years; fourth felony: life).

Maine, Nebraska, New Jersey, Ohio, and Pennsylvania do not have a habitual offender statute.

[2]Some authorities argue that recidivist statutes do not achieve these purported goals and thus should be reexamined. *See* Katkin, *Habitual Offender Laws: A Reconsideration*, 21 BUFFALO L. REV. 99 (1971); Lynch, *Parole and the Habitual Criminal*, 13 MCGILL L.J. 632 (1967); Note, *The 'Bitch' Threatens, But Seldom Bites*, 8 CREIGHTON L. REV. 893 (1974).

[3]IND. CODE § 35-50-2-8 (Supp. 1979).

Habitual offender statutes, including Indiana's, have withstood various constitutional attacks. Double jeopardy attacks have failed because the defendant does not receive additional punishment for the latest crime triggering the statute, but rather for the fact that his repetitive criminal conduct justifies the enhanced penalty.[4] Such reasoning also has defeated constitutional attacks based upon the theory that recidivist statutes are ex post facto.[5] An ex post facto objection will be recognized only when a statute increases the punishment for a crime already committed.[6] In the recidivist setting, the defendant does not receive punishment for previously committed crimes; rather, he receives an enhanced penalty for the last crime because of his persistent criminal activity.

Indiana's current habitual offender statute[7] has cured a constitutional defect inherent in the former statute.[8] Under the former statute, the state was permitted to present evidence of prior convictions for purposes of determining habitual criminal status and to prosecute the crime charged in a single judicial proceeding, thus creating a procedural due process problem because knowledge of prior offenses had a potentially prejudicial effect on the jury's determination of guilt on the crime charged.[9] The current statute remedies this procedural due process weakness by mandating a two-tiered trial.[10] The state may bring a habitual offender charge only by filing the charge on a separate instrument.[11] During the first stage of the trial, the trial court determines guilt on the crime charged.[12] Upon a finding of guilt, the trial resumes for a determination of habitual of-

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[4]Gryger v. Burke, 334 U.S. 728, 732 (1948); Graham v. West Virginia, 224 U.S. 616, 631 (1912); McDonald v. Massachusetts, 180 U.S. 311, 312-13 (1901); Smith v. State, 227 Ind. 672, 676, 87 N.E.2d 881, 883 (1949); Kelley v. State, 204 Ind. 612, 623, 185 N.E. 453, 457-58 (1933).

[5]*See, e.g.*, Gryger v. Burke, 334 U.S. 728, 732; McDonald v. Massachusetts, 180 U.S. 311, 312; Smith v. State, 227 Ind. 672, 676, 87 N.E.2d 881, 882-83; Kelley v. State, 204 Ind. 612, 623, 185 N.E. 453, 457-58.

[6]Lindsey v. Washington, 301 U.S. 397, 401 (1937); Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 326, 328 (1866); Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798).

[7]IND. CODE § 35-50-2-8 (Supp. 1979).

[8]Act of April 10, 1907, ch. 82, §§ 1, 2, 1907 Ind. Acts 109. The supreme court in Lawrence v. State, 259 Ind. 306, 286 N.E.2d 830 (1972) declared the former statute unconstitutional in dicta: "It is highly improbable that twelve jurors can be found with sufficient mental discipline to compartmentalize the evidence. . . . It is difficult to see how the appellant could have received a fair trial on the safe burglary charge once the jury became aware of his prior convictions." *Id.* at 311-12, 286 N.E.2d at 833.

[9]259 Ind. at 310-12, 286 N.E.2d at 833-34.

[10]*See* IND. CODE § 35-50-2-8 (Supp. 1979).

[11]*Id.* § 35-50-2-8(a).

[12]*Id.* § 35-50-2-8(c).

fender status.[13] Evidence of prior offenses may be presented only at this second stage.[14]

Although this constitutional infirmity has been cured, not all constitutional attacks have been foreclosed. Indiana's recidivist statute is still vulnerable to constitutional attack on the grounds of equal protection and due process, separation of powers, and a two-pronged eighth amendment argument involving the "freakishness" of its application and the disproportionality of the mandatory thirty-year sentence to the underlying offenses.[15] The purpose of this Note is to examine Indiana's habitual offender statute for constitutional defects and to suggest means by which any defects may be remedied.

II. Equal Protection and Due Process

The United States[16] and Indiana[17] Constitutions not only guarantee equal protection under the laws but also due process. Traditionally, the United States Supreme Court has applied two levels of review, low level scrutiny or strict scrutiny, in examining state action that allegedly violates these two guarantees.[18] During the past three decades, the Court has developed a third tier of review, middle level scrutiny, in analyzing certain equal protection cases.[19] A defendant's success in raising an equal protection or due process challenge to Indiana's habitual offender statute depends not only on his ability to present a claim warranting strict or middle level scrutiny but also on the receptiveness of the Indiana courts to changes in equal protection or due process analysis.

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[13]*Id.*

[14]*See id.*

[15]Despite this tidy categorization of arguments, a warning should issue that such categorization is illusory. The arguments have hazy parameters and frequently overlap. This categorization, therefore, is offered merely to enhance clarity.

[16]U.S. Const. amend. XIV, § 1.

[17]Ind. Const. art. 1, §§ 12, 23.

[18]The due process and equal protection tests are virtually identical in language, content, and application. If strict scrutiny applies, both equal protection and due process require that the state action serve a compelling state interest and that the least drastic alternative be chosen. Should low level scrutiny apply, the two guarantees require that the state action be rationally related to a hypothetical, permissible state interest. The process of choosing to apply strict or low level scrutiny demonstrates the only critical difference between equal protection and due process. Strict scrutiny will apply in due process cases only when the state action affects a fundamental right. In equal protection cases, strict scrutiny will apply when the legislation not only classifies individuals according to their exercise of a fundamental right but also separates individuals on the basis of suspect criteria like race. J. Nowak, R. Rotunda & J. Young, Handbook on Constitutional Law 524-25 (1978) [hereinafter cited as J. Nowak].

[19]*See* notes 53-55 and accompanying text.

A. Levels of Review for Equal Protection and Due Process

1. Low Level Scrutiny.—Low level scrutiny demonstrates judicial restraint. Under this approach, the courts presume that the legislation or state action is constitutional, requiring only that the differential treatment established by the challenged statute bears some rational relationship to a hypothetical state purpose.[20] Given these guidelines, it is not surprising that the traditional equal protection or due process argument against recidivist statutes has failed. The traditional argument is that singling out habitual criminals for enhanced punishment violates the fourteenth amendment guarantees of equal protection and due process. This argument has been rejected because differential treatment of habitual criminals is reasonably related to legitimate state purposes, namely, public protection and deterrence of career criminality.[21]

The Supreme Court recently has tightened its scrutiny when noneconomic interests are at stake. In such cases, the Court will look at the articulated, central purpose of the law and will require that the means be rationally related to that purpose.[22] Because noneconomic interests are at stake in equal protection or due process challenges to recidivist statutes, courts should raise their standard of scrutiny to require that enhanced penalties be rationally related to the articulated, central purpose of the recidivist statute. Nevertheless, this slightly toughened standard will not prove very helpful to an Indiana defendant. Indiana's Criminal Law Commission, which helped draft the statute, has stated that the purpose of Indiana's statute is to remove from society those members who prove to be incorrigible.[23] Consequently, a defendant will have difficulty in showing that lengthened confinement for three-time felons is not rationally related to the articulated purpose of removing recidivists from society.

2. Strict Scrutiny.—A tenable equal protection argument is still inherent in the selective enforcement of the habitual offender stat-

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[20]The prototypical case in which low level scrutiny is imposed is one in which economic interests are at stake. *See, e.g.*, Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949).

[21]*See* McDonald v. Massachusetts, 180 U.S. 311 (1901). The Court stated that "[the habitual offender statute] affects alike all persons similarly situated, and therefore does not deprive any one of the equal protection of the laws." *Id.* at 313 (citations omitted). *See also* Barr v. State, 205 Ind. 481, 187 N.E. 259 (1933).

[22]In this situation, the Court has alternatively labelled its scrutiny low level and middle level. *See* Craig v. Boren, 429 U.S. 190 (1976) (middle level scrutiny); United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973) (low level scrutiny).

[23]*See* INDIANA CRIMINAL LAW COMMISSION, PROPOSED FINAL DRAFT, IND. PENAL CODE § 35-19.1-3-4 (1974), *quoted in* IND. CODE ANN. § 35-50-2-8 (West 1978) (Commentary).

ute, premised on the notion that selective enforcement discriminates against a suspect class or the exercise of a fundamental right.[24] Such discrimination triggers strict scrutiny review, which requires that the state action serve a compelling state purpose and that the least restrictive means be chosen to accomplish that purpose.[25]

To date, the Supreme Court has treated race,[26] national origin,[27] and alienage[28] as suspect classes for equal protection analysis. If the recidivist statutes are being selectively enforced against an individual of a particular race, nationality, or alienage, the defendant may succeed on an equal protection theory. To prevail on a suspect class theory, the defendant must present a thorough statistical study documenting selective enforcement.[29] Furthermore, he must show intentional, purposeful discrimination in enforcement of the recidivist laws.[30] In extreme cases, statistics alone may adequately bear out the discriminatory intent.[31] In most cases, however, the defendant should be prepared to supply not only convincing statistics but also other evidence demonstrating intentional discrimination.[32]

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[24]*See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969); Loving v. Virginia, 388 U.S. 1 (1967); Strauder v. West Virginia, 100 U.S. 303 (1880).

[25]University of Cal. Regents v. Bakke, 438 U.S. 265 (1978); Loving v. Virginia, 388 U.S. 1 (1967).

[26]University of Cal. Regents v. Bakke, 438 U.S. 265 (1978); Loving v. Virginia, 388 U.S. 1 (1967); Korematsu v. United States, 323 U.S. 214 (1944).

[27]Graham v. Richardson, 403 U.S. 365 (1971); Truax v. Raich, 239 U.S. 33 (1915).

[28]Graham v. Richardson, 403 U.S. 365 (1971). *But cf.* Foley v. Connelie, 435 U.S. 291 (1978) (challenge to a New York statute requiring citizenship for appointment to the state police force failed). The *Foley* Court employed lower level scrutiny, holding that states may exclude aliens from participation in activities central to the definition of citizenship. *Id.* at 296. The Court observed: "[W]e [have never] held that all limitations on aliens are suspect." *Id.*

[29]*See* Washington v. Davis, 426 U.S. 229 (1976).

[30]*Id.* at 239-40. In *Washington*, respondents claimed that the recruiting procedures employed by the Washington, D.C. police department were racially discriminatory. Holding that a governmental act is not unconstitutional solely because of its racially disproportionate impact, the Court required a showing of discriminatory purpose. *Id.* at 239-45.

[31]*See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356 (1886) (ordinance regarding the licensing of laundries was applied arbitrarily and discriminatively against persons of Chinese origin); United States v. Falk, 479 F.2d 616 (7th Cir. 1973) (government has the burden to show no discriminatory intent when only 1 of 25,000 violators was prosecuted).

[32]Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266-68 (1977). *Arlington Heights* involved a challenge to a Chicago suburb's refusal to rezone certain property from a single- to a multiple-family housing classification. Even though the refusal would have a racially disproportionate impact, the claimants failed to show intentional, purposeful discrimination. The Court stated that discriminatory intent may be inferred from other factors, including the historical background of the refusal, the specific sequence of events, departures from normal procedures, dramatic

The Court also applies strict scrutiny to equal protection and due process claims when a statutory classification or other state action impinges a fundamental interest. Thus far, the Court has recognized travel,[33] marriage,[34] familial relationships,[35] voting,[36] various privacy rights,[37] and the first amendment rights[38] as fundamental interests. The California Supreme Court has gone a step further and declared freedom from incarceration and parole restraints as fundamental interests protected by the Constitution.[39] Although an argument could be made that the burden on the classification of habitual offenders impinges fundamental rights, Indiana is unlikely to take the liberal approach of California.

A 1962 Supreme Court decision illustrates the necessity of showing that prosecution under a habitual offender statute discriminates against a suspect class or the exercise of a fundamental right. In *Oyler v. Boles*,[40] the petitioners, inmates serving life sentences under West Virginia's recidivist statute, claimed that they had been denied equal protection of the laws. One petitioner presented evidence indicating that although six persons in a particular court were subject to prosecution under the recidivist statute, he was the only person actually prosecuted as a habitual offender. The Supreme Court rejected the equal protection plea.[41] The Court noted that the

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substantive departures, and the legislative and administrative history of a decision. *Id.* at 267-68. *Cf.* Castaneda v. Partida, 430 U.S. 482 (1977) (plaintiffs not only presented statistical evidence of discrimination against Mexican-Americans in the selection of jurors but also demonstrated a history of discrimination).

[33]Shapiro v. Thompson, 394 U.S. 618 (1969) (residency requirements to qualify for welfare benefits constituted an unconstitutional burden on travel).

[34]Zablocki v. Redhail, 434 U.S. 374 (1978) (law requiring any resident who is obligated by court order to support children not in his custody to seek court approval before marriage is unconstitutional restraint on marriage).

[35]Moore v. City of E. Cleveland, 431 U.S. 494 (1977) (ordinance forbidding unrelated persons from living together stricken as a violation of the right to familial association); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (parental right to send children to parochial schools asserted); Meyer v. Nebraska, 262 U.S. 390 (1923) (state cannot forbid teaching of German).

[36]Kramer v. Union Free School Dist., 395 U.S. 621 (1969) (although voting is not technically a fundamental right, once extended, there can be no invidious discrimination).

[37]Roe v. Wade, 410 U.S. 113 (1973) (right to abortion within certain state-imposed guidelines); Griswold v. Connecticut, 382 U.S. 479 (1965) (statute prohibiting use of contraceptives violated right of marital privacy); Skinner v. Oklahoma, 316 U.S. 535 (1942) (statute providing for compulsory sterilization of certain habitual offenders violated the right of procreation).

[38]Elrod v. Burns, 427 U.S. 347, 362-63 (1976) (first amendment rights of political belief and association protected).

[39]People v. Olivas, 17 Cal. 3d 236, 551 P.2d 375, 131 Cal. Rptr. 55 (1976).

[40]368 U.S. 448 (1962).

[41]*Id.* at 456.

petitioner had failed to state whether the failure to prosecute the others was "the result of a deliberate policy" to bring charges against only certain persons or cases, or whether it was merely due to a lack of information regarding the prior offenses.[42] The Court stated that the complaint charged nothing more than a lack of information on the part of the prosecutor.[43] The Court concluded that "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation," unless the petitioners demonstrate that the selection "was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification."[44]

Although *Oyler* involved an equal protection challenge, the Supreme Court applied the rationale established in *Oyler* to a due process claim in *Bordenkircher v. Hayes*.[45] In *Bordenkircher*, the respondent, Paul Lewis Hayes, was charged with passing a forged instrument in the sum of $88.30, an offense punishable in Kentucky by a two-to-ten-year sentence.[46] During plea bargaining sessions, the prosecutor offered to recommend a five-year sentence if Hayes would agree to plead guilty to the offense. The prosecutor also informed Hayes that if he pleaded not guilty, a recidivist charge under Kentucky's habitual offender statute, which called for a mandatory life sentence would be sought. Hayes did not plead guilty and was charged with being a habitual offender. Hayes was convicted and sentenced to life imprisonment.[47]

In a five-four decision, the Supreme Court upheld the conviction, stating that the prosecutor's conduct did not violate the due process clause.[48] Drawing upon the *Oyler* holding approving some selective enforcement, the Court concluded that the prosecutor's conduct was within the limits of acceptable prosecutorial discretion and was not premised on an unjustifiable standard such as race or religion.[49]

By contrast, Justice Blackmun dissented, asserting that Hayes had been subjected to prosecutorial vindictiveness in violation of the due process clause of the fourteenth amendment.[50] Justice Blackmun explained that vindictiveness in any context, including plea bar-

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[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] 434 U.S. 357 (1978).

[46] *Id.* at 358 (citing KY. REV. STAT. § 434.130 (1973) (repealed 1975) (current version at KY. REV. STAT. § 516.020 (1975)).

[47] 434 U.S. at 358-59.

[48] *Id.* at 365.

[49] *Id.* at 364-65.

[50] *Id.* at 367-68 (Blackmun, J., dissenting).

gaining negotiations, is unjustifiable.[51] Apparently, Justice Blackmun believed that the prosecutor's action invidiously violated the respondent's fundamental right to a trial.[52]

In sum, *Oyler* and *Bordenkircher* require that a defendant challenging a habitual criminal statute on due process or equal protection grounds demonstrate not only selective enforcement but also a deliberate policy of discriminating against suspect classes or the exercise of a fundamental right. Unless an Indiana defendant demonstrates such improper selective enforcement, his success will depend on whether he can convince the court to apply middle level scrutiny.

3. Middle Level Scrutiny.—Middle level scrutiny involves a search for important state interests with substantially related means.[53] It typically implies that the court will accept the stated purpose of the statute but will critically examine whether the means serve that purpose.[54] The Supreme Court has applied middle level scrutiny to gender and illegitimacy classifications.[55] A male defendant in Indiana may succeed in demonstrating that selective enforcement against males warrants middle level review. An Indiana Department of Corrections official recently stated that the recidivist statute was not applied against any females in 1978-79.[56] To prevail in an Indiana court, the male defendant must conduct a thorough study of the application of the recidivist statute in Indiana. Assuming the statistics demonstrate selective enforcement on the basis of gender, the defendant can argue that the application of the statute is not substantially related to the statute's purposes[57] of protecting society from dangerous offenders and deterring career criminality because the enforcement is underinclusive. Indeed, if the enforcement of the statute were substantially related, the statute would apply to males and females equally. Without proof of such improper enforcement, Indiana courts will apply the lowest level of scrutiny.

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[51]*Id.* (Blackmun, J., dissenting).

[52]*See id.* (Blackmun, J., dissenting).

[53]*See, e.g.*, Califano v. Goldfarb, 430 U.S. 199 (1977); Craig v. Boren, 429 U.S. 190 (1976).

[54]J. NOWAK, *supra* note 18, at 526.

[55]*See, e.g.*, Mathews v. Lucas, 427 U.S. 495 (1976); Frontiero v. Richardson, 411 U.S. 677 (1973).

[56]Interview with Ronald Vail, Director of Research and Statistics, Indiana Department of Corrections (October 23, 1979).

[57]Indiana's Criminal Law Commission has stated that the purpose of Indiana's habitual offender statute is "to remove from society those offenders who have proven to be incorrigible." INDIANA CRIMINAL LAW COMMISSION, PROPOSED FINAL DRAFT, IND. PENAL CODE § 35-19.1-3-4 (1974), *quoted in* IND. CODE ANN. § 35-50-2-8 (West 1978) (Commentary).

B. *Indiana's Response to Equal Protection and Due Process Objections*

The Indiana Supreme Court has been faced with constitutional questions regarding Indiana's habitual offender statute on several occasions. When a generalized complaint of "unconstitutionality" has been posed, the supreme court has summarily disposed of the contention.[58] In the past, specific equal protection arguments have not fared much better than generalized complaints of unconstitutionality. In *Barr v. State*,[59] the appellant raised the traditional equal protection argument, asserting that singling out repeat offenders for increased punishment violated Indiana's constitutional guarantee of equal protection of the laws.[60] The court disposed of this contention in a single paragraph, stating: "The statute was enacted with a view to the protection of society, believing that a hardened criminal needed severer punishment . . . than a first offender. The statute makes a reasonable classification and applies equally on all persons within that class."[61]

Similarly, the supreme court rejected the equal protection argument of an appellant sentenced to one-to-ten years for stealing a vehicle and life imprisonment for being a habitual offender in *Smith v. State*.[62] Without any enlightened discussion, the court declared the statute constitutional, relying on previous decisions, some of which did not even involve equal protection challenges.[63]

Although not presenting a challenge to the Habitual Offender Act, *Owens v. State*[64] involved an equal protection challenge to Indiana's Habitual Traffic Offender Act,[65] which possesses some of the same weaknesses as the recidivist statute.[66] The appellant presented evidence showing that only twenty-five percent of those adjudged habitual traffic offenders actually had their licenses revoked. The court of appeals stated that the appellant's statistics were too

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[58]Gurecki v. State, 240 Ind. 177, 161 N.E.2d 610 (1959); Goodman v. Daly, 201 Ind. 332, 165 N.E. 906 (1929).

[59]205 Ind. 481, 187 N.E. 259 (1933).

[60]IND. CONST. art. 1, § 23.

[61]205 Ind. at 488-89, 187 N.E. at 262.

[62]237 Ind. 532, 535-36, 146 N.E.2d 86, 87-88 (1957).

[63]*Id.* at 535, 146 N.E.2d at 87 (citing Hanks v. State, 225 Ind. 593, 76 N.E.2d 702 (1948) (double jeopardy objection); Kelley v. State, 204 Ind. 612, 185 N.E. 453 (1933) (double jeopardy, ex post facto, and cruel and unusual punishment objections)).

[64]382 N.E.2d 1312 (Ind. Ct. App. 1978).

[65]IND. CODE §§ 9-4-13-1 to -19 (1976 & Supp. 1979).

[66]The habitual traffic offender statute provides that upon conviction of certain enumerated traffic offenses within a 10-year period, the offender shall have his driver's license revoked. *Id.* § 9-4-13-10 (Supp. 1979). This statute is vulnerable to an equal protection attack in that the statute is subject to improper selective enforcement by prosecutors.

speculative and incomplete in that they failed to show the number of cases pending on appeal.[67] The court reasoned, however, that even if the statistics had been complete, no violation of equal protection occurred.[68] The court stated that "[m]ere laxity in the administration of the law, no matter how long continued, is not and cannot be held to be denial of the equal protection of the law."[69]

The reasoning in *Owens* is unconvincing. Surely there is a point at which "mere laxity" becomes invidious discrimination in the form of selective enforcement.[70] The appellate court drew no lines of demarcation between mere laxity in administration which does not violate equal protection guarantees and invidious discrimination against suspect classes or the exercise of a fundamental right which does violate equal protection guarantees. Such judicial statements can only lead to cluttered thinking and poor law.

Clear legal reasoning was also absent in *McMahan v. State*,[71] which involved a due process allegation similar to that found in *Bordenkircher*. The appellant in *McMahan* was originally charged with one count of forgery. After the appellant rejected the prosecutor's plea bargaining offer, the prosecutor amended the charging instruments, claiming that the appellant committed five counts of forgery and qualified as a habitual offender. The court convicted the appellant on all five counts and declared him a habitual criminal.[72]

On appeal, the appellant asserted that the prosecutor added the habitual offender charge as a result of prosecutorial vindictiveness and that this vindictiveness violated his due process rights.[73] Citing *Bordenkircher*, the supreme court rejected the appellant's assertion.[74] The court reasoned that because the appellant was lawfully subject to prosecution as a habitual criminal and because he knew that rejection of the plea bargain might result in additional charges, no violation of due process occurred.[75] The court concluded that "the prosecutor's conduct was . . . a justifiable exploitation of legitimate bargaining leverage."[76]

Although *McMahan* relies on *Bordenkircher* as authority, *McMahan* provides no in-depth analysis to guide a defendant seeking

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[67]382 N.E.2d at 1315.

[68]*Id.*

[69]*Id.* at 1316 (emphasis omitted) (quoting 16A AM. JUR. 2d *Constitutional Law* § 803, at 949-51 (1979)).

[70]*See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356 (1886); United States v. Falk, 479 F.2d 616 (7th Cir. 1973).

[71]382 N.E.2d 154 (Ind. 1978).

[72]*Id.* at 155.

[73]*Id.* at 156.

[74]*Id.* at 156-57.

[75]*Id.*

[76]*Id.* (citing United States v. Allsup, 573 F.2d 1141, 1143 (9th Cir. 1978)).

to present a due process claim. If the prosecutor had based his actions on an unjustifiable standard such as religion, the defendant could have prevailed on due process grounds. This is only conjecture, considering the court's summary treatment of the subject.

In light of recent Supreme Court decisions, an Indiana defendant's success in raising a valid equal protection or due process claim depends on his ability to demonstrate invidious selective enforcement warranting middle or high level review. If an Indiana defendant demonstrates that enforcement is based on race or the exercise of a fundamental right, Indiana courts should apply high level review. Moreover, proof that enforcement is premised on the basis of sex requires the application of middle level scrutiny. Recent Indiana cases dealing with equal protection or due process challenges, however, have relied on older cases which had summarily rejected equal protection or due process arguments. Because of the dramatic changes in equal protection and due process analysis over the past three decades, Indiana courts should endeavor to engage in the sophisticated, in-depth analysis typified by recent United States Supreme Court cases. An Indiana defendant must present a thorough statistical survey accompanied by substantial supporting evidence of discrimination in order to raise an equal protection or due process challenge to the enforcement of the recidivist statute. Absent such proof, the courts are likely to apply the lowest level of review.

III. Separation of Powers

The Constitutions of the United States[77] and of Indiana[78] provide for the vesting of certain enumerated powers and functions in three distinct branches of government: the legislative, the executive, and the judicial. The framers of the United States Constitution created separation of powers as a means to check abuse and over-concentration of powers. Thus, separation of powers "preclude[s] a commingling of . . . essentially different powers of government in the same hands."[79]

Nevertheless, the separation of powers doctrine has not been construed to demand complete and absolute delineation of powers among the three branches. A certain amount of overlapping and

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[77]U.S. Const. arts. I-III.

[78]Ind. Const. art. III, § 1 provides: "The powers of the Government are divided into three separate departments; the Legislative, the Executive including the Administrative, and the Judicial: and no person, charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided."

[79]O'Donoghue v. United States, 289 U.S. 516, 530 (1933) (citing Springer v. Philippine Islands, 277 U.S. 189 (1928)).

blurring of functions is not only tolerated but expected.[80] For example, the legislature may delegate its functions to other branches by establishing limits and standards for execution.[81]

Indiana's legislature has given the prosecutors discretionary authority in applying the statute. The statute provides that the "state *may* seek to have a person sentenced as an habitual offender."[82] Because the legislature has failed to establish prosecutorial standards for charging habitual offender status, Indiana's statute may be vulnerable to a separation of powers attack.[83] Nevertheless, a separation of powers challenge to the habitual offender statute has never been raised in Indiana.

In *Oregon v. Cory*,[84] however, a defendant successfully challenged Oregon's habitual offender statute on the separation of powers theory.[85] Oregon's statute required the prosecutor to bring a habitual offender charge in cases involving violence to the person but gave the prosecutor discretion to file such a charge in other cases.[86] The Oregon Supreme Court ruled that the statute gave the prosecutor unbridled discretion to determine whether to bring the habitual offender charge in cases not involving personal violence and found that the portion of the statute permitting such discretion was unconstitutional.[87] The court stated that "there is no yardstick or semblance of classification which would enable the district attorney to determine under what circumstances an information should be filed."[88]

Although the defendant in *Cory* succeeded in showing that the Oregon legislature improperly delegated discretionary power to the executive branch, few persons sentenced as habitual offenders have raised similar challenges.[89] In several cases, however, defendants

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[80]*See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

[81]American Power & Light Co. v. SEC, 329 U.S. 90 (1946); Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935).

[82]IND. CODE § 35-50-2-8 (Supp. 1979) (emphasis added).

[83]*See* Note, *The Separation of Powers Doctrine: A Viable Challenge to the Nebraska Habitual Criminal Statute?*, 11 CREIGHTON L. REV. 925 (1978). This argument also may be characterized as an improper delegation. *See* Brown v. Parratt, 560 F.2d 303, 309 (8th Cir. 1977) (Heaney, J., concurring).

[84]204 Or. 235, 282 P.2d 1054 (1955).

[85]OR. REV. STAT. § 168.040 (1947) (repealed 1976) (currently codified at OR. REV. STAT. §§ 161.725, 166.230 (1977)).

[86]OR. REV. STAT. § 168.040 (1947) (repealed 1976), *quoted in* 204 Or. at 237-38, 282 P.2d at 1055.

[87]204 Or. at 240, 282 P.2d at 1056.

[88]*Id.*

[89]Most courts have rejected separation of powers challenges to recidivist statutes. *See, e.g.*, Ruiz v. Martinez, 385 F. Supp. 800 (D.P.R. 1974); People v. Hanke, 389 Ill. 602, 60 N.E.2d 395 (1945).

have claimed that unbridled prosecutorial discretion violated other constitutional proscriptions.[90] Two such cases, *Martin v. Parratt*[91] and *Brown v. Parratt*,[92] recently reached the Eighth Circuit.

In *Martin*, the defendant, Melvin Martin, was charged with receiving stolen property valued at more than $100. Following conviction by a jury, Martin was tried as a habitual offender and subsequently sentenced to seventeen years imprisonment. Martin appealed, alleging *inter alia* that Nebraska's recidivist statute[93] virtually accorded unreviewable sentencing discretion to the prosecutors in violation of the fourteenth amendment demand for due process and equal protection of the laws. The Eighth Circuit upheld the recidivist statute, stating that the prosecutor's discretion was reviewable by the court[94] and that the court, not the prosecutor, retained sentencing authority.[95]

Brown also involved the issue of prosecutorial discretion under Nebraska's recidivist statute. In *Brown*, the defendant, Monroe Brown, was charged with robbery. The charging affidavit accused him of stealing seventeen dollars and a watch. Upon conviction by jury, Brown was sentenced as a habitual offender to the mandatory minimum of ten years. Brown appealed, asserting that because of unlimited prosecutorial discretion, his resulting sentence was cruel and unusual punishment in violation of the eighth amendment. Relying on *Martin* as authority, the Eighth Circuit held that prosecution inherently involves opportunities for discretion.[96] Accordingly, this exercise of prosecutorial discretion in bringing the habitual offender charge was not unconstitutional.[97]

In a concurring opinion, Judge Heaney stated that Nebraska's recidivist statute *does* violate the due process clause of the fourteenth amendment because it grants unreviewable sentencing authority to the prosecuting attorney.[98] Judge Heaney also recognized that a strong argument could be made that Nebraska's recidi-

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[90]*See, e.g.*, Brown v. Parratt, 560 F.2d 303 (8th Cir. 1977) (cruel and unusual punishment claim); Martin v. Parratt, 549 F.2d 50 (8th Cir. 1977) (cruel and unusual punishment, due process, and equal protection claims); Michigan v. Birmingham, 13 Mich. App. 402, 164 N.W.2d 561 (1969) (equal protection claim). The *Birmingham* court stated that "the discretion granted the prosecuting attorney, a *quasi*-judicial officer, under the Michigan Habitual Criminal Act is not unconstitutional under the Fourteenth Amendment." 13 Mich. App. at 410, 164 N.W.2d at 565.

[91]549 F.2d 50 (8th Cir. 1977).

[92]560 F.2d 303 (8th Cir. 1977).

[93]NEB. REV. STAT. § 29-2221 (1975).

[94]549 F.2d at 52 (citing NEB. REV. STAT. § 29-1606 (1975)).

[95]549 F.2d at 52 (quoting NEB. REV. STAT. § 29-2221 (1975)).

[96]560 F.2d at 304 (citing Martin v. Parratt, 549 F.2d 50 (8th Cir. 1977)).

[97]560 F.2d at 304.

[98]*Id.* at 305 (Heaney, J., concurring).

vist statute violates the separation of powers doctrine.[99] He reasoned that because the sentence for habitual criminals is mandatory if a conviction for the triggering offense is obtained, the prosecutor's decision to bring habitual offender charges is "tantamount to imposition" of the minimum sentence.[100] Thus, he argued that this was an improper delegation of judicial sentencing authority to the prosecutor.[101] Although he recognized that the court was constrained to follow *Martin*, Judge Heaney urged en banc reversal of *Martin* at the earliest opportunity.[102]

The Eighth Circuit pronouncements in *Brown* and *Martin* indicate the typical judicial reluctance to fetter prosecutorial discretion. Although *Brown* and *Martin* are somewhat discouraging to defendants seeking to litigate the separation of powers challenge to recidivist statutes, the challenge remains untested in other circuits. The United States Supreme Court has not considered whether recidivist statutes are unconstitutional because they vest virtually unreviewable sentencing authority in prosecutors. However, the Court's recent decision in *Bordenkircher*, a due process case, strongly indicates that the Court would uphold broad prosecutorial discretion.[103] Acknowledging the potential abuses inherent in broad prosecutorial discretion, the *Bordenkircher* Court also recognized the inherent virtues, stating that in "the 'give-and-take' of plea bargaining, there is no such element of punishment or retaliation" if the accused is free to accept or reject the prosecutorial offer.[104] Dissenting, Justice Blackmun argued that the prosecutor's vindictiveness violated the respondent's due process rights.[105] Justice Blackmun observed that vindictiveness under any circumstances is unjustifiable.[106]

The Indiana Supreme Court in *McMahan* reached a conclusion similar to *Bordenkircher*'s.[107] Citing *Bordenkircher*, the supreme court rejected the appellant's assertion that the filing of a habitual offender charge after rejection of a plea bargain offer constituted prosecutorial vindictiveness.[108] The court explained that the prosecutor's action was merely "a justifiable exploitation of legitimate bargaining leverage."[109]

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[99] *Id.* at 309 (Heaney, J., concurring).

[100] *Id.* (Heaney, J., concurring).

[101] *Id.* (Heaney, J., concurring). *See* K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY, 209-10 (1969) (judicial check on unfettered prosecutorial discretion urged).

[102] 560 F.2d at 305 (Heaney, J., concurring).

[103] *See* notes 45-52 and accompanying text.

[104] 434 U.S. at 363.

[105] *Id.* at 367-68 (Blackmun, J., dissenting).

[106] *Id.* (Blackmun, J., dissenting).

[107] 382 N.E.2d 154 (Ind. 1978).

[108] *Id.* at 156-57.

[109] *Id.* at 156.

Although the holdings in *Bordenkircher* and *McMahan* are confined to the facts of those cases, the two courts' blessing of broad prosecutorial discretion essentially defeats a separation of powers challenge to habitual offender statutes. The traditional judicial reluctance to interfere with the prosecuting function typified by these cases increases the danger of prosecutorial abuses. Justice Black recognized this danger in his dissenting opinion in *Berra v. United States*:[110] "A constitutional delegation of such vast power to the prosecuting department would raise serious constitutional questions . . . . [The] judgments and verdicts [of the judge and jury] are reached after a public trial . . . . No such protections are thrown around decisions by a prosecuting attorney."[111] The danger of prosecutorial abuse has led to many recommendations that the prosecutor's discretion should be regulated by articulated guidelines.[112]

Ultimately, Indiana courts should be persuaded to check prosecutorial discretion by turning to the source of all governmental authority—the Constitution. Indiana's statute allows the prosecutor unlimited discretion to apply the Habitual Criminal Act.[113] The statute ignores the underlying basis for the doctrine of separation of powers. Indeed, the doctrine is intended to mitigate the framers' fears that one branch of government will monopolize and abuse power. Granting unfettered powers to any one branch not only upsets the governmental balance but also violates the Constitution, in the absence of legislative standards to limit prosecutorial discretion.

IV. THE EIGHTH AMENDMENT

The eighth amendment to the United States Constitution expressly bans the infliction of cruel and unusual punishment.[114] The Supreme Court made this prohibition binding upon the states through the fourteenth amendment in *Robinson v. California*.[115] Notwithstanding *Robinson*, however, cruel and unusual punishment had already been outlawed in Indiana by its constitution.[116] Despite these

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[110]Berra v. United States, 351 U.S. 131 (1956).

[111]*Id.* at 140 (Black, J., dissenting).

[112]*See* ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE FOR CRIMINAL JUSTICE §§ 350.3(2)-(3) (1975); ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, THE PROSECUTION FUNCTION §§ 2.5, 3.9 (App. Draft 1971); Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 U.C.L.A. L. REV. 1 (1971).

[113]*See* IND. CODE 35-50-2-8 (Supp. 1979).

[114]U.S. CONST. amend. VIII.

[115]370 U.S. 660 (1962).

[116]IND. CONST. art. I, § 16 states: "Cruel and unusual punishments shall not be inflicted. All penalties shall be proportioned to the nature of the offense."

constitutional protections, Indiana's habitual offender statute may inflict cruel and unusual punishment on some recidivists. The eighth amendment is the vehicle for a two-pronged attack on Indiana's statute. The first branch of the attack concerns the "freakishness"[117] of the application of the statute, whereas the second branch examines the disproportionality of the recidivist penalty to the underlying offenses.[118]

A. The Eighth Amendment and Freakish Application of the Statute

The essence of the freakishness attack is that the infrequent application of the habitual offender statute renders the enforcement freakish; in other words, the statute's irrational, capricious application is manifestly unfair and therefore violates the ban on cruel and unusual punishment.[119] Although this argument resembles the equal protection objection to recidivist statutes, the freakishness argument is probably a more viable one than the equal protection argument.[120] This result is due to the very heavy burden cast on the defendant raising an equal protection attack to prove intentional discrimination in enforcement of the statute.[121] Despite the removal of this burden, the defendant seeking to use a freakishness argument must still statistically demonstrate the infrequent application of the statute.

Justice Stewart introduced the "freakishness" concept in his concurring opinion to the leading death penalty case of *Furman v. Georgia*.[122] In *Furman*, the Supreme Court considered three separate cases.[123] The grant of certiorari was confined to the following issue:

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[117]Justice Stewart coined the term "freakish" in conjunction with the eighth amendment ban on cruel and unusual punishment in his concurring opinion to Furman v. Georgia, 408 U.S. 238, 310 (1972) (Stewart, J., concurring).

[118]This two-faceted eighth amendment analysis was discussed in Note, *A Closer Look at Habitual Criminal Statutes:* Brown v. Parratt *and* Martin v. Parratt, *A Case Study of the Nebraska Law*, 16 AM. CRIM. L. REV. 275 (1979) [hereinafter cited as Note, *A Closer Look*]. The freakishness argument was also discussed in Note, *The 'Bitch' Threatens, But Seldom Bites*, 8 CREIGHTON L. REV. 893 (1974).

[119]Several courts have rejected this eighth amendment objection to recidivist statutes. *See* Goodloe v. Parratt, 453 F. Supp. 1380 (D. Neb. 1978), *rev'd on other grounds*, 605 F.2d 1041 (8th Cir. 1979); People v. Thomas, 189 Colo. 490, 542 P.2d 387 (1975); State v. Troy, 215 Kan. 369, 524 P.2d 1121 (1974).

[120]*See* Note, *A Closer Look*, *supra* note 118, at 296.

[121]*See* notes 29-32 *supra* and accompanying text.

[122]408 U.S. 238, 310 (1972) (Stewart, J., concurring).

[123]Furman v. Georgia, 225 Ga. 253, 167 S.E.2d 628 (1969), *rev'd per curiam*, 408 U.S. 238 (1972) (petitioner convicted of murder sentenced to death); Jackson v. Georgia, 225 Ga. 790, 171 S.E.2d 501 (1969), *rev'd per curiam*, 408 U.S. 238 (1972) (petitioner convicted of rape sentenced to death); Branch v. Texas, 447 S.W.2d 932 (Tex. Crim. App.) (1969), *rev'd per curiam*, 408 U.S. 238 (1972) (petitioner convicted of rape sentenced to death).

"Does the imposition and carrying out of the death penalty in [these cases] constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?"[124] The plurality response to this question was that the imposition of the death penalty as applied in these particular cases did constitute cruel and unusual punishment,[125] and accordingly, the judgments were reversed.[126]

According to *Furman*, the eighth amendment is violated if a punishment is so severe that it fails to accord "with human dignity."[127] Human dignity should be measured by the "evolving standards" of a maturing society.[128] In concluding that the death penalty in these cases was unconstitutional, the Court pointed to the freakish manner in which the death penalty statutes were being enforced.[129] Because the death penalty statutes had been so rarely applied, Justice Brennan in his concurring opinion stated that "an arbitrary handful of criminals" had been chosen for punishment.[130] Justice Douglas similarly concluded that such "an arbitrary handful" may not constitutionally be selected for the death penalty.[131]

Furman lends valuable ammunition to the defendant's arsenal. The Eighth Circuit Court of Appeals, however, rejected the application of the *Furman* freakishness rationale in the recidivist setting in *Brown v. Parratt*.[132] Although the petitioner presented statistical data showing the infrequent application of the recidivist statute in Douglas County, Nebraska, the appellate court did not reach the question whether the statute was imposed so rarely as to be deemed freakish.[133] The court avoided the question by first finding that the *Furman* freakishness rationale was limited "primarily" to death penalty cases.[134] The court reasoned that application of the habitual criminal statute did not possess the unique gravity of the death penalty.[135]

The finding in *Brown* is subject to criticism. Although *Furman* was a death penalty case which emphasized the unique and irrevoca-

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[124]408 U.S. at 239.

[125]*Id.* at 240.

[126]*Id.*

[127]*Id.* at 285 (Brennan, J., concurring).

[128]*Id.* at 269-70 (Brennan, J., concurring) (citing Trop v. Dulles, 356 U.S. 86, 100-01 (1958)).

[129]408 U.S. at 256-57 (Douglas, J., concurring); *id.* at 304-05 (Brennan, J., concurring); *id.* at 309-10 (Stewart, J., concurring); *id.* at 313 (White, J., concurring); *id.* at 364-66 (Marshall, J., concurring).

[130]*Id.* at 305 (Brennan, J., concurring).

[131]*Id.* at 249-57 (Douglas, J., concurring).

[132]560 F.2d 303 (8th Cir. 1977).

[133]*Id.* at 305.

[134]*Id.* at 304.

[135]*Id.*

ble nature of the death sentence,[136] the *Brown* analysis misses a crucial aspect underlying *Furman*. In *Furman*, the Supreme Court emphasized that death penalty statutes must not be arbitrarily or freakishly applied.[137] Confining the Court's freakishness rationale to death penalty cases precludes an eighth amendment challenge in any case mandating only a term of years, regardless of whether a prosecutorial scheme may be patently arbitrary.[138] In this regard, one commentator has stated that "[i]f the Court's reasoning [in *Furman*] applies only to capital punishment cases, then the eighth amendment would be unavailable to challenge a wholly arbitrary prosecution simply because the defendant is subjected only to a term of years and not to death, however harsh or unfair his treatment might seem."[139] It is unlikely that the Court intended such a result. The Eighth Circuit should have considered whether Brown's statistical evidence supported his freakishness claim in light of the standards prescribed in *Furman*.

Even though the Supreme Court has not decided whether the freakishness rationale applies to nondeath penalty cases, the theory is worth advancing, particularly in a case possessing evidence of arbitrary enforcement but little convincing evidence of intentional discrimination required under equal protection analysis. The defendant should be prepared to present thorough statistical data evidencing arbitrary enforcement.

Furthermore, the freakishness attack has an added advantage over the other eighth amendment argument involving a disproportionality analysis, which focuses on legislative determinations.[140] Traditionally, courts have hesitated to disturb legislative determinations of appropriate penalties for criminal offenses.[141] The defendant probably will face this judicial reluctance if he raises a disproportionality attack. In a freakishness attack, however, the argument is focused on capricious enforcement by prosecutors rather than on legislative determinations.[142]

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[136]408 U.S. at 286-91 (Brennan, J., concurring); *id.* at 306 (Stewart, J., concurring).

[137]*See id.* at 313 (White, J., concurring).

[138]*See* Note, *A Closer Look*, *supra* note 118, at 298.

[139]*Id.*

[140]*Id.* at 296.

[141]*See, e.g.*, Brown v. Parratt, 419 F. Supp. 44, 48 (D. Neb. 1976), *aff'd*, 560 F.2d 303 (8th Cir. 1977).

[142]This advantage is discussed in Note, *A Closer Look*, *supra* note 118, at 296. Despite this advantage, the defendant will probably find that an eighth amendment challenge based on a disproportionality theory is more viable than a "freakishness" claim in the recidivist setting.

B. *The Eighth Amendment and Disproportionality*

Traditionally, the constitutional ban on cruel and unusual punishment was interpreted to prohibit extreme physical punishment or torture.[143] This narrow interpretation was expanded in *Weems v. United States.*[144] In *Weems*, the plaintiff in error, a public official of the Philippine Islands, appealed his fine and fifteen year sentence at hard labor with chains for the offense of falsifying a public record.[145] The Supreme Court invalidated the sentence, holding that it was cruel and unusual[146] and stating that the eighth amendment acquires wider meaning as society is enlightened by new standards of justice.[147] The Court stated that "it is a precept of justice that punishment for crime should be graduated and proportioned to offense."[148] *Weems* is the only case in which the Supreme Court has invalidated an excessively long sentence[149] as cruel and unusual.[150] The Court, however, has engaged in disproportionality analysis in recent death penalty cases.[151]

1. The Supreme Court Response.—The Supreme Court applied a disproportionality analysis in *Furman*. Justice Brennan's concurrence in *Furman* enumerated four guiding principles inherent in the phrase "cruel and unusual."[152] First, punishment may not be so harsh as to degrade the dignity of the individual.[153] Second, severe penal-

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[143]*In re* Kemmler, 136 U.S. 436 (1890). The *Kemmler* Court remarked: "Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there . . . [is] something more than the mere extinguishment of life." *Id.* at 447; *see* Wilkerson v. Utah, 99 U.S. 130 (1878); Hobbs v. State, 133 Ind. 404, 32 N.E. 1019 (1893). The *Hobbs* court stated: "The word 'cruel' [means punishment] . . . such as that inflicted at the whipping-post, . . . burning at the stake, breaking on the wheel, etc. The word . . . does not affect legislation providing imprisonment for life or for years, or the death penalty by hanging or electrocution." *Id.* at 409, 32 N.E. at 1021.

[144]217 U.S. 349 (1910).

[145]*Id.* at 358.

[146]*Id.* at 381.

[147]*Id.* at 367-68.

[148]*Id.* at 367.

[149]*Weems* may be somewhat distinguishable from other cases involving excessive sentences because the plaintiff in error was sentenced to hard labor with chains.

[150]*But see* Hutto v. Finney, 437 U.S. 678 (1978). The *Hutto* Court indicated that the length of imprisonment is one factor to be considered in determining the constitutionality of a penalty. *Id.* at 686-87. *See also* Robinson v. California, 370 U.S. 660 (1962). The *Robinson* Court stated: "The question [whether a punishment is cruel and unusual] cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." *Id.* at 667.

[151]*See, e.g.*, Coker v. Georgia, 433 U.S. 584 (1977); Gregg v. Georgia, 428 U.S. 153 (1976); Furman v. Georgia, 408 U.S. 238 (1972) (per curiam).

[152]408 U.S. at 270-80 (Brennan, J., concurring).

[153]*Id.* at 271 (Brennan, J., concurring).

ties may not be arbitrarily inflicted.[154] Third, contemporary society must not consider the penalty excessively severe.[155] Finally, the penalty must not be excessively severe.[156] Under this principle, a penalty is excessive if it is unnecessary.[157] Justice Brennan added that although courts should examine the laws of other jurisdictions to help gauge the view of contemporary society, he reminded them that "[l]egislative authorization, of course, does not establish acceptance."[158]

The Supreme Court adopted a similar, although not identical, test in *Coker v. Georgia*.[159] To determine whether a particular punishment exceeds eighth amendment limits, the Court adopted two criteria: (1) the penalty must make a "measurable contribution to acceptable goals of punishment" and (2) the penalty may not be "grossly out of proportion" to the seriousness of the offense.[160] The Court in *Coker* held that the death penalty was "grossly disproportionate" to the offense of rape and thereby prohibited by the eighth amendment ban on cruel and unusual punishment.[161] The Court relied on three factors to determine disproportionality: the nature of the offense,[162] the prescribed penalty in other jurisdictions for the same offense,[163] and the prescribed penalty for similar crimes in the same jurisdiction.[164] Lower courts have adopted similar criteria when presented with disproportionality objections to recidivist statutes.[165]

2. The Lower Court Response.—Despite the Supreme Court's approval of disproportionality analysis, few courts have applied this analysis.[166] One of those courts which has engaged in a disproportionality analysis was the Fourth Circuit Court of Appeals in *Hart v. Coiner*.[167] The appellant in *Hart*, Dewey Hart, was sentenced to life imprisonment as a habitual offender. Hart was sentenced under

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[154]*Id.* at 274 (Brennan, J., concurring).

[155]*Id.* at 277 (Brennan, J., concurring).

[156]*Id.* at 279 (Brennan, J., concurring).

[157]*Id.* at 279 (Brennan, J., concurring).

[158]*Id.* at 278-79 (Brennan, J., concurring).

[159]433 U.S. 584 (1977).

[160]*Id.* at 592 (citing Gregg v. Georgia, 428 U.S. 153 (1976)).

[161]433 U.S. at 592.

[162]*Id.*

[163]*Id.* at 593-96.

[164]*Id.* at 598-600.

[165]*See* notes 166-210 and accompanying text.

[166]*See* Note, *A Closer Look*, *supra* note 118 at 285 n.70 (listing 20 cases in which lower courts have engaged in a disproportionality analysis, including Hart v. Coiner, 483 F.2d 136 (4th Cir. 1973), *cert. denied*, 415 U.S. 938 (1974); Ralph v. Warden, 438 F.2d 786 (4th Cir. 1970); United States v. McKinney, 427 F.2d 449 (6th Cir. 1970)).

[167]483 F.2d 136 (4th Cir. 1973), *cert. denied*, 415 U.S. 938 (1974).

West Virginia's recidivist statute,[168] which mandates a life term upon conviction of a third felony. Hart's prior convictions consisted of writing a bad check for fifty dollars[169] and transporting forged checks in the amount of $140 across state lines.[170] The triggering offense, a 1968 conviction of perjury, resulted from false testimony given by Hart at his son's murder trial.[171] The Fourth Circuit held that a mandatory life sentence is so excessive and so disproportionate to the underlying offenses that it constituted cruel and unusual punishment.[172] Accordingly, the court reversed and remanded with instructions to grant habeas corpus relief, unless the state elected to resentence the appellant within a reasonable time solely on the perjury conviction.[173]

In reaching this conclusion, the court used a four-element test for disproportionality. The first element involves an assessment of the nature of the offense.[174] In this regard, the court noted the nonviolent nature of Hart's prior offenses. The second element is an examination of the legislative purpose behind the recidivist statute.[175] The state had asserted that its two-fold purpose was societal protection and deterrence of habitual criminality.[176] The court ruled that, given the trivial nature of Hart's offenses, life imprisonment was not a practical solution, stating "there aren't enough prisons in America to hold all the Harts that afflict us."[177] The third factor involves comparing the penalty actually given with the penalty that would be assessed in other states.[178] The court observed that West Virginia's habitual offender statute was among the four most severe recidivist statutes in the nation.[179] The fourth element in the *Hart* test is a comparison of penalties in the same state for other crimes.[180] Applying this element, the court stated that only first degree murder, rape, and kidnapping call for mandatory life im-

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[168]W. VA. CODE § 61-11-18 (1977).

[169]According to W. VA. CODE § 61-3-39 (1977), had the check been for $49.99 rather than $50, the crime would not have been a felony.

[170]483 F.2d at 138.

[171]*Id.*

[172]*Id.*

[173]*Id.*

[174]*Id.* at 140.

[175]*Id.* at 141.

[176]*Id.*

[177]*Id.*

[178]*Id.*

[179]*Id.* at 142. The court stated that only three other states—Indiana, Kentucky, and Texas—prescribed mandatory life sentences upon the third felony conviction. *Id.* at 141. Indiana's new habitual criminal statute only prescribes a 30-year sentence. IND. CODE § 35-50-2-8 (Supp. 1979).

[180]483 F.2d at 142.

prisonment in West Virginia.[181] Accordingly, the court concluded that given the nonviolent nature of his offenses, Hart did not deserve the punishment accorded only to murderers, rapists, and kidnappers.[182] The court then considered the four factors together[183] to determine that Hart's mandatory life sentence was grossly disproportionate to the underlying offenses.[184]

The test adopted in *Hart* was considered by the Fifth Circuit Court of Appeals en banc in *Rummel v. Estelle*.[185] The facts in *Rummel* resemble those in *Hart*. The petitioner, William J. Rummel, was sentenced for life as a habitual offender under the former Texas recidivist statute.[186] The statute mandated a life sentence upon the third felony conviction. Rummel's prior felonies were a 1964 conviction for presenting a credit card with intent to defraud in the amount of $80 and a 1969 conviction for passing a forged instrument worth $28.36. The third and triggering offense was receiving $120.75 by false pretenses.[187]

The Fifth Circuit en banc agreed, albeit reluctantly, with Rummel's contention that the eighth amendment does prohibit some penalties solely because of their excessive length.[188] The court also adopted three of the four factors in the *Hart* test,[189] rejecting only the second factor involving the determination of whether a significantly less severe sentence might achieve the legislative purposes.[190] The rejection of this test indicates the distinction between the *Hart* and *Rummel* courts. The *Rummel* court was less willing to tread on a legislative determination of appropriate punishments than the *Hart* court. The *Rummel* court sought to "uphold a sentence if there is any rational basis for so doing,"[191] whereas the *Hart* court vetoed

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[181] *Id.*

[182] *Id.*

[183] *Id.* at 140.

[184] *Id.*

[185] 587 F.2d 651 (5th Cir. 1978), *aff'd*, No. 78-6386, slip op. (U.S., Mar. 18, 1980). The Fifth Circuit en banc vacated a panel decision, 568 F.2d 1193 (5th Cir. 1978), which held that the Texas habitual offender statute could not be applied in a manner which would violate eighth amendment protections. 587 F.2d at 653.

[186] TEX. PENAL CODE ANN. arts. 61-64 (Vernon 1925) (repealed 1974) (current version at TEX. PENAL CODE ANN. tit. 3, § 12.42 (Vernon 1974)).

[187] 587 F.2d at 653.

[188] *Id.* at 655. The court stated:

> Were this a question of history alone, we must admit that we would have great difficulty in accepting the proportionality analysis . . . .
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> . . . .
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> We do not [, however,] wish to retreat from this rule and therefore we conclude that the eighth amendment does proscribe some punishments that are so disproportionate as to have no rational support.

Id.

[189] *Id.* at 656.

[190] *Id.* at 660-61.

[191] *Id.* at 656.

the legislative prerogative by determining that life imprisonment "is not a practical solution to petty crime in America."[192] This distinction in degree of deference to the legislative branch led to divergent results. Although the Fourth Circuit reversed and remanded with instructions for habeas corpus relief for Hart,[193] the Fifth Circuit reversed the panel's[194] grant of habeas corpus on the eighth amendment issue.[195] The Fifth Circuit en banc ruled that Rummel had failed to demonstrate that the legislative scheme lacked any rational basis.[196]

The court also relied on Texas' good time statute[197] in upholding Rummel's sentence. In Texas, an inmate is eligible for parole after serving the lesser of either one-third of his sentence or twenty years.[198] The court observed that Rummel could be eligible for parole after twelve years.[199] By discounting the life sentence based on the probability of parole, the court eventually considered the constitutionality of some hypothetical lesser penalty. Indeed, the court stated that "if the court is forced to assume that Rummel's sentence is automatically and invariably for his natural life, then the [panel] majority's assertion [that Rummel's life sentence is grossly disproportionate to his offenses] is probably accurate."[200] This statement indicates that the outcome would have been different had the court only considered the constitutionality of Rummel's actual sentence and ignored the possibility of parole as a basis for its opinion.

A strong argument exists that the court should not have considered the mere possibilities of parole.[201] The Supreme Court recently held that the possibility of parole creates no liberty interest, but at best "a mere hope" for parole.[202] One author has commented that the possibilities of parole even when the legislatively prescribed penalty is a life term converts "prosecutors, prison wardens, and parole boards [into] the ultimate arbiters in eighth amendment analysis, in which their discretion in enforcing the legislative mandate is substituted by the judiciary for its own."[203] This theme also

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[192]483 F.2d at 141.

[193]*Id.* at 143.

[194]568 F.2d 1193 (5th Cir. 1978), *rev'd*, 587 F.2d at 653.

[195]587 F.2d at 662.

[196]*Id.* at 661-62.

[197]TEXAS CRIM. PRO. CODE ANN. art. 42.12, § 15(a) (Vernon 1974).

[198]*Id.*

[199]587 F.2d at 659.

[200]*Id.*

[201]*See* Brief for Petitioner, Rummel v. Estelle, No. 78-6386 (U.S., filed May 1, 1979).

[202]Greenholtz v. Inmates, 442 U.S. 1, 9 (1979). *But see* People v. Olivas, 17 Cal. 3d 236, 551 P.2d 375, 131 Cal. Rptr. 55 (1976) (liberty interest to be free from restraints accompanying parole).

[203]Note, *Recidivist Laws Under the Eighth Amendment*—Rummel v. Estelle, 10 U. TOL. L. REV. 606, 633 (1979) [hereinafter cited as Note, *Recidivist Laws*].

was expressed in the dissenting opinion of *Rummel* which rejected the reliance on the mere statistical possibility of parole, stating that "the eighth amendment demands that Rummel's claim be judged by the law of rights and duties, not the law of probabilities."[204] Mere hypothetical possibilities should not determine the constitutionality of sentencing.

The *Rummel* decision also may be criticized for ruling that a petitioner must demonstrate the total irrationality of a recidivist scheme.[205] One author has suggested that this rule severely limits a recidivist's chances of successfully challenging the penalty.[206] This perceived difficulty stems from the fact that in the recidivist setting the rationality of the sentence is not to be measured against the individual offenses but against the recidivist sentence itself.[207] For example, an individual with three prior felony convictions for passing bad checks will not be permitted to challenge his life sentence as being disproportionate to the crimes of passing bad checks, but rather he must show that a life sentence for a three-time felon is totally irrational. Obviously, the latter requirement imposes a more stringent burden on the recidivist. In essence, classifying a particular offense, regardless of its trivial nature, as a felony under the recidivist statute forecloses any consideration of the rationality of the penalty.[208] Thus, the *Rummel* test frustrates the recidivist's eighth amendment right to measure his penalty against the crimes committed.[209] *Rummel* is currently pending on appeal before the United States Supreme Court.[210] The outcome could be important to many jurisdictions, including Indiana.

3. The Indiana Response.—In addition to the cruel and unusual punishment provision in the United States Constitution, the Indiana Constitution provides that "penalties shall be proportioned to the nature of the offense."[211] Given these two constitutional provisions, Indiana should be an excellent forum in which to raise a disproportionality objection. The case law indicates otherwise.

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[204]587 F.2d at 668 (Clark, J., dissenting). Judge Clark reasoned that "[s]ince parole is totally an act of grace by the state, there is no legal basis for judicial intervention in the merits of parole decisions." *Id.* at 667.

[205]*See id.* at 661-62.

[206]*See* Note, *Recidivist Laws*, *supra* note 203, at 633-35.

[207]*See* Rummel v. Estelle, 587 F.2d at 659.

[208]*See* Note, *Recidivist Laws*, *supra* note 203, at 633-35.

[209]*Id.* at 635.

[210]After this Note went to print, the Supreme Court in a 5-4 decision rejected the cruel and unusual punishment claim, observing that Texas' good time statute probably eliminates the possibility that the defendant will be imprisoned for the rest of his life under the habitual criminal statute. Rummel v. Estelle, No. 78-6386, slip op. (U.S., Mar. 18, 1980).

[211]IND. CONST. art. 1, § 16, *quoted in* note 116 *supra*.

The Indiana Supreme Court's attitude toward the eighth amendment's ban on cruel and unusual punishment is reflected in its comments in *Beard v. State*:[212] "Generally, the constitutional prohibitions against cruel and unusual punishment are proscriptions of atrocious or obsolete punishments and are aimed at the kind and form rather than the duration."[213] The court also stated that because determining appropriate penalties is primarily a legislative function, the judiciary is not at liberty to alter a sentence because of its severity.[214]

The judicial deference expressed in *Beard* typifies Indiana decisions.[215] The supreme court, however, has stated that a penalty that is "grossly or unquestionably excessive"[216] will not be tolerated. Unfortunately, Indiana courts have failed to articulate standards or criteria by which to judge whether a penalty is "grossly or unquestionably excessive." The supreme court has prevented the legislature from imposing a greater sentence for a lesser offense than would be imposed for the higher offense.[217]

The Indiana Supreme Court recently considered an eighth amendment disproportionality challenge in *McMahan v. State*.[218] The appellant in *McMahan* argued that the imposition of life imprisonment for the underlying offenses of forgery violated the eighth amendment ban on cruel and unusual punishment. The supreme court adopted the two criteria utilized in *Coker* to determine whether the punishment is excessive: (1) the punishment is excessive if it unnecessarily imposes pain and suffering or (2) the punishment is excessive if it is "grossly out of proportion" to the severity of the crime.[219] Despite the adoption of these standards, the court's reasoning is rather cryptic. First, the court relied on *Spencer v. Texas*,[220] a United States Supreme Court decision, for the proposition that the Habitual Offender Act is constitutional.[221] *Spencer*, however, involved

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[212]262 Ind. 643, 323 N.E.2d 216 (1975).

[213]*Id.* at 648, 323 N.E.2d at 219 (citing Hollars v. State, 259 Ind. 229, 236, 286 N.E.2d 166, 170 (1972)).

[214]262 Ind. at 648, 323 N.E.2d at 219 (citing Blue v. State, 224 Ind. 394, 67 N.E.2d 377 (1946); Mellot v. State, 219 Ind. 646, 40 N.E.2d 655 (1942)).

[215]*See, e.g.*, Parks v. State, 389 N.E.2d 286 (Ind. 1979); Hawkins v. State, 378 N.E.2d 819 (Ind. 1978) (20-year sentence on heroin charge is not cruel and unusual); Rector v. State, 264 Ind. 78, 339 N.E.2d 551 (1976) (life sentence for kidnapping is not cruel and unusual).

[216]Rowe v. State, 262 Ind. 250, 257, 314 N.E.2d 745, 749 (1974).

[217]Heathe v. State, 257 Ind. 345, 274 N.E.2d 697 (1971) (applying IND. CONST. art. 1, § 16).

[218]382 N.E.2d 154 (Ind. 1978).

[219]382 N.E.2d at 157 (citing Gregg v. Georgia, 428 U.S. 153, 173 (1976)); *see* Coker v. Georgia, 433 U.S. 584, 592 (1977).

[220]385 U.S. 554 (1967).

[221]382 N.E.2d at 157.

a due process challenge rather than an eighth amendment challenge.[222] Although the *Spencer* Court observed that the recidivist statute previously had withstood a cruel and unusual punishment attack, the Court relied on pre-*Coker* authority.[223] The supreme court's use of *Spencer* obviously does not demonstrate an application or appreciation of the *Coker* criteria. Moreover, the court summarily stated that the failure to distinguish between violent and nonviolent felonies did not render imposition of an enhanced sentence excessive and unconstitutional.[224]

The Indiana Supreme Court also rejected a disproportionality objection in *Parks v. State*.[225] In *Parks*, the appellant, Larry Parks, was sentenced to life imprisonment upon conviction of first degree burglary and of being a habitual offender. Park's previous offenses were a 1970 conviction of theft and a 1966 conviction of first degree burglary.[226] Parks was sentenced under Indiana's former recidivist statute[227] which provided for a mandatory life sentence. Although Parks urged the court to engage in a disproportionality analysis,[228] the supreme court declined the invitation[229] and summarily disposed of Park's contention: "We have consistently held that the determination of appropriate penalties for crimes committed in this state is a function of the legislature, and we will disturb such a determination only upon a showing of clear constitutional infirmity."[230]

Clearly, Indiana courts have not welcomed an eighth amendment disproportionality claim. The supreme court has demonstrated the utmost judicial deference to legislative judgments. Although some deference is desirable, "[j]udicial enforcement of the [cruel and unusual clause] . . . cannot be evaded by invoking the obvious truth that legislatures have the power to prescribe punishment for crimes. That is precisely the reason the Clause appears in the Bill of Rights."[231] The Indiana courts should be more meticulous in applying the analysis adopted in *McMahan*.

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[222]385 U.S. at 559.

[223]*Id.* at 560 (citations omitted).

[224]382 N.E.2d at 157 (court applied former statute imposing mandatory life sentence rather than 30-year penalty of new statute for persons found to be habitual criminals).

[225]389 N.E.2d 286 (Ind. 1979).

[226]*See* Brief for Appellant at 7, 389 N.E.2d 286 (Ind. 1979).

[227]Act of February 28, 1907, ch. 82, §§ 1, 2, 1907 Ind. Acts 109.

[228]*See* Brief for Appellant, at 15-18, 389 N.E.2d 286 (Ind. 1979).

[229]389 N.E.2d at 289.

[230]*Id.* (citing Vacendak v. State, 264 Ind. 101, 340 N.E.2d 352, *cert. denied*, 429 U.S. 851 (1976); Rowe v. State, 262 Ind. 643, 323 N.E.2d 216 (1975)).

[231]Furman v. Georgia, 408 U.S. at 269 (Brennan, J., concurring).

A recent Indiana statute may offer a partial solution to a disproportionality challenge.[232] The statute would allow the thirty-year additional prison sentence for a habitual criminal to be reduced by as much as twenty-five years if at least ten years have elapsed since the defendant's release.[233] The unique feature of this statute is that the court can consider aggravating or mitigating circumstances in determining whether to grant a reduction.[234] By considering mitigating factors, the court can reduce the disproportionate impact that the habitual criminal statute has, at least in cases where the defendant's most recent felony occurred before the triggering offense. This legislative directive should encourage the courts to reconsider the analysis of their previous eighth amendment cases.

If Indiana adopts a disproportionality analysis, the mandatory thirty-year sentence might be unconstitutionally excessive for some underlying offenses. Indeed, the reluctance of some Indiana juries to apply the habitual offender statute indicates that the mandatory thirty-year sentence is unacceptable.[235]

V. CONCLUSION

Constitutional attacks upon Indiana's habitual offender statute typically have not been accepted by Indiana courts. Obviously, a defendant challenging Indiana's recidivist scheme faces an uphill battle. Nevertheless, Indiana's statute has several serious problems that deserve a closer examination by Indiana courts. At least three constitutional arguments can be raised against the recidivist statute: equal protection or due process, separation of powers, and cruel and unusual punishment.

An Indiana defendant may succeed upon an equal protection or due process theory by demonstrating that the statute is selectively enforced according to some invidious standard. If the state enforced the statute on the basis of a suspect class or exercise of a fundamental right, the court must apply a high level of review. If enforcement is predicated on the basis of sex, the courts must employ a middle level of review. An Indiana defendant should succeed if high or middle level review applies.

Improper enforcement of Indiana's habitual offender statute also

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[232]Act of Feb. 19, 1980, Pub. L. No. 210 (1980).

[233]*Id.*

[234]*Id.*

[235]*See* State v. Baker, No. 78-1250 (Marion Co. Crim. Ct. 4, Jan. 17, 1980); State v. Harrison, No. 78-313B (Marion Co. Crim. Ct. 2, Jan. 16, 1980); State v. Rector, No. 78-365C (Marion Co. Crim. Ct. 3, Sept. 18, 1979).

may support a separation of powers argument. Indiana's statute gives prosecutors sole discretion to bring habitual offender charges without standards or guidelines. Nevertheless, recent Indiana and United States Supreme Court decisions have permitted prosecutors wide discretion in applying the statute.

Generally, the most promising attacks may be based upon eighth amendment disproportionality claims. Indiana, however, has not engaged in a sophisticated disproportionality analysis. Typically, the courts have deferred to legislative determinations of criminal penalties. Although a certain degree of deference is proper, a more sensitive application of the disproportionality test would check legislative action which divests individuals of eighth amendment protections.

Indiana's habitual criminal act could be legislatively improved in three respects. First, the penalty of thirty years should be discretionary rather than mandatory. By increasing judicial flexibility, sentences are more likely to fit the offenses committed. The second proposal is to limit the statute's application to certain felonies such as violent crimes or crimes against the person. Although crimes such as forgery and perjury are deserving of punishment, these crimes are not as reprehensible as violent crimes against the person and therefore should not be treated the same.[236] By limiting the application of the recidivist statute to violent crimes and crimes against the person, societal protection from truly dangerous criminals could be achieved without imposing unconstitutionally severe sentences for nonviolent, relatively trivial offenses. The first two proposals have the added advantage of reducing the opportunity for disproportionality attacks. Third, the legislature should establish limits on prosecutorial discretion. Closer monitoring of prosecutor conduct would insure even-handed application of the laws.[237] This procedure is preferable to the current procedure that allows prosecutors unlimited authority to bring recidivist charges. This proposal should

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[236]*See* Coker v. Georgia, 433 U.S. at 592-600; Hart v. Coiner, 483 F.2d at 141-43. *Hart* and *Coker* advocated differential treatment of various crimes according to the nature of the offense. *But see* Note, *Recidivist Laws*, *supra* note 203, at 635-39 (argument that factors other than the violent nature of the offenses should be considered in determining the appropriate standard).

[237]At least one county prosecutor in Indiana has publicly declared his intention to charge habitual offender status in every applicable case. Address by Stephen Goldsmith, Marion County Prosecutor, at Indiana University School of Law—Indianapolis (October 23, 1979). Although such a policy is arguably better than no policy at all, a preferable course of action would be legislative imposition of articulated guidelines to replace the current procedure that gives prosecutors the sole discretion to bring recidivist charges. Some flexibility in charging habitual criminal status is desirable when mitigating factors exist.

reduce the possibilities of raising a successful due process, equal protection, freakishness, or separation of powers argument. At first glance, the third proposal urging standard application of the laws conflicts with the first two proposals encouraging greater flexibility in the sentencing of recidivists. In reality, no conflict exists. It is one thing to grant wider discretion to a neutral trial court, yet quite another thing to permit such wide latitude to prosecutors who are necessarily interested adversaries.

Old attitudes die hard. Consequently, Indiana courts have rather consistently upheld the habitual offender statute against a myriad of constitutional attacks with little or no enlightened reasoning. Typically, the statute has been upheld either by relying on prior cases demonstrating little if any sensitivity for new developments in constitutional law or by applying the evolving constitutional standards in an unenlightened manner. Indiana should give its recidivist statute a closer look to foster a fair and effective habitual offender statute.

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