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Don't Steal a Turkey in Arkansas—The Second Felony Offender in New York

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DON'T STEAL A TURKEY IN ARKANSAS— THE SECOND FELONY OFFENDER IN NEW YORK

The New York legislature has been wrestling with the problem of the habitual criminal since 1796.[1] Various approaches have been adopted, each of which—for constitutional or practical reasons—ended in failure. Recently New York has, through a legislative amendment,[2] embarked on still another course. This Note will evaluate the prospects for the new amendment's success through a detailed examination of past approaches in an attempt to determine if the amendment is free of the problems that plagued its predecessors. More importantly, however, this Note will demonstrate that there is a basic discrepancy between the goals behind recidivist statutes and the manner in which the New York legislature has and is going about reaching these goals. Alternatives for change will then be postulated.

I. Overview of Habitual Offender Legislation

In general, habitual offender laws have withstood attacks on grounds of being unconstitutional violations of the double jeopardy clause,[3] the cruel and unusual punishments clause,[4] the ex-post facto provision,[5] and the guarantees of due process[6] and equal protection.[7] While these statutes have weathered such constitutional criticism, they have been emasculated by the judiciary through inconsistent and illogical opinions which not only compound their ineffectiveness, but increase the unfairness of their application. As one commentator has noted:

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1. See Law of March 26, 1796, ch. 30, [1792-1797] N.Y. Laws 291-92 (repealed 1909). See generally Note, Court Treatment of General Recidivist Statutes, 48 Colum. L. Rev. 238 (1948) [hereinafter cited as Columbia Note].

An habitual offender is a "person convicted of a felony having already been convicted of one or more previous felonies." Brown, The Treatment of the Recidivist in the United States, 23 Can. B. Rev. 640, 647 (1945).

2. N.Y. Penal Law § 70.06 (McKinney Supp. 1975).

3. E.g., Price v. Allgood, 369 F.2d 376 (5th Cir. 1966), cert. denied, 386 U.S. 998 (1967); People v. Vienne, 30 Cal. App. 3d 266, 105 Cal. Rptr. 584 (1st Dist. 1973); Vigil v. People, 137 Colo. 161, 322 P.2d 320 (1958) (en banc); State v. Salazar, 95 Idaho 650, 516 P.2d 707 (1973); People v. Potts, 55 Mich. App. 622, 223 N.W.2d 96 (3d Div. 1974). See generally Katkin, Habitual Offender Laws: A Reconsideration, 21 Buff. L. Rev. 99 (1971) [hereinafter cited as Katkin].

4. Thompson v. State, 252 Ark. 1, 477 S.W.2d 469 (1972); State v. Dowden, 137 Iowa 573, 115 N.W. 211 (1908). See generally 6 Loyola U.L. Rev. (L.A.) 416 (1973).

5. People v. Dunlop, 227 P.2d 281, 102 Cal. App. 2d 314 (2d Dist. 1951).

6. E.g., Bernard v. Tinsley, 144 Colo. 244, 355 P.2d 1098 (1960) (en banc), cert. denied, 365 U.S. 830 (1961); State v. Prigett, 470 S.W.2d 459 (Mo. 1971). See generally Note, Recidivist Procedures: Prejudice and Due Process, 53 Cornell L. Rev. 337 (1968).

7. E.g., Wilson v. Slayton, 470 F.2d 986 (4th Cir. 1972) (per curiam); People v. Dutton, 9 Cal. 2d 505, 71 P.2d 218 (en banc), appeal dismissed, 302 U.S. 656 (1937); Barr v. State, 205 Ind. 481, 187 N.E. 259 (1933). See generally Graham v. West Virginia, 224 U.S. 616 (1912); McDonald v. Massachusetts, 180 U.S. 311 (1901); Moore v. Missouri, 159 U.S. 673 (1895); Note, Recidivism and Virginia's "Come-Back" Law, 48 Va. L. Rev. 597 (1962) [hereinafter cited as Va. L. Rev.].

Whatever may be the wisdom of the present statutes and their underlying policies, the laws stand as a mockery so long as they are not effectuated. Certainly the extent of judicial intransigency which they have incurred points up a need for legislative reexamination not only of present enforcement procedures, but of the entire orientation of existent recidivist legislation.[8]

The judiciary, however, is not solely to blame for the great disparity in treatment of offenders. The irreconcilable legislative sentencing schemes throughout the country render consistent sentencing decisions virtually impossible. The great majority of states have provisions relating to the punishment of the habitual offender.[9] While the philosophy most common among the states is that the greater number of crimes an offender commits the more severe his sentence should be (a theory based on the quantity of convictions) the statutes differ as to the number of offenses sufficient to mobilize the increased sanctions. Some states begin with the second offense,[10] while others choose the third[11] or fourth.[12] Other states have abandoned the "quantity of convictions" theory by focusing on certain dangerous characteristics of the defendant,[13] while a final group combines the two philosophies and looks for repetition of more violent crimes.[14] The issue of whether or not the prior

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8. Columbia Note, supra note 1, at 253. See S. Rubin, The Law of Criminal Correction 461-63 (2d ed. 1973) [hereinafter cited as Rubin].

9. See Alaska Stat. § 12.55.050 (1972); Ariz. Rev. Stat. Ann. §§ 13-1649 to -1650 (Spec. Pamphlet 1973); Ark. Stat. Ann. § 43-2328 to -2329 (1964), as amended, (Supp. 1975); Cal. Penal Code §§ 644, 666-68 (West 1970); Colo. Rev. Stat. Ann. § 16-13-101 (1973); Conn. Gen. Stat. Ann. § 53a -40 (Supp. 1976); Del. Code Ann. tit. 11, §§ 4214-4215 (1974), as amended, (Supp. 1975); D.C. Code Encycl. Ann. §§ 22-104 to -104a (Supp. 1970); Fla. Stat. Ann. § 775.084 (1976); Ga. Code Ann. § 27-2511 (Supp. 1975); Idaho Code § 19-2514 (Supp. 1975); Ill. Rev. Stat. ch. 38, § 1005-8-2 (1973); Iowa Code Ann. §§ 747.1 et seq. (1950), as amended, (Cum. Pamphlet 1976); Kan. Stat. Ann. § 21-4504 (1974); Ky. Rev. Stat. Ann. § 532.080 (1975); La. Rev. Stat. § 15: 529.1 (1967); Md. Ann. Code art. 27, § 643 B (1976); Mass. Gen. Laws Ann. ch. 279, § 25 (1968); Mich. Comp. Laws Ann. §§ 769.10 et seq. (1968); Minn. Stat. Ann. §§ 609.155-.16 (1964); Miss. Code Ann. § 47-7-3 (1973); Mo. Ann. Stat. §§ 556.280, .290 (Vernon 1953), as amended, (Vernon, Cum. Supp. 1975); Mont. Rev. Codes Ann. § 95-107 (Supp. 1975); Neb. Rev. Stat. § 29-2221 (Supp. 1974); Nev. Rev. Stat. § 207.010 (1973); N.J. Stat. Ann. §§ 2A: 85-8 et seq. (1969); N.M. Stat. Ann. § 40A-29-3.1 et seq. (1964), as amended, (Supp. 1975); N.C. Gen. Stat. §§ 14-7.1 et seq. (1969), as amended, (Supp. 1975); N.D. Cent Code § 12.1-32-09 (1976); Okla. Stat. Ann. tit. 21, §§ 51-54 (1958), as amended, (Supp. 1975); Ore. Rev. Stat. §§ 161.725, .735 (1975); R.I. Gen. Laws Ann. § 12-19-21 (1970); S.C. Code Ann. 17-553.1 (1962); S.D. Compiled Laws Ann. §§ 22-7-1 et seq. (1967); Tenn. Code Ann. § 40-2801 et seq. (1975); Tex. Penal Code Ann. § 12.42 (1974); Utah Code Ann. §§ 76-8-1001, -1002 (Supp. 1975); Vt. Stat. Ann. tit. 13, § 11 (1974); Va. Code Ann. § 53-296 (1974); Wash. Rev. Code Ann. § 9.92.090 (1961); W. Va. Code Ann. §§ 61-11-18 to -19 (1966); Wyo. Stat. Ann. § 6-9 to 6-11 (Cum. Supp. 1975).

10. E.g., Alaska Stat. § 12.55.050 (1972); N.Y. Penal Law § 70.06 (McKinney Supp. 1975).

11. E.g., Colo. Rev. Stat. Ann. § 16-13-101 (1973).

12. E.g., Vt. Stat. Ann. tit. 13, § 11 (1974).

13. E.g., N.D. Cent. Code § 12.1-32-09 (1976); Ore. Rev. Stat. §§ 161.725, .735 (1975).

14. E.g., S.C. Code Ann. § 17-553.1 (1962); Tenn. Code Ann. §§ 40-2801 et seq. (1975).

The Texas courts experienced so much difficulty in determining whether or not a prior conviction was a "similar offense" that the statute was recently amended to provide that any prior

offense need be a felony or simply a lesser crime is another source of disagreement.[15] Similarly the necessity for jury trial,[16] the age of the defendant at the time of the prior offense,[17] the effect of a pardon of the prior offense,[18] and the time span between offenses[19] are treated differently in various statutes.

Substantive disparity aside, one of the most difficult problems which exists throughout the country is determining which prior offenses can be counted for purposes of the habitual offender statutes.[20] The Supreme Court of Iowa, illustrating an extreme view, recently held:

> Our statute dictates that each offense must have been complete as to conviction, sentence and commitment to prison before the commission of the next in order that it qualify for application of the enlarged punishment of [Iowa's habitual offender statute].[21]

Other states require that the defendant have been previously convicted,

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felony will satisfy the requirements for increased sentencing. Tex. Penal Code Ann. § 12.42 (1974). See, e.g., Davis v. State, 501 S.W.2d 629, 632 (Tex. Crim. App. 1973) ("It is well established that the only form of burglary which is an offense of the same nature as robbery is burglary with intent to commit theft."); Chaney v. State, 494 S.W.2d 813 (Tex. Crim. App. 1973).

15. E.g., Mass. Gen. Laws Ann. ch. 279, § 25 (1968) ("crimes"); Mo. Ann. Stat. §§ 556.280, .290 (Vernon 1953), as amended, (Vernon, Cum. Supp. 1975) ("offense" or "attempt to commit an offense"). For a discussion of New York's efforts in eliminating this problem see part II, infra.

16. Compare Utah Code Ann. §§ 76-8-1001, -1002 (Supp. 1975) (jury) and Mich. Comp. Laws Ann. § 769.10 et seq. (1968) (jury) with Neb. Rev. Stat. § 29-2221 (Supp. 1974) (court) and Kan. Stat. Ann. § 21-4504 (1974) (court).

17. Compare Ky. Rev. Stat. Ann. § 532.080 (1975) (eighteen) with Ore. Rev. Stat. §§ 161.725, .735 (1975) (over sixteen).

18. E.g., Murray v. Louisiana, 347 F.2d 825, 826-27 (5th Cir. 1965) (while pardon of prior Missouri offense would not prevent its being used for the purposes of the recidivist statute in Missouri, it is not unconstitutional to give that same effect in Louisiana although Louisiana law would not permit an offense pardoned in Louisiana to be used).

19. Compare La. Rev. Stat. § 15:529.1 (1967) (convictions cannot be more than five years apart); Minn. Stat. Ann. § 609.155-.16 (1964) (convictions cannot be more than ten years apart); Ore. Rev. Stat. §§ 161.725, 735 (1974) (convictions cannot be more than seven years apart). See State v. Phillips, 511 S.W.2d 841, 843 (Mo. 1974) ("The Second Offender Act places no time limit within which the previous conviction shall have occurred, and the fact that the prior conviction in this case occurred twenty-six years earlier is immaterial."); Simmons v. State, 493 S.W.2d 937, 940 (Tex. Crim. App. 1973) ("Unlike the rule that a prior conviction too remote in time cannot be used for impeachment purposes, such prior convictions may be utilized for enhancement purposes.").

20. See Va. L. Rev., supra note 7, at 607-08.

21. State v. Tillman, 228 N.W.2d 38, 41 (Iowa 1975). Accord, State v. Conley, 222 N.W.2d 501, 502-03 (Iowa 1974) (not only must the defendant have been convicted, sentenced and imprisoned, but the statute dictates that the imprisonment must have been for at least a three year term). The reason cited in support of this view is that "each conviction and sentence which serves as a predicate for application of an habitual criminal statute is viewed as separate warning." 222 N.W.2d at 503.

sentenced and "placed on probation, paroled, fined *or* imprisoned . . . ."[22] Florida demands a "formal adjudication of guilt," a requirement that has caused detailed discussion by its courts.[23] In other jurisdictions, a verdict or a plea of guilty is all that is necessary to implement added sanctions.[24] Other opinions indicate that simultaneous, multiple convictions may be used for the purpose of applying recidivist statutes.[25] It is, however, well recognized that prior convictions obtained without benefit of counsel in violation of *Gideon v. Wainwright*[26] may not be used to enhance sentencing.[27]

To complicate the problem of defining a valid prior conviction, the sentencing judge must also determine the effect to be given prior out-of-state convictions. This is by far the most difficult task facing the judiciary in this area.[28] The philosophies employed by the various states in this regard can be broken down into three general categories: the internal view, the limited internal view and the external view.[29]

A state adopting the strict internal view gives no effect to foreign convictions.[30] Virginia appears to be the only jurisdiction adopting this extreme position.[31] While its recidivist statute does not specifically exclude the consideration of foreign convictions,[32] "Virginia authorities have avoided . . . complications [arising from out-of-state convictions] by limiting the actual practical application of the recidivist law to prior Virginia convictions."[33] In *Sims v. Cunningham*,[34] this policy was challenged as being an unconstitutional denial of the guarantees of the equal protection clause, but the Supreme Court

22. State v. Abernathy, 515 S.W.2d 812, 814 (Mo. Ct. App. 1974) (emphasis added). Accord, Lis v. State, 327 A.2d 746, 748 (Del. 1974) ("As used, the word 'convicted' means 'the act of proving, finding or adjudging a person guilty of an offense,' . . . not commitment to prison." (citation omitted)).

23. E.g., Shargaa v. State, 102 So. 2d 809 (Fla.), cert. denied, 358 U.S. 873 (1958); Ellis v. State, 100 Fla. 27, 129 So. 106 (1930); Note, Adjudication of Guilt in a Criminal Case in Florida, 12 U. Fla. L. Rev. 102 (1959) (arguing that courts are, in effect, legislating by not rendering such formal adjudication when sentencing defendants to probation).

24. E.g., Woods v. Mills, 503 S.W.2d 706 (Ky. Ct. App. 1974).

25. E.g., Cox v. State, 255 Ark. 204, 499 S.W.2d 630 (1973); State v. Williams, 226 La. 862, 77 So. 2d 515 (1955). But see Moore v. Coiner, 303 F. Supp. 185, 188-89 (N.D.W. Va. 1969) (reasoning that since the purpose of the habitual offender laws is to deter, no purpose is served in applying it to "offenses committed simultaneously, or approximately so, with the principal offense").

26. 372 U.S. 335 (1963).

27. Burgett v. Texas, 389 U.S. 109 (1967); see, e.g., Blaylock v. Hopper, 233 Ga. 504, 212 S.E.2d 339 (1975) (per curiam) (applying Burgett).

28. See Comment, Provisions for Foreign Convictions in Habitual Criminal Legislation, 2 La. L. Rev. 177 (1939).

29. Id. at 177.

30. Id. at 177 n.3.

31. See Va. L. Rev., supra note 7, at 608 n.63.

32. Va. Code Ann. § 53-296 (1974).

33. Va. L. Rev., supra note 7, at 608 n.63.

34. 203 Va. 347, 124 S.E.2d 221, cert. denied, 371 U.S. 840 (1962).

of Virginia rejected this contention, finding no intentional discrimination.[35] The internal view is, at best, unrealistic and outdated. "Not only does this practice seem inherently unfair, if not unconstitutional, but also it fails to give effect to the policy behind the law which relates to *all* habitual criminals."[36]

With the exception of Virginia, all the states with habitual offender provisions have adopted either the limited internal view—by examining each out-of-state conviction in terms of local law[37]—or the external view—by accepting the determination of the foreign conviction.[38] Since New York has experimented with both, an examination of the problems and solutions encountered in the history of New York's second felony offender statute will best serve to illustrate the advantages and disadvantages of the two views.

II. NEW YORK

Although the first state to enact recidivist legislation,[39] New York is probably most famous in the field of habitual offender laws for two dubious contributions: enactment of the oppressive Baumes Law[40] in response to public outrage over ineffective penal sanctions in the 1920's[41] and, more importantly, the New York Court of Appeals' decision in *People v. Olah*.[42]

Defendant Olah was convicted of a felony in New York and due to a prior New Jersey larceny conviction was sentenced to imprisonment as a second felony offender.[43] The statute in effect at the time was of the limited-internal

35. Id.

36. Va. L. Rev., supra note 7, at 634 (footnote omitted) (emphasis in original).

37. A statute evidencing the limited-internal view might read: Any crime, which if committed in this state would be a felony, will satisfy the requirement of a prior felony.

The statutes which most clearly adopt this view are: Alaska Stat. § 12.55.050 (1972); Colo. Rev. Stat. Ann. § 16-13-101 (1974); Ga. Code Ann. § 27-2511 (Supp. 1975); Mich. Comp. Laws Ann. §§ 769.10 et seq. (1968); Mo. Ann. Stat. § 556.290 (Vernon 1953); N.J. Stat. Ann. § 2A:85-8 (1969); N.M. Stat. Ann. §§ 40A-29-3.1 et seq. (1964), as amended, (Supp. 1975); Okla. Stat. Ann. tit. 21, § 54 (1958); S.D. Compiled Laws Ann. §§ 22-7-1 et seq. (1967); Vt. Stat. Ann. tit. 13, § 11 (1974); Wash. Rev. Code Ann. § 9.92.090 (1961).

38. A statute evidencing the external view might read: Any previous crime punishable by imprisonment for a year or more in the state where committed, will satisfy the requirement of a prior felony.

The statutes which most clearly adopt this view are: D.C. Code Encycl. Ann. §§ 22-104 to -104a (Supp. 1970); Iowa Code Ann. § 747.5 (1950); Mass. Gen. Laws Ann. ch. 279, § 25 (1968); Mont. Rev. Codes Ann. § 95-1507 (Supp. 1976); Neb. Rev. Stat. § 29-2221 (Supp. 1974); W. Va. Code Ann. §§ 61-11-18 to -19 (1966).

39. Law of March 26, 1796, ch. 30, [1792-1797] N.Y. Laws 291-92 (repealed 1909), provided in pertinent part: "[E]very person who shall be a second time duly convicted or attainted of any of [certain specific felonies] committed after such first conviction, shall instead of the punishment now annexed to such crimes be adjudged by the justices, who shall give judgment thereupon, on like consideration of all the circumstances of the case, to imprisonment in one of the prisons aforesaid, at hard labour or in solitude, or both, for life."

40. Law of April 16, 1926, ch. 457, [1926] N.Y. Laws 805-06 (repealed 1936) (automatic life imprisonment for fourth felony conviction).

41. See Rubin, supra note 8, at 453-54.

42. 300 N.Y. 96, 89 N.E.2d 329 (1949).

43. Id. at 103, 89 N.E.2d at 333 (Conway, J., dissenting).

type.[44] Thus, the court was forced to examine the New Jersey larceny conviction in terms of New York penal standards. The court noted that the New York Penal Law defined grand larceny as the theft of property in excess of $100,[45] while the corresponding New Jersey statute set the minimum amount at $20.[46] Although it was conceded that the defendant had "pleaded guilty to stealing a wallet and two $100 bills"[47] in the New Jersey proceeding, the New York Court of Appeals held that the defendant could not be sentenced as a second felony offender, reasoning that "[t]here is a difference between the 'crime' of which a defendant was convicted and the 'evidence' relied upon to establish that crime."[48]

Olah and cases which adhere to its view illustrate one of two ways to examine out-of-state convictions in a state having a limited-internal type of statute. The test applied in New York has been termed the "statute" test[49] referring to the fact that New York would not look beyond the face of the foreign statute in determining the validity of prior convictions.[50] Other states with the limited-internal view have rejected this approach, and prefer to look to all of the circumstances of the prior crime, including the indictment. This test, which might be called the "general" test, has been adopted, notably, by New Jersey[51] and California.[52]

Both of these approaches present serious problems. The statute test obvi-

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44. The statute provided: "A person, who, after having been once or twice convicted within this state, of a felony, of an attempt to commit a felony, or, under the laws of any other state, government, or country, of a crime which, if committed within this state, would be a felony, commits any felony, within this state, is punishable upon conviction of such second or third offense [to increased punishment] . . . ." Law of May 8, 1942, ch. 700, [1942] N.Y. Laws 1583-84 (repealed 1965). This provision was § 1941 of the former N.Y. Penal Law.

45. 300 N.Y. at 98, 89 N.E.2d at 330.

46. Id.

47. Id. at 104, 89 N.E.2d at 333 (Conway, J., dissenting).

48. Id. at 98-99, 89 N.E.2d at 330. Ten years later, in People ex rel. Goldman v. Denno, 9 N.Y.2d 138, 172 N.E.2d 663, 211 N.Y.S.2d 403 (1961), prior convictions were again considered inadequate for second felony offender status because the prior crimes included elements which would only have been misdemeanors in New York. Id. at 141, 172 N.E.2d at 665, 211 N.Y.S.2d at 405.

49. Comment, Loopholes in New York's Multiple Offender Statutes for the "Interstate" Criminal, 24 Albany L. Rev. 177, 179 (1960) [hereinafter cited as Albany Comment].

50. In State v. Briton, 265 Minn. 326, 121 N.W.2d 577 (1963), overruled on other grounds, State v. Clark, 270 Minn. 538, 134 N.W.2d 857 (1965), the Minnesota Supreme Court adopted the "statute" test reasoning that Minnesota courts should not look to extrinsic evidence because it would not only "invite a retrial of prior prosecutions," but that it was "conceivable that a defendant in a [larceny] prosecution may fail to contest the value of the property involved." Id. at 329, 121 N.W.2d at 579. Minnesota has since amended its habitual offender law in such a way that the "statute" test is inapplicable. See Minn. Stat. Ann. § 609.155-.16 (1964) and notes 115-18 infra and accompanying text.

51. See State v. Hines, 109 N.J. Super. 298, 306, 263 A.2d 161, 165, cert. denied, 400 U.S. 867 (1970) ("the entire record of conviction in the foreign jurisdiction must be reviewed").

52. See Ex parte Wolfson, 30 Cal. 2d 20, 180 P.2d 326 (1947); Ex parte McVickers, 29 Cal. 2d 264, 176 P.2d 40 (1946); Ex parte Martin, 115 Cal. App. 2d 188, 251 P.2d 745 (2d Dist. 1952).

ously creates loopholes for the interstate criminal.[53] While a defendant may have previously stolen property worth thousands of dollars, if the first state had a grand larceny minimum smaller than the state where his second offense was committed, the conviction could not be counted in determining habitual offender status.[54] The "general" test, on the other hand, seemingly requires the court to re-try the first cause of action, a process that can not only be confusing, but time-consuming.[55] Thus, difficulties will exist no matter which test is applied by a state with a limited-internal statute.

Nonetheless, New York's brief experience with an external statute illustrates that that view does not present a viable alternative.

Upon the enactment of the revised Penal Law in 1965 the second felony provision was eliminated.[56] This action may have been due to (a) the mandatory characteristics of the statute, (b) a feeling that second offenders could be adequately sentenced through the use of normal sentencing procedures,[57] or (c) the tremendous repercussions of *People v. Olah*. In 1973, however, it surfaced again on the coattails of New York's revised Drug Law.[58] The new statute was of the external variety and it was thought that the legislature had finally eliminated the out-of-state conviction problem. One commentator noted:

Under [the 1973 version of] Section 70.06, that issue can no longer arise, for as we

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53. Albany Comment, supra note 49, at 183.

54. At the time of the decision in Olah, forty-five states had a grand larceny minimum lower than New York's. People v. Olah, 300 N.Y. 96, 104-05, 89 N.E.2d 329, 334 (1949) (Conway, J., dissenting).

55. See, e.g., Ex parte Wolfson, 30 Cal. 2d 20, 180 P.2d 326 (1947).

56. A provision for persistent offenders (felons with two or more convictions) was retained. This version, which became effective in 1967, was for all practical purposes of this discussion, identical to the present statute for persistent offenders. Compare Law of July 20, 1965, ch. 1030, [1965] N.Y. Laws 2367-68 with N.Y. Penal Law § 70.10 (McKinney 1975). The present statute is discretionary and is of the external type—a crime for which more than a year's imprisonment or the death penalty was imposed is valid for purposes of increased sentencing.

Applauding the revised Penal Law's sentencing scheme, one commentator suggested that "[u]nder the new law the court has much greater discretion in the imposition of sentence. In accordance with modern penal theories, the mandatory features of sentence for multiple felony offenders have been abolished. The court can now concern itself with the history, character and condition of a defendant and exercise a broad discretion when imposing sentence." H. Rothblatt, New York Crimes, The Revised Penal Law 48 (1968).

While the persistent felony offender statute has experienced problems similar to the second offender provision [see, e.g., People v. Klein, 35 App. Div. 2d 528, 313 N.Y.S.2d 430 (2d Dep't 1970) (mem.)] its discretionary feature has probably caused it to be less controversial than its counterpart.

57. P. Preiser, Practice Commentary to N.Y. Penal Law § 70.10 (McKinney 1967).

58. N.Y. Penal Law § 70.06 (McKinney 1975), as amended, (McKinney Supp. 1975) provided in pertinent part: "For the purpose of determining whether a prior conviction is a predicate felony conviction . . . [t]he conviction must have been in this state of a felony, or in any other jurisdiction of an offense for which a sentence to a term of imprisonment in excess of one year or a sentence of death was authorized . . . irrespective of whether such sentence was imposed . . . ." Id. § 70.06(b)(i).

have seen, the test is whether the [out-of-state] crime *carried* more than a year under foreign law, without regard to its character as a felony here, or whether the defendant served the year or more.[59]

Immediately, however, it became apparent that the statute created problems more difficult than those it attempted to solve. A conflict over the constitutionality of the statute which developed at the trial court level was soon resolved by the Third Department[60] and, in turn, the legislature itself.

In *People v. Mazzie*[61] the defendant maintained that his prior federal conviction would only have been a misdemeanor under New York law. This was irrelevant under section 70.06 since the federal crime was one for which a sentence of imprisonment for more than a year was authorized.[62] Thus, the defendant challenged the constitutionality of the statute on two grounds: first, that the statute violated the New York State Constitution, article III, sections 1 and 16 in that it was an improper delegation of legislative power and incorporated, by reference, the laws of foreign jurisdictions;[63] and second, that it violated the equal protection clause of the United States Constitution.[64]

The state supreme court agreed with both defense contentions. On the issue of unlawful incorporation of legislative acts, the court reasoned that the statute's reliance on out-of-state penal standards could not "constitutionally be tolerated,"[65] pointing out that one "convicted of fornication in Alabama . . . , seduction in Texas . . . , blasphemy in New Jersey . . . , or of stealing a library book in North Carolina . . . or a turkey in Arkansas . . . , "[66] would have to be sentenced as a second felony offender in New York. Turning to the equal protection issue the court, relying on *Skinner v. Oklahoma*,[67] reasoned that similar criminal conduct should not be punished unequally,[68] and concluded that blind reliance on such a statutory scheme was "simply

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59. A. Rosenblatt, New York's New Drug Laws and Sentencing Statutes 63 (1973) [hereinafter cited as Rosenblatt].

60. People v. Morton, 48 App. Div. 2d 58, 367 N.Y.S.2d 595 (3d Dep't 1975).

61. 78 Misc. 2d 1014, 358 N.Y.S.2d 307 (Sup. Ct. 1974).

62. See note 58 supra.

63. 78 Misc. 2d at 1015, 358 N.Y.S.2d at 309-10. New York Constitution, article III, § 1 provides: "The legislative power of this State shall be vested in the Senate and Assembly." N.Y. Const. art. III, § 1 (1969).

New York Constitution, article III, § 16 provides: "No act shall be passed which shall provide that any existing law, or any part thereof, shall be made or deemed a part of said act, or which shall enact that any existing law, or part thereof, shall be applicable, except by inserting it in such act." N.Y. Const. art. III, § 16.

64. On this point the defendant argued that the statute treated "those convicted in other jurisdictions more harshly than it treats persons convicted in New York State courts for the same conduct . . . ." 78 Misc. 2d at 1015, 358 N.Y.S.2d at 310.

65. Id. at 1018, 358 N.Y.S.2d at 312.

66. Id. at 1017-18, 358 N.Y.S.2d at 311-12 (citations omitted). All of these crimes carried a sentence of more than a year in their respective jurisdictions.

67. 316 U.S. 535 (1942).

68. 78 Misc. 2d at 1018, 358 N.Y.S.2d at 312.

irrational and [bore] little relationship to the statutory objective of section 70.06 . . . ."[69]

A contrary result was reached four months later in *People v. Wixson.*[70] The court rejected both claims that the statute violated the New York Constitution, holding that the purposes of sections 1 and 16 of article III were unrelated to the new sentencing statute.

On the issue of improper delegation of legislative power, the court held that such a constitutional provision was merely meant to assure a representative government in New York.[71] Turning to the claim of unlawful incorporation of foreign statutes, the court found that this section's main purpose was to protect the legislature from unknowingly incorporating old statutes or clauses into new legislation.[72] In brushing aside the equal protection argument, the court relied on the United State Supreme Court decision in *Marshall v. United States,*[73] which involved the constitutionality of a federal statute providing that persistent drug offenders were ineligible for a rehabilitative project available in lieu of sentencing. The *Marshall* Court noted that the program was experimental, and held that the distinction between repeaters and non-repeaters was rational in light of the purposes of the statute.[74] However, the validity or effect of prior drug convictions was neither in issue nor discussed by the Court.

On May 8, 1975, the Appellate Division, Third Department, adopted the *Mazzie* holding in *People v. Morton.*[75] In commenting on the fact that a prior conviction for turkey theft in Arkansas would require the court to sentence a defendant as a second felon, the court noted:

> That such a result would be purely arbitrary and without a basis in reason is amply demonstrated by the fact that, had defendant fortuitously performed these very same earlier acts in the State of New York, he would still be entitled to first offender status upon his sentencing for his subsequent New York felony conviction.[76]

The legislature acted quickly, amending the statute to provide that prior convictions must carry a possible sentence of a year or more not only in the sister jurisdiction, but also in New York. New York's brief encounter with an external statute was over.

The 1975 revised version of section 70.06 provides in part:

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69. Id. at 1019, 358 N.Y.S.2d at 313. The court also discussed Graham v. West Virginia, 224 U.S. 616 (1912) and Oyler v. Boles, 368 U.S. 448 (1962), two major opinions upholding the constitutionality of habitual offender statutes, finding, nevertheless, that they did not support the statute's validity.

70. 79 Misc. 2d 557, 360 N.Y.S.2d 818 (Sup. Ct. 1974).

71. Id. at 563, 360 N.Y.S.2d at 825.

72. Id. at 564, 360 N.Y.S.2d at 826.

73. 414 U.S. 417 (1974).

74. Id. at 429-30. The decision in Wixson was subsequently followed in People v. Sibila, 81 Misc. 2d 1028, 367 N.Y.S.2d 193 (Nassau County Ct. 1975).

75. 48 App. Div. 2d 58, 367 N.Y.S.2d 595 (3d Dep't 1975).

76. Id. at 60, 367 N.Y.S.2d at 597.

Sentence of imprisonment for second felony offender

1. Definition of second felony offender.

(a) A second felony offender is a person who stands convicted of a felony defined in this chapter . . . after having previously been subjected to one or more predicate felony convictions as defined in paragraph (b) of this subdivision.

(b) For the purpose of determining whether a prior conviction is a predicate felony conviction the following criteria shall apply:

(i) The conviction must have been in this state of a felony, or in any other jurisdiction of an offense for which a sentence to a term of imprisonment in excess of one year or a sentence of death was authorized and could be authorized in this state irrespective of whether such sentence was imposed . . . .[77]

As noted,[78] the statute adopts the limited-internal view of out-of-state convictions, but with one minor variation. While the prior crime must have been one which in New York would have carried a possible term in excess of one year (a felony in New York),[79] the sentencing court must now also determine if that crime would have satisfied the same requirement in the original sentencing state. Unfortunately the statute requires the courts to focus the sentencing decision on form, not substance. Once again, prior out-of-state convictions must be carefully measured against New York penal standards. Simply stated, the problems and inequities of *People v. Olah* have returned. The statute also retains its mandatory characteristic which inevitably encourages "judicial reluctance to give [such] laws an expansive reading."[80]

Concededly, the amendment has eliminated the constitutional problems that prompted concern in the courts. Nevertheless, New York has come full circle. The legislature has been preoccupied with defining a prior conviction when it appears that not only are these laws not reaching those most deserving of enhanced sentencing,[81] but they are also encountering tremendous difficulties in their application. A brief examination of the purposes of habitual offender sentencing will hopefully illuminate the root of the problem.

III. The Purposes and Possible Future of Habitual Offender Laws

Punishment and protection of society appear to be the most realistic goals underlying traditional habitual offender legislation.[82] It is submitted that neither of these goals has been achieved.

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77. N.Y. Penal Law § 70.06 (McKinney Supp. 1975), amending N.Y. Penal Law § 70.06 (McKinney 1975).

78. See text accompanying notes 76-77 supra.

79. N.Y. Penal Law § 10.00(5) (McKinney 1975).

80. Rosenblatt, supra note 59, at 57.

81. See notes 87-89 infra and accompanying text.

82. See Comment, Recidivism: The Treatment of the Habitual Offender, 7 U. Richmond L. Rev. 525, 526-27 (1973); W. LaFave & A. Scott, Jr., Criminal Law 22 (1972). See also People v. Butler, 46 App. Div. 2d 422, 425-26, 362 N.Y.S.2d 658, 661-62 (4th Dep't 1975).

While it has been argued that deterrence is a main reason for habitual offender legislation, one author has observed that "habitual offender laws are wholly unnecessary to deter serious offenses.

One reason advanced to explain society's widespread fear of the habitual offender, and hence a need for protection from him, is that "recidivism is characteristic of criminals and extremely common."[83] However, "[t]his impression is based on the illusory and deceptive statistic that most prisoners—60 per cent or more—are recidivists. They are; but that figure alone does not establish a general rate of recidivism."[84] The reason that these rates are deceptive is that studies of the number of recidivists center on the number of offenders in prison,[85] as opposed to the total number of convicted offenders, which would necessarily include those on parole.[86] In fact, "most serious offenders never repeat their crimes."[87]

Another reason advanced for additional protection is the dangerous character of the offender. But as one study observed:

> Contrary to the popular stereotype of a persistent criminal, few of these prisoners were prone to violence and hardly any were efficiently organized, professional criminals. The majority were shiftless, work-shy characters for whom petty stealing represented the line of least resistance. The high proportion of housebreakers, unusual for men of mature years, reflected the persistence of crude methods of thieving learned in youth rather than the acquirement of special skill in burglary.[88]

Other authors concur in the view that the majority of offenders who feel the brunt of more severe sentencing are neither "dangerous" nor "professional" criminals.[89] Thus it appears that the criminals from whom society needs the most protection manage to escape the increased penalties.

This would seem to be true almost as a matter of definition. Courts sentencing truly dangerous felons, such as murderers, rapists or armed robbers can impose lengthy terms of imprisonment (in some cases the death penalty) without regard to the existence of habitual offender laws or the issue of habitual criminality." Katkin, supra note 3, at 106. The author continues to explain that if deterrence is the object of habitual offender legislation that it has only had that effect on the petty offender. Id. See text accompanying notes 87-89 infra.

Rehabilitation has also been cited as an underlying rationale "[h]owever, it is difficult to imagine increased punishment as a rehabilitative device when one considers that offenders will be detained in the same system that has failed to rehabilitate them during their first incarceration." Comment, Recidivism: The Treatment of the Habitual Offender, supra, at 527. If rehabilitation were a serious concern of such legislation, it has not succeeded. See Van West, Cultural Background and Treatment of the Persistent Offender, 28 Fed. Prob. 17 (1964).

83. Rubin, supra note 8, at 466.

84. Id.

85. See, e.g., A. MacLeod, Recidivism, A Deficiency Disease 69-70 (1965).

86. Rubin, supra note 8, at 466.

87. Id.

88. D. West, The Habitual Prisoner 100 (1963). See Katkin, supra note 3, at 106-08 (discussing West's study).

89. Such a conclusion was reached in a Canadian study of the habitual criminal: "Most of them are unfortunate, inadequate people who have never had a chance in life and who are either drug addicts or men with a serious drinking problem. The armed bank robber is rare and out-numbered by the type of criminal who has many convictions for shoplifting, petty theft, or false pretences, usually on quite a small scale. While it is true that these people are a nuisance and a constant source of trouble to the police and law enforcement bodies, nevertheless they do not present a serious threat to the public." Lynch, Parole and the Habitual Criminal, 13 McGill

Punishment is the second common goal that such legislation attempts to achieve, based on the rationale that increased criminal activity should merit increased punishment. If it were true that each criminal was punished equitably and fairly for the repetition of crimes, this goal would be satisfied. However, this is simply not the case. The disparate treatment of habitual offenders throughout the fifty states and even within the same state has prevented attainment of this goal.

New York's experience with habitual offender statutes clearly illustrates how these goals have been frustrated. Simple redefinition and clarification of prerequisite convictions will not solve the problem. Analysis of some of the more modern alternatives to habitual offender sentencing will help to define the directions toward which New York should move.

An attempt to reach those offenders most deserving of increased penalties is evidenced by the federal statute. Title *X* of the Organized Crime Control Act[90] is directed towards "three categories of special offenders—habitual offenders, professional offenders, and organized crime offenders."[91] While the purpose of the Act was primarily to control organized crime,[92] the legislative history indicates that its effects were "expected to be significant across the criminal justice system as it faces the dangerous offender."[93]

The Act allows the prosecutor to file a notice with the court indicating that the defendant is a "dangerous special offender,"[94] and upon such finding the court shall sentence the defendant to increased punishment.[95] The statute defines a "special offender" as either (1) one who has been previously convicted of at least two offenses punishable by imprisonment in excess of one

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L.J. 632, 644 (1967). Another writer suggests that "[r]ecidivist criminals are often youthful criminals, in their teens or early twenties. Furthermore, youthful crime, even when repeated, does not necessarily presage a long-term career in crime. It has been found that advancing age is accompanied by a decline in criminality and in the seriousness of the crimes committed. But, it has been observed, 'those imprisoned recidivists whose criminal tendencies wane and disappear with advancing years cannot be released until the statutory minimum prerequisite to parole has passed regardless of the fact that they may no longer be dangerous.' " Rubin, supra note 8, at 466 (footnote omitted).

In sum, "[n]either rigorous study nor casual observation provide any evidence for the proposition that violent, or organized, or professional theives, who may truly be said to represent a serious danger to the social order, are in any way affected by the operation of these laws." Katkin, supra note 3, at 108. See Rubin, supra note 8, at 459-60.

90. 18 U.S.C. §§ 3575-77 (1970).

91. Department of Justice Comments on S. 30, in Report of the Senate Committee on the Judiciary, S. Rep. No. 91-617, 91st Cong., 1st Sess. 115 (1969).

92. "It is the purpose of this act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." Report of the Senate Committee on the Judiciary, S. Rep. No. 91-617, 91st Cong., 1st Sess. 2 [hereinafter cited as Senate Report]; see also Senate Report at 83.

93. Id. at 83.

94. 18 U.S.C. § 3575(a) (1970).

95. Id. § 3575(b).

year, provided the defendant was imprisoned for at least one offense;[96] or (2) one whose present felony is "part of a pattern of conduct . . . which constituted a substantial source of his income, and in which he manifested special skill or expertise";[97] or (3) one whose felony furthered a conspiracy and who agreed to act in a leadership position or use force or bribery.[98] The Act also provides that the defendant must be found to be "dangerous"—a concept defined in terms of society's need for protection.[99]

The federal statute offers a significant improvement over traditional habitual offender legislation. Despite its obvious focus on organized crime, its modern approach to the determination of the character of the defendant is promising. However, it has recently come under an attack aimed at its procedural elements.

In *United States v. Duardi*[100] the district court was concerned with the sufficiency of the information supplied by the prosecution as to the defendant's alleged status as a "dangerous special offender."[101] In an earlier series of opinions[102] on the same issue, the court had warned government's counsel of the need to produce explicit data which counsel considered relevant and material to the sentencing procedure.[103] The court's repeated requests to the prosecution for a detailed motion outlining the reasons for a finding of dangerousness were never sufficiently satisfied.[104] The court also dismissed the prosecutor's motion for leave to amend the motion, finding that such a motion to amend could not be made after trial and conviction.[105] In addition, the court found it appropriate to consider other important points raised by the prosecution. In ruling on the broad issue of whether information used to support a finding of dangerousness need only be established by a preponderance of the evidence and without jury trial, the court held that in that case the statute could "not pass constitutional muster."[106] Moreover, as a "final, alternate and independent ground"[107] the court held that the statute was unconstitutionally vague and, therefore, violated due process.[108] The Eighth Circuit affirmed the decision but refused to reach the constitutional questions.[109]

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96. Id. § 3575(e)(1).

97. Id. § 3575(e)(2).

98. Id. § 3575(e)(3).

99. Id. § 3575(f).

100. 384 F. Supp. 874 (W.D. Mo. 1974), aff'd in part, 529 F.2d 123 (8th Cir. 1975).

101. See 18 U.S.C. § 3575(a) (1970).

102. United States v. Duardi, 384 F. Supp. 856 (W.D. Mo. 1973); United States v. Duardi, 384 F. Supp. 861 (W.D. Mo. 1973); United States v. Duardi, 384 F. Supp. 871 (W.D. Mo. 1974).

103. United States v. Duardi, 384 F. Supp. 871, 873 (W.D. Mo. 1974).

104. See United States v. Duardi, 384 F. Supp. 874, 880 (W.D. Mo. 1974), aff'd in part, 529 F.2d 123 (8th Cir. 1975).

105. 384 F. Supp. at 879.

106. Id. at 883.

107. Id. at 885.

108. Id. Detailed discussion of the constitutional problems raised by Duardi is beyond the scope of this Note.

109. United States v. Duardi, 529 F.2d 123, 125 (8th Cir. 1976).

According to the district court in a previous opinion in the *Duardi* case, this was the first time that the government had elected to proceed under the federal statute since its enactment.[110] The decision in this foreboding debut illustrates that while the statute was "designed to avoid the pitfalls of the State laws,"[111] it has created pitfalls of its own. Not only is its constitutional status in question, but the procedural inadequacies of the statute may contribute to the rarity of its use.

Despite the *Duardi* problem, the federal statute attempts to reach those who most deserve increased punishment. In doing so, however, the statute retains the traditional quantity of convictions rationale[112] as does the present New York statute. Not only is the quantity of convictions theory thought to be an unreliable guide[113] but it is the root of all the problems involved in defining a valid prior conviction. By rejecting this theory, which underlies most recidivist legislation, the courts could focus their attention on the history, character, and attitudes of a defendant, instead of wasting valuable time and energy on such semantics as were displayed in *People v. Olah*.

Congress, nevertheless, clung to the quantity of convictions theory, choosing a middle ground between the traditional and modern approaches. The section of the statute relating to repeating offenders is of the external type. It provides that the offender must have had two prior convictions, each punishable by imprisonment in excess of a year, and that one term of imprisonment must have been served.[114] There have been no decisions centering on this aspect of the statute, probably due to the complications of the *Duardi* case.

The Minnesota statute is also a compromise between old and new penal theories.[115] While attempting to focus the sentencing decision on the character of the defendant, it also subscribes to the quantity of convictions theory. The statute is of the limited-internal variety and has, therefore, faced *Olah* problems. In *State v. Briton,*[116] the Minnesota Supreme Court adopted the statute test for evaluating prior convictions under facts strikingly similar to those involved in *Olah*.[117] It is submitted that the retention of the quantity of

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110. United States v. Duardi, 384 F. Supp. 861, 870 (W.D. Mo. 1974). The court stated that Duardi was the "(almost) first case" for in a prior case, while the government had filed a § 3575 motion, it had been withdrawn prior to determination. Id.

111. Senate Report, supra note 92, at 88.

112. See text accompanying notes 9-10 supra. Prior convictions need not be proved to sentence professional criminals or organized crime offenders to increased penalties. Such criminals need only fall within their respective categories and be found "dangerous." Thus, the quantity of convictions rationale only applies to the traditional habitual offender.

113. Commentary, Model Sentencing Act 3, 10 (2d ed. 1972).

114. See 18 U.S.C. § 3575(e)(1) (1970).

115. Compare Minn. Stat. Ann. §§ 609.16(3)(a) with (3)(b) (1964). The Oregon statute is analogous. See Ore. Rev. Stat. §§ 161.725, .735 (1973).

116. 265 Minn. 326, 121 N.W.2d 577 (1963), overruled on other grounds, State v Clark, 270 Minn. 538, 552, 134 N.W.2d 857, 867 (1965).

117. The case involved the comparison of an Iowa statute defining larceny as the theft of property of $20, and the Minnesota statute valuing it at $25. The state had introduced evidence that the defendant had stolen $46.26. Id.

convictions theory will strike at the very heart of the statute's more modern provisions.[118]

The reason that the combination of the two approaches is unsatisfactory is that if a sentencing judge is truly trying to consider the nature and character of a defendant, there is no reason to exclude information of prior convictions that do not now qualify under the statute. By excluding a prior larceny conviction simply because the original sentencing state defines larceny differently (the situation in *State v. Briton*) or ignoring any prior convictions simply because the defendant did not serve a prison term in excess of a year (the situation under the federal statute) many defendants will not technically qualify for consideration under these statutes. Dangerous or not, they will simply not be reached by the statute.

The Model Sentencing Act[119] offers a viable alternative.[120] The Act thoroughly embraces the idea that the sentencing decision should focus exclusively on the character of the defendant. Its goal is to diminish

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While the present version of the Minnesota statute was not applicable at the time, the provisions concerning prior convictions are identical. See Ch. 236, [1927] Minn. Sess. Laws 337. There appear to be no cases on the subject under the new statute. See also State ex rel. Lee v. Tahash, 269 Minn. 441, 131 N.W.2d 214 (1964).

118. At the time of the decision in Briton, one author commented that as a result of the decision, "the new Minnesota habitual offender provisions probably may not be enforced on the basis of foreign felony convictions in states where the relevant crime is defined as a felony more strictly than in Minnesota." The Minnesota Supreme Court 1962-1963, 48 Minn. L. Rev. 119, 156 (1963).

119. Model Sentencing Act (2d ed. 1972).

120. The provisions of the Model Penal Code regarding habitual offenders have had a great effect on state recidivist legislation. Although the code defines a persistent offender as one "whose commitment for an extended term is necessary for protection of the public," [Model Penal Code § 7.03(1) (Proposed Official Draft 1962)], the court may not make such a finding unless there have been two prior felony convictions, or one felony conviction and two misdemeanor convictions. Id. The provision relating to the professional criminal is similar to the federal statute. Id. § 7.03(2). The code also promulgates procedures for sentencing the defendant as a "dangerous, mentally abnormal person." Id. § 7.03(3). The code's answer to the out-of-state conviction problem is that any prior conviction "shall be deemed to have been of a felony if sentence of death or of imprisonment in excess of one year was authorized under the law of [a foreign] jurisdiction . . . ." Id. § 7.05(1). As noted this suggestion was adopted by the New York legislature and was subsequently amended due to its alleged unconstitutional effect. See notes 58-78 supra and accompanying text. In commenting on the alternative view of judging the prior offense by the standards of the sentencing state (the limited-internal view), the draftors felt that it was "difficult in application and, it seems to us, defective in its logic, since the seriousness of the crime ought to be judged by the prevailing norms in the jurisdiction where it was committed." Model Penal Code § 7.05, Comment 1 (Tent. Draft No. 2, 1954).

The ABA Standards are similar to those of the Model Penal Code and attempt to differentiate the average criminal, the dangerous offender and the professional criminal. ABA Standards Relating to Sentencing Alternatives and Procedures § 2.5 (Approved Draft 1968). The proposals require two prior convictions punishable by confinement for more than a year, [Id. § 3.3(b)(i) at 23] and a detailed psychiatric examination. However, the findings of the court need only be based on a preponderance of the evidence [Id. § 5.5(b)(iv) at 35], a provision which angered the Duardi court. See notes 107-08 supra and accompanying text.

the major source of disparity—sentencing according to the particular offense. Under it the dangerous offender may be committed to a lengthy term; the nondangerous defendant may not. It makes available, for the first time, a plan that allows the sentence to be determined by the defendant's make-up, his potential threat in the future, and other similar factors, with a minimum of variation according to the offense.[121]

The effect of this suggested statute on out-of-state convictions is obvious—it simply eliminates the problem. The Act provides a reasonable method for basing the imposition of lengthy terms on the characteristics of the defendant rather than the number of previous convictions.[122] A statute similar to the Act has recently been enacted in Illinois.[123]

IV. CONCLUSION

It is obvious that the New York second felony offender statutes have not enjoyed success. While the legislature may not be willing to take the giant leap toward a statute identical to the Model Sentencing Act, serious review of the present policy is needed. It is time for the legislature to devote substantial energy to the reexamination of the habitual offender, to develop reasonable goals, and to promulgate workable solutions. Until this occurs, however, the resurrection of *People v. Olah* will cause twenty-five years of failure to be followed by many more.

Susan Buckley

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121. Model Sentencing Act 2 (2d ed. 1972).

122. See Rubin, The Model Sentencing Act, 39 N.Y.U.L. Rev. 251, 258 (1964). Subjects of inquiry in the pre-sentence investigation are the "characteristics, circumstances, needs and potentialities of the defendant; his criminal record and social history; the circumstances of the offense; the time the defendant has been in detention; and the harm to the victim, his immediate family, and the community." Model Sentencing Act § 3 (2d ed. 1972).

123. See Ill. Rev. Stat. ch. 38, § 1005-8-1(c) (Supp. 1975); Ill. Rev. Stat. ch. 38, § 1005-8-2 (1973). An extended sentence may be imposed if the convicted felon "inflicted or attempted to inflict serious bodily injury to another, or . . . used a firearm in the commission of the offense or flight therefrom . . . ." Id. § 1005-8-2(a). While the statute makes no special provisions for the professional racketeer, the entire sentencing decision is focused on the circumstances of the crime and the nature of the defendant. Id. § 1005-8-1(c)(1)-(4).