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The Habitual Criminal Act: Quantity of Convictions Only?

State v. Pierce, 204 Neb. 433, 283 N.W.2d 6 (1979)

I. INTRODUCTION

Virtually every jurisdiction in the United States has enacted some form of habitual offender law providing for enhancement of the penalty for the repetition of criminal conduct by an individual with a prior conviction or prior convictions.¹ Habitual criminal statutes, in general, are manifestations of society's attempts to deal with the problems of criminal recidivism. Such statutes are intended to deter potential recidivists, protect society from persistent offenders who have not been deterred by prior punishment, rehabilitate persistent offenders, and provide retribution.² In view

1. S. RUBIN, *LAW OF CRIMINAL CORRECTION* 452 (2d ed. 1973); Katkin, *Habitual Offender Laws: A Reconsideration*, 21 BUFFALO L. REV. 99, 104 (1971). For a brief survey of habitual offender laws in the United States, see AMERICAN BAR ASSOCIATION COMMISSION ON CORRECTIONAL FACILITIES AND SERVICES, *SENTENCING COMPUTATION LAWS AND PRACTICE* (1974) [hereinafter cited as ABA SENTENCING].

2. See, e.g., Note, *Recidivist Procedures*, 40 N.Y.U. L. REV. 332, 349-50 (1965):

Increased recidivist penalties serve to separate from society, for a longer period of time, persons who have shown themselves to be incorrigibly anti-social. By providing stiffer penalties for multiple offenders, society may deter those who have already been convicted of crime from the commission of further criminal acts. If penal sanctions are regarded as rehabilitative, a larger dose of rehabilitation for multiple offenders is indicated by the fact that previous rehabilitation in normal measure was not sufficient to reform them. Finally, it can be argued that one who commits more than one crime should be punished more severely than a first offender because all subsequent crimes are aggravated, in a moral sense, by the fact of prior crimes.

For a general discussion of the history and purposes behind habitual offender laws, see Katkin, *supra* note 1, at 99-104. The efficacy of recidivist statutes in achieving their purposes has long been subject to doubt. See Katkin, *supra* note 1, at 105-09. Katkin argues that habitual criminal statutes fail to serve the purposes of protection of society and deterrence of serious offenders because truly dangerous felons may be sentenced to lengthy imprisonment without regard to recidivist statutes. Thus, habitual offender statutes actually may only serve to deter and isolate individuals who commit minor offenses not in themselves deserving of lengthy prison terms and from which

of the fact that the invocation of an habitual criminal statute is within the prosecutor's discretion in most states,³ it could be asserted that habitual criminal laws also provide a bargaining tool for the prosecutor and police in obtaining guilty pleas and information from an individual against whom an habitual criminal complaint could be filed.⁴ This selective application of habitual criminal laws has been upheld on constitutional grounds.⁵

Although the number of prior convictions required by the habitual criminal statute before sentence enhancement may be sought varies from state to state, the majority of states adhere to a traditional scheme in which the number of prior convictions is the major triggering mechanism for application of the statute.⁶

society does not urgently require protection. Citing studies like that of D. WEST, *THE HABITUAL PRISONER* (1963), Katkin asserts that the majority of persistent offenders tend to be socially inadequate types, drug addicts and alcoholics rarely involved in organized or violent crime. Katkin, *supra* note 1, at 107-08.

For the arguments that (1) increased punishment in the same system that failed to rehabilitate an offender the first time cannot be expected to achieve the goal of rehabilitation, and (2) the goal of retribution is not achieved in light of the disparate and discretionary use of habitual criminal laws within states and between states, see Note, *Don't Steal a Turkey in Arkansas—The Second Felony Offender in New York*, 45 *FORDHAM L. REV.* 76, 85 n.82, 86-87 (1976). For further discussion of the failure of recidivist laws to serve their purposes, relating to the Nebraska law, see § III-B of text *infra*.

3. S. RUBIN, *supra* note 1, at 458; Note, *Recidivist Laws under the Eighth Amendment—Rummel v. Estelle*, 10 *TOL. L. REV.* 606, 607 (1979). Under Nebraska's recidivist law, NEB. REV. STAT. § 29-2221 (Reissue 1975), the prosecutor has complete discretion as to whether to file the habitual criminal information. *State v. Reed*, 187 Neb. 792, 793, 194 N.W.2d 197, 180 (1972). For a discussion of the prosecutor's discretion under the Nebraska habitual offender law, see Note, *The 'Bitch' Threatens, but Seldom Bites—A Study of Habitual Criminal Sentencing in Douglas County*, 8 *CREIGHTON L. REV.* 893, 896 (1975). See also § III-B-2 of text *infra*.
4. S. RUBIN, *supra* note 1, at 458; Klein, *Habitual Offender Legislation and the Bargaining Process*, 15 *CRIM. L. Q.* 417, 426-35 (1973). Klein asserts that habitual offender legislation has failed to serve its purpose of protecting the public from dangerous offenders, and that case studies indicate the threat of habitual offender proceedings has been used by law enforcement officials primarily against narcotics and burglary offenders in order to get information and guilty pleas. *Id.* at 436.
5. See *Bordenkircher v. Hayes*, 434 U.S. 357, 363-65 (1978).
6. Note, *FORDHAM L. REV.*, *supra* note 2, at 77; Note, *TOL. L. REV.*, *supra* note 3, at 610. See *ABA SENTENCING*, *supra* note 1. A few states, e.g., Hawaii, New Hampshire and Oregon, employ a Model Penal Code system under which the decision as to whether to apply the statute is based on consideration of not only the defendant's past criminal record, but also his propensity toward future crime and the nature of his latest offense. See *id.*; L. SLEFFEL, *LAW AND THE DANGEROUS CRIMINAL* 2-3, 22-23 (1977).

Nebraska's habitual criminal statute⁷ applies only if the prosecutor has exercised the discretionary authority to file a supplementary complaint seeking sentence enhancement.⁸ Upon the filing of this complaint, the court must apply the sentence enhancement provision if there is proof that the defendant has been convicted, sentenced, and imprisoned in any state or federal prison⁹ for terms of at least one year for each of two prior offenses.¹⁰

From their inception, habitual criminal statutes have been attacked unsuccessfully upon the constitutional grounds¹¹ that they constitute double jeopardy,¹² operate ex post facto,¹³ violate due process,¹⁴ inflict cruel and unusual punishment,¹⁵ and deny equal protection.¹⁶ Nebraska's habitual criminal statute has also withstood these challenges as a legitimate exercise of legislative power.¹⁷ The assertion that the habitual criminal statute violates the constitutional prohibition against ex post facto laws has been rejected on the grounds that "the penalty does not punish [the criminal] for his previous offenses but for his persistence in crime."¹⁸ Double jeopardy challenges have been rejected by the courts upon the similar rationale that the recidivist statute does

7. NEB. REV. STAT. § 29-2221 (Reissue 1975). The statute provides in relevant part:

Whoever has been twice convicted of crime, sentenced and committed to prison, in this or any other state, or by the United States, or once in this state and once at least in any other state, or by the United States, for terms of not less than one year each, shall, upon conviction of a felony committed in this state, be deemed to be an habitual criminal, and shall be punished by imprisonment in the Nebraska Penal and Correctional Complex for a term of not less than ten nor more than sixty years; *Provided*, that no greater punishment is otherwise provided by statute, in which case the law creating the greater punishment shall govern.

For a general discussion of the history of the Nebraska statute, see Note, CREIGHTON L. REV., *supra* note 3, at 893-94.

8. See *State v. Reed*, 187 Neb. 792, 194 N.W.2d 179 (1972).

9. *State v. Nance*, 197 Neb. 257, 248 N.W.2d 339 (1976).

10. NEB. REV. STAT. § 29-2221(1) (Reissue 1975).

11. For a general discussion of the constitutional attacks on habitual criminal statutes, see Katkin, *supra* note 1, at 110-20; Comment, *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).

12. *Graham v. West Virginia*, 224 U.S. 616 (1912).

13. *Gryger v. Burke*, 334 U.S. 728 (1948).

14. *Graham v. West Virginia*, 224 U.S. 616 (1912).

15. *Id.*; *McDonald v. Massachusetts*, 180 U.S. 311 (1901); *Moore v. Missouri*, 159 U.S. 673 (1895).

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

17. For a recent, detailed analysis of the constitutionality of Nebraska's habitual criminal statute, see Comment, *supra* note 11.

18. *Taylor v. State*, 114 Neb. 257, 263, 207 N.W. 207, 209 (1926).

not set out a distinct crime and does not punish an offender a second time for his previous crimes, but instead "provides that the repetition of criminal conduct aggravates the crime and justifies heavier penalties."¹⁹

Nebraska's habitual criminal statute was upheld in a recent case²⁰ against a challenge that the prosecutor's discretion in applying the statute was a violation of due process because it gave the prosecutor unbridled sentencing authority. Eighth amendment attacks based on the assertion that the statute's minimum mandatory sentence of ten years would be excessive in some circumstances and that the statute's infrequent use rendered it invalid have also been dismissed.²¹ Recently, the Nebraska Supreme Court rejected an equal protection attack based upon alleged racial discrimination in the application of the habitual criminal statute.²² Commenting upon the prosecutor's discretion to apply the statute, the court noted that "the mere selectivity of enforcement creates no constitutional defect" without a *prima facie* showing of "intentional and purposeful discrimination"²³ based on some impermissible criterion such as race.²⁴

A recent controversy concerning section 29-2221 did not involve the statute's constitutionality, but rather the court's construction of the statute's requirements that in order to be subjected to sentence enhancement, an offender must have been "twice convicted of crime, sentenced and committed to prison . . . for terms of not less than one year each"²⁵ In *State v. Pierce*,²⁶ the court faced, for the first time, the question of whether two prior felonies committed on the same day, prosecuted under the same information, and for which the defendant was sentenced to concurrent prison terms, could support the application of the habitual criminal enhancement provision after the defendant's conviction for a third felony.²⁷ The majority held that neither the absence of a time

19. *State v. Losieau*, 182 Neb. 367, 369, 154 N.W.2d 762, 763 (1967) (citation omitted).

20. *Martin v. Parratt*, 549 F.2d 50 (8th Cir. 1977).

21. *Brown v. Parratt*, 560 F.2d 303 (8th Cir. 1977).

22. *State v. Bird Head*, 204 Neb. 807, 285 N.W.2d 698 (1979).

23. *Id.* at 810, 285 N.W.2d at 701 (citation omitted).

24. *Id.*

25. NEB. REV. STAT. § 29-2221 (Reissue 1975).

26. 204 Neb. 433, 283 N.W.2d 6 (1979).

27. *Id.* at 440, 283 N.W.2d at 10. The Court noted that similar facts were present in *Huffman v. Sigler*, 182 Neb. 290, 154 N.W.2d 459 (1967). *Huffman* was sentenced to one year for breaking and entering, one year for escape from custody to be served concurrently, and three years to be served consecutively for robbery. He argued that consecutive sentences for his three prior felony convictions would not support his later sentence as an habitual criminal because his continuous imprisonment amounted to only one four-year sentence. The

interval between commitment to prison for the first offense and the commission of the second offense, nor the fact that defendant was sentenced to concurrent prison terms is relevant to the applicability of the habitual criminal statute.²⁸ A strong dissent argued that the statute could not reasonably be construed to apply to an individual whose two prior burglaries were committed within minutes of each other, resulting "in the filing of a single information and conviction, sentencing, and commitment out of the same court on the same day."²⁹

Pierce presents a question of first impression, upon which the statute is silent, *i.e.*, the sequence of commission of crime, sentencing, and imprisonment required in order to count prior convictions toward habitual criminal statutes. The holding is clearly against the weight of authority in the majority of jurisdictions that have considered this issue;³⁰ it elicits a strong feeling of unfairness; and

court held that "[t]he defendant was thrice convicted of crime, sentenced and committed to prison. It is of no consequence that the defendant was imprisoned continuously from the start of his 1-year sentences until the end of the 3-year sentence." *Id.* at 291, 154 N.W.2d at 460.

The *Pierce* court essentially relied on *Huffman* to dispose of the defendant's contention that he was not an habitual criminal because he had not been committed to prison for two distinct terms. 204 Neb. at 440, 283 N.W.2d at 10. However, it must be noted that, despite the broad language in *Huffman*, the court was generally presented with different issues and facts than those presented in *Pierce*. *Huffman* did not raise the issue of the sequence of prior convictions, and the facts considered by the court in that case do not indicate when the prior felonies took place or whether the convictions occurred under the same information. *See* 182 Neb. at 290, 154 N.W.2d at 459. Thus, the court's holding in *Huffman* should be limited to the proposition that sentences need not be separated in time in order to qualify as commitments to prison under section 29-2221. Another issue presented in *Pierce* which is not relevant to this note concerned the defendant's claim that there was newly discovered evidence mandating a new trial on the current felony conviction. The court upheld that trial court's denial of a motion for a new trial on the grounds that there were "no additional facts . . . which are so potent that if offered a new trial would probably result in a different verdict." 204 Neb. at 439, 283 N.W.2d at 10.

28. *Id.* at 443, 283 N.W.2d at 11-12.

29. *Id.* at 443-44, 283 N.W.2d at 12 (Hastings, J., dissenting, joined by Krivosha, C.J. & McCown, J.).

30. *State v. Carlson*, 560 P.2d 26, 29 (Alaska 1977); *Karz v. State*, 279 So.2d 383, 384 (Dist. Ct. App. Fla., 1972); *Cooper v. State*, 259 Ind. 107, 113, 284 N.E.2d 799, 802 (1972); *State v. Conley*, 222 N.W.2d 501, 503 (Iowa 1974); *State v. Lohrback*, 217 Kan. 588, 596, 538 P.2d 678, 682 (1975); *State v. Mitchell*, 2 Wash. App. 943, 950, 472 P.2d 629, 633 (1970). *See Moore v. Coiner*, 303 F. Supp. 185 (N.D. W. Va. 1969); *Gonzales v. State*, 593 P.2d 257 (Alaska 1979); *Washington v. United States*, 343 A.2d 560 (App. D.C. 1975); *People v. Phillips*, 56 Ill. App. 3d 689, 371 N.E.2d 1214 (1978); *State v. Tillman*, 228 N.W.2d 38 (Iowa 1975); *Coleman v. Commonwealth*, 276 Ky. 802, 125 S.W.2d 728 (1939); *Jackson v. Henderson*, 283 So. 2d 210 (La. 1973); *State v. Sanchez*, 87 N.M. 256, 531 P.2d 1229 (1975); *Frazier v. State*, 485 S.W.2d 877 (Tenn. Crim. App. 1972); *Ansell v. Common-*

it suggests the inequity and inadequacy of an habitual criminal statute which has a minimum mandatory sentencing scheme triggered at the prosecutor's discretion by only the number of prior felony convictions.³¹ These inadequacies and inequities, which manifest themselves in the *Pierce* case, require legislative redress or further judicial construction. This note will discuss the majority and dissenting positions, and suggest the possible directions reform should take.

II. FACTS

The state patrol made an agreement with an individual whereby he was to set up drug buys in exchange for the patrol's attempt to get certain felony drug charges against him dropped.³² The patrol supplied this person with money and a radio transmitter for use in his transactions. On June 7, 1978, he made contact with the defendant and arranged an amphetamine purchase. After delivery later that evening, but while the defendant was still in the company of the patrol's informant, the radio transmitter was discovered and a scuffle ensued. Law enforcement officers immediately entered the premises and arrested all parties.³³

The defendant was charged in count II of an amended information³⁴ with unlawfully delivering a controlled substance, amphetamines, under section 28-4,125.³⁵ In addition, a supplemental information charging that the defendant was an habitual criminal under section 29-2221 was filed, based upon allegations that on July 14, 1976, the defendant had been twice convicted, sentenced, and committed to prison for terms of not less than one year each.³⁶

At trial the jury found the defendant guilty of delivery of a con-

wealth, 250 S.E.2d 760 (Va. 1979); *State v. Brezillac*, 19 Wash. App. 11, 573 P.2d 1343 (1978); *Hill v. Boles*, 149 W. Va. 779, 143 S.E.2d 467 (1965); Annot. 24 A.L.R.2d 1247 (1952).

31. For a discussion of these issues, see § III-B of text *infra*.

32. 204 Neb. at 435, 283 N.W.2d at 8.

33. *Id.* at 435-36, 283 N.W.2d at 8.

34. In count I the defendant was also charged with assault, but the jury did not find him guilty on this charge. 204 Neb. at 437, 283 N.W.2d at 9.

35. NEB. REV. STAT. § 28-4,125 (Reissue 1975) (current version at NEB. REV. STAT. § 28-416 (Cum. Supp. 1978)).

36. 204 Neb. at 434-35, 283 N.W.2d at 8. NEB. REV. STAT. § 29-2221(2) (Reissue 1975) provides:

Where punishment of an accused as an habitual criminal is sought, the facts with reference thereto must be charged in the indictment or information which contains the charge of the felony upon which the accused is prosecuted, but the fact that the accused is charged with being an habitual criminal shall not be an issue upon the trial of the felony charge and shall not in any manner be disclosed to the jury. If the accused is convicted of a felony and before sentence is imposed, a hearing shall be had before the court alone as

trolled substance. At a subsequent hearing to consider the habitual criminal charge,³⁷ the trial court found that the defendant had been previously convicted under a two-count information for burglary and grand larceny, and had been concurrently sentenced to prison terms of eighteen months and one year respectively. The incidents upon which these charges were based occurred on the same day but at different locations.³⁸ After denying his motion for a new trial, the court found the defendant to be an habitual criminal and sentenced him to a prison term of twelve years.³⁹

III. ANALYSIS

A. Sequence of Crimes, Convictions, Sentencings and Imprisonments

On appeal to the Nebraska Supreme Court, the defendant challenged the trial court's finding that he was an habitual criminal.⁴⁰ He argued that since his prior two felony convictions were for offenses committed on the same day, and he was charged in only one information and sentenced to concurrent terms of imprisonment, he had not been "twice convicted of crime, sentenced and committed to prison . . . for terms of not less than one year each . . ."⁴¹

to whether such person has been previously convicted of prior felonies.

37. NEB. REV. STAT. § 29-2221 (Reissue 1975) requires that a separate hearing must be had "before the court alone as to whether such person has been previously convicted of prior felonies."

38. 204 Neb. at 437, 283 N.W.2d at 9.

39. *Id.* The maximum sentence the defendant could have received without the habitual criminal sentence enhancement was five years. *Id.*; NEB. REV. STAT. § 28-4,125 (Reissue 1975) (current version at NEB. REV. STAT. § 28-416 (Cum. Supp. 1978)).

40. For a delineation of defendant's other grounds for appeal, see note 27 *supra*.

41. 204 Neb. at 440, 283 N.W.2d at 10 (quoting NEB. REV. STAT. § 29-2221(1) (Reissue 1975)). Actually, defendant's challenge to the trial court's findings presented at least two distinct arguments: (1) Concurrent sentences are not sufficient to support enhancement because the defendant has only been committed to prison once, contrary to a strict reading of the statute. Brief for Appellant at 15, *State v. Pierce*, 204 Neb. 433, 283 N.W.2d 6 (1979); and (2) the statute should be interpreted to require that defendant must have committed his second offenses after he had been convicted, sentenced, and committed to prison for the first offense in order to satisfy the purpose of the statute. *Id.* at 16.

This note only deals with the sequential aspect of the defendant's argument primarily because the issue of concurrent sentences would normally not arise if the defendant's position were adopted concerning the required sequence. Defendant's argument concerning concurrent sentences may have been answered in *State v. Huffman*. See note 27 *supra*. Also, it should be noted that in *Pierce* the defendant might not be viewed as having been committed to prison only once for his two prior convictions, since his two concurrent sentences were for different lengths of time. Thus, after serving the one-year sentence the defendant could be viewed as commencing service of the

The defendant contended that in keeping with the purpose of the habitual criminal statute as expressed in *State v. Losieau*⁴²—punishment of the repetition of criminal conduct—the statute should be construed to require that the second or third offense be committed subsequent to the commission *and* conviction on the first or second offense. The court in *Pierce* agreed “that such reasoning would be applicable to the principle offense, i.e., the offense for which enhancement is sought must have been committed after conviction and sentencing for the two prior offenses.”⁴³ However, the court did not believe “that a reading of our statute on its face requires or supports such a holding with regard to the prior offenses themselves.”⁴⁴

The court then quoted language from *Ansell v. Commonwealth*⁴⁵ as expressive of its philosophy: “We have stated that the purposes of the recidivist statute are to protect society against habitual criminals and to impose further punishment upon them.”⁴⁶ Although the court’s opinion is not clear on this point, the purpose of this quote is apparently to refute the rationale employed by some jurisdictions that “a defendant should receive two separate and independent warnings before being charged as an habitual criminal or that the defendant should have two separate opportunities for the beneficent influence of penal incarceration before giving up on him as an habitual criminal.”⁴⁷

The Nebraska Supreme Court’s reasoning in *Pierce* cannot withstand even moderate scrutiny, and reaches what appears to be an unduly harsh result. In fact, the court’s holding may stem from a narrow, unreasoned interpretation of the purpose and legislative

remaining eighteen month sentence with credit for time already served. Brief for Appellee at 12.

Also, it should be noted that the one jurisdiction with an habitual criminal act similar to section 29-2221 which has considered the issue of concurrent sentences in this context, concluded that the fact that sentences were served concurrently was irrelevant, even though the recidivist statute was interpreted as requiring that “the offense, conviction, and imposition of penalty must precede each succeeding offense, conviction, and imposition of penalty for the statute to be applicable.” *State v. Robinson*, 262 N.W.2d 270, 272 (Iowa 1978) (quoting *State v. Conley*, 222 N.W.2d 501 at 503 (Iowa 1974)). In *Robinson* the defendant, while on parole for his first offense, was convicted of a second offense for which he was sentenced to an additional term to be served concurrently with the remainder of his sentence for his first offense.

42. 182 Neb. 367, 369, 154 N.W.2d 762, 763-64 (1967).

43. 204 Neb. at 441-42, 283 N.W.2d at 11.

44. *Id.* at 442, 283 N.W.2d at 11.

45. 250 S.E.2d 760 (Va. 1979).

46. 204 Neb. at 442, 283 N.W.2d at 11 (quoting *Ansell v. Commonwealth*, 250 S.E.2d at 761).

47. 204 Neb. at 442, 283 N.W.2d at 11.

intent of the statute, as well as the statute itself in light of the court's prior holdings and rules of statutory construction.

1. *Statutory Construction*

In *State v. Nance*,⁴⁸ the Nebraska Supreme Court indicated that a penal statute generally is required to be strictly construed; "if possible a court will try to avoid a construction that leads to absurd, unjust, or unconscionable results. A sensible construction will be placed upon a statute to effectuate the object of the legislation rather than a literal meaning"⁴⁹ The *Pierce* case arguably presents a prime example of the interpretation of a statute leading to an unjust result. The defendant was classified as an habitual criminal and sentenced to an extended term of imprisonment as a result of the two prior crimes (occurring on the same day) and his recent drug offense. He was given only one chance to respond to incarceration between periods of criminal activity, but is being treated more harshly than another individual who engaged in two equally or more serious crimes separated by that individual's term of imprisonment. Under the court's own rules of construction, an interpretation of a penal statute should not lead to such unjust or disparate treatment of individuals unless it is clearly required to achieve the objective of the statute.

Admittedly, a court's interpretation of a statute must be sensible in light of the legislative purpose of the statute, and Nebraska's habitual offender laws may not have the same purpose as the laws

48. 197 Neb. 257, 248 N.W.2d 339 (1976). The *Nance* court held that a reasonable interpretation of the statute required a conclusion that two prior convictions in two separate states were sufficient to support criminal enhancements. *Id.* at 260, 248 N.W.2d at 341.

49. *Id.* at 260, 248 N.W.2d at 341. The principle of strict construction of penal statutes in favor of the defendant has been explicitly considered by other jurisdictions in this context. See, e.g., *People v. Phillips*, 56 Ill. App. 689, 695, 371 N.E.2d 1214, 1218-19 (1978); *State v. Conley*, 222 N.W.2d 501, 503 (Iowa 1974); *Ansell v. Commonwealth*, 250 S.E.2d 760, 761 (Va. 1979). See generally Note, *Court Treatment of General Recidivist Statutes*, 48 COLUM. L. REV. 238, 244 (1948).

Under these principles two jurisdictions with habitual criminal statutes containing the same triggering wording, i.e., "twice convicted, sentenced and committed to prison," have come to a conclusion opposite that of the Nebraska majority. They interpreted their statutes to require that the defendant be twice convicted, twice sentenced, and twice imprisoned with each conviction subsequent to the prior sentencing and imprisonment. *Cooper v. State*, 259 Ind. 107, 284 N.E.2d 799 (1972); *State v. Conley*, 222 N.W.2d 501 (Iowa 1974). The dissenting opinion in *Pierce* cites these cases with approval. 204 Neb. 433, 444, 283 N.W.2d 6, 12 (Hastings, J., dissenting, joined by Krivosha, C.J. & McCown, J.). For further discussion of *Conley* and *Cooper*, see notes 81-86 & accompanying text *infra*.

of other states.⁵⁰ However, it could be argued that the court in *Pierce* failed to adequately analyze the purpose of the Nebraska recidivist law. Instead, the court may have simply applied one possible literal reading of the statute without considering its own rules of statutory construction.⁵¹

2. Purpose of the Habitual Criminal Statute

The court in *Pierce* essentially relied on three sources for its conclusions concerning the purpose of the habitual criminal statute: (1) *State v. Losieau*,⁵² (2) *Ansell v. Commonwealth*,⁵³ and tacitly, (3) the language of the statute.⁵⁴ *Losieau*, however, may have been interpreted too narrowly and may be inapposite to the conclusion the court derived from that opinion. Essentially, the court cites *Losieau* for the proposition that "the very purpose of the habitual [sic] criminal act is to penalize the repetition of criminal conduct"⁵⁵ Although the *Losieau* court did make this statement, it was made in the context of a case involving an individual who had been convicted, sentenced, and imprisoned on three separate and independent occasions for crimes committed over an extended period of time. The issue was whether a defendant who had been previously sentenced as an habitual criminal was eligible for habitual criminal sentence enhancement for a fourth felony conviction several years later.⁵⁶

If, as *Losieau* might be read to imply, the only purpose of the

50. See, e.g., cases cited note 49 *supra*.

51. The court's reading of the language of section 29-2221, "twice convicted of crime, sentenced and committed to prison . . . for terms of not less than one year each," appears to isolate each element of the phrase independently of the other, i.e., (1) twice convicted, (2) sentenced, (3) committed to prison. An equally plausible literal reading of the same language as a whole could be: (1) convicted, sentenced, committed to prison, (2) convicted, sentenced, committed to prison. See generally cases cited in note 49 *supra*.

The *Pierce* court's literal and expansive reading of section 29-2221 could be contrasted with the court's very recent interpretation of the same statute in *State v. Chapman*, 205 Neb. 368, 287 N.W.2d 697 (1980). In *Chapman* the court said that it was "reluctant to apply an expansive reading to the Habitual Criminal Act, and held that 'offenses which are felonies because the defendant has previously been convicted of the same crime do not constitute 'felonies' within the meaning of prior felonies that enhance penalties under the habitual criminal statute.'" *Id.* at 370, 287 N.W.2d at 697.

52. 182 Neb. 367, 154 N.W.2d 762.

53. 250 S.E.2d 760 (Va. 1979).

54. For the relevant text of section 29-2221, see notes 7, 36 *supra*.

55. 204 Neb. at 441, 283 N.W.2d at 11 (quoting *Losieau*, 182 Neb. at 369, 154 N.W.2d at 764).

56. The court held that service of one habitual criminal sentence does not wipe the slate clean and that the prior convictions may be used again for further enhancement upon a subsequent conviction. 182 Neb. 367, 370, 154 N.W.2d 762, 764.

habitual criminal law is to punish the repetition of crime, then the court's interpretation of the statute might be viable. However, *Losieau* does not necessarily support that proposition. There is also language in the opinion indicating that the statute "does not punish a defendant for his previous offenses, but for his persistence in crime."⁵⁷ It is submitted, and was accepted by the dissent in *Pierce*, that "persistence in crime" connotes something more than just the gross numerical repetition of criminal conduct.⁵⁸ It implies an unwillingness to be deterred from criminal activity after a reason for deterrence is given.⁵⁹ On this point the Washington court in *State v. Brezillac*⁶⁰ stated that "[i]t does seem reasonable that there must be a time interval between convictions to show the defendant's persistence in criminal conduct."⁶¹ It is difficult to see how an individual who commits two crimes within minutes of each other on the same day can be viewed as persisting in crime to the same extent as an individual who commits two crimes separated by conviction and imprisonment, yet this is the conclusion that the *Pierce* decision requires.

Relying on language from *Ansell v. Commonwealth*⁶² to express its philosophy in the *Pierce* case, the Nebraska Court rejected the argument that a defendant should receive two independent warnings or opportunities for the influence of imprisonment before being considered an habitual criminal. The court's philosophy is that the protection of society from, and the increased punishment of, habitual criminals are the purposes of recidivists statutes.⁶³ However, analysis of the *Ansell* case suggests one of the flaws in the Nebraska court's reasoning—the failure of the court to distinguish between the mechanics and purposes of general recidivist laws and those of statutes strictly punishing the repetition of certain violent criminal conduct.

Ansell involved the interpretation of a Virginia statute enhancing the penalties for multiple use or attempted use of firearms in the commission of certain dangerous crimes.⁶⁴ The court in *Ansell*

57. *Id.* at 369, 154 N.W.2d at 763.

58. See 204 Neb. at 444, 283 N.W.2d at 12 (Hastings, J., dissenting, joined by Krivosha, C.J. & McCown, J.).

59. Cf. *State v. Mitchell*, 2 Wash. App. 943, 472 P.2d 629 (1970) (it "is not so much that the defendant has sinned more than once as that he is deemed incorrigible when he persists in violations of the law after conviction of previous infractions." *Id.* at 950, 472 P.2d at 633 (quoting 24 A.L.R.2d 1247 at 1248)).

60. 19 Wash. App. 11, 573 P.2d 1343 (1978).

61. *Id.* at 16, 573 P.2d at 1346 (citation omitted).

62. 250 S.E.2d 760 (Va. 1979).

63. 204 Neb. at 442, 283 N.W.2d at 11.

64. VA. CODE § 18.2-53.1 (Supp. 1979), provides that the use, attempted use, or threatening display of a firearm while attempting or committing murder, rape, robbery, burglary or abduction is a separate felony and that any person

noted that this statute providing additional punishment for the commission of the same offense, sometimes characterized as a specific recidivist statute, was criminal in nature.⁶⁵ In contrast, a general recidivist statute is a statutory sentencing procedure which imposes punishment because the previous punishment has failed to achieve the reform that was intended.⁶⁶

The Virginia Supreme Court specifically distinguished the purposes of this type of specific recidivist statute from those of general recidivist statutes like Nebraska's section 29-2221. The general recidivist statute, in addition to public protection and punishment, has the related purpose of serving as a warning and incentive to reform.⁶⁷ Noting that, unlike a general recidivist statute, the type of specific recidivist statute concerning firearm use creates a crime, is non-discretionary in its application, is restricted to serious felonies, and employs inflexible penalties to run consecutively, the *Ansell* court concluded that the primary purpose of the firearms statute was to protect society by deterring the repetition of certain *violent* criminal conduct.⁶⁸ Therefore, the court reasoned that conviction on a prior offense need not precede the commission of that same offense again in order to trigger increased penalties.⁶⁹

If the purposes behind section 29-2221 are the protection of society from and the punishment of habitual criminals, it is doubtful that such purposes mandate the interpretation of the statute given by the Nebraska court in *Pierce*. In rejecting the assertion that an individual should be given two independent warnings or two chances for reform before being considered an habitual criminal the court is reading section 29-2221 as if it were the type of specific recidivist statute found in *Ansell*.⁷⁰ This reading of the statute is simply not consistent with either the language of the statute⁷¹ or with the court's consistent approval of the discretionary and infrequent invocation of the statute by the prosecutor.⁷² Arguably, if the legislature had intended such a strict application of the statute providing that an offender should not have two separate warnings and opportunities for reform, it would have made the statute mandatory in its application and chosen a statutory scheme similar to the type of specific recidivist penalty construed in *Ansell*:

convicted of that offense a second or subsequent time must receive an additional three-year consecutive term of imprisonment for each conviction.

65. See 250 S.E.2d at 761.

66. *Id.*

67. *Id.* at 762.

68. *Id.*

69. See *id.* at 763.

70. See notes 64-69 & accompanying text *supra*.

71. See notes 7, 36 & accompanying text *supra*.

72. See note 3 *supra*; § III-B-2 of text *infra*.

mandatory specific penalties for each repetition of specifically enumerated dangerous crimes.⁷³

Furthermore, if the purposes of the statute are protection of society from and punishment of habitual offenders, it must first be determined that an individual is an habitual offender. The court in *Pierce* seemingly fails to consider or make any distinction between the purposes underlying the two prior convictions and terms of imprisonment, and those underlying the habitual offender sentence. Perhaps reformation of the criminal is not the purpose of the habitual criminal statute,⁷⁴ but it certainly could be considered one of the purposes of the penalties provided for the two prior felony convictions.⁷⁵ As the dissent argues, "[r]ecidivist statutes . . . are intended to apply to persistent violators who have not responded to the restraining influence of conviction and punishment."⁷⁶ Thus, it is the failure of the defendant to respond to two warnings and ordinary doses of punishment or rehabilitation that defines his persistence and makes him an habitual criminal from whom society requires additional protection.⁷⁷

The finding of the Nebraska court—that the statute on its face supports a conclusion that the offense for which enhancement is sought must have been committed after the two prior convictions and sentencings, but that there need be no time interval between the conviction and imprisonment for the first offense and the commission of the second offense—essentially transforms a three offense habitual criminal statute into a two offense statute when the two prior offenses occur on the same day and are charged in one information. However, section 29-2221 does not provide the potentially less severe sentence enhancement⁷⁸ for a second felony conviction that is common in states with second offender sentence enhancement statutes.⁷⁹ The *Pierce* finding is inconsistent with

73. See notes 64-69 & accompanying text *supra*.

74. But see Note, N.Y.U. L. REV., *supra* note 2.

75. See generally S. RUBIN, *supra* note 1, at 784-86. Cf. *Coleman v. Commonwealth*, 276 Ky. 802, 803, 125 S.W.2d 728, 728 (1939) ("The animating purposes of inflicting penalties for violations of criminal law is . . . reformation of the culprit, if it seems possible, and protection of society."). For examples of Nebraska cases acknowledging that rehabilitation is one of function of criminal penalties, see *State v. Suggett*, 200 Neb. 693, 264 N.W.2d 876 (1978); *State v. Moore*, 198 Neb. 317, 252 N.W.2d 617 (1977).

76. 204 Neb. at 442, 283 N.W.2d at 12 (citation omitted).

77. Cf. *State v. Jones*, 138 Wash. 110, 111, 244 P. 395, 395 (1926) ("when that hope of reformation had passed, the increased punishment [under the habitual criminal statute] should be meted out, but only then.").

78. Section 29-2221 provides a minimum sentence of 10 years and a maximum of 60 unless the penalty for the current offense is greater. NEB. REV. STAT. § 29-2221 (Reissue 1975).

79. *E.g.*, ALASKA STAT. § 12.55.050 (1972) (repealed effective 1980) provided that a person previously convicted of a felony, upon commission and conviction of a

the court's assertion that one is an habitual criminal if one repeats a certain number of criminal acts in that it implies that something more than just the repetition of criminal conduct is involved in the determination of habitual criminality. It suggests that warnings or opportunities for reform are inherent in the statute. However, if the legislature intended to allow only one warning and one opportunity to reform, it could have very easily done so by adopting a statute that provided enhanced punishment for the commission of a second offense after conviction and imprisonment for the first offense.⁸⁰

The dissenting opinion in *Pierce* relied on a more appealing interpretation of recidivist statutes similar to section 29-2221 by Iowa and Indiana courts.⁸¹ In *State v. Conley*,⁸² the Iowa court based its analysis on the fundamental premise accepted by the Nebraska court:⁸³ penal statutes are to be strictly construed in favor of the accused and reasonably interpreted in light of the purpose of the statute.⁸⁴ The Iowa court concluded that before an individual may be sentenced as an habitual criminal, there must be two prior convictions, two sentencing, and two imprisonments and the commission of each offense must be subsequent to the imprisonment upon conviction for the prior offense.⁸⁵ The court reasoned that "[r]ecidivist statutes are enacted in an effort to deter and punish incorrigible offenders. . . . They are intended to apply to persistent violators who have not responded to the restraining influence of conviction and punishment."⁸⁶ The court noted that by its terms the statute "makes the nature of disposition of the two prior con-

subsequent felony is punishable by imprisonment for not less than the minimum or more than twice the maximum prescribed for that felony. See also note 99 *infra*.

80. See, e.g., note 79 *supra*; note 99 *infra*.

81. See 204 Neb. at 444, 283 N.W.2d at 12 (Hastings, J., dissenting, joined by Krivosha, C.J. & McCown, J.).

82. 222 N.W.2d 501 (Iowa 1974). Accord, *State v. Tillman*, 228 N.W.2d 38 (Iowa 1975); *Cooper v. State*, 259 Ind. 107, 284 N.E.2d 799 (1972).

83. See note 48 & accompanying text *supra*.

84. 222 N.W.2d at 502.

85. *Id.* at 503. The Iowa statute construed in *Conley*, IOWA CODE § 747.5 (1975) (repealed 1976) (current version at IOWA CODE § 902.8 (1979)), provided in relevant part that "[w]hoever has been twice convicted of crime, sentenced, and committed to prison . . . for terms of not less than three years each shall, upon conviction of a felony . . . , be deemed to be a habitual criminal" *Id.* at 501-02.

The Indiana statute in *Cooper* provided in relevant part that "[e]very person who, after having been twice convicted, sentenced and imprisoned . . . for felony, . . . shall be convicted . . . in this state for a felony . . . , shall be deemed and taken to be an habitual criminal" IND. CODE ANN. § 9-2207 (Burns 1971) (repealed 1976) (current version at IND. CODE ANN. § 35-50-2-8 (Burns 1979)).

86. 222 N.W.2d at 503 (citations omitted).

victions determinative of their use"⁸⁷ for habitual criminal sentence enhancement upon a third conviction. "The defendant must have been on each prior occasion 'convicted of crime, sentenced and committed to prison' Significantly, the statute emphasizes conviction and disposition of the prior offense. There can be no recidivism until after conviction of crime and imposition of penalty."⁸⁸ Perhaps the Iowa and Indiana courts reached their conclusions because they considered the principles of statutory interpretation and gave meaning to each word of the statute, including the phrase "twice . . . imprisoned." In effect, the Nebraska court's interpretation has eliminated that precondition.

In addition to the rationale presented above, courts in jurisdictions with habitual offender laws similar to those relied on by the majority opinion⁸⁹ have relied on sound policy arguments to support the proposition that each successive felony must be committed after the previous felony conviction and imprisonment in order to be considered for habitual criminal status. In *State v. Carlson*,⁹⁰ the court noted that a convicted criminal who has not responded to the opportunity to reform presented by penal sanctions and subsequently commits another offense may be considered a worse offender than an individual who does not have any prior convictions; thus, harsher sanctions may be justified. However, in the situation in which two convictions occur on the same day, the individual is given only one opportunity to reform. Thus, if convictions occurring on the same day were to be considered separately for the purposes of habitual criminal sentence enhancement, "an individual who committed four crimes within a short time, and was given at most one opportunity to reform, would be treated the same as a defendant who had three opportunities to reform over a substantial period of time, but has persisted in his criminal conduct."⁹¹ This is essentially the result under the *Pierce* decision; it is hard to believe that the legislature could have intended such unjust disparity of treatment.

3. *Authorities Relied on by the Court*

Despite a lack of substantial Nebraska precedent or past analysis concerning either the purpose of the Nebraska recidivist statute or the issue presented by the *Pierce* case, it is somewhat surprising that the court sought guidance from jurisdictions with

87. *Id.* at 502.

88. *Id.* at 502-03 (citation omitted).

89. For discussion of the statutes in the jurisdictions relied on by the *Pierce* majority, see § III-A-3 of text *infra*.

90. 560 P.2d 26, 30 (Alaska 1977).

91. *Id.*

substantially distinguishable statutory schemes rather than looking to those jurisdictions with statutes similar to Nebraska's section 29-2221.⁹² The court recognized that "very possibly the majority view is contrary to the one adopted by us here today,"⁹³ and adopted the logic of *Cox v. State* and *State v. Williams*:

[T]he argument is made that under multiple offender legislation, which is directed at recidivism, "The increased penalties for habitual offenders are not intended to follow according to a numerical count of the offender's crimes, but are imposed for his successive failures to rehabilitate himself. The result is that two or more offenses of a contemporaneous nature amount to but one offense." This argument might be effective if addressed to the lawmakers. But with respect to the judicial interpretation of the particular statute under consideration it has no merit.⁹⁴

The "logic" of the court's argument, of course depends upon the "particular statute under consideration,"⁹⁵ and the statutes construed in *Williams* and *Cox* are significantly distinguishable from Nebraska's section 29-2221.

Several points should be made about the habitual offender law⁹⁶ that was interpreted by the Louisiana court in *Williams*. First, as cited in *Williams*, the statute provided in relevant part that "[i]f the judge finds that [the defendant] has been convicted of a prior felony or felonies, . . . the court shall sentence him to the punishment prescribed in this statute"⁹⁷ The statute does not refer to imprisonment. In contrast, Nebraska section 29-2221 provides that one who "has been twice convicted of crime, sentenced and committed to prison, . . . for terms of not less than one year each"⁹⁸ shall be subjected to the enhancement provisions of the statute upon conviction of a third felony.

In addition, Louisiana's recidivist statute contained a sentencing scheme providing different minimum and maximum determinate penalties for a second, third, fourth and subsequent felony.⁹⁹

92. See, e.g., note 85 *supra*.

93. 204 Neb. at 442, 283 N.W.2d at 11. See note 30 *supra*.

94. 204 Neb. at 442-43, 283 N.W.2d at 11 (quoting *Cox v. State*, 255 Ark. 204, 211, 499 S.W.2d 630, 634 (1973) (quoting *State v. Williams*, 226 La. 862, 866, 77 So. 2d 515, 516 (1955)). Like *Pierce*, *Cox* and *Williams* dealt with the issue of whether multiple prior convictions on the same day in court for crimes apparently committed on the same day could be separately counted as prior convictions for later enhancement under the habitual criminal statutes. 255 Ark. at 208-09, 499 S.W.2d at 633; 226 La. at 864, 77 So. 2d at 516.

95. *Id.* at 443, 283 N.W.2d at 11 (quoting *Cox v. State*, 255 Ark. 204, 211, 499 S.W.2d 630, 634 (1973) (quoting *State v. Williams*, 226 La. 862, 866, 77 So.2d 515, 516 (1955)).

96. LA. REV. STAT. ANN. § 15:529.1 (West 1967) (amended 1978).

97. 226 La. at 866, 77 So. 2d at 516 (quoting LA. REV. STAT. ANN. § 15:529.1).

98. NEB. REV. STAT. § 29-2221 (Reissue 1975).

99. For example, the statute provided in part that:

A. Any person who, after having been convicted under the laws of any other state or of the United States, or any foreign government

The punishments provided under the statute were based on what the determinate sentence for that felony would be if it were a first conviction. For example, an individual convicted of a third felony in the *Pierce* situation would have been subject to only a two and one-half to ten year sentence under a Louisiana-type habitual criminal statute,¹⁰⁰ rather than "not less than ten nor more than sixty years" under Nebraska law.¹⁰¹ In light of the fact that Louisiana's statute provided potentially less severe enhanced penalties for repeat offenders, it is understandable that the *Williams* court could have construed its statute as being based only on the number of repetitions of criminal conduct. However, it must be noted that immediately after *Williams*, the Louisiana legislature revised the statute¹⁰² to provide that an offender can be considered "a second offender only if the crime resulting in the second conviction shall have been committed after his first conviction; . . . a third offender . . . only if the crime resulting in the third conviction shall have been committed after his conviction for a crime which in fact caused him to be a second offender."¹⁰³ This revision was seen as a repudiation of the *Williams* court's interpretation.¹⁰⁴

Similar factors and arguments distinguish the Arkansas habitual offender law¹⁰⁵ which was construed by the *Coz* court. The

or country of a crime which, if committed in this state would be a felony, thereafter commits any subsequent felony within this state upon conviction of said felony shall be punished as follows:

(1) If the second felony is such that upon a first conviction the offender would be punishable by imprisonment for any term less than his natural life, then the sentence to imprisonment shall be for a determinate term not less than one-third the longest term and not more than twice the longest term prescribed for a first conviction;

(2) If the third felony is such that, upon a first conviction, the offender would be punishable by imprisonment for any term less than his natural life, then the person shall be sentenced to imprisonment for any term not less than one-half the longest term prescribed for a first conviction;

LA. REV. STAT. § 15:529.1 (West 1967) (amended 1978).

100. *Id.* The maximum penalty *Pierce* could have received for his conviction of delivery of amphetamines without the habitual criminal sentence enhancement was five years. NEB. REV. STAT. § 28-4,125 (Reissue 1975) (current version at NEB. REV. STAT. § 28-416 (Cum. Supp. 1978)).

101. NEB. REV. STAT. § 29-2221 (Reissue 1975).

102. *Jackson v. Henderson*, 283 So. 2d 210, 212 (La. 1973).

103. LA. REV. STAT. § 15:529.1(B) (West 1967) (amended 1978).

104. 283 So. 2d at 212.

105. ARK. STAT. ANN. § 43-2328 (Supp. 1975) (current version at ARK. STAT. ANN. § 41-1001 (1977)) provided in relevant part:

Any person convicted of an offense, which is punishable by imprisonment in the penitentiary, who shall subsequently be convicted of another such offense, shall be punished as follows:

(2) If the third offense is such that, upon a first conviction, the

Arkansas statute began sentence enhancement for repeat offenders after the conviction for the second offense and provided a sentencing scheme which appears to be far less harsh than Nebraska's.¹⁰⁶ For example, under an Arkansas-type habitual criminal scheme a defendant similar to Pierce would only be subject to a maximum sentence of five years¹⁰⁷ for his third offense, unless the minimum sentence for that offense plus three years was more than the maximum.¹⁰⁸

Other factors may have strongly influenced the Arkansas court's willingness in *Cox* to construe the Arkansas recidivist law as being based only on the number of prior crimes. Prior to the Arkansas court's decision in *Cox*, the Arkansas legislature had amended section 43-2328, eliminating a provision which explicitly provided that a subsequent offense must be committed after the conviction and discharge from prison for a prior offense in order to be considered for the purposes of sentence enhancement.¹⁰⁹ In light of this fact, the Arkansas court in *Cox*, unlike the Nebraska Supreme Court in *Pierce*, was not without explicit expression of the legislative intent concerning the sequence of prior convictions.¹¹⁰

The *Pierce* majority also refers in passing to *State v. Bomar*,¹¹¹ where a Tennessee court held that two offenses committed at separate times, for which the defendant was convicted on the same day,

offender could be punished by imprisonment for a term less than his natural life, then the person shall be sentenced to imprisonment for a determinate term not less than three (3) years more than the minimum sentence provided by law for a first conviction of the offense for which the defendant is being tried, and not more than the maximum sentence provided by law for the offense, unless the maximum sentence is less than the minimum sentence plus three (3) years, in which case the longer term shall govern.

106. *Id.*

107. Five years was the maximum sentence for delivery of a controlled substance in the *Pierce* situation. NEB. REV. STAT. § 28-4,125 (Reissue 1975) (current version NEB. REV. STAT. § 28-416 (Cum. Supp. 1978)).

108. *Id.* There is no minimum sentence for delivery of amphetamines in Nebraska. The statute allows penalties of a fine of not more than two thousand dollars or imprisonment for not more than six months in the county jail.

109. 1967 ARK. ACTS No. 639, § 1, p. 1174 (amending ARK. STAT. ANN. § 43-2328 (1964) (current version at ARK. STAT. ANN. § 43-2328 (Supp. 1975))). The statute prior to amendment read in relevant part: "[A]ny person convicted of any offense punishable by imprisonment in the penitentiary, who has been discharged, either upon compliance with the sentence or upon pardon or parole, and shall subsequently be convicted of any offense committed after such discharge, pardon or parole shall be punished as follows."

110. This line of argument was followed in *State v. Carlson*, 560 P.2d 26, 29 (Alaska 1977) (distinguishing the construction that the Oregon courts had placed on their similar habitual offender statute).

111. 213 Tenn. 487, 376 S.W.2d 446 (1964).

constituted two convictions under the Tennessee recidivist statute.¹¹² The Tennessee statutory scheme is also significantly different from Nebraska's in that it provides that "[a]ny person who has either been three (3) times convicted . . . of felonies, not less than two (2) of which are among those specified . . . shall be considered . . . to be an habitual criminal."¹¹³ This statute makes no mention of a requirement for sentencing and imprisonment as does Nebraska section 29-2221, and is limited in application to specific dangerous crimes. Moreover, the Tennessee recidivist statute explicitly provides that "each of such three (3) convictions shall be for separate offenses, committed at different times, and on separate occasions."¹¹⁴

The meaning of the phrase "committed at different times, and on separate occasions" apparently has not been fully delineated by the Tennessee courts. However, in *Fazier v. State*,¹¹⁵ the court, construing this phrase, held that five convictions for burglaries all committed on the same date should be considered as only one conviction for the purposes of habitual criminal prosecution.¹¹⁶ Thus, even under Tennessee's somewhat stricter scheme, a defendant like Pierce would not be considered an habitual criminal. Arguably, because his prior offenses occurred on the same day, his incorrigibility would not have been demonstrated.

Analysis of the recidivist statute construed in the decisions cited by the majority in *Pierce* reveals significant differences in statutory schemes¹¹⁷ and legislative histories¹¹⁸ from those in Nebraska; differences that might explain the Arkansas and Louisiana courts' rejection of the argument that increased penalties for habitual offenders should not be based only on the number of defendant's past crimes. In light of these dissimilarities between the habitual criminal statutes in these jurisdictions and section 29-2221, it is submitted that the majority's reliance on them for support in *Pierce* was misplaced.

B. Directions for Reform

Upholding the position taken by the dissent in *Pierce*,¹¹⁹ and following the example provided by the Louisiana legislature after

112. TENN. CODE ANN. § 40-2801 (1975).

113. *Id.* Crimes specified include: assault with intent to murder or rape, mayhem, malicious shooting, abduction of a female, rape, robbery, and burglary.

114. *Id.*

115. 485 S.W.2d 877 (Tenn. Crim. App. 1972).

116. *Id.* at 881.

117. See notes 97-101, 105-08, 113-16 & accompanying text *supra*.

118. See notes 102-03, 104-10 & accompanying text *supra*.

119. 204 Neb. at 444, 283 N.W.2d at 12 (Hastings, J., dissenting, joined by Krivosha, C.J. & McCown, J.).

the *Williams* decision,¹²⁰ the Nebraska Legislature should, at a minimum, repudiate the *Pierce* decision by amending section 29-2221 to provide that each felony must be committed after conviction, sentencing, and imprisonment for the prior felony in order to be counted toward habitual criminal status. This change would at least eliminate one of the inequities present in the *Pierce* situation: the harsher treatment of offenders given only one chance to respond to sanctions than of offenders who have been given two opportunities to respond. It would also provide a more adequate indication of whether an individual should be considered a persistent offender deserving increased punishment and from whom society needs more protection.¹²¹ However, additional revision is

120. See note 102 & accompanying text *supra*.

121. An amendment to section 29-2221 has been introduced in the Nebraska Unicameral in response to *Pierce*. The amendment provides:

The conviction for two or more felonies committed as part of a single course of conduct during which there was no substantial change in the nature of the criminal conduct constitutes one conviction . . . but offenses . . . committed while attempting to escape detention or apprehension are not part of the same course of criminal conduct.

L.B. 799, 86th Leg., 2d Sess. (1980).

Unfortunately L.B. 799 may not rectify the *Pierce* decision, and may inadequately address the other major inadequacies and inequities of the habitual criminal statute. See §§ III-B-1, to -3 of text *infra*, for discussion of these inadequacies and inequities. The phrases in L.B. 799, "single course of criminal conduct" and "no substantial change in the nature of criminal conduct" are sufficiently ambiguous to require further legislative definition before their meaning becomes clear.

However, a "single course of criminal conduct" might be construed to apply only to a situation in which an individual commits two felonies almost simultaneously, *e.g.*, breaking and entering followed by a larceny at the same location. If so interpreted, L.B. 799 would not eliminate the current disparity of treatment that results from treating an individual who has had only one opportunity to respond to criminal sanctions more harshly than an individual who has had two chances to respond. Also, this amendment really would not provide any greater indication of the persistence of an individual's criminal conduct than does the current habitual criminal statute as interpreted by the court in *Pierce*. Furthermore, if so interpreted, this amendment would not even apply to the defendant in *Pierce*, since his two prior crimes (burglary and grand larceny) upon which his habitual criminal sentence was based, occurred "on the same day, but at different locations." 204 Neb. at 437, 283 N.W.2d at 9.

More importantly, however, it must be noted that L.B. 799 was taken directly from the Persistent Offenders sentencing provisions of the UNIFORM LAW COMMISSIONERS' MODEL SENTENCING AND CORRECTIONS ACT, NATIONAL INSTITUTE OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, U.S. DEP'T OF JUSTICE § 3-105 (1979) [hereinafter cited as MSCA]. The definition of prior conviction for purposes of sentence enhancement adopted in L.B. 799 is only part of a carefully devised and interrelated sentencing scheme in the Model Act that is almost totally distinguishable from Nebraska's scheme. See MSCA §§ 3-101 to -116. For a general discussion of the Model Act, see Perlman & Potuto, *The Uniform Law Com-*

needed to ameliorate the inadequacy and unfairness of the habitual criminal statute caused by its reliance on solely the quantity of convictions as a measure for habitual criminality, the discretionary and infrequent application of the statute by prosecutors,¹²² the minimum mandatory ten-year sentence and the maximum sixty-year sentence. These provisions may render the statute incapable of serving any of its asserted purposes and frequently lead to other inequities.

1. *Quantity of Convictions*

Using quantity of convictions as the only criterion for the application of the habitual criminal statute provides an unreliable guide for distinguishing the habitual from the non-habitual criminal in the sociological sense¹²³ and represents one of the major flaws in the scheme.¹²⁴ It fails to take into account either the specific nature of the crimes committed or the character of the offender.¹²⁵ Such a scheme fails to account for the length of time between prior convictions and the current offense for which enhancement is being sought. Thus, it could be argued, if several years have passed between punishment for one offense and the commission of another, an individual should not be considered an habitual offender.¹²⁶ A question also arises as to whether crimes committed by an individual in his teens or early twenties are sufficient indications of that individual's unreformable character or persistence in

missioners' Model Sentencing and Corrections Act: An Overview, 58 NEB. L. REV. 925 (1979).

Although the Model Act is far too complex for treatment in this note, a few of the major distinguishing characteristics relating to persistent offenders should be noted. Persistent offenders are defined as persons who have "at least two prior felony convictions for offenses committed within the 5 years immediately preceding commission of the instant offense . . . [but] [i]n establishing the 5-year period, time spent in confinement may not be included" MSCA at § 3-105. The maximum sentence to which a persistent offender may be sentenced is twice the maximum for the particular class of felony he has most recently committed. *Id.* § 3-104. Although the prosecutor still appears to have the discretion as to whether to seek persistent offender sentence enhancement, *see id.* §§ 3-202 to -207, the act does not mandate sentence enhancement for all persistent offenders; "it merely provides a greater range of sanctions to be used by the . . . sentencing courts." *Id.* at 116. It is submitted that L.B. 799's use of a small portion of the Persistent Offender provisions of the Model Act outside the framework of that act is inappropriate.

122. *See* § III-B-2 of text *infra*.

123. S. RUBIN, *supra* note 1, at 465; Note, FORDHAM L. REV., *supra* note 2, at 89.

124. Katkin, *supra* note 1, at 101-02.

125. *Id.*

126. *See* S. RUBIN, *supra* note 1, at 465; Note, CREIGHTON L. REV., *supra* note 3, at 896.

crime to justify lengthy prison terms.¹²⁷

A statute triggered by the quantity of prior convictions fails to distinguish between violent and non-violent crimes and is contrary to the basic assumption that in the interest of public safety individuals committing violent crimes should be more readily and severely subjected to habitual criminal sentence enhancement than should those committing non-violent crimes.¹²⁸ It also has been noted that the quantity of convictions criterion results in problems in defining a valid prior conviction from another state due to the variance in classification of crimes and sentencing from state to state.¹²⁹ This can result in the non-consideration of a prior conviction which resulted in less than a one-year sentence, even though the defendant may in fact be known to be dangerous. It may also result in the consideration of a prior conviction from another state which would not be subject to a one-year prison term in Nebraska.¹³⁰

Another basic challenge to a statute based on the quantity of convictions rationale is that it fails to serve either the purposes of deterrence or protection of the public from truly dangerous or professional offenders.¹³¹ Relying on the data from empirical studies,

127. S. RUBIN, *supra* note 1, at 466. Rubin notes that recidivism rates are higher in the late teens and early twenties but that criminality and seriousness of crimes declines with advancing age. However, those individuals whose recidivist tendencies have disappeared and who are no longer a dangerous threat to society may not be released until they have served their minimum sentence. *Id.*

Admittedly, the relevance of the factors discussed in text accompanying notes 123-26 *supra*, depends on the basic underlying purpose of the habitual criminal statute. It could be argued that some of the factors may not be relevant to an habitual offender law which defines an habitual criminal as one who repeats crime, and is only intended to punish the repetition of criminal conduct. However, as it has been argued throughout this note, section 29-2221 should not be viewed as such a statute because it does not provide enhancement for second offenders; invocation of the statute is discretionary and rarely undertaken; the language of the statute requires imprisonments, not just convictions, for one to be considered an habitual criminal; and the penalty under the statute is potentially more severe than under strictly repeat offender statutes.

A different definitional perspective of an habitual criminal is provided by N. MORRIS, *THE HABITUAL CRIMINAL* 8 (1951) (emphasis omitted):

[A]n 'habitual criminal' is 'one who possesses criminal qualities inherent or latent in his mental constitution (but who is not insane or mentally deficient); who has manifested a settled practice in crime; and who presents a danger to the society in which he lives (but is not merely a prostitute, vagrant, habitual drunkard or habitual petty delinquent).'

128. Note, CREIGHTON L. REV., *supra* note 3, at 896.

129. See Note, FORDHAM L. REV., *supra* note 2, at 90-91.

130. *Id.*

131. Katkin, *supra* note 1, at 105; Note, FORDHAM L. REV., *supra* note 2, at 86.

Katkin concluded that "both social scientists and prison administrators seem agreed that habitual offender laws operate only to isolate from society those unfortunate inadequates from whom comparatively little need be feared. More dangerous offenders from whom the public truly needs to be protected seem not to be affected."¹³²

Support for this conclusion can be gleaned from a recent Douglas County, Nebraska, study which indicated that none of the three individuals (out of eighty-two eligibles) who were sentenced under the habitual criminal statute in 1971-72 were charged with violent crimes (murder, manslaughter, rape, assault and battery, and shooting with the intent to kill, wound or maim).¹³³ One could argue that since the maximum sentence for violent crimes could be as long or longer than habitual criminal enhancement, society is still being protected from truly dangerous offenders. However, the Douglas County study surprisingly indicated that "the only sentences which compared to the 11.66-year average sentence of the third offense habitual criminals were the sentences received by violent, sixth-offense defendants."¹³⁴ The violent offenders who had the same number of prior offenses as the habitual offenders received average sentences that were about six-and-one-half years less than those of the nonviolent habitual offenders.¹³⁵

The rationale that extended sentences are justifiable on the basis of public protection is clearly not supported by a law that "permits a man who has twice committed a crime of violence to go free in less time than a man who has three times committed a lesser offense."¹³⁶ Nevertheless, this is the potential result under a statute based only on the quantity of prior convictions.

By definition, habitual offender laws are not needed to deter serious crimes because courts currently may sentence violent offenders to lengthy prison terms without habitual offender laws; thus, the potential for deterrence is relatively nil.¹³⁷ At most, harsh ha-

132. Katkin, *supra* note 1, at 112. See also note 2 *supra*. One explanation for this conclusion is that habitual criminal statutes are used primarily by law enforcement officials against burglary and narcotics offenders when trying to get guilty pleas and information. Klein, *supra* note 4, at 436. It must be noted that the crime which subjected the defendant in *Pierce* to an habitual criminal charge was the delivery of a controlled substance, amphetamines. 204 Neb. at 434, 283 N.W.2d at 7.

133. Note, CREIGHTON L. REV., *supra* note 3, at 908-12.

134. *Id.* at 910. Although the Douglas County study related primarily to the effects of prosecutors' discretion, it must be noted that these results would not be possible under an habitual offender statute that mandated consideration of the violence of the crimes as one of its criteria.

135. *Id.* at 909.

136. Katkin, *supra* note 1, at 119.

137. *Id.* at 106.

bitual offender laws may only have some effect in deterring "comparatively petty offenses which are not deemed to deserve, in and of themselves, long terms of confinement."¹³⁸ However, this would be true only if laws like section 29-2221 were mandatorily or frequently applied.¹³⁹

Those who advocate abandoning quantity of convictions as the sole triggering mechanism for sentence enhancement, at a minimum, suggest that the criteria for determining which offenders require an enhanced prison term should include "the dangerousness of the act—particularly, dangerousness against the person, not the property, of another" and "the likelihood of repetition."¹⁴⁰ Factors which may be considered relevant under the latter criteria include "[t]he offender's age, the amount of 'good time' since the last felony conviction, and the number of prior convictions."¹⁴¹

One attempt at this type of reform, the Model Sentencing Act,¹⁴² calls for the repeal of habitual offender laws, relying instead on a dangerous offender sentencing concept.¹⁴³ Under this scheme, only dangerous offenders may be sentenced to an extended term.¹⁴⁴ The question of whether or not an individual should be given an extended sentence is to be determined by a presentence investigation into an offender's behavior patterns, personality, the dangerousness of his crimes, amount of time the offender has been in detention, and his propensity toward future crime, *inter alia*.¹⁴⁵ The court, rather than the prosecutor, makes the determination of whether the enhancement provisions will be applied, basing its decision largely on psychiatric evidence. A defendant found to be a dangerous offender under the Act may be sentenced to a maximum term of thirty years imprisonment; there is no minimum sentence.¹⁴⁶

Another proposal for reform is embodied in the Model Penal Code habitual offender sentencing scheme.¹⁴⁷ Like the Model Sen-

138. *Id.*

139. See § III-B-2 of text *infra*.

140. S. RUBIN, *PSYCHIATRY AND THE CRIMINAL LAW, ILLUSIONS, FICTIONS, AND MYTHS* 175 (1965). For a general discussion of the problems associated with habitual offender laws and argument for repeal or reform, see S. RUBIN, *supra* note 1, at 461-66, 480-81.

141. Note, CREIGHTON L. REV., *supra* note 3, at 903.

142. NATIONAL COUNCIL ON CRIME AND DELINQUENCY, *MODEL SENTENCING ACT*, (2d ed. 1972) [hereinafter cited as the *MODEL SENTENCING ACT*].

143. *Id.* at 10. See S. RUBIN, *supra* note 1, at 480, for a general discussion of this portion of the Model Sentencing Act.

144. *MODEL SENTENCING ACT*, *supra* note 142, at 2.

145. See *id.* §§ 2, 3, 5 & accompanying comments.

146. *Id.* § 5.

147. *MODEL PENAL CODE* § 7.03 (P.O.D. 1962). For discussion of this section, see S. RUBIN, *supra* note 140, at 178-82; Comment, *supra* note 11, at 276 n.3; Note,

tencing Act, the Model Penal Code requires that the court determine whether the enhancement provisions should apply and generally focuses on the nature of the offense and the defendant's potential for future criminal conduct.¹⁴⁸ However, the Model Penal Code does not have a definite mechanism for a determination of or an adequate definition of dangerousness and "does not provide for a hearing to put any allegations or findings in issue."¹⁴⁹ Thus, the judge has more complete discretion under the Model Penal Code than under the Model Sentencing Act. Furthermore, the Model Penal Code retains the quantity of convictions as a triggering mechanism for invocation of the statute independently of the dangerousness of the individual.¹⁵⁰ Finally, the Model Penal Code employs minimum-maximum extended terms, the range and length of which depend on the seriousness of the offense for which the defendant was most recently convicted.¹⁵¹ The presence of this wide-ranging sentencing scheme and the almost unfettered discretion of the judge has lead critics to charge that the Model Penal Code repeat offender scheme does little to remedy, and may actually worsen, the problem of disparity of sentences present in traditional recidivist laws.¹⁵²

2. *Prosecutorial Discretion*

Any utility the habitual criminal law may have in terms of satisfying the purposes of punishment, deterrence, and public protection has been virtually nullified by the fact that invocation of the statute is within the discretion of the prosecutor¹⁵³ and the fact that the statute is rarely invoked.¹⁵⁴ Recent studies in Douglas County, Nebraska, indicated that between 1971 and 1973 only four of 133 individuals eligible for enhanced sentences under section 29-2221 were actually sentenced as habitual offenders.¹⁵⁵ Further-

FORDHAM L. REV., *supra* note 3, at 90 n.120; Note, TOL. L. REV., *supra* note 3, at 611.

148. MODEL PENAL CODE, *supra* note 147, § 7.03.

149. S. RUBIN, *supra* note 140, at 180.

150. MODEL PENAL CODE, *supra* note 147, § 7.03; See S. RUBIN, *supra* note 140, at 179.

151. S. RUBIN, *supra* note 140, at 179.

152. *Id.* at 182. For a brief discussion of another recent proposal for reform, the Model Sentencing and Corrections Act, see note 121 *supra*.

153. See notes 3, 8 & accompanying text *supra*.

154. Note, CREIGHTON L. REV., *supra* note 3, at 906. Only three of 82 qualifying individuals were sentenced as habitual criminals in 1971 and 1972, and only one of 51 qualifying individuals in 1973 in Douglas County, Nebraska. *Id.* at 906 & n.49. Evidence in *State v. Bird Head*, 204 Neb. 807, 812, 285 N.W.2d 698, 702 (1979) indicated that between 1971 and 1977, eight of 26 eligible individuals were charged as habitual criminals in Sheridan County, Nebraska.

155. Note, CREIGHTON L. REV., *supra* note 3, at 906 & n.49.

more, "[n]o clear correlation was indicated between receipt of an habitual criminal sentence and a defendant's age, race, prior record, current offense or frequency of criminal activity."¹⁵⁶

In light of those findings, it can hardly be argued the habitual criminal statute serves a purpose of protecting the public from even relatively minor offenders, much less individuals who commit violent crimes. Realistically, the potential that a seldom-used statute will have a deterrent effect seems highly questionable.¹⁵⁷ Furthermore, even the rationale that the statute provides retribution for the repetition of crime, the justification primarily relied upon by the court in *Pierce*,¹⁵⁸ is destroyed by these findings. Instead, the habitual criminal statute currently creates unjustified disparities in the treatment of individuals.

Not only does it appear that section 29-2221 is being applied arbitrarily,¹⁵⁹ but judicial discretion in sentencing has apparently not compensated for the sentencing disparity between eligible individuals charged as habitual offenders and those not charged. "Sentences given to defendants with two prior convictions who were sentenced as habitual criminals were seven-and-one-half years longer than sentences imposed upon other defendants with two prior felonies."¹⁶⁰ Finally, even if the threat or the invocation of section 29-2221 can be seen as serving the purpose of obtaining information and guilty pleas,¹⁶¹ the use of the statute in this manner must be seen as inconsistent with the goals of punishment and the protection of society, as well as a source of unconscionable disparity in the treatment of offenders.

The direction that reform in this area might take seems to depend on what the legislature views as the fundamental purpose of the recidivist statutes. If the goal of the statute is to protect society from truly dangerous offenders, an appropriate statutory scheme might be one similar to the Model Sentencing Act, under which the determination of whether to apply sentence enhancement is in the hands of the trial judge, limited by certain standards.¹⁶² It has also been suggested that similar reform might be accomplished by "providing express standards for prosecutors and by mandating a limited judicial review of their decisions"¹⁶³ con-

156. *Id.* at 912. See also notes 133-35 & accompanying text *supra*.

157. Comment, *supra* note 11, at 299.

158. 204 Neb. at 441, 283 N.W.2d at 11 (1979).

159. Note, CREIGHTON L. REV., *supra* note 3, at 918. See also note 156 & accompanying text *supra*.

160. Note, CREIGHTON L. REV., *supra* note 3, at 912.

161. See note 4 & accompanying text *supra*.

162. See generally notes 142-46 & accompanying text *supra*.

163. Comment, *supra* note 11, at 315. See also *id.* at 312-13. But see *United States v. Cox*, 342 F.2d 167, 171 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965) ("as an

cerning invocation of the habitual criminal statute. At least under those schemes there is a requirement for a rational and supportable basis for the disparity of treatment of individuals committing the same number of offenses.

If the primary purpose of the statute is to punish the repetition of all crimes, thereby providing broader deterrence and social protection, it could be asserted that the invocation of the statute should be made mandatory upon each subsequent felony conviction. If nothing else, this would eliminate the disparity of treatment between individuals who have been convicted, sentenced, and imprisoned an equal number of times. However, it has been noted that such a change should be accompanied by a reduction or elimination of the ten-year minimum mandatory sentence and the sixty-year maximum sentence in order to ameliorate the unfairness that results from grossly disproportionate sentences.¹⁶⁴

3. *The Ten to Sixty-Year Sentencing Scheme*

Inequity and unfairness in sentencing can stem from the requirement in section 29-2221 that, upon being found to be an habitual criminal, an individual must be sentenced to a minimum of ten years imprisonment and may be sentenced to a maximum of sixty years.¹⁶⁵ Katkin, citing *State v. Sedalecek*,¹⁶⁶ characterized these types of statutes as being indefensibly harsh by allowing or mandating the imposition of sentences that are completely dispropor-

incident of the constitutional separation of powers . . . courts are not to interfere with the free exercise of the discretionary powers of attorneys of the United States in their control over criminal prosecutions").

164. Comment, *supra* note 11, at 315. For an example of a statute that contains a potentially less severe minimum sentence, see note 105 *supra*. However, it must be noted that making the application of a recidivist statute mandatory upon the conviction of a defendant for a subsequent felony may not cure the disparity of treatment of individuals under the current statute, and may actually result in less protection for the public. This is because the prosecutor still would have to file *felony* charges against a defendant for his latest offense in order to trigger the habitual offender law. A prosecutor engaged in bargaining with the defendant might have to agree to file misdemeanor charges against the offender in order to obtain a guilty plea or information. "Such a practice actually undermines the safety of the public by working to the advantage of organized and professional thieves." Katkin, *supra* note 1, at 109.

165. NEB. REV. STAT. § 29-2221 (Reissue 1975). See S. RUBIN, *supra* note 1, at 462-63; Katkin, *supra* note 1, at 117.

166. 178 Neb. 322, 133 N.W.2d 380 (1965) (sentencing a 64-year-old defendant with two prior offenses to 14 years for stealing a \$20 to \$25 shotgun from his neighbor). Another example of an arguably harsh sentence is *State v. Silvacarrvalho*, 193 Neb. 447, 227 N.W.2d 602 (1975) (defendant convicted of burglarizing an unoccupied commercial building, taking a few dollars change and a pocket knife was sentenced to 12 to 15 years).

tionate to the specific offense which "triggers" them.¹⁶⁷

Furthermore, it may well be that an individual who has served two independent terms of imprisonment for his two previous crimes¹⁶⁸ has manifested a resistance to the corrections system and demonstrated sufficient persistence in crime to justify an enhanced sentence for a third offense. "However, 'it defies all sense of just proportion to suggest that the limit for a second offender should be two years and for a third offender twenty five.'"¹⁶⁹ Similarly, there is little equitable appeal in a statutory program that does not have a minimum penalty for second offenders,¹⁷⁰ but requires that a third offender be sentenced to a minimum term of ten years imprisonment for the very same offense.¹⁷¹ This type of disproportionate punishment is vividly demonstrated in the *Pierce* case. The defendant's twelve year sentence for delivery of amphetamines as a third offense was at least twelve times as long as the minimum penalty and almost two-and-one-half times the maximum penalty he could have received for the same crime were it only his second offense.¹⁷²

Finally, the unfairness of a statutory sentencing scheme which would allow an individual who has been twice convicted of a violent crime to serve less time than an individual who has been convicted of three lesser offenses cannot be denied. Yet, this is not only a possibility,¹⁷³ but apparently a reality under Nebraska law.¹⁷⁴

167. Katkin, *supra* note 1, at 117. Arguably, *Pierce*'s sentence of 12 years for delivery of \$65 worth of amphetamines could be characterized as harsh.

168. It should be noted that under *Pierce* only two previous convictions would be necessary. 204 Neb. at 443, 282 N.W.2d at 11.

169. Katkin, *supra* note 1, at 118 (citation omitted). (Under Nebraska law these limits would be five and 60 years. NEB. REV. STAT. § 28-4,125 (Reissue 1975) (current version at *id.* § 28-416 (Cum. Supp. 1978)); *id.* § 29-2221 (Reissue 1975)).

170. NEB. REV. STAT. § 28-4,125 (Reissue 1975) (current version at *id.* § 28-416 (Cum. Supp. 1978)) (allowing a penalty of imprisonment up to six months in county jail or a fine of up to \$2,000).

171. *Id.* § 29-2221 (Reissue 1975).

172. *See id.* § 28-4,125 (Reissue 1975) (current version at *id.* § 28-416 (Cum. Supp. 1978)).

173. Penalties for some violent crimes under Nebraska law are potentially less severe than the 10 year minimum mandatory sentence under section 29-2221. *See, e.g., id.* § 28-305 (Cum. Supp. 1978) (manslaughter—one to 20 years); § 28-308 (Cum. Supp. 1978) (first degree assault—one to 20 years); § 28-309 (Cum. Supp. 1978) (second degree assault—maximum five years, no minimum).

174. *See generally* Note, CREIGHTON L. REV., *supra* note 3, at 908-12; notes 133-35 & accompanying text *supra*. This study shows that sentences imposed on violent offenders who had not been charged under section 29-2221 were shorter than the 10-year minimum sentence under that statute and were about six-and-one-half years shorter than the 11.66-year sentence for those defendants

Assuming that the legislature does want to use the habitual criminal law to strictly punish individuals for the repetition of any criminal conduct, it may be more just and rational to abandon the mandatory ten to sixty-year sentencing scheme in favor of a scheme which imposes sentences that are a multiple of the maximum sentence that could be imposed for the subsequent offense that triggers the application of the recidivist statute.¹⁷⁵ Another alternative would be to devise a schedule "providing extensions of various lengths which are directly proportionate to the immediate offense."¹⁷⁶ Either of these schemes would serve to mitigate the disproportionately harsh treatment that relatively minor offenders now receive and would provide lengthier sentences for those individuals whose most recent crime indicates that they do represent a serious threat to the public.

IV. CONCLUSION

The majority of jurisdictions appear to adhere to the position that in order for crimes to be counted toward habitual criminal sentence enhancement, the commission of each subsequent felony must follow the conviction on a prior felony.¹⁷⁷ Although this proposition has been explicitly incorporated in the statutes of some jurisdictions,¹⁷⁸ it has been reached through judicial interpretation in others. Of particular note are those cases which interpreted recidivist statutes that were similar to Nebraska's section 29-2221.¹⁷⁹

The contrary position taken by the majority justices of the Nebraska court in *Pierce* may be attributable in general to a lack of in-depth consideration of: (1) principles of statutory construction, (2) the purposes of the statute in light of its language and mechanics viewed as a whole, and (3) concepts of equity and social policy.

convicted of nonviolent crimes but against whom the habitual criminal statute was used, *even though all defendants had committed the same number of offenses*. Note, CREIGHTON L. REV., *supra* note 3, at 908-12.

175. Katkin, *supra* note 1, at 119. For an example of a scheme similar to this, see MICH. COMP. LAWS ANN. §§ 769.10 to .12 (Supp. 1979) which provide generally that a second felony conviction is punishable by a maximum prison term two times the maximum sentence for a first conviction of that offense; a third felony conviction is punishable by a maximum sentence twice the length of the sentence for a first conviction of that offense; a fourth felony conviction may be punished by a life sentence if the felony would be punishable upon first conviction for that offense by a maximum term of five years or more.

176. Katkin, *supra* note 1, at 119.

177. See note 30 & accompanying text *supra*.

178. See, e.g., KY. REV. STAT. ANN. § 532.080 (Baldwin Supp. 1979); LA. REV. STAT. ANN. § 15-529.1 (West 1967) (amended 1978).

179. See notes 82-88 & accompanying text *supra*. These cases are cited by the *Pierce* dissent. 204 Neb. at 444, 283 N.W.2d at 12.

In addition, it has been argued that the *Pierce* majority cited and relied on decisions from jurisdictions with substantially distinguishable habitual offender laws in terms of the mechanics of operation and harshness of penalties.¹⁸⁰

The defects and unfairness of *Pierce*, as well as the habitual criminal statute, cannot be cured merely by a legislative change which provides that in order to apply habitual criminal sentence enhancement, each subsequent felony must be committed after the conviction, sentencing and imprisonment for the prior felony. While such reform might help to eliminate the disparity of treatment of individuals who have had the same number of opportunities to respond to correction and may serve as a somewhat more adequate indicator of habitual criminality, it fails to address other inadequacies and inequities inherent in section 29-2221.¹⁸¹ These include: failure to adequately define habitual criminality; extreme and irrational disparity of treatment of individuals generally; disproportionately harsh punishment relative to the nature of the offense; failure to protect society from and deter dangerous or nondangerous offenders; and failure to provide retribution for the repetition of criminal conduct.

Reconsideration of the necessity for and re-definition of the goals of the habitual offender statute must be undertaken. Three characteristics of the statute must be given specific attention: (1) the use of numerical counts of crime as the sole criteria for the determination of habitual criminal status, (2) the discretionary and infrequent use of the statute by prosecutors, and (3) the mandatory ten to sixty-year sentencing provision. It is suggested that with the specific goals of the recidivist statute clearly defined, the legislature can create a statute which at least approaches the achievement of the goals with less disparity of treatment and harshness than that resulting from the current law.

However, in view of the complexity and extent of the problems inherent in any habitual criminal statute, one might well conclude that the repeal of the statute would be the better course of action.¹⁸² It could be argued the state would lose nothing by the repeal of section 29-2221, because crime can still be "repressed by penalties of just proportion set by a judge utilizing his discretion."¹⁸³ Furthermore, repeal is the only way to cure what may be

180. See generally § III-A-3 of text *supra*.

181. It has been argued that L.B. 799, introduced to amend section 29-2221 in response to the *Pierce* decision, is also inadequate and inappropriate. For a brief discussion of L.B. 799, see note 121 *supra*.

182. See S. RUBIN, *supra* note 1, at 464; Note, CREIGHTON L. REV., *supra* note 3, at 918.

183. Note, CREIGHTON L. REV., *supra* note 3, at 918.

the fundamental injustice pervading habitual criminal statutes—the punishment of a person for a *status* rather than for a *crime*.¹⁸⁴

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184. See *State v. Losieau*, 184 Neb. 178, 181, 166 N.W.2d 406, 408 (1969) (citations omitted); “‘Habitual criminality’ is, under the habitual criminal law, a status rather than a crime”

It has been held that one can not be criminally punished for the status of narcotic addiction, *Robinson v. California*, 370 U.S. 660 (1962), and it has been suggested that it would be cruel to inflict sentence enhancement for the repetition of criminal conduct that is attributable to a defendant’s addiction. *In re Foss*, 10 Cal. 3d 910, 519 P.2d 1073, Cal. Rptr. 649 (1974). It is submitted that the status of habitual criminality might well be viewed analogously.