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Separation of Powers and the Illinois Habitual Offender Act: Who Sentences the Habitual Criminal?

INTRODUCTION

Western society has adopted a system of temporary imprisonment as the primary method of punishing criminal behavior. This system contains a serious flaw: a criminal's temporary loss of liberty does not necessarily lead him or her to rehabilitation or remorse. In fact, many criminals exhibit disdain for the system and continue to lead lives of crime with little fear of potential prison sentences. When apprehended, they serve their time with a view toward getting back on the streets and resuming their prior criminal activity. One legislative remedy for this flaw has been the habitual offender or recidivist statute.

Recidivist statutes typically either mandate or allow enhanced sentences for those defendants convicted of a prescribed number of specified offenses. The Illinois Habitual Offender Act commands

1. The habitual criminal is not a new phenomenon. As long ago as 1895, in England, the Gladstone Committee on Prisons reported:

   There is evidently a large class of habitual criminals—who live by robbery and thieving and petty larceny—who run the risk of comparatively short sentences with comparative indifference. They make money rapidly by crime, they enjoy life after their fashion, and then, on detection and conviction, serve their time quietly, with the full determination to revert to crime when they come out... To punish them for the particular offense is almost useless; the real offense is the willful persistence in the deliberately acquired habit of crime.

   HOUSE OF COMMONS, REPORT OF THE COMMITTEE ON PRISONS 31 (1895), quoted in Katkin, Habitual Offender Laws: A Reconsideration, 21 BUFFALO L. REV. 99, 99-100 (1971). Although the Committee urged that rehabilitation be accepted as the primary goal of the English penal system, it also suggested the creation of a system of extended sentences for repeat offenders.

2. The terms habitual offender and recidivist are used synonymously in this article.

3. For example, the Indiana recidivist statute mandates adding 30 years to the sentence imposed for the triggering offense, if the convicted defendant has been convicted and sentenced for two or more previous felonies. IND. CODE ANN. § 35-50-28 (West Supp. 1981). On the other hand, the Kansas statute gives the court discretion to double the sentence of a defendant convicted of his second felony and to triple the sentence of a defendant convicted of his third felony. KAN. STAT. ANN. § 21-4504 (Supp. 1980). For further examples, see infra note 6.

a life sentence, without the possibility of parole, for a person convicted three times of murder and/or offenses classified as Class X felonies in Illinois, unless the death sentence is imposed. Similar laws have been enacted in forty-two states, the District of Columbia, Puerto Rico and the Virgin Islands. The statutes are similar


6. ALA. CODE § 13A-5-0 (Supp. 1980) (second class A felony—15 to 99 years; third class A felony—99 years to life; fourth class A felony—life without parole); ALASKA STAT. §§ 12.55.125, 12.55.145 (Supp. 1980) (second class A felony within seven years of discharge—minimum of 10 years; third class A felony within seven years of discharge—minimum of 15 years); ARIZ. REV. STAT. ANN. § 13-604 (Supp. 1980) (second felony—maximum to triple the maximum, with parole restrictions; third felony—twice the maximum to quadruple the maximum, with parole restrictions); ARK. STAT. ANN. § 41-1001 (1977) (second to fourth class A felony—discretionary enhancement of 10 to 50 years; fifth class A felony—discretionary enhancement of 50 years to life); CAL. PENAL CODE § 667.5 (West Supp. 1981) (violent felonies—three year enhancement for each prior violent felony); COLO. REV. STAT. § 16-13-101 (Supp. 1976) (third felony within 10 years—25 to 50 years; fourth felony—life); CONN. GEN. STAT. ANN. § 53a-40 (West Supp. 1981) (second “dangerous” felony—25 years to life (discretionary); DEL. CODE ANN. tit. 11, § 4214 (1981) (third violent felony—mandatory life without parole; fourth felony—up to life (discretionary)); D.C. CODE ENCYCL. § 22-104 (West Supp. 1979) (third felony—up to life (discretionary)); FLA. STAT. ANN. § 775.084 (West 1976 & Supp. 1981) (second felony within five years—maximum of 10 years, 30 years, or life, depending on the felony (discretionary)); GA. CODE ANN. § 27-2511 (1978) (second felony after prior prison term—maximum sentence for that offense; fourth felony—maximum sentence without parole); HAWAII REV. STAT. §§ 706-661 to 706-662 (1976) (third felony—10 years, 20 years or life, depending on the felony (discretionary)); IDAHO CODE § 19-2514 (1979) (third felony—five years to life); ILL. REV. STAT. ch. 38, ¶ 33B (1981), (third class X felony or murder—life without parole); IND. CODE ANN. § 35-50-2-8 (West Supp. 1981) (third felony—mandatory addition of 30 years to sentence for triggering offense); IOWA CODE ANN. §§ 902.8-9 (West 1979) (third felony—maximum three years, without parole, up to maximum of 15 years); KAN. STAT. ANN. § 21-4504 (Supp. 1980) (second felony—up to double the maximum sentence; third felony—up to triple the maximum sentence (discretionary)); KY. REV. STAT. § 532.060 (Supp. 1980) (third felony—10 years to life); LA. REV. STAT. ANN. § 15:529.1 (West 1981) (second felony—one-third the maximum to double the maximum; third felony—one-half the maximum to twice the maximum; fourth felony—20 years to life; three or more violent felonies—20 years to life, without parole); MD. ANN. CODE art. 27, §§ 293, 643B (1976 & Supp. 1981) (second offense—double the prescribed term; third violent offense—minimum of 25 years; fourth violent offense—life without parole); MASS. ANN. LAWS ch. 279, § 25 (Michie/Law Co-op 1980) (third felony—maximum for offense); MICH. COMP. LAWS ANN. §§ 333.7413, 769.10-769.12 (1980) (second specified drug offense—life without parole; second felony—one and one-half times the maximum; third felony—double the maximum; fourth felony—15 years to life, depending on the felony classification); MINN. STAT. ANN. § 609.346 (West Supp. 1981) (second specified violent offense—additional three years to life); MISS. CODE ANN. §§ 99-19-81, 99-19-83 (Supp. 1981) (third felony—maximum without parole;
in substance, but they vary in the number and nature of prior offenses they require and the extent of sentence enhancement they allow. Although widely enacted, recidivist statutes remain controversial. Some commentators charge that such statutes do not effectively serve their stated purposes of crime deterrence and protection of society.⁷

Habitual offender laws have withstood frequent constitutional challenges since their inception.⁸ Double jeopardy⁹ and ex post


9. "[N]or shall any person be subject for the same offense to be put twice in jeopardy of life and limb. . . . " U.S. CONST. amend. V. This fifth amendment provision is applicable to the states through the due process clause of the fourteenth amendment. Benton v. Maryland, 395 U.S. 784, 793-96 (1969). The prohibition is not merely against being twice punished, but also "relates to a potential, i.e., the risk that an accused for a second time will be
facto claims have been rejected, because the challenged statutes merely affect the defendant’s punishment for the most recent offense, which is characterized as an aggravated offense solely on the basis of being a repetitive one. Courts have generally agreed that no new offense is created by such laws, and that the defendant’s prior convictions are not ingredients of a subsequent offense. Due process, equal protection, and cruel and unusual punishment

10. "No State shall . . . pass any . . . ex post facto Law . . . ." U.S. Const. art. 1, § 10, cl. 1. The meaning of the constitutional prohibition is that:

"any statute which punishes as a crime an act previously committed, which was innocent when done, which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime any defense available according to law at the time when the act was committed, is prohibited as ex post facto."


11. Gryger v. Burke, 334 U.S. 728 (1948). Gryger petitioned for habeas corpus relief after having been sentenced to life imprisonment under the Pennsylvania Habitual Criminal Act then in effect, 18 Pa. Stat. Ann. § 5108 (1939). 334 U.S. at 729. The Court rejected his argument that, because one of his prior offenses was committed before the recidivist law was enacted, his sentence was unconstitutionally retroactive and ex post facto, and also constituted double jeopardy. "The sentence as a fourth offender or habitual criminal is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes. It is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one." Id. at 732. See also People v. Hanke, 389 Ill. 602, 60 N.E.2d 395 (1945).


Most due process challenges have been directed at recidivist laws that allow prior convictions to be alleged in the indictment or information. These statutes allow evidence of those prior convictions to be offered at trial, even if prior convictions otherwise would be inadmissible. Such a challenge to the Texas procedure for enforcing its habitual criminal statute was rejected in Spencer v. Texas, 385 U.S. 554 (1967). The Court termed any possible prejudice "collateral," id. at 564, and held that the defendant's interests were adequately protected by limiting instructions. Id. at 561.

Illinois has adopted a two stage procedure, Ill. Rev. Stat. ch. 38, § 33B-2 (1981), which does not permit the prior convictions to be alleged in the indictment or disclosed to the jury, unless the prior convictions are otherwise admissible. See infra note 36 for the text of the Illinois statute. Justice Stewart, in his concurring opinion in Spencer, found the two stage procedure under the predecessor Illinois statute, Ill. Rev. Stat. ch. 38, § 22-43 (1963), "far superior" to the one stage procedure upheld in that case. 385 U.S. at 569 (Stewart, J., concurring).


Equal protection challenges to recidivist acts have focused on the opportunity for selective enforcement of such statutes by public prosecutors. In Oyler v. Boles, 368 U.S. 448 (1962), the Court rejected such a challenge. William Oyler and Paul Crabtree sought habeas
challenges to the validity of recidivist statutes also have been consistently rejected. A different constitutional challenge, however, may be raised against the Illinois Habitual Offender Act, that of a violation of the separation of powers clause of the Illinois Constitution. The separation of powers doctrine embodies the principle that one constitutionally created branch of government cannot exercise powers belonging to another branch. The Illinois Habitual Offender Act
gives the prosecuting State's Attorney sole discretion to decide whether to invoke the sentence enhancing provisions of the Act.\textsuperscript{20} That discretion is exercised only after the defendant has been convicted.\textsuperscript{21} The exercise of that discretion removes sentencing power from the judge, who is required by the statute to impose a sentence of natural life.\textsuperscript{22} Because criminal sentencing has been held to be a purely judicial function,\textsuperscript{23} whereas the State's Attorney is an officer of the executive branch, the Illinois Habitual Offender Act may violate the separation of powers clause of the Illinois Constitution.\textsuperscript{24}

This article will examine the issue of a separation of powers challenge to the Illinois Habitual Offender Act. It will first review the Illinois statute and the separation of powers doctrine as developed in Illinois. Next, it will discuss constitutional challenges to the pretrial exercise of the prosecutor's charging function. Then, it will discuss constitutional challenges to prosecutorial infringement on the judicial sentencing function. Finally, this article will conclude that the Illinois Habitual Offender Act violates the separation of powers clause of the Illinois Constitution by giving the prosecutor direct and absolute control over the judicial function of criminal sentencing.

**BACKGROUND**

*The Illinois Habitual Offender Act*

The Illinois Habitual Offender Act, section 33B of the Criminal Code, provides for mandatory life sentences for defendants convicted three or more times of forcible felonies.\textsuperscript{25} In order for the Act to apply, each felony conviction must have arisen from a sepa-

\textsuperscript{20} ILL. REV. STAT. ch. 38, ¶ 33B-2 (1981).
\textsuperscript{21} Id. ¶ 33B-2(a).
\textsuperscript{22} Id. ¶ 33B-1(e).
\textsuperscript{23} See infra notes 52-53, 83-95 and accompanying text.
\textsuperscript{24} In Illinois, the office of State's Attorney is constitutionally created. ILL. Const. art. VI, § 19. Although the provision creating this office is in the Judiciary article of the Illinois Constitution, the State's Attorney is considered part of the executive branch of government.
\textsuperscript{25} ILL. REV. STAT. ch. 38, ¶ 33B-1(a) (1981). See supra note 5 and accompanying text.
rate transaction, and the second and third offenses must each have been committed after a prior forcible felony conviction. When first adopted, the statute required that all of the felonies must have been committed in Illinois after February 1, 1978, the effective date of the Act. These requirements rendered the recidivist statute unusable for many years. The law was amended in 1980, however, to allow convictions from any state or federal court to be considered, and to provide that only the latest offense must have been committed after July 3, 1980, the effective date of the amended Act. The enactment of the 1980 amendment gave Illinois prosecutors the opportunity for immediate utilization of section 33B.

26. Id. ¶ 33B-1(c). For example, if a defendant is convicted of rape, deviate sexual assault, and armed violence for one attack on a woman he is considered to have only one Class X felony conviction for purposes of invoking the Habitual Offender Act.

27. Id. ¶ 33B-1. This section of the Act provides:

(a) Every person who has been twice convicted in any state or federal court of an offense that contains the same elements as an offense now classified as a Class X felony or murder, and is thereafter convicted of a Class X felony or murder, committed after the two prior convictions, shall be adjudged an habitual criminal.

(b) The two prior convictions need not have been for the same offense.

(c) Any convictions which result from or are connected with the same transaction, or result from offenses committed at the same time, shall be counted for the purposes of this Section as one conviction.

(d) This Article shall not apply unless each of the following requirements are satisfied:

(1) the third offense was committed after the effective date of this Act;

(2) the third offense was committed within 20 years of the date that judgment was entered on the first conviction, provided, however, that time spent in custody shall not be counted;

(3) the third offense was committed after conviction on the second offense;

(4) the second offense was committed after conviction on the first offense;

(5) Except when the death penalty is imposed, anyone adjudged an habitual criminal shall be sentenced to life imprisonment.

28. Class X Sentencing Act, P.A. 80-1099, § 1 (1978). This Act, of which the recidivist law was a part, completely overhauled the Illinois system of criminal sentencing.

29. ILL. REV. STAT. ch. 38, ¶ 33B-1(a), (c)(1) (1979).


32. As of the date this article was written, the Cook County State's Attorney's office had invoked the Act only once. People v. Withers, No. 80-C-7482 (Cir. Ct. of Cook County, Ill., 1981). Withers was convicted October 16, 1981, of three armed robberies committed earlier in the year (after the effective date of the amended statute). The prior convictions raised by the State's Attorney in the petition for a natural life sentence were a guilty plea for attempted murder in 1979 (the incident occurred in 1977), and guilty pleas in 1975 for two rapes that occurred in 1973. Withers was sentenced to life imprisonment without the possibility of parole by Judge Thomas Hett on November 9, 1981.
The procedural section of the statute\(^3\) prohibits the State's Attorney from including in the indictment an allegation of prior convictions.\(^4\) It further forbids evidence of such convictions from being introduced at trial, unless such evidence is otherwise admissible by the issues raised at trial.\(^5\) The statute also grants the prosecutor absolute discretion in deciding whether to invoke the statute after the defendant's conviction.\(^6\) If the prosecutor chooses to seek the statute's enhanced sentences for an eligible defendant, the trial judge is required to impose a sentence of life imprisonment without the possibility of parole.\(^7\)

**Separation of Powers in Illinois**

The Illinois Constitution provides that "[t]he legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another."\(^8\) This principle of separation of the powers of government is basic to the American system

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34. Id. ¶ 33B-2(a).
35. Id.
36. Id. The procedure under the statute is as follows:
   (a) A prior conviction shall not be alleged in the indictment, and no evidence or other disclosure of such conviction shall be presented to the court or the jury during the trial . . . unless otherwise permitted by the issues properly raised in such trial. After a plea or verdict or finding of guilty and before sentence is imposed, the prosecutor may file with the court a verified written statement signed by the State's attorney concerning any former conviction of an offense set forth in Section 33B-1 rendered against the defendant. The court shall then cause the defendant to be brought before it; shall inform him of the allegations of the statement so filed, and of his right to a hearing before the court on the issue of such former conviction and of his right to counsel at such hearing; and unless the defendant admits such conviction, the court shall hear and determine such issue, and shall make a written finding thereon. If a sentence has previously been imposed, the court may vacate such sentence and impose a new sentence in accordance with Section 33B-1 of this Act.
37. Id. (emphasis added).
38. Id. ¶ 33B-1(e): "Except when the death penalty is imposed, anyone adjudged an habitual criminal shall be sentenced to life imprisonment." (emphasis added). Paragraph 1005-8-1(a)(2), a section of Illinois' general criminal sentencing statute, reinforces the mandatory nature of the recidivist statute: "[F]or a person adjudged a habitual criminal . . . the sentence shall be a term of natural life imprisonment." (emphasis added).
39. ILL. CONST. art. II, § 1. Unlike the Illinois Constitution, and most other state constitutions, the federal Constitution has no provision explicitly requiring separation of governmental powers. It rather seeks to ensure the political independence of each branch and prevent undue accumulation of power through a system of checks and balances implicit in the structure of the federal government. This approach has been termed "a political doctrine, rather than a technical rule of law." J. NOWAK, R. ROTUNDA, & J. YOUNG, HANDBOOK OF CONSTITUTIONAL LAW 126-27 (1978).
of government and constitutional law, and is aimed at preventing undue concentration of power in a single branch of government. The doctrine forbids the legislature from "overdelegating" its own powers to another branch of government. It also precludes executive interference with the legislature or the judiciary. Most importantly, from this article's perspective, the separation of powers clause forbids the legislature from exercising or delegating judicial power which the legislature does not itself possess.

Generally, the separation of powers clause has not been interpreted so literally as to require division of the powers of government into rigidly separate compartments; a certain amount of overlapping power is allowed. This is partly because classification of the departments of government often cannot be very exact or capable of sharp delineation.

Recognized judicial powers


42. Ex-Cello Corp. v. McKibbin, 383 Ill. 316, 50 N.E.2d 505 (1943); Standard Oil Co. v. Department of Fin., 383 Ill. 136, 48 N.E.2d 514 (1943); Fox v. Inter-State Assurance Co., 84 Ill. App. 3d 512, 405 N.E.2d 873 (2d Dist. 1980).


46. Klafter v. State Bd. of Examiners of Architects, 259 Ill. 15, 102 N.E. 193 (1913); Connover v. Gatton, 251 Ill. 587, 96 N.E. 522 (1911); People v. Joyce, 246 Ill. 124, 92 N.E. 607 (1910).


"Yet the general principle of overlapping power is not without its exceptions. In People v. Bruner (1931), 343 Ill. 146, 175 N.E. 400, 405, for example, the court explained that 'if the power is judicial in its nature, it necessarily follows that the legislature is expressly prohibited from exercising it.'" Id. at 642, 366 N.E.2d at 1135.
are said to be vested solely in the courts. Thus, while the legislature may delegate some of its own powers to an administrative agency if it provides adequate standards for guidance, it may not confer judicial powers on an executive officer or agency. Moreover, the legislature may not act to encroach upon the exercise of judicial functions.

The judiciary's function is to administer justice under the law and to adjudicate the rights, interests, and duties of individuals by construing and applying statutes and the common law. The power to impose criminal sentence upon a convicted defendant clearly falls within this general function, and has been held to be exclusively within the power of the courts.

At first glance, section 33B appears to violate these constitutional principles, because it encroaches upon the exercise of the judicial function of criminal sentencing by delegating control over that function to the prosecuting State's Attorney. The unique nature of the State's Attorney's office, however, makes the question a difficult and complex one.

PROSECUTORIAL DISCRETION AND THE JUDICIAL SENTENCING FUNCTION

On the one hand, Illinois courts have consistently allowed the State's Attorney virtually absolute discretion to decide what charges, if any, should be filed against a criminal suspect. On the other hand, the courts have been consistent in holding that crimi

52. People v. Nicholls, 71 Ill.2d 166, 374 N.E.2d 194 (1978); People v. Bruner, 343 Ill. 146, 175 N.E. 400 (1931).
54. See supra note 24.
nal sentencing is a purely judicial function. A separation of pow-
ers challenge to the Illinois Habitual Offender Act would bring
these two principles into conflict.

The Prosecutor's Charging Function—Exercise of Pretrial
Discretion

Although created by the Judiciary article of the Illinois Constitu-
tion, the State's Attorney is considered a part of the executive
branch of government. His powers are not merely ministerial, but
rather involve, in large measure, the exercise of discretion. The
legislature's delegation of such discretion was necessary, because it
could not possibly envision every situation involving criminal con-


57. The separation of powers doctrine has been suggested as a vehicle for attacking recidivist statutes in states other than Illinois. See Note, The Separation of Powers Doctrine: A Viable Challenge to the Nebraska Habitual Criminal Statute?, 11 CREIGHTON L. REV. 925 (1978), where the author asserts that the Nebraska recidivist act violates the separation of powers provision of that state's constitution "by delegating to the prosecutor [the] legislative responsibility of defining criminal conduct." Id. at 926. See also Note, The Constitutional Infirmities of Indiana's Habitual Offender Statute, 13 IND. L. REV. 597 (1980), where the author makes a similar assertion about the Indiana habitual offender law.

The Nebraska habitual criminal statute, Neb. Rev. Stat. § 29-2221 (1975), was upheld against due process and cruel and unusual punishment attacks in Martin v. Parratt, 549 F.2d 50 (8th Cir. 1977), and Brown v. Parratt, 560 F.2d 303 (8th Cir. 1977). However, while concurring in Brown, Judge Heaney noted that "a strong argument can be made that the Nebraska statute violates the separation of powers doctrine" by giving "to the prosecutor an essential element of the judiciary's sentencing function." 560 F.2d at 306 n.4 (Heaney, J., concurring). Judge Heaney's argument is even more appropriate when applied to the Illinois Habitual Offender Act than to the Nebraska statute. The latter requires the recidivist charge to be included in the indictment for the triggering offense, thereby forcing the prose-
cutor to exercise his discretion before trial, a time at which prosecutors traditionally have been given broad discretion in charging decisions. See infra notes 58-82 and accompanying text. The Illinois statute, on the other hand, authorizes prosecutorial discretion at the sen-
tencing stage of the trial, a time traditionally held exclusively subject to judicial control. See infra notes 90-97 and accompanying text.

58. Ill. Const. art. VI, § 19.


60. Although often cited as support for broad prosecutorial discretion, Newcomer actually represents the imposition of judicial limits on that discretion, because it held that the consent of the court is required before a State's Attorney may nolle prosequi a case in which charges have been filed. Subsequent cases held, however, that the court must consent to a nolle prosequi motion absent a clear abuse of prosecutorial discretion. People ex rel. Castle v. Daniels, 8 Ill. 2d 43, 132 N.E.2d 507 (1956); People v. Baes, 94 Ill. App. 3d 741, 419 N.E.2d 47 (3d Dist. 1981).
duct and prescribe the method and direction of prosecution.\textsuperscript{61} Therefore, when the State's Attorney has probable cause to believe that an accused has committed a crime, it is within the State's Attorney's discretion to decide whether or not to prosecute, and, if so, what specific charges to bring against the accused. When that discretion is exercised before trial, Illinois courts have refused to restrict its scope, despite the fact that such charging decisions may have a dramatic, albeit indirect, effect on the sentence imposed by the court upon the defendant's conviction.\textsuperscript{62}

In \textit{People v. Keegan},\textsuperscript{63} the Illinois Supreme Court upheld the validity of a prosecutor's discretionary authority to charge a defendant with taking indecent liberties with a child,\textsuperscript{64} a felony punishable by four to twenty years imprisonment, when the prosecutor instead could have charged the defendant with contributing to the sexual delinquency of a child,\textsuperscript{65} a misdemeanor carrying a maximum penalty of one year in jail and a $1,000 fine.\textsuperscript{66} In proceeding with the felony charge, the prosecutor indirectly increased the defendant's possible sentence range.

Similarly, in \textit{People v. McCollough},\textsuperscript{67} the supreme court upheld the prosecutor's statutory power to charge both involuntary manslaughter, a felony, and reckless homicide, a misdemeanor, against a defendant who fatally struck a five-year-old child with his car.\textsuperscript{68} The prosecutor's charging decision had the effect of enhancing the defendant's maximum potential sentence from five years in jail and a $1,000 fine, to up to ten years in the penitentiary and a $1,000 fine,\textsuperscript{69} assuming conviction on both counts.\textsuperscript{70} The McColl-


\textsuperscript{62} See cases cited supra note 55.

\textsuperscript{63} 52 Ill. 2d 147, 286 N.E.2d 345 (1971), appeal dismissed, 406 U.S. 964 (1972).

\textsuperscript{64} ILL. REV. STAT. ch. 38, ¶ 11-4 (1981).

\textsuperscript{65} Id. ¶ 11-5.

\textsuperscript{66} Jack Keegan's conviction of taking indecent liberties with a child, and sentence of four to ten years imprisonment, was reversed by the Illinois Supreme Court, however, because two jurors had read newspaper accounts of suppressed evidence. 52 Ill. 2d at 154-56, 286 N.E.2d at 348-49.

\textsuperscript{67} 57 Ill. 2d 440, 313 N.E.2d 462, appeal dismissed, 419 U.S. 1043 (1974).

\textsuperscript{68} ILL. REV. STAT. ch. 38, ¶ 9-3 (1981). This statute specifically provides that both offenses may be charged.

\textsuperscript{69} Id. ¶ 9-3(c).

\textsuperscript{70} Horace McCollough was acquitted of manslaughter but convicted of reckless homicide. The supreme court affirmed that conviction and the six month probation sentence that had been imposed. 57 Ill. 2d at 441, 313 N.E.2d at 564.
lough court viewed the State’s Attorney’s discretion to proceed against the defendant with both charges as simply the same kind of discretion exercised by him every day with respect to other offenses.\textsuperscript{71}

In *People v. Muskgrove*,\textsuperscript{72} the defendant objected to the prosecutor’s power to charge armed violence,\textsuperscript{73} an offense with no potential for probation, upon facts identical to those constituting aggravated battery,\textsuperscript{74} an offense which does allow for probation. Because the prosecutor’s charging decision totally removed the sentencing alternative of probation from the court’s consideration upon conviction, the defendant claimed a violation of the separation of powers clause.\textsuperscript{75} Emphasizing that the State’s Attorney’s discretion was exercised in the charging decision before trial, and citing *McCoulouse* and *Keegan*, the Illinois Appellate Court found no constitutional violation.\textsuperscript{76}

A statute specifically granting the State’s Attorney broad discretion in charging decisions was upheld in *People v. Bombacino*,\textsuperscript{77} *People v. Handley*,\textsuperscript{78} and *People v. Sprinkle*.\textsuperscript{79} Those cases put in issue the constitutionality of section 2-7 of the Juvenile Court Act\textsuperscript{80} which allowed the State’s Attorney to remove a case from the juvenile court and to try the juvenile offender as an adult. The prosecutor’s discretion was subject to judicial review since the presiding juvenile court judge could object to removal, and such an objection required the chief judge of the circuit to decide whether removal was appropriate.\textsuperscript{81} The Illinois Supreme Court in *Handley* noted the large measure of discretion historically exercised by the State’s Attorney, and held that the Illinois legislature may delegate to the State’s Attorney the discretion to decide whether to prosecute a juvenile suspect as an adult or as a juvenile offender.\textsuperscript{82}

These cases illustrate the Illinois Supreme Court’s approval of the broad discretion afforded the prosecutor in pretrial charging.

\begin{itemize}
\item[71.] *Id.* at 444, 313 N.E.2d at 565.
\item[72.] 44 Ill. App. 3d 381, 358 N.E.2d 336 (3d Dist. 1976).
\item[73.] ILL. REV. STAT. ch. 38, ¶¶ 12-4(a), 33A-2 (1981).
\item[74.] *Id.* ¶ 12-4.
\item[75.] 44 Ill. App. 3d at 386-87, 358 N.E.2d at 341.
\item[76.] *Id.* at 387, 358 N.E.2d at 341.
\item[77.] 51 Ill. 2d 17, 280 N.E.2d 697, cert. denied, 409 U.S. 912 (1972).
\item[78.] 51 Ill. 2d 229, 282 N.E.2d 131, cert. denied, 409 U.S. 914 (1972).
\item[81.] *Id.*
\item[82.] 51 Ill. 2d at 233, 282 N.E.2d at 134-35.
\end{itemize}
decisions, even though that discretion has a significant, but indirect, effect on sentencing. Nevertheless, a different situation is presented by the Illinois Habitual Offender Act. That statute grants the State's Attorney discretionary control over a decision made after conviction, rather than before trial, and that decision directly and absolutely controls the sentence that will be imposed. The Act in effect turns over control of the sentencing stage of the trial to the prosecuting State's Attorney. In placing sentencing power in the hands of the prosecutor, section 33B conflicts with the traditional view of sentencing as an exclusively judicial function.

Criminal Sentencing—A Judicial Function

In People v. Montana, the Illinois Supreme Court held that the power to impose criminal sentences is "purely judicial" and cannot be exercised constitutionally by members of another branch of government. In Montana, the court struck down provisions of the Parole Act that gave the Division of Corrections the power to alter the minimum and maximum prison terms previously set by the trial court. Although the discretion granted to the Division of Corrections by the Parole Act could only be exercised after trial, the court emphasized that the actual exercise of such discretion had a "direct relationship to the sentence itself." The court therefore concluded that the Parole Act vested judicial power in an administrative agency in violation of the separation of powers clause.

The judicial nature of the sentencing function was reaffirmed in People v. Weeks. In that case, the Illinois Appellate Court affirmed a trial judge's refusal to accept a defendant's bargained plea because the judge disagreed with the sentence recommended by the State's Attorney. Justice Dixon wrote that, "[t]he law is clear in Illinois that sentencing is a judicial function, and it remains so in plea negotiations. Any agreements in plea negotiations are at most recommendations and the sentence to be imposed is for the court and the court alone."

83. 380 Ill. 596, 44 N.E.2d 569 (1942).
84. Id. at 608, 44 N.E.2d at 569.
85. ILL. REV. STAT. ch. 38, §§ 802, 803, 803a, 807 (1941).
86. 380 Ill. at 607, 44 N.E.2d at 574.
87. Id. at 608, 44 N.E.2d at 575.
89. Id. at 44, 344 N.E.2d at 793.
Infringement on the Judicial Sentencing Function

The Time Factor

In analyzing the parameters of the sentencing function to determine whether executive power encroaches upon that judicial prerogative, the Illinois Supreme Court has indicated that the precise time when executive power is exercised may be an important factor. In *People v. Phillips*, the court upheld a statute requiring the consent of a defendant's probation officer before a repeat narcotics offender can be referred to a drug treatment program in lieu of prosecution. The statute expressly grants an executive officer discretionary power which directly affects the offender's sentence, because if the probation officer consents to the drug treatment program, the defendant avoids the criminal justice process altogether. If, on the other hand, the probation officer refuses to consent, the defendant faces the possibility of imprisonment upon conviction. Writing for a unanimous court, Justice Ryan conceded as "indisputable that the power to impose sentence is exclusively a function of the judiciary." Yet the point in time when the contested executive power was exercised, after the defendant had been charged but before trial and conviction, was emphasized in the court's decision. Noting that the Illinois Unified Code of Corrections defines "sentence" as "the disposition imposed by the court on a convicted defendant," the supreme court concluded that the pre-conviction executive discretion authorized by the challenged statute did not interfere with judicial power in violation of the separation of powers clause. The *Phillips* court did not, however, enunciate a black letter rule that the validity of executive discretion with respect to sentencing turns upon whether it is exercised in a pre-conviction or post-conviction time context.

Although recognized as important, the point in time in the judicial process when executive power is exercised has yet to be held either the sole or the decisive factor in a separation of powers challenge to such power. In *Phillips*, for example, the supreme court also noted that the required consent of the probation officer did

92. *66 Ill. 2d* at 415, 362 N.E.2d at 1039.
93. *Id.* at 415-18, 362 N.E.2d at 1039-40.
95. *66 Ill. 2d* at 418, 362 N.E. at 1040.
not have the effect of dictating the sentence or of infringing upon the sentencing power of the court, because the trial judge could still direct a convicted defendant to a drug treatment program as a condition of a sentence of probation. Therefore, whether the timing of executive discretion may, standing alone, violate the separation of powers doctrine is a question of continuing controversy.

The extent to which the timing of executive discretion should determine the outcome of a separation of powers attack on such discretion was considered by the Illinois Supreme Court in *People ex rel. Carey v. Cousins*. At issue in *Cousins* was the validity of prosecutorial discretion, under the Illinois murder statute, to initiate a post-conviction death penalty hearing. The murder statute provides that a separate death penalty sentencing hearing must be convened if requested by the prosecution, but may not be conducted in the absence of such a request. If the hearing is held, the judge or jury considers enumerated factors in aggravation and mitigation, and may impose the death sentence only upon a finding that one or more aggravating factors and no mitigating factors are present in the case. A Cook County trial judge, William Cousins, Jr., refused to conduct a death penalty hearing when requested to do so by the State's Attorney. The supreme court held that the statute does not violate the separation of powers provision of the state constitution, and issued a writ of mandamus ordering Judge Cousins to conduct the statutory sentencing

96. See infra notes 116-26 and accompanying text for a discussion of the effect of prosecutor discretion on the sentence imposed and its importance to a separation of powers challenge to such discretion.
97. 66 Ill. 2d at 416, 362 N.E.2d at 1039.
98. 77 Ill. 2d 531, 397 N.E.2d 809, cert. denied, 445 U.S. 953 (1980).
100. *Id.* The statute states that, "[w]here requested by the State, the court shall conduct a separate sentencing proceeding" to determine whether the death sentence shall be imposed. *Id.*
101. The statute provides that, in a jury trial, the same jury that convicted the defendant of murder shall decide whether or not to impose the death penalty unless the defendant waives a jury or shows good cause to impanel a new jury. If the defendant is convicted in a bench trial, he or she may choose between having the same judge determine sentence or having a sentencing jury impaneled. *Id.*
102. Aggravating factors are listed in ILL. REV. STAT. ch. 38, ¶ 9-1(b) (1979); some mitigating factors are listed in id. ¶ 9-1(c). Significantly, the judge or sentencing jury is not limited to the enumerated mitigating factors and may consider other mitigating factors as well.
103. 77 Ill. 2d at 533, 397 N.E.2d at 811.
104. *Id.* at 536, 397 N.E.2d at 812.
proceeding.\textsuperscript{105}

Three justices dissented, however, arguing that the prosecutorial discretion at issue violates the separation of powers clause. To Justice Ryan, spokesman for the three dissenters,\textsuperscript{106} the timing of the State’s Attorney’s discretionary power as authorized by the statute is a flaw fatal to the statute’s constitutionality. He argued that injecting prosecutor discretion "into the sentencing stage of the proceeding, which . . . has consistently been held to be a judicial function," violates the separation of powers principle.\textsuperscript{107} He distinguished between allowing prosecutors broad discretion in pretrial charging decisions and giving the State’s Attorney discretionary control over the sentencing stage of a criminal trial.\textsuperscript{108} In his view, once the verdict is obtained, only the court may exercise sentencing discretion, and that judicial discretion constitutionally may not be conditioned upon the prior approval of the prosecutor.\textsuperscript{109}

Although the time factor was not accepted by the \emph{Cousins} majority as determinative of whether executive power infringes upon a judicial function, a recent Illinois Supreme Court decision, \emph{People v. Lewis},\textsuperscript{110} suggests that a majority of the present court may find the time factor determinative in a sentencing context other than the death penalty. \emph{Lewis} rejected the appeal of a convicted murderer who had been sentenced to death, and who challenged the validity of the same murder statute upheld in \emph{Cousins}.\textsuperscript{111} However, the makeup of the court had changed since \emph{Cousins} had been decided, with Justice Simon replacing the retired Justice Kluzinsky, who had voted with the majority in \emph{Cousins}. In \emph{Lewis}, Justice Simon dissented from the court’s decision affirming the imposition of the death sentence. His dissent was based upon the reasoning of Justice Ryan’s \emph{Cousins} dissent, which he attached as an appendix to his own opinion.\textsuperscript{112} He opined that the infirmity of the death penalty statute “is that it puts the prosecutor in a place where he has no business,” in the sentencing stage of the trial.\textsuperscript{113}

Although the \emph{Cousins} dissenters refused to join with Justice Si-
mon and overrule the earlier case, their decision was motivated by respect for *stare decisis* rather than a change of opinion.\textsuperscript{114} Therefore, in a future case not involving the particular statute upheld in *Cousins*, the Illinois Supreme Court may very well take the position that the time when prosecutorial discretion is exercised is a decisive factor in determining whether such discretion interferes with the judicial sentencing function. If the supreme court does indeed take such a position, it would seriously undermine the Illinois Habitual Offender Act, which authorizes prosecutor discretion after conviction, during the sentencing stage of a criminal trial.\textsuperscript{115}

**The Effect Factor**

Regardless of the outcome of the time factor issue, the *Cousins* majority laid the groundwork for finding a separation of powers violation in the Illinois Habitual Offender Act. In *Cousins*, the majority of the supreme court emphasized the **effect** that prosecutorial discretion had on the sentence, rather than the time when that discretion was exercised.\textsuperscript{116} The court adopted the position that where prosecutor discretion merely affects the potential sentence, leaving the ultimate imposition of sentence within the court's discretion, there is no separation of powers violation, even if the prosecutor's discretion is exercised at the sentencing stage of the trial.\textsuperscript{117} It was important to the court that under the challenged death penalty procedure of the murder statute the prosecutor does not act as the sentencing authority, but merely requests a sentencing hearing, with the ultimate determination of whether the death penalty will be imposed left to the judge or sentencing jury.\textsuperscript{118} Thus, even if the trial court must conduct a death penalty hearing, it retains total discretion over the sentence ultimately imposed.\textsuperscript{119}

\textsuperscript{114} Each of the *Cousins* dissenters wrote a special concurring opinion. Chief Justice Goldenhersh's statement that, "with considerable reluctance, under the compulsion of *People ex rel. Carey v. Cousins*, I concur in the opinion affirming the judgment," id. at 166, 430 N.E.2d at 1364. (Goldenhersh, C.J., concurring), was typical. None of these justices indicated any change of opinion since *Cousins*, but agreed with Justice Clark "that the circumstances which warrant changes in the law do not include changes in personnel" on the court. Id. at 169, 430 N.E.2d at 1365. (Clark, J., concurring).


\textsuperscript{117} Id. at 536, 397 N.E.2d at 812.

\textsuperscript{118} Id. at 535-36, 397 N.E.2d at 812.

\textsuperscript{119} Id.
The Cousins court relied heavily on the line of cases upholding the discretion granted to the State's Attorney by other statutes, even though such statutory grants of discretion give the prosecutor the power to increase the severity of the sentence which might otherwise be imposed.120 People v. McCollough121 upheld the prosecutor's power to charge a defendant with both the felony of involuntary manslaughter and the misdemeanor of reckless homicide for the same occurrence. The Cousins court also cited the three cases, People v. Bombacino,122 People v. Handley,123 and People v. Sprinkle,124 that upheld the State's Attorney's power to decide whether a minor defendant will be tried as a juvenile or as an adult.

The Cousins majority analyzed the cases upon which it relied in terms of the effect that prosecutorial discretion had upon final sentence.125 Although the State's Attorney's decision in Cousins to request a post-conviction death penalty hearing affected the potential sentence which might be imposed upon conviction, the prosecutor did not directly control the specific sentence imposed. Rather, the discretion over the sentence ultimately imposed remained in the hands of the trial court.126

Analysis of section 33B in terms of the effect factor also leads to the conclusion that the statute violates the separation of powers provision of the Illinois Constitution by authorizing executive infringement upon the judicial sentencing prerogative. The Illinois Habitual Offender Act does more than allow the State's Attorney to affect a defendant's potential sentence. It gives the prosecutor

120. Id. at 536-40, 397 N.E.2d at 812-14. The Cousins dissenters were highly critical of the majority's reliance on these cases, emphasizing the distinction between prosecutor discretion exercised at the pretrial charging stage and such discretion exercised at the post-conviction sentencing stage. Id. at 547, 397 N.E.2d at 818 (Ryan, J., dissenting). Justice Simon echoed this criticism in his Lewis dissent. People v. Lewis, 88 Ill. 2d 129, 189-90, 430 N.E.2d 1346, 1375, (1981) (Simon, J., dissenting). See also Note, The Prosecutor's Discretionary Power to Initiate the Death Sentence Hearing—People ex rel. Carey v. Cousins, 29 De Paul L. Rev. 1097, 1111-13 (1980).


122. 51 Ill. 2d 17, 280 N.E.2d 697, cert. denied, 409 U.S. 912 (1972). See supra notes 77-82 and accompanying text.

123. 51 Ill. 2d 229, 282 N.E.2d 131, cert. denied, 409 U.S. 914 (1972). See supra notes 77-82 and accompanying text.


126. Id.
authority to control directly and absolutely the specific sentence actually imposed upon a convicted defendant. In doing so, it robs the trial judge of all sentencing discretion and control. If the State's Attorney chooses to invoke the statute against an eligible defendant, he has, in effect, directly imposed a sentence of natural life, because that is the only sentence which the trial judge may order. This direct and absolute effect on sentence renders the Illinois Habitual Offender Act unconstitutional as a violation of the separation of powers doctrine.

CONCLUSION

In deciding whether an exercise of executive power infringes on the judicial sentencing function, the Illinois Supreme Court has considered two factors to be of vital importance: (1) the time when such power is exercised; and (2) the effect which the exercise of such power has upon the sentence ultimately imposed on a convicted defendant. When the Illinois Habitual Offender Act is analyzed in terms of either or both of these factors, it is apparent that the Act violates the separation of powers clause of the Illinois Constitution. Under the statute, the State's Attorney exercises discretionary control over the sentencing stage of a criminal trial. That stage of the criminal justice process has traditionally been considered subject to judicial control exclusively. Moreover, even if the time factor alone is not fatal to the Act's validity, scrutiny of the statute under an "effect" analysis is likely to be so. The executive discretion authorized by the Act empowers the prosecutor with absolute control over the convicted defendant's sentence, removing all judicial discretion over sentencing from the trial court. If the State's Attorney invokes the Habitual Offender Act against an eligible defendant, the trial judge has no choice but to sentence that defendant to serve the rest of his life in the penitentiary. Thus, the operative effect of the statute is to give the prosecutor direct and absolute control over the judicial function of criminal sentencing in violation of the separation of governmental powers mandated by the Illinois Constitution.

Therefore, the Illinois legislature should amend the Habitual Offender Act to remove this discretionary control over criminal sentencing from the hands of the prosecuting State's Attorney. Such amendments should be aimed at (1) altering the time when the decision to invoke the statute is made, and (2) altering the effect of such a decision so as to leave some sentencing discretion in the hands of the court. In the absence of such amendments, Illinois
courts can be expected to strike down section 33B as a violation of the separation of powers clause of the Illinois Constitution.\textsuperscript{127}

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\textsuperscript{127.} The fact that the Illinois Supreme Court recently upheld the Habitual Juvenile Offender Act, ILL. REV. STAT. ch. 37, ¶ 705-12 (1981), in the recent case of People ex rel. Carey v. Chrasta, 83 Ill. 2d 67, 413 N.E.2d 1269 (1980), need not stand in the way of the court's invalidating the adult Illinois Habitual Offender Act. Although the statutes are very similar, they vary in an important respect. The juvenile act requires the State's Attorney to give the defendant written notice, simultaneously with the filing of the delinquency petition, of an intention to seek recidivist penalties. ILL. REV. STAT. ch. 37, ¶ 705-12(b) (1981). In terms of the time factor, see supra notes 90-115 and accompanying text, this assures that prosecutorial discretion will be exercised before trial, rather than after conviction. Indeed, this notice requirement represents one possible way § 33B could be amended to reduce its vulnerability to a separation of powers attack.

In terms of the effect factor, see supra notes 116-26, the juvenile statute, like § 33B, requires the trial court to impose an enhanced sentence if the State's Attorney chooses to invoke the statute against an eligible defendant. The juvenile statute mandates commitment until the juvenile offender's "21st birthday, without possibility of parole, furlough, or non-emergency authorized absence." ILL. REV. STAT. ch. 37, ¶ 705-12 (1981). The court in Chrasta discussed the effect factor primarily in relation to the defendant's due process argument, and gave only cursory attention to the defendant's separation of powers argument. Therefore, Chrasta does not preclude a separation of powers attack on the adult Illinois Habitual Offender Act.